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Critical Issues in the *Bemba* Confirmation Decision

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Abstract
The International Criminal Court (ICC) has issued its third confirmation decision against Jean-Pierre Bemba Gombo,[1] the former president of the rebel Mouvement de Libération du Congo (MLC) and commander in chief of its military wing, the Armée de Libération du Congo (ALC).[2] The decision is, in principle, to be welcomed, since it constitutes a further consolidation of the ICC case law and breaks new ground in some important areas, for example the law of crimes against humanity (Art. 7 of the ICC Statute[3])[4] and command responsibility (Art. 28).[5] From an outsider's perspective it also seems that the Chamber, on the basis of the available (disclosed) evidence, took the right decision when it changed the Prosecutor's liability from (co-)perpetration (Art. 25(3)(a)) to command responsibility. Yet there are some fine legal-technical points where the Chamber did not dig deep enough, incurred conceptual errors, or drew some illogical conclusions. These issues shall be discussed briefly here, not in a destructive spirit but to contribute constructively to the improvement of the future case law.

Key words
Bemba case; command responsibility; confirmation procedure; cumulative charging; mental element; modes of liability

1. The Chamber interprets the term '**intentional**' in the **crime against humanity of torture** (Art. 7(2)(e)) as excluding 'knowledge' in the sense of Article 30(3).[6] It further finds it unnecessary to demonstrate the perpetrator's awareness as to the severity of the harm inflicted.[7] It considers that this interpretation 'is consistent' with paragraph 4 of the General Introduction to the Elements of Crimes,[8] which states that with regard to 'elements involving value judgement' it is not necessary

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1 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC 01/05–01/08, Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, 15 June 2009 (hereafter *Bemba* confirmation decision).
2 The ALC entered the Central African Republic (CAR) from the Democratic Republic of Congo (DRC) on or about 16 October 2002 in order to support former CAR President Ange-Félix Patassé against insurgents, and left on 15 March 2003; see *Bemba* confirmation decision, *supra* note 1, paras. 101, 126; on the MLC and Bemba's role see ibid., paras. 451 ff.
3 Articles without reference belong to the (Rome) Statute of the International Criminal Court (ICC Statute).
4 *Bemba* confirmation decision, *supra* note 1, paras. 71 ff.
5 Ibid., paras. 402 ff.
6 Ibid., para. 194.
7 Ibid., para. 194.
8 Report of the Preparatory Commission for the ICC Add. Part II. Finalized draft text of the Elements of Crimes. PCNICC/2000/1/Add. 2., 2 November 2000.

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that the perpetrator him- or herself completes the respective value judgement.[9] With these few phrases the Chamber, maybe unconsciously, opens up a Pandora's box. The first question is what the Chamber means if it states that the term 'intentional' excludes knowledge in the sense of Article 30(3). Does it understand 'intentional' in a purely volitional sense as will, desire or purpose? Or does it only want to exclude awareness with regard to a *circumstance* required by the offence's definition? The former interpretation conflicts with Article 30(2)(b) second alternative, according to which intent also encompasses awareness that a *consequence* 'will occur in the ordinary course of events'. If the Chamber had wanted to exclude the cognitive intent element it would have had to exclude not only paragraph 3 but also paragraph 2(b) second alternative of Article 30. In addition, the awareness with regard to a consequence as embodied in paragraph 2(b) is, in an identical fashion, also contained in paragraph 3, and this makes the Chamber's statement even more confusing. For if the Chamber had wanted to exclude only awareness regarding circumstances it should have said so explicitly. If, on the other hand, it had wanted to exclude awareness (the cognitive side of intent) in general, it should have excluded also the second alternative of paragraph 2(b). Be that as it may, the Chamber's following statement regarding the absence of knowledge as to the severity of the harm seems to indicate that what it really wanted was to exclude the knowledge requirement as to a circumstance, *in concreto* as to the normative element (circumstance) of 'severe'. The Chamber's reference to the Elements in this regard creates, however, the impression that it mixes up the general knowledge requirement (cognitive element of intent) and the specific problem of knowledge with regard to normative elements of the offence (called 'elements involving value judgement' in the Elements). The Chamber seems to overlook that it is one thing to require, as Article 30(3) *inter alia* does, awareness with regard to circumstances but quite another to redefine this awareness requirement with regard to normative elements. In other words, the specific problem of knowledge with regard to these elements cannot justify the general exclusion of the knowledge requirement with regard to all (including descriptive) elements.

If the Chamber indeed wanted to interpret the term '*intentional*' in a purely volitional sense on the basis of its literal meaning, it needs to be said that this meaning is, to say the least, *ambiguous*.[10] While traditional common law knows specific intent crimes implying aim and purpose, for example burglary,[11] the concepts of intent or intention were always understood in both a volitional and a cognitive sense.[12] Modern English law still includes in the definition of intention, apart from purpose,

9 *Bemba* confirmation decision, *supra* note 1, para. 194.

10 For a discussion with regard to the genocide's 'intent to destroy' see K. Ambos, 'Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes', in L. C. Vohrah et al. (eds.), *Man's Inhumanity to Man. Essays in Honour of Antonio Cassese* (2003), 11, at 19 ff.

