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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

with Annex A Confidential, Ex parte, Defence Only

**Defence further submissions 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**

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.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. The trial commenced on 22 November 2010. The Prosecution case lasted 16 months and closed on 20 March 2012. During that time, no mention was made of an allegation that Mr. Bemba “should have known” of any fact relevant to the charges.

3. On 13 July 2012, the Defence filed its Pre-Defence Brief.³ In that document, the Defence once again noted that Mr. Bemba was not charged under the “should have known” theory of liability and that its case was based exclusively on the allegation that Mr. Bemba “knew” of the crimes charged and other relevant material facts.⁴

4. The Defence case opened on 14 August 2012.

5. 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 that it may modify the legal characterisation of the facts so as 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 about to commit the crimes included in the charges.⁵

6. On 18 October 2012, the Defence filed submissions responding to the First Notification,⁶ in which it objected to the proposed re-characterisation, which it argued would result in manifest unfairness and actual prejudice to the accused. The Defence noted the risk of a perception that the proposed amendment might be perceived as being aimed at securing a conviction, and that when a trial chamber takes over the responsibility of prosecuting the case

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-01/05-01/08-2243-Conf.

⁴ See *ibid.*, para. 18(e) and accompanying footnote 13.

⁵ ICC-01/05-01/08-2324 (“First Notification”).

⁶ ICC-01/05-01/08-2365 (“First Defence Submissions”).

or where it appears to do so, the guarantee of a seemingly impartial tribunal is violated.⁷ The Defence also noted the impossibility of any further investigations in the present case, due to the interference it had already experienced in the discharge of its functions in that regard during missions.⁸

7. Critically, the Defence argued that the “should have known” standard is a novel theory of liability, with *mens rea* elements which are entirely different and require separate and distinct means of proof.⁹ Whilst some facts that would be relevant to show that the accused “knew” crimes had been or would be committed could also be relevant that he “should have known”,¹⁰ the same, they remain distinct (as the refusal of the Pre-Trial Chamber to confirm this standard makes clear). The Defence noted that facts that would be material to such a case, and of which the accused would require notice in a timely manner including (but are not limited to):¹¹

- 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?

⁷ ICC-01/05-01/08-2365, paras. 33-40.

⁸ ICC-01/05-01/08-2365, para. 31.

⁹ ICC-01/05-01/08-2365, para. 17.

¹⁰ Confirmation Decision, para. 434.

¹¹ ICC-01/05-01/08-2365, para. 18.

- 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?

8. The Defence finally urged the Chamber to render a reasoned decision in a timely manner in order to minimize the impact of the issue on the ongoing trial.¹²

9. On 19 November 2012, the Chamber rendered 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*,¹³ in which it noted that a potential change to the charges, if any will be made at the time of rendering the final judgement.¹⁴ Without addressing the substance of the Defence submissions concerning the prejudice which would result, the risks which would arise out of further investigations, or the impossibility of answering a charge for which no notice of material facts has been given, the Chamber ordered the Defence to provide "concrete information and relevant justifications" in relation to (i) which prosecution witnesses the defence would intend to recall; and (ii) the envisaged time needed for further defence investigations and preparations.¹⁵

10. Pursuant to the Chamber's Request, the Defence files the current submissions. Given that the Defence refers herein to the content of, and cites to the transcripts of a confidential and *ex parte* Prosecution and Defence Status Conference, the Defence files; (a) a confidential version *ex parte* Prosecution and Defence, and (b) a public redacted version. For the reasons set out in paragraph 33 below, Annex A is also filed confidential and *ex parte* Defence only.

B. SUBMISSIONS

(a) The Accused cannot, in the absence of notice of the material facts and relevant circumstances underlying the proposed re-characterisation, meaningfully respond to the Chamber's Request.

¹² ICC-01/05-01/08-2365, para. 51.

¹³ ICC-01/05-01/08-2419 ("Chamber's Request")

¹⁴ ICC-01/05-01/08-2419, para. 6.

¹⁵ ICC-01/05-01/08-2419, para. 6.

11. In response to the Defence submission that Mr. Bemba had not been provided with a detailed notice of the relevant material facts and circumstances supporting the proposed re-characterisation of charges, the Chamber noted as follows:¹⁶

...such a change, if any, would only be made without exceeding the facts and circumstances described in the charges, as confirmed by the Pre-Trial Chamber. In addition, the Chamber stresses that the prosecution, which bears the onus of proving the guilt of the accused beyond reasonable doubt, has already submitted that the possible change would have no impact on the prosecution case and that, in the view of the prosecution, "[t]he same evidence presented by the Prosecution to prove that [the accused] had actual knowledge **also proves** that the accused, "owing to the circumstances at the time, should have known."

