



Original: **English**

No.: ICC-01/05-01/08
Date: **13 January 2009**

PRE-TRIAL CHAMBER III

Before: Judge Ekaterina Trendafilova, President
Judge Hans-Peter Kaul
Judge Mauro Politi

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public Document

Defence Objections to the Form of the Amended Charges

Source: Defence

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

The Office of the Prosecutor

Fatou Bensouda, Deputy Prosecutor
Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Nkwebe Liriss
Karim A.A.Khan
Aimé Kilolo-Musamba
Pierre Legros

Legal Representatives of Victims

Marie-Edith Douzima
Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

Mr. Jean-Pierre BEMBA GOMBO, acting through Counsel pursuant to Articles 61(6)(a) and 67(1)(b) of the Rome Statute, hereby submits his *Defence Objections to the Form of the Amended Charges*. In support of this Motion, Counsel states the following:

1. The Prosecution has been seized of this matter since January 2005, when the Central African Republic first referred Mr. Bemba for investigation.¹ A formal investigation was officially opened on 22 May 2007.²
2. Mr. Bemba was arrested in Belgium on 24 May 2008.³
3. Mr. Bemba was transferred to the Netherlands on 3 July 2008.⁴
4. His initial appearance before Pre-Trial Chamber III was held on 4 July 2008.⁵
5. The Document containing the charges against Mr. Bemba was filed on 1 October 2008, along with a table of evidence in support of the charges.⁶
6. Amended charges were filed on 17 October 2008⁷ and 20 November 2008.⁸ A consolidated table of the evidence was filed on 19 December 2008.⁹
7. The hearing to consider whether to confirm the charges against Mr. Bemba began on 12 January 2009, and the Bemba Defence raised the objections to the form of the *Amended Document Containing the Charges* which are contained in this motion, namely:
 - (a) Some of the charges are too vague because they allege crimes committed against unidentified victims on unidentified dates;¹⁰

¹ ICC-OTP-20050107-86-En (press release dated 7 January 2005).

² ICC-OTP-PR-20070522-220_EN (press release dated 22 May 2007).

³ ICC-01/05-01/08-8, para. 5.

⁴ ICC-01/05-01/08-T-3, page 4.

⁵ ICC-01/05-01/08-T-3 (transcript of initial appearance).

⁶ Document containing Charges, ICC-01/05-01/08-129-Conf-Exp-Anex2 (1 October 2008).

⁷ ICC-01/05-01/08-169.

⁸ ICC-01/05-01/08-264.

⁹ ICC-01/05-01/08-330, Annex 2.

¹⁰ Document containing charges, paras. 53-5 and Counts 1 through 5 and 8

- (b) Some of the charges are too vague because they alleged crimes which “are not limited to” the crimes actually alleged;¹¹
- (c) The charges are too vague because they purport to be based upon Art. 25(3)(a) “without excluding any other applicable mode of liability”.¹²
- (d) The Charges contain evidence which is not a proper part of the charges and should be stricken.¹³
- (e) The Charges contain allegations which include inconsistent dates which may not come within the time period covered by the charges.¹⁴
- (f) The Counts allege more than one offense per Count, making a verdict on any count impossible.

LEGAL BASIS

- 8. Article 61(6)(a) provides that a person may object to the charges under consideration at the hearing on the confirmation of charges.
- 9. Article 67(1)(a) of the Rome Statute sets out the right of the defendant to be “informed promptly and in detail of the nature, cause, and content of the charge”. Pursuant to Article 67(1)(b), the defendant is entitled “to have adequate time and facilities to prepare the defence case.” In order for these rights to be effective, the Document Containing the Charges must be framed in a clear and unambiguous manner.
- 10. Rule 121(3) of the Rules of Procedure and Evidence (“Rules”) mandates that the Prosecution to “provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing”.

¹¹ Document containing charges, Counts 1 through 5 and 8.

¹² Document containing Charges, para. 57.

¹³ Document containing charges, para. 78.

¹⁴ Document containing charges, paras. 54 and 55.

11. Regulation 52 of the Regulations of the Court (RoC) provides that the Document Containing the Charges shall include: (a) the full name of the person and any identifying information; (b) 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, including relevant facts for the exercise of jurisdiction by the Court; (c) a legal characterisation of the facts to accord both with the crimes under Articles 6, 7, or 8 and the precise form of participation under Articles 25 and 28. When evaluating the sufficiency of the charges, both the Charging Document and the table of evidence in support of the Charges must be read together.¹⁵

SPECIFIC OBJECTIONS TO THE CHARGES

12. Specific objections are made in relation to the following paragraphs contained in the charges:

a. Paragraph 7 contains surplusage which is misleading.

13. Paragraph 7 does not pertain to any material elements of the charges and is misleading and causes undue and unfair prejudice.

