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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

***IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public

Prosecution's Response to "Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and Related Procedural Deadlines" (ICC-01/05-01/08-2483-Red)

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. On 21 September 2012, Trial Chamber III ("Chamber") gave notice to parties and participants pursuant to regulation 55(2) that it may modify the legal characterization of the facts so as to consider the alternate form of knowledge contained within article 28(a)(i), namely that the accused "should have known" instead of "knew" of the commission of the crimes by forces under his effective command and control or under his effective authority or control. In the same decision, the Chamber requested submissions from the parties on the procedural impact of the notification ("Decision on Regulation 55").
2. On 13 December 2012, and after receiving submissions from the parties, the Chamber decided to suspend temporarily the proceedings until 4 March 2013 to provide the Accused sufficient time to prepare his defence ("Decision Suspending the Proceedings or Impugned Decision"). In addition, the Chamber ordered the Defence to provide particular justifications for Prosecution witnesses it seeks to recall by 18 February 2012 and for additional witnesses it wishes to add to its list of Defence witnesses by 4 March 2012.
3. On 18 December 2012, the Defence sought leave to appeal the Decision Suspending the Proceedings raising the following two issues: first, that "the Chamber interpreted and applied Regulation 55 in a manner inconsistent with the text of that provision and, therefore, without a valid legal basis [...] by adding a new set of facts and factual allegations to the charges" and second, that "[t]he Chamber erred when it failed to apply Regulation 55 in a manner consistent with the Statute".¹

¹ ICC-01/05-01/08-2483-Red. The Prosecution notes that the Defence simultaneously filed a Confidential Ex parte Prosecution and Defence only and Public Redacted versions. The Prosecution will be referring to the public redacted version.

4. The Prosecution submits that the Defence merely disagrees with the Chamber's decision to provide notice that it may change the legal characterisation of the facts pursuant to regulation 55(2). However, this notice was not provided in the Impugned Decision, but in the prior Decision on Regulation 55 issued on 21 September 2012. The Impugned Decision is a subsequent ruling in which the Chamber, after having heard the parties, decided to suspend the proceedings temporarily to allow the Defence sufficient time to conduct additional investigations and then indicate the witnesses it wishes to recall and additional evidence it seeks to submit. Thus, the issues do not arise from the Impugned Decision.
5. Further, the issues do not arise from the Decision on Regulation 55 either. First, the Defence erroneously describes this decision as going beyond the factual scope of the charges. Second, the Defence Application is in essence a disagreement with the Chamber's notice that it may legally characterize the facts under the alternate form of knowledge contained in article 28(a)(i) in its final judgment under article 74. Hence, the Defence Application should be dismissed.

Procedural Background

6. On 15 June 2009, Pre-Trial Chamber II issued its "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" ("Confirmation Decision")² in which it ruled that there was "sufficient evidence to establish substantial grounds to believe that Mr. Jean-Pierre Bemba knew that the "*Mouvement de Libération du Congo*" ("MLC") troops were committing or were about to commit [...] crimes from on or about 26 October 2002 to 15 March 2003."³

² ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009.

³ ICC-01/05-01/08-424, para. 478

7. In making this determination,⁴ the Pre-Trial Chamber considered several factors or indicia identified by the *ad hoc* tribunals as circumstantial evidence relevant to prove actual knowledge.⁵ Turning to the specific facts of the case, the Pre-Trial Chamber attached weight to the widespread nature of the illegal acts committed by the MLC troops; the length of the period over which these acts were committed; Mr. Jean-Pierre Bemba's visit to his forces in Bangui in early November 2002; the existence of an effective reporting system at Mr. Jean-Pierre Bemba's disposal; his ability to use the existing means of communication to contact the commanders in the field during the entire period of intervention; and the existence of media broadcasts reporting about the commission of murder, rapes and pillaging by MLC forces.⁶
8. On 4 November 2009, the Prosecution submitted a revised Document Containing the Charges ("DCC").⁷ In that document, the Prosecution submitted that the Accused either knew or "owing to the circumstances at the time, should have known".⁸
9. On 12 February 2010, the Defence filed its "*Requête aux fins d'obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé*

⁴ ICC-01/05-01/08-424, para. 431.

