

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 3 March 2009

**PRE-TRIAL CHAMBER III**

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

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

**Public**

**Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome  
Statute**

Decision 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  
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**Legal Representatives of the Victims**

Marie Edith Douzima-Lawson

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Paolina Massidda

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Pre-Trial Chamber III** (the “Chamber”) of the International Criminal Court (the “Court”) issues a decision adjourning the hearing pursuant to article 61(7)(c)(ii) of the Rome Statute (the “Statute”) in the case of *The Prosecutor v. Mr Jean-Pierre Bemba Gombo* (“Mr Jean-Pierre Bemba”).

1. At the outset, the Chamber wishes to clarify that the purpose of this decision is neither to confirm (article 61(7)(a) of the Statute) nor decline to confirm the charges (article 61(7)(b) of the Statute) against Mr Jean-Pierre Bemba, or to request the Prosecutor to consider providing further evidence or conducting further investigation (article 61(7)(c)(i) of the Statute). Rather, the Chamber is of the view that the evidence submitted appears to establish a different crime within the jurisdiction of the Court in accordance with article 61(7)(c)(ii) of the Statute.

### **I. Procedural History**

2. On 1 October 2008 the Prosecutor filed the “Prosecution’s Submission of Public Redacted Version of the Document Containing the Charges against Jean-Pierre Bemba Gombo” to which he appended the “Document containing the charges” as annex A.<sup>1</sup>

3. On 17 October 2008 the Prosecutor filed the “Prosecution’s Submission of Amended Document Containing the Charges and Amended List of Evidence” to which he appended an “Amended Document Containing the Charges” (the “Amended DCC”) as annex 3A.<sup>2</sup>

4. On 19 November 2008 the Prosecutor filed the “Prosecution’s Communication of Amended Document Containing the Charges and Amended List of Evidence pursuant to the Third Decision on the Prosecutor’s Requests for Redactions and

<sup>1</sup> ICC-01/05-01/08-136-AnxA.

<sup>2</sup> ICC-01/05-01/08-169-Anx3A.

Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo” to which he appended the Amended DCC. In the Amended DCC, the Prosecutor charged Mr Jean-Pierre Bemba with crimes against humanity and war crimes “jointly with Patassé through MLC [*Mouvement de Libération du Congo*] troops” under article 25(3)(a) of the Statute, “[w]ithout excluding any other applicable mode of liability”.<sup>3</sup>

5. On 29 December 2008 the Single Judge, acting on behalf of the Chamber,<sup>4</sup> issued the “Decision Setting the Date of the Confirmation Hearing”<sup>5</sup> (the “Hearing”), whereby it was decided that the Hearing would commence on 12 January 2009. On the same date, the Single Judge also issued the “Decision on the Schedule for the Confirmation of Charges Hearing”<sup>6</sup> in which she decided that the Hearing would take place between 12 and 15 January 2009.

6. On 12 January 2009 the Hearing commenced. During the Hearing, the parties made their presentations focusing, *inter alia*, on the mode of liability included in the Amended DCC. The Defence also requested to file supplementary written submissions after the oral sessions of the Hearing had come to an end.<sup>7</sup>

7. On 15 January 2009 the Chamber granted leave to file submissions to all the parties as well as to the victims’ legal representatives, provided that the Chamber would receive them no later than 26 January 2009.<sup>8</sup> On 26 January 2009 the Prosecutor,<sup>9</sup> the victims’ legal representatives<sup>10</sup> and the Defence<sup>11</sup> filed their written submissions.

<sup>3</sup> ICC-01/05-01/08-169-Anx3A, para. 57 and ICC-01/05-01/08-264-Conf-AnxA, para. 57.

<sup>4</sup> Pre-Trial Chamber III, Decision Designating a Single Judge, ICC-01/05-01/08-293.

<sup>5</sup> Pre-Trial Chamber III, ICC-01/05-01/08-335.

<sup>6</sup> Pre-Trial Chamber III, ICC-01/05-01/08-336.

