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Pénale
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**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

**Defence Submissions on the Trial Chamber's Notification under Regulation 55(2)
of the Regulations of the Court**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. BACKGROUND

1. On 9 May 2008, the Prosecution brought charges against Mr Jean-Pierre Bemba Gombo.¹ On 15 June 2009, the charges were confirmed in part.² The Pre-Trial Chamber refused to confirm an allegation that Mr Bemba “should have known” that MLC troops were committing or about to commit the crimes for which he was charged.

2. On 4 November 2009, the Prosecution submitted a revised Document Containing the Charges (“DCC”), pursuant to an order from the Pre-Trial Chamber.³ The Prosecution submitted that the Accused either knew or “owing to the circumstances at the time, should have known” that the MLC troops were committing or about to commit crimes.⁴

3. On 12 February 2010, the Defence submitted that the revised DCC did not reflect accurately the charges confirmed by the Pre-Trial Chamber. In particular, the Defence challenged the Prosecution’s attempt to broaden the scope of the alleged responsibility of the Accused by inserting the “should have known” standard under the *mens rea* element for Article 28(a)(i).⁵

4. On 20 July 2010, the Trial Chamber held that the allegation that the Accused “should have known” of the alleged crimes exceeded the scope of the confirmed charges and should be deleted.⁶

5. On 18 August 2010, the Prosecution submitted its Revised Second Amended DCC in which it deleted the allegation that the Accused “should have known” about the alleged crimes, in accordance with the Chamber’s decision.⁷ Significantly, the Prosecution did not appeal the Pre-Trial Chamber’s finding on that point.

6. The trial commenced on 22 November 2010. The Prosecution case lasted 16 months and closed on 20 March 2012. Neither in its brief, its filings, nor in the presentation of its

¹ ICC-01/05-13-Exp, Application for Warrant of Arrest against Jean-Pierre Bemba Gombo under Article 58 with annexes, 9 May 2008. The first Document Containing the Charges against Mr. Bemba (ICC-01/05-01/08-136-AnxA) was submitted on 1 October 2008.

² ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (“Confirmation Decision”)

³ ICC-01/05-01/08-T-14-ENG ET, page 13 lines 6 to 11.

⁴ ICC-01/05-01/08-593, and in particular ICC-01/05-01/08-593-Anx-Red, paras. 60, 78, 80, 99, 102.

⁵ ICC-01/05-01/08-694, para. 89.

⁶ ICC-01/05-01/08-836, para. 121.

⁷ ICC-01/05-01/08-856-Conf-AnxA

evidence, did the prosecution seek to assert that Mr. Bemba “should have known” of any fact relevant to the charges as opposed to his possession of actual knowledge of such matters. Insofar as any submission or line of questioning to that effect may have occurred, it was so subliminal as to have been incapable of amounting to notice that such liability was being asserted.

7. On 13 July 2012, the Defence filed its Pre-Defence Brief.⁸ In that document, the Defence expressly paused to note that the charges the accused faced depended upon proof of his actual rather than his constructive knowledge of the crimes charged and other relevant material facts.⁹

8. The Defence case opened on 14 August 2012. Between 14 August and 21 September, the evidence of four Defence witnesses was heard by the Chamber, with the fifth commencing his testimony.

9. On 21 September 2012, nearly two years after the start of the proceedings, Trial Chamber III (“the Chamber”) gave notice pursuant to Regulation 55(2) of the Regulations of its desire to consider modification of the legal characterisation of the facts so as to permit it to consider 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 MLC troops were committing or were about to commit the crimes included in the charges.¹⁰

10. The Defence objects to the proposed re-characterisation, which would result in manifest unfairness and actual prejudice to the accused, for the reasons set out below.

B. SUBMISSIONS

(a) Preliminary considerations: the Prosecution is foreclosed from prosecuting this alternative theory

11. The trial in this case commenced on 22 November 2010. A charge that Mr. Bemba “should have known” was explicitly rejected and the trial proceeded on that basis. The Prosecution did not seek leave to appeal the Pre-Trial Chamber’s decision. As such, it

⁸ ICC-01/05-01/08-2243-Conf.

⁹ See *ibid.*, para. 18(e) and accompanying footnote 13.

¹⁰ ICC-01/05-01/08-2324 (“21 September Decision”).

effectively renounced the possibility of prosecuting Mr. Bemba on the basis of the alternative “should have known” theory.¹¹ Having failed to do so, and having complied with the Pre-Trial Chamber’s decision,¹² the Prosecution has renounced its ability to prosecute Mr. Bemba under that theory of liability and is now foreclosed from arguing that it should be permitted to do so.¹³

(b) The proposed re-characterisation would amount to a violation of Mr. Bemba’s right to prompt and detailed notice of the charges against him

(i) Statutory right to prompt and detailed notice of charges

12. Article 67(1)(a) of the Statute guarantees the right of the accused to be informed promptly and in detail of the nature, cause and content of the charges against him. At the ICC, this notice is provided by the Confirmation Decision.¹⁴

13. The rationale behind this guarantee is to provide defendants in criminal cases with a clear and timely understanding of the charges to enable preparation in full equality.¹⁵ This, in turn, is a condition of defendants’ ability to take an effective part and make a meaningful

¹¹ A party may not complain of a prejudice or claim an advantage where it failed to make use of available remedial means when the relevant event occurred. If the party fails to make use of those, it is foreclosed from later complaining about it. See, for example, *Prosecutor v. Milan Simić et al.*, IT-95-9/2, Decision on Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, 28 February 2000.

