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**International  
Criminal  
Court**

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

Date: **8 October 2012**

**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 Document  
With  
Public Annex A**

**Prosecution's Submissions on the Procedural Impact of Trial Chamber's  
Notification pursuant to Regulation 55(2) of the Regulations of the Court**

**Source:** The Office of the Prosecutor

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

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## **REGISTRY**

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## I. Introduction

1. Pursuant to Trial Chamber III's ("Chamber") instructions, the Office of the Prosecutor ("Prosecution") herewith files its submissions on the procedural impact of the notification given by the Chamber, pursuant to Regulation 55(2) of the Regulations of the Court ("Regulations"),<sup>1</sup> that the legal characterization of the facts may be subject to change so as to consider the alternate form of knowledge to support command responsibility under Article 28(a)(i) of the Rome Statute ("Statute").

2. The Prosecution does not object to the possible change.

3. Regulation 55(3) of the Regulations provides safeguards for the Accused if the Defence proves that he will suffer actual prejudice from the possible change. Assuming, as the Prosecution anticipates, the Defence will object to the possibility or request implementation of these safeguards to ameliorate potential prejudice, the Prosecution asserts that (a) the proposed change is not a substantial departure from the findings in the Confirmation Decision; (b) the evidence offered to establish the Accused's knowledge would also necessarily prove that he should have known of the crimes; and (c) unless the Defence can establish specifically that its examination of identified witnesses would have been different or it would have interposed different or additional objections to any evidence offered by the Prosecution, had it anticipated that the evidence would also be considered to establish that the Accused "should have known", there is no need to reopen the Prosecution's case or to recall any of the Defence witnesses who already testified.

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<sup>1</sup> ICC-01/05-01/08-2324, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 21 September 2012, para. 6.

## II. Statement of Facts

4. On 15 June 2009, Pre-Trial Chamber II issued its “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”)<sup>2</sup> in which it ruled that there was “sufficient evidence to establish substantial grounds to believe that Mr. Jean-Pierre Bemba knew that the MLC troops were committing or were about to commit [...] crimes from on or about 26 October 2002 to 15 March 2003.”<sup>3</sup>

5. In making this determination,<sup>4</sup> the Pre-Trial Chamber considered several factors or indicia identified by the *ad hoc* tribunals as circumstantial evidence relevant to prove actual knowledge.<sup>5</sup> Turning to the specific facts of the case, the Pre-Trial Chamber attached weight to the widespread nature of the illegal acts committed by the *Mouvement de Libération du Congo* (“MLC”) troops; the length of the period over which these acts were committed; Mr. Jean-Pierre Bemba's visit to his forces in Bangui in early November 2002; the existence of an effective reporting system at Mr. Jean-Pierre Bemba's disposal; his ability to use the existing means of communication to contact the commanders in the field during the entire period of intervention; and the existence of media broadcasts throughout the entire period of intervention which reported about the commission of murder, rapes and pillaging by MLC forces.<sup>6</sup> Of significance to the present filing, the Pre-Trial Chamber clarified that these factors

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<sup>2</sup> 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, 15 June 2009.

<sup>3</sup> ICC-01/05-01/08-424, para. 478

<sup>4</sup> ICC-01/05-01/08-424, para. 431.

<sup>5</sup> These factors included the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communications, the *modus operandi* of similar acts, the location of the commander at the time and the geographical location of the acts. See Final Report of the Commission of Experts Established Pursuant of Security Council Resolution 780 (1992), UN Doc. S/1994/674, at page 17; ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 386; ICTY, *Prosecutor v. Blaskic.*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 307; ICTY, *Prosecutor v. Strugar.*, Case No. IT-01-42-T, Judgement, 31 January 2005, para. 368; ICTY, *Prosecutor v. Oric.*, Case No. IT-03-68-T, Judgement, 3 July 2006, para. 319; SCSL, *The Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, para. 309.

<sup>6</sup> ICC-01/05-01/08-424, para. 489.

were “also relevant in the Chamber’s final assessment of whether a superior should have known of the commission of the crimes or the risk of their occurrence.”<sup>7</sup>

6. In compliance with the Chamber’s order issued on 7 October 2009,<sup>8</sup> on 4 November 2009 the Prosecution submitted a revised Document Containing the Charges (“DCC”), which comported with the findings of the Confirmation Decision.<sup>9</sup> In that document, the Prosecution submitted that the Accused either knew or “owing to the circumstances at the time, should have known”.<sup>10</sup>

7. On 12 February 2010, the Defence filed its “*Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges*”,<sup>11</sup> arguing that the revised DCC did not reflect accurately the charges confirmed by the Pre-Trial Chamber.

