



Original: English

No.: ICC-01/05-01/08

Date: 28/01/2013

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 Redacted Version

Urgent

Defence Motion to Vacate Trial Chamber's "Decision on the temporary suspension of the proceedings" of 13 December 2012 and Notification Regarding the Envisaged Re-Qualification of Charges Pursuant to Regulation 55

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. BACKGROUND

1. On 21 September 2012, Trial Chamber III issued its *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* ("Regulation 55 Notification").¹ In that Decision, the Trial Chamber envisaged the possibility of modifying the legal characterisation of the facts so as to consider "in the same mode of responsibility the alternate form of knowledge contained in Article 28(a)(i) of the Statute, namely that owing to the circumstances at the time, the accused 'should have known' that the forces under his effective command and control or under his effective authority and control, as the case may be, were committing or about to commit the crimes included in the charges confirmed in the Decision on the Confirmation of Charges."² The Chamber requested the parties and participants to make submissions on the procedural impact of the notification.³

2. On 18 October 2012, the Defence for Mr Jean-Pierre Bemba ("Defence") filed its *Defence Submissions on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court*, in which it raised a number of substantive objections to the course of action envisaged by the Trial Chamber.⁴

3. On 19 November 2012, the Chamber issued its *Decision requesting the defence to provide further information on the procedural impact of the Chamber's notification pursuant to Regulation 55(2) of the Regulations of the Court*. The Chamber requested the defence to provide concrete information and relevant justifications in relation to

¹ Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 21 September 2012, ICC-01/05-01/08-2324.

² *Ibid.*, para.5.

³ Prosecution's Submission on the Procedural Impacts of Trial Chamber's Notification pursuant to Regulation 55(2) of the Regulations of the Court, 8 October 2012, ICC-01/05-01/08-2334.

⁴ Defence Submissions on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, 18 October 2012, ICC-01/05-01/08-2365-Conf. A public redacted version of this document was filed on the same day (ICC-01/05-01/08-2365-Red).

(i) which Prosecution witnesses the Defence would intend to recall; and (ii) the envisaged time needed for further defence investigations and preparations.⁵

4. On 30 November 2012, as requested, the Defence filed its *Defence further submission on the notification under Regulation 55(2) of the Regulations of the Court and Motion for notice of material facts and circumstances underlying the proposed amended charge*.⁶

5. On 13 December 2012, the Chamber issued its *Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines* ("Decision suspending the proceedings").⁷In this decision the Chamber: (i) temporarily suspended the proceedings and decided that the presentation of evidence by the Defence would recommence on 4 March 2013; (ii) ordered the Defence to provide, by no later than 16.00 on 18 February 2013, on a confidential basis, a detailed list of the witnesses it intended to recall, indicating the justification for each witness and specifying the relevant aspects of their testimony that would be revisited; (iii) instructed the Prosecution to provide its observations in response, if any, by no later than 16.00 on 4 March 2013; (iv) ordered the Defence to disclose and/or permit the prosecution to inspect any additional Rule 78 material as soon as it decides to use the item, and in any event by no later than 16.00 on 4 March 2013; and (v) ordered the Defence to submit, by no later than 16.00 on 4 March 2013, a complete list with the identity of any additional witnesses it intends to call, the precise justification for the need to call each additional witness, their estimated length of questioning, and full statements signed by the witnesses or, at a

⁵ Decision requesting the defence to provide further information on the procedural impact of the Chamber's notification pursuant to Regulation 55(2) of the Regulations of the Court, 19 November 2012, ICC-01/05-01/08-2419.

⁶ Defence further submission on the notification under Regulation 55(2) of the Regulations of the Court and Motion for notice of material facts and circumstances underlying the proposed amended charge, 30 November 2012, ICC-01/05-01/08-2451-Conf-Exp, with Public Redacted Version ICC-01/05-01/08-2451-Red and confidential ex parte defence only Annex A ICC-01/05-01/08-2451-Conf-Exp-AnxA.

