

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08
Date: 2 December 2009

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

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

Public Document
**Decision on the defence application for additional disclosure relating to a
challenge on admissibility**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo-Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

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

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod Jacome

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on the defence application for additional disclosure relating to a challenge on admissibility.

The submissions of the parties

1. The defence has indicated an intention to contest the admissibility of this case, on the basis of the principles of complementarity and *non bis in idem*. To assist in his challenge, the accused, on 5 October 2009, filed the "Requête Aux Fins De Divulgation",¹ which followed certain *inter partes* exchanges on the issue of disclosure that did not produce, in the view of the defence, a satisfactory result.
2. In essence, the defence requests comprehensive disclosure of five categories of material:
 - a) The procès-verbaux of any relevant meetings between the prosecution and the Central African Republic ("CAR"), and with other countries.
 - b) Any relevant exchange of correspondence with national authorities.
 - c) The entire dossier on the criminal proceedings initiated before the national criminal courts in Bangui.
 - d) The notification sent by the Prosecutor and addressed to the Democratic Republic of the Congo ("DRC"), pursuant to Article 18 of the Statute, on the issue of competence, along with any response from the DRC.

¹ Requête Aux Fins De Divulgation, 5 October 2009, ICC-01/05-01/08-542.

e) The material internal documents.²

3. The defence argues that disclosure of this material is necessary to enable the accused to investigate whether or not there has been interference in domestic legal proceedings, while the case was under investigation by the national authorities in Bangui.³
4. The defence complains that there has only been partial disclosure of the Bangui dossier relating to criminal proceedings brought against the accused, and it suggests that it is not for the Office of the Prosecutor (“prosecution”) to decide which parts of this material are relevant for the purpose of the defence submissions. The accused argues that the partial disclosure that has occurred thus far conceals the full picture as to how this case came before the International Criminal Court (“ICC” or “Court”).⁴
5. On 12 October 2009, the prosecution filed the “Prosecution’s Response to Defence ‘Requête Aux Fins De Divulgation’ dated 5 October 2009 and Request for a Rule 87(3)(b) Order”.⁵ The prosecution submits that it is not in possession of any minutes of meetings or correspondence with the CAR or the DRC that are relevant to this admissibility challenge,⁶ and that at the pre-confirmation stage it reviewed and disclosed all the exculpatory and Rule 77 material relating to the criminal proceedings before the Bangui national courts. Although certain potentially incriminating documents were then left outstanding, given the defence argument that all of these documents may have a bearing on its admissibility challenge, the prosecution disclosed this

² ICC-01/05-01/08-542, paragraph 12.

³ ICC-01/05-01/08-542, paragraph 8.

⁴ ICC-01/05-01/08-542, paragraph 10.

⁵ Prosecution’s Response to Defence “Requête Aux Fins De Divulgation” dated 5 October 2009 and Request for a Rule 87(3)(b) Order, 12 October 2009, ICC-01/05-01/08-556.

⁶ ICC-01/05-01/08-556, paragraph 11.

remaining material on 12 October 2009 under Rule 77 of the Rules of Procedure and Evidence (“Rules”).⁷

6. The prosecution rehearsed that in compliance with its obligations under Article 18 of the Rome Statute (“Statute”), it sent a confidential notification to all States Parties, including the DRC, of its decision that there was reasonable basis to commence an investigation into the situation in the CAR. This document was attached as Annex A to the prosecution’s filing. No response to this has been received.⁸
7. Given these circumstances, the prosecution submits that it has disclosed all the evidence in its possession relevant to the admissibility of its case.⁹
8. Finally, the prosecution seeks an order, under Rule 87(3)(b) of the Rules, prohibiting the defence from making third party disclosure.¹⁰
9. On 19 October 2009, the defence filed the “Defence reply to the Prosecutor’s Response of 12 October 2009 regarding Disclosure of Evidence in relation to Admissibility” (along with a corrigendum of the same date).¹¹ The accused complains that the prosecution’s disclosure of 12 October 2009 was “only partial”, in that some of the disclosed evidence remains inaccessible (*viz.* the references in footnote 3,¹² and in particular the letter that the Prosecutor sent to the DRC).¹³

⁷ ICC-01/05-01/08-556, paragraph 12.

⁸ ICC-01/05-01/08-556, paragraph 13.

⁹ ICC-01/05-01/08-556, paragraph 14.

¹⁰ ICC-01/05-01/08-556, paragraph 15.