8. On 20 July 2010, the Chamber issued its “Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges”, in which it held that the allegation that the Accused “should have known” of the crimes committed by MLC soldiers exceeded the scope of the confirmed charges and should be deleted.<sup>12</sup>

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<sup>7</sup> ICC-01/05-01/08-424, para. 434.

<sup>8</sup> ICC-01/05-01/08-T-14-ENG ET, page 13 lines 6 to 11

<sup>9</sup> ICC-01/05-01/08-593-Conf- Anx A, Prosecution’s Submission of the Document Containing the Charges as Confirmed by the Pre-Trial Chamber filed in accordance with the Chamber’s Order of 7 October 2009, 4 November 2009.

<sup>10</sup> ICC-01/05-01/08-395-Conf-Anx2A, Prosecution’s Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, 30 March 2009, paras 105 to 120.

<sup>11</sup> ICC-01/05-01/08-694, Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges, 12 February 2010.

<sup>12</sup> ICC-01/05-01/08-836, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, para. 121.

9. On 18 August 2010, the Prosecution submitted its Revised Second Amended DCC<sup>13</sup> in which, in accordance with the Chamber's decision, it deleted the allegation that the Accused should have known about the crimes.

10. During the presentation of its case, the Prosecution led evidence on facts including the coverage by the international media of the crimes committed by the MLC troops, the visits by the Accused to Central African Republic ("CAR") during the relevant timeframe, the MLC's reporting system, and the MLC's communication system.<sup>14</sup> The Defence examined the Prosecution's witnesses on these facts.<sup>15</sup>

11. On 13 July 2012, the Defence filed the "Defence disclosure of its list of witnesses and the Factual and Legal elements of its Case".<sup>16</sup> The Defence submitted, inter alia, that it would lead evidence on "means of verifying rumors of crimes".<sup>17</sup> The summaries of the statements of numerous Defence witnesses clarify that the expected testimony "is also relevant to the reliability of rumours of crimes attributed to the MLC, which has a bearing on the alleged *mens rea* of the accused."<sup>18</sup>

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<sup>13</sup> ICC-01/05-01/08-856-Conf-AnxA, Prosecution's Submission of the Revised Second Amended Document Containing the Charges, 18 August 2010. On 13 October 2010, the Prosecution filed its "Prosecution's Submission of its Corrected Revised Second Amended Document Containing the Charges", ICC-01/05-01/08-950-Conf-Anx A, to correct a factual mistake contained in paragraph 79 of the Revised Second Amended Document Containing the Charges in conformity with the Confirmation Decision.

<sup>14</sup> See for instance ICC-01/05-01/08-T-65-CONF-ENG ET, page 18 lines 17-20 ; ICC-01/05-01/08-T-65-CONF-ENG ET page 19 lines 14-15, lines 22-23; ICC-01/05-01/08-T-34-CONF-ENG ET, page 33 line 18; ICC-01/05-01/08-T-168-CONF-ENG ET, page 22 lines 18-19; ICC-01/05-01/08-T-214-CONF-ENG ET, page 49 line 10; ICC-01/05-01/08-T-214-CONF-ENG ET, page 48, lines 12-13, lines 18-19; ICC-01/05-01/08-T-215-CONF-ENG ET, page 60 lines 4-5; ICC-01/05-01/08-T-205-CONF-ENG ET, page 54 lines 4-5; ICC-01/05-01/08-T-205-CONF-ENG ET, page 53 lines 19-20, lines 23-24; ICC-01/05-01/08-T-205-CONF-ENG ET, page 48 lines 21-22; ICC-01/05-01/08-T-188-CONF-ENG ET, page 7 lines 1-2; ICC-01/05-01/08-T-188-CONF-ENG ET, page 23 lines 19-20, lines 23 to 25; ICC-01/05-01/08-T-188-CONF-ENG ET, page 24 lines 18-19, lines 23 to 25; ICC-01/05-01/08-T-201-CONF-ENG ET, page 66 line 25 ; ICC-01/05-01/08-T-176-CONF-ENG ET, page 61, lines 11-12.