12. Firstly, the Defence evidently disputes the Prosecution's assertion (directly quoted by the Chamber) that the Prosecution has **proven** that the accused "should have known" about the alleged misconduct of MLC troops in the Central African Republic.

13. Secondly, the lack of notice of the material facts and circumstances underlying the proposed new charge renders it impossible for the Defence to respond to the Chamber's Request in any meaningful way. This is not a technical complaint; the Defence cannot be expected to guess what such a case might have consisted of and what evidence would have been advanced in support of it;¹⁷ nor can it be expected to know how to investigate a "should have known" case, without any notice of how, from whom, in relation to what and by what means, Mr. Bemba is supposed to have obtained information relevant to the "should have known standard".

¹⁶ ICC-01/05-01/08-2419, para. 7 (emphasis added).

¹⁷ See e.g. *Prosecutor v. Kupreškić*, IT-95-16-A, Judgement, 23 October 2001, para. 88 ("Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence."). See also "The right of an accused to be informed promptly of the nature and cause of the charges against him, enshrined in similar terms in Article 6(3)(a) of the ECHR, Article 14(3)(a) of the ICCPR and Article 21, sub-paragraph 4(a) of the Statute of the International Tribunal, constitutes one element of the general requirement of fairness that is a fundamental aspect of a right to a fair trial. The following common general principles which may be derived from the practice of the European Court of Human Rights in relation to Article 6 of the ECHR provides some guidance as to how to interpret the requirements set out in Article 21, sub-paragraphs 4 (a) and (c) of the Tribunal's Statute: firstly, that the accused's right to be informed promptly of the charges against him has to be assessed in the light of the general requirement of fairness to the accused; secondly, that the information provided to the accused must enable him to prepare an effective defence; thirdly, that the accused must be tried without undue delay; and fourthly, that the requirement must be interpreted according to the special features of each case. This is consistent with the provisions of the Statute, which in Article 21, sub-paragraph 2 provides that all accused are entitled to a fair and public hearing, and thereafter in sub-paragraph 4 sets out the right of the accused to be informed promptly of the charge against him, and to be tried without undue delay, as part of the specific minimum guarantees necessary to ensure that this general requirement of fairness is met." (*Prosecutor v. Kovacević*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Request of 29 May 1998, 2 July 1998, par 30).

14. Nor can this approach be reconciled with Article 67(1)(a) and Article 74(2) of the Rome Statute, and Regulation 52 of the Regulations of the Court, which require notification to the accused of the precise factual and legal basis of allegations against him, in order to facilitate the preparation of a defence. Such a course would be inconsistent with the right of an accused to have detailed and prompt notice of the charges he is faced with.¹⁸ In *Ntagerura*, the ICTR Appeals Chamber held:¹⁹

if an accused is not properly notified of the material facts of his alleged criminal activity until the Prosecution files its Pre-Trial Brief or until the trial itself, it will be difficult for his Defence to conduct a meaningful investigation prior to the commencement of the trial. The question of whether an indictment is pleaded with sufficient particularity is therefore dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence.

15. To this end, the Defence recalls the *Prosecution's In-Depth Analysis Chart of Incriminatory Evidence*, filed in May 2010, in which the Prosecution gave notice in over 500 pages of the evidence upon which it intended to rely in relation to each element of the crimes charged in the *Revised Second Amended Document Containing the Charges*.²⁰ No such detail has been provided for the proposed amended charge. The Defence also recalls Article 61(9) of the Rome Statute, which requires that after the confirmation hearing, should the Prosecutor wish to add additional charges or substitute more serious charges, an additional confirmation hearing must be held. The “should have known” standard is *not* a lesser-included form of liability to actual knowledge. As noted in the First Defence Submissions, the *mens rea* elements of the alleged charges are entirely different and require quite separate and distinct means of proof.²¹ 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. The drafters of the Rome Statute mandated that before such a change could be made pre-trial, an additional confirmation hearing was required. Simply giving “notification” after the start of the Defence case cannot be reconciled with that statutory safeguard.

¹⁸ See e.g. *Prosecutor v. Kupreškić*, IT-95-16-A, Judgement, 23 October 2001, para.122; *Krnjelac* IT-97-25-A, Judgment, 17 September 2003, para. 139.

¹⁹ *Prosecutor v. Ntagerura*, ICTR-99-46-A, Judgment, 17 July 2006, para. 22, footnote omitted.

²⁰ ICC-01/05-01/08-856-Conf-AnxA (“Revised Second Amended DCC”)

²¹ ICC-01/05-01/08-2365, para. 17.

