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TRIAL CHAMBER VII

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Olga Herrera Carbuccia
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO

Public with Public Annex A

Defence Response to Prosecution's Application for Notice to be given under Regulation 55(2) on the Accused's Individual Criminal Responsibility (ICC-01/05-01/13-922)

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. INTRODUCTION

1. On 23 April 2015, the Prosecution submitted its 'Application for Notice to be given under Regulation 55(2) on the Accused's Individual Criminal Responsibility' (hereinafter, the 'Application').[1]

2. The Application contains no discussion or justification as concerns the application of Regulation 55 to this case. It is also extraordinarily broad-ranging in nature: the Prosecution has proposed that the Trial Chamber provide notice in relation to every defendant such that if granted, each defendant would be facing multiple alternative forms of liability.

3. The proposed characterisation is thus inimical to the defendant's right to be informed of the details of the charges. In particular, the use of such wide-ranging alternative charging would leave the Defence with no clear picture as to the specific nature of the allegations against each defendant, particularly as some constellations of liability are incompatible with the confirmed facts concerning each defendant, or with the legal limits of liability.

4. Even if Regulation 55 were to be applicable to Article 70 cases, its purpose would be subverted if it were to be employed in order to introduce multiple alternate (and potentially incompatible) charges.

5. This case has already lasted for an unreasonable period of time. The use of Regulation 55 would further compromise Mr. Bemba's right to a speedy resolution of these allegations, and the interests of judicial economy and efficiency.

6. The Trial Chamber must therefore dismiss the Application on the grounds that:
   a. Regulation 55 is not applicable to Article 70 offences;
   b. The proposed recharacterisation would exceed the scope of the confirmed case; and
   c. Given the number of defendants and specific nature of this case, the proposed recharacterisation would be contrary to the rights of the accused, and would undermine the underlying purpose of Regulation 55.

[1] ICC-01/05-01/13-922.

B. SUBMISSIONS

1. <u>Regulation 55 is not applicable to modes of liability concerning Article 70 offences</u>

7. Both a textual and purposive interpretation of Regulation 55 exclude the conclusion that it applies to Article 70 offences.

8. Regulation 55(1) of the Regulations of the Court provides that:

> In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

9. Notably, the Regulation only refers to 'crimes under articles 6, 7, or 8' and not, offences under Article 70.

10. This omission must be considered to be a deliberate choice on the part of the drafters to confine the scope of Regulation 55 to the serious and complex crimes set out in Articles 6, 7, and 8. As set out by the Appeals Chamber in the *Lubanga* case, the principal purpose of the Regulation is to close the accountability gap,[2] and eliminate impunity as concerns "serious crimes of concern to the international community as a whole".[3]

11. Article 70 offences cannot be characterised as "serious crimes of concern to the international community as a whole", and do not attract the same obligation to prosecute as Article 5 crimes, as reflected by the fact that Article 70 offences are subject to a statute of limitations. The underlying rationale of Regulation 55 simply does not apply to Article 70 offences.

12. The particular wording of Article 70 also appears to exclude the application of Regulation 55. Article 70 prescribes the form of participation for Article 70 offences in that the Court may only exercise jurisdiction over the offences set out in Article 70 "when committed intentionally".

[2] ICC-01/04-01/06-2205, para. 77.
[3] At para. 77, the Appeals Chamber references the preambular objective of the Court to put an end to impunity for "these crimes", which is set out in the Preamble as being "serious crimes of concern to the international community as a whole".

13. This phrase is unambiguous and must be given its plain meaning;[4] this *chapeau* wording thus prohibits any modification being made to the requirement that the offence must have been committed with intent. Whereas, in the context of an Article 5 case, it might be permissible to omit specific facts which refer to intent, Article 70 precludes such an approach. If the facts, which underpin the allegation that the accused committed the offence with intent are omitted, the allegations would then fall outside the jurisdiction of the Court.

14. Article 70(4) also requires State parties to penalise Article 70 under domestic law. Domestic implementing legislation therefore provides a useful indicator as to the understanding of State parties concerning the import of the phrase "when committed intentionally". In particular, whereas States have the discretion to extend the ambit of Article 70 in their domestic law, if they were to adopt an overly narrow approach, (which does not reflect the intention of the drafters), they would fall foul of Article 70(4).