<sup>7</sup> ICC-01/05-01/08-T-9-CONF-ENG ET WT, p. 11, lines 1-19.

<sup>8</sup> ICC-01/05-01/08-T-12-CONF-ENG ET, p. 141, lines 9-15.

<sup>9</sup> ICC-01/05-01/08-377.

<sup>10</sup> ICC-01/05-01/08-376; ICC-01/05-01/08-380-Conf.

<sup>11</sup> ICC-01/05-01/08-379 and ICC-01/05-01/08-379-Corr.

## II. The Applicable Law

8. The Chamber notes articles 21(1)(b), 21(2), 21(3), 25, 28, 61(7) and 67(1) of the Statute, rule 127 of the Rules of Procedure and Evidence (the “Rules”) and regulations 33, 34(1), 52(c) and 53 of the Regulations of the Court (the “Regulations”).

### 1. Nature and Interpretation of article 61(7) of the Statute

9. The Chamber recalls article 61(7) of the Statute, which provides the procedural framework governing the confirmation of the charges before trial. Article 61(7) of the Statute reflects in essence the filtering function of the Pre-Trial Chamber which has been highlighted on numerous occasions in the present case.<sup>12</sup> The Chamber first referred to its role under article 61(7) of the Statute in the “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”.<sup>13</sup> Article 61(7) of the Statute reads:

The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
  - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
  - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

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<sup>12</sup> As reiterated by the Presiding Judge during the oral sessions of the Hearing, ICC-01/05-01/08-T-9-ENG ET WT 12-01-2009, p. 6, lines 8-12; and acknowledged by the Prosecutor, ICC-01/05-01/08-T-12-CONF-ENG ET 15-01-2009, p. 61, lines 13-17.

<sup>13</sup> Pre-Trial Chamber III, ICC-01/05-01/08-55, in particular, paras. 11 and 13.

10. The chapeau of article 61(7) of the Statute imposes a duty on the Chamber to “determine” or make a “determination” in order to resort to any of the options outlined in sub-paragraphs (a) to (c). Thus, the Chamber underlines that a proper interpretation of the notion “determine” or “determination” is imperative for any decision to be taken within the sphere of article 61(7) of the Statute.

11. Under article 61(7) of the Statute, the Chamber shall make its determination on the basis of the evidence disclosed between the parties, communicated to the Chamber prior to the Hearing and discussed during the Hearing, as well as on the basis of all related documents<sup>14</sup> presented by the parties and participants supporting their arguments based on the disclosed evidence (the “Evidence and Arguments of the Parties and Participants”). This determination must be undertaken within the time-frame established by regulation 53 of the Regulations.

12. For the purpose of making the determination pursuant to the chapeau of article 61(7) of the Statute, the Chamber is required to answer a central question: is there sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged in the Prosecutor’s document containing the charges?

13. The Chamber wishes to point out that the nature of the determination required under articles 61(7)(a) and 61(7)(b) of the Statute differs substantially from that required under article 61(7)(c) of the Statute. The determination under sub-paragraphs (a) and (b) is directly related to the charges - the subject-matter of the confirmation hearing - submitted by the Prosecutor in his document containing the charges and discussed during the oral sessions of the hearing. After having fully examined the Evidence and Arguments of the Parties and Participants and if the answer to the central question outlined above is in the affirmative, the Chamber

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<sup>14</sup> Documents as defined under regulation 22 of the Regulations. This includes the In-Depth Analysis Chart filed by both parties and the written submissions by the parties and participants filed after the Hearing.

shall confirm the charges and commit the person to trial (sub-paragraph (a)). If the answer is in the negative, the Chamber shall decline to confirm the charges (sub-paragraph (b)). Alternatively, if the Chamber determines that this evidentiary threshold is met only with respect to some of the charges, it shall apply sub-paragraphs (a) and (b) accordingly. Thus, under sub-paragraphs (a) and (b), the Chamber makes a determination of whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged and accordingly issues a decision on the merits.

