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

Date: 30/05/2014

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

Defence Request for Notice

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. SUBMISSIONS

1. The Trial Chamber in the present case has previously indicated that the legal characterization of facts could be subject to change in accordance with Regulation 55(2) of the Regulations of the Court ("Regulations").¹ Namely, that the Trial Chamber may consider the alternate form of knowledge under Article 28(a)(i) of the Statute, that owing to the circumstances at the time, the accused "should have known" that the forces under his effective command and control were committing the crimes confirmed in the Decision on the Confirmation of Charges.²

2. The Defence has indicated that, in its view, Mr Bemba had not received sufficiently detailed notice of which facts and circumstances, as confirmed by the Pre-Trial Chamber, would support the elements of the potentially recharacterised charge.³ To this end, the Defence notes that the allegation that Mr Bemba "should have known" of crimes was not confirmed by the Pre-Trial Chamber and was rejected at the time of confirmation. The confirmation decision accordingly does not provide details of the facts and circumstances underlying a "should have known" case against Mr Bemba.⁴

3. The last decision concerning the proposed recharacterisation was rendered by the Chamber on 13 February 2013, nine months before to the completion of the Defence evidence, and before the majority of the evidentiary record had been settled.⁵

4. Since this time, the jurisprudence of the ICC concerning Regulation 55 has been significantly developed. Notably, it is now clear that notice must be provided at a far

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, ICC-01/05-01/08-2324, 21 September 2012 ("Regulation 55 Decision").

² Regulation 55 Notification, para. 5.

³ ICC-01/05-01/08-2451-Red, para. 34.

⁴ Requête aux fins d'obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges, ICC-01/05-01/08-694, 12 February 2010, para. 89; 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, ICC-01/05-01/08-836, 21 July 2010, paras. 120-121.

⁵ See, for example, "Decision on the admission into evidence of items deferred in the Chamber's previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber", ICC-01/05-01/08-3019-Conf, rendered only on 17 March 2014.

earlier stage of the trial proceedings, permitting the accused appropriately to adjust their strategy to the charges. Trial Chamber V(A) in *Ruto and Sang* gave notice of a potential recharacterisation three months after the commencement of the trial hearings on 10 September 2013. Even at this stage, the Chamber felt compelled to justify why notice was coming so late, finding that:⁶

The Chamber acknowledges that Regulation 55(2) Notice could have been given at an even earlier point during the trial proceedings than now. However, this is the first extended break in the proceedings since the Prosecution Additional Submission was filed and the Chamber required additional time to deliberate on the legal and factual complexity raised by the relief sought.

5. Indeed, it appears that the Office of the Prosecutor has adopted a policy to request the Chamber to provide notice of a potential Regulation 55 recharacterisations as early as possible. Referencing the *Ruto and Sang* case, the Prosecution in the *Banda* case requested that the Chamber provide notice under Regulation 55 even before the commencement of the trial, noting that:⁷

providing notice at the start of trial will ensure that the trial is fair and expeditious, as required by Article 64(2). It will ensure the trial is fair because it will minimise the possibility of prejudice if the Chamber decides to recharacterise the facts later in the proceedings. And it will ensure the trial is expeditious because it will reduce the risk of delays, the recall of witnesses, or the need for further investigations if the Chamber decides that recharacterisation is appropriate...

It will enable the parties to consider the evidence against the range of legal characterisations open to the Chamber and, if appropriate, to adapt their trial presentations accordingly. Early notice will also remove the risk of the parties being taken by surprise at the end of trial by an unexpected change in the legal framework of the case. This consideration is particularly apt at this early stage of the Court's development, where the law on the various modes of liability remains unsettled to a certain degree.

⁶ Trial Chamber V(A), *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Decision on Applications for Notice of Possibility of Variation of Legal Characterisation", 12 December 2013, ICC-01/09-01/11-1122, para. 28.

⁷ ICC-02/05-03/09-549, para.31.

This practice of both the Court and the Prosecution reflects the right of the accused to receive detailed and prompt notice of the charges.⁸ Furthermore, as emphasised by the Appeals Chamber, the application of Regulation 55 would only ever be valid where consistent with the effective protection of the rights of the accused.⁹

6. Moreover, since the Chamber's last decision concerning Regulation 55 in February 2013, the presentation of Defence evidence has been concluded, and the state of the evidentiary record has been almost completely clarified. As such, it is necessarily the case that the Trial Chamber is in a position to provide further clarity to the accused as to the charges against which his liability will be assessed. Given the advanced stage of the proceedings, it is also self-evident, should the Chamber intend to recharacterise the charges, it would be in a position to indicate the material facts and circumstances which are said to underpin a "should have known case", including but not limited to:

- i. Identification of the crimes about which Mr Bemba "should have known";
- ii. By what means is it alleged Mr Bemba "should have known";
- iii. On what basis is it alleged Mr Bemba could be said to have culpably failed to obtain relevant information;
- iv. What is the information that is said to have been available to Mr Bemba and which, it is said, he culpably failed to acquire; and
- v. What evidence is said to support each of the alleged facts outlined above.

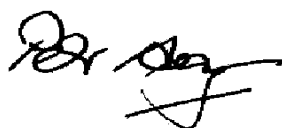
⁸ See Article 67(1)(A) of the Statute. See also, *inter alia*, Article 6(3)(a) ECHR; Article 14(3) ICCPR; Art 8(2)(2) IACHR; Human Rights Committee, *General Comment 13* [1984], para. 8. For relevant international caselaw, see also, *inter alia*, *Kupreskic Appeals Judgment*, paras. 79 *et seq*; *Krnjelac Appeals Judgment*, paras. 129 *et seq*; *Prosecutor v Kovacevic*, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 30 (ICTY); *Sipavicius v Lithuania*, Judgment of 21 February 2002, para. 28 (ECHR) (pointing to the right and need for "the provision of full, detailed information concerning the charges against a defendant").

⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 15 OA 16, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "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", ICC-01/04-01/06-2205, 8 December 2009, para. 85; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 OA 13, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", ICC-01/04-01/07-3363, 27 March 2013, para. 102.

7. The Defence is in the process of preparing Mr Bemba's Final Trial Brief. This must be completed within a limited timeframe and, more relevantly for the present motion, within a limited number of pages. A clear prejudice arises for an accused who must defend against multiple (and potential) charges, particularly if the facts and circumstances underpinning potentially recharacterised charges have not been identified with sufficient clarity. Despite the evidential record having been closed, Mr Bemba is not in a position to discern which material facts and circumstances are alleged to support a "should have known" standard, and any Final Trial Brief will be necessarily be compromised by this ambiguity and lack of precision.

8. Accordingly, the Defence asks that the Trial Chamber provide notice to Mr Bemba of the charges against which his liability will be assessed. In the event of a recharacterisation of the charges pursuant to Regulation 55(2), the Defence requests that Mr Bemba be provided with notice of the material facts listed in paragraph 6 above, and any other fact which the Trial Chamber considers to be "material" to an allegation that Mr Bemba "should have known" of the crimes charged against him.

The whole respectfully submitted.



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30 May 2014