16. The importance of providing timely notice of the underlying material facts and circumstances of the charges was recently at issue in the *Ruto* case. Trial Chamber V recalled that the Prosecution had been instructed to indicate in the DCC “the material facts and circumstances underlying the charges as confirmed”²² It noted, however, that although the DCC provided “detailed information” on the Prosecution’s allegations, it was not apparent which allegations contained in the DCC were part of the “facts and circumstances” underlying each of the charges, and which information was considered to be “subsidiary”. As such the Trial Chamber detailed which “facts and circumstances” must be included in a “Charges” section of a DCC. It recalled:

The most relevant provisions of the Statute in this regard are: Article 67(1)(a) and Article 74(2), which articulate the two basic functions of the charge, namely, (i) **notification to the accused of the precise factual and legal basis of the accusation, in order to enable the accused to prepare his or her defence**, and (ii) delimitation of the allegation for the purpose of establishing what the trial is about, in order for the Chamber to properly conduct the trial and render the decision in accordance with Article 74(2). Regulation 52 of the Regulations further specifies that a charge should consist of “[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial” and “[a] legal characterisation of the facts”.

17. The Trial Chamber noted that “the ‘facts and circumstances’ should be specified, in a clear and concise manner in the Charges section of a DCC.”²³ It accordingly ordered the Prosecution “to clearly indicate, using the wording of the allegations contained in other sections of the Updated DCC, **which are the material facts and circumstances underlying each count in the Charges section.**”²⁴

18. There can be no reasonable basis for requiring this level of notice to be given to an accused in the DCC, but deeming it unnecessary if the charges are amended pursuant to Regulation 55 (especially at such a late stage of the trial where the evidence manifestly differs from the facts and circumstances originally alleged in the DCC). It is plainly insufficient to assert, as the Chamber has done in this case, that “*the same evidence*” presented by the Prosecution supports both the current charge and the proposed amended charge.²⁵ Simply because a fact appears in the DCC or the Confirmation Decision, does not permit the Chamber

²² ICC-01/09-01/11-475, para. 5.

²³ ICC-01/09-01/11-475, para. 11.

²⁴ ICC-01/09-01/11-475, para. 11.

²⁵ ICC-01/05-01/08-2419, para. 7.

to pick and choose any fact to support a re-characterised charge, without giving notice to the accused. “Charges are not merely a loose collection, of names, places, events etc., which can be ordered and re-ordered at will... there is a discrete set of facts which supports each of the elements of the crimes and/or modes(s) of criminal responsibility charged.”²⁶

19. The point is neatly illustrated by the recent Trial Chamber II notification that the legal characterization of facts may also be changed in the *Katanga* case.²⁷ Relevantly, in this decision giving notice under Regulation 55, the Majority of Trial Chamber II set out in some detail the material facts and circumstances confirmed by the Pre-Trial Chamber in the Confirmation Decision which it considered would support the proposed amended charge.²⁸ Despite this, the Defence subscribes to the view of the dissenting Judge, Her Honour Judge Van den Wyngaert, who described it as “regrettable” that:²⁹

the Majority did not deem it necessary to give a precise indication of the factual allegations from the Confirmation Decision on which it intends to rely for the proposed recharacterisation. I consider the few references in the footnotes to a number of paragraphs from the Confirmation Decision wholly inadequate in this regard. The Majority’s reasoning in paragraphs 24-30 is extremely succinct, and makes it difficult to appreciate how exactly it considers proceeding to the proposed recharacterisation. Apart from raising serious concerns about proper notice being given, the Majority also potentially conceals that it may to a certain extent be relying on ‘subsidiary facts’ for its 25(3)(d) Notice Decision. If this were the case, a conviction on this basis would be impossible in light of Article 74(2), which would render the whole exercise unlawful. However, as the majority was less than candid in this regard, I will refrain from speculating and limit myself to emphasizing that extreme vigilance is called for on this fundamental issue

20. Her Honour emphasized that “not every word, sentence or phrase that may be contained in the Document Containing the Charges, or the Confirmation Decision for that matter, qualifies for re-characterisation. The Majority is therefore misguided when it suggests... that Regulation 55 allows Chambers to pick and choose any fact from the Confirmation Decision in order to meet the legal requirements of a different form of liability.”³⁰ This interpretation is consistent with the requirement that the Rules and Regulations are interpreted in all cases in a manner consistent with the underlying fair trial guarantees provided for in the Statute.

²⁶ ICC-01/04-01/07-3319, Dissenting Opinion of Judge Christine Van den Wyngaert, paras. 14, 20.

²⁷ ICC-01/04-01/07-3319

²⁸ ICC-01/04-01/07-3319, paras. 24-30.

²⁹ ICC-01/04-01/07-3319, Dissenting Opinion of Judge Christine Van den Wyngaert, para. 17.

³⁰ ICC-01/04-01/07-3319, Dissenting Opinion of Judge Christine Van den Wyngaert, para. 15.

