

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 June 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

Decision on Defence Request for Notice

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

States' Representatives

Amicus Curiae

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on Defence Request for Notice ("Decision").

I. Background and Submissions

1. On 21 September 2012, the Chamber 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 The Chamber informed the parties and participants that – after having heard all the evidence and when making its decision under Article 74 of the Rome Statute ("Statute") – the Chamber may modify the legal characterisation of the facts pursuant to Regulation 55 of the Regulations of the Court ("Regulations").²
2. The Chamber envisaged considering "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."³ The Chamber further requested that the parties and participants make submissions on the procedural impact of the notification.⁴ None of the parties or participants sought leave to appeal this decision.

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 ICC-01/05-01/08-2324, paragraphs 4 and 5.

³ ICC-01/05-01/08-2324, paragraph 5.

⁴ ICC-01/05-01/08-2324, paragraph 6.

3. On 8 October 2012, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Submission on the Procedural Impacts of Trial Chamber’s Notification pursuant to Regulation 55(2) of the Regulations of the Court” ,⁵ in which it submitted that the Chamber’s Regulation 55 Notification had no impact on the prosecution case.⁶
4. 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”,⁷ in which it raised a number of substantive objections to a possible change of the legal characterisation of the facts.⁸ On the procedural impact, the defence submitted that, at a minimum, the envisaged change could require (i) recalling prosecution witnesses; (ii) being provided with a detailed notice of the relevant material facts; (iii) further defence investigations; (iv) additional time to identify and interview potential witnesses; (v) further requests for assistance from various governments and/or organisations; (vi) additional disclosure requests from the prosecution; and (vii) a meaningful period of time to investigate and prepare.⁹
5. 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”.¹⁰ The Chamber requested that the defence provide concrete information as to (i) which prosecution witnesses it would intend to recall;

⁵ 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.

⁶ ICC-01/05-01/08-2334, paragraph 13.

⁷ 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.

⁸ ICC-01/05-01/08-2365-Conf, paragraphs 11 to 26.

⁹ ICC-01/05-01/08-2365-Red, paragraphs 29 and 42.

¹⁰ 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.

and (ii) the envisaged time needed for further investigations and preparations.¹¹ In its decision, the Chamber emphasised once again 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.¹² In addition, it reiterated that such a possible change in the legal characterisation of the facts would only be made “without exceeding the facts and circumstances described in the charges, as confirmed by the Pre-Trial Chamber”.¹³ None of the parties or participants sought leave to appeal this decision.

6. On 30 November 2012, 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”,¹⁴ in which it, *inter alia*, requested that the Chamber provide further details of the material facts and circumstances upon which it intends to rely on for the proposed re-characterisation under Regulation 55 of the Regulations.¹⁵ In addition, in a confidential *ex parte* Annex A,¹⁶ the defence (i) anticipated the need for further investigations and preparation; (ii) identified a number of prosecution witnesses that it would require to recall;¹⁷ and (iii) anticipated calling a number of additional witnesses. The defence also argued that it required “an additional six (6) to nine (9) months investigation and preparation”, in order to undertake further investigations, interview potential witnesses and others with relevant

¹¹ ICC-01/05-01/08-2419, paragraph 8.

¹² ICC-01/05-01/08-2419, paragraph 6.

¹³ ICC-01/05-01/08-2419, paragraph 7.

¹⁴ 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.

¹⁵ ICC-01/05-01/08-2451-Red, paragraph 34.

¹⁶ ICC-01/05-01/08-2451-Red, paragraph 33 and ICC-01/05-01/08-2451-Conf-Exp-AnxA. The Chamber notes that the present decision refers to matters addressed in the context of that confidential *ex parte* Annex. While some of the matters referred therein should remain *ex parte* at this stage, the Chamber is of the view that in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, this Decision makes reference to information that the Chamber considers not to warrant *ex parte* treatment at this time.

¹⁷ ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 3.

information, and to initiate further requests for assistance from various governments and/or organisations and/or press bodies, to review and gather relevant material.¹⁸ The defence stressed that the time requested was calculated on the basis of the current proceedings being suspended for the entirety of this defence investigation phase.¹⁹

7. 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” (“Suspension Decision”),²⁰ in which it stressed that, “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.”²¹ In particular, the Chamber highlighted that the sole facts and circumstances relevant for the envisaged re-characterisation were 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”.²² Taking the Defence Additional Submission into account, and striking a balance between the need to ensure adequate time and facilities for the effective preparation of the defence and the need to ensure that the trial is fair and expeditious and that the accused is tried without undue delay, the Chamber decided to suspend the trial proceedings for two and a half months and requested that the defence provide a list of the witnesses it intended to recall and a list of any new witnesses or other additional evidence.

¹⁸ ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 5.

¹⁹ ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 6.

²⁰ 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.

²¹ ICC-01/05-01/08-2480, paragraph 12.