14. The Twenty-second Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2006/759, 21 September 2006, paras. 17-23, 25, describes the circumstances facing Mr. Bemba in the DRC which led to the 2007 confrontation which forced Mr. Bemba into exile:

17. On the morning of 21 August, at the request of my Special Representative, CIAT held a meeting, attended by the International Committee of Eminent Persons, to discuss concerns over the high level of tension between the supporters of President Kabila and Vice-President Bemba, and the call for the holding of the second presidential round 15 days after the announcement of the final results of the first.

18. Earlier in the day, the MONUC Force Commander was informed by the Chief of Defence Staff of the Armed Forces of the Democratic Republic of the Congo (FARDC) that troops would be deployed in Kinshasa to maintain law and order, and, in that regard, to forcibly disarm the security elements of the four Vice-Presidents. The Chief of Defence Staff was strongly advised that PNC should be allowed to maintain law and order and that discussions should be held with the Vice-Presidents in regard to any proposed disarmament of their security personnel. Vice-President Bemba also expressed deep concern to my Special Representative that the Republican Guard intended to attack his residence.

19. Shortly after the CIAT meeting had begun at the residence of Vice-President Bemba, small automatic and heavy arms fire was heard around the house, making it impossible for

¹⁵ ICC-01/04-01/06-803-Anx1, Lubanga, PTC I, 29 January 2007, at para. 150 (Decision on confirmation of Charges).

CIAT members to leave. MONUC troops, troops of the European Union force (Eufor R. D. Congo) and the MONUC Chief of Security were immediately alerted and moved to the area. My Special Representative established contact with President Kabila and his advisers, while the Force Commander established contact with the FARDC Chief of Staff. After discussions, two MONUC companies and one Eufor R. D. Congo company undertook a closely coordinated operation to extract CIAT members and stabilize the situation. Eufor R. D. Congo took action within its mandate in Kinshasa, as authorized by the Security Council in its resolution 1671 (2006) of 25 April, and deployed along a key section of the main boulevard in central Kinshasa.

20. MONUC and Eufor R. D. Congo troops dispatched in the vicinity reported that a company of the Republican Guard, with three armoured personnel carriers, one with a 90 mm mounted gun, and two howitzer guns, were assembled at a strategic junction on the 30 June Boulevard, apparently ready to advance towards the residence of the Vice-President. Meanwhile, small groups of the Republican Guard were seen in the area exchanging fire with a group of some 200 of Vice-President Bemba's guards, who were positioned among the houses around his residence. During the fighting, Vice-President Bemba's personal helicopter, located in the courtyard in front of his office building, approximately 300 metres from his residence, was destroyed.

21. From the outset, my Special Representative worked actively to arrange a cessation of hostilities and restore calm, including through arranging a direct telephone conversation between President Kabila and Vice-President Bemba. Meanwhile, the Secretary-General spoke with both Vice-President Bemba and President Kabila to warn them that the fighting was jeopardizing the achievements of the transitional process, and called for an immediate cessation of hostilities. Senior officials from several CIAT member States made similar calls.

22. My Special Representative emphasized to Vice-President Bemba and President Kabila that: (a) hostilities should immediately cease; (b) the forces of both camps should disengage and withdraw to their earlier positions; and (c) President Kabila and Vice-President Bemba should meet as soon as possible, with international mediation or not, and commit to some basic rules of conduct to be adhered to during the electoral process.

23. Calm was restored by early evening, as the Republican Guard withdrew most of its personnel together with the armoured vehicles and armaments. MONUC and Eufor R. D. Congo units deployed at key road junctions in the city centre. Furthermore, MONUC deployed troops with 20 armoured personnel carriers around the residence of the Vice-President to stabilize the situation and provide security. Soon thereafter, MONUC safely extracted my Special Representative and the CIAT Ambassadors from the residence.

25. Meanwhile, President Kabila and Vice-President Bemba also agreed to my Special Representative's proposal to establish a joint commission, facilitated by MONUC, with two subcommissions tasked to conduct an impartial, preliminary inquiry into the events of 20 to 22 August, and to foster agreement between the two candidates concerning rules of conduct for themselves and their supporters during the electoral campaign and the second presidential election round, as well as a memorandum of understanding on the post-electoral period. The two candidates have agreed, in principle, to a weapons-free zone in Kinshasa, the details of which are under discussion. Further progress was made on 13 September, when President Kabila met Vice-President Bemba for the first time since the events in August, together with Vice-Presidents Azerias Ruberwa and Arthur Zahidi N'Goma, to discuss the recent violence.

15. Similarly, the Human Watch Rights Report entitled "We will Crush You: The restriction of political space in the Democratic Republic of Congo" opens its chapter four, entitled "Crushing Jean-Pierre Bemba and his Supporters" with the following paragraph:

"In August 2006, some members of the Republican Guard got into an armed skirmish with members of Bemba's guard in Kinshasa. Kabila, commanding the stronger force, took advantage

of the opportunity to conduct a military operation that struck a major blow against Bemba. Unsuccessful then in completely destroying Bemba's strength, Kabila's forces launched a second military operation in March 2007 that, together with a campaign of arbitrary arrests and intimidation, effectively ended Bemba's challenge to Kabila's power and pushed Bemba into exile."