15. For example, Article 37(1)(c) of the relevant implementing legislation adopted by South Africa stipulates that the prescribed conduct must have been committed "intentionally".[5]

16. Similarly , Article 7(1) of Part 3 (Offences in relation to the ICC) of the International Criminal Court Act of 2002 adopted by Malta specifies that:[6]

> It shall be an offence for any person to intentionally commit any of the acts mentioned in Article 70.1 of the ICC Treaty […].

17. Article 8(2) of the same part then elaborates that:

> Unless otherwise provided by article 7 or by the relevant article, a person is regarded as committing an act referred to in subarticle (1) only if the material elements are committed with intent and knowledge. (3) For this purpose - (a) a person has intent - (i) in relation to conduct, where he means to engage in the conduct, and (ii) in relation to a consequence, where he means to cause the consequence or is aware that it will occur in the ordinary course of events, and (b) "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

[4] As noted by Judge Tarfusser, in accordance with the Latin maxim "in claris non fit interpretatio: when the wording of a legal provision is univocal, the meaning and content of that provision must be determined based solely on such wording, with no need to recur to systematic or teleological arguments, or to look elsewhere": ICC-01/04-01/07-3363, para. 2.

[5] Implementation of the Rome Statute of the International Criminal Court (Act No. 27 of 2002), http://iccdb.webfactional.com/documents/implementations/pdf/South_Africa_ICC_Act_27_2002.pdf

[6] ACT XXIV of 2002, http://www.nottingham.ac.uk/shared/shared_hrlcicju/Malta/International_Criminal_Court_Act.pdf

18. Intent is also an essential element of the offence as set out in the respective implementing legislation of Spain,[7] Uganda,[8] New Zealand,[9] Nigeria,[10] and the United Kingdom.[11] The latter legislation contains an explanatory note regarding the mental element to the effect that the implementing legislation has been drafted to comport to the ICC Statute and "[t]he general presumption is that such offences must be committed with knowledge and intent, unless the contrary can be shown."[12]

19. It is therefore apparent that these key State parties understood the phrase "committed with intent" in Article 70 to equate to a requirement that the accused must have committed the offence with intent in order to attract criminal responsibility under Article 70. This, in turn, leads to the irresistible inference that the drafters intended that the words "committed with intent" would displace any contrary provisions in the Statute or Rules, and would further guide the Court's consideration as to which provisions of the Statute and Rules of Procedure and Evidence would apply '*mutatis mutandis'*. If contrary modes of liability are excluded, then it follows that contrary interpretations and applications of Regulation 55 must also be excluded.

20. Finally, in its Submissions on the Confirmation of the Charges, the Prosecution argued that Article 70 was analogous to Rule 77 of the ICTY Rules of Procedure and Evidence, and further suggested that the "Chamber may consider informative these institutions' jurisprudence".[13]

21. In line with this proposition, it is significant for the purposes of Article 21(2) that the equivalent provisions at the *ad hoc* Tribunals confine the Court's jurisdiction to instances

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[7] Article 471 *bis* of the Provisions of the Spanish Criminal Code Concerning International Crimes. Integrated Text Containing the Amendments Introduced by the Ley Organica 15/2003 Implementing the Statute of the International Criminal Court', http://iccdb.webfactional.com/documents/implementations/pdf/Spain_Implementation_Provisions_in_Criminal_Code_2003.pdf

[8] Articles 14 and 16, the International Criminal Court Act 2010' in relation to the ICC, https://iccdb.hrlc.net/data/span/6508/.

[9] Articles 19 and 21, International Crimes and International Criminal Court Act 2000. http://iccdb.webfactional.com/documents/implementations/pdf/New_Zealand_International_Crimes_and_International_Criminal_Court_Act_2000_amend_2012.pdf.

[10] Articles 117, 120, 122, Criminal Code Act - Chapter 77. http://iccdb.webfactional.com/documents/implementations/pdf/Criminal_Code_Act_Nigeria_EN_1916.pdf.

