

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 06 February 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  
URGENT**

**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**

**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**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Ms Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Trial Chamber III (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following 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 (“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”).<sup>1</sup> 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”).<sup>2</sup> The possible change envisaged was 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.”<sup>3</sup> The Chamber further requested the parties and participants to make submissions on the procedural impact of the notification.<sup>4</sup>
  
2. On 8 October 2012, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Submission on the Procedural Impacts of Trial Chamber’s

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<sup>1</sup> 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.

<sup>2</sup> ICC-01/05-01/08-2324, paragraphs 4 and 5.

<sup>3</sup> ICC-01/05-01/08-2324, paragraph 5.

<sup>4</sup> ICC-01/05-01/08-2324, paragraph 6.

Notification pursuant to Regulation 55(2) of the Regulations of the Court” (“Prosecution Submission on the Regulation 55 Notification”),<sup>5</sup> in which it submitted that the Chamber’s Regulation 55 Notification has no impact on the prosecution case.<sup>6</sup>

3. 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” (“Defence Submission on the Regulation 55 Notification”),<sup>7</sup> in which it raised a number of substantive objections to a possible change of the legal characterisation of the facts. 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.<sup>8</sup>
  
4. 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”),<sup>9</sup> in which it requested that the defence 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

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<sup>5</sup> 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.

<sup>6</sup> ICC-01/05-01/08-2334, paragraph 13.

<sup>7</sup> 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.

<sup>8</sup> ICC-01/05-01/08-2365-Red, paragraphs 29 and 42.

<sup>9</sup> 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.<sup>10</sup> 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 at the time of issuing its decision under Article 74 of the Statute.<sup>11</sup> Further, 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.<sup>12</sup> No leave to appeal was sought by any of the parties or participants in relation to this Decision.

5. 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” (“Defence Additional Submission”),<sup>13</sup> in which, *inter alia*, it requested the Chamber to 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.<sup>14</sup> In addition, in a confidential *ex parte* Annex A,<sup>15</sup> the defence anticipated the need for further investigations and preparation, identified a number of prosecution witnesses that it would require to recall,<sup>16</sup> and anticipated calling a number of additional witnesses. The defence further 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 information, and to initiate further requests for assistance from various

<sup>10</sup> ICC-01/05-01/08-2419, paragraph 8.

<sup>11</sup> ICC-01/05-01/08-2419, paragraph 6.

<sup>12</sup> ICC-01/05-01/08-2419, paragraph 7.

<sup>13</sup> 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.

<sup>14</sup> ICC-01/05-01/08-2451-Red, paragraph 34.

<sup>15</sup> 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.

<sup>16</sup> ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 3.

governments and/or organisations and/or press bodies, to review and gather relevant material.<sup>17</sup> The defence stressed that the time requested was calculated on the basis of the current proceedings being suspended for the entirety of this phase of investigations.<sup>18</sup>

6. 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”),<sup>19</sup> in which it stressed that the facts and circumstances, as well as the evidence submitted in order to prove them were exactly the same and that there was no new ‘case to answer’, as alleged by the defence.”<sup>20</sup> Taking into account the Defence’s Additional Submission, 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 the defence to provide a list of the witnesses it intended to recall and lists of additional witnesses or other additional evidence.
  
7. 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” (“Leave to Appeal”).<sup>21</sup>

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<sup>17</sup> ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 5.

<sup>18</sup> ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 6.

<sup>19</sup> 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.

<sup>20</sup> ICC-01/05-01/08-2480, paragraph 12.

<sup>21</sup> 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).

8. On 11 January 2013, the Chamber issued its “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’” (“Decision on the Leave to Appeal”),<sup>22</sup> in which it denied the Leave to Appeal.
9. 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” (“Defence Motion to Vacate the Suspension Decision”).<sup>23</sup> The defence submits 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) informs the Chamber that it will not be requesting to re-call any prosecution witnesses or seeking to call any additional evidence; (ii) declines to conduct any effective additional investigation; and (iii) requests that the trial re-commence as soon as possible.<sup>24</sup> In addition, the defence reiterates its wish to call all witnesses currently on its list and announces that it will propose a group of witnesses it wishes to call as a priority in order to ensure an efficient presentation of evidence.<sup>25</sup>
10. On 30 January 2013, on the Chamber’s instruction<sup>26</sup> the prosecution filed its “Prosecution’s Response to Defence Motion to Vacate Trial Chamber’s 13

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> ICC-01/05-01/08-2490-Red, paragraph 24.

