

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: French

N° : ICC-01/05-01/08
Date : 15 September 2008

PRE-TRIAL CHAMBER III

Before: Judge Fatoumata Dembele Diarra, Single Judge

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

Confidential

**Corrigendum to Decision on the Prosecutor's Request to Convene a Status
Conference**

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, Trial Lawyer

Counsel for the Defence

Nkwebe Liriss
Tjarda E. Van der Spoel
Aimé Kilolo-Musamba

Legal Representatives of the Victims

Legal Representatives of the 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

1. Judge Fatoumata Dembele Diarra, judge at the International Criminal Court ("the Court"), acting as Single Judge¹ for Pre-Trial Chamber III ("the Chamber"), was seized of a request by the Prosecutor on 4 September 2008 entitled "Prosecution's Request for a Status Conference and Submissions on Criteria for Identifying Evidence pursuant to Article 67(2) and Rule 77" ("the Prosecutor's Request").²

2. In his request, the Prosecutor requests that a status conference be convened in order to:³

- 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 Chamber's Decision of 31 July 2008 on the system for disclosing evidence,⁴ in particular exculpatory evidence pursuant to article 67(2) of the Rome Statute ("the Statute") and the evidence necessary for preparing the defence of the accused pursuant to rule 77 of the *Rules of Procedure and Evidence* ("the Rules");
- allow him to present and explain to the Defence the criteria established by the Prosecution for identifying the exculpatory evidence which, under article 67(2) of the Statute, he is obliged to disclose, and to receive the observations of the Defence on the said criteria;
- allow him to present a chart indicating the incriminatory evidence which the Prosecutor considers of relevance to the case.

¹ ICC-01/05-01/08-86.

² ICC-01/05-01/08-90-Conf., "Prosecution's Request for a Status Conference and Submissions on Criteria for Identifying Evidence pursuant to Article 67(2) and Rule 77".

³ "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; 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; allow the OTP to present a chart indicating the incriminatory evidence which the OTP considers of true relevance to its case."

⁴ ICC-01/05-01/08-55.

3. On 5 September 2008, pursuant to regulations 24 and 34 of the *Regulations of the Court*, the Single Judge requested the Defence to submit its observations⁵ on the Prosecution Request. Counsel for Mr Jean-Pierre Bemba Gombo ("Mr Jean-Pierre Bemba") submitted their observations to the Single Judge on 9 September 2008 ("the Defence Observations").⁶

4. In its observations, the Defence contends:

"[TRANSLATION] – that the burden of proof lies with the Prosecutor and that the Defence does not have to work with the Office of the Prosecutor in providing evidence [...];

- that if the Prosecutor considers that the abovementioned decision of 31 July 2008 requires clarification because it relates to "*evidence which is of true relevance to the case*", the Prosecutor must set in motion the procedures provided by the relevant legal provisions;

- that the disclosure of evidence need not systematically take place during a status conference;

- that the Office of the Prosecutor was seized of a complaint by the Court of Cassation of the Central African Republic on 13 April 2006 and the Prosecutor officially announced he was opening an investigation into the situation in the CAR on 22 May 2007. It would be reasonable to consider that after more than two years, he has collected all the evidence to be disclosed to the Defence and that his case is ready".⁷

5. Moreover, the Defence "[TRANSLATION] regrets that to date, less than one month from 4 October 2008, no evidence entailing Mr Jean-Pierre Bemba Gombo's responsibility has been disclosed to it."⁸

⁵ ICC-01/05-01/08-94-Conf.

⁶ ICC-01/05-01/08-96-Conf.

⁷ ICC-01/05-01/08-96-Conf., paras. 10, 11, 12, 14.

⁸ ICC-01/05-01/08-96-Conf., para. 15.

6. The Single Judge notes articles 54(1)(a), 60(4) and 67(2) of the Statute, rules 77 and 121(2)(b) of the Rules and regulation 30 of the *Regulations of the Court*.

