

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08

Date: 6 April 2009

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Fumiko Saiga

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

Public Document

**APPLICATION FOR LEAVE TO SUBMIT AMICUS CURIAE OBSERVATIONS
PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE**

Source: Amnesty International

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

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Other

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence (“the Rules”) of the International Criminal Court (“the Court”), Amnesty International seeks leave to submit, as *amicus curiae*, written observations on superior responsibility in the case of *The Prosecutor v. Mr Jean-Pierre Bemba Gombo* (“the Case”).

A. The Application for Leave

2. Amnesty International Ltd. is a company limited by guarantee and committed to the protection of internationally recognised human rights.
3. Rule 103(1) of the Rules permits application by a State, organization or individual for leave to submit observations by providing:

At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

4. For the reasons set forth below, Amnesty International requests that it be granted leave to submit a proposed *amicus curiae* brief.

B. Relevant Procedural History

5. On 3 March 2009, Pre-Trial Chamber III of the Court (the “Chamber”) issued its 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 Bemba”).¹ In the decision, the Chamber expressed the view “that the evidence submitted appears to establish a different crime within the jurisdiction of the Court”.² In particular, the Chamber was concerned that

¹ ICC-01/05-01/08-388.

² ICC-01/05-01/08-388, ¶ 1.

“the idea of a different mode of participation pursuant to article 28 of the Statute [had] not [been] sufficiently addressed.”³

6. This prompted the Chamber to: (a) “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 [superior responsibility]”⁴; and (b) request written elaboration from the parties on superior responsibility.
7. On 30 March 2009, the Office of the Prosecutor (“the Prosecution”) submitted an Amended Document Containing the Charges (“the Amended DCC”), an Amended List of Evidence and an Amended In-Depth Analysis Chart of Incriminatory Evidence, in which it added alternative charges pursuant to Article 28 by alleging:

Jean-Pierre Bemba is criminally responsible by virtue of his superior-subordinate relationship with MLC troops pursuant to Article 28(a), or in the alternative Article 28(b), of the Statute, for crimes against humanity and war crimes, ... which were committed by MLC troops under his effective command, or authority, and control as a result of his failure to exercise control properly over these forces.⁵

8. Amnesty International seeks leave to submit, as *amicus curiae*, a proposed brief on superior responsibility. The proposed brief will be “desirable for the proper determination of the case”,⁶ because it will (1) address issues on which the Chamber requested written elaboration from the parties; (2) provide clarification of three unsettled aspects of superior responsibility that are at issue in the Case; (3) address the interpretation and application of Article 28 – issues of first impression before the Court; and (4) provide a survey of the

³ ICC-01/05-01/08-388, ¶ 48.

⁴ ICC-01/05-01/08-388, ¶ 49.

⁵ ICC-01/05-01/08-395, ¶ 11.

⁶ Rules of Procedure and Evidence, ICC-ASP/1/3 (Part.II-A), r 103(1).

jurisprudence of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone and other courts, relevant to these aspects of superior responsibility.

C. The Proposed *Amicus Curiae* Brief Will Address Three Specific Unsettled Aspects of Article 28 That Have Been Raised in the Case

9. The proposed brief will focus on three specific aspects of superior responsibility pursuant to Article 28 that are of particular relevance to the Case. These are: (a) the requisite mental element for military commanders, including with respect to crimes of sexual violence; (b) liability for the failure to punish as applied to non-state actors; and (c) whether causation is an element of superior responsibility.
10. The requisite mental element applicable to military commanders under Article 28(a) has been raised in the Case by the Chamber⁷ and by the Prosecution.⁸ The proposed brief will: (1) clarify the mental element applicable to military commanders under customary international law and under Article 28(a); and (2) provide a survey of the jurisprudence of the *ad hoc* tribunals with respect to circumstances in which the mental element requirement applicable to a military commander, under the governing statute, has been held satisfied.
11. The Chamber and the Prosecution have each laid particular emphasis in the Case on potential liability for the failure to submit the matter to the competent authorities for investigation and prosecution.⁹ On this issue, the proposed brief will describe: (1) the conduct required from superiors of non-state armed groups pursuant to Article 28's duty to "submit the matter to the competent authorities for investigation and prosecution"; and (2) the relationship, if any, between the submission of a crime to the competent authorities for

⁷ ICC-01/05-01/08-388, ¶ 45.

⁸ ICC-01/05-01/08-395-Anx3, ¶¶ 105-120.