14. The determination, however, is different with respect to article 61(7)(c) of the Statute, where the Chamber is not in a position to take a decision on the merits of the case. The sole purpose of the provision is to adjourn the hearing in order to overcome deficiencies concerning the evidence (sub-paragraph(c)(i)) or the legal characterisation of the facts presented (sub-paragraph (c)(ii)), which prevented the Chamber from issuing a final decision on the merits at this stage.

15. The Chamber further specifies that, although the provisions of articles 61(7)(c)(i) and 61(7)(c)(ii) of the Statute share a common feature, namely that the Chamber adjourns the hearing as it cannot issue a decision on the merits of the case, there is a substantial difference between them.

16. Under sub-paragraph (i), the Chamber makes an evaluation of the evidence presented and its sufficiency to reach the "substantial grounds to believe" threshold of the chapeau in article 61(7) of the Statute. In its determination, pursuant to article 61(7)(c)(i) of the Statute, the Chamber adjourns the hearing because the evidence presented does not meet the required threshold for confirming the charges as required by article 61(7)(a) of the Statute, and because such evidence is not irrelevant and insufficient to a degree that merits declining to confirm the charges under article 61(7)(b) of the Statute. In this case the Chamber decides that some further evidence is needed. Only after this evidence is provided will the Chamber be in a position to

make its final determination on the merits. This process requires analysis and evaluation of the evidence and related documents already before the Chamber in order to justify the request for further evidence.

17. Under sub-paragraph (ii), no further evidence is required. Rather, upon examination of the Evidence and Arguments of the Parties and Participants, the Chamber identifies a problem as to the legal characterisation of the facts presented because the evidence submitted “appears to establish a different crime”. At this stage, a general review of the Evidence and Arguments of the Parties and Participants pertaining only to the issue at stake is sufficient. Thus, a complete and in-depth analysis of all the evidence is unwarranted during this limited examination. The Chamber’s examination ends at this point without addressing the issue of sufficiency of evidence to meet the threshold requirement of “substantial grounds to believe”.

18. This conclusion is warranted by the following considerations: first, the existing charges in the document containing the charges to which the evidentiary threshold “substantial grounds to believe” applies require amendment; second, the language used in this provision, namely “the evidence submitted *appears* to establish a different crime”, is *lex specialis* that establishes a lower threshold and accordingly requires a specific approach to the evidence as well as a different kind of determination to be made by the Chamber. At this point the Chamber, based on its knowledge of the evidence, ascertains the necessity to explore a “different crime” from the one indicated in the document containing the charges.

19. Hence, the determination of the Chamber is to adjourn the hearing and request the Prosecutor to consider amending the charges. Once the Chamber has received an amended document containing the charges, it shall apply the test set out in the chapeau of article 61(7) of the Statute on the basis of a full and in-depth analysis of the Evidence and the Arguments of the Parties and Participants in order to take a



decision on the merits by either confirming or declining to confirm the charges in accordance with sub-paragraphs (a) and (b).

20. Consequently, the determination pursuant to article 61(7)(c)(ii) of the Statute as compared to the one on the merits is an intermediate determination of the Chamber to request the Prosecutor to consider remedying the deficiency detected by the Chamber. Only after the Prosecutor's submission of the requested changes will the Chamber be in a position to make its final determination on the merits of the case pursuant to sub-paragraphs (a) or (b) based on the criterion of "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".

## 2. Specific requirements of article 61(7)(c)(ii) of the Statute

21. The Chamber considers it crucial to further set out and interpret article 61(7)(c)(ii) of the Statute. To this end, having due regard to articles 21(1)(b) and 21(3) of the Statute, the Chamber is guided by established principles of treaty interpretation in international law as reflected in the 1969 Vienna Convention on the Law of Treaties ("VCLT")<sup>15</sup>.