¹² See Revised Second Amended DCC.

¹³ *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Strike Allegation of Conspiracy with Juvenal Kejelijeli on the Basis of Collateral Estoppel, Rules 73 of the Rules of Procedure and Evidence, 16 July 2008, paras. 2 and 4; *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of His Right to Trial Without Undue Delay, 29 May 2007, para. 6: “As the jurisprudence of this Tribunal demonstrates, the Trial Chambers have often considered and applied arguments concerning the doctrine of res judicata (or issue estoppel) in relation to interlocutory matters in cases which have not yet reached the stage of final judgement; *Prosecutor v. Prlić et al.*, Decision on Stoic Defence Motion for Reconsideration or, in the alternative, for certification to Appeal the Order to Admit Evidence Regarding Witness 4D-AB, Dissenting Opinion of Judge Jean-Claude Antonietti, 3 February 2010, p. 4: “The sole option available to the Prosecution or the Defence who do not agree with a decision of the Chamber, is a request for certification to appeal.”

¹⁴ See Confirmation Decision, paras. 27-31 and the authorities cited therein. See also STL, *Decision Relating to the Examination of the Indictment of the 10 June 2011 issued against Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi & Mr. Assad Hassan Sabra*, 28 June 2011, para. 27 (“The procedure for confirmation of an indictment is also intended to best protect the fundamental rights of any accused [...] to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her [...] This right rests on the notion that a person, at the time of being charged, must be in full possession of the necessary facts to allow him to understand the charges laid against him in order to prepare his defence, and, if need be, challenge the legality of his detention”).

¹⁵ See e.g. *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 122: “It goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely, to inform him of the case he has to meet.”). See also Simic AJ, para. 74 describing the guarantee as “substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case against him”; Brdjanin, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 12. See also, before the ECtHR, *Sipavicius v Lithuania*, Judgment of 21 February 2002, para. 28.

contribution to the proceedings, in particular, the defendant's (i) ability to understand the case;¹⁶ (ii) ability to make efficient use of limited resources;¹⁷ (iii) ability to give informed instructions to counsel; (iv) ability to meet the Prosecution case and ability to make focused submissions;¹⁸ (v) ability to make an informed decision about the calling of witnesses; and the (vi) expeditiousness of proceedings and right to a trial without undue delay.

14. The guarantee to detailed notice is thus inextricably linked with the protection of other fundamental rights of the accused and a condition of the effective exercise of these rights.¹⁹ An accused cannot be expected to prepare to defend against allegations with which he is not charged. Being forced to continuously adapt to a changing theory of liability would render these rights illusory, and would undermine the safeguards put in place by the statutory right of the accused to receive prompt and detailed notice of the charges.²⁰

(ii) *The proposed re-characterisation is incompatible with Article 67(1)(a)*

15. The proposed re-characterisation of the charges cannot reasonably represent "prompt" notice to the accused of the charges against him.²¹ The right to "prompt" notice of charges has been generally interpreted as being immediate (upon being charged or upon arrest).²² "Notice" encompasses informing the accused of the legal qualification of the impugned conduct, as well as the material facts underpinning the charges.

¹⁶ E.g. *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, AC, paras. 88 *et seq.* See also *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 22 and para. 122; *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement, 9 July 2004, para. 194; *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 303; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003, para. 139; *Prosecutor v. Halilović*, IT-01-48-T, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 13.

¹⁷ See, for example, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003, para. 139.

¹⁸ See, generally, *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 12.

¹⁹ See, for example, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003, para. 139.

²⁰ See *Prosecutor v. Ante Gotovina*, IT-06-90-A, Ante Gotovina's Supplemental Brief Pursuant to the Oral Order of the Appeals Chamber of 14 May 2012, 17 May 2012, para. 13.

²¹ ICC-01/06-01/04-925, Dissenting Opinion of Judge Pikis, para. 19: "The Prosecutor, the accuser, is required to forewarn and inform the person about the case he/she has to face at the confirmation hearing or at the trial."

²² Article 14(3) ICCPR, Article 6(3) ECHR, and Article 8(2)(b) ACHR, all of which require that the accused to be given prompt notice of the charges. The Human Rights Committee has stated that the right to be informed of the charge "promptly" requires that information is given "as soon as the charge is first made by a competent authority", and provided that "the information indicates both the law and the alleged facts on which it is based". The aim of this requirement is to guarantee that the Accused is not hampered in his/her defence due to missing, misleading or otherwise insufficient information. One fundamental aspect of this right, according to a distinguished scholar on this subject, is that the Defence has the right to receive the information "immediately or at least early enough in the course of the proceedings"; See S. Trechsel, *Human Rights in Criminal Proceedings* p.195.