⁵ These factors included the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communications, the *modus operandi* of similar acts, the location of the commander at the time and the geographical location of the acts. See Final Report of the Commission of Experts Established Pursuant of Security Council Resolution 780 (1992), UN Doc. S/1994/674, at page 17; ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 386; ICTY, *Prosecutor v. Blaskic.*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 307; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005, para. 368; ICTY, *Prosecutor v. Oric*, Case No. IT-03-68-T, Judgement, 3 July 2006, para. 319; SCSL, *The Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, para. 309.

⁶ ICC-01/05-01/08-424, para. 489.

⁷ ICC-01/05-01/08-593-Conf- Anx A, Prosecution's Submission of the Document Containing the Charges as Confirmed by the Pre-Trial Chamber filed in accordance with the Chamber's Order of 7 October 2009, 4 November 2009.

⁸ ICC-01/05-01/08-395-Conf-Anx2A, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, 30 March 2009, paras 105 to 120.

Contenant les Charges”,⁹ arguing that the revised DCC did not reflect accurately the charges confirmed by the Pre-Trial Chamber.

10. On 20 July 2010, the Chamber ruled that the allegation that the Accused “should have known” of the crimes committed by MLC soldiers exceeded the scope of the confirmed charges and should be deleted.¹⁰
11. On 18 August 2010, the Prosecution submitted its Revised Second Amended DCC¹¹ in which it deleted, in accordance with the Chamber’s decision, the allegation that the Accused should have known about the crimes.
12. On 21 September 2012, the Chamber gave notice to the parties and participants pursuant to regulation 55(2) of the Regulations of the Court (“RoC”) that in its decision under article 74, without exceeding the facts and circumstances described in the charges and any amendment thereto, it may modify the legal characterization of the facts so as to consider the alternate form of knowledge contained in article 28(a)(i) of the Statute, that is, owing to the circumstances at the time, the Accused “should have known” that MLC troops were committing or about to commit the crimes included in the charges. The Chamber requested the parties and participants to provide submissions on the procedural impact of the notification (“Decision on Regulation 55”).¹²
13. No application for leave to appeal was filed against this decision.
14. On 8 October 2012, the Prosecution submitted that the possibility of an alternative legal characterization of the facts would have no impact on the

⁹ ICC-01/05-01/08-694, Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges, 12 February 2010.

¹⁰ ICC-01/05-01/08-836, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, para. 121.

¹¹ ICC-01/05-01/08-856-Conf-AnxA, Prosecution’s Submission of the Revised Second Amended Document Containing the Charges, 18 August 2010. On 13 October 2010, the Prosecution filed its “Prosecution’s Submission of its Corrected Revised Second Amended Document Containing the Charges”, ICC-01/05-01/08-950-Conf-Anx A, to correct a factual mistake contained in paragraph 79 of the Revised Second Amended Document Containing the Charges in conformity with the Confirmation Decision.

¹² ICC-01/05-01/08-2324.

Prosecution case because the same evidence presented to prove that the accused had actual knowledge also proves that the accused, owing to the circumstances, should have known.¹³

15. On 3 and 8 October, the Legal Representatives filed their submissions.¹⁴ On 18 October, the Defence filed its submissions in which it raised a number of objections to a possible change of the legal characterization of the facts.¹⁵

16. On 19 November 2012, the Chamber requested the Defence to provide further information on the procedural impact of the Chamber's notification pursuant to regulation 55(2).¹⁶

17. On 30 November 2012, the Defence provided this additional information in a confidential Ex parte annex and requested the Chamber to provide further details of the material facts and circumstances upon which it intends to rely for the purposes of the re-characterization.¹⁷

18. On 13 December 2012, the Chamber decided to suspend temporarily the proceedings pursuant to regulation 55(2) and (3)(a) to give time to the Defence to investigate and decide whether it wishes to recall witnesses or present additional evidence pursuant to regulation 55(3)(b) (the "Decision Suspending the Proceedings" or "Impugned Decision").¹⁸

19. On 18 December 2012, the Defence filed an application for leave to appeal the Decision Suspending the Proceedings and raised two issues (the "Application"): first, "the Chamber interpreted and applied Regulation 55 in a manner inconsistent with the text of that provision and, therefore without legal basis. Although characterized by the Chamber as a 'legal characterization of facts', the course envisaged by the Chamber goes well

¹³ Ibid., para.13.

¹⁴ ICC-01/05-01/08-2328-Conf and ICC-01/05-01/08-2335-Conf.

¹⁵ ICC-01/05-01/08-2365-Conf.