¹¹ Réplique de la Défense à la Réponse du Procureur du 12 Octobre 2009 sur la Divulgence des éléments de preuve relatifs à l’admissibilité, 19 October 2009, ICC-01/05-01/08-564; Corrigendum Réplique de la Défense à la Réponse du Procureur du 12 Octobre 2009 sur la Divulgence des éléments de preuve relatifs à l’admissibilité, 19 October 2009, ICC-01/05-01/08-564-Corr.

¹² Which are CAR-OTP-0004-0022, the international arrest warrant for Ange Félix Patassé issued by the Cour d’Appel de Bangui; CAR-OTP-0004-0023 (which is unavailable on the ecourt system); CAR-OTP-0004-0063, International Commission Rogatoire issued by the Cour d’Appel de Bangui, requesting the cooperation of the judicial authorities of the French Republic in identifying and freezing bank accounts belonging to Ange Félix Patassé in France and other European Union countries; CAR-OTP-0004-0177, Cour Criminelle de Bangui. Arrêt

10. Addressing the procès-verbaux of the meetings held with the authorities of the CAR and the DRC, the defence suggests that the Prosecutor must inform the accused of all the material in his possession in order to enable the defence to analyse the evidence and to assess for itself whether or not it is relevant to its submissions on admissibility.¹⁴
11. As to the correspondence with the authorities in the CAR and the DRC, the defence suggests that it is not for the prosecution to substitute its own assessment for that of the defence as regards the relevance of this information, which, it submitted, should be disclosed in its entirety. As an example of its complaint of non-disclosure, the defence refers to a letter sent by President Bozize to the United Nations Security Council, dated 1 August 2008 in which he purportedly indicated that the criminal courts in the CAR were competent to deal with crimes allegedly falling within the jurisdiction of the ICC, along with an earlier letter from the Prosecutor of the ICC, dated 10 June 2008, to President Bozize.¹⁵
12. The defence focussed on the dossier of the Bangui criminal proceedings, complaining that it had received a wholly inadequate and incomplete copy. Furthermore, it submitted that it is crucial that it is provided with the decisions of the Court of First Instance and the Appeal Court following the recommendation of the Bangui prosecutor not to prosecute after its investigations in the CAR. It is argued that these decisions have considerable potential relevance to the twin issues of admissibility and *non bis in idem*, and

avant dire droit (statement of facts before judgment on the merits) in the Case against Patassé and others, 22 December 2004; CAR-OTP-0004-0216, Procès verbale of the first appearance of Gabriel Jean Edouard Koyambonou before the Cour d'Appel de Bangui; CAR-OTP-0004-0050 (which is unavailable on the ecourt system); and CAR-OTP-0004-0055 (which is unavailable on the ecourt system). The defence observes that there is a page missing from CAR-OTP-0004-0032, the international arrest warrant for Martin Koumtamadji alias Abdouye Miskine, issued by the Cour d'Appel de Bangui.

¹³ ICC-01/05-01/08-564, paragraph 3.

¹⁴ ICC-01/05-01/08-564, paragraph 4.

¹⁵ ICC-01/05-01/08-564, paragraph 5.

that submissions on these areas can only be properly formulated after the full Bangui dossier is made available for inspection. The defence is interested, *inter alia*, in the possibility that external interference led to the cessation of the Central African legal proceedings, which had reached a relatively advanced stage.¹⁶

13. The defence highlights certain “internal” documents, and including its exchanges with non-governmental organisations such as FIDH and Ocodefad, at a relevant time whilst proceedings were pending before the Central African courts.¹⁷

The pre-trial stage

14. It is to be observed that although Pre-Trial Chamber II considered certain procedural matters in relation to this proposed admissibility challenge, it did not address the merits of the issue, and in those circumstances it is unnecessary to rehearse in full the history to this issue during that stage of the case. It is sufficient to note that on 22 July 2009, the defence filed its “Requête Aux Fins De Divulgateion Des Eléments Pertinents Relatifs à L’Admissibilité”.¹⁸ On 13 August 2009, the prosecution filed its response to this request, in which it indicated that it had reviewed all the documents in its possession or control, including the CAR and DRC collections, and was satisfied that it had discharged its disclosure obligations.¹⁹ The documents provided to the defence included the Decision of the Cour de Cassation on the national criminal proceedings conducted in the CAR and the other relevant documents from the Cour d’Appel de Bangui. Additionally, the defence has been provided with the referral and the supporting report provided by the

¹⁶ ICC-01/05-01/08-564, paragraphs 6 and 7.

¹⁷ ICC-01/05-01/08-564, paragraph 8.

¹⁸ Requête Aux Fins De Divulgateion Des Eléments Pertinents Relatifs à L’Admissibilité, 22 July 2009, ICC-01/05-01/08-458.

