

**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***

**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'" of 11 January 2013**

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 Aimé Kilolo Musamba

Mr Peter Haynes

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

Registrar

Ms Silvana Arbia

Defence 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 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” (“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 In its decision, 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 The 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.”³ The Chamber further requested the parties and participants to make submissions on the procedural impact of the notification.⁴

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.

2. On 8 October 2012, the Office of the Prosecutor ("prosecution") filed its "Prosecution's Submissions on the Procedural Impact 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 In addition, the prosecution submitted that its theory of the case is consistent with the possible change to the legal characterisation of the facts and that the same evidence it had presented to prove that the accused had actual knowledge also proves that he, "owing to the circumstances at the time, should have known".⁷ The prosecution stated that during the presentation of its case it had led evidence on facts – and the defence had questioned and challenged the prosecution's witnesses on these facts – that would establish that the accused should have known, including evidence on the coverage by the international media of the crimes committed by the *Mouvement de Libération du Congo* ("MLC"), visits by the accused to the Central African Republic during the relevant period under examination, the MLC's reporting system and the MLC's communication system.⁸

3. On 3 and 8 October 2012, the legal representatives of victims filed their submissions.⁹ Mr Zarambaud submitted, *inter alia*, that the envisaged potential modification of the legal characterisation of the facts is in the interests of victims.¹⁰ Ms Douzima argued, *inter alia*, that it is within the Chamber's powers to make the potential change to the legal characterisation of the facts envisaged in the Regulation 55 Notification.¹¹ Neither legal

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 *Ibid.*

⁸ ICC-01/05-01/08-2334, paragraphs 10 and 18.

⁹ Observations du Représentant légal Maître Zarambaud Assingambi su 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 (ICC-01/05-01/08), 3 October 2012, ICC-01/05-01/08-2328-Conf ; Observations de la Représentante légale de victimes sur la décision de la Chambre de première instance III du 21 septembre 2012, 8 October 2012, ICC-01/05-01/08-2335-Conf.

¹⁰ ICC-01/05-01/08-2328-Conf, paragraph 4.

¹¹ ICC-01/05-01/08-2335-Conf, page 4.

representative raised any procedural issues arising out of the Chamber's Regulation 55 Notification.

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",¹² in which it raised a number of substantive objections to a possible change of the legal characterisation of the facts. In relation to the procedural impact of the Regulation 55 Notification, the defence submitted that, at a minimum, the envisaged change would 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.¹³ The defence urged the Chamber to "render a reasoned decision in a timely fashion in order to minimize the impact of the issue upon the continuing process".¹⁴
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" ("Decision Requesting Further Information"),¹⁵ in which it requested the defence to provide concrete information and relevant justifications in relation to (i) which prosecution witnesses the defence would intend to recall; and (ii) the envisaged time needed for further defence investigations and

¹² 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).

¹³ ICC-01/05-01/08-2365-Red, paragraphs 29 and 42.

¹⁴ ICC-01/05-01/08-2365-Red, paragraph 51.

¹⁵ 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.

preparations.¹⁶ 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.¹⁷ Further, it reiterated that such a 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.¹⁸

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”,¹⁹ in which it, *inter alia*, requested the Chamber to provide further details of the material facts and circumstances upon which it intends to rely for the proposed re-characterisation under Regulation 55 of the Regulations.²⁰ In addition, in a confidential *ex parte* Annex A, the defence provided the Chamber with more detailed and concrete information as requested.²¹
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” (“Impugned Decision”).²² In this decision the Chamber: (i) temporarily suspended the proceedings and decided that the presentation of evidence by the defence would recommence

¹⁶ ICC-01/05-01/08-2419, paragraph 8.

¹⁷ ICC-01/05-01/08-2419, paragraph 6.

¹⁸ ICC-01/05-01/08-2419, paragraph 7.

¹⁹ 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.

²⁰ ICC-01/05-01/08-2451-Red, paragraph 34.

²¹ 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.

²² 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.

on 4 March 2013 at 9.00; (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 intends 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 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.²³

8. 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").²⁴ The defence argues that the Impugned Decision gives rise to the following two issues: (i) "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 [a legal re-characterisation of facts] by adding a new set of facts and factual allegations to the charges" ("First Issue");²⁵ and (ii) "the Chamber failed to apply Regulation 55 in a

²³ ICC-01/05-01/08-2480, paragraph 22.

²⁴ 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).