22. In its decision on the confirmation of charges in *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I stated that the purpose of article 61(7)(c)(ii) of the Statute:

(...) is to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing.<sup>16</sup>

23. The Chamber concurs with this interpretation and believes that the provision of article 61(7)(c)(ii) of the Statute is warranted by considerations of fairness whenever the parties, and in particular the Defence, must be notified of any material change to

<sup>15</sup> UN Treaty Series, vol. 1155, p. 331.

<sup>16</sup> Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/05-01/08-803-tEN, para. 203.

the document containing the charges which delineates the subject-matter and the scope of the proceedings.<sup>17</sup>

24. As already clarified above, in applying article 61(7)(c)(ii) of the Statute the Chamber has to make a determination based on a limited examination of the evidence submitted that leads the Chamber to conclude that the said evidence appears to establish a different crime within the jurisdiction of the Court. Thus, the starting point for the Chamber's determination at this stage is the "evidence submitted".

25. The notion of appearance is used in various provisions of the Statute,<sup>18</sup> but lacks any statutory definition. In the English language, the word "appear" means to "give a specified impression".<sup>19</sup> Thus, this meaning should be borne in mind when the Chamber is called upon to decide on the nature and scope of determination required and the manner in which to approach the evidence under article 61(7)(c)(ii) of the Statute. Given the nature of the present stage of the proceedings, the Chamber is of the opinion that the threshold required for a determination under sub-paragraph (c)(ii) must inevitably be lower than the "substantial grounds to believe" set out in the chapeau of article 61(7) of the Statute. At this stage the Chamber is not called upon to prove that the requirements of the "different crime" are *definitely* satisfied. To make its determination under article 61(7)(c)(ii) of the Statute, the Chamber deems it sufficient to rather make a *prima facie* finding that it has doubts as to the legal characterisation of the facts as reflected in the document containing the charges. By way of a general review of the evidence and mere reference to it in its decision, the Chamber substantiates its finding that a different crime within the jurisdiction of the Court may have been committed. To this end, the Chamber needs only to indicate certain elements which may lead it to conclude that a different crime exists. Accordingly, in the context of the present decision the Chamber will not

<sup>17</sup> Pre-Trial Chamber III, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320, para. 63.

<sup>18</sup> See for e.g., articles 13(a), 13(b), 15(4) and 58(1)(b) of the Statute.

<sup>19</sup> C. Soanes, A. Stevenson (eds.), *Concise Oxford English Dictionary*, (OUP, 11th ed., 2004), p. 62.

conduct an in-depth analysis of the evidence. It will also not address its admissibility and probative value as this will be laid down in the final decision on the confirmation or not of the charges.

a) Notion of “different crime”

26. The notion of a “different crime” pursuant to article 61(7)(c)(ii) of the Statute relates both to the crimes as defined in articles 6, 7 and 8 of the Statute as well as to the mode of liability as referred to in articles 25 and 28 of the Statute. The crimes and the mode of liability correlate to each other. Depending on the mode of participation as set out in articles 25 and 28 of the Statute, the material (objective) elements of the crime are shaped differently. It does have a bearing on the structure of *the crime* whether the person held liable for committing the crime acted as a principal, as an accomplice or as a superior.

27. This correlation is evidenced for example in the wording of article 25(3) of the Statute. It is also evidenced in article 30(1) of the Statute which makes clear that the mental (subjective) element must pertain to a crime as defined under articles 6, 7 and 8 in conjunction with article 25 of the Statute, which represent the material (objective) elements.

28. Moreover, the Chamber, as judicial guarantor of the proceedings, has to ensure that both parties are notified of material changes in the document containing the charges which is the subject-matter of the proceedings in the present case. In particular, the Chamber refers to article 67(1)(a) of the Statute, which establishes that the accused shall be “informed promptly and in detail of the nature, cause and content of the charge (...)”. If the Chamber were to read article 61(7)(c)(ii) of the Statute in such a manner as to exclude the mode of liability, considerations of fairness would also arise since the Defence would be deprived of its right to be informed promptly and in detail of the nature, cause and content of the charges, in

accordance with article 67(1)(a) of the Statute, and of the opportunity to submit observations thereto.

b) Notions of “adjourn the hearing” and “consider amending a charge”

29. After having examined the requirements of article 61(7)(c)(ii) of the Statute, the Chamber wishes to lay down its interpretation of the consequences arising therefrom. The consequences are twofold: the Chamber adjourns the hearing and requests the Prosecutor to consider amending one or more of the charges.