<sup>25</sup> ICC-01/05-01/08-2490-Red, paragraph 23.

<sup>26</sup> Decision shortening the time for observations and requesting further information on the defence Motion ICC-01/05-01/08-2490-Red, 29 January 2013, ICC-01/05-01/08-2492.

December 2012 Decision and Notification Pursuant to Regulation 55 of the Regulations of the Court” (“Prosecution Response”).<sup>27</sup> The prosecution requests the Chamber to: (i) accept the defence’s request to end the temporary suspension of the trial; (ii) accept the defence’s 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 crimes charged; (iii) reject the defence’s claim that notice has not been provided pursuant to Regulation 55(2) of the Regulations; and (iv) reject the defence’s attempts to re-litigate the issues surrounding the Regulation 55(2) notice.<sup>28</sup>

11. On 31 January 2013, on the Chamber’s instruction,<sup>29</sup> the defence filed its “Defence Submission in Compliance with Decision ICC-01/05-01/08-2492” (“Defence’s Submissions”).<sup>30</sup> The defence stresses that it is continuing to work closely with the Victims and Witnesses Unit (“VWU”) in order to “provide all the assistance possible to facilitate the ongoing presentation of defence witnesses, and the efficient running of the proceedings.”<sup>31</sup> However, the defence contends that it is the responsibility of the Registry and the VWU, rather than the defence, to arrange the appearance of witnesses before the Court.<sup>32</sup> As such, the defence alleges that the schedule of appearance of the witnesses called by the defence is “out of the hands” of the members of the defence team.<sup>33</sup> Consequently, although reiterating its request for the re-commencement of the trial as soon as possible, the defence informs the Chamber that following consultations with the VWU, no witnesses would be

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<sup>27</sup> 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, 30 January 2013, ICC-01/05-01/08-2493.

<sup>28</sup> ICC-01/05-01/08-2493, paragraph 24.

<sup>29</sup> ICC-01/05-01/08-2492, paragraph 14.

<sup>30</sup> Defence Submission in Compliance with Decision ICC-01/05-01/08-2492, 31 January 2013, ICC-01/05-01/08-2497 and Confidential *ex parte* Annex A, ICC-01/05-01/08-2497-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.

<sup>31</sup> ICC-01/05-01/08-2497, paragraph 3.

<sup>32</sup> ICC-01/05-01/08-2497, paragraph 4.

<sup>33</sup> ICC-01/05-01/08-2497, paragraph 5.



available to testify before the Chamber earlier than 4 March 2013.<sup>34</sup> The defence also indicates that it intends to call as a priority witnesses D04-21, D04-19 – *via* video-link, as requested in confidential *ex parte* Annex A –<sup>35</sup> D04-15, D04-18, D04-39, D04-46 and D04-45.<sup>36</sup>

12. For the purposes of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Statute, Articles 43(6), 61(9), 64(2), 64(3)(a), 64(6)(b), 64(8)(b), 66(2) and (3), 67(1)(c), (e), (g) and (i), 68(2), 69(2), 69(3) and 93(1)(e) of the Statute, Rules 16(2), 17(2), 18, 67 and 140 of the Rules of Procedure and Evidence (“Rules”), Regulations 43, 54, 55 of the Regulations and Regulations 79 to 96 of the Regulations of the Registry.

## II. Analysis

### *The Regulation 55 proceedings*

13. At the outset, the Chamber notes that the Defence Motion to Vacate the Suspension Decision is based on the premise that, on the defence’s understanding, 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”.<sup>37</sup> As a result, according to the defence, the Chamber would have no “lawful authority to prosecute the accused”<sup>38</sup> under 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 his forces were committing or about to commit the crimes charged.

<sup>34</sup> ICC-01/05-01/08-2497, paragraphs 6 and 7.

<sup>35</sup> ICC-01/05-01/08-2497-Conf-Exp-AnxA, page 5.

<sup>36</sup> ICC-01/05-01/08-2497, paragraph 8.