⁷ Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, 13 December 2012, ICC-01/05-01/08-2480.

minimum, a detailed summary of the issues to be addressed during the witnesses' testimony and its relevance to the envisaged possible modification to the legal characterisation of the facts.⁸

6. On 18 December 2012, the Defence filed its *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* ("Request for Leave to Appeal"),⁹ in which it argued that the Chamber interpreted and applied Regulation 55 in a manner inconsistent with the text of the provision and, therefore, without a valid legal basis [in so far as] the course envisaged by the Chamber goes well beyond. This resulted, the Defence submitted, in the violation of the following fundamental rights of Mr. Bemba: (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 ; and (f) his right to be tried by a tribunal which does not lack the appearance of impartiality.¹⁰

7. On 21 December 2012, the Prosecution filed its response to the Request, in which it urged the Chamber to reject the Request for Leave to Appeal.¹¹

8. On 11 January 2013 the Chamber rendered its *Decision on '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'*

⁸ICC-01/05-01/08-2480, paragraph 22.

⁹ 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, 18 December 2012, ICC-01/05-01/08-2483-Conf-Exp. Pursuant to Trial Chamber III's instruction, dated 20 December 2012, this document was reclassified as Confidential. A public redacted version of this document was filed on the same day (ICC-01/05-01/08-2483-Red).

¹⁰*Ibid.*, paras 20(ii)(a) - (f).

¹¹ 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), 21 December 2012, ICC-01/05-01/08-2484.

("Decision on Leave of Appeal").¹² The Trial Chamber rejected the Request for Leave to Appeal as The Trial Chamber rejected the Request for Leave to Appeal as it considered that none of the issues submitted by the Defence constituted appealable issues under Article 82(1)(d) of the Statute.¹³

D. SUBMISSIONS

(i) Notice of intent not to call any evidence pertaining to the envisaged "should have known" mens rea standard

9. The Defence hereby respectfully requests that the Chamber vacate its Decision suspending the proceedings. The Defence maintains its submission that the "should have known" standard that the Trial Chamber seeks to consider in relation to the charges against Mr. Bemba does not form part of the charges, as presently exist, and its application in these proceedings would result in manifest unfairness and actual prejudice to him. For reasons already outlined in earlier filings, and absent a formal decision to amend the charges accordingly or to render a decision that Regulation 55 is in fact being relied upon in the proceedings for that purpose, the Trial Chamber has no lawful authority to prosecute the accused under this theory of liability. **Furthermore, the matter is in fact *res judicata* or *chose jugée* insofar as two decisions were rendered by both the Pre-Trial Chamber¹⁴ and the Trial Chamber¹⁵ that "should have known" did not form part of the charges.** The Prosecution did not seek leave to appeal either of these decisions, or seek review or reconsideration of any aspect.

¹²ICC-01/05-01/08-2487-red, Public redacted version of "Decision on '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'", 11 January 2013.

¹³*Ibid.*, para. 35.

¹⁴ 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 ICC-01/05-01/08-836, Decision on the Defence application for corrections to the documents containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, para. 121

10. According to the Appeals Chamber, “pursuant to Article 74(2) of the Statute and Regulation 55 of the Regulations, the sole facts and circumstances that may be relevant for the envisaged re-characterisation *are those upon which the form of knowledge contained in Article 28(a)(i) of the Statute is based in the charges, i.e. paragraphs 478 to 489 of the Decision on the Confirmation of Charges and paragraphs 77 to 90 of the Second Amended Document Containing the Charges*”.¹⁶ Nowhere in those cited paragraphs is a reference to the “should have known standard” made, with the exception of paragraph 480, where the Chamber actually stated the following:

The Chamber further wishes to clarify that, bearing in mind its findings with respect to Mr Jean-Pierre Bemba's criminal responsibility under article 25(3)(a) of the Statute, in particular paragraphs 394, 396 and 397, *some of the arguments presented by the Prosecutor in support of its demonstration on Mr Jean-Pierre Bemba's mens rea under article 28 of the Statute can no longer be entertained*. The Chamber refers in particular to the arguments put forward by the Prosecutor in paragraphs 113 and 115 of the Amended DCC” (emphasis added).¹⁷

This allegation does not therefore form a valid part of the charges. Nor has the Trial Chamber rendered a decision which would include such an allegation in the charges against Mr. Bemba. As such, the accused is not being charged with a “should have known” case and is not, therefore, required to respond. Mr. Bemba has had no valid legal notice of such a case against him.