¹⁹ Prosecution’s Response to Defence “Requête Aux Fins De Divulgateion Des Eléments Pertinents Relatifs A L’Admissibilité”, 13 August 2009, ICC-01/05-01/08-474.

CAR authorities. The defence was invited to identify any other evidence that it considered had been improperly withheld.

15. On 18 September 2009, the single judge of Pre-Trial Chamber II rejected the defence application dated 22 July 2009, on the basis that the accused lacked *locus standi*²⁰ to raise the issue of admissibility before the Pre-Trial Chamber, because, *inter alia*, the Confirmation Decision²¹ had been issued on 15 June 2009.

Analysis and Conclusions

16. Given the broad attack made on the adequacy of disclosure by the prosecution for the purpose of the defence admissibility challenge, it is useful to rehearse the prosecution's obligations in this regard.
17. The following is required by Article 67(2) of the Statute:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

18. It is arguable that this provision does not apply in these circumstances, because an admissibility challenge (including by way of arguments under the *non bis in idem* principle) does not relate to the guilt or innocence of this accused or the credibility of the prosecution evidence; instead, it concerns the purely jurisdictional issue of whether the ICC is legally competent to try him. Put otherwise, a decision declining jurisdiction does not address the merits of the charges or the credibility of the evidence to be called in support of them. However, neither party substantively addressed this issue, and in any event it

²⁰ Decision on the "Requête Aux Fins De Divulgarion Des Eléments Pertinents Relatifs A L'Admissibilité", 18 September 2009, ICC-01/05-01/08-529, paragraphs 13 and 14.

²¹ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424.

is unnecessary for the Chamber to decide the point because Rule 77 of the Rules undoubtedly applies in these circumstances:

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

19. Documents and any other items listed in Rule 77 of the Rules that are relevant to the accused's complementarity and *non bis in idem* challenges are self-evidently material to the preparation of his defence, and the prosecution must permit inspection of them (a requirement which, the Chamber observes, is regularly fulfilled by the Prosecutor providing copies of the relevant items, if they are susceptible to copying). Therefore, in the present context, this step is indistinguishable from disclosure.

20. An issue that arises is the approach to be taken in circumstances such as the present, when there is an allegation that the prosecution has not fulfilled its disclosure duties and has improperly withheld material. As just set out, the obligation of the prosecution is to permit inspection of any documents, and other items as listed in Rule 77 of the Rules, which are material to the preparation of the defence. The requirement, therefore, is not for the prosecution to offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection; it is, instead, to provide all the items that are material to the preparation of the defence. This inevitably involves an exercise of judgment on the part of the prosecution as to what is relevant ("material"), on the basis of all the available information, and including anything revealed to the accused. It is to be observed that similarly under Article 67(2) of the Statute the Prosecutor must assess the

material and disclose those items which “he [...] believes” satisfy the statutory criteria.

21. Given that the prosecution will, therefore, make a decision on issues that may affect the fairness of the proceedings, it is necessary that the Chamber is able properly to review the approach that has been taken, and the conclusions reached, by the prosecution, in the event of a credible challenge or in other relevant circumstances. The judges have an overarching responsibility to secure a fair trial of the accused (Article 64(2) of the Statute), and they have the power to rule on any relevant matters (Article 64(6)(f) of the Statute). In the result, whenever the Chamber considers it necessary the underlying disputed material is to be provided to the judges, so that they can investigate whether or not the disclosure or inspection regime has been appropriately managed.

22. However, it needs to be emphasised that the twin duties of disclosure (Article 67(2) of the Statute) and permitting inspection (Rule 77 of the Rules) rest with the prosecution, and the Chamber will not routinely oversee or review the decisions taken by Office of the Prosecutor in fulfilment of them. They are important prosecutorial obligations, which must be discharged scrupulously and fairly. The Chamber will only intervene if there are other good reasons for doubting that the duty has been properly fulfilled.

23. Additionally, the Chamber has borne in mind the provisions of Rule 81 of the Rules:

Restrictions on disclosure

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

24. The Chamber must ensure that any disclosure order does not infringe the prohibition set out in this rule. Furthermore, certainly in the present context, the lesser provision (inspection, created by the Rules) is to be treated in the same way as the greater (disclosure, created by the Statute), and if disclosure is prohibited, applying a purposive interpretation in order to give effect to Rule 81 of the Rules, this applies equally to inspection. Otherwise, an inspection order under Rule 77 would render Rule 81 wholly ineffective.

25. Turning to the merits of this application, the Chamber has reached the following conclusions, under the various headings identified by the defence.