16. Even at this late stage of the process, Mr. Bemba has received no notice of the “material facts” that would support an allegation that he “should have known” that crimes were being committed or were about to be committed by those allegedly under his command. Nor is it the role of a trial chamber to identify and plead such facts *in lieu* of the Prosecution, and without the relevant confirmation process by the Pre-Trial Chamber.

17. Further, the Prosecution’s claim that the proposed re-characterisation is of no real significance is unsubstantiated and misleading.²³ Firstly, the mental elements of the alleged crimes are entirely different and require quite separate and distinct means of proof. Constructive knowledge is not a lesser included form of liability to actual knowledge. Actual knowledge requires proof of knowledge of the crimes alleged, whereas constructive knowledge can be based on a mere objective assessment of the available information about such matters. This *mens rea* standard has been expressly rejected at the ICTY and ICTR,²⁴ and has been consistently criticized in legal literature.²⁵ Under the “should have known” standard, the core of the responsibility moves from a failure to take steps to prevent or punish crimes to a failure to keep oneself informed. Thus, this standard could result in a superior being convicted of a crime of which he had no knowledge. Contrary to the Prosecution’s claim, the proposed re-characterisation is therefore of monumental significance.

18. Secondly, and as a consequence of the above, this novel theory of liability is based on entirely different material elements. Whilst facts that would be relevant to show that the accused “knew” crimes had been or were being committed could also be relevant to demonstrate that he “should have known” the same,²⁶ they remain distinct (as the refusal of the Pre-Trial Chamber to confirm charges makes clear). Facts that would be material to such a

²³ ICC-01/05-01/08-2334, para. 3.

²⁴ See e.g. *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 226: “Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.”; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, paras. 62 and 106; *Prosecutor v. Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007, para. 69; *Prosecutor v. Hadžihasanović*, IT-01-47-A, Decision on Jurisdiction, para. 128.

²⁵ See e.g., Mettraux, *Command Responsibility*, pp. 30-31, 194-196 and, in particular, 210-213, Ambos, *Superior Responsibility*, 853-863; M. Damaska, “The Shadow Side of Command Responsibility”, 49(3) *American Journal of Comparative Law*, 455 (‘Damaska, *Shadow Side*’), at 471-472 (2001). It has been pointed out in the literature that the loosening of legal standards might have the effect of weakening the stigmatizing effect of a criminal conviction (see Ambos, *Superior Responsibility*, 871). The broadening of the scope of criminal liability would also have the effect of exaggerating the ability of international justice, understood in its broadest sense, to process even a small fraction of the cases that would come within its scope (see Darcy, *Collective Responsibility*, 356-357).

²⁶ See Confirmation Decision, para. 434.

case and which the Pre-Trial Chamber would have to give notice of in a timely fashion, include (but are not limited to) the following:

- a. How and by what means, considering the circumstances at the time, was Mr. Bemba supposed to have obtained the information relevant to the "should have known" standard?
 - i. In particular, how and by what means is it alleged that he "should have known" about the identity of the perpetrators or of victims (if that is in fact alleged)?
 - ii. How and by what means is it alleged that he "should have known" about the location and time of offences?
- b. What is it that Mr. Bemba "should have known"?
- c. What information, is it claimed, that Mr. Bemba had in his possession that meant that he "should have known" about the alleged crimes?
- d. Concerning those crimes which he is alleged to have failed to prevent, when and by what means did Mr. Bemba obtain information based on which he "should have known" that each and every one of the crimes with which he is charged "were about to be committed"?
- e. When is Mr. Bemba supposed to have received the relevant information or obtained access to a source of information relevant to the "should have known" standard?
- f. What are the material facts relevant to an allegation that Mr. Bemba culpably failed to keep himself informed? In particular, what means of information was at his disposal at the time that he culpably failed to exploit as would have provided him the requisite information?

19. Clear and prompt notice of these material facts would have to have been provided in relation to each alleged crime to ensure that the Defence could properly and effectively prepare and test them at trial. Absent such notice, the Defence had no reason (and no means) to do so.

