

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08
Date: 4 September 2008

PRE-TRIAL CHAMBER III

Before: Judge Fatoumata Dembele Diarra (Presiding Judge)
Judge Hans-Peter Kaul
Judge Ekaterina Trendafilova

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

CONFIDENTIAL

**Prosecution's Request for a Status Conference and Submissions on Criteria for
Identifying Evidence pursuant to Article 67(2) and Rule 77**

Source: The Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

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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

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural Background

1. On 9 May 2008 the Office of the Prosecutor (hereinafter referred to as "OTP") filed an application for a warrant of arrest to issue against Jean-Pierre Bemba (hereinafter referred to as "Bemba").
2. On 23 May 2008 Pre-Trial Chamber III (hereinafter referred to as "PTC") issued a Warrant of Arrest against Bemba, who was arrested in Belgium by the Belgian authorities pursuant to Article 92 of the Rome Statute on 24 May 2008.
3. On 27 May 2008 the OTP submitted further information and evidentiary materials.
4. On 10 June 2008, the PTC issued a new Warrant of Arrest, which replaced the previous Warrant of Arrest.
5. On 3 July 2008 Bemba was transferred and surrendered to the International Criminal Court in The Hague.
6. On 4 July 2008 the initial appearance took place before the PTC, which set the date of the confirmation hearing for 4 November 2008.
7. On 31 July 2008, the Single Judge issued on its own motion a "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties" (hereinafter referred to as "Decision").¹

¹ ICC-01/05-01/08-55

8. On 6 August 2008 the OTP filed its "Prosecution's Application for leave to Appeal Pre-Trial Chamber III's 31 July 2008 Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties".²
9. On 25 August 2008 the Single Judge issued the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure", rejecting the OTP's application.³

I - The definition of "evidence *which is of true relevance to the case*"

10. Paragraph 67 of the 31 July 2008 Decision reads as follows: "... in the Chamber's opinion, the most important factor in both safeguarding the rights of the defence and enabling the Chamber to exercise its functions is not for the Prosecutor to disclose the greatest volume of evidence, but to disclose the evidence *which is of true relevance to the case*, whether that evidence be incriminating or exculpatory."
11. The Prosecution submits that it has the statutory authority to assess what incriminatory evidence in its possession is of true relevance to its case, and accordingly has the ability to disclose such evidence in compliance with the 31 July 2008 Decision.
12. The Prosecution, however, further submits that according to the provisions governing disclosure of exculpatory evidence and material before the Court, the Prosecutor has no authority on its own to assess what evidence is more relevant or less relevant to the Defence's case.

² ICC-01/05-01/08-63

³ ICC-01/05-01/08-75

13. Therefore, the Prosecution submits that in order to comply with the Decision, with regard to disclosure of exculpatory evidence *which is of true relevance to the case*, the views of the Defence are crucially important for the Prosecution to understand what falls within this category of evidence, as only the Defence knows what its defence is at this time.
14. The Prosecution can only proceed to identifying the evidence in question if enabled by the Defence's explanation as to what is of true relevance to the Defence's case, and by the Defence's observations concerning the criteria identified by the Prosecution to select evidence for disclosure pursuant to Article 67(2) and inspection pursuant to Rule 77.

II - Prosecution's Obligations to Disclose Evidence of Exculpatory Nature

15. In order to comply with its disclosure obligations, the Prosecution has identified a list of criteria to be used in order to select evidence for disclosure pursuant to Article 67(2) and inspection by the Defence pursuant to Rule 77.

Criteria Identified to Select Evidence to be disclosed pursuant to Article 67(2)

16. These criteria were formulated taking into account the crimes and the mode of liability with which Bemba was charged as contained in the 10 June 2008 Warrant of Arrest. In addition, the identified criteria also encompass potentially exonerating evidence such as, for instance, grounds for excluding criminal responsibility, or impeaching the credibility of a witness.

17. Accordingly, the criteria identified by the Prosecution for selecting exculpatory evidence pursuant to Article 67(2) are set out below:

- **Undermining the theory of the case.** Falling within this category is information that may contradict or undermine the Prosecution's case theory: namely that Bemba and the former Central African Republic (hereinafter referred to as "CAR") President Ange-Felix Patasse (hereinafter referred to as "Patasse") reached an agreement/common plan for Bemba to send trained and equipped troops of the *Mouvement de Libération du Congo* (hereinafter referred to as "MLC") into the CAR to defend Patasse's presidency from October 2002 to March 2003. This category therefore includes information contradicting the existence of an agreement between Bemba and Patasse as well as information suggesting that Bemba did not send MLC troops into the CAR from October 2002 to March 2003.
- **Contextual Elements of War Crimes Alleged in the Warrant of Arrest.** It relates to information or evidence that suggest that the conflict in the CAR from 25 October 2002 to about 15 March 2003 was not armed and sustained, that there was no planning or policy of armed groups and that there was no nexus between the conduct of the suspect and the armed conflict.
- **Contextual Elements of Crimes against Humanity Alleged in the Warrant of Arrest.** This category includes information or evidence that suggest that there was no large-scale targeting of civilians, that individuals were targeted on personal basis, that the attacks by MLC troops against civilians were not systematic, or widespread attacks..