<sup>37</sup> ICC-01/05-01/08-2490-Red, paragraph 9. See also paragraph 10.

<sup>38</sup> *Ibid.*

14. As previously stated by the Chamber, Regulation 55(1) of the Regulations provides that the legal characterisation of the facts may only be changed in the context of the Chamber's final decision on the merits under Article 74 of the Statute. In accordance with Regulation 55, and as clearly set out in the Regulation 55 Notification, the Decision requesting further information, the Suspension Decision and the Decision on the Request for Leave to Appeal, the issuance of the Regulation 55 Notification enables the Chamber to rely upon the envisaged potential change in legal re-characterisation in its decision under Article 74 of the Statute; no further decision is required. Therefore, the defence's interpretation rests on a misconception of the *rationale* behind and the procedural effects of Regulation 55 of the Regulations and of the decisions taken by the Chamber pursuant to it in the present case to date.
15. As previously stated by the Chamber, in accordance with Regulation 55(2) of the Regulations, during the trial proceedings and before rendering the decision under Article 74 of the Statute, the Chamber shall: (i) give notice to the parties and participants if, at any time during the trial, it appears that the legal characterisation of the facts may be subject to change; and (ii) after having heard the evidence, give the participants the opportunity to make oral or written submissions. In addition, the Chamber may suspend the trial proceedings or, if necessary, order a hearing to consider all the matters relevant to the proposed change. According to Regulation 55(3) of the Regulations, the Chamber shall, in particular, ensure that the accused has adequate time and facilities for effective preparation.<sup>39</sup>
16. As also previously stressed by the Chamber,<sup>40</sup> the Appeals Chamber has held that Regulation 55 of the Regulations is not inherently incompatible with the

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<sup>39</sup> Emphasis added.

<sup>40</sup> See ICC-01/05-01/08-2487-Red, paragraph 28.

Statute,<sup>41</sup> general principles of international law<sup>42</sup> or the inherent rights of the accused.<sup>43</sup> On the contrary, Regulation 55 of the Regulations addresses the power of the Trial Chamber to modify the legal characterisation of the facts on its own motion "at any time during the trial". This power is to be distinguished from that of the prosecution pursuant to Article 61(9) of the Statute.<sup>44</sup> In this context, there is no need for a "formal decision to amend the charges", as demanded by the defence,<sup>45</sup> since, as stressed by the Appeals Chamber, "article 67(1)(a) of the Statute does not preclude the possibility that there may be a change in the legal characterisation of the facts in the course of the trial, and without a formal amendment to the charges."<sup>46</sup>

17. Consequently, the defence's allegation that 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"<sup>47</sup> is misconceived; no such decision is required under Regulation 55 and this was perfectly clear from the Chamber's previous decisions on this matter.

*The defence's waiver of the measures granted by the Suspension Decision*

18. In the Suspension Decision, pursuant to Regulation 55(2) and (3) of the Regulations, and taking into account the prosecution's submissions,<sup>48</sup> and the defence's original<sup>49</sup> and additional submissions<sup>50</sup> on the Regulation 55 Notification, the Chamber granted the defence (i) two and a half months for

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<sup>41</sup> 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 66 to 78.

<sup>42</sup> ICC-01/04-01/06-2205, paragraphs 79 to 81.

<sup>43</sup> ICC-01/04-01/06-2205, paragraphs 82 to 87.

<sup>44</sup> ICC-01/04-01/06-2205, paragraph 77.

<sup>45</sup> ICC-01/05-01/08-2490-Red, paragraph 9.

<sup>46</sup> ICC-01/04-01/06-2205, paragraph 84.

<sup>47</sup> ICC-01/05-01/08-2490-Red, paragraph 9. See also paragraph 10.

<sup>48</sup> ICC-01/05-01/08-2334, in particular paragraphs 2, 10, 13 and 18.

<sup>49</sup> ICC-01/05-01/08-2365-Red, in particular paragraph 29.