¹⁶ ICC-01/05-01/08-2419.

¹⁷ ICC-01/05-01/08-2451-Red and ICC-01/05-01/08-2451-Conf-Exp-AnxA.

¹⁸ ICC-01/05-01/08-2480.

beyond that by adding a new set of facts and factual allegations to the charges [...]”; second, “the Chamber erred when it failed to apply Regulation 55 in a manner consistent with the Statute. As a result, the course taken by the Chamber resulted in the violation of the following rights of the accused: a) his right to have prompt and detailed notice of the charges [...]; b) his right to have adequate time and resources to prepare [...]; c) his right to liberty [...]; d) his right to be presumed innocent and to have the Prosecution bear at all times the burden of proof [...]; e) his right to be tried without undue delay [...]; f) his right to be tried by a tribunal which does not lack the appearance of impartiality [...].¹⁹

Submissions

20. The Prosecution submits that the issues do not arise from the Impugned Decision. Further, the Defence erroneously asserts that the Decision on Regulation 55 goes beyond the facts and circumstances described in the charges. The Defence additionally disagrees with the Chamber’s notice of a possible legal characterization of the facts under the alternate form of knowledge under article 28(a)(i) in its judgment under article 74. In the alternative, should the Chamber consider that the issues do arise, the Prosecution submits that they do not meet the requirements for leave to appeal under article 82(1)(d).

The issues do not arise out from the Decision

21. The purported issues identified by the Defence do not arise from the Impugned Decision. The Impugned Decision did not give notice on the application of regulation 55; this was done in the Decision on Regulation 55 rendered on 21 September 2011. The Defence did not seek leave to appeal that decision. On this basis alone, the Application should be denied.

¹⁹ ICC-01/05-01/08-2483-Red, para.20.

22. The Impugned Decision only applies the safeguards envisaged in regulation 55(2) and (3) whereby the Chamber, when the possibility of a change to the legal characterisation of the facts is envisaged at any time during trial, “may suspend the hearing and ensure that the participants [and particularly the accused] have adequate time and facilities for effective preparation”.²⁰ Therefore, the Chamber, after hearing the parties, decided to suspend the proceedings temporarily until 4 March 2013 to provide the Defence with adequate time for its effective preparation.²¹

23. Even if the purported issues identified by the Defence arose from the Impugned Decision, they do not constitute appealable issues. First, they are grounded on the erroneous premise that the Chamber added new facts and circumstances to those in the charges.²² This is incorrect. The Chamber has repeatedly recognised that regulation 55(1) does not permit it to go beyond the facts and circumstances described in the charges,²³ and that the facts and circumstances on which it will rely in its article 74 judgment will be the same regardless of the form of knowledge it considers under article 28(a)(i), i.e. those listed in paragraphs 478 to 489 of the Confirmation Decision and paragraphs 77 to 90 of the Second Amended DCC.²⁴ Therefore, “the facts and circumstances, as well as the evidence submitted in order to prove them, are exactly the same. There is therefore no new ‘case to answer’, as alleged by the defence.”²⁵

24. Second, the Defence Application is a mere disagreement with the Chamber’s decision to notify the parties that it may change the legal characterisation of the facts in light of the evidence heard. This is not an

²⁰ Impugned Decision, para.13.

²¹ Ibid., paras.14-15.

²² Defence Application, para.20(i).

²³ Decision on Regulation 55, para.3. See also ICC-01/05-01/08-2419, para.7 and Impugned Decision, para. 11.

²⁴ Impugned Decision, para.11.

²⁵ Impugned Decision, para.12.

appealable issue as it has been consistently found by the jurisprudence of this Court.²⁶

25. Further, the Defence submission that “the application of Regulation 55 was recognised by both the Lubanga Trial Chamber and, subsequently, the Appeals Chamber as being an appealable issue under Article 82(1)(d)” is incorrect.²⁷ Trial Chamber I and the Appeals Chamber did not rule that any application of regulation 55 by the Chambers of this Court is subject to automatic appeal: first, in the *Lubanga* case leave was granted for two confined issues, and not for all the issues raised by the parties; second, the instant scenario is radically different from that case in which the Majority of Trial Chamber I sought to add *new crimes* to *new factual allegations* not contained in the charges.²⁸

The issues do not meet the requirements for leave to appeal under article 82(1)(d)

26. In the alternative, should the Chamber find that the two issues arise from the Impugned Decision, the Prosecution submits that they do not meet the requirements for leave to appeal under article 82(1)(d).
27. The Defence argues that the issues affect the *fairness* and *expeditiousness* of the proceedings as the trial will be on hold for at least 2,5 months and Prosecution and Defence witnesses will need to be recalled.²⁹ The *outcome of the trial* would also be affected if the Chamber were to convict the accused

²⁶ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179,para.27.