20. When evaluating the notice to which Mr. Bemba is entitled, the following should also be noted: the notice to be given to an accused pertains to the "nature and cause" of the

charges, namely, both the legal and factual allegations that underpin the charges.²⁷ In this case, the Chamber is considering amending the charges to introduce a new doctrine of liability which is largely untested. The scope of this doctrine, its constituent elements, and what would constitute “material facts” relevant to giving notice of charges based on that theory is therefore for the most part unknown or uncertain. Tellingly, the Prosecution did not attempt to identify these facts in its submission.²⁸ During the negotiation of Article 86 API, it was noted that “the words ‘or should have known’ introduced a lack of clarity with regard to the conduct of superior”.²⁹ Therefore Mr. Bemba’s right to be promptly informed of the case against him under Article 67(1)(a) would be adversely affected by both (a) the lateness of that notice; and (b) by the inability of the Chamber to provide any degree of clarity on the material facts (to which Mr. Bemba is entitled)³⁰ it considers relevant to such an allegation.³¹

(iii) *Regulation 55 does not permit the Trial Chamber to introduce a new mode of legal liability during trial*

21. In the instant case, the proposed re-characterisation would result, not in a modification of the legal characterisation of facts, but rather in the modification of the factual allegations themselves. Such a modification is impermissible. As was made clear by Judge Fulford:³²

To recapitulate, the Statute, in explicit terms, left control over framing and effecting any changes to the charges (under Article 61(9) of the Statute) exclusively to the Pre-Trial Chamber. The scheme was clearly designed to ensure that once the trial has begun the charges are not subject to any further amendment, addition or substitution. No opportunity is created for the Trial Chamber to send the case back to the Pre-Trial Chamber for a further hearing to amend or alter the charges, because “[a]fter the commencement of the trial” the only available step is, following an application and with leave,

²⁷ See e.g., *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 121; *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, paras. 326 and 336; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 33. See also Human Rights Committee, *General Comment 13* [1984], para. 8; *Sipavicius v Lithuania*, Judgment of 21 February 2002, para. 27; *Pelissier v France*, Judgment of 25 March 1999, para. 52; *Yvonne Neptune v. Republic of Haiti*, para. 109 (IACHR).

²⁸ ICC-01/05-01/08-2334.

²⁹ Summary Record of the Fiftieth Meeting, CDDH/I/SR.50, 4 May 1976, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volume IX, p 118.

³⁰ See e.g. *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 88; *The Prosecutor v. Bagosora et al.*, Case No. IT-98-41-T, Judgement and Sentence, 18 December 2008, para. 110; *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 147; *Prosecutor v. Krnojelac*, IT-97-25-T, Decision of 24 February 1999, paras. 7 and 12; *Prosecutor v. Krnojelac*, IT-97-25-T, Decision of 11 February 2000, paras. 17 and 18; and *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 20 February 2001, para. 18

³¹ Any notice of charges brought under that theory of liability would have to provide, at the very least, detailed notice of the facts listed above in paragraph 18 of the present filing.

³² ICC-01/04-01/06-2054.

to withdraw the charges. Critically, the statutory scheme has provided an accused with a high degree of certainty as to charges that he or she will face once the trial has commenced. Inevitably, it follows that a modification to the legal characterisation of the facts under Regulation 55 must not constitute an amendment to the charges, an additional charge, a substitute charge or a withdrawal of a charge, because these are each governed by Article 61(9).

22. Regulation 55(1) requires that a trial chamber act “without exceeding the facts and circumstances described in the charges and any amendments to the charges”. Both international and domestic jurisprudence establish this as a well-entrenched limitation.³³ In the case at hand, the Chamber would effectively go beyond the facts and circumstances described in the charges, thus acting *ultra vires* its power under Regulation 55.

23. Any interpretation by the Chamber of Regulation 55 should be guided by the spirit of the ICC Statute and the Rules,³⁴ as well as the highest standards of international justice, including the fundamental rights of the accused. Thus, Regulation 55 must be read in light of, and restricted by, *inter alia*, Article 74(2) which requires that: “the final decision of the Trial Chamber must be based on an evaluation of the evidence and must not exceed the facts and circumstances in the charges” and that “the Court may base its decision *only on evidence submitted and discussed before it at the trial*.”

24. The Appeals Chamber in *Lubanga* held that “facts” refers to:³⁵

...the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the

³³ ICC-01/04-01/06-2205, para. 1. See also Extraordinary Chambers in the Courts of Cambodia (ECCC), *Prosecutor v Kaing Guek Eav*, No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010, E188, para. 494. See also France, Cour de Cassation, Cass. Crim., 22 April 1986, Bulletin Criminel, No. 136 (“[I]l appartient aux juridictions correctionnelles de modifier la qualification des faits et de substituer une qualification nouvelle à celle sous laquelle ils leur étaient déférés [...] à la condition qu’il ne soit rien changé ni ajouté aux faits de la prévention et que ceux-ci restent tels qu’ils ont été retenus dans l’acte de saisine.”); Criminal Code 1985 (Can), s601(4)(d): “The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider (a) the matters disclosed by the evidence taken on the preliminary inquiry; (b) the evidence taken on the trial, if any; (c) the circumstances of the case; (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done”; Crimes Act 1961 (NZ), s335(2); Washington Court Rules, Rule 2.1(d); United States of America, *State v. Vangerpen*, 125 Wn.2d 782[1995] at [11] (“...information may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense”).

³⁴ See Regulation 1(1) of the Regulations of the Court.