7. The Single Judge notes that in support of his request, the Prosecutor submits that he does not have the authority to assess what evidence is relevant to the Defence⁹ and that, for this reason, must have the explanations of the Defence in order to understand what evidence it considers really important, as only Mr Jean-Pierre Bemba's counsel know what their defence strategy is at this stage of the proceedings.¹⁰ The Prosecutor also submits that he will not be able to begin to make an assessment until the Defence not only indicates the evidence it considers relevant but also submits its observations to him in respect of the criteria the Prosecutor intends to use in order to identify the evidence to be disclosed pursuant to article 67(2) of the Statute and rule 77 of the Rules.¹¹

8. The Single Judge observes nevertheless that with regard to the application of article 67(2) of the Statute, in its judgment of 11 July 2008, the Appeals Chamber "observes that the Prosecutor's ordinarily unfettered duty to disclose must necessarily be based, inter alia, on the Prosecutor's understanding of the case as a whole, including what is known or anticipated about possible defence(s). The fact that the Prosecutor is required 'to investigate incriminating and exonerating circumstances equally', pursuant to article 54(1)(a) of the Statute, means that the Prosecutor will be aware, during the course of his investigations, of material that may be of assistance to the defence".¹²

9. The Single Judge considers that the Appeals Chamber judgment is especially instructive in respect of how the Prosecutor, who knows his own case best, must himself select the evidence for disclosure pursuant to article 67(2) of the Statute and

⁹ ICC-01/05-01/08-90-Conf., para. 12.

¹⁰ ICC-01/05-01/08-90-Conf., para. 13.

¹¹ ICC-01/05-01/08-90-Conf., para. 14.

¹² ICC-01/04-01/06-1433, para. 36., last sentence.

rule 77 of the Rules. Accordingly, the Single Judge is of the opinion that only the Prosecutor must establish the criteria he will use to identify the exculpatory evidence in the evidence collected during the investigation and assess its relevance. The Single Judge recalls that only if questions arise as to the nature of specific evidence is the Prosecutor required to act in accordance with the procedure provided in the second sentence of article 67(2) of the Statute.

10. Moreover, as regards working with the Defence to clarify the concept of evidence relevant to the case as provided in rule 77 of the Rules, and contrary to what the Prosecutor asserts, the Single Judge recalls that the Appeals Chamber, referring to the jurisprudence of the international tribunals for the former Yugoslavia and for Rwanda¹³, found that “[t]he wording of rule 77 of the Rules of Procedure and Evidence [...] should be understood as referring to all objects that are relevant for the preparation of the defence”.¹⁴

11. The Single Judge is also of the opinion that counsel for Mr Jean-Pierre Bemba are correct in maintaining that “[TRANSLATION] the burden of proof lies with the Prosecutor and that the Defence does not have to work with the Office of the Prosecutor in providing evidence”.¹⁵

12. In view of the above, the Single Judge considers that a status conference is not necessary in order to present, explain and obtain the Defence observations on the criteria established by the Prosecutor for identifying the exculpatory evidence relevant to the case which, under article 67(2) of the Statute and rule 77 of the Rules he is obliged to disclose to the Defence.

¹³ ICC-01/04-01/06-1433, paras. 78 and 79, for example: paragraph 9 of the decision issued by the Appeals Chamber of the International Criminal Tribunal for Rwanda in the case of *Bagosora et al.*

¹⁴ ICC-01/04-01/06-1433, para. 77.

¹⁵ ICC-01/05-01/08-96-Conf., para. 10.

13. With regard to the chart listing the incriminatory evidence, the Single Judge considers that this document must be disclosed according to the modalities set out in the Chamber's decision of 31 July 2008 on the evidence disclosure system,¹⁶ particularly in respect of part III of this decision, which invites the Prosecutor to provide an explanatory chart for each piece of evidence tendered, indicating how it can be related to the constituent elements – contextual, material and *mens rea* – and to the mode of liability alleged with regard to the crimes charged in the warrant of arrest.

14. Accordingly, the Single Judge considers that a status conference is not the appropriate procedure for transmitting evidence to the Defence, especially considering that the modalities for disclosure of evidence were clearly set more than a month ago by decision of the Chamber which is now final.

15. The Single Judge, like the Defence, finds it particularly disturbing that the Prosecutor, has yet to begin disclosing his evidence, whether incriminatory or exculpatory. The Single Judge would take this opportunity to recall that any inexcusable delay which can be ascribed to the Prosecutor might have consequences in respect of the Chamber's examination of any request for interim release by Mr Jean-Pierre Bemba pursuant to article 60(4) of the Statute.

FOR THESE REASONS, THE SINGLE JUDGE REJECTS

the Prosecutor's Request.

¹⁶ ICC-01/05-01/08-55.

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

_____[signed]_____
Judge Fatoumata Dembele Diarra
Single Judge

Dated this 15 September 2008

At The Hague, The Netherlands