*(i) Adjournment of the hearing*

30. The Chamber considers that the word “hearing” which appears in the chapeau of article 61(7) of the Statute is open to two different interpretations. The Statute, being a multilateral treaty, is governed by the principles of treaty interpretation set out in article 31 (1) of the VCLT according to which “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.

31. In its judgment on the “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” the Appeals Chamber stated:

The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.<sup>20</sup>

32. By way of a literal (textual) interpretation, the notion of “hearing” (in the French text “*l’audience*”) refers to the oral sessions taking place before judges, in which the parties and/or participants make their submissions and presentations during one or

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<sup>20</sup> Appeals Chamber, ICC-01/04-168, para. 33.

more sessions, regardless of the stage of proceedings. This interpretation can be inferred from many provisions of the Statute.<sup>21</sup> It has also been laid down in many decisions of this Chamber.<sup>22</sup>

33. However, based on this interpretation, the Chamber's determination on the subject-matter would exclude any relevant document submitted by the parties and participants subsequent to the oral sessions of the Hearing. The Chamber believes that the same holds true with respect to the word "hearing" in article 61(7)(c) of the Statute which gives the power to the Chamber to "adjourn the hearing". To "adjourn" means to "defer", "postpone", "suspend proceedings", "to postpone action of a convened court (...) until another time specified, or indefinitely".<sup>23</sup> If the Chamber were to follow a strict interpretation, a scenario of "adjourn[ing] the hearing" would be a valid possibility only at the close of the oral sessions of the confirmation hearing and before the sessions end.

34. The Chamber believes that adopting a restrictive interpretation of the word "hearing" in the specific context of article 61(7)(c) of the Statute would result in limiting the scope of its assessment regarding the case under consideration. To say that an adjournment may be possible only before or at the close of the oral sessions of the Hearing would in reality mean that the Chamber would not have the option to "adjourn" after these sessions of the hearing have ended. The Chamber therefore considers that the word "hearing" must be subject to a contextual and a teleological or effective interpretation.

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<sup>21</sup> The notion of "hearing" interpreted in this fashion can be thus found in articles 36(10), 39(3)(a), 61(1), 61(2), 61(2)(b), 61(3), 61(3)(b), 61(4), 61(5), 61(6), 61(7), 61(7)(c), 61(9), 64(9)(b), 67(1), 68(2), 72(7)(a)(i), 76(2) and 76(3) of the Statute. This interpretation is further sustained in many provisions of the Rules, in particular rules 50(4), 55(1), 58(2), 74 (8), 83, 87(3), 88(2), 91(2), 91(4), 92(3), 92 (5)(a), 115(2), 118(3), 121,122(1), 122 (3), 122(6), 122(7), 123(2), 124(1), 124(2), 124(3), 124(4), 125(1), 125(3), 125(4), 126(1), 127, 138, 143, 147(1), 147(2), 156(3), 160(1), 161(1), 161(2), 165(3), 171(3), 174(2), 214(6), 224(1) and 224(4) of the Rules.

<sup>22</sup> See for example, Pre-Trial Chamber III, ICC-01/05-01/08-335; *ibid.*, "Decision on the Postponement of the Confirmation Hearing", ICC-01/05-01/08-304; *ibid.*, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320.

<sup>23</sup>Black's Law Dictionary, (West Publishing Co, 6th ed., 1999), p. 41; L. Brown (ed.), Shorter Oxford English Dictionary, vol. 1, (OUP, 5th ed., 2002) at p. 27.