³⁵ *Ibid.*, para. 90, footnote 163.

confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (I) (a) of the Statute.

25. The Appeals Chamber also held that any interpretation of Regulation 55 that cannot be reconciled with Article 74(2) of the Statute, must be rejected as incorrect.³⁶ It is equally noteworthy that the Appeals Chamber held that additional facts coming to light during the trial *does not cure* the breach of Article 74(2) of the Statute.³⁷

26. As is clear from the Pre-Trial Chamber's confirmation decision, the factual (or material) elements relevant to establishing one category of *mens rea* ("knew") is not identical, sufficient or comparable to fulfill the factual elements relevant to proving the other ("should have known").³⁸ Instead, the proposed addition of "should have known" allegations constitutes an amendment of the charges as it adds a novel basis for a finding of liability.³⁹ This is, therefore subject to Articles 61(9) and to the limitations of Article 74(2). It is not, merely, a modification of the legal characterisation of facts: instead, it adds an alternative basis of liability to the existing one so that it is *ultra vires* of Regulation 55.

(c) The proposed re-characterisation would violate the principle of equality of arms and Mr. Bemba's right to adequate time and facilities to present his defence

27. Without prejudice to the arguments advanced above, the Defence submits that the proposed re-characterisation of the facts at this stage of the proceedings would in any event create incurable prejudice and unfairness to Mr. Bemba. The accused is entitled under the Statute to have "adequate time and facilities for the preparation of [his] defence" and to present his case in full equality with the Prosecution.⁴⁰ A Chamber is therefore would only be able to modify the legal characterisation of the facts if the accused's right to have adequate time and facilities is ensured.⁴¹ In the circumstances at hand, this is impossible.

³⁶ *Ibid.*, para. 90.

³⁷ *Ibid.*, para. 91.

³⁸ As pointed out in footnotes 27 and 28, the difference between the two standards of *mens rea* has been duly noted in jurisprudence. and in the literature. On the need for "delineated" charges, see Hans-Peter Kaul, "Developments at the International Criminal Court, Construction Site for More Justice: The International Criminal Court after Two Years", 99 *American Journal of International Law*, 370 (2005), pp. 376-7, cited in ICC-01/09-01/11-444, Public Joint Defence Response to Submissions of Victims' Representative on Regulation 55 and Article 25(3).

³⁹ *Prosecutor v Halilović*, IT-01-48-T, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 14 December 2004.

⁴⁰ Article 67(1)(b).

⁴¹ See also Regulation 55(2) and 55(3)(a)).

28. The Defence has investigated, formulated a strategy, and prepared and presented evidence in response to the allegation that Mr. Bemba “knew” of the crimes with which he was charged. No such effort was made in relation to the allegation – rejected by the Pre-Trial Chamber - that he “should have known” of these crimes.

29. Given that the Defence case is already well underway, the Defence has neither the time nor the resources to investigate and prepare to refute an alternative theory of liability. The proposed re-characterisation of the facts would require not only the recall of those Prosecution witnesses who are able to give evidence (or even perhaps in the view of the Chamber have already done so) to this new form of liability (and thus cause impermissible undue delay) but would also, at an absolute minimum, require:

- (i) detailed notice of the material facts that would make up such a case with a view for the Defence to understand the case fully and enabling the Defence to prepare to meet it (see above);
- (ii) further Defence investigations into the question as to what information Mr. Bemba had received at the time which could be said to have put him on sufficient notice of the allegations, what means were available to him to know more that he culpably failed to use, what culpable failure to inform himself could be imputed to him, etc.
- (iii) additional time to identify and interview potential witnesses in relation to such allegations,
- (iv) further requests for assistance from various government and/or organizations to receive relevant material; and, as the case may be; and
- (v) additional disclosure requests from the Prosecutor.

30. Such investigations and preparations are now impossible. The “Counsel Support Section” of the ICC Registry (“CSS”) has been adamant that no more funds will be made available to Mr. Bemba for investigations. It is also worth nothing that Mr Bemba is personally financially liable for the investigation and preparation of a case (“knew”) that would now be set aside. This utter waste of resources, and the expectation that Mr. Bemba should now also be personally financially liable for an alternative investigation based on a new theory of liability is entirely unreasonable.

31. Moreover, circumstances specific to that case render the very possibility of effective preparation for a new case at this point entirely illusory. It is significant in that regard that the accused is entitled to rights that are concrete and effective, not theoretical.⁴² The Chamber, the Registry and the Prosecution have now been made aware of [REDACTED]. Incredibly, requests for inquiries and information addressed to the Registrar, Deputy Registrar, and CSS have gone unanswered for months. In such circumstances, the expectation that the Defence could be required to conduct additional investigations is simply unreasonable, either from a financial perspective, or from the perspective of [REDACTED]. Given these circumstances, the proposed re-characterisation is wholly inconsistent with the right of Mr. Bemba to have adequate time and facilities for the preparation of his defence in accordance with Article 67(1)(b).

