



The Trial of Jean-Pierre Bemba

Questions and Answers

On Monday, November 22, 2010, in The Hague, judges of Trial Chamber III of the International Criminal Court (ICC) will begin hearing evidence in the trial against Jean-Pierre Bemba Gombo, a former vice president of Congo, rebel leader, and leader of Congo's main opposition party.

The Bemba trial will be the ICC's first stemming from its investigation of serious crimes in the Central African Republic (CAR).

1. Who is Jean-Pierre Bemba?

As a rebel leader during the Democratic Republic of the Congo's (DRC) war from 1998 to 2003, Bemba and his group, the Movement for the Liberation of Congo (MLC), controlled a large part of northeastern and north western Congo, with support from Uganda. After a peace agreement ended the war, he became one of the country's four vice presidents in a transitional government, from 2003 to 2006. Bemba was the runner-up in Congo's presidential elections in 2006 and was elected a senator in January 2007, and he remains the leader of the MLC, now the main opposition party. However, he went into exile in Portugal in April 2007, following a bloody street battle between his bodyguards and President Joseph Kabila's forces. He was arrested on May 24, 2008, by Belgian authorities near Brussels on the basis of an ICC arrest warrant. His arrest by the Belgian authorities underscores the importance of state cooperation in enabling the ICC to carry out its mandate effectively.

2. How did the Central African Republic investigation come about, and how did a Congolese rebel leader become involved in it?

Bemba was in the CAR beginning in 2002, after its then-president, Ange-Félix Patassé, invited him and his MLC forces, as well as Chadian mercenaries, to help put down a coup attempt led by Patassé's former army chief of staff, François Bozizé. Bemba's MLC forces are

alleged to have carried out horrific crimes, including mass rapes, killings, and looting against the civilian population in the CAR. The coup was successful, and Bozizé became president. In December 2004 he asked the ICC to investigate crimes committed during the 2002-2003 rebellion. In May 2007 the Office of the Prosecutor of the ICC announced the opening of an investigation in the CAR.

3. What crimes is Bemba accused of committing?

Bemba is being tried on two counts of crimes against humanity and three counts of war crimes for his alleged role in committing rape, murder, and pillage in conjunction with the 2002-2003 CAR coup. Human Rights Watch did not conduct research at the time into the events related to the coup.

4. Wasn't Bemba originally charged with other crimes?

Yes. Bemba was originally charged with five counts of war crimes and three counts of crimes against humanity. However, following the hearing to confirm charges against him, in January 2009, the Pre-Trial Chamber declined to confirm three of the eight counts. In doing so, the judges rejected what they termed the prosecution's "cumulative charging approach": essentially prosecuting the same criminal conduct under different counts. For instance, the prosecution charged rape under the crime of torture, the act of rape being an instrument of torture, and separately as the crime of rape. The judges found that this approach placed an undue burden on Bemba in preparing his defense, although it did not rule out the possibility of cumulative charging in other cases, if the crimes are distinct.

The Pre-Trial Chamber judges also decided that there was not enough evidence to establish that Bemba was directly responsible, as co-perpetrator, for the crimes alleged against him. The judges changed the theory of criminal responsibility against Bemba from "individual responsibility," as initially put forward by the prosecution, to that of a military commander under article 28(a) of the Rome Statute, which created and governs the mandate and operation of the ICC. Under command responsibility, a defendant can be held responsible for crimes committed by people under his command. The prosecution must show that Bemba had effective command and control of the troops who committed ICC crimes, that he "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 "failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution."

5. Wasn't this trial supposed to start earlier?

The Bemba trial was initially scheduled to start on April 27, 2010. It was initially postponed to July because Bemba challenged the lawfulness of the ICC hearing his case.

The ICC is a “court of last resort” and can only prosecute an individual when the home state is unable or unwilling to do so. The defense can challenge the admissibility of the case at any time before the trial begins.

Bemba refuted the court’s jurisdiction on several grounds, including that investigations into the crimes alleged against him had already been carried out by the CAR judicial system and that his case did not meet the gravity threshold to be tried before the ICC.

On June 24, the judges of Trial Chamber III disagreed and decided that the trial could move forward. In reaching this decision, the judges analyzed at length judicial proceedings in the CAR against Bemba, including by holding consultations with the CAR authorities. The judges concluded that proceedings against Bemba in CAR were effectively ended in April 2006, following a decision by the highest court (the *Cour de Cassation*) that the CAR national courts did not have the capacity to handle the case, and its recommendation that the case be referred to the ICC. Trial Chamber III determined that this was not a decision “not to prosecute” based on a lack of evidence, and thus that the ICC retained jurisdiction, given the “unavailability” of the CAR courts.

With regard to the gravity of the case, the judges recalled that the ICC’s pre-trial chamber had considered this factor in its June 2009 decision to confirm the charges. The pre-trial chamber evidently found that the case against Bemba was grave enough in confirming charges against him, and that decision was not appealed at the time.

