

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 November 2008

PRE-TRIAL CHAMBER III

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

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

Public

**Decision Regarding the Disclosure of Materials Pursuant to Article 67(2) of the
Rome Statute and Rule 77 of the Rules of Procedure and Evidence**

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
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

PRE-TRIAL CHAMBER III (the “Chamber”) of the International Criminal Court (the “Court”) has been seized of the “Application for the Return of Defence Evidence” submitted by the Defence on 28 October 2008 (the “Defence Application”).¹

1. The present decision is classified as public although it refers to the existence of hearings and documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential or confidential *ex parte*. The Chamber is of the view that the present classification is required by the principle of publicity of the proceedings. Moreover, the Chamber considers that references in the present decision to confidential documents or confidential *ex parte* hearing have been kept to a minimum and are not inconsistent with the nature of the documents referred to.

2. On 31 July 2008 the Chamber issued the “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties” (the “Decision on Disclosure”)² in which it ordered the Prosecutor to disclose to the Defence all evidence in the Prosecutor’s possession or control under article 67(2) of the Rome Statute (the “Statute”) as soon as practicable and on a continuous basis. In addition, disclosure of evidence falling under rules 76 and 77 of the Rules of Procedure and Evidence (the “Rules”) was ordered to be conducted as soon as possible and no later than 3 October 2008.

3. On 17 October 2008 the Chamber decided to postpone the date of the confirmation hearing and to suspend the calendar as established in the Decision on Disclosure.³ On 3 November 2008 the Chamber *inter alia* decided to schedule the

¹ ICC-01/05-01/08-194-Conf-tENG.

² ICC-01/05-01/08-55.

³ ICC-01/05-01/08-170.

confirmation hearing to start on the 8 December 2008 and set a new calendar for the disclosure between the parties.⁴

4. In accordance with the Chamber's decisions,⁵ the Prosecutor filed on 1 October 2008,⁶ 3 October 2008,⁷ 14 October 2008,⁸ 16 October 2008,⁹ 20 October 2008,¹⁰ 24 October 2008,¹¹ 31 October 2008,¹² 4 November 2008,¹³ 5 November 2008¹⁴ and 7 November 2008¹⁵ lists and in-depth analysis charts for items of exculpatory nature and rule 77 materials. According to the aforementioned submissions, the Prosecutor has disclosed to the Defence in total 37 materials pursuant to article 67(2) of the Statute and made available for the Defence's inspection in total 2063 materials under rule 77 of the Rules. Out of the aforementioned 2063 materials and with the exception of financial documents, 486 have been obtained from or belonged to Mr Jean-Pierre Bemba.¹⁶

⁴ ICC-01/05-01/08-199.

⁵ ICC-01/05-01/08-55; ICC-01/05-01/08-170; ICC-01/05-01/08-199; ICC-01/05-01/08-T-8-Conf-ENG CT, p. 30, lines 17-21.

⁶ Prosecutor, "Prosecution's Communication of In-Depth Analysis Charts for Items of Truly Relevant Incriminating and Exonerating Evidence Disclosed to the Defence on 1 October 2008", ICC-01/05-01/08-130 and ICC-01/05-01/08-130-Conf-AnxB; and "Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 1 October 2008", ICC-01/05-01/08-133 and ICC-01/05-01/08-133-Conf-AnxA.

⁷ "Prosecution's Communication of Materials Provided to the Defence under Rule 77 on 3 October 2008", ICC-01/05-01/08-138 and ICC-01/05-01/08-138-Conf-AnxA.

⁸ "Prosecution's Submission of In-depth Analysis Charts for Items of Evidence Disclosed to the Defence as Potentially Exonerating and Rule 77 Evidence", ICC-01/05-01/08-156 and ICC-01/05-01/08-156-Conf-AnxA and AnxB1-B4.

⁹ "Prosecution's Communication of Rule 77 Evidence Disclosed to the Defence on 16 October", ICC-01/05-01/08-160 and ICC-01/05-01/08-160-Conf-AnxA; and "Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 16 October 2008", ICC-01/05-01/08-161 and ICC-01/05-01/08-161-Conf-AnxA.

¹⁰ "Prosecution's Submission of In-depth Analysis Charts for Items of Evidence Disclosed to the Defence under Rule 77 of the Rules of Procedure and Evidence on 16 October 2008", ICC-01/05-01/08-173 and ICC-01/05-01/08-173-Conf-AnxA1-A3; and "Prosecution's Submission of In-depth Analysis Chart for Items of Potentially Exonerating Evidence Disclosed to the Defence on 16 October 2008", ICC-01/05-01/08-174 and ICC-01/05-01/08-174-Conf-AnxA.

¹¹ ICC-01/05-01/08-187 and in particular ICC-01/05-01/08-187-Conf-AnxC and ICC-01/05-01/08-187-Conf-AnxD.