[11] Article 54 of Part 5 (England and Wales), and Article 61 (Northern Ireland) (Offences in relation to the ICC) of the UK International Criminal Court Act of 2001, http://iccdb.webfactional.com/documents/implementations/pdf/UK_-_International_Criminal_Court_Act_2001_2007_.pdf.

[12] See Article 66 and accompanying analysis in text.

[13] ICC-01/05-01/13-597-Conf-AnxB, para. 258.

where contempt has been committed wilfully and knowingly (i.e. with intent). Separate from the issue as to whether 'specific intent' is required, the different Tribunals have required, uniformly, the Prosecution to establish that the defendant committed the acts of contempt with knowledge and intent.[14] These institutions have successfully tried multiple cases of contempt, without resorting to a practice of alternative charging for modes of liability or judicial legal requalification. The absence of alternative charging or complex variations of liabilities has also, arguably, contributed to the relative expedition with which these cases have been tried, which in turn, has allowed the respective institutions to address issues affecting the administration of justice in a rapid and effective manner.

22. The straightforward manner in which contempt has been prosecuted at the *ad hoc* Tribunals appears to fall squarely within the vision of this case adumbrated by the Trial Chamber:

> We will give you our vision of the case and here it comes. This case involved allegations in the nature of obstruction of justice. That's what the charges against the accused persons come to. The case is certainly serious, but the factual matter of the charges does not engage a judicial inquiry into widespread or systemic attack against a civilian population, nor of acts committed with intent to destroy a group in whole or in part. Therefore, in light of the compass of the -- the proper compass of the charges in the case the Chamber will strongly discourage multiplication of procedural issues in the case.[15]

23. Regulation 55, by its very nature, will engender a multiplication of procedural issues, which are geared towards an Article 5 case rather than a case of this nature. Regulation 55 therefore has no place in these proceedings.

[14] *Prosecutor v. Pecanac*, IT-05-88/2-R77.2, Trial Judgment, 9 December 2011, para. 19; *Prosecutor v. Hartmann*, IT-02-54-R77.5, Appeals Judgment, 14 September 2009, paras. 127-128; *Prosecutor v Duško Tadić*, Judgment on Allegations of Contempt Against prior Counsel, Milan Vujin, Case IT-94-1-A-R77, 31 January 2000, paras. 20, 26; *Prosecutor v. Kanyabashi et al*, Decision on the Prosecutor's Further Allegations of Contempt, Case No. ICTR-96-15-T, 30 November 2001, para. 20; *Independent Counsel against Brima Samura*, Judgement in contempt Proceedings, Case No. SCSL-2005-01, 26 October 2005, para. 27. The Special Tribunal for Lebanon has not yet issued a contempt judgment. Nonetheless, the orders in lieu of the indictments refer to the requirement that the contempt is committed knowingly and wilfully. See for example, STL-14-06 - Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, paras. 9, 11 and 12. The Pre-Trial Brief submitted by the *amicus* Prosecutor in Case STL-14-06 also avers, on the basis of a survey of the jurisprudence of the ICTY, ICTR and SCSL, that the "*actus reus* of contempt is conduct which "tends to obstruct, prejudice or abuse the administration of justice. The required *mens rea* is that the conduct be knowing and wilful" (Prosecution Pre-Trial Brief Pursuant to Rule 91(G)(i), STL-14-06/PT/CJ, para. 37.) It follows that it would be necessary to demonstrate that the accused knowingly and wilfully engaged in conduct which obstruct, prejudices or abuses the administration of justice.

[15] ICC-01/05-01/13-T-8-CONF-ENG, p. 4, lines 6-15.

2. <u>The proposed recharacterisation falls outside the scope of the confirmed facts and circumstances of the case</u>

24. Of key importance, this is not a scenario in which the Pre-Trial Chamber failed to consider the applicability of Article 25(3)(d), or rejected its application on the basis of an erroneous interpretation of the law.

25. The Pre-Trial Chamber considered the application of Article 25(3)(d) to Mr. Bemba, and rejected it.[16] The Chamber did so on the basis of the "specific nature of the offences", and the direct involvement of the accused in question in the commission of these alleged offences. [17]

26. The Chamber's conclusion was based on the particular facts and circumstances of the case. It must therefore be presumed that the facts and circumstances confirmed by the Pre-Trial Chamber would not support a finding of responsibility under Article 25(3)(d).

