

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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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**

Confidential

**Prosecution's Response to Defence Motion to Vacate Trial Chamber's 13 December
2012 Decision and Notification Pursuant to Regulation 55 of the Regulations of the
Court**

Source: The Office of the Prosecutor

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

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I. Introduction

1. In its “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” (“Motion”),¹ the Defence of Mr. Jean-Pierre Bemba Gombo (“Accused”) seeks to end the temporary suspension of the proceedings and recommence the trial. Further, the Defence states that it will not seek to re-call any Prosecution witnesses or present any additional evidence in response to the Chamber’s notice provided pursuant to Regulation 55(2) of the Regulations of the Court (“Regulation 55(2)”). At the same time, the Defence wilfully misrepresents the record and the posture of the case, claiming that the Chamber has not in fact provided notice pursuant to Regulation 55(2) and that therefore the Accused does not have to address the possibility of being held liable pursuant to the “should have known” part of Article 28(a)(i) of the Rome Statute (“Statute”). Additionally, the Defence seeks once again to re-litigate matters already decided by the Chamber.

2. Under these circumstances, the Chamber should find that the Accused has waived his right to remedial measures in response to the Chamber’s Regulation 55(2) notice and to complain of any prejudice resulting from that notice. Further, the Chamber should end the temporary suspension of the proceedings and order the Defence to recommence presenting its case.

II. Procedural History

¹ ICC-01/05-01/08-2490-Conf, 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, 28 January 2013.

3. On 21 September 2012, the Chamber gave notice to the parties and participants pursuant to Regulation 55(2)² that in its decision under Article 74 of the Statute, without exceeding the facts and circumstances described in the charges and any amendment thereto, it might also consider, under Article 28(a)(i) of the Statute, that owing to the circumstances at the time the Accused “should have known” that “*Mouvement de Libération du Congo*” troops were committing or about to commit the crimes charged. The Chamber requested the parties and participants to provide submissions on the procedural impact of the notification.

4. On 8 October 2012 the Prosecution submitted that the possibility of an alternative legal characterization of the facts would have no impact on the 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.³

5. On 3 October 2012 and 8 October 2012 the Legal Representatives also filed their submissions.⁴

6. 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.⁵

² ICC-01/05-01/08-2324, 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.

³ ICC-01/05-01/08-2334, 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.

⁴ ICC-01/05-01/08-2328-Conf, Observations du Représentant légal Maître Zarambaud Assingambi sur la décision de la Chambre de première instance III du 21 septembre 2012 signalant aux parties et aux participants que la qualification juridique des faits pourrait faire l'objet de modification, conformément à la norme 55-2 du Règlement de la Cour, 3 October 2012; ICC-01/05-01/08-2335-Conf, Observations de la Représentante légale des victimes sur la décision de la Chambre de première instance III du 21 septembre 2012, 8 October 2012.

⁵ ICC-01/05-01/08-2365-Conf, Defence Submissions on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, 18 October 2012.

7. 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).⁶

8. On 30 November 2012, the Defence provided this additional information in a confidential Ex parte annex.⁷

9. On 13 December 2012, the Chamber, pursuant to Regulation 55(2) and (3), decided to suspend temporarily the proceedings and to give time to the Defence to investigate in relation to the proposed legal re-characterization and decide whether it wishes to recall witnesses or present additional evidence. ("Decision Suspending the Proceedings").⁸

10. On 18 December 2012, the Defence filed an application for leave to appeal the Decision Suspending the Proceedings ("Defence Application").⁹

11. On 21 December 2012, the Prosecution filed its response to the Defence Application.¹⁰

12. 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

⁶ ICC-01/05-01/08-2419, 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.

⁷ ICC-01/05-01/08-2451-Conf-Exp, 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.

⁸ ICC-01/05-01/08-2480, 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.

⁹ ICC-01/05-01/08-2483-Conf-Exp, 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.

¹⁰ ICC-01/05-01/08-2484, 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", 21 December 2012.

Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines" whereby the 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.¹¹

13. On 28 January 2013 the Defence filed its "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". The Defence gave notice that it will not recall any Prosecution witness, or seek to call any additional evidence; it declines to any effective investigation in relation to the alternate form of knowledge "should have known"; it requests that the trial re-commence as soon as possible.¹²

14. On 29 January the Chamber issued its "Decision shortening the time for observations and requesting further information on the Defence Motion ICC-01/05-01/08-2490-Red", whereby it required that responses by the Prosecution and the legal representatives of victims to the Defence Motion be filed by 30 January.¹³

III. Submissions

15. The Defence is clear in what it is requesting in its filing: it asks the Chamber to end the temporary suspension of the proceedings and recommence the trial. The Prosecution has no objection to this request.