¹² "Prosecution's Communication of Rule 77 Evidence Disclosed to the Defence on 30 October 2008", ICC-01/05-01/08-198 and ICC-01/05-01/08-198-Conf-AnxA; and "Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 30 October 2008", ICC-01/05-01/08-197 and ICC-01/05-01/08-197-Conf-AnxA.

¹³ ICC-01/05-01/08-203 and ICC-01/05-01/08-203-Conf-AnxA.

¹⁴ "Prosecution's Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 4 November 2008", ICC-01/05-01/08-210 and ICC-01/05-01/08-210-Conf-AnxA.

¹⁵ "Prosecution's Submission of Updated Version of In-depth Analysis Chart for All Materials Provided to the Defence for Inspection under Rule 77", ICC-01/05-01/08-219 and ICC-01/05-01/08-219-Conf-AnxA.

¹⁶ ICC-01/05-01/08-156-conf-AnxB-3; ICC-01/05-01/08-173-conf-AnxA2 and ICC-01/05-01/08-219-Conf-AnxA.

5. On 22 October 2008 a status conference was held in closed session in the presence of the Prosecutor, the Defence and the Registry, during which the Defence notably informed the Chamber that it was “in the process of exploring all of the disclosure material” after which it will ask the Prosecutor to inspect certain of the materials.¹⁷

6. On 28 October 2008 the Defence Application was filed.¹⁸ The Defence asserted that materials belonging to Mr. Jean-Pierre Bemba have been seized¹⁹ and requested that the Prosecutor provides a complete inventory of these materials. In addition, the Defence asserted that it intends to rely for the purposes of the confirmation hearing on certain of the aforementioned seized materials and that those materials have not yet been disclosed to the Defence, namely a laptop containing a file marked “CPI” [ICC], three videotapes showing the trial of soldiers from the *Mouvement de Libération du Congo* (the “MLC”) suspected of perpetrating crimes in Central African Republic (“CAR”) as well as documents pertaining to the trial of MLC soldiers suspected of having committed crimes in Mombasa.²⁰ In this regard, the Defence requested the return or, at the very least a true copy, of the materials seized and in particular of the aforementioned laptop containing the file “CPI”, the aforementioned three videotapes and the documents pertaining to the trial of MLC soldiers suspected of having committed crimes in Mombasa.²¹

7. On 7 November 2008 the Prosecutor submitted the “Prosecution’s response to the Defence’s ‘Requête en vue de la restitution des éléments de preuve de la Défense’” (the “Prosecutor’s Response”).²² In his response, the Prosecutor firstly pointed out that the metadata fields accompanying each piece of material disclosed

¹⁷ ICC-01/05-01/08-T-8-Conf-ENG CT, p.25, lines 16-21; ICC-01/05-01/08-T-8-Conf-ENG CT, p 31, lines 2-6.

¹⁸ ICC-01/05-01/08-194-Conf-tENG

¹⁹ ICC-01/05-01/08-194-Conf-tENG, paras 6-7

²⁰ ICC-01/05-01/08-194-Conf-tENG, para.9

²¹ ICC-01/05-01/08-194-Conf-tENG, para.13. See also ICC-01/05-01/08-T-8-Conf-ENG CT, p.26. lines 21-25 to page 27, line 1.

²² ICC-01/05-01/08-227-Conf and ICC-01/05-01/08-227-Conf-AnxA-AnxE.

to the Defence, specify its origin and thus whether it was collected by the Prosecutor further the search and seizure in Mr Jean-Pierre Bemba's houses. The Prosecutor also contended that the return of the materials seized will violate the Decision on Disclosure. Thirdly, the Prosecutor advanced that he has disclosed the "CPI" file referred to by the Defence as well as the three videotapes and the documents pertaining to the trial of MLC soldiers suspected of having committed crimes in Mombasa. In relation to the aforementioned videotapes and documents, the Prosecutor added that due to a technical problem, the Defence was unable to open the tapes and the documents and that the Prosecutor is ready to re-disclose those materials or to assist the Defence to solve the technical problems in any other possible way. Finally, in relation to the laptop seized in Mr. Jean-Pierre Bemba's house, an inspection has been scheduled but was not proceeded with as the representative of the Defence was not in possession of the necessary password to access the computer, such inspection will thus take place in the next days, depending on the Defence's readiness.

8. The Chamber notes articles 61(3) and 67(2) of the Statute and rules 77 and 121 of the Rules.

9. At the outset, the Chamber is of the view that only when the Defence is notified of the document containing the charges and the list of evidence, or any amendments thereto, together with the supporting evidence, will the Defence effectively be in a position to take an informed decision whether to include in its list of evidence any of the items disclosed by the Prosecutor under article 67(2) of the Statute or rule 77 of the Rules. It is therefore crucial that any item falling under article 67(2) of the Statute be disclosed to the Defence as soon as practicable and that the Prosecutor permits the Defence to inspect all evidence under rule 77 of the Rules as soon as possible.