11 G. Williams, *Criminal Law: The General Part* (1961), 34.

12 See G. Williams, *The Mental Element in Crime* (1965), 20 ('Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one's conduct, or else of foresight that the result will certainly follow'). See also G. P. Fletcher, *Rethinking Criminal Law* (1978, repr. 2000), 440; M. Elewa Badar, 'The Mental Element in the Rome Statute of the ICC: A Commentary from a Comparative Criminal Law Perspective', (2008) 19 *Criminal Law Forum* 473, at 479.

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'foresight of virtual certainty'; at best, the core meaning of intent or intention is reserved to desire, purpose, and so on.[13] Also, the US Model Penal Code which served as a reference for the ICC Statute in many regards, albeit distinguishing between 'purpose' and 'knowledge' (s. 2.02(a)), defines the former in a cognitive sense by referring to the perpetrator's 'conscious object' with regard to conduct and result.[14] Similarly in civil law jurisdictions the distinction between purpose and knowledge and thus the meaning of 'intention' is not always clear-cut. In French law, the expression 'intention criminelle' was never defined in the Code Pénal. In the scholarly literature, 'intention' is defined in both a volitional sense[15] and a cognitive sense.[16] On this basis, a distinction between the volitional *dolus directus* and the cognitive *dolus indirectus* is drawn.[17] In German and Spanish law the apparently clear-cut volitional tendency of *dolus directus* of first degree ('dolus specialis', 'intención', 'Absicht')[18] is by no means uncontroversial.[19]

2. Similar conceptual inconsistencies or imprecisions can be found in the Chamber's discussion of the **mental element** according to **Article 30**.[20] First of all, the Chamber's understanding of *mens rea* as 'a certain state of guilty mind' or 'the subjective elements'[21] is a purely naturalistic one limiting the *mens rea* to the psychological state of mind of the perpetrator at the moment of commission. There seems to be no room for normative considerations linked to the blameworthiness (in the sense of *Vorwerfbarkeit* or *reprochabilidad*) and, on this basis, culpability (in the sense of *Schuld* or *culpabilidad*) of the perpetrator's conduct. In fact, the Chamber seems to employ the term 'culpability' at a later stage in a purely psychological-naturalistic sense.[22] Thus it seems as if the Chamber is unaware of the theoretical distinction between a psychological and normative concept of culpability (guilt) which is so essential for a modern and fair theory of criminal law.[23] Second, the Chamber's reference to the

13 A. Ashworth, *Principles of Criminal Law* (2009), 170 ff. (171); A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (2007), 120 ff. (121). In this sense also I. Kugler, *Direct and Oblique Intention in the Criminal Law* (2002), at 4 ff., distinguishing between direct and oblique intention

14 The relevant part of s. 2.02(a) reads, 'A person acts purposely with respect to a material element of an offense . . . if the element involves the nature of his conduct or a result thereof, it is his *conscious object* to engage in conduct of that nature or to cause such a result' (emphasis added). See also Fletcher, *supra* note 12, at 440 ff.

15 B. Bouloc, *Droit pénal général et procédure pénale* (2006), 238: 'volonté tendue à dessein vers un but interdit par la loi pénale' ('will that aims to realize an illegal goal').

16 Cf. Crim. 7 janvier 2003, Bull. no.1: 'la connaissance ou la conscience chez l'agent qu'il accomplit un acte illicite' ('the agent's knowledge or awareness that he commits an illegal act'). See also E. Garçon, *Code pénal annoté*, Art.1, no. 77; R. Merle and A. Vitu, *Traité de droit criminal*, vol. 1 (1997), no. 579.

17 J. Pradel, *Droit pénal général* (2006), 463; C. Hennau and J. Verhaegen, *Droit pénal général* (2003), no. 350 ff.

18 C. Roxin, *Strafrecht-Allgemeiner Teil. Grundlagen. Der Aufbau der Verbrechenslehre*. Vol. 1 (2006), §12 mn. 7 ff.; S. Mir Puig, *Derecho Penal Parte General* (2006), 244, mn. 82–3.

19 For some Spanish scholars *intención* is to be understood as *dolus* in the general sense or as encompassing both forms of *dolus directus* (desire and knowledge); see, on the one hand, J. Cerezo Mir, *Curso de Derecho penal español, Parte General II. Teoría juridical del delito* (1998), 153; on the other, D. M. Luzon Peña, *Curso de Derecho penal: parte general* (2004), 416.

20 *Bemba* confirmation decision, *supra* note 1, para. 352 ff.

21 Ibid., para. 351.

22 See, e.g., ibid., para. 368, where it equates it with *dolus*.

23 See on this important distinction G. P. Fletcher, *The Grammar of Criminal Law* (2007), 307 ff., 319 ff.; with regard to international criminal law, K. Ambos, 'Remarks on the General Part of International Criminal Law', (2006) 4 *Journal of International Criminal Justice* 660, at 667–8; for an explanation with regard to the structure or system of crime see K. Ambos, 'Toward a Universal System of Crime: Comments of George Fletcher's Grammar of Criminal Law', (2007) 28 *Cardozo Law Review* 2647, at 2648 ff.