²⁵ ICC-01/05-01/08-2483-Red, paragraph 20(i).

manner consistent with the Statute” (“Second Issue”) and violated the following rights of the accused: (a) his right to have prompt and detailed notice of the charges (“Sub-issue 1”); (b) his right to have adequate time and resources to prepare (“Sub-issue 2”); (c) his right to liberty (“Sub-issue 3”); (d) his right to be presumed innocent and to have the prosecution bear at all times the burden of proof (“Sub-issue 4”); (e) his right to be tried without undue delay (“Sub-issue 5”); and (f) his right to be tried by a tribunal which does not lack the appearance of impartiality (“Sub-issue 6”).²⁶

9. The defence submits that both issues significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial,²⁷ and that an immediate resolution of these issues by the Appeals Chamber would materially advance the proceedings.²⁸ Finally, the defence requests the Chamber to suspend the timeframes it set in the Impugned Decision until the resolution of its Request and any subsequent appellate litigation.²⁹

10. On 21 December 2012, the prosecution filed its response to the Request.³⁰ In its response, the prosecution urges the Chamber to reject the Request on the basis that the issues identified by the defence do not arise from the Impugned Decision but rather from the Regulation 55 Notification for which no leave to appeal was sought.³¹ The prosecution further submits that in the alternative, should the Chamber find that the issues do arise from the Impugned Decision, they would not meet the requirements under Article 82(1)(d).³² In this regard, the prosecution submits that the possible limited re-characterisation of the facts under Article 28(a)(i) would not cause unfairness

²⁶ ICC-01/05-01/08-2483-Red, paragraph 20(ii)(a) – (f).

²⁷ ICC-01/05-01/08-2483-Red, paragraphs 21 to 23.

²⁸ ICC-01/05-01/08-2483-Red, paragraph 24.

²⁹ ICC-01/05-01/08-2483-Red, paragraph 26.

³⁰ 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.

³¹ ICC-01/05-01/08-2484, paragraph 21.

³² ICC-01/05-01/08-2484, paragraph 26.

to the accused for three reasons: (i) the defence's arguments are grounded on the erroneous premise that the Chamber is adding new factual allegations to the charges; (ii) the Chamber, in determining the suspension of the proceedings, "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'"; and (iii) raising the matter to the Appeals Chamber will only delay the proceedings.³³

II. Analysis and Conclusions

11. For the purpose of the present Decision and in accordance with Article 21(1) of the Statute the Chamber has considered Articles 67 and 82(1)(d) of the Statute and Regulation 55 of the Regulations.
12. In deciding on the Request, the Chamber is guided by the established jurisprudence of this Chamber and of the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, for a request for leave to appeal to be granted, the party seeking leave to appeal should identify a specific "issue" which has been dealt with in the relevant decision and which constitutes the appealable subject.³⁴
13. The Appeals Chamber has held that "[o]nly an 'issue' may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]. An issue is constituted by a

³³ ICC-01/05-01/08-2484, paragraph 28.

³⁴ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9; *see also* Decision on the "Defence Request for Leave to Appeal the Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute", 30 October 2012, ICC-01/05-01/08-2399, paragraph 9.

subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”³⁵ In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.³⁶

14. Accordingly, the Chamber has examined the Application according to the following criteria:

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand could significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³⁷

15. The three criteria mentioned above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.³⁸ The cumulative nature of these requirements means that, if at least one of them is not satisfied, it is unnecessary for the Chamber to continue to consider whether the remaining criteria are met.³⁹

³⁵ ICC-01/04-168, paragraph 9; *see also* ICC-01/05-01/08-2399, paragraph 10.

³⁶ Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paragraph 17; Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, paragraph 11; Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)”, 29 August 2011, ICC-01/09-01/11-301, paragraph 34; Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paragraphs 50 and 61.

³⁷ Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169, paragraph 23; *see also* ICC-01/05-01/08-2399, paragraph 11.

³⁸ ICC-01/05-01/08-1169, paragraph 24; *see also* ICC-01/05-01/08-2399, paragraph 12.

³⁹ *Ibid.*

16. It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.⁴⁰ Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.⁴¹

17. As a final preliminary point, the Chamber notes that some of the issues identified by the defence in its Request might more properly be considered to have arisen out of the Chamber's initial Regulation 55 Notification. That notwithstanding, and for the purposes of clarity, the Chamber will address the substance of all issues identified by the defence in its Request.