27. This is underscored by the fact that the proposed recharacterisation concerning Mr. Bemba is predicated on two significant factual elements, which fall outside the scope of the confirmed charges:

a. *Firstly*, the existence of a shared common purpose to "to provide false evidence and corruptly influence witnesses before Trial Chamber III";[18] and
b. *Secondly*, the existence of a group of person sharing a common criminal purpose, which is comprised at least one Accused and the witnesses in this case.[19]

a) *the existence of a shared common purpose is not supported by the confirmed charges*

28. With respect to the first aspect, although the Pre-Trial Chamber referred throughout its decision to an overall strategy of defending Mr. Bemba in the Main Case, this 'strategy' does not comprise a common criminal purpose. It is also impermissibly vague and question-

[16] ICC-01/05-01/13-749, paras. 36, and 51.
[17] ICC-01/05-01/13-749, para. 51.
[18] ICC-01/05-01/13-922, para. 44.
[19] ICC-01/05-01/13-922, paras. 34-35.

begging to allege that there was a common criminal purpose to commit offences against Article 70 of the Statute.[20]

29. In this regard, the *ad hoc* Tribunals have specified that the existence of a common purpose is a material fact which must be pleaded in the indictment.[21] Moreover, in pleading the existence of a common purpose – the Prosecution must provide details concerning:

> The nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise.[22]

30. The ICTY Appeals Chamber has also found that "using the concept of joint criminal enterprise to define an individual's responsibility for crimes physically committed by others requires a <u>strict definition</u> of common purpose".[23]

31. In this case, rather than confirming the existence of one shared common criminal purpose, the Pre-Trial Chamber's factual findings pointed towards differing objectives and endeavours as between the defendants.

32. For example, the Pre-Trial Chamber declined to confirm the charges on the basis of Article 25(3)(d) as concerns Mr. Bemba due to its <u>factual</u> finding that the means and conduct of each defendant differed.[24] The Pre-Trial Chamber made no factual findings that Mr. Babala or Mr. Arido knew of or shared a <u>common</u> criminal purpose.[25]

33. The individual findings concerning Me. Kilolo and Mr. Mangenda also do not point to the existence of a shared intent or shared criminal purpose (other than to defend Mr. Bemba – which is not a criminal purpose). As noted by Judge Van der Wyngaert, it cannot be presumed <u>automatically</u> from the fact that two individuals possess intent that they constitute a group acting pursuant to a common criminal purpose.[26]

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[20] At paragraph 75, the Pre-Trial Chamber found that "Mr Mangenda pursued his role in the overall strategy to defend Mr Bemba in the Main Case together with Mr Kilolo and Mr Bemba including through the commission of offences against the administration of justice": ICC-01/05-01/13-749. The use of the word 'including' suggest that the overall strategy was also pursued by other means, which were not necessary unlawful in nature. This vitiates any factual finding that the common purpose necessarily involved the commission of a crime. The reference to a 'crime within the jurisdiction of the Court' in Article 25(1(3)(d)(i) also mirrors the language of Article 5, which excludes Article 70 offences.

[21] *Prosecutor v. Stakic,* Appeals Judgment, IT-97-24-A, 22 March 2006, para. 118.

[22] *Prosecutor v. Sainovic et al.,* Appeals Judgment, IT-05-87-A, 23 January 2014, para. 214.

[23] *Prosecutor v. Krnojelac,* Appeals Judgment, IT-97-25-A, 17 September 2003, para. 116.

[24] ICC-01/05-01/13-749, para. 52.

[25] ICC-01/05-01/13-749, paras. 84, 96.

[26] ICC-01/04-01/07-3436-AnxI, para. 23.