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concept of *dolus* in connection with Article 30[24] is, to say the least, unfortunate, since this concept includes, as correctly acknowledged by the Chamber,[25] *dolus eventualis*, and this very standard is later (together with recklessness and other lower standards) rejected.[26]

This indeed is the essence of the Chamber's discussion of Article 30. While I concur with the exclusion of *dolus eventualis* (contrary to the Lubanga Pre-Trial Chamber)[27] and recklessness from Article 30 *in the result* – in fact, I have argued earlier that in case of *dolus eventualis* a perpetrator is not aware, as required by Article 30(2)(b), that a certain consequence will occur in the ordinary course of events[28] and this applies *a fortiori* to recklessness, which also requires awareness as to the risk of a negative consequence[29] – some clarifications are needed. While the *travaux* confirm a restrictive approach as to Article 30,[30] they are only a 'supplementary means of interpretation' (cf. Article 32 Vienna Convention on the Law of Treaties) and thus not decisive in the light of a clear or different literal interpretation. The literal interpretation, in turn, is predicated on the conceptual understanding of *dolus eventualis*. In this regard one must not overlook the fact that the 'commonly agreed' standard invoked by the Chamber[31] is by no means the only one. In fact, there are other, more cognitive concepts of *dolus eventualis* (requiring awareness or certainty as to a consequence)[32] and these may indeed be included in Article 30. For this reason it is a *petitio principii* if the Chamber justifies its restrictive reading of Article 30 with the *lex stricta* rule of Article 22(2)[33] because the invocation of this rule against a broad reading of Article 30 presupposes what has to be demonstrated in the first place, namely that Article 30 has to be understood in a narrow (and for that purpose strict) sense.

In contrast, in the case of recklessness it is generally agreed that it stands between *dolus eventualis* and conscious negligence (*bewußte Fahrlässigkeit*);[34] in cognitive terms, the reckless perpetrator possesses at most a 'risk consciousness' which, on

24 *Bemba* confirmation decision, *supra* note 1, para. 357.
25 Ibid., para. 357.
26 Ibid., para. 360 ff.
27 See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04–01/06, Decision on the confirmation of charges, 29 January 2007, paras. 349 ff. (352).
28 K. Ambos, 'General Principles of Criminal Law in the Rome Statute', (1999) 10 *Criminal Law Forum* 1, at 21–2; Ambos, *supra* note 10, at 20–1; Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002/4), 771; Ambos, *La parte general del derecho penal internacional* (2005/6), 398–9; Ambos, *Internationales Strafrecht* (2008), §7 mn. 67, with further references in n. 297. See for the same interpretation *Bemba* confirmation decision, *supra* note 1, para. 362 ('will occur' read together with 'in the ordinary course of events' close to certainty).
29 Ambos, 'General Principles', *supra* note 28, at 21; Ambos, *Allgemeiner Teil*, *supra* note 28, at 771; Ambos, *Parte general*, *supra* note 28, at 398–9.
30 See the detailed analysis in *Bemba* confirmation decision, *supra* note 1, paras. 364 ff.
31 Ibid., para. 363.
32 See the reference to the Norwegian and Finnish discussion in Ambos, *supra* note 10, at 20–1 with n. 37; also Ambos, *Allgemeiner Teil*, *supra* note 28, at 771. For the different theories of dolus eventualis see Roxin, *supra* note 18, §12 mn. 35 ff.
33 *Bemba* confirmation decision, *supra* note 1, para. 369.
34 See the seminal article by T. Weigend, 'Zwischen Vorsatz und Fahrlässigkeit', (1981) 93 *Zeitschrift für die gesamte Strafrechtswissenschaft* 657, 673 ff.

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the one hand, clearly distinguishes recklessness from negligence[35] but, on the other, must not be confused with the awareness requirement in the cognitive theories of *dolus eventualis*. For this reason it is not correct if the Chamber equates the so-called subjective recklessness (Cunningham recklessness in English law)[36] with *dolus eventualis*;[37] it may be closer to it than to conscious negligence, but it cannot be put on an equal footing with it.