11. Moreover, the Pre-Trial Chamber already examined the facts contained in paragraphs 479 to 489 of the Decision Confirming the Charges. Following this examination, the Pre-Trial Chamber rejected any qualification of these facts indicating that Mr. Bemba “should have known”. It is contrary to the principle of

¹⁶ Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, 13 December 2012, ICC-01/05-01/08-2480, para. 11.

¹⁷ 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, para. 480.

judicial certainty to come back a question which has been rejected by the authorized Chamber on exactly the same facts.

12. At no point during the Prosecution's case was the Defence put on notice that the "should have known" standard was being considered.¹⁸ The Defence has prepared and decided to call a case on that basis. Given the accused has received no valid, prompt and legally adequate notification of any such allegation,¹⁹ the Defence cannot be required at this late stage of proceedings to prepare and answer the *possibility* of a different basis of liability.

13. Furthermore, as the Defence has previously submitted, the "should have known" standard remains controversial and the Court has never elaborated its scope or potential application. There is, at present, no legal certainty as to the elements of this standard or the material facts which could underpin it. In these circumstances, Mr. Bemba cannot be said to be informed meaningfully and effectively of this envisaged alternative case.

¹⁸In fact, in its "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" of 20 July 2010, the Trial Chamber explicitly held 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 (see 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). In its Revised Second Amended Document Containing the Charges, the Prosecution accordingly *deleted* the allegation that the Accused 'should have known' about the crimes (see 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.)

¹⁹For case law relating to an accused's right to be promptly informed of the nature and cause of the charges against him, see e.g. *Prosecutor v. Ntagerura et al.* Case No. ICTR-99-46-A, Judgement, 7 July 2006, para.121; *Nahimana et al v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, paras.326 and 336; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 33. See also Human Rights Committee, General Comment 13 [1984], para.8; *Sipavicius v Lithuania*, Judgment of 21 February 2002, para.27; *Pelissier v France*, Judgment of 25 March 1999, para.52; *Yvonne Neptune v. Republic of Haiti*, para.109 (IACHR).

14. Practically, Mr. Bemba is being expected to present a defence against a case that does not form a part of the charges, and to guess what the Prosecution case might have been, without the Prosecution having had the burden and responsibility of carrying the burden in relation to such a case. This constitutes a violation of the rights of the accused and the fundamental requirement that the Prosecution, not the accused, should bear the burden of proof.

15. The course envisaged by the Trial Chamber, moreover puts counsel in the position of having to act in direct contradiction of their duties to their own client. Counsel are in effect being expected to call evidence relevant to a “should have known” case and offer the Prosecution (and the Chamber) an opportunity to use that evidence – and the presence of witnesses called by the Defence – to build a case against the accused that, up to this point, has formed no part of the charges and which has not been evidentially relevant. As the ICTY has acknowledged, such a course would constitute a clear violation of their ethical duty of care and diligence.²⁰

16. In this case, as in any other, the Prosecution bears the *exclusive* burden of proof. The Defence declines to carry that burden in any respect. The Trial Chamber’s decision to suspend the proceedings and ask the Defence to identify Prosecution witnesses who should be re-called in relation to this new, envisaged, allegation, effectively places the onus on the Defence to call evidence relevant to this allegation – when no such evidence was validly presented during the course of the trial.

17. The course taken by the Trial Chamber also affects its appearance of impartiality to the extent that it may create an impression of the Chamber is taking over the responsibility of prosecuting Mr. Bemba or, at the very least, to enable the Prosecution to do so by creating an alternative to what must be regarded as a failure on its part to prove the case as validly pleaded and confirmed.

²⁰See e.g. *Prosecutor v. Krstic*, Case No. 98-33-A, 1 July 2003, paras. 8-12.