²² ICC-01/05-01/08-2480, paragraph 11, referring to 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, ICC-01/05-01/08-424, paragraphs 478 to 489 and Prosecution’s Submission of the Revised Second Amended Document Containing the Charges, 18 August 2010, Annex A, ICC-01/05-01/08-856-Conf-AnxA, paragraphs 77 to 90, a Corrected Revised Second Amended Document Containing the Charges was filed on 13 October 2010, ICC-01/05-01/08-950-Red-AnxA.

8. On 18 December 2012, the defence filed a request for leave to appeal the Suspension Decision.²³
9. On 11 January 2013, the Chamber issued its decision,²⁴ denying the Leave to Appeal,²⁵ as none of the issues raised by the defence constituted appealable issues.²⁶ The Chamber noted that some of the issues identified by the defence would have arisen out of the Regulation 55 Notification for which no leave to appeal was sought. However, for the purpose of clarity, the Chamber addressed the substance of all issues identified by the defence.²⁷ In particular, the Chamber stressed that, in its previous decisions, it had made “abundantly clear” that (i) “the proposed re-characterisation would not exceed the facts and circumstances set out in the charges or any amendment thereto”;²⁸ and (ii) the material facts underlying the potential re-characterisation “do not differ from those underlying the allegation that the accused ‘knew’ of the alleged commission of the relevant crimes”.²⁹
10. The Chamber further stressed that it identified the precise paragraphs of the Decision Confirming the Charges (“Confirmation Decision”) ³⁰ and the Document Containing the Charges (“DCC”),³¹ which set out the relevant underlying facts.³² As to the potential impact on the rights of the accused by the application of Regulation 55, the Chamber recalled the Appeals

²³ 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).

²⁴ Decision on “Defence Request for Leave to Appeal the Decision on Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines”, 11 January 2013, ICC-01/05-01/08-2487-Conf and Public Redacted Version ICC-01/05-01/08-2487-Red.

²⁵ ICC-01/05-01/08-2487-Red, paragraph 36.

²⁶ ICC-01/05-01/08-2487-Red, paragraph 35.

²⁷ ICC-01/05-01/08-2487-Red, paragraph 17.

²⁸ ICC-01/05-01/08-2487-Red, paragraph 19.

²⁹ ICC-01/05-01/08-2487-Red, paragraph 19.

³⁰ ICC-01/05-01/08-424, paragraphs 478 to 489.

³¹ ICC-01/05-01/08-950-Red-AnxA , paragraphs 77 to 90.

³² ICC-01/05-01/08-2487-Red, paragraph 19.

Chamber's determination that "the application of Regulation 55 during a trial does not *per se* breach the rights of an accused to a fair trial".³³

11. 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".³⁴ The defence submitted that "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." Accordingly, the defence (i) informed the Chamber that it will not be requesting to recall any prosecution witnesses or seeking to present any additional evidence; (ii) declined to conduct any effective additional investigation; and (iii) requested that the trial recommence as soon as possible.³⁵

12. On 6 February 2013, the Chamber issued its "Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497".³⁶ The Chamber, *inter alia*, reiterated that, a change to the legal characterisation of the facts pursuant to Regulation 55(1) of the Regulations, may be effected in the context of the Chamber's final decision on the merits under Article 74 of the Statute.³⁷ The Chamber further stressed that "the defence's allegation that

³³ ICC-01/05-01/08-2487-Red, paragraph 28, referring to Judgment of 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", 8 December 2009, ICC-01/04-01/06-2205, paragraphs 82 to 87.

³⁴ 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, ICC-01/05-01/08-2490-Conf and Public Redacted Version ICC-01/05-01/08-2490-Red.

³⁵ ICC-01/05-01/08-2490-Red, paragraph 24.

³⁶ Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, 06 February 2013, ICC-01/05-01/08-2500.

³⁷ ICC-01/05-01/08-2500, paragraph 14.

the Chamber has not made a 'formal decision to amend the charges accordingly or [...] a decision that Regulation 55 is in fact being relied upon in the proceedings' is misconceived; no such decision is required under Regulation 55 and this was perfectly clear from the Chamber's previous decisions on this matter."³⁸ The Chamber further considered that, "the accused has waived the opportunity to conduct further investigations, recall witnesses or submit additional evidence relevant to the potential legal re-characterisation of the facts and circumstances related to the alternate form of knowledge contained in Article 28(a)(i) of the Statute".³⁹ Consequently, it lifted the temporary suspension and ordered the trial to resume as soon as practicable.⁴⁰

13. On 30 May 2014, more than a year later, the defence filed its "Defence Request for Notice",⁴¹ requesting that the Chamber "provide notice to Mr Bemba of the charges against which his liability will be assessed".⁴² The defence argues that:⁴³

[g]iven the advanced stage of the proceedings [...] should the Chamber intend to re-characterise the charges, it would be in a position to indicate the material facts and circumstances which are said to underpin the "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";
- ii. 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.