3. The other, maybe most important, issue of the decision concerns the correct **mode of liability** to be applied. The Chamber's substitution of the Prosecutor's **co-perpetration** by the command responsibility mode is convincing in the result but not completely satisfactory in its reasoning. As to co-perpetration the Chamber follows the 'control over the crime' theory,[38] but then, quite surprisingly, only focuses on the subjective requirements, arguing that these have not been satisfied and therefore it is not necessary to examine the objective requirements.[39] Such a bypassing of the objective requirements of a mode of liability (or, *mutatis mutandis*, of an offence definition) is only justified if the subjective requirements are beyond any doubt missing. This is clearly not the case here; in fact, as will be seen in the following, the subjective requirements of co-perpetration are quite controversial. The Chamber distinguishes between three subjective requirements which must be fulfilled cumulatively – that is, (i) the co-perpetrator's intent and knowledge as to the committed crimes, (ii) his awareness and acceptance as to the fulfilment of the material elements by the implementation of the common plan, and (iii) his awareness as to the factual circumstances of the joint control.[40] While the first requirement is uncontroversial – clearly, the co-perpetrator, being a perpetrator, must himself act with intent and knowledge within the meaning of Article 30 as to the underlying crimes – the two other requirements deserve closer attention. While the second requirement – as the first – stems from both the *Lubanga* and *Katanga/Chui* confirmation decisions,[41] the third requirement is recognized unambiguously only in *Lubanga*,[42] and not in *Katanga/Chui*.[43] In this decision this requirement is discussed only in relation to co-perpetration *through another person* – that is, indirect perpetration or perpetration by means – while Pre-Trial Chamber I clearly excludes it for 'plain co-perpetration'.[44] This is the correct view, since this (third) requirement demands

35 Cf. Ambos, *Allgemeiner Teil*, *supra* note 28, at 700–1, with further references; also K. Ambos, 'Superior Responsibility', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), III, 823, at 867–8.

36 For a further discussion and references see Weigend, *supra* note 34, 674 ff. (687); J. Watzek, *Rechtfertigung und Entschuldigung im englischen Strafrecht* (1997), at 46; American Law Institute, *Model Penal Code*, (1985), I, 236 ff.

37 *Bemba* confirmation decision, *supra* note 1, para. 357 with n. 448. The Chamber in this regard only repeats the imprecise ICTY case law; see the references ibid.

38 Ibid., para. 348. In fact, the Chamber follows insofar the *Lubanga* confirmation decision, *supra* note 27, paras. 330 ff., and *Prosecutor v. Germain Katanga and Mathieu Ngudjolo/Chui*, ICC-01/04–01/07, Decision on the Confirmation of Charges, 30 September 2008, paras. 480 ff.

39 *Bemba* confirmation decision, *supra* note 1, para. 350.

40 Ibid., para. 351.

41 *Lubanga* confirmation decision, *supra* note 27, para. 349 ff., 360 (ii); *Katanga* confirmation decision, *supra* note 38, para. 533. The Chamber quotes these decisions with pages.

42 *Lubanga* confirmation decision, *supra* note 27, paras. 366–367.

43 *Katanga* confirmation decision, *supra* note 38, paras. 534–535.

44 Ibid., para. 535 ('last requirement does not apply').

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too much from the co-perpetrator whose form of control is structurally different from the one of the indirect perpetrator: while the latter exercises control *over the physical perpetrators* and must be aware of this powerful position, the co-perpetrator only exercises control *over the crime jointly* with the other co-perpetrator(s). Thus, in the former case there exists a *vertical relationship* between the indirect perpetrator and the physical perpetrator, while in the latter this relationship is *horizontal*. There may be a combination of a joint control over physical perpetrators – that is, a mixed horizontal–vertical relationship – in cases where two or more superiors exercise joint control over physical perpetrators. This, in fact, has been the situation of the *Katanga/Chui* decision (Katanga and Chui as co-perpetrators through physical perpetrators) and it is also, structurally, the situation in *Bemba*, for one may consider Bemba and Patassé as co-perpetrators jointly acting through their subordinates as direct perpetrators.[45]

In casu, the Chamber finds that Bemba does not even fulfil the first subjective requirement – that is, was not aware that the crimes would be committed.[46] While this may be the right decision in the light of the evidentiary standard of Article 61(7) ('substantial grounds to believe') and the available facts, and, indeed, it has not been appealed by the Prosecutor,[47] it is difficult to reconcile with the Chamber's subsequent finding as to command responsibility, namely that Bemba 'knew' or even 'actually knew' that his troops were committing or about to commit the respective crimes.[48] One wonders how it can be that one and the same person acts, on the one hand (as co-perpetrator), without knowledge and, on the other, with knowledge (as commander) with regard to the very same crimes. The Chamber does not ignore this logical impasse but its attempted way out by proposing a different knowledge standard for co-perpetration and command responsibility, arguing that the cognitive element as defined in Article 30 only applies to Article 25,[49] is plainly incorrect and does not find any support in any (judicial or scholarly) authority. Indeed, Article 30 provides a general definition of the volitional and cognitive side of intent which is applicable to the ICC Statute as a whole 'unless otherwise provided' – that is, unless there is no different (lower) standard provided for (as, for example, the 'should have known' standard of Article 28).[50] The fact that the subjective side of the superior's liability under Article 28 is different from the one under Article 25(3) in that it refers to the subordinates' crimes (and not to his own crimes)[51] is irrelevant in this

45 The point was made by the defence; see *Bemba* confirmation decision, *supra* note 1, para. 345 ('indirect co-perpetrator').

46 Ibid., paras. 372, 400–401.

47 See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC 01/05–01/08, Prosecution's Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, 22 June 2009 (hereafter Prosecution's leave to appeal).

48 *Bemba* confirmation decision, *supra* note 1, paras. 478 ff. (478, 489).