34. The mere fact that a perpetrator possesses intent also does not exclude the possibility that the perpetrator committed the acts on an 'opportunistic' basis rather than as part of a common criminal purpose.[27]

b) *the existence of a group of person sharing a common criminal purpose, which is comprised at least one Accused and the witnesses in this case is not supported by the confirmed charges*

35. At paragraph 30 of its Application, the Prosecution asserts – incorrectly – that for each count, there is at least one accused who committed the crime (as a perpetrator under Article 25(3)(a), which is the subject of the common plan. However, if all the proposed recharacterisations were to be accepted, it is possible that all accused could be convicted for a form of liability other than Article 25(3)(a) i.e. as accessories or aiders and abetters.

36. In particular, if the Prosecution's proposed recharacterisation under article 25(3)(d)(ii) concerning Mr. Bemba, Me. Kilolo and Mr. Mangenda is accepted, this would also require the trial to proceed in accordance with the possibility that these accused were not part of, or did not share the common criminal purpose of the 'group'.

37. The fundamental flaw in the proposed recharacterisation is that it leaves Mr. Bemba with absolutely no certainty or even predictability as concerns the members of the group acting with the common purpose, and the persons who committed the crimes pursuant to this common purpose. This is of key importance in connection with an allegation under Article 25(3)(d) that Mr. Bemba allegedly contributed to the commission of crimes committed by unidentified persons in a nebulous group.

38. This violates the right of the Defence to be informed in detail of the specific nature of the charges against him. As found by Trial Chamber V in the *Ruto & Sang* case:

> It would be difficult for Mr Ruto to prepare for his defence on the issue of whether he agreed to such common plan if he is not provided, to the extent possible, with the identity of the persons with whom he allegedly agreed to that common plan. The Chamber therefore agrees with the Defence that, in order to give effect to the accused's right to be informed of the charges

[27] *Prosecutor v. Limaj et al.*, Trial Judgment, 30 November 2005, paras. 667 - 668.

> against him, he is entitled to be provided with the identity of the persons whose involvement in the common plan the prosecution appears to allege.[28]

39. It would appear that the Prosecution has attempted to remedy this defect by proposing that the common purpose group could be comprised of the 'tainted' witnesses. This attempt is, however, flawed. At paragraph 35 of the Application, the Prosecution concedes that whereas the proposed recharacterisation concerning Mr. Bemba is linked to the role of the witnesses and their membership of a common group, neither the DCC nor the Confirmation Decision refer to the witnesses as sharing a common purpose with any of the Accused or each other, or possessing knowledge and intent as concerns the overall strategy.

40. As such, the alleged fact that the witnesses comprised all or part of a group sharing a common purpose falls outside the scope of the charges, and cannot form part of the factual matrix of the trial.

41. There is a key distinction between on the one hand, the question as to whether the Trial Chamber can take into consideration alleged facts, which underpinned the theory and allegations confirmed by the Pre-Trial Chamber, but which were not explicitly confirmed in the Confirmation Decision, and on the other, the question as to whether the Trial Chamber can rely on alleged facts that were never put to the Pre-Trial Chamber and which constitute a "radical transformation"[29] as concerns the factual allegations constituting the charges. Whereas the former is permissible, the latter is not.

42. Conduct and knowledge form part of the facts and circumstances which must be set out explicitly in the charges;[30] they cannot be conjured from thin air. For this reason, the Appeals Chamber considered it to be important in connection with the proposed recharacterisation from Article 25(3)(a) to (d) in the Katanga case that the Decision confirming the charges had already identified:

> the commission of crimes by a hierarchically organised group acting in a concerted manner, that Mr Katanga's contribution to the attack on Bogoro

[28] ICC-01/09-01/11-522, para. 35. See also *Prosecutor v. Krnojelac*, Judgment, IT-97-25-A, 17 September 2003, paras. 116 -117.
29 The ICTR Appeals Chamber has employed this terminology, and confirmed the correctness of the Trial Chamber's refusal to consider allegations concerning acts of rape committed by perpetrators, which were not set out in the indictment, on the basis that this information was a 'material fact': *Prosecutor v. Muvunyi* Case No. ICTR-2000-55A-A, Appeals Judgment, 29 August 2008, paras. 163-166.
[30] ICC-01/05-01/08-424, para. 208; ICC-01/04-01/06-222, para 29. See also *Prosecutor v. Krnojelac*, Decision on Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras. 12-13,*Prosecutor v. Uwinkindi*, Appeal Chamber "Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment"; 16 November 2011, paras. 4-5.