<sup>50</sup> ICC-01/05-01/08-2451-Red, in particular ICC-01/05-01/08-2451-Conf-Exp-AnxA.

further investigations and effective preparation;<sup>51</sup> (ii) the possibility to recall witnesses;<sup>52</sup> and (iii) the possibility to submit additional items into evidence and to call additional witnesses.<sup>53</sup> By its Defence Motion to Vacate the Suspension Decision, the defence informed the Chamber that it would not conduct further investigations, recall witnesses or submit additional evidence relevant to the potential change in the legal characterisation of the facts and circumstances related to the form of knowledge contained in Article 28(a)(i) of the Statute, as granted by the Suspension Decision.

19. The Chamber recalls, as noted in the course of the Regulation 55 proceedings, that pursuant to Article 66(2) and (3) of the Statute, the onus of proving the guilt of the accused is on the prosecution and in order to convict the accused, the Chamber must be convinced beyond reasonable doubt. In addition, pursuant to Article 67(1)(g) and (i) of the Statute, the accused has the right to remain silent and not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

20. In deciding on the remedial measures to be afforded to the accused, in accordance with Regulation 55(3) of the Regulations, the Chamber took into account the prosecution's statement that Regulation 55 Notification had no impact on the prosecution case, and therefore, that it would not submit any additional evidence.<sup>54</sup> Notwithstanding the above, the Chamber granted the defence's initial request to collect and submit additional evidence – as guaranteed by Article 67(1)(e) of the Statute.

21. However, since the accused is not obliged to present evidence, the defence may voluntarily decide not to do so. The Chamber therefore considers that the

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<sup>51</sup> ICC-01/05-01/08-2480, paragraphs 13 to 15.

<sup>52</sup> ICC-01/05-01/08-2480, paragraphs 16-17.

<sup>53</sup> ICC-01/05-01/08-2480, paragraphs 18 to 20.

<sup>54</sup> ICC-01/05-01/08-2334, paragraph 13.

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, as granted by the Suspension Decision. Consequently, as the *rationale* behind the temporary suspension of the trial proceedings no longer exists, the Chamber hereby lifts the temporary suspension and orders that the trial resume as soon as practicable.

*The continuation of the presentation of evidence by the defence*

22. The Chamber notes that the defence urged it to recommence the trial as soon as possible,<sup>55</sup> and submits that it is “ready to continue with the presentation of its evidence as soon as this can be facilitated by the relevant organs of the Court.”<sup>56</sup> In this respect, the defence argues that the responsibility for arranging the appearance of witnesses before the Court “does not rest with the Defence, but with the VWU and the Registry.”<sup>57</sup> In the view of the Chamber, these submissions reflect a misunderstanding on the part of the defence of the Court’s legal framework and the role and functions of the VWU, the Registry and of the defence itself.

23. As emphasised above, although the accused has the right to remain silent since the onus of proof rests with the prosecution, the accused also has the right to submit evidence relevant to the case (Article 69(3) of the Statute), including the right to “obtain the attendance and examination of witnesses on his or her behalf” (Article 67(1)(e) of the Statute and Rule 140(2)(a) of the Rules). That notwithstanding, no organ of the Court can be held responsible for securing the appearance of the witnesses called to testify by a party, be it

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<sup>55</sup> ICC-01/05-01/08-2490-Red, paragraph 24(iii) and ICC-01/05-01/08-2497, paragraph 6.

<sup>56</sup> ICC-01/05-01/08-2497, paragraph 6.

<sup>57</sup> ICC-01/05-01/08-2497, paragraph 4.

the prosecution or the defence. The party wishing to submit evidence by way of a witness's oral testimony is the sole entity responsible for contacting the witness concerned, obtaining his or her voluntary consent to testify and proposing to the Chamber a feasible schedule for the appearance of witnesses, taking into account all necessary arrangements that may need to be implemented – with the support of the Registry and the VWU – in order to enable the witnesses to appear to testify before the Court.

24. In accordance with the Court's legal framework, the VWU's role is to support the parties, and to arrange, in consultation with them, the logistics for the appearance of witnesses called to testify at trial. The functions and responsibilities of the VWU in relation to witnesses are, *inter alia*, detailed under Article 43(6) of the Statute, Rules 16(2) 17(2) 18(b) and (c) of the Rules and further specified in Regulations 79 to 96 of the Regulations of the Registry. In addition, in the present case, the Unified Protocol on Witness Familiarisation<sup>58</sup> and several decisions of the Chamber<sup>59</sup> specify the VWU's obligations in relation to the facilitation of witnesses' testimony. Nowhere in these provisions are the VWU or the Registry made responsible for ensuring the appearance of witnesses. It should be stressed that the Court has no power to compel witnesses to testify. Only witnesses who have appeared before the Court may be compelled to provide testimony in accordance with Rule 65 of the Rules. In addition, pursuant to Article 93(1)(e) of the Statute, the Court may request cooperation from States only to facilitate the "voluntary" appearance of witnesses.