49 Ibid., para. 479 ('distinction between the knowledge required under article 30(3) [i.e. for Article 25] and article 28(a)').

50 Cf. G. Werle and F. Jessberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', (2005) 3 *Journal of International Criminal Justice* 35.

51 Cf. *Bemba* confirmation decision, *supra* note 1, para. 479: 'Under article 30 of the Statute the person is aware of the occurrence of a result of his *own act* . . . while this is not the case with article 28, where the person does not participate in the commission of the crime (i.e., the crime is *not* a direct result of his *own act*)' (emphasis added).

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respect. Apart from that, the Chamber's affirmation in this context that in the case of Article 28 the superior does not participate in the commission of the crime[52] is highly controversial and presupposes a profound analysis of the doctrinal structure of Article 28 which the Chamber fails to undertake.[53]

While the Chamber's third subjective requirement, as explained above, does not even find unequivocal support in the ICC's own jurisprudence and appears to set too high a standard for co-perpetration, the *second requirement* – awareness and acceptance as to the fulfilment of the material elements by the implementation of the common plan – is in fact a consequence of the mixed objective–subjective contents of the common plan requirement. While the ICC's case law so far has given this requirement a rather objective meaning,[54] it also possesses clearly a subjective tendency, since the common plan is only the potential co-perpetrators' decision (*Tatentschluß*) jointly to commit the crime. This decision only manifests itself in the external world with the implementation of the plan – that is, the joint (functional) commission of the envisaged crime. Before this joint commission, which constitutes in fact the second (objective) requirement of co-perpetration,[55] the common plan belongs only to the inner world of the planners and thus constitutes an inchoate offence whose punishability presupposes a specific codification, for example as conspiracy or *Verbrechensverabredung* (§30(2) 3rd alternative German *Strafgesetzbuch*).

4. As to the Chamber's on the whole convincing considerations on **command responsibility** I have only two minor objections. First, the Chamber convincingly affirms – in explicit contrast to the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY)[56] – that there must be some form of *causality* between the superior's failure of supervision and the subordinates' underlying crimes.[57] In the result, the Chamber follows the *Risikoerhöhungstheorie* ('theory of risk aggravation or increase', 'théorie du risque aggravé', 'teoría del aumento del riesgo', hereinafter 'risk theory' or 'risk approach'), according to which it suffices that the commander's non-intervention increased the risk of the commission of the subordinates' crimes.[58] The Chamber comes to this solution after acknowledging the problems of causality in cases of omission.[59] Indeed, it seems to see the risk theory as the – apparently logical ('[T]herefore') – solution to these problems. It also seems to

52 Ibid., para. 479 (as quoted in note 51 *supra*).
53 The Chamber limits itself to a little profound statement in para. 405. For my view see Ambos, *supra* note 35, at 850 ff.; Ambos, *Allgemeiner Teil, supra* note 28, at 666 ff.; Ambos, *Parte general, supra* note 28, at 295 ff.
54 See *Lubanga* confirmation decision, *supra* note 27, para. 343 ff. (although requiring awareness as to the risk of a commission of a crime by implementation of the plan); *Katanga* confirmation decision, *supra* note 38, paras. 522–523 (strictly objective).
55 See *Lubanga* confirmation decision, *supra* note 27, paras. 346 ff. ('coordinated essential contribution by each co-perpetrator'); *Katanga* confirmation decision, *supra* note 38, paras. 524 ff.
56 See *Bemba* confirmation decision, *supra* note 1, para. 423 with further references in n. 550.
57 Ibid., para. 420 ff. (423). See for a customary law rule in this respect G. Mettraux, *The Law of Command Responsibility* (2009), 83 ff. (87), 263.
58 *Bemba* confirmation decision, *supra* note 1, para. 425.
59 Ibid., para. 425 ('effect of an omission cannot be empirically determined with certainty', 'not be practical to predict exactly what would have happened if').

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view the risk approach as something completely different from a causality theory.[60] I may misread the Chamber's considerations on this point, but I think it would have been less confusing if it had more clearly separated its (brief) considerations of the causality demonstration in cases of omission from the solution it ultimately adopts. For the fact that omissions cannot display 'causal energy' and therefore must be determined on the basis of a normative (instead of naturalistic) concept of causation[61] does not predetermine the concept of causation ultimately applied in these cases. Indeed, it is logically possible to apply an inverted *conditio sine qua non* or 'but for test'; in fact, the Chamber formulates such a test but seems to consider it inapplicable in these cases.[62] Yet it is ultimately a policy question if one prefers the risk approach or a stricter causality test.[63] In any case, the risk approach also constitutes a causality test in the sense that it implies that the increased risk was at least one of the causes of the harmful result.[64] Clearly, though, it is easier to demonstrate that certain conduct – be it an act or an omission – increased the risk with a view to the production of a harmful result than that it directly caused such a result.