35. The Chamber notes that according to article 31(2) of the VCLT, a contextual approach requires that a provision be read in relation to its context, which, *inter alia*, “shall comprise...the text, including its preamble and annexes”. It is therefore necessary to read article 61(7) in the wider context of article 61 of the Statute. It is clear from the structure of article 61 of the Statute that pre-trial proceedings can be separated into proceedings *before*, *during* and *after* the Hearing. The provision on adjournment under 61(7)(c) is embedded within the specific time-frame of article 61(7) of the Statute and must be construed accordingly. On the basis of the hearing, the Chamber will be in a position to make three determinations: either to confirm the charges, to decline to confirm them or to adjourn the hearing. Those three possibilities are listed under a common chapeau, which suggests that, within the same time-frame, the Chamber will be in a position to make one or more of the three determinations. The decision on adjournment under 61(7)(c) of the Statute is therefore *not* one which always has to be taken prior to the decisions under subparagraphs (a) and (b) but rather more commonly, within the same time-frame, after the oral sessions of the Hearing are over.

36. The Chamber also notes that a teleological interpretation which is mirrored in the principle of effectiveness<sup>24</sup> and based on the object and purpose of a treaty means that the provisions of the treaty are to be “interpreted so as to give it its full meaning and to enable the system (...) to attain its ‘appropriate effects’”,<sup>25</sup> while preventing

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<sup>24</sup> Permanent Court of International Justice (PCIJ), *Free Zones of Upper Savoy and the District of Gex*, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13; International Court of Justice (ICJ), *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, ICJ Reports 1949, p. 24; *ibid.*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South west Africa) Notwithstanding Security Council Resolution 276(1970)*, ICJ Reports 1971, p. 35; *ibid.*, *Aegean Sea Continental Shelf*, ICJ Reports 1978, p. 22; *Territorial Dispute (Libyan Arab Jamahiryah/ Chad)*, Judgment of 3 February 1994, ICJ Reports 1994, p. 25; Inter American Court of Human Rights (IACtHR), *Fairén Garbí and Solís Corrales Case, Preliminary Objections*, Judgment of 26 June 1987, *ibid.*, (Ser. C) No. 2, para. 35; *Constantine et al. v Trinidad and Tobago Case, Preliminary Objections*, Judgment of 1 September 2001, *ibid.*, (Ser. C) No. 82, para. 73; European Court of Human Rights (ECtHR), *Mamatkulov and Abdurasulovic v. Turkey, (Merits)* App. No. 46827/99, Judgment of 6 February 2003, paras. 93-94; *ibid.*, *Loizidou v Turkey (Preliminary Objections)*, App. No.1531/89, 23 March 1995, para. 72.

<sup>25</sup> IACtHR, *Fairén Garbí and Solís Corrales Case, Preliminary Objections*, Judgment of 26 June 1987, (Ser. C) No. 2, para. 35.

any *restrictions* of interpretation that would render the provisions of the treaty “inoperative”.<sup>26</sup>

37. Thus, according to a wider interpretation, an adjournment of the Hearing may take place subsequent to the oral sessions and as long as the Chamber has not made its final determination on the merits and issued a decision whether or not to confirm the charges. This interpretation finds support also in the language of rule 127 of the Rules which states that “if the Pre-Trial Chamber is ready to confirm some of the charges but adjourns the hearing on other charges under article 61, paragraph 7(c), it may decide that the committal of the person concerned to the Trial Chamber (...) shall be deferred pending the *continuation of the hearing (...)*” (emphasis added). The reference to the phrase “continuation of the hearing” indicates that the notion of “hearing” may extend beyond the oral sessions of the Hearing.

*(ii) Consider amending the charge*

38. When “adjourn[ing] the hearing”, the Chamber shall request the Prosecutor to consider amending the relevant charge. The wording of article 61(7)(c)(ii) of the Statute is formulated in a discretionary fashion, leaving it for the Prosecutor to decide whether to amend the relevant charge.

