

**Cour
Pénale
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**International
Criminal
Court**



Bureau du Conseil public pour les victimes

Office of Public Counsel for Victims

**Internal memorandum
Mémorandum interne**

To À	Fiona McKay, Head – VPRS	From De	Paolina Massidda, Principal Counsel – OPCV
Date	15 September 2010	Copies	Marc Dubuisson, Director DCS Caroline Walter, ALO – OPCV
Ref.	CAR-Bemba-T-2010-42-PM	Pages	5 (Including this page y compris cette page) Annex included
Subject Objet	<i>Memorandum on attempted murder in the framework of the Bemba case for transmission to Trial Chamber III –</i> CONFIDENTIAL		

Dear Ms McKay,

As legal representative of applicants in the *Bemba* case, I have recently provided the VPRS with applications of individuals who allege attempted murder as crime for which they have suffered harms from in the period relevant to the charges confirmed by former Pre-Trial Chamber III in the case *The Prosecutor v. Jean-Pierre Bemba Gombo*. In support of said applications, I hereby submits this legal *Memorandum*.

I would be most grateful if you could attach this *Memorandum* to the VPRS Report to be sent to Trial Chamber III in the near future.

I would also be grateful if you could acknowledge receipt of the *Memorandum* and confirm the transmission to the Chamber.

I thank you in advance for your cooperation.

Best regards,

ANNEX

The notion of attempted murder in the framework of the proceedings of the case

The Prosecutor v. Jean-Pierre Bemba Gombo

The notion of attempted murder can be considered as being included in the charges confirmed against the accused by Pre-Trial Chamber III in its Decision dated 15 June 2009 (the “Confirmation Decision”)¹; and as a consequence, individuals alleging in their application forms that they have suffered harm(s) from an attempted murder against themselves or relative(s) have to be regarded as qualifying for the purpose of the *prima facie* assessment, conducted under rule 85 of the Rules of Procedure and Evidence, in order to determine whether they can be granted the status to participate in the proceedings at the trial stage.

In support of such argument, the Legal Representative first relies on the recent jurisprudence developed by Trial Chamber III in its process of assessing victims’ applications for participation at trial. In the Chamber’s recent Decision dated 19 July 2010², the Chamber manifestly considered attempted murder to be included amongst the charges confirmed by Pre-Trial Chamber III at this stage of the proceedings for the purpose of the *prima facie* assessment of victims’ applications.

The Legal Representative specifically refers to the analysis and conclusions made by the Chamber in such Decision with respect of some applicants and especially with respect of applicants a/0511/08 and a/0563/08. The Chamber indeed “[c]onsiders that the (...) applicant has provided sufficient evidence to establish, *prima facie*, that he is a victim under Rule 85(a), on the basis that he suffered material harm as a result of crimes confirmed against the accused, namely the alleged murder of his mother, the attempted murder of the applicant and the pillage of their home by the Banyamulengués of Jean-Pierre Bemba in October 2002”. The Chamber also notes that “[g]iven that troops allegedly controlled by the accused were at the location of the applicant’s house during the time relevant to these events, the applicant has provided sufficient evidence to establish *prima facie* that she is a victim under Rule 85(a), on the basis that the applicant suffered personal harm as a result of crimes confirmed against the accused, namely the alleged pillage of her house and attempted murder by the Banyamulengués of Jean-Pierre Bemba in November 2002.”³

¹ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber III), No. ICC-01/05-01/08-424, 15 June 2009.

² See the “Corrigendum to Annex A of the Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, No. ICC-01/05-01/08-807-Conf-Exp-Anx-Corr, 19 July 2010.

³*Idem.*, p. 5 (for applicant a/0511/08) and p. 16 (for applicant a/0563/08) [we underline].

Looking at the legal definition of “*attempt*”, it occurs when a person does an act tending directly toward the commission of a specific offense, for instance, murder, and does this with the specific intent to commit such offense. The attempted crime occurs then “[a]t the point that it is unambiguous that the perpetrator specifically intended the criminal end (...) and [the attempt] should be punishable independently of the completed or not completed end”⁴.

Attempt can then be defined as “[a]n overt act that is done with the intent to commit a crime but that falls short of completing the crime. [It] is an inchoate offense distinct from the attempted crime, [...including] any act that is a substantial step toward commission of a crime.” It constitutes consequently the “[m]ost common of the preliminary crimes [consisting] of steps taken in furtherance of an indictable offence which the person attempting intends to carry out if he can.”⁵ According to the same author, “[i]t is necessary to have some test by which to decide that the particular link in the chain [of those steps] has been reached at which the crime of attempt has been achieved; that link will represent the *actus reus* of attempt”⁶.