My second query refers to the Chamber's *obiter*-like statement that the 'had reason to know' criterion embodied in the Statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) is different from the 'should have known' standard under Article 28.[65] In fact, it quite clearly follows from the *travaux* of the command responsibility provisions since the 1976 Additional Protocol I to the Four Geneva Conventions of 1949 that both formulations essentially constitute negligence standards.[66] While, for example, the UN Secretary-General's Report about the establishment of the ICTY describes the 'had reason to know' standard as 'criminal negligence',[67] the US Model Penal Code refers to 'should have known' in the context of negligence.[68] If one really wants to read a difference in these two standards considering that the 'should have known' standard 'goes one step below' the 'had reason to know' standard,[69] it would be the ICC's task to employ a restrictive interpretation which brings the former standard in line with the latter.[70]

60 Before its conclusion ('[T]herefore') the Chamber states that '[T]here is no direct causal link that needs to be established' (*Bemba* confirmation decision, *supra* note 1, para. 425).

61 Ambos, *supra* note 35, at 860.

62 *Bemba* confirmation decision, *supra* note 1, para. 425 ('to apply a "but for test", in the sense that, but for the superior's failure to fulfil his duty to take reasonable and necessary measures to prevent crimes, those crimes would not have been committed by his forces.')

63 See, e.g., on the 'probability theory' R. Arnold, in O. Triffterer (ed.), *Commentary on the Rome Statute of the ICC* (2008), Article 28 mn. 109.

64 See recently Mettraux, *supra* note 57, at 87, defining the causality as a 'significant – though not necessarily the sole – contributing factor'.

65 *Bemba* confirmation decision, *supra* note 1, para. 434.

66 For a discussion and further references see Ambos, in Cassese et al., *supra* note 35, at 865 ff. See more recently Arnold, *supra* note 63, mn. 97, concluding that 'notwithstanding a slightly different wording, the applicable test is still whether someone, on the basis of the available information, *had reason to know* in the sense of Add. Prot. I' (emphasis in the original).

67 S/RES 827 (1993) 25 May 1993, reprinted in 32 ILM 1203 (1993), para. 56.

68 According to MPC, s. 2.02(2)(d), a person acts negligently 'when he should be aware of a substantial and unjustifiable risk '.

69 Mettraux, *supra* note 57, at 210.

70 Cf. ibid., at 212; see also Arnold, as quoted in note 66 *supra*.

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5. As to the practice of **cumulative charging**[71] – that is, the multiple charging of the same conduct – the Chamber deems this only possible, following the ICTY's Celibici-test,[72] with regard to 'distinct crimes' – that is, if 'each' of the offences in question 'requires at least one additional material element not contained in the other'.[73] In turn, in terms of the doctrine of concurrence of offences (*concursus delictorum*,[74] *concours de qualifications/d'infractions*, *concurso de leyes/delitos*, *Konkurrenzen*),[75] this means that cumulative charging is only admissible if there exists a 'real' or 'true' concurrence (*concours idéal*, *concurso ideal*, *Idealkonkurrenz*) – that is, a situation where the same conduct fulfils various distinct offences;[76] this is to be distinguished from a 'merger' or an apparent or 'false' concurrence (*concours apparent*, *concurso apparente*, *Gesetzeskonkurrenz/-einheit*), where one offence (the 'smaller' offence) is completely contained in another (the 'larger' offence) – that is, it is subsumed by the larger offence or this offence 'consumes' the smaller offence (consumption or inclusion/speciality).[77] This parallel to the doctrine of *concours* has only been drawn implicitly by the Chamber when considering that torture (as a crime against humanity) and outrages against personal dignity (as a war crime) are 'fully subsumed' by rape (as a crime against humanity),[78] since this act requires, compared with torture, only one additional element, namely the act of penetration,[79] and, compared with outrages, 'in essence the constitutive elements of force or coercion'.[80] While this is,

71 *Bemba* confirmation decision, *supra* note 1, para. 199 ff.

72 *Prosecutor v. Delalić et al.*, App. Judgment 20 Feb. 2001, Case No. IT-96–21-A, para. 412 (quoted by *Bemba* confirmation decision, *supra* note 1, in fn. 277). For an analysis see A. Bogdan, 'Cumulative charges, convictions and sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda', (2002) 3 *Melbourne Journal of International Law* 1, at 20 ff.; N. Valabhji, 'Cumulative convictions based on the same acts under the Statute of the ICTY', (2002) 10 *Tulane Journal of International and Comparative Law* 185, at 191 ff.; H. Azari, 'Le critère Celebici du cumul des déclarations de culpabilité en droit pénal international', (2007) 1 *Revue de Science Criminelle et de droit pénal comparé*, 1, at 4 ff.