> resulted in the realisation of the objective elements of the crime, and that the group was acting with criminal intent, of which Mr Katanga was aware. [31]

43. Apart from the fact that the confirmed charges do not contain any factual findings concerning the existence of a group of witnesses sharing a common criminal purpose, the confirmed charges also do not reference any facts which would support a finding that the accused were aware that the witnesses (or other accused) shared a common criminal purpose.

44. To the contrary, the Prosecution emphasised in its Submissions on the Confirmation of Charges that as concerns the offence of corruption of witnesses, it was not necessary to demonstrate that the witnesses were actually corrupted;[32] it is therefore clear that they did not consider their own DCC to plead knowledge and intent on the part of the witnesses as a material fact as concerns this charge. Since the Prosecution's new factual theory is predicated on material facts, which were never part of the confirmation process, the Prosecution must resort to Article 61(9) and not Regulation 55.

45. In these circumstances, it would be both *ultra vires* and unfair to allow the trial to proceed on the basis of a theory which is not supported explicitly or implicitly by the confirmed facts and circumstances. This issue of unfairness will be addressed in the next section.

3. <u>The proposed application of Regulation 55 to this specific case would be unduly prejudicial, and contrary to the rights of the accused, and inconsistent with the underlying objective of Regulation 55</u>

46. The proposed requalification should be dismissed on the grounds that providing notice of such a broad and varying degree of potential liability would be contrary to the rights of the accused, and the interests of judicial economy and efficiency. The latter two elements are tied to Regulation 55's objective to streamline the trial and narrow its focus.

47. In this regard, even if the proposed recharacterisation falls within the scope of the confirmed charges, the Trial Chamber is not under a duty to invoke Regulation 55. The Trial Chamber's power to invoke Regulation 55 is discretionary -whereas the Trial Chamber 'may' recharacterise the legal qualification of the facts, it is not required to do so.

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[31] ICC-01/04-01/07-3363, para. 55.
[32] ICC-01/05-01/13-597-Conf-AnxB, para. 283.

48. The Chamber is, however, required to ensure that any decision concerning Regulation 55 is consistent with the rights of the accused, and the interests of justice and efficacy as concerns this particular case.[33] It should also ensure that the practical application of Regulation 55 in this case would be consistent with the underlying objectives of the Regulation.

a) *Granting the application would be contrary to the rights of the accused*

49. The right to be informed promptly of the nature of the charges, and the right to an expeditious trial are key attributes of fair proceedings before the ICC. Both rights would be compromised if the Prosecution's application were to be granted.

50. Even if notice of the proposed recharacterisation is provided, the use of Regulation 55 necessarily introduces an additional element of uncertainty into the trial proceedings. This is detrimental to the accused's right to be informed promptly of the specific nature and scope of the charges.

51. For the confirmed charges, the defendant has full notice that he may be convicted for such charges. However under Regulation 55 the defendant will not know whether the proposed additions will form part of the case against him until the judgment itself.

52. The ambiguity is exacerbated by the fact that there are five defendants, who are charged with three types of Article 70 offences, and three to five modes of liabilities. If the Defence for Mr. Bemba only considers the possible permutations in case theory as concerns Mr. Bemba triggered by the Application, the Defence would be faced with **48** different case theories. If, however, the Defence considers the total possible permutations for each defendant, and the various constellations generated by their different interactions concerning the different offences, the Defence would be faced with a matrix of **179, 159, 040** potential scenarios.[34]

53. Whereas alternative charging might not be prejudicial in cases in which the only variable is the accused's own participation, it is highly prejudicial to employ it in connection

[33] ICC-01/04-169 at para. 2; ICC-01/04-01/06- 1444-Anx at para. 6. See also *Prosecutor v. Haradinaj*, Appeals Judgment, 27 July 2010, at para. 196.
[34] See Annex A.

with a case, in which there are five defendants, and in which every aspect of the allegations is a shifting variable.

54. As set out above, Mr. Bemba is entitled to know the members of the common purpose group. If notice of the proposed recharacterisations is given, the Defence will have no concrete information on that point: it may or not be witnesses, or one, some, all or none of the five defendants.