²⁷ Defence Application, para.18.

²⁸ The issues addressed by the Appeals Chamber were *first*, whether regulation 55 encompassed two separate proceedings: one applicable right before the issuance of the final judgment that did not envisaged any safeguard to the accused’s rights – regulation 55(1) - and another applicable throughout the proceedings which did foresee measures to address any impact on the accused’s rights - regulation 55(2) and (3); and *second*, whether regulation 55 permits to legally characterise the facts of that case to include the additional crimes of rape and other sexual crimes, torture and cruel and inhuman treatment under articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(vi), 8(2)(a)(ii) and 8(2)(c)(i). See ICC-01/04-01/06-2107, para.41. The Appeals Chamber found that regulation 55 includes a single procedure, and that any legal characterisation must not exceed the facts and circumstances described in the charges. See ICC-01/04-01/06-2205 OA15 OA16.

²⁹ Defence Application, para.22. See also Defence Application, para.20 (ii), whereby the Defence lists the purported negative impact that the possible re-characterization would have on the rights of the accused. Although the Defence presents it as an appealable issue, those arguments would arguably go to the purported impact of the Decision on Regulation 55 to the fairness and expeditiousness of the proceedings.

under the “should have known” provision in article 28(a)(i).³⁰ The Defence further argues that the resolution of the issues would *materially advance the proceedings* as a final appeal “would take many months and years to be remedied by the Appeals Chamber”.³¹

28. The Chamber’s possible and limited re-characterisation of the facts under article 28(a)(i) does not cause unfairness to the accused. First, and as noted above, the Defence arguments are grounded on the erroneous premise that the Trial Chamber is adding new factual allegations to those described in the charges. Second, the Chamber afforded to the Defence the safeguards contained in paragraphs 2 and 3 of regulation 55 that precisely seek to address any impact that a legal re-characterisation might have on the rights of the accused. In determining the suspension of the proceedings, the Trial Chamber expressly considered “the need to strike a balance between its obligation to ensure that the trial is fair and expeditious and that the accused is tried without undue delay and its duty to ensure the right of the accused to have adequate time and facilities for the preparation of his defence”.³² As a result, it gave the parties the opportunity to provide submissions on the procedural impact of this re-characterisation and it temporarily suspended the proceedings until 4 March 2012 so that the Defence has sufficient time to carry out additional investigations and to indicate which witnesses it wishes to recall and new evidence to submit.³³ Third, raising this matter to the Appeals Chamber at this stage will only delay the proceedings which are scheduled to resume on 4 March 2013.
29. The Prosecution submits that the Defence arguments on the future and hypothetical impact of the issues on the outcome of the trial, and how the intervention of the Appeals Chamber at this stage would materially

³⁰ Defence Application, para.23.

³¹ Defence Application, paras.24-25.

³² Impugned Decision, paras.14-15.

³³ Ibid., paras.16-20.

advance the proceedings, are equally without merit. The Defence Application is premature at this stage. The factual scope of the trial remains unaffected and a change of the legal characterisation of the facts, if any, will ultimately be made by the Chamber when it issues its decision under article 74 of the Statute. The Defence can then renew its arguments in an appeal of the final judgment if the accused is found guilty under the alternative form of knowledge in article 28(a)(i). Thus, an intervention of the Appeals Chamber at this stage will not assist the proceedings to “move forward”.³⁴ It will only cause an unnecessary delay in the proceedings.³⁵

Relief sought

30. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence’s Application.



Fatou Bensouda,
Prosecutor

Dated this 21st day of December 2012

At The Hague, The Netherlands

³⁴ ICC-01/04-168, paras. 14-15,18.

³⁵ As the Prosecution has regularly submitted, the extent of any likely delay is one factor to consider in whether immediate resolution of the issue would materially advance the proceedings, although it is certainly not decisive in its own right - see e.g. ICC-01/04-103, para. 37, and authorities cited therein (in particular at footnote 22).