73 *Prosecutor v. Delalić et al.*, *supra* note 72 para. 202. The same test, known in common law as '*Blockburger* test' (see S. Walther, 'Cumulation of Offences', in Cassese et al., *supra* note 35, 475, at 490; C.-F. Stuckenberg, 'Multiplicity of Offences: Concursus Delictorum', in H. Fischer, C. Kress, and S. R. Lüder (eds.), *International and National Prosecutions under International Law* (2001), 559, at 581; Bogdan, *supra* note 72, at 12; Azari, *supra* note 72, at 3), has been applied earlier by the ICTY in *Prosecutor v. Kupreškić*, Trial Judgement, 14 Jan. 2000, IT-95–16-T, paras. 668 ff. and by the ICTR in *Prosecutor v. Kayishema and Ruzindana*, Trial Judgement 21 May 1999, ICTR 95–1-T, paras. 636 ff. (see Walther, *supra*, at 489 ff.; Stuckenberg, *supra*, at 579 ff.; Bogdan, *supra* note 72, at 9 ff., 17 ff.; Valabhji, *supra* note 72, at 188–9 ff.; on the *Kupreškić* Appeals Judgement in this respect, F. M. Palombino, 'Should Genocide Subsume Crimes against Humanity?', 3 *Journal of International Criminal Justice* 778 (2005); on *Kayishema* and *Ruzindana*, K. Ambos and S. Wirth, 'Commentary', in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, Vol. 2, *The International Criminal Tribunal for Rwanda* 1994–1999 (2001), 701 ff.).

74 'Delictorum', not 'delictiorum' (genitive plural from 'delictum', Lat. = offence) as incorrectly quoted in Bogdan, *supra* note 72, at 1 and *passim* (he furthers speaks of 'poene' instead of 'poena', at 31).

75 For the basic structure see Ambos and Wirth, *supra* note 73, at 701 ff. For an excellent and profound structural analysis see Stuckenberg, *supra* note 73, 559 ff.; for the different forms of *concours* from a comparative perspective see I. Hünerbein, *Straftatkonkurrenzen im Völkerstrafrecht* (2005), at 30 ff. (Germany and common law); S. Walther, *supra* note 73, at 478 ff. (Germany and Anglo-American approach); Azari, *supra* note 72, at 14 ff. (France and United States).

76 The *concours idéal* must be distinguished from the – here inapplicable – *concours réel* (*concurso real*, *Realkonkurrenz*) where several, separate acts fulfil (different) offences; see Ambos and Wirth, *supra* note 73, at 703.

77 For a profound conceptual discussion see Stuckenberg, *supra* note 73, at 586 ff.; see also Azari, *supra* note 72, at 4 identifying the Čelebići test with the principle of 'specialité réciproque'; on this principle see also Palombino, *supra* note 73, 782 ff.

78 *Bemba* confirmation decision, *supra* note 1, paras. 205, 312.

79 Ibid., para. 204.

80 Ibid., para. 310.

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in principle, correct,[81] the Chamber's considerations would have been understood better if it had explained that the theory of *concours* is the other side of the coin of cumulative charging.[82] In any case, while rape may be 'the most appropriate legal characterization'[83] in cases of torture with an (additional) act of penetration, the Prosecutor must charge torture for those acts where the element of penetration is lacking.[84]

The Chamber's restrictive approach to cumulative charging is to be welcomed. This practice, which is one of the common-law legacies of the ad hoc tribunals,[85] blows up the prosecution case unnecessarily and creates a difficult situation for the defence. In fact, this practice is incompatible with the information and delimitation functions of charging rules,[86] since it entails an imprecise 'overcharging' which makes it difficult, if not impossible, for the defence to prepare adequately a defence case (which?). While cumulative charging may be considered indispensable from a prosecution perspective if it runs the risk of 'losing' offences it has not (properly) charged in the first place, such a risk does not exist if the judge has the ultimate word on the 'correct' legal classification anyway – that is, in a system governed by the *iura novit curia* principle. This is the case of the ICC procedure, as will be explained in the following section.

6. As to the Chamber's change of the mode of liability two questions regarding **authority under Article 61(7)(c)(ii)** arise. First, can the Pre-Trial Chamber *proprio motu* amend a charge of the Prosecutor at all? Second, in the affirmative, does such a power also extend to the change of a mode of liability as opposed to a change of a crime? Unfortunately, the Chamber ignores these questions and amends the mode of liability by *judicial fiat*. Interestingly, Pre-Trial Chamber III (sitting with two of the same judges as this Pre-Trial Chamber II, namely Judges Trendafilova and Kaul) correctly acknowledged earlier that Article 61(7)(c)(ii) – which authorizes the PTC only to 'request the Prosecutor to consider' amending a charge – 'is formulated in a discretionary fashion, leaving it for the Prosecutor to decide whether to amend the relevant charge' (subpara. (ii)).[87] Further, the Chamber made it clear that 'it does not purport to impinge upon the Prosecutor's functions as regards the formulation of the appropriate charges or to advise the Prosecutor on how best to prepare the document containing the charges'.[88] While these are clear words, it is not clear whether

81 For a different view (still without detailed reasoning) see Prosecution's Application for Leave to Appeal, *supra* note 47, paras. 16, 17 (as to rape and torture).

82 On the interdependence see also Stuckenberg, *supra* note 73, at 589–90, 594, 604 (589: '[W]here cumulative convictions cannot be had, it makes no sense to allow cumulative charges'); Walther, *supra* note 73, at 493; Bogdan, *supra* note 72, at 3. This interdependence is overlooked by the Prosecution's Application for Leave to Appeal, *supra* note 47, para. 16, arguing that the authority invoked by the Pre-Trial Chamber does not prohibit cumulative charging but convictions.