55. This ambiguity would permit the Prosecution, impermissibly, to mould its theory based on the outcome of the evidence at trial. [35]

56. Notice does not cure the prejudice as notice under Regulation 55 translates to a mere *possibility* that the charges could be requalified. In the Application, the Prosecution has not suggested that the proposed requalifications are the more appropriate basis for the trial, nor has it indicated that it will renounce its reliance on any of the confirmed liabilities. This in itself violates the finding of the ICTY Appeals Chamber that in order to respect the right of the accused to be informed of the nature of the charges, the Prosecution must notify the Defence if it does not intend to rely on any forms of liability set out in the initial indictment.[36]

57. As a result, it will be necessary, throughout the entire course of the trial, for the Defence to perform the herculean task of weighing up the risks associated with pursuing a strategy, which addresses the elements set out in the confirmed modes of liability, but which could be deleterious as concerns the multiple case theories generated by the *possibility* of one or more recharacterisations (as concerns the different defendants) at a later stage. An accused cannot be considered to be 'informed' of the nature of the charges if the nature is so infinitesimally complex and varied that it is impossible to make informed decisions.

58. This scenario therefore falls squarely within the ambit of the European Court of Human Rights (ECtHR) finding in the case of *I.H. v. Austria*:

> in order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the

[35] ICC-01/05-01/08-424, para. 208, and footnote 284, citing in particular, *Prosecutor v Kupreskic et al*, Case No. IT-95-16-A, "Appeals Chamber Judgment", 23 October 2001, paras. 88, 92 and 98.
[36] *Prosecutor v. Kvocka*, Appeal Judgment, 28 February 2005; paras. 41-42.

> charges made, including the legal characterisation that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution as regards the qualification of an offence is clearly not sufficient.[37]

59. Apart from the issue of the right to be informed of the charges, the proposed requalification would also undermine Mr. Bemba's right to a speedy trial, and the right of the Defence to adequate time and resources.

60. For this reason, the ECtHR emphasised in the case of *De Salvador Torres v. Spain* that "for the purpose of preparing his or her defence, a person charged with a criminal offence is entitled to be informed not only of the material facts on which the accusation is based but also of the precise legal classification given to these facts." (emphasis added)[38]

61. By obscuring the precise legal classification that can be applied to the different defendants in the final judgment, the Application impedes the ability of the Defence to prepare its case, particularly in light of the limited resources at its disposal.

62. In particular, if the Trial Chamber grants the Application and issues notice, the Defence would be required to dedicate a significant amount of time and resources to both considering the evidential implications of the different requalifications, and constructing multiple Defence responses.

63. Although some case theories generated by the proposed legal requalifications might fall outside the scope of the modes of liability under Article 25(3), the Defence will still need to dedicate time and resources to make this determination, and then advocate for it through litigation. Since the Chamber will not decide upon the proposed requalification or the precise legal definition of the elements of Article 25(3)(d) until the final judgment,[39] this

[37] Nº 42780/98 Judgement of 20 April 2006.

[38] De Salvador Torres v. Spain (Application no 21525/93), Judgement 24 October 1996, para. 28. See also ICC-01/04-01/07-3363, para. 88. See also *Prosecutor v. Uwinkindi*, Appeal Chamber "Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment", 16 November 2011, paras. 48 and 58 concerning the obligation of the Prosecution to plead the nature of the accused's responsibility in an **unambiguous** manner. In order to comply with this requirement, the Prosecution must plead the specific facts pertaining to each form of liability.

[39] The Defence has not addressed the definition of Article 25(3)(d) on the basis of Trial Chamber V(a)'s ruling that any interpretation concerning the proposed mode of liability would be provided in the final judgment: ICC-01/09-01/11-1122, para. 16.

uncertainty may also prevent the Defence from agreeing to certain facts or issues, to which it might otherwise be prepared to stipulate.

64. The resultant additional evidential and legal workload will inevitably prolong the trial in a manner, disproportionate to the nature of Article 70 offences, and the likely penalty that could be imposed.