The first issue and the first sub-issue identified by the defence

18. The first issue identified by the defence is that "[t]he Chamber interpreted and applied Regulation 55 in a manner inconsistent with the text of that provision" in that "the course envisaged by the Chamber goes well beyond a [legal recharacterisation of the facts] by adding a new set of facts and factual allegations to the charges".⁴² The prosecution submits that "[t]he Chamber has repeatedly recognised that regulation 55(1) does not permit it to go beyond the facts and circumstances described in the charges", and notes that "the facts and circumstances on which [the Chamber] will rely will be the same regardless of the form of knowledge it considers under article 28(a)(i), i.e.

⁴⁰ ICC-01/05-01/08-1169, paragraph 25. See also Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 21; Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 11; *see also* ICC-01/05-01/08-2399, paragraph 13.

⁴¹ ICC-01/05-01/08-1169, paragraph 25; *see also* ICC-01/05-01/08-2399, paragraph 13.

⁴² ICC-01/05-01/08-2483-Red, paragraph 20(i).

those listed in paragraphs 478 to 489 of the Confirmation Decision and paragraphs 77 to 90 of the Second Amended DCC".⁴³

19. In the Impugned Decision, as well as in the Decision Requesting Further Information, the Chamber made it abundantly clear that the proposed re-characterisation would not exceed the facts and circumstances set out in the charges or any amendment thereto.⁴⁴ The Chamber has stated that the material facts underlying the potential alternate form of responsibility envisaged in the Regulation 55 Notice do not differ from those underlying the allegation that the accused "knew" of the alleged commission of the relevant crimes.⁴⁵ In this regard, the Chamber identified the precise paragraphs of the Decision Confirming the Charges and the Document Containing the Charges which set out the facts underlying the allegation that the accused knew about the crimes allegedly committed by the forces allegedly under his control.⁴⁶ In line with the proposed re-characterisation, it is these facts which may be considered by the Chamber in relation to its determination as to whether the accused, "owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes". Furthermore, in its submissions on the Regulation 55 Notice the prosecution indicated that its case would not change.⁴⁷ Thus, the defence's contention that "the course envisioned by the Chamber goes well beyond [a legal re-characterisation of the facts] by adding a new set of facts and factual allegations to the charges" is incorrect and, therefore, the question of the Chamber "adding a new set of facts and factual allegations to the charges" does not arise from the Impugned Decision.

⁴³ ICC-01/05-01/08-2484, paragraph 23.

⁴⁴ ICC-01/05-01/08-2419, paragraph 7 and ICC-01/05-01/08-2480, paragraph 11.

⁴⁵ ICC-01/05-01/08-2480, paragraph 11.

⁴⁶ Ibid.

⁴⁷ ICC-01/05-01/08-2334, paragraph 13.

20. The Chamber will now turn to its analysis of Sub-issue 1 as, like the First Issue, it also relates to the underlying facts relevant to the proposed re-characterisation under Regulation 55. Sub-issue 1 relates to the question of whether the application of Regulation 55 by the Chamber is consistent with the accused's right to have prompt and detailed notice of the charges. The defence alleges that "[t]he accused has received no notice of the material facts which would be relevant to the case envisaged by the Chamber pursuant to Regulation 55".⁴⁸ However, as demonstrated above, the Chamber has clearly stated that the underlying facts will remain unchanged regardless of whether the Chamber considers the knowledge of the accused against the standard of "knew" or of "should have known". Accordingly, the defence's allegations that "[t]he Chamber has refused (on two occasions) to provide such particulars" and that "[t]he Defence still has no notice of what the [...] allegations might consist, or what evidence could be relevant" are incorrect and therefore do not arise from the Impugned Decision.⁴⁹

21. Finally, the defence asserts that "[t]he timing of the Impugned Decision (*two years into the case; months into the Defence case; after the end of the Prosecution*) also constitutes a violation of the right of the accused to 'prompt' notice of the charges".⁵⁰ The prosecution, on the other hand, submits that the defence's assertion is a "mere disagreement with the Chamber's decision to notify the parties that it may change the legal characterisation of the facts", which the prosecution submits is not an appealable issue.⁵¹

22. Regulation 55(2) states that, "[i]f, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility" (emphasis

⁴⁸ ICC-01/05-01/08-2483-Red, paragraph 20(ii)(a).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ ICC-01/05-01/08-2484, paragraph 24.

added). However, this freedom is subject to certain conditions designed to limit any potential prejudice to the accused. If a Chamber does decide to give such notice under Regulation 55, pursuant to sub-regulations 55(2) and (3) it must, (i) “[after having heard the evidence] give the participants the opportunity to make oral or written submissions”, (ii) ensure that the accused has “adequate time and facilities for the effective preparation of his or her defence in accordance with Article 67, paragraph (1) (b)”, and (iii) “[i]f necessary, [give the accused] the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence”.