32. Also significant is the eight-month period which the Chamber has set for the completion of the Defence case.⁴³ It is neither reasonable nor foreseeable to expect the Defence to both rebut existing charges and prepare a *supplementary* defence to an alternative theory of liability. By comparison, the Prosecution took effectively more than three years (from February 2005 until May 2008) to investigate and seven years (from February 2005 until 20 March 2012) to present its case.

(d) The proposed re-characterisation would violate Mr. Bemba's right to confront the Prosecution case

33. An accused person has a right to confront the case against him.⁴⁴ Considering that, absent charges to that effect, the Defence neither investigated nor presented a case relevant to this new theory of liability, it was denied an opportunity to confront that case in relation to the ("should have known") allegation.

34. Evidently, the authority of a trial chamber to amend the charges cannot be the result of a realization of the insufficiency of evidence advanced during the Prosecution case, lest it

⁴² See e.g. *Airey v. Ireland*, 32 Eur Ct HR Ser A (1979), at para. 24; *McVicar v. the United Kingdom*, no. 46311/99, ECHR 2002-III, para. 47.

⁴³ ICC-01/05-01/08-2225, para. 11.

⁴⁴ See, e.g., *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, paras. 23-24; *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, paras. 127 et seq.; Human Rights Committee, *General Comment 13* [1984], para. 121; *Barberà, Messegué and Jabardo*, para. 78; *Brandstetter*, para. 66-67; *Ruiz-Mateos*, para. 63; *Colozza*, para. 27.

would breach the accused's presumption of innocence and right to an impartial tribunal.⁴⁵ It is for Prosecution to ultimately determine and litigate its case.⁴⁶ As the Appeals Chamber has unambiguously stated, "to give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute".⁴⁷ The Prosecution has sole responsibility for prosecutions.⁴⁸ If a trial chamber comes to the view that the Prosecution has failed to prove an element of the charges confirmed by the Pre-Trial Chamber, the only permissible course for the Chamber is to acquit the accused of that charge, rather than to assume the role of the Prosecution and attempt to build an alternative basis for conviction.

35. This is because an accused appearing before the ICC is entitled, as a matter of both statutory and international law, to a tribunal that is impartial – objectively and subjectively.⁴⁹ This guarantees means, *inter alia*, that the responsibility to prove the charges and the responsibility to determine whether they are met must necessarily belong to two different judicial bodies. As often reiterated, it is of fundamental importance to the fairness of proceedings that justice should not only be done, but should manifestly and undoubtedly seem to be done.⁵⁰

What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.⁵¹

36. Where a trial chamber takes over the responsibility of prosecuting the case or where an appearance thereof is created, the guarantee of an impartial tribunal is violated.⁵² In

⁴⁵ See e.g. Articles 41(2)(a) and 68(5) of the Statute. See also, *inter alia*, *General Comment No. 13*, 13 April 1984; *González del Río v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 20; *Montgomery and Coutler v HM Advocate and Another* [2003] 1 AC 641, PC at 673, per Lord Hope; *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, paras. 172 et seq.; *Prosecutor v. Prlić et al*, Decision of the President on Jadranko Prlić's Motion to Disqualify Judge Arpad Prandler, 4 October 2010, paras. 6-7; STL, *Decision on Mr El Sayed's Motion for the Disqualification of Judge Chamseddine from the Appeals Chamber Pursuant to Rule 25*, 5 November 2010, paras. 19-20.

⁴⁶ See Articles 51(1) and 61(1) and (3) of the Statute.

⁴⁷ ICC-01/04-01/06-2205, para. 94.

⁴⁸ *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999: "the decision on whether or not to proceed in any given matter rests with the Prosecutor, and that she has the right, at any stage of the proceedings, to apply for leave to withdraw an indictment"

⁴⁹ See e.g. Articles 41(2)(a) and 68(5) of the Statute. See also, *inter alia*, *General Comment No. 13*, 13 April 1984; *González del Río v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 20; *Montgomery and Coutler v HM Advocate and Another* [2003] 1 AC 641, PC at 673, per Lord Hope; *Furundžija Appeal Judgement*, paras 172 et seq; *Prosecutor v. Prlić et al*, Decision of the President on Jadranko Prlić's Motion to Disqualify Judge Arpad Prandler, 4 October 2010, paras 6-7; STL, *Decision on Mr El Sayed's Motion for the Disqualification of Judge Chamseddine from the Appeals Chamber Pursuant to Rule 25*, 5 November 2010, paras. 19-20.

⁵⁰ *King v Sussex Justices, Ex Parte McCarthy* [1924] KB 256, 259.

⁵¹ *Piersack v Belgium* (1983) 5 EHRR 169, para. 30(a).

Kyprianou, the ECtHR granted the application complaining of violation of Article 6(1) of the Convention when the applicant had been adjudged in contempt (in the face of the court) by the same judges who had also commenced the charges. The Court said the following:⁵³

[Judges] had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench (see *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, pp. 18-19, §§ 41-42).