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<sup>58</sup> See Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 8 December 2010, ICC-01/05-01/08-1081-Anx.

<sup>59</sup> See, *inter alia*, Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, 15 November 2011, ICC-01/05-01/08-1904-Red, paragraphs 24 and 25; Decision on the defence disclosure and related issues, 24 February 2012, ICC-01/05-01/08-2141, paragraphs 23 and 24; Decision on "Submission on Defence Evidence", 7 June 2012, ICC-01/05-01/08-2225, paragraphs 14 to 17; Public Redacted version of "Decision on the Third Defence Submission on the Presentation of its Evidence" of 6 July 2012" 28 September 2012, ICC-01/05-01/08-2242-Red, paragraphs 16 to 20; and ICC-01/05-01/08-2081-Anx, paragraph 15.

25. Accordingly, in the view of the Chamber, the calling party – be it the prosecution or the defence - bears principal responsibility for the presentation of its evidence and should take all reasonable measures to minimise gaps in the proceedings. The Chamber therefore does not support the defence's apparent shifting of its responsibility onto the VWU and the Registry, and orders the defence to continue its utmost efforts, in coordination with the VWU and the Registry, to ensure a smooth presentation of the defence's evidence.

*Scheduling of witnesses and Request for video-link for Witness D04-19*

26. The Chamber notes the defence's proposal to continue the presentation of its evidence with the testimony of the following witnesses: Witness D04-21; Witness D04-19; Witness D04-15; Witness D04-18; Witness D04-39; Witness D04-46; and Witness D04-45.

27. The reasons justifying the order suggested are set out in the confidential *ex parte* Annex A to the Defence's Submissions. In particular, the defence proposes to recommence the presentation of its evidence with the testimony of Witness D04-21, who is able to appear before the Chamber as of 4 March 2013. In addition, the defence requests the testimony of Witness D04-19 to be provided *via* video-link.

28. The Chamber regrets that the defence's request for the testimony of Witness D04-19 to be presented by means of video technology was submitted in an *ex parte* Annex, preventing the prosecution and the legal representatives of victims from responding to the request. That notwithstanding, in order to expedite the proceedings, on an exceptional basis and solely in relation to Witness D04-19, the Chamber will take into account the prosecution and the legal representatives of victims' general acceptance or non-opposition to the

use of video-link technology, as an alternative to the testimony of witnesses called to testify by the defence to be provided live at the seat of the Court.<sup>60</sup>

29. In deciding on the defence's request for the testimony of Witness D04-19 to be provided *via* video-link, the Chamber has considered Article 69(2) of the Statute and Rule 67 of the Rules. As previously underlined, the term "given in person" used in Article 69(2) of the Statute, does not imply that witness testimony must necessarily, under any circumstances, be given by way of live testimony in court. Instead, the Statute and the Rules give the Court broad discretion, subject to the provisions of Rule 67 of the Rules, to permit evidence to be given *viva voce* by means of video or audio technology whenever necessary,<sup>61</sup> provided that the Statute and the Rules are respected and that such measures are not prejudicial to, or inconsistent with, the rights of the accused.

30. In relation to the testimony of Witness D04-19, the Chamber notes that the request for video-link was made by the defence itself and is therefore satisfied that the presentation of Witness D04-19's testimony will not be prejudicial to, or inconsistent with, the rights of the accused. One of the relevant criteria in determining whether or not a witness should be allowed to give *viva voce* testimony by means of video or audio technology relates to the witness's personal and exceptional circumstances. In the present case, the Chamber considers that the reasons that prevent Witness D04-19 from travelling to The Hague to give live testimony are well-founded.<sup>62</sup> Therefore, the Chamber