23. The Chamber has considered the above factors in taking its decision to give notice pursuant to Regulation 55(2) and in the related decisions which have followed thereafter including the Impugned Decision. Condition (i) is not required until the Chamber has “heard the evidence” and therefore does not arise at this stage of the proceedings. In relation to conditions (ii) and (iii), the Chamber has sought the views of the defence as to the time it requires and as to the witnesses it deems necessary to call or recall.⁵² Following this, the Chamber suspended the hearings for two and a half months in order to ensure that the accused has adequate time for the preparation of his defence.⁵³ Furthermore, the Chamber has expressly taken into consideration 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”, in applying Regulation 55.⁵⁴ As such, the Chamber considers that it has properly fulfilled its obligations as provided for in Regulation 55. That the defence disagrees with the Chamber’s conclusions

⁵² See ICC-01/05-01/08-2324, paragraph 6; ICC-01/05-01/08-2419, paragraph 8; and ICC-01/05-01/08-2480, paragraph 22 (ii) and (v).

⁵³ ICC-01/05-01/08-2480, paragraph 22 (ii) and (v)..

⁵⁴ ICC-01/05-01/08-2480, paragraph 15.

as to the appropriateness of the timing of the application of Regulation 55 is not an appealable issue.⁵⁵

24. For the above reasons, the Chamber considers that the First Issue and Sub-issue 1 do not amount to “appealable” issues under Article 82(1)(d) of the Statute.

The second issue identified by the defence

25. The Second Issue comprises six Sub-issues generally alleging that the Chamber’s application of Regulation 55 violates a number of rights of the accused. While Sub-issue 1, the “right to prompt notice of the charges”, has already been addressed above, the Chamber considers that the remaining Sub-issues identified by the defence can be divided into two groups which will be addressed in turn. In this regard, the Chamber is of the view that Sub-issues 3, 4 and 6 (alleged violations of the accused’s right to liberty, his right to be presumed innocent and to have the prosecution bear at all times the burden of proof, and his right to be tried by a tribunal which does not lack the appearance of impartiality) are issues of a general nature relating to the legality of Regulation 55 of the Regulations *per se* and entail legal issues that would arise in any case where a Chamber of this Court decided to apply this provision.

26. On the other hand, the Chamber considers that Sub-issues 2 and 5 relate to more specific issues concerning the Chamber’s application of Regulation 55 in the present case, namely, whether, as a result of the Chamber’s decision to suspend the trial proceedings until 4 March 2013, Mr Bemba has adequate

⁵⁵ Judgment of the Appeal of the Defence against the “Decision on the admissibility of the case under article 19(1) of the Statute of 10 March 2009”, 16 September 2009, ICC-02/04-01/05-408, paragraphs 80 and 81. *See also* ICC-01/04-168, paragraph 9.

time and resources to prepare his defence and whether he will be tried without undue delay.

A - General issues on the legality of Regulation 55

27. Under Sub-issues 3, 4 and 6, the defence asserts that the Impugned Decision violates a number of rights of the accused.⁵⁶ The Chamber considers that this set of Sub-issues relates to the general compatibility of Regulation 55 with the rights of the accused, rather than to the specific application of Regulation 55 in the present case.

28. In its Request, the defence expresses its general disagreement concerning the *rationale* behind and the procedure of Regulation 55. In this regard, the Appeals Chamber has already determined that Regulation 55 is not inherently incompatible with the Statute, general principles of international law, or the accused's right to a fair trial.⁵⁷ The Chamber notes in particular, with regard to the defence's general assertions that Regulation 55 violates the rights of the accused to a fair trial – including, *inter alia*, his right to be presumed innocent and to be tried by a tribunal which does not lack the appearance of impartiality – that the Appeals Chamber has, after reviewing international human rights jurisprudence, determined that the application of Regulation 55 during a trial does not *per se* breach the rights of an accused to a fair trial.⁵⁸ Accordingly, the Chamber is of the view that the general assertions made under Sub-issues 3, 4 and 6 have already been resolved or decided upon by the Appeals Chamber and do not constitute specific appealable issues arising from the Impugned Decision.

⁵⁶ ICC-01/05-01/08-2483-Red, paragraphs 20(ii)(c), 20(ii)(d) and 20(ii)(f).

⁵⁷ 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", 8 December 2009, ICC-01/04-01/06-2205, paragraphs 78, 81 and 87.

⁵⁸ ICC-01/04-01/06-2205, paragraphs 82 – 87. For numerous examples of this type of procedure in domestic legal systems *see* Impugned Decision, footnote 30.