39. In addition, the Chamber makes it clear that by way of adjourning the hearing 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. The Chamber holds the view that it is the responsibility of the Prosecutor to build and shape the case according to his statutory mandate pursuant to article 54(1)(a) of the Statute. The responsibilities of the Chamber lie in exerting judicial oversight during the pre-trial proceedings and rendering its decision in accordance with article 61(7) of the Statute.

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<sup>26</sup> IACtHR, *Constantine et al v. Trinidad and Tobago Case, Preliminary Objections*, Judgment of 1 September 2001, (Ser. C) No. 82, para. 73.

### **III. Elements Considered and Findings of the Chamber**

40. Applying the “appearance” standard set out in article 61(7)(c)(ii) of the Statute, the Chamber deems it unnecessary to engage in an in-depth analysis of the evidence in its possession for the purpose of this procedural decision. To this end, the Chamber considers that reference to specific evidence or arguments of the parties or participants is sufficient. This ensures that the Chamber is not engaged in a process of predetermination or prejudgment on the issues at stake, which in any event would be ruled upon in its decision on the merits.

41. The Chamber considered the Evidence and the Arguments of the Parties and Participants. More specifically, the Chamber observes that, in paragraph 57 of the Amended DCC, the Prosecutor does not exclude “any other applicable mode of liability” beside article 25 of the Statute.<sup>27</sup>

42. Furthermore, in his closing statements at the Hearing, the Prosecutor stated that at the Gbadolite trials “the punishments that were meted out in these sham trials were inordinately small in comparison to the horrific crimes of rape and killing and pillaging that took place”<sup>28</sup> – a statement which appears to be an indication for a different mode of liability as enshrined in article 28 of the Statute.

43. The Defence also pointed towards this different mode of liability in some of its arguments which reflect the position of a hierarchical superior [commander] who would allegedly discipline and punish his troops in case of commission of crimes.<sup>29</sup>

44. Along the same line of argument, one of the legal representatives of the victims referred to Mr Jean-Pierre Bemba’s alleged failure to take measures to prevent crimes

<sup>27</sup> ICC-01/05-01/04-264-Conf-AnxA, para. 57.

<sup>28</sup> ICC-01/05-01/08-T-12-Conf-ENG ET 15-01-2009, p. 77, lines 2-8; p. 78, lines 5-7.

<sup>29</sup> ICC-01/05-01/08-T-12-Conf-ENG ET 15-01-2009, p. 36, lines 14-19 and pp. 23-25; p.37, lines 7-10 and 12-20; p. 38, lines 16-23; p. 39, lines 11-19; p. 41, lines 1-10; p. 43, lines 23-25 to p. 44, lines 1-8; p. 56, lines 1-6.



from being committed or to punish those responsible,<sup>30</sup> which also appears to point towards article 28 of the Statute.

45. The same holds true for some witness statements corroborated by NGO reports which evidence that Mr Jean-Pierre Bemba “must have known about the crimes committed by his troops”.<sup>31</sup>

46. On the basis of such elements, and without any predetermination on the possible application of the form of participation invoked by the Prosecutor (article 25(3)(a) of the Statute) in the Amended DCC, it appears to the Chamber that the legal characterisation of the facts of the case may amount to a different mode of liability under article 28 of the Statute.

47. The Chamber recalls article 28 of the Statute which reads as follows:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or

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<sup>30</sup> ICC-01/05-01/08-T-12-Conf-ENG ET 15-01-2009, p. 88, lines 23-25 to p. 89, lines 1-3; p. 95, lines 20-25 and p. 96, lines 12-14 and ICC-01/05-01/08-380-Conf, pp. 5-6.