<sup>15</sup> See for instance ICC-01/05-01/08-T-69-CONF-ENG ET, page 48 lines 8-9, lines 13-14 ; ICC-01/05-01/08-T-140-CONF-ENG ET, page 22 lines 6-7; ICC-01/05-01/08-T-171-CONF-ENG ET, page 3 lines 7 to 10 ; ICC-01/05-01/08-T-171-CONF-ENG ET page 43, lines 21 to 23.

<sup>16</sup> ICC-01/05-01/08-2243-Conf, Defence disclosure of its list of witnesses and the Factual and Legal elements of its Case, 13 July 2012.

<sup>17</sup> ICC-01/05-01/08-2243-Conf, para. 18 (a).

<sup>18</sup> CAR-D04-0003-0196. See also CAR-D04-003-0162 at CAR-D04-003-0163; CAR-D04-003-0166 at CAR-D04-003-0167; CAR-D04-003-0168 at CAR-D04-003-0169; CAR-D04-003-0170 at CAR-D04-003-0171; CAR-D04-003-0172 at CAR-D04-003-0173; CAR-D04-003-0174 at CAR-D04-003-0175; CAR-D04-003-0176

12. On 21 September 2012, the Chamber gave notice to the parties and participants pursuant to Regulation 55(2) of the Regulations that in its decision under Article 74 of the Statute, without exceeding the facts and circumstances described in the charges and any amendment thereto, it may modify the legal characterization of the facts so as to consider the alternate form of knowledge contained in Article 28(a)(i) of the Statute, that is, 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.

### **III. Prosecution’s Submissions**

#### **(a) Impact of the notice on the Prosecution’s case**

13. The Prosecution submits that the notice has no impact on the Prosecution’s case. The Prosecution’s theory of the case is consistent with the possible change to the legal characterization of the facts. The same evidence presented by the Prosecution to prove that Jean-Pierre Bemba Gombo (“Accused”) had actual knowledge also proves that the Accused, “owing to the circumstances at the time, should have known”.

#### **(b) Availability of measures to protect the rights of the Defence pursuant to Regulation 55(2) and (3) of the Regulations**

14. Anticipating the Defence’s opposition to re-characterization at this stage by claiming that it will cause unfair and irreparable prejudice to the Accused, the Prosecution submits that in fact no discernible and actual prejudice is likely to occur. If the Defence can demonstrate that this proposed recharacterisation is both a substantial departure and that it caught the Defence unfairly by surprise and will

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at CAR-D04-003-0177; CAR-D04-003-0178 at CAR-D04-003-0179; CAR-D04-003-0180 at CAR-D04-003-0181; CAR-D04-003-0182 at CAR-D04-003-0183; CAR-D04-003-0184 at CAR-D04-003-0185.

cause prejudice, however, Regulation 55(3) authorizes the Chamber to take steps to ameliorate the prejudice by ensuring that the Defence has adequate time and facilities to respond to the change and the opportunity to recall witnesses or present new witnesses or evidence.

15. First, the Prosecution notes that the Notice does not propose a drastic departure from the mode of liability identified in the Confirmation Decision. On the contrary, it is difficult to imagine a less significant variation than the one suggested by the Trial Chamber, namely, the consideration of what is in effect a lesser included element within the mode of liability under Article 28(a)(i). This is a critical consideration in determining whether the Defence has suffered any tangible prejudice by the Notice, and if so, the extent of such prejudice.

16. To the extent that it bears on a claim of unfair surprise, the Prosecution notes that (a) the “should have known” standard was always a real possibility in this case, and (b) the Defence itself was quite aware of this.

17. For one, the Pre-Trial Chamber, in analyzing the factors establishing the Accused’s knowledge, specifically noted that they are also relevant in the final assessment of whether a superior “should have known” of the commission of the crimes or the risk of their occurrence.<sup>19</sup> Though the Trial Chamber struck language to this effect from the Amended DCC on the sole ground that the Pre-Trial Chamber did not expressly confirm that theory, it did not reject “should have known” on substantive legal or factual grounds. Thus, in a judicial system that expressly provides for the possibility of a legal re-characterization of the facts, the findings by the Pre-Trial Chamber that the Accused should have known of the crimes and/or the risk that they would occur, combined with the inclusion of that construction in the

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<sup>19</sup> ICC-01/05-01/08-424, para. 434.