18. Furthermore, contrary to the Trial Chamber's apparent assumption in the Decision suspending the proceedings,²¹ the Defence has no proven ability to investigate this new envisaged allegation without putting Defence staff and/or potential interviewees at risk. Instead, the record clearly suggests that no adequate or timely preparation could take place in the circumstances of this case without exposing counsel and/or potential interviewees to risks. The Defence notes in that regard that despite serious and repeated interference in the work of Defence counsel having been reported to the Chamber and the Registry, the Defence has not been informed of any or any adequate investigation of these incidents. Counsel for Mr. Bemba cannot reasonably be expected to expose themselves and/or potential witnesses to such risks until and unless the Chamber has satisfied itself that any such risks have now been put to rest. The Defence also wishes to point to the following in this context:

- (i) The Defence has no more resources at its disposal for further investigations. Nor should Mr. Bemba be expected to use his own money to finance an alternative theory of liability at this point in time. The course envisaged would mean that Mr. Bemba would be required to pay for a second, alternative, basis for conviction after the Prosecution failed to meet its burden in relation to the first. This would be entirely unfair.
- (ii) The level of state cooperation (on the part of both the Democratic Republic of Congo and the Central African Republic) is still questionable. [REDACTED].
- (iii) The accused, Mr. Jean-Pierre Bemba, remains in ongoing detention whilst a pretense of investigation has been created.

²¹See Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, 13 December 2012, ICC-01/05-01/08-2480, paras. 15-20.

19. The Defence further observes that – given holiday closures of both the ICC and relevant government agencies and organisations in the relevant states - the effective period of suspension of proceedings was a mere seven weeks, which, even in the event that counsel were minded to embark upon the exercise described above in dereliction of their professional duties, is manifestly insufficient for a multinational investigation of the kind that would be necessary. The Trial Chamber has moreover, chosen to further burden the Defence with the additional responsibilities described in paragraphs 17 and 18 of its *Decision on measures to facilitate the continued presentation of evidence by the defence*.²² Leaving aside the fact that no party has requested any such order in the six months since the filing of the Defence witness list, that the order has no apparent connection to the question of the Regulation 55 issue, and that the order was made by the Chamber *proprio motu* without the Defence being given the opportunity to make any submissions relating to it, it represents a considerable undertaking; one which would further prevent the Defence team from carrying out the investigations which apparently justify the suspension.

20. Moreover, the Defence has also been denied the opportunity to remedy what it considers to be the impermissible and prejudicial course taken by the Trial Chamber in denying the Defence an opportunity to appeal its Regulation 55 decision. Instead, it has been ordered to prepare for and meet a case it never expected to meet and despite the absence of resources, and to wait until the trial resumes in March 2013.

21. The Trial Chamber's decision to reject the Defence Request for Leave to Appeal also raises an issue of equality of treatment between accused persons appearing before the ICC. Both Messrs Lubanga and Katanga were granted leave to appeal Regulation 55 decisions in comparable situations, which affected their

²²ICC-01/05-01/08-2482-Red

fundamental rights and the fairness of proceedings in at least equal measures.²³ The Trial Chamber has provide no reasoned opinion to justify this departure from sound judicial precedents of Trial Chamber I and Trial Chamber II.

22. Based on the above, the Defence hereby gives notice to the Trial Chamber that it will not be requesting to re-call any Prosecution witness, or present any evidence in response to the thus-far un-charged "should have known" allegation. Furthermore, and so as to preserve the right of Mr Bemba to be tried without undue delay, the Defence asks the Trial Chamber to order that the proceedings recommence as soon as possible and without undue delay, to enable the Defence to present the remainder of its defence case.

(ii) Order of the presentation of the remaining Defence witnesses

23. The Defence re-confirms its wish to call all witnesses currently on its list, but reserves the right to propose to the Chamber, by a separate motion, a group of witnesses who it wishes to call as a priority in order to ensure the most efficient presentation of the defence case.

C. RELIEF REQUESTED

24. For the reasons outlined above, the Defence gives notice that:

- (i) It will not be requesting the re-call of any Prosecution witness, or seeking to call any additional evidence to counter an allegation which does not form part of the charges against the accused;

²³*Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2107, "Decision on the prosecution and the defence applications for leave to appeal the 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", 3 September 2009; *Prosecutor v Germaine Katanga*, ICC-01/04-01/07-3327, "Decision on the 'Defence Request for Leave to Appeal the Decision 3319'", 28 December 2012.

(ii) It declines to conduct, and is unable to conduct any effective investigation in relation to the potential “should have known” allegation; and

(iii) It requests that the trial re-commence as soon as possible.

The whole, respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 28th of January 2013
At The Hague, The Netherlands