<sup>31</sup> Mainly witnesses 6, 31,45 and 46, FIDH reports and ICC-01/05-01/08-278-Conf-AnxB, p. 31, line 7; p. 32, line 4; p. 134, line 3; p. 151, line 3; p. 180, line 5; p. 184, line 5; pp. 164-165, line 10. More precisely, EVD-P-2340, p. 30 “The only thing I know is that long after when he felt that the threat was really becoming more precise upon him, he had to face a dilemma: Either keep on denying at the risk of being accomplice to the acts committed in the field or punishing the military, which was difficult for him to imagine, because in his opinion military did a good job in the field. And he didn't see how to punish them. And so he found, what I call from his point of view, as the middle way. In order to clear his responsibility, he organised a fake trial.”

repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

48. Although the parties and participants referred implicitly or explicitly to article 28 of the Statute in their oral presentations<sup>32</sup> and some of them in their written submissions,<sup>33</sup> the Chamber still believes that the idea of a different form of participation pursuant to article 28 of the Statute was not sufficiently addressed. Accordingly, the Chamber deems it necessary to receive in writing some elaboration on this particular form of participation on the basis of the evidence already disclosed in order to be in a position to issue a decision on the merits as to whether Mr Jean-Pierre Bemba should be committed to trial. In this respect, the Chamber recalls its Decision on Disclosure and the decision requesting the Prosecutor to file an in-depth analysis chart for the purpose of assisting the Defence in responding to the Prosecutor's arguments,<sup>34</sup> and clarifies that any further evidence submitted by the Prosecutor will not be considered.

<sup>32</sup> See for eg., ICC-01/05-01/08-T-12-Conf-ENG ET, p.36, lines 14-19 and pp. 23-25; p.37, lines 7-10 and 12-20; p. 38, lines 16-23; p. 39, lines 11-19; p. 41, lines 1-10; p. 43, lines 23-25 to p. 44, lines 1-8; p. 56, lines 1-6; p. 70, lines 12-22; p. 71, lines 4-8 and lines 17-19; p. 72, lines 8-11 and 21-22; p. 76, lines 7-14 and 16-21; p. 77, lines 2-8; p. 78, lines 5-7; p. 88, lines 23-25 to p. 89, lines 1-3; p. 95, lines 20-25 and p. 96, lines 12-23. The legal representative of victims also made an explicit reference to article 28 of the Statute. See ICC-01/05-01/08-T-12-Conf-ENG ET, p. 96, lines 12-14.

<sup>33</sup> ICC-01/05-01/08-380-Conf., pp. 5-6 ; ICC-01/05-01/08-379-Corr, for e.g., para. 82, fn. 32; para. 86.


<sup>34</sup> Pre-Trial Chamber III, ICC-01/05-01/08-55; *ibid.*, "Decision on the Submission of an updated Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence", ICC-01/05-01/08-232.

49. In light of the foregoing, the Chamber finds it necessary to adjourn the hearing and request the Prosecutor to consider amending the charges because the evidence submitted appears to establish a different crime (mode of liability), namely the mode of liability under article 28 of the Statute, in the context and within the meaning of article 61(7)(c) (ii) of the Statute.


**FOR THESE REASONS, THE CHAMBER**

- a) **decides** to adjourn the Hearing;
- b) **requests** the Prosecutor to consider submitting to the Chamber no later than 30 March 2009 an amended document containing the charges addressing article 28 of the Statute as possible mode of criminal liability, and its related in-depth analysis chart on the basis of the evidence already submitted to the Chamber;
- c) **invites** the Defence to respond to the new amended document containing the charges by way of written submissions not exceeding 30 pages in total, no later than 24 April 2009;
- d) **invites** the legal representatives for victims to submit written observations not exceeding 30 pages in total, no later than 9 April 2009;
- e) **decides** that the 60-day period required for the issuance of the decision on the confirmation of charges will start running anew as of the date of receipt of the last written submission.

Done in both English and French, the English version being authoritative.

  
Judge Ekaterina Trendafilova  
Presiding Judge

  
Judge Hans-Peter Kaul

  
Judge Mauro Politi

Dated this Tuesday, 3 March 2009

At The Hague, The Netherlands