65. The Judges of this Court have recognised explicitly that the use of multiple cumulative charging creates an unfair burden on the Defence.[40] Their objection to this practice gave rise to the adoption of Regulation 55 as a means for eliminating rather than facilitating this practice. The Application should not be permitted to undercut their objective. This will be addressed in the next section.

b) *Granting the application would be contrary to the interests of judicial efficiency and the underlying objective of Regulation 55*

66. If granted, the Application would subvert the objective of Regulation 55 and undermine judicial efficiency by introducing multiple alternative charges, and widening rather than streamlining the focus of the case.

67. The objective of Regulation 55 has been formulated by Judge Kaul in the following manner:

> Although [Regulation 55's] adoption was not entirely uncontroversial, such a provision was deemed essential to avoid lengthy indictments with cumulative and alternative charges. The judges want to conduct focused trials on clearly delineated charges, in the interest both of judicial economy and of the defence.[41]

68. Carsten Stan further confirms that the Judge introduced the Regulation 55 in order to avoid the practice of cumulative charging which had been employed at the *ad hoc* Tribunals.[42]

[40] Pre-Trial Chamber II emphasised in the *Prosecutor v. Bemba* that the "prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence": ICC-01/05-01/08-424, para .202.
[41] Hans-Peter Kaul, Construction Site for More Justice: The International Criminal Court after Two Years, 99 Am. J. Intl. L. 370, at 377 (April 2005).
[42] C. Stahn, 'Modification of the Legal Characterization of Facts in the **ICC** System; A Portrayal of Regulation 55' (2005) 1 Criminal Law Forum 1, p. 3.

69. Stahn further elaborates that Regulation 55 is "based on four cardinal principles: flexibility in the scope of application of the provision; maintenance of procedural control by the Trial Chamber; transparency of the procedure of re-characterization; and preservation of judicial economy“.[43]

70. The idea was therefore to confirm the charges on the basis of the most appropriate mode of liability, whilst leaving the door open for the Trial Chamber to requalify the charges, on an exceptional basis, [44] if the evidence appeared to support a different legal qualification.

71. The Application runs roughshod over this projected purpose. Rather than narrowing the scope of the charges, or modifying it in order to take into consideration subsequently discovered evidence, the Prosecution is seeking to employ Regulation 55 as a vehicle for introducing multiple, alternative charges, in addition to the alternative charges which were already confirmed by the Pre-Trial Chamber.

72. The Prosecution has, moreover, done so without respecting the safeguards which apply to cumulative charging at the *ad hoc* Tribunals, such as the requirement for unambiguous pleading as to which forms of liability will or will not be relied upon, and the obligation to particularise which specific modes of liability apply to which incidents.[45]

73. The fact that the Application has been filed so quickly on the heels of the confirmation decision also supports the inference that the Prosecution is seeking to utilise Regulation 55 as a means either to appeal the Pre-Trial Chamber's findings, or to circumvent the Article 61(9) amendment process.

74. The Defence is not positing that the Prosecution must always resort to Article 61(9) before requesting the Chamber to give notice, or in lieu of a Regulation 55 application. Rather, each provision has a specific purpose, and the specific requirement under Regulation 55 that the facts and circumstances must fall within the scope of the confirmed charges must not be blurred in order to make it easier for prosecutors who do not wish to resort to the amendment process.

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[43] C. Stahn, *Ibid*, p. 24.
[44] Dissenting Opinion of Judge Tarfusser, ICC-01/04-01/07-3363, paras. 5-8.
[45] *Prosecutor v. Kvocka*, Appeal Judgment, 28 February 2005, paras. 41-42: *Prosecutor v. Ntawukulilyayo*, Appeal Chamber Judgment, 14 December 2011, para. 194.

75. As set out above, the proposed requalification is not confined to minor or lesser included facts, but seeks to introduce major new factual elements into the charges. For some defendants, it also increases the gravity of the allegations by increasing the degree and nature of their responsibility. This key alteration of the factual basis of the case falls outside the scope of Regulation 55 and into the realm of Article 61(9).[46]

C. RELIEF SOUGHT

76. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba requests the Honourable Trial Chamber to reject the Application.

Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 15th day of May 2015
The Hague, The Netherlands

[46] ICC-01/04-01/06-2205, paras. 91 and 97.