14. On 9 June 2014, the prosecution filed its "Prosecution Observations to 'Defence Request for Notice'",⁴⁴ opposing the Defence Request for Notice and

³⁸ ICC-01/05-01/08-2500, paragraph 17.

³⁹ ICC-01/05-01/08-2500, paragraph 21.

⁴⁰ ICC-01/05-01/08-2500, paragraph 21.

⁴¹ Defence Request for Notice, 30 May 2014, ICC-01/05-01/08-3076.

⁴² ICC-01/05-01/08-3076, paragraph 8.

⁴³ ICC-01/05-01/08-3076, paragraph 6.

⁴⁴ Prosecution Observations to "Defence Request for Notice", 9 June 2014, ICC-01/05-01/08-3085.

asking the Chamber to reject it as moot.⁴⁵ The prosecution submits that the Regulation 55 Notification fulfilled the legal requirements of Regulation 55(2) of the Regulations.⁴⁶ The prosecution further submits that the defence is already on notice of the material facts and circumstances relating to the “should have known” requirement, and that paragraphs 77 to 90 of the DCC encompass both the ‘knew’ and the ‘should have known’ forms of knowledge.⁴⁷ Lastly, the prosecution submits that the Chamber’s Regulation 55 Notification and the DCC both provide the defence with “sufficient notice to be in a position to respond to the Prosecution’s case in their closing brief”.⁴⁸

II. Analysis and Conclusions

15. For the purposes of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Statute, Articles 64(2) and 67(1)(a) and (c) of the Statute and Regulation 55 of the Regulations.
16. The Chamber notes that, once again, the Defence Request for Notice is based on an incorrect interpretation of Regulation 55 of the Regulations and of the related Chamber’s decisions to date. As the Chamber’s previous decisions clearly and consistently state, the only facts and circumstances relevant for a possible re-characterisation pursuant to Regulation 55 of the Regulations, if any, are those upon which Mr Bemba’s knowledge is based in the Confirmation Decision and in the DCC, i.e. paragraphs 478 to 489 of the Confirmation Decision and paragraphs 77 to 90 of the DCC.⁴⁹
17. The Chamber considers that the Defence Request for Notice is an attempt to re-litigate and seek reconsideration of a matter which the Chamber has

⁴⁵ ICC-01/05-01/08-3085, paragraph 5.

⁴⁶ ICC-01/05-01/08-3085, paragraph 2.

⁴⁷ ICC-01/05-01/08-3085, paragraph 3.

⁴⁸ ICC-01/05-01/08-3085, paragraph 4.

⁴⁹ ICC-01/05-01/08-424, paragraphs 478 to 489 and ICC-01/05-01/08-950-Red-AnxA, paragraphs 77 to 90.

previously addressed on more than one occasion. As the Chamber has previously noted,⁵⁰ a significant change in circumstances, or new and compelling reasons, may justify reconsideration of a decision.⁵¹ However, the Chamber does not consider that any of the submissions made by the defence provide such a basis for reconsideration in this instance. In particular, the Chamber is not persuaded by the defence's argument that given that the evidentiary record of the case is now settled,⁵² or because other Chambers of the Court have developed some jurisprudence on the interpretation of Regulation 55 of the Regulations,⁵³ the Chamber will be "in a position to indicate the material facts and circumstances which are said to underpin a 'should have known case'".⁵⁴ The Chamber finds its previous decisions to be sufficiently clear as to the facts and circumstances relevant for any possible re-characterisation pursuant to Regulation 55 of the Regulations and finds that there are no exceptional circumstances that may justify a re-litigation of the matter.

18. In light of the foregoing, the Chamber REJECTS the Defence Request for Notice.

⁵⁰ See, *inter alia*, Decision on the "Third Defence Submissions on the Presentations of its Evidence", 6 July 2012, ICC-01/05-01/08-2242-Conf –Exp, a public redacted version of this decision was filed on 28 September 2012, ICC-01/05-01/08-2242-Red, paragraph 19; and Order rescheduling the video-link testimony of Witness D04-56, 3 May 2013, ICC-01/05-01/08-2614, paragraph 8.

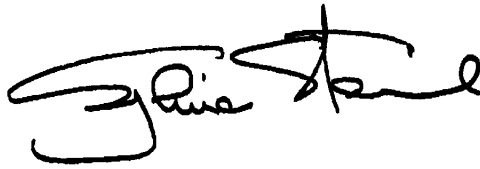
⁵¹ See also, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, paragraphs 15 to 18; Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 13 December 2012, ICC-01/09-01/11-511; and Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863, paragraph 11.

⁵² ICC-01/05-01/08-3076, paragraphs 6.

⁵³ ICC-01/05-01/08-3076, paragraphs 4 and 5.

⁵⁴ ICC-01/05-01/08-3076, paragraph 6.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 12 June 2014

At The Hague, the Netherlands