10. Firstly, the Chamber notes that the metadata fields accompanying each material disclosed to the Defence allow a search by source, so the Defence is in a position to

identify which of the material disclosed has been obtained following the search and seizure in Mr. Jean-Pierre Bemba's houses.

11. Secondly, as to the Defence request for return or the access to a true copy of the materials seized, the Chamber recalls that in the Decision on Disclosure it ordered the parties to submit to the Registry the original of the evidence as well as an electronic copy thereof; or, in case of tangible objects, an electronic photograph.²³ The Chamber further notes that the Prosecutor asserted that he has permitted the Defence to inspect all materials that were seized in Mr. Jean-Pierre Bemba's houses.²⁴ Therefore, the Defence request for return or at least the full reproduction of the materials seized must be dismissed.

12. Thirdly, with regard to the laptop referred to by the Defence, the Chamber notes that an inspection has been scheduled on 30 October 2008 but was not completed since the Defence representative was not in possession of the necessary password to access the computer.²⁵ The Chamber further observes that, according to the Prosecutor, such inspection will take place in the next days, depending on the Defence's readiness.²⁶

13. Fourthly, in relation to the three videotapes and the documents pertaining to the trial of MLC soldiers suspected of having committed crimes in Mombasa, the Chamber notes that those documents have been disclosed to the Defence. Nevertheless, the Chamber observes that due to technical problems, the Defence was unable to open the aforementioned materials.²⁷ In this regard, the Chamber recalls that the Registrar has designated a focal point to resolve any technical problems the Defence may encounter.²⁸

²³ ICC-01/05-01/08-55, page 22, letter b) of the operative part.

²⁴ ICC-01/05-01/08-227-Conf, para.2.

²⁵ ICC-01/05-01/08-227-Conf-AnxD.

²⁶ ICC-01/05-01/08-227-Conf, para.8.

²⁷ ICC-01/05-01/08-227-Conf, para. 9 and ICC-01/05-01/08-227-Conf-AnxE.

²⁸ ICC-01/05-01/08-185-Conf.

14. Finally, the Chamber also wishes to address the issue of disclosure with regard to materials falling under article 67(2) of the Statute. According to article 67(2) of the Statute, the Prosecutor shall, as soon as practicable, disclose to the Defence evidence in the Prosecutor's possession or control which he believes shows or tends to show the innocence of the accused. The Chamber further notes that pursuant to article 54(1)(a) of the Statute, the Prosecutor shall, in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

15. The Chamber notes that the Prosecutor has repetitiously declared that he has discharged his disclosure obligations with regard to exculpatory materials and that he is doing so on a regular basis.²⁹ In this respect, the Chamber observes that to date the Prosecutor has disclosed a total of 37 documents falling under article 67(2) of the Statute.³⁰

16. Nevertheless, the Chamber underlines that Mr Jean-Pierre Bemba is believed to be a national of the Democratic Republic of the Congo ("DRC")³¹ and that the Prosecutor has conducted investigations into the situation of the DRC since June 2004.³² Therefore the Chamber would like to ascertain whether the Prosecutor's ongoing search for potentially exculpatory materials that could fall under article 67(2) of the Statute, for the purposes of the present case, encompasses the DRC documents in his possession and control.

17. In conclusion, the Chamber would like once again to remind the Prosecutor that he has to disclose all exculpatory materials, which is of utmost importance for the preparation of the Defence, on an ongoing basis and as soon as practicable.

²⁹ ICC-01/05-01/08-T-6-Conf-Exp-ENG ET, p. 27, lines 9-11. See as well ICC-01/05-01/08-T-8-CONF-ENG CT, p. 32, lines 18-21.

³⁰ ICC-01/05-01/08-133 and ICC-01/05-01/08-133-Conf-AnxA; ICC-01/05-01/08-161 and ICC-01/05-01/08-161-Conf-AnxA; ICC-01/05-01/08-187-Conf-AnxC; and ICC-01/05-01/08-197-Conf-AnxA.

³¹ ICC-01/05-01/08-15, p. 9; see also ICC-01/05-01/08-169-Conf-Anx2A, para. 1.

³² ICC-01/04-1, p. 2.

FOR THESE REASONS, THE CHAMBER

- a) **rejects** the Defence Application;
- b) **invites** the Defence to contact the focal point designated by the Registrar in order to resolve any technical problems it encounters;
- c) **orders** the Prosecutor to inform the Chamber and the Defence, by Monday 17 November 2008, whether his ongoing search for potentially exculpatory materials that could fall under article 67(2) of the Statute encompasses the DRC documents in his possession and control.

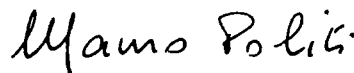
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafflova
Presiding Judge



Judge Hans-Peter Kaul



Judge Mauro Politi

Dated this Wednesday, 12 November 2008

At The Hague, The Netherlands