37. As a result, the Court found that –

the impartiality of the Assize Court was capable of appearing open to doubt. The applicant's fears in this respect can thus be considered to have been objectively justified and the Assize Court accordingly failed to meet the required Convention standard under the objective test.

38. In *Hauschildt*, the ECtHR took the view that Article 6(1) had been breached where the judge who was to decide on the responsibility of the accused had, in prior decisions, made findings to the effect that there was effectively a *prima facie* case of guilt.⁵⁴ The European Commission took a similar view in *Ben Yaacoub*, where it held that a preliminary finding that there was enough evidence to warrant continued detention was enough to create an appearance of lack of impartiality of the adjudicative body.⁵⁵

39. As such, “the Prosecutor has sole responsibility for prosecutions”.⁵⁶ It is equally clear that any effort on the part of a trial chamber to prosecute the case or any appearance thereof created by its conduct would be irreconcilable of the above standards. This explains that, as held by the Appeals Chamber, the responsibility to frame the charges belongs exclusively to

⁵² See e.g. *Kyprianou v Cyprus*, Appl No 73797/01, ECHR 2005-XIII, 14 Dec 2005, pars 126-128. See also *Bulut v Austria* (1997) 24 EHRR 84; *Pfeifer and Plankl*, Appl 10802/84, Judgment of 25 February 1992; F. Tulkens, “La Procédure pénale: grandes lignes de comparaison entre systèmes nationaux”, in Delmas-Marty (ed), *Procès pénal et droits de l’homme*, (1992), at 41. See also *The Prosecutor v Nyiramasuhuko et al.*, ICTR-98-42-T, Decision on Prosecutor’s Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor’s Counsel, 10 July 2001, para. 7.

⁵³ *Ibid.*, para. 127.

⁵⁴ Judgment of 24 May 1989, in particular para. 50; See also *Sainte-Marie* (1993) 16 EHRR 116, para. 32.

⁵⁵ *Ben Yaacoub v Belgium* (1991) 13 EHRR 418, para. 108.

⁵⁶ *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor’s Motion to Withdraw the Indictment, 18 March 1999, “the decision on whether or not to proceed in any given matter rests with the Prosecutor, and that she has the right, at any stage of the proceedings, to apply for leave to withdraw an indictment”.

the Pre-Trial Chamber that the role of the Trial Chamber is limited to its function as trier of fact based upon those charges.

40. The proposed re-characterisation falls exactly within the range of amendment that the Appeals Chamber prohibited. If pursued, this amendment to the charges against Mr. Bemba would accordingly also violate his right to confront the case against him in relation to all aspects of the amended charges, and would also, arguably, violate Mr Bemba's right to an impartial tribunal.

(e) The proposed re-characterisation would violate Mr. Bemba's right to a trial without undue delay

41. Under both the Statute and international law, an accused is entitled to an expeditious trial.⁵⁷ Mr. Bemba has been in detention for four and a half years. All applications for his provisional release have been denied.

42. The amendment of the charges at this late stage would require that the Defence be given a meaningful period of time to investigate and prepare for this new allegation. This would constitute "undue delay" in the proceedings. It would also emphasise the unacceptable situation in which Mr. Bemba finds himself: his inability to obtain provisional release whilst at the same time having to accept delays caused by no fault of his or his counsel and, now, the possibility of a second theory of liability arising after the close of the Prosecution case, the first one presumably being considered unproven. This, with respect, is contrary to the fundamental rights to which he is entitled. It would also justify the immediate provisional release of Mr. Bemba pending the resolution of this matter and any requisite preparation that would be required in the circumstances.

(f) The proposed re-characterisation would constitute a violation of Mr Bemba's right to a fair trial

⁵⁷ See, e.g., Articles 64(2), 64(3), and 67(1)(c) of the Statute. See Articles 9(3) and 14(3)(c) of the ICCPR, Article 5(3) of the ECHR, The Human Rights Committee has held in that regard in its *General Comment No. 32* [2007] that: "In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible. This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal." See also, *Prosecutor v. Gatete*, ICTR-00-61-A, Judgement, 9 October 2012, para. 45.

43. Ultimately, the present situation raises fundamental issues of fairness. Mr Bemba was charged with one theory of liability; the alternative now proposed was rejected by the Chamber competent to set the framework of charges; Defence preparations were made on that basis; the Trial Chamber heard *that* case and the evidence relevant to it and let the Prosecution proceed and close its case on that basis; like the Defence (and Prosecutor), the Chamber asked questions based on *that* case;⁵⁸ the Defence investigated and decided to present evidence relevant to *that* case, and no other; the Defence never prepared for or sought to meet an alternative theory of liability (nor was it required to); the witnesses which it now intends to call have been interviewed and they are being called in relation to *that* case.