21. In the present case, rather than exercising “extreme vigilance”, the Chamber has not given any indication of which material facts and circumstance would support the proposed amended charge. Rather, the Chamber merely “stresses” that “in the view of the Prosecution, the same evidence presented by the Prosecution to prove that [the accused] had actual knowledge **also proves** that the accused, owing to the circumstances of the time, should have known”.³¹ That proposition is undermined by the fact that the elements of the two *mens rea* standards are clearly different, and by the Pre-Trial Chamber’s refusal to confirm a “should have known” standard against the accused. The lack of any precision of the underlying material facts and circumstances of the “should have known” allegation, even as compared to the Majority’s impugned approach in *Katanga*, is manifestly insufficient to provide Mr. Bemba with “adequate time and facilities for the effective preparation of his or her defence” as required by Regulation 55(3)(a). Nor does it allow him to respond in any meaningful manner to the Chamber’s Request.

22. The Defence also notes its understanding that the “should have known” standard applies to only those viewed for the purpose of Article 28(a) as a “military commander or person effectively acting as a military commander”. Whether Mr Bemba was in a superior-subordinate relationship vis-à-vis the alleged perpetrators of the crimes, and whether he can be regarded as a “military commander or person effectively acting as a military commander” are live issues in the case. The proposed re-characterisation therefore suggests a pre-judgement of these issues. Absent a preliminary determination on its part, the Chamber could not have taken the view that the “should have known” standard would be relevant to these proceedings, further heightening the need for clarification at this stage.

23. As such, the Defence seizes the Chamber with a request to provide the accused with the precise details of the facts and circumstances as confirmed by the Pre-Trial Chamber in the Confirmation Decision upon which it intends to rely for the proposed re-characterisation under Regulation 55. The Defence respectfully reserves its right to provide further details in its response to the Chamber’s Request upon receipt of this notice.

(b) [REDACTED]

24. [REDACTED]

³¹ ICC-01/05-01/08-2419, para. 7.
No. ICC-01/05-01/08

25. [REDACTED]

26. [REDACTED]

27. [REDACTED]

28. [REDACTED]

29. [REDACTED]

30. [REDACTED]

31. On a practical note, the Defence reiterates that the CSS has indicated that no more funds will be made available for Defence investigations, nor can it possibly be seen as reasonable to require Mr. Bemba to fund further investigations into an alternative case simply because the Prosecution has failed to establish the case it originally charged.³²

(c) The Chamber's Request requires the Defence to reveal its strategy to deal with an allegation which falls outside the charges in the present case

32. The Chamber has ordered the Defence to provide "in as much detail as possible" information on "(i) which prosecution witnesses the defence would intend to recall; and (ii) the envisaged time needed for further defence investigations and preparations."³³

33. In effect, the Chamber is ordering the Defence to provide details of its strategy to the Prosecution and Legal Representatives of Victims, in relation to an allegation with which the

³² ICC-01/05-01/08-2365, para. 30.

³³ ICC-01/05-01/08-2419, paras. 8-9.

accused is not currently charged, in order to ensure that the Chamber has the option of convicting the accused of this potential charge in its final judgement. The proposed course has no apparent legal basis, and appears contrary to the principle that the Prosecution bears the burden of proving its case. Defence Counsel have professional obligations with which they could not comply in revealing a potential defence strategy to the Prosecution and LRVs, against an allegation with which the accused has not even been charged. However, in order to continue to do its utmost to comply with orders from the Chamber, the Defence accordingly files *Confidential and Ex Parte Defence Only Annex A* to the present motion, in which it provides the information as ordered by the Chamber.

C. RELIEF REQUESTED

34. In light of the arguments set out above, the Defence requests that the Chamber:

PROVIDE the accused with precise details of the material facts and circumstances as confirmed by the Pre-Trial Chamber in the Confirmation Decision upon which it intends to rely for the proposed re-characterisation under Regulation 55.

And, once such notice is given,

ALLOW the Defence an opportunity to expand on its response to the Chamber's Request following receipt of notice of the material facts and circumstances underlying the proposed amended charge.

35. Finally, the Defence requests that the Chamber render a reasoned decision at the earliest opportunity so that the Defence, if necessary, may seek leave to appeal as necessary to ensure the application of the rights afforded to Mr Bemba under the ICC's statutory regime. A decision on such an essential aspect of the case, if notified only in the Trial Judgment, would deprive the Defence of a meaningful remedy and would lead to unnecessary uncertainty and prolongation of a Defence case, as the accused would be required to defend against both the current and proposed charge. In the absence of a judicial decision, given that the "should have known" case was rejected by the Pre-Trial Chamber and does not form part against the case as currently charged, the Defence will continue to take the position that it has no case to answer in relation to such an allegation.

The whole respectfully submitted.



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Done on the 30th of November 2012
At The Hague, The Netherlands