29. In addition to a general issue as to the lawfulness of Regulation 55, Sub-issue 6 also includes a specific issue in that the defence asserts that the Chamber failed “to consider and give weight to the rights of Mr Bemba before [applying Regulation 55]”.⁵⁹ However, the Chamber reiterates that it has explicitly “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”.⁶⁰ As such, this more specific allegation contained within Sub-issue 6 is incorrect and this aspect of the Sub-issue does not arise from the Impugned Decision.

30. For the above reasons, the Chamber is of the view that Sub-issues 3, 4 and 6 do not constitute specific appealable issues arising from the Impugned Decision.

B - Specific issues on the application of Regulation 55 (Sub-issues 2 and 5 relating to the rights of the accused)

31. Under Sub-issue 2, the defence submits that “the course taken by the Chamber resulted in the violation of [the accused’s] right to have adequate time and resources to prepare”.⁶¹ Under Sub-issue 5, the defence claims that “the course taken by the Chamber resulted in the violation of [the accused’s] right to be tried without undue delay”.⁶²

32. The defence alleges that the time allotted by the Chamber for defence investigations is “manifestly inadequate” and that “[t]he Chamber has

⁵⁹ ICC-01/05-01/08-2483-Red, paragraph 20(ii)(f).

⁶⁰ ICC-01/05-01/08-2480, paragraph 15.

⁶¹ ICC-01/05-01/08-2483-Red, paragraph 20(ii)(b).

⁶² ICC-01/05-01/08-2483-Red, paragraph 20(ii)(e).

provided no reasoned opinion supporting such a limited timeframe, particularly in light of the defence's request for a 6 to 9 month period for re-investigation".⁶³

33. The Chamber notes that under Regulation 55(2) the Chamber "may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation". In the present circumstances, it should first be recalled that, in deciding to suspend the proceedings, although it is not an obligation under the legal framework, the Chamber granted the defence's request. Second, in the Impugned Decision, the Chamber "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".⁶⁴ Furthermore, in deciding on the time period for the temporary suspension of hearings (two and a half months), the Chamber "[took] into account that [...] the prosecution will not submit any additional evidence in support of the potential change to the legal characterisation of the facts and circumstances relevant to the form of knowledge contained in Article 28(a)(i) of the Statute".⁶⁵ The Chamber also emphasised the limited nature of the proposed potential change and the fact that the underlying facts and circumstances would be identical to those supporting the allegation that the accused had actual knowledge for the purposes of Article 28(a)(i).⁶⁶ These elements are the key factors the Chamber considered in its decision on a suspension of two and a half months, which, compared to the 6 to 9 months initially requested by the defence⁶⁷ for further investigations, strikes a reasonable balance between the abovementioned

⁶³ ICC-01/05-01/08-2483-Red, paragraph 20(ii)(b).

⁶⁴ ICC-01/05-01/08-2480, paragraph 15.

⁶⁵ ICC-01/05-01/08-2480, paragraph 15.

⁶⁶ ICC-01/05-01/08-2480, paragraphs 9 to 12.

⁶⁷ The defence requested additional six (6) to nine (9) months for investigation and preparation, *see* ICC-01/05-01/08-2483-Red, paragraph 20(ii)(b).

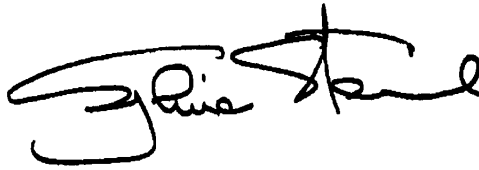
factors. Therefore, the allegation that the Chamber “provided no reasoned opinion” when suspending the proceedings and the argument that the course taken by the Chamber would violate the accused’s right to be tried without undue delay are without merit.

34. With regard to the right of the accused to have adequate facilities to prepare his defence, the defence claims that the Chamber did not take into account, in the Impugned Decision, the fact that the defence team has experienced several difficulties in properly conducting its investigations [REDACTED] Therefore, the defence’s claim that these difficulties have not been taken into consideration when determining the length for the suspension of the hearings is ill-founded.

35. As none of the issues raised in the Request constitute appealable issues under Article 82(l)(d) of the Statute and given that the requirements of Article 82(l)(d) are cumulative, the Chamber need not address the subsequent criteria set out in paragraph 14 above.

36. For the foregoing reasons, the Chamber hereby DENIES the Request and consequently the relevant timeframes as set out in the Impugned Decision remain in effect.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 16 January 2013

At The Hague, The Netherlands