On June 28, Bemba’s defense appealed this decision and requested that the proceedings be suspended while the appeals chamber considered the matter. The trial chamber judges decided that it was in the interest of justice to resolve the admissibility matter before the trial began, and thus agreed to postpone the opening.

On October 19, the ICC appeals chamber confirmed the analysis of the trial judges that the case against Bemba is admissible before the ICC.

6. Weren't Bemba's MLC troops also involved in grave human rights violations in the Democratic Republic of the Congo? Why isn't he being prosecuted for these crimes too?

Bemba's MLC troops were also implicated in numerous atrocities in northern Congo during the five-year war that took place there. In November 2002, Bemba's soldiers began a military operation called "*effacer le tableau*" ("wipe the slate") in the Mambasa territory of the Ituri district. During that operation, MLC forces were accused of committing numerous crimes against civilians, including rape, summary executions, and looting. Indeed, during the proceedings to confirm the charges against Bemba, the Office of the Prosecutor extensively discussed the behavior of MLC troops in the DRC. The Office did so to demonstrate that Bemba should have known that MLC troops were likely to commit crimes when sent to the CAR.

Human Rights Watch has repeatedly called on the ICC prosecutor to investigate crimes committed by MLC troops in the Ituri district of DRC and, if the evidence was sufficient, to prosecute Bemba for these crimes. In June, Congolese victims who say that they suffered crimes at the hands of MLC soldiers and who are participating in the DRC investigation before the ICC, asked Pre-Trial Chamber I to review the prosecutor's decision not to prosecute Bemba for crimes in the DRC. On October 25, Pre-Trial Chamber I concluded that there was no decision it could review, since the Office of the Prosecutor had not yet made a formal decision "in the interests of justice" not to investigate and prosecute Bemba for his role in Ituri.

With the Bemba CAR trial starting, it appears more and more unlikely that the ICC prosecutor will ever bring charges against Bemba for his alleged role in crimes committed in Ituri. This is a significant missed opportunity to bring justice for Congolese victims of crimes committed by MLC troops.

7. Can victims participate in the trial?

Under the Rome Statute, victims can participate in the hearing, even beyond testifying as witnesses. This is unique in international justice proceedings and an important innovation with the potential to ensure that the proceedings engage those more directly affected by the alleged crimes. The judges, in their role, ensure that victims' participation is not prejudicial to, or inconsistent with, the defendants' fair trial rights.

Victims in the CAR have tirelessly called for justice ever since the coup, and expectations about ICC investigations and the Bemba trial are high. Numerous victims wish to take part in the proceedings and have filed applications. At the date of this writing, 135 victims have been accepted to participate, and more than 1,200 additional applications are under review.

Victim participants who do not have the financial means to pay for a legal representative are entitled to assistance from the court. In the Bemba case, Trial Chamber III decided that the court's registry should appoint two common legal representatives, with one assistant each, to represent all of the victims who will eventually be authorized to participate. In addition, the judges insisted that, to make the representation more meaningful, the legal representatives should be culturally connected to the victims, "speak the victims' language, share their culture and know their realities."

8. Who is paying for Bemba's legal representation?

A defendant has the right to legal counsel during criminal proceedings and is entitled to financial assistance if he or she does not have the resources to exercise this right. Bemba submitted an application for financial assistance, which the ICC registrar provisionally rejected in August 2008, based on an initial determination that Bemba has the resources to pay for his own defense.

Bemba claimed, however, that because the court had issued a number of orders aiming at freezing and seizing his considerable assets in 2008, in the event of possible reparations for victims, he was unable to access his financial resources readily to pay for his defense. Thus, the court initially ordered the release of one of Bemba's bank accounts in Portugal to enable him to pay his defense team and support his family. Once those resources were exhausted, and in the absence of any immediate prospect that Bemba could access his other assets, the court decided in October 2009 that the Registry should advance funds for his legal representation, retroactively to March 2009, to guarantee that Bemba could have a fair trial without undue delay. The chamber further ordered the Registry to put in place a number safeguards to ensure that the court would be able to recover these funds. Based on the registry's own calculations, legal assistance amounted to approximately €30,000 per month.

The issue of the payment of Bemba's legal team remains controversial. In August, Bemba's defense asked that the Registry increase its payments for the duration of the trial, and asked for additional funding to conduct investigations.

But in October, the Registry decided to halt the advance payments to the defense. The Registry noted that its own investigations into Bemba's financial situation revealed differences from the way he had described it. The Registry had previously complained about a lack of cooperation on the part of Bemba to sell one of his villas and thus release funds to pay back the Registry's advances and finance his own defense. The Registry offered, however, to continue providing resources for another three months, with the possibility of an extension, if Bemba demonstrates a willingness to release his assets to repay the court and finance his own defense in the future.

On November 1 Bemba requested another postponement of the trial, contending he had lacked the time and facilities to prepare his defense adequately. He alleged that a lack of financial and human resources had prevented the defense team from conducting proper investigations. The trial chamber has not yet ruled on this matter.