Finally, the facts that the crime of attempted murder has not been included in itself amongst the crimes the Court has jurisdiction over also lead to the necessity to interpret the crime of murder as including the attempt to such crime as well. In support of such reasoning, during the negotiations of the Rome Statute, the United States delegation notably argued that: “[I]n addition to intentional killing, many legal systems appear to recognize murder or wilful homicide to extend to situations where the accused knowingly or intentionally caused conditions likely to result in death [...], including intentionally causing grave bodily injury (...)”⁷. Moreover, the Committee of Experts supported the view of including such killings in their suggestions for the definition of murder as crime against humanity under the Rome Statute⁸. As a result, the consolidated version of the proposals on murder as crime against humanity of 1996

⁴ See the definition provided by Christopher Blakesley in its Commentary included in the “Annotated Leading Cases of International Criminal Tribunals”, Volume VII, André Klip and Goran Sluiter (eds), 2005, p. 569 [we underline].

⁵ See the definition of “attempt” given in the Black’s Law Dictionary, 8th ed. 2004.

⁶ This definition is given by J.W. Cecil Turner in “Kenny’s Outlines of Criminal Law” 79 (16th ed. 1952), cited under the term “attempt” in the Black’s Law Dictionary, 8th ed. 2004.

⁷ See the Proposal of the delegation of United States submitted to the Preparatory Committee, Discussion Draft for Annex to Statute, Elements Related to Article on Crimes against Humanity, Unofficial Document, 2 April 1996, p. 1, footnote 4 [we underline].

⁸ See the Draft Statute for an International Criminal Court with Suggested Modifications (Updated Siracusa-Draft) prepared by a Committee of Experts, 15 March 1996, p. 30. Professor Bassiouni, who was one of the members of the Committee of Experts, stated that the customary practice of States, evidenced by international and national military prosecutions, reveals that murder is not only intended to mean those specific intentional killings without lawful justification but also the conducts of creating life endangering conditions likely to result in death according known or foreseeable expectations or human experience of a reasonable person in the same circumstances, notwithstanding the technical differences in the definitions of various forms killing. See BASSIOUNI (M.C.), *Crimes against Humanity in International Criminal Law*, The Hague/London/Boston, Kluwer Law International, 1999, p. 302.

appeared as: “[T]he acts constituting “crimes against humanity” are: (a) [wilful] murder [killing or extermination] [including killings by knowingly creating conditions likely to cause death”⁹.

Pre-Trial Chamber III in the present case confirmed amongst the charges the crime of murder as a war crime and as a crime against humanity. As the Chamber stated in the Confirmation Decision, regarding murder considered as a crime against humanity, “[i]n determining whether an act forms part of a widespread attack, the Chamber considers the characteristics, the aims, the nature or consequences of the act”¹⁰. The Chamber also recalled that “[f]or a crime to be committed, two essential and distinct elements must be established: the *actus reus* element (material or objective element) and the *mens rea* element (mental or subjective element)”¹¹. Regarding the *actus reus*, the Chamber recognises that “[t]he Elements of Crimes offer limited guidance as to the *actus reus* in that they stipulate that “the perpetrator killed one or more persons””; the Chamber further specified with regard to the *mens rea* that “[t]aking into account that no mental element is specified in article 7(1)(a) of the Statute, the Chamber applies article 30 of the Statute. The legal requirements to be proven are thus “intent and knowledge”. The Chamber has to be satisfied that the perpetrator meant to cause death or was aware that death “will occur in the ordinary course of events” required by article 30(2)(b) of the Statute (...)”¹².

Moreover, concerning murder as crime of war, the Chamber noted that “[a]rticle 8 of the Statute does not limit the Court’s jurisdiction, but serves as a practical guideline for the Court.”¹³

As a result, it appears that the only distinction that could be drawn between murder and attempted murder is the actual result deriving from the act of killing which would have been committed both in case of attempted murder and murder, therefore constituting a similar *actus reus* basis, with the *mens rea* remaining identical. The intention to cause death or the awareness that death will occur in the ordinary course of events, as well as the commission of the act that was supposed to result in the death of the person are consequently identical whether the death finally occurs or not. Moreover, the accompanying harms, possibly physically and morally, especially emanating from the perpetrated acts and the threat on the person do exist in the case of attempted murder¹⁴.

⁹ See the Summary of the Proceedings of the Preparatory Committee during the Period 25 March - 12 April 1996, Rapporteur: Mr. Jun Yoshida (Japan), UN Doc. A/AC.249/1, 7 May 1996, pp. 18 and 69 [we underline].

¹⁰ See *Supra* note 1, par. 86 [we underline].

¹¹ *Idem*, par. 130.

¹² *Ibidem*, par. 138.

¹³ See *Supra* note 1, par. 266.

¹⁴ The Chamber also noted that “MLC soldiers acted in groups and created a climate of fear among civilians”. See *Supra* note 1, par. 150.

Therefore, the combination of both the commission of an act aiming to result in the death of the person and the intention to cause such death are the major elements leading to the conclusion that the crime of murder as confirmed against the accused in the present case encompass the crime of attempted murder.