83 *Bemba* confirmation decision, *supra* note 1, para. 204.

84 See *in casu* ibid., para. 206 ff.

85 On the common law origin see Bogdan, *supra* note 72, at 2–3, 31 ('common law's pragmatic approach to cumulative charging'). It is worthwhile recalling that even the *Čelebići* Appeals Chamber approved the practice (cf. *Prosecutor v. Delalić et al.*, *supra* note 72, para. 400).

86 See on these functions Walther, *supra* note 73, at 477–8.

87 *Prosecutor v. Bemba*, Decision Adjourning the Hearing Pursuant to Article 67(7)(c)(ii) of the Rome Statute, 3 March 2009 (ICC-01/05–01/08–388), para. 38.

88 Ibid., para. 39.

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Pre-Trial Chamber III refers exclusively to the factual basis of the charges or also to the legal characterization of these facts. If the latter were the case it could not have amended the mode of liability as it did in the decision under analysis. It would be too formalistic to argue that the Chamber did in fact not amend the charges in the sense of Article 61(7)(c) but only declined to confirm (subpara. (b)) the co-perpetration charge and instead confirmed (subpara. (a)) the command responsibility charge. Ultimately, with this double operation the Chamber changed the mode of liability and thus amended the charge in this respect.

Be that as it may, the authority of the Pre-Trial Chamber under Article 61(7) must be analysed from the perspective of the relationship between the Prosecutor and the Chambers under the ICC procedural system. I have argued elsewhere that the *iura novit curia* principle reflected in Regulation 55 of the Regulations of the Court, providing the Trial Chamber with a wide 'modification competence'[89] during the trial phase, should also be applied to the pre-trial phase.[90] The defence rights could be secured by a new Rule 128 (4) of the Rules of Procedure and Evidence, providing for a sufficient notice for the defence and a possible adjournment of the hearing to give it sufficient time to prepare the case.[91] The reference to 'sufficient evidence' in various parts of paragraph 7 does not – contrary to the Prosecutor's view[92] – speak against such a judicial modification competence, since this reference does not stand alone but must be read together with the references to the 'crimes charged' and the 'charges' encompassing the facts (evidence) and their legal qualification. Clearly, the Pre-Trial Chamber cannot assess the evidence on its own or *in abstracto* but only with a view to a certain legal qualification (offences, modes of liability). Indeed, subparagraph (c)(ii) of Article 61(7) links the evidence to 'a different crime'.

If one accepts such a judicial modification competence, the second question – as to its *scope* – must be answered accordingly in favour of a broad authority of the Pre-Trial Chamber. While again the letter of the provision (Article 61(7)(ii): 'different crime') seems to call for a restrictive interpretation excluding any amendment going beyond a change of the respective criminal offences, the *travaux* are silent on the point,[93] but a systematic and teleological interpretation suggests a broader approach. For if it is argued that the *jura novit curiae* principle and the corresponding Regulation 55 should also be applied at the Pre-Trial stage, it follows – in fact from the very text of Regulation 55 – that the Pre-Trial Chamber may also amend the legal classification as to 'the form of participation of the accused under Articles 25 and 28'. Interestingly, Pre-Trial Chamber III had adopted the same view earlier, arguing that the mode of liability has 'a bearing on the structure of the crime' and that both 'correlate to each

89 See C. Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55', (2005) 16 *Criminal Law Forum* 1, at 16–17, arguing that Regulation 55 only 'crystallize[s] and refine[s]' the Trial Chamber's modification competence which is 'implanted' in Articles 74(2) and 64(6)(f) of the Statute and may be inferred from the Chamber's implied powers.

90 K. Ambos and D. Miller, 'Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective' (2007) 7 *International Criminal Law Review* 335, at 359–60, with a comparative analysis of the question of a judicial *proprio motu* power to amend the indictment on pp. 348 ff.

91 See for the full text of this new rule Ambos and Miller, *supra* note 90, at 360.

92 Prosecution's Application for Leave to Appeal, *supra* note 47, para. 14.

93 Cf. C. Bassiouni, *The Legislative History of the ICC*, Vol. 2 (2005), at 440.

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other'.[94] Yet while it is obvious that there is a relationship between the modes of liability (as part of the 'General Part') and the crimes (the 'Special Part') and that the former cannot be interpreted without the latter,[95] this does not necessarily allow for stretching a procedural rule like Article 61(7)(ii) beyond its wording. Such a broad interpretation can, in my view, only be based on a procedural interpretation as set out above. Ultimately, it rests on the acceptance of the *jura novit curiae* principle for the ICC, and this should have been discussed by the Chamber.

94 *Prosecutor v. Bemba*, Decision Adjourning, *supra* note 87, para. 26.
95 Cf. Ambos, *Allgemeiner Teil*, *supra* note 28, at 72. This relationship has been analysed in great depth in M. Fincke, *Das Verhältnis des Allgemeinen zum Besonderen Teil des Strafrechts* (1975).

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