The question of Bemba's resources is also of interest to victims seeking reparations in the case against him. Under the Rome Statute, if Bemba's case proceeds to trial and he is found guilty, the court can order him to pay individual or collective reparations to victims. To be eligible under the Rome Statute for an award from a convicted person, victims must submit an application to the court.

9. What should the ICC do to ensure that people in the CAR and the DRC know about courtroom developments in the Bemba trial in The Hague?

The ICC is faced with the challenge of making sure that the proceedings are meaningful for and understood by the communities most affected by the crimes in the situations under investigation. The ICC must, therefore, make every possible effort to communicate publicly with the people of the CAR about the important legal proceedings in The Hague.

In addition, because Bemba is such a high-profile figure in the DRC, the ICC should anticipate and be prepared to address a pressing need for information about the confirmation of charges there. Some of those interviewed by Human Rights Watch there in July 2007 were of the opinion that the prosecutor's decision to open an investigation in the CAR in May 2007, nearly three years after the CAR referred the situation there to the ICC, was to pursue a political rival of President Kabila. Bemba's arrest and transfer to The Hague, while positive developments, undoubtedly feed this perception.

The Public Information and Documentation Section of the ICC has developed an outreach and communications plan to ensure that information about the opening of the Bemba trial is

available in the CAR and the DRC. For example, the court will hold a news conference in The Hague on the first day of the trial; CAR and DRC journalists will be able to participate through video conference. In addition, it will produce audio and video summaries for wider distribution. ICC field offices in the CAR and DRC will be able to use these summaries in events with the local population.

It will be essential for the ICC to provide regular updates about the trial in outreach events as proceedings progress.

10. Some people are of the opinion that this trial aims at preventing Bemba from running in the presidential elections scheduled for November 2011 in the DRC. Could Bemba still run for office while on trial at the ICC?

International law does not prohibit an individual sought for crimes by the ICC from running for an elected position. Congolese law prohibits individuals who have been *convicted* of war crimes, crimes against humanity, or genocide by an international tribunal from running for office. This does not include individuals accused of such crimes, or on trial at the time of the elections. Congolese law, however, demands that the presidential candidate be present on the territory of the DRC on the day of the elections. The ICC judges deemed Bemba's arrest and detention necessary to ensure his appearance at trial and that he would not endanger the court's proceedings, including through intimidating witnesses. Pending the beginning of the trial, Bemba has filed several applications for "provisional release" which have not been granted. To date, Bemba has not made any public statement about his intentions concerning the 2011 elections.

11. Is there any precedent for a candidate running for office while involved in criminal proceedings before an international court?

There is precedent for indictees of serious crimes being permitted to continue political activity, provided that they are also cooperating with the international tribunal prosecuting the crimes. For example, Ramush Haradinaj— a former Kosovo Liberation Army commander, former prime minister of Kosovo, and leader of the political party Alliance for the Future of Kosovo— was on trial for war crimes at the International Criminal Tribunal for the former Yugoslavia while participating in elections in Kosovo in 2007.

12. Will the ICC prosecutor pursue others in the CAR?

Bemba is currently the only individual charged in relation to the ICC's investigation in the CAR. Human Rights Watch urges the ICC prosecutor to investigate and, evidence permitting, to prosecute others, including former President Patassé, considered to be the person most responsible for ICC-level crimes committed in the CAR, including during the 2002-2003 coup.

13. What about claims by some African leaders that the ICC is unjustly targeting Africans?

The court makes decisions about its investigations based on a variety of factors, including whether it has jurisdiction over the crimes and their gravity. The court's authority extends primarily to crimes committed in states that are parties to the ICC treaty, unless the United Nations Security Council refers a situation to the court or a state that is not a party to the court voluntarily accepts its authority. This has limited the range of situations in which the ICC can be active.

The ICC is currently conducting investigations in five situations in Africa in which extremely grave human rights violations have been committed. In three of these situations (Uganda, the Democratic Republic of the Congo, and the CAR), the national authorities themselves referred the crimes committed on their territory to the ICC. In addition, the ICC prosecutor has also commenced preliminary analysis to see whether he has jurisdiction over alleged violations in a number of non-African situations, including Colombia, Afghanistan, Georgia, and the Occupied Palestinian Territory of Gaza.

At the same time, the landscape in which international justice is applied has admittedly been uneven. Other grave international crimes committed since the ICC was established in 2002 have occurred in states that are not parties to the court and are thus outside of its jurisdiction, including Sri Lanka, Burma, and Iraq. None of these situations have been the subject of a Security Council referral to the ICC. Political realities mean that leaders of powerful states, or with powerful allies, are less likely to be prosecuted by international courts when they are associated with serious crimes.

Justice should not be denied, however, because it is politically impossible to ensure justice for all. Rather, the reach of accountability should be extended to wherever serious crimes occur.