⁹ ICC-01/05-01/08-388, ¶¶ 42-44; ICC-01/05-01/08-395-Anx3, ¶¶ 128, 130.

investigation and prosecution, and the failure to prevent and repress that crime.

12. The issue of causation was specifically raised by the Prosecution in the Amended DCC.¹⁰ The proposed brief will address whether and to what extent causation (that is, whether the commander's failure to exercise control properly caused the crimes by the subordinates) is a required element under Article 28, by addressing: (1) whether causation is a required element of superior responsibility under customary international law; and (2) whether Article 28 should be interpreted to require proof of causation as an element of superior responsibility.

D. Amnesty International's Focused Observations Satisfy the Purpose of Rule 103

13. Submissions on relevant legal issues are appropriate under Rule 103(1).¹¹ In the Situation in the Democratic Republic of the Congo, the Pre-Trial Chamber noted that "it is the view of the Chamber that the rationale for admitting *amicus curiae* in the proceedings is to have the opportunity to get experts' information on relevant issues of legal interest for the proceedings in order to provide the Chamber with a contribution to the proper determination of the case."¹²
14. Amnesty International's proposed brief on superior responsibility satisfies both the rationale for admission of *amicus curiae* and the practical concerns

¹⁰ ICC-01/05-01/08-395-Anx3, ¶¶ 100-104.

¹¹ See, e.g., Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1289 OA11, Decision on "Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules Procedure and Evidence", ¶ 8 (22 April 2008).

¹² Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-373, Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence, ¶ 4 (17 August 2007).

expressed in previous decisions of the Pre-Trial Chamber.¹³ The Case involves the first application of Article 28 by the Court, and the Chamber has recognised that the current proceedings present it with “a problem as to the legal characterisation of the facts presented.”¹⁴ Amnesty International’s proposed brief will be focused on the legal issues of relevance to the Case and will be submitted expeditiously. Furthermore, Amnesty International is well suited, based on its experience and expertise in international humanitarian law and international human rights law, to submit observations on the legal issues in question.

E. **Amnesty International Is an Appropriate Organization to Act as an *Amicus Curiae* in the Present Matter**

15. Amnesty International works internationally on situations of armed conflict, concentrating on documenting and campaigning against human rights abuses and violations of international humanitarian law.
16. Numerous international and national courts have recognised Amnesty International’s expertise and ability to assist in the resolution of significant questions of international law. Amnesty International has submitted *amicus curiae* briefs and made third-party submissions in proceedings before the Special Court for Sierra Leone,¹⁵ the European Court of Human Rights,¹⁶ the

¹³ Situation in Uganda in the Case of The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, ICC-02/04-01/05-333, Decision on application for leave to submit observations under Rule 103, ¶¶ 11-14 (5 November 2008); Situation in Uganda in the Case of The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, ICC-02/04-01/05-342, Decision on application for leave to submit observations under Rule 103 dated 7 November 2008, ¶¶ 10-12 (10 November 2008).

¹⁴ ICC-01/05-01/08-388, ¶ 17.

¹⁵ Special Court for Sierra Leone, Prosecutor v. Alex Tamba Brima and Others, Case No. SCSL-04-16-AR73, Amicus Curiae Brief of Amnesty International Concerning the Public Interest Information Privilege, 16 December 2005 (Appeals Chamber, Decision on Prosecution appeal against decision on oral application for Witness TF1-150 to testify without being compelled to answer questions on grounds of confidentiality, 26 May 2006).

¹⁶ For example, Amnesty International has submitted written comments in the following cases before the European Court of Human Rights: *Acar v. Turkey* (Application No. 26307/95), 8 April 2004 (Preliminary Issue, 6 May 2003); *Aydin v. Turkey* (Application No. 23178/94), 4

Inter-American Court of Human Rights,¹⁷ the United Kingdom House of Lords¹⁸ and the United States Supreme Court.¹⁹

17. Amnesty International has particular expertise on the Rome Statute, having been actively involved in its drafting, from the deliberations in the International Law Commission through to the Rome Diplomatic Conference on the International Criminal Court. Amnesty International co-founded the Coalition for the International Criminal Court, which is made up of over 2000 non-governmental organizations, and is a member of its Steering Committee. Following the adoption of the Statute, Amnesty International launched a worldwide campaign for its universal ratification and implementation. In