The procès-verbaux of any relevant meetings between the prosecution and the Central African Republic (“CAR”), and with other countries

26. There is no sustainable basis that has been identified for the Chamber’s consideration that the prosecution has failed to reveal any parts of the procès-verbaux, and particularly of meetings that are material to the accused’s admissibility challenge. The prosecution has stated unequivocally that it is not in possession of any minutes of meetings or correspondence with the CAR or the DRC that concern this admissibility challenge. Furthermore, for the reasons set out above, the Chamber rejects the defence submission that the prosecution has an obligation to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of “handing the defence the keys to the warehouse” in this way.²²

²² Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court. Issued by the Judiciary of England and Wales, 20 February 2006, paragraph 31.

27. In the absence of any *prima facie* indications that the prosecution has failed to discharge its duties in this regard conscientiously, the Chamber refuses the application for additional material.

Any relevant correspondence

28. The Chamber has been informed that certain letters that passed between the Court and the authorities of the CAR have been improperly withheld. The allegations particularly centre, as set out above, on a letter sent by President Bozize to the United Nations Security Council, dated 1 August 2008, in which he purportedly indicated that the criminal courts in the CAR were competent to deal with crimes allegedly falling within the jurisdiction of the ICC, along with an earlier letter from the Prosecutor of the ICC, dated 10 June 2008, to President Bozize.

29. Given the focussed, and *prima facie* credible, complaint made by the defence, the Chamber will conduct an *ex parte* hearing with the prosecution to investigate whether inspection should be ordered.

The entire dossier on the criminal proceedings initiated before the national criminal courts in Bangui

30. For the reasons set out above, the defence is not entitled to inspect the entire file. Instead, the prosecution must facilitate inspection of those parts that are material to the defence submissions on admissibility. Given there is a clear need for the defence to be able to view any relevant documents in their proper context, the prosecution should not interpret this obligation over-restrictively.

31. Although the prosecution avers that it has now disclosed all the remaining material in its possession, given the focussed, and *prima facie* credible, complaint made by the defence as regards the first instance and appellate decisions, the Chamber will conduct an *ex parte* hearing with the prosecution

to investigate whether inspection of relevant court decisions should be ordered. However, as set out in paragraph 14 above, the prosecution indicates that this material has been provided.

32. Furthermore, the prosecution is asked to consider the documents set out in footnote 12 above, to ensure the defence has access to them.

The notification sent by the Prosecutor and addressed to the DRC, pursuant to Article 18 of the Statute, on the issue of competence, along with any response from the DRC

33. As set out above, the prosecution maintains that in compliance with its obligations under Article 18 of the Statute, it sent a confidential notification to all States Parties, including the DRC, of its decision that there was reasonable basis to commence an investigation into the situation in the CAR. This document was attached to the prosecution's filing as Annex A.²³ Given that inspection has therefore been effected, subject to the prosecution addressing the defence complaint that it cannot access certain identified materials within the Court's electronic filing system (see above), no sustainable basis has been identified for the Chamber's consideration that the prosecution has failed to discharge this particular obligation.

Material internal documents

34. As set out above, by Rule 81(1) of the Rules, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure. Letters sent to, or by, the prosecution fall outside this restriction, and the prosecution should ensure that it has provided for inspection (in light of the accused's submissions on complementarity and *non bis in idem*) any relevant exchanges with non-governmental organisations such as FIDH and

²³ ICC-01/05-01/08-556, paragraph 13.

Ocodefad, if they occurred at a relevant time (*viz.* whilst proceedings were pending before the Central African courts).

Third Party Disclosure

35. The prosecution submits that it disclosed the outstanding documents from the national proceedings in Bangui on 12 October 2009.²⁴ It requests an order under Rule 87(3)(b) of the Rules (see paragraph 3 above) without providing any justification for the request save by suggesting that this will “provide an appropriate measure to further protect the confidentiality of this information”. Therefore, the Chamber has not been furnished with any details of the suggested confidentiality concerns or the basis for protection under the Rome Statute framework. Given the absence of any substantive justification on the part of the prosecution, this application is refused. Finally, the Chamber observes that it is inappropriate in any event for an application to be made as part of a response to an application by the other party: there should instead be a separate filing which will be subject to the provisions of the Rome Statute framework, and particularly Regulation 24 of the Regulations of the Court.

Conclusions

36. Save for the two matters which will form the basis of an *ex parte*, prosecution-only status conference (which are adjourned) and subject to the discrete guidance set out above for the prosecution (see paragraphs 30, 32, 33 and 34), the application for access to additional material is refused.

²⁴ ICC-01/05-01/08-556, paragraph 12.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 2 December 2009

At The Hague, The Netherlands