Amended DCC and the basis for the Chamber's order striking it, together discredit a potential claim that the Defence was caught completely unaware.

18. Second, during the presentation of its case, the Prosecution led abundant evidence on facts relevant to establish that information about the ongoing crimes was so widespread and available to the Accused that even if the Prosecution could not prove his actual knowledge by direct evidence – such as an unambiguous admission to others that he knew – the facts would establish circumstantially, beyond a reasonable doubt, that he knew of them. This circumstantial evidence that would permit the Chamber to infer actual knowledge is precisely the same evidence that would establish that he should have known. In this regard, the Defence also examined and challenged the Prosecution's witnesses on this type of evidence, such as its question to one witness, "Did you have any reason to suspect that MLC troops would misbehave if they were sent to Bangui"?<sup>20</sup>

19. Third, the Defence, in listing the key facts on which it intends to lead evidence, explained that "the case that Mr. Bemba knew of the underlying crimes is based", among others, on factors also relevant to the standard that the Accused "owing to the circumstances at the time, should have known", such as: (i) Mr. Bemba's visits to CAR, (ii) the duration and extensive nature of the attack against the civilian population as well as the widespread nature of the illegal acts committed by MLC members, (iii) broadcasts in the press and Mr. Bemba's review of that press/media, and (iv) Mr. Bemba's means of communication.<sup>21</sup> In other words, the Defence

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<sup>20</sup> ICC-01/05-01/08-T-217-CONF-ENG ET, page 47 lines 24-25. See also, ICC-01/05-01/08-T-140-CONF-ENG ET, page 22 lines 6-7. Question: "Do you remember stating that during that period Mr. Bemba came to the Central African Republic only once?" ICC-01/05-01/08-T-171-CONF-ENG ET, page 3 lines 7 to 10. Question: "Yesterday we were at the point of examining whether or not Mr. Bemba had visited the Central African Republic particularly PK12, where the troops were; and today my question is as follows: was he in other places in the Central African Republic where operations were ongoing in which the MLC was involved?" ICC-01/05-01/08-T-98-CONF-ENG ET, page 41 lines 19 to 21. Question: "Witness, did General Bombayake inform you that from his standpoint and as far as he knew, Jean-Pierre Bemba was never informed of the pillaging and theft attributed to the MLC soldiers?" .

<sup>21</sup> ICC-01/05-01/08-2243-Conf, para. 18 (a).

has already expressly stated that it will challenge the factors on which the Prosecution will rely to establish that Mr. Bemba both knew and should have known.

20. In light of the substantial overlap in the types of evidence used to prove known and should have known, the Prosecution submits that the proposed change will not unfairly prejudice the Accused. In any event, the Defence has the burden of showing likely or actual prejudice in this regard. Conclusory and general assertions of surprise should be insufficient. Rather, the Defence should be required to show *concretely* and *specifically* how its case would have been materially different had it been informed at an earlier stage of the possible legal re-characterization.

21. Even assuming that the Defence does somehow demonstrate that this proposed change is wholly unexpected, the possibility of prejudice is remote at best. The Prosecution observes that the Defence has just begun the presentation of its evidence. It has called three expert witnesses whose evidence is unrelated to the factual issues concerning his knowledge of the crimes. It also called two insider witnesses who were proffered in part, according to defence summaries provided in advance of their appearance, to testify about “rumours” of crimes or other issues relevant to whether the Accused should have known that the crimes were or would be occurring. Moreover, 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”.

22. In any event, it is clearly within the ability of the Chamber to fashion particular measures to prevent actual prejudice. For example, if the Defence can establish that it would have asked particular witnesses different questions pertaining to whether the Accused “should have known” about the crimes, the Chamber can recall those witnesses or consider other steps, such as authorizing the submission of

statements. The type of measure to be fashioned will of course depend on the particular Defence claim. The Prosecution cannot make meaningful comments on these matters before it knows the Defence arguments, which presumably will be filed on or before 18 October 2012. The Prosecution therefore reserves the right to request leave to reply to those submissions should they raise particular claims to which a response will be relevant and helpful, after the Defence submissions are filed. In the alternative, the Prosecution will request that a status conference be convened to entertain oral submissions.



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**Fatou Bensouda, Prosecutor**

Dated this 8<sup>th</sup> Day of October 2012

At The Hague, The Netherlands