¹¹ ICC-01/05-01/08-2487-Conf, 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.

¹² ICC-01/05-01/08-2490-Conf ("Motion").

¹³ ICC-01/05-01/08-2492, Decision shortening the time for observations and requesting further information on the Defence Motion ICC-01/05-01/08-2490-Red, 29 January 2013.

16. Further, the Defence states that it will not seek to re-call any Prosecution witnesses, nor will it seek to add witnesses or evidence to its Defence case. The Accused has the right to make this decision. The Chamber should take note of these representations and allow the Defence to present its case as it chooses. .

17. At the same time, the Defence asserts that the Chamber has not “render[ed] a decision that Regulation 55 is in fact being relied upon in the proceedings...”¹⁴ and that therefore the Defence does not need to address the “should have known” part of Article 28(a)(i).

18. The Defence appears to be claiming that the Chamber’s decisions to date regarding Regulation 55(2) have all been to indicate that the Chamber might issue notice pursuant to Regulation 55(2) but it had not yet in fact done so.

19. The Prosecution disagrees. Contrary to the Defence reading of the Chamber’s decisions, it is impossible to interpret the Chamber’s unequivocal statements in any manner other than a notice that, pursuant to Regulation 55(2), “the legal characterisation of facts may be subject to change.” The Defence has in fact been put on notice, it knows that it has been put on notice, and it has been provided substantial additional time to address the possibility of the change in the legal characterisation of the facts.

20. The language of the Chamber’s decisions regarding notice has been clear. In its 19 November 2012 “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 ordered the Defence to provide concrete information on witnesses the Defence wished to recall and the

¹⁴ Motion, para. 6. See also para. 10 (“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.”)

amount of time it needed for additional investigation and preparations. Significantly, the Chamber also emphasised that a change to the legal characterisation of the facts, if any, would ultimately be made by the Chamber in its decision under Article 74 of the Statute.¹⁵ The Chamber has not reached that stage, and it has not signalled that it will find the Accused guilty, much less that it will do so on the basis of what the Accused “should have known” and not on a finding that the Accused “knew” that the crimes would be committed by his soldiers. But regardless how the Chamber decides, it is manifestly clear that there will be no additional “formal notice” provided or other interim step. Rather, the requisite notice under Regulation 55 has already been provided by the Chamber.

21. In its Decision Suspending the Proceedings, the Chamber temporarily suspended the trial in order to give the Defence a chance to conduct further investigations and preparations to address the possible change in the legal characterisation of the facts.¹⁶ Obviously, this significant step would be unnecessary if the Chamber were in fact only contemplating providing notice under Regulation 55(2). Plainly, the Chamber had provided notice and was then providing the Defence with the means to address the possible change in the legal characterisation of the facts. No other interpretation of these decisions is possible. The Defence’s claim that it has not in fact been provided notice is simply specious.

22. Further, the Defence in its Motion again seeks to litigate issues that have been repeatedly addressed by the Chamber. The Defence argues, among other points, that the Chamber should be bound by the Pre-Trial Chamber’s decision, that the Confirmation Decision did not include the “should have known” allegation, that the Defence was not put on notice during the Prosecution case of the alternative knowledge allegation, that the “should have known” standard is controversial, and

¹⁵ ICC-01/05-01/08-2419, para. 6.

¹⁶ ICC-01/05-01/08-2480, para. 22(i).

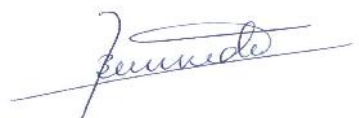
that the notice affects the Chamber's appearance of impartiality.¹⁷ All of these issues have been repeatedly raised by the Defence and addressed by the Chamber. It is improper for the Defence to seek to raise them again at this stage.

IV. Request for confidentiality

23. The Prosecution requests that this document be received as "Confidential" pursuant to Regulation 23 *bis* (2) of the Regulations of the Court, as it responds to the Defence Motion, which is currently classified as confidential.

V. Conclusion

24. For the reasons set forth above, the Chamber should accept the Defence's request to end the temporary suspension of the trial and allow the Defence to resume presenting its case and accept its waiver of the opportunity to re-call any witnesses or add new witnesses or evidence to address whether the Accused "should have known" that his soldiers would commit the charged crimes. In addition, the Chamber should reject the Defence's claim that notice has not been provided pursuant to Regulation 55(2), and it should reject the Defence's attempts to re-litigate the issues surrounding the Regulation 55(2) notice.



Fatou Bensouda, Prosecutor

Dated this 30th Day of January 2013

At The Hague, The Netherlands

¹⁷ Motion, paras. 9, 10, 13 and 17.