44. The Defence still has no notice of the material allegations or supporting material to the mode of liability now proposed. There has been no confirmation of such charges. The unfairness of the envisaged course is further accentuated by the grave uncertainties surrounding this *mens rea* standard. The Pre-Trial Chamber provided no guidance as to what the material facts relevant to such a doctrine might be⁵⁹ – so that the Defence would be required to mount a defence for a case of which it has no identifiable notice and to do so after the Prosecution has finished presenting its case (in relation to a different theory of liability). This complete absence of legal certainty is all the more dangerous given the advanced stage of proceedings.

(g) The Prosecution’s arguments in favour of the proposed re-characterisation are misplaced

45. The Prosecution cites no authority to support its claim that “the Defence has the burden of showing likely or actual prejudice” resulting from the proposed re-characterisation of the facts.⁶⁰ This is a fundamental misstatement of the burden of proof. Regulation 55(3) specifically vests the Chamber with responsibility for ensuring that the Defence is not prejudiced as a result of this irregular procedure. It is certainly not for an accused to prove that amending the charges will not cause prejudice. Rather, it is only open to the Chamber to take this drastic step if and where satisfied that it will not have a prejudicial effect on the

⁵⁸ See, for example, ICC-01/05-01/08-T-216-CONF-ENG ET 16-03-2012 24/29; ICC-01/05-01/08-T-138-CONF-ENG ET 05-07-2011 29/58 PV T.

⁵⁹ In the Confirmation Decision, the Pre-Trial Chamber explicitly noted that it did not deem “necessary to address in the present decision” the question of the difference between the “had reason to know” criterion embodied in the ICTR, ICTY and SCSL Statutes, and the “should have known” standard under Article 28(a) of the ICC Statute (see Confirmation Decision, para. 434C). Absent such a clarification on the part of the Chamber, the Defendant cannot be seen to be in a position to understand how to challenge such an allegation.

⁶⁰ ICC-01/05-01/08-2334, para. 20.

accused. For the reasons given above, and those outlined below, no reasonable trial chamber could be so satisfied in the present case.

46. The Prosecution's claim that it is for the Defence to establish that it would have asked different questions or made different or additional objections is logically absurd. The responsibility for establishing material facts to the case against an accused rests exclusively with the Prosecution. It was, therefore, for the Prosecution to establish how it could have established the material allegations relevant to the "should have known" theory of liability. At no stage did the Defence turn its mind to trying to disprove such a case, nor did it seek to guess what the Prosecution's case might have been, had it formed part of the Prosecution's case.

47. The Prosecution's reasoning that that "in light of the Chamber's Regulation 55 notice, the Defence will have the opportunity to ask the bulk of its witnesses, who have yet to testify, any question regarding facts relevant to the standard 'owing to the circumstances at the time, the accused should have known'" ⁶¹ is misplaced, and shows a worrying disregard for the rights of an accused before the ICC. Firstly, an accused cannot be expected to defend against allegations which do not (and may never) form part of the charges against him. Secondly, it simply cannot be the case that the Chamber can amend the charges, change the scope of the case, and the only remedy for the Defence is that it will be able to question forthcoming witnesses as to the newly-introduced charges. The safeguards put in place under the Statute and Rules regarding prompt and detailed notification of the charges exist to avoid the very prejudice which would result if an accused commenced his case without knowing what he was defending himself against. As each witness completes his or her testimony, Mr. Bemba loses the opportunity to test and respond to the re-characterised charges. This gives rise to an irreparable prejudice which cannot be remedied in the manner the Prosecution casually suggests.

48. More specifically, the Prosecution's argument completely ignores the fact that, presented with the new proposed form of liability, the Defence would necessarily have (i) asked different questions of Prosecution witnesses; (ii) requested and be entitled to disclosure of wholly different material; and (iii) have interviewed and called completely different witnesses.

⁶¹ ICC-01/05-01/08-2334, para. 21.
No. ICC-01/05-01/08

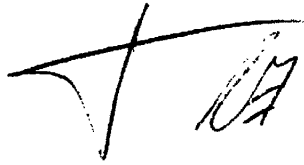
49. Based on the above, and for all the reasons advanced in the present filing, the introduction of an allegation that Mr. Bemba “should have known” of the material facts relevant to the charges at this late stage of the proceedings and in the circumstances of this case would constitute a grave violation of his right to a fair trial.

C. CONCLUSIONS AND RELIEF SOUGHT

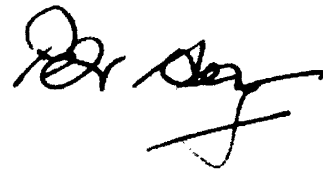
50. In light of the reasons above, the Defence submits that the Trial Chamber would be acting *ultra vires* and in a manner inconsistent with Mr. Bemba’s statutorily-guaranteed rights if it were effectively to amend the charges through a re-characterisation of the facts at this stage of the proceedings.

51. Finally, the Defence urges the Chamber to render a reasoned decision in a timely fashion in order to minimize the impact of the issue upon the continuing process.

The whole respectfully submitted.



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Done on the 18th of October 2012
At The Hague, The Netherlands