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<sup>60</sup> Transcript of hearing of 2 October 2011, ICC-01/05-01/08-T-252-ENG-ET, page 11, lines 24 to 25, page 15, line 22 to page 16, line 16; Prosecution's Observations on the "Registry report to the Chamber on the feasibility of the modalities of specific arrangements in relation to witness testimony", 7 December 2012, ICC-01/05-01/08-2474, paragraph 2; Decision shortening time for observations on the "Registry report to the Chamber on the feasibility of the modalities of specific arrangements in relation to witness testimony", 30 November 2012, ICC-01/05-01/08-2448, paragraph 5 and Observations sur le rapport du Greffe relatif au projet de transfert du procès le Procureur contre Jean-Pierre Bemba à Arusha, 10 December 2012, ICC-01/05-01/08-2475-Conf.

<sup>61</sup> The same view was adopted by Trial Chamber I in the case of The Prosecutor v. Thomas Lubanga Dyilo ("*Lubanga* case"), Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 41.

<sup>62</sup> ICC-01/05-01/08-2497-Conf-Exp-AnxA, page 5, paragraph 2.



grants the defence's request and authorises Witness D04-19 to give testimony before the Chamber by means of video technology.

31. Furthermore, the Chamber notes the defence's additional request at paragraph 3 of its confidential *ex parte* Annex A to the Defence's Submission relating to the possible presence of two members of the defence team at the location of the video-link and the feasibility of privileged communication between counsel at the place of the video-link and the accused in the court room in The Hague.<sup>63</sup> As this request relates to the logistical arrangements of the video-link testimony and the defence mode of questioning of Witness D04-19, the Chamber deems it necessary to first receive the observations of the prosecution, the legal representatives of victims and the Registry in order for the Chamber to take an informed decision on the said request.

32. In the absence of any obstacles to the appearance of Witness D04-19 *via* video-link, the Chamber is of the view that his testimony should commence as soon as practicable and, if possible, before the testimony of Witness D04-21. The defence and the VWU should jointly report to the Chamber on the proposed starting date for the presentation of the testimony of Witness D04-19 *via* video-link.

33. The order of appearance of the following witnesses will be decided upon in due course.

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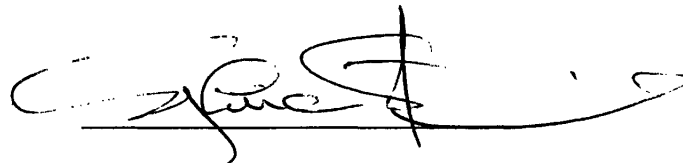
<sup>63</sup> ICC-01/05-01/08-2497-Conf-Exp-AnxA, page 5, paragraph 3. The Chamber notes that the present decision refers to matters addressed in the context of that confidential *ex parte* Annex. While some of the matters referred therein should remain *ex parte* at this stage, the Chamber is of the 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.

### III. Conclusions


34. In view of the foregoing, the Chamber hereby:

- (i) GRANTS the Defence Motion to Vacate the Suspension Decision and DECIDES to lift the temporary suspension of the trial proceedings ordered by the Suspension Decision;
- (ii) ORDERS the defence to continue with the presentation of its evidence as soon as practicable;
- (iii) GRANTS the defence's request for the testimony of Witness D04-19 to be given *viva voce* before the Chamber by means of video technology;
- (iv) ORDERS the Registry to make the necessary arrangements for the conduct of the video-link testimony referred to in paragraph 34 (iii) above;
- (v) ORDERS the defence and the Registry to inform the Chamber, no later than 16.00 on Friday 8 February 2013, on the earliest possible date for the start of the testimony of Witness D04-19 *via* video-link;
- (vi) INSTRUCES the prosecution, the legal representatives of victims and the Registry to submit, if any, their observations on the defence's request as set out in paragraph 31 no later than 16.00 on Friday 8 February 2013.

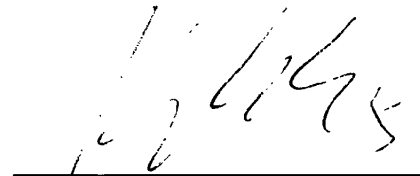
Done in both English and French, the English version being authoritative.



**Judge Sylvia Steiner**



**Judge Joyce Aluoch**



**Judge Kuniko Ozaki**

Dated this 06 February 2013

At The Hague, The Netherlands