16. Paragraph 7 should either be stricken entirely as unnecessary surplusage, or in the alternative, it should be amended to show that Mr. Bemba was forced into exile because of political persecution by the DRC government.

b. Paragraphs 53 to 55 do not provide sufficient factual basis to allow Mr. Bemba to defend himself.

17. The amended charges contain three alleged mass rapes:

- i. Paragraph 53 refers to 8 unidentified victims are alleged to have been raped between 26 October and 31 December.
- ii. Paragraph 54 refers to 22 unidentified victims who are alleged to have been raped « Between October 2002 and 31 December 2002 ».
- iii. Paragraph 55 refers to 5 unidentified victims alleged to have been raped « Between October 2002 and 31 December 2002 »

18. Without more information, it is impossible to have a fair trial on these vague allegations.

19. In relation to paragraphs 54 and 55, the form of the charges indicates the Prosecutor has a doubt as to whether the rapes were committed within the time period covered by the amended charges (between 26 October and 31 December). On that basis, the charges in those paragraphs should be dismissed.

20. It has been noted at the ICTY that "since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."¹⁶

"It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the

¹⁶ Prosecutor v. Kupreskic, Appeals Judgement, para 90.
<http://www.un.org/icty/kupreskic/appeal/judgement/index.htm>

impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair. The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.”¹⁷

21. The above language is particularly applicable where, as in this case, the failure to allege dates suggests that it cannot be established whether the events took place within the time period covered by the charges.

22. We request either greater specificity or else that paragraphs 53 to 55 be stricken, as well as unidentified groups of victims in Counts 1 through 5.

c. Paragraph 57 fails to allege the precise form of participation.

23. Objection is made to vague language used in Paragraph 56 which we ask be stricken: “Without excluding any other applicable mode of liability”.

24. Regulation of the Court 52(c), which requires the Charges to contain “the precise form of participation under Articles 25 and 28.”

d. The last sentence of paragraph 78 is surplusage which should be stricken.

25. This paragraph quotes statements allegedly made by unidentified individuals making glib statements while in the process of committing terrible crimes. The reported statement is hearsay evidence which is not probative of Mr. Bemba’s *mens rea*. The last sentence of paragraph 78 should be stricken.

¹⁷ Prosecutor v.. Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment , 24 February 1999, para. 40 <http://www.un.org/icty/krnjelac/trialc2/decision-e/902247325494.htm>

26. Similar language in the amended charges in the Katanga case were stricken because they referred only to evidence which the defence adamantly denied and which did not refer to material facts or their legal characterization.¹⁸

e. Each of the Counts contains multiple offenses committed at different places on different dates.

27. In their present form, the Counts charge multiple offenses in a single count. This defect means that any verdict on a single Count is impossible. For example, Count 1 includes forty-four separate allegations of rape. Each of those offenses will be contested, and each will require a verdict. The charges should be in a form which permits an individual verdict on each offense alleged.

28. In their present form, the Counts allege a different date than the dates contained in specific allegations relating to each offense charged. By providing for separate counts for each offense, this source of confusion will be eliminated.

f. Counts 1 to 5 and 8 purport to include unnamed victims.

29. The second paragraph of Counts 1 to 5 and 8 list the victims included in that Count. However, in each case, that paragraph begins: “Civilian men, women and children in the Central African Republic include, but are not limited to”

30. The phrase “but are not limited to” should be stricken because of a total lack of a factual basis. The same language was stricken from the charges in the Katanga case.¹⁹

g. Counts 6 and 7 include an unidentified victim.

31. Counts 6 and 7 refer to an unidentified murder victim who is alleged to have been murdered between 26 October and 31 December. Without more information, it is impossible to have a fair trial on these vague allegations.

¹⁸ ICC-01/04-01/07-648, Pre-Trial Chamber I, Decision on the three Defences’ Requests Regarding the Prosecution’s Amended Charging Document, 25 June 2008, at para. 35.

¹⁹ ICC-01/04-01/07-648, Pre-Trial Chamber I, Decision on the three Defences’ Requests Regarding the Prosecution’s Amended Charging Document, 25 June 2008, at para. 34.

**WAIVER OF ADDITIONAL TIME PRIOR TO
HEARING ON CONFIRMATION OF CHARGES**

32. Under Article 61(4), amendments to the charges may be made prior to the hearing. If this occurs, the suspect is entitled to reasonable notice before the hearing of any amendment to the charges. As these amendments are ones sought by the Bemba Defence, and as they affect only the form of the charges, there would be no need for any additional time as a result of amendments being granted.

CONCLUSION

33. For the foregoing reasons, Counsel for Mr. Bemba respectfully requests that this motion be granted and the Prosecutor be ordered to file amended charges in conformity with the objections raised in this Motion.

Respectfully submitted,



Karim A.A. Khan

Dated this 13th day of January 2009

The Hague, Netherlands.