November 1996 (Judgment, 57/1996/676/866, 25 September 1997); Assenov and Others v. Bulgaria (Application No. 24760/94), 30 April 1998 (Judgment, 90/1997/874/1086, 18 October 1998); Kurt v. Turkey (Application No. 24276/94), 7 November 1997 (Judgment, 15/1997/799/1002, 25 May 1998); Chahal v. United Kingdom (Application No. 22414/93), 15 January 1996 (Judgment, 70/1995/576/662, 15 November 1996); Akdivar and Others v. Turkey (Application No. 21893/93), 19 June 1996 (Judgment, 99/1995/605/693, 16 September 1996); McCann and Others v. United Kingdom (Application No. 18984/91), 16 November 1994 (Judgment, 17/1994/464/545, 27 September 1995); Murray v. United Kingdom (Application No. 18731/91), 1 April 1995 (Judgment, 41/1994/488/570, 8 February 1996); Brannigan and McBride v. United Kingdom (Application Nos. 14553/89 and 14554/89), 7 August 1992 (Judgment, 25 May 1993); Soering v. United Kingdom (Application No. 14038/88), 13 April 1989 (Judgment, 7 July 1989).

- ¹⁷ For example, Amnesty International has intervened as *amicus curiae* in the following cases before the Inter-American Court of Human Rights: Case of Velásquez-Rodríguez v. Honduras, Judgment of 29 July 1988 (Series C No. 4); Case of Godínez-Cruz v. Honduras, Judgment of 20 January 1989 (Series C No. 5); Case of Fairén-Garbi and Solís-Corrales v. Honduras, Judgment of 15 March 1989 (Series C No. 6). Amnesty International has also intervened in the following advisory opinions of the Inter-American Court of Human Rights: "Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)" (OC-9/87 of October 6, 1987, Series A No. 9); and "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law" (OC-16/99 of October 1, 1999, Series A No. 16).

- ¹⁸ Amnesty International has filed third-party interventions in the United Kingdom House of Lords decisions of: Jones v. Ministry of the Interior Al-Mamlaka Al-Arabiya As Saudiya (The Kingdom of Saudi Arabia), [2006] UKHL 26; A(FC) v. Secretary of State for the Home Department, [2004] UKHL 56; R v. Bartle and the Commissioner of Police for the Metropolis: Ex Parte Pinochet, [2000] 1 AC 61 (25 November 1998); In re Pinochet, [2000] 1 AC 119 (15 January 1999).

- ¹⁹ Among the recent cases in which Amnesty International has filed *amicus curiae* briefs in the United States Supreme Court are: Boumediene v. Bush, 128 S. Ct. 2229 (2008) (filed 24 August 2007); Rasul v. Bush, 542 U.S. 466 (2004) (filed January 14 2004); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (filed 27 February 2004); Roper v. Simmons, 543 U.S. 551 (2005) (filed 19 July 2004).

addition, Amnesty International has documented rape and other forms of sexual violence in situations of armed conflict in numerous countries including the Democratic Republic of Congo, Chad, Sudan, Sierra Leone and Liberia and explored issues of superior responsibility.

18. Amnesty International enjoys recognition by various international organizations. It has Special Consultative Status to the Economic and Social Council of the United Nations, Participatory Status with the Council of Europe and Observer Status with the African Commission on Human and Peoples' Rights. It is registered as a civil society organization for participation in activities of the Organization of American States.
19. Amnesty International is independent of any government, political ideology, economic interest or religion. It is funded mainly by its membership and public donations. No funds are sought or accepted from governments for investigating and campaigning against human rights abuses.

F. Conclusion

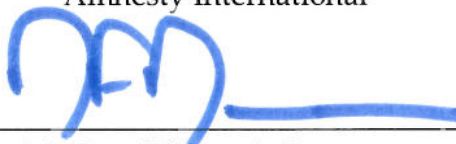
20. For the reasons set forth above, Amnesty International requests that it be granted leave to submit the proposed *amicus curiae* brief on these matters pursuant to Rule 103 of the Rules, within any time-limit fixed by the Chamber. To comport with the Chamber's submission schedule under the recently ordered adjournment, the proposed brief could be submitted by 24 April 2009.

21. Amnesty International remains prepared to submit any further written comments at the request or with the leave of the Chamber.

Respectfully submitted,



Ms Widney Brown
on behalf of
Amnesty International



Mr Donald Francis Donovan
Debevoise & Plimpton LLP
Counsel on behalf of the Applicant

Dated this fourth day of April 2009

At London, United Kingdom and New York, USA