- **Crimes Alleged in the Warrant of Arrest.** Falling within this category is information that may contradict or undermine the fact that the MLC troops committed the crimes of rape, murder, torture, outrage upon personal dignity and pillaging against the CAR civilian population as alleged in the Warrant of Arrest.
- **Lack of Authority of Bemba over the MLC.** Information in this category includes but is not limited to the following: Bemba's insufficient authority, insufficient command and control over MLC or the fact that Bemba had absolutely no control over MLC's political or military wing. It also includes information portraying Bemba as an ordinary civilian member of the MLC with no political or military authority/control over the MLC.
- **Lack of knowledge of Bemba of the existence of an armed conflict or the widespread or systematic nature of attacks against civilians.** It refers to information showing that the suspect was not aware of the existence of (i) an armed conflict in the CAR; (ii) MLC's widespread and systematic attacks against the CAR civilian population or (iii) the commission of the crimes itself from October 2002 to March 2003.
- **Co perpetration.** Information that may suggest that Bemba and Patasse did not contribute to a common plan/agreement to maintain Patasse's presidency falls within this category. It also includes information suggesting that Bemba did not send MLC troops to the CAR, information suggesting that there was nothing in Bemba and Patasse's power to prevent MLC from committing alleged crimes. Also includes information suggesting that Bemba took sufficient steps to punish MLC

officers/members for the crimes specifically alleged in the Warrant of Arrest.

- **Other.** Any information not covered by the above-mentioned criteria, which would undermine the case against Bemba, including possible grounds for excluding criminal responsibility provided for in Article 31 and Article 32, falls within this category. These grounds include whether Bemba was suffering from mental disease or was in state of intoxication that destroyed his capacity to appreciate the unlawfulness of his conduct. It also includes information showing that Bemba committed alleged crimes under duress. Further examples include mistake of fact as to Bemba's identity and self-defence. Furthermore, any information impeaching the credibility of Prosecution's evidence, criminal records of witnesses that are actually relied upon by the Prosecution and also, the fact that evidence was obtained in violation of the provisions of the Statute, such as through torture, under duress, etcetera.

Criteria Identified by the OTP to Select Evidence Subject to Inspection by the Defence pursuant to Rule 77

18. The OTP further identified the evidentiary material of exculpatory nature subject to inspection pursuant to Rule 77, as including: information relating to the fact that the MLC was controlled or influenced by individuals other than the suspect; information concerning the fact that a third country apart from the CAR and the Democratic Republic of Congo had control over MLC's actions; information presenting Bemba as a politician only, with no military link to the MLC; pictures of Bemba, and generally letters and documents signed by Bemba and Patasse not relating to the events under

investigations. The OTP also stresses that in order to mark documents as relevant pursuant to Rule 77, the selection is not to be constrained by the temporal and geographical limits of the case. Facts occurring beyond these temporal limits may properly fall within the scope of Rule 77.

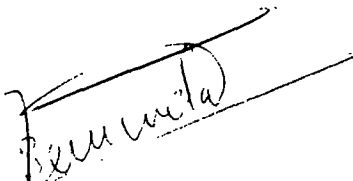
III - Status Conference

19. The Prosecution herewith requests a status conference in order to discuss before the PTC the definition of evidence of an exculpatory nature or material for the Defence *which is of true relevance to the case*. In order to comply with the 31 July 2008 Decision the Prosecution needs explanations from the Defence as to what the Defence considers as falling within this category of evidence.
20. In addition, the Prosecution would present during the status conference a chart indicating the incriminatory evidence which the OTP considers of true relevance to its case.
21. A status conference is a procedural device which aims at efficiently organizing imminent or ongoing judicial proceedings. Status conferences are provided for in the Rules of Procedure and Evidence also in the context of the proceedings with regard to the confirmation of the charges. Pursuant to Rule 121(2)(b), the PTC has the authority to hold status conferences for the specific purpose of ensuring that disclosure prior to the confirmation hearing "takes place under satisfactory conditions".

Relief Sought

22. For the foregoing reasons, the Prosecution respectfully requests that the Pre-Trial Chamber convene a status conference in order to:

- a) allow the parties to discuss and define the concept of "evidence *which is of true relevance to the case*" as formulated in paragraph 67 of the 31 July 2008 Decision in the case of evidence for disclosure pursuant to Article 67(2) and inspection by the Defence pursuant to Rule 77;
- b) allow the Prosecution in this regard to present and explain the criteria identified to select and seek for the Defence's observations with regard to these criteria;
- c) allow the OTP to present a chart indicating the incriminatory evidence which the OTP considers of true relevance to its case.



Fafou Bensouda, Deputy Prosecutor
On behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 4th day of September 2008

At The Hague, The Netherlands