

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/05-01/08  
Date: 14 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**

**Second decision on disclosure relating to an admissibility challenge**

**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**

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**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 order to the Office of the Prosecutor (“prosecution”) for additional disclosure relating to a possible challenge on admissibility.

1. On 5 October 2009, the defence indicated its intention to contest the admissibility of this case, on the basis of the principles of complementarity and *non bis in idem*. To assist his challenge, the accused, on 5 October 2009, filed the “Requête Aux Fins De Divuligation”,<sup>1</sup> 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. The defence argued that disclosure of, *inter alia*, any relevant exchange of correspondence with the national authorities, is necessary to enable the accused to investigate whether or not there has been interference in certain legal proceedings in the Central African Republic (“CAR”), while the case was under investigation by the national authorities in Bangui.<sup>2</sup>
3. On 12 October 2009, the prosecution filed the “Prosecution’s Response to Defence ‘Requête Aux Fins De Divuligation’ dated 5 October 2009 and Request for a Rule 87(3)(b) Order”.<sup>3</sup> Save for one document annexed to this response disclosed under Rule 77 of the Rules of Procedure and Evidence (“Rules”),<sup>4</sup> the prosecution submitted that it has disclosed all the evidence in its possession relevant to the admissibility of the case.

<sup>1</sup> Requête Aux Fins De Divuligation, 5 October 2009, ICC-01/05-01/08-542.

<sup>2</sup> ICC-01/05-01/08-542, paragraph 8.

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

<sup>4</sup> ICC-01/05-01/08-556, paragraph 12.

4. On the same day, the prosecution filed the "Prosecution's Communication of documents disclosed to the Defence on 9 October 2009 pursuant to Paragraph 12(c) of the Defence 'Requête aux fins de Divulgateion' dated 5 October 2009 and request for non-disclosure order".<sup>5</sup> The prosecution in Annex A of this communication disclosed to the defence a list of material from the CAR national authorities which may have an impact on its admissibility challenge.<sup>6</sup>
5. 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", ("Defence Application") along with a corrigendum of the same date.<sup>7</sup> The accused complained that the prosecution's disclosure of 12 October 2009 was "only partial".<sup>8</sup>
6. The defence reiterated its request for additional disclosure, specifying the five following 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 correspondence.
  - (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.
  - (e) The material internal documents.<sup>9</sup>

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<sup>5</sup> ICC-01/05-01/08-554.

<sup>6</sup> ICC-01/05-01/08-554, paragraph 2.

<sup>7</sup> Réplique de la Défense à la Réponse du Procureur du 12 Octobre 2009 sur la Divulgateion 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 Divulgateion des éléments de preuve relatifs à l'admissibilité, 19 October 2009, ICC-01/05-01/08-564-Corr.

<sup>8</sup> ICC-01/05-01/08-564-Corr, paragraph 3.

<sup>9</sup> ICC-01/05-01/08-542, paragraph 12.

7. More specifically, as to item (b) (the correspondence between the Prosecutor and the authorities in the CAR and the DRC), the defence suggested 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 referred to the two following items:

- A letter from the Prosecutor of the ICC, dated 10 June 2008, to President Bozizé of the CAR and,
- A letter sent by President Bozizé to the Secretary General of the United Nations Security Council, dated 1 August 2008 in which he refers, in part, to the letter sent by the ICC Prosecutor. In this second letter, President Bozizé purportedly indicated that the criminal courts in the CAR were competent to deal with crimes allegedly falling within the jurisdiction of the ICC.<sup>10</sup>

8. As to item (c), the defence complained that there has only been partial disclosure of the Bangui dossier relating to criminal proceedings brought against the accused. Specifically, the defence requested disclosure of a first instance judicial decision, an appellate decision and the decision seizing the *Cour de Cassation* of Bangui (“acte de pourvoi”).<sup>11</sup>

9. The defence suggested 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 argued 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”).<sup>12</sup>

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<sup>10</sup> ICC-01/05-01/08-564-Corr, paragraph 5.

<sup>11</sup> ICC-01/05-01/08-564-Corr, paragraph 6.

<sup>12</sup> ICC-01/05-01/08-542, paragraph 10.

10. On 2 December 2009, the Chamber issued the “Decision on the defence application for additional disclosure relating to a challenge on admissibility”.<sup>13</sup> The Chamber refused the application by the defence to access additional material save for two categories of information under items (b) and (c) above, which were to form the basis of an *ex parte*, prosecution-only status conference.<sup>14</sup> The specific issue of the non-disclosed material under these two items was dealt with at the *ex parte* hearing with the prosecution held on 8 December 2009.<sup>15</sup>
11. As to the two letters set out above, the prosecution submitted at the status conference that, according to its assessment, they are not material to the preparation of the defence under Rule 77 of the Rules of Procedure and Evidence (“Rules”) since they “do not relate to the crimes committed during the 2002-2003 conflict”.<sup>16</sup> However, the prosecution communicated to the Chamber the above-mentioned letters for its own assessment of their relevance in relation to a possible challenge to admissibility under Article 19 of the Rome Statute (“Statute”).<sup>17</sup>
12. As to the entirety of the dossier on the criminal proceedings initiated before the national criminal courts in Bangui, the prosecution “maintain[ed] its position” that it already disclosed to the defence the information it had in its possession, including the national appellate and first instance judicial decisions.<sup>18</sup> For ease of reference, the prosecution provided to the Chamber on 9 December 2009, by way of an e-mail, copies of one appellate decision

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<sup>13</sup> ICC-01/05-01/08-632.

<sup>14</sup> ICC-01/05-01/08-632, paragraph 36.

<sup>15</sup> ICC-01/05-01/08-632, paragraphs 28 to 32 and Agenda for the status conference on 8 December 2009, ICC-01/05-01/08-636.

<sup>16</sup> ICC-01/05-01/08-T-19-CONF-EXP-ENG, page 2, lines 10 to 14.

<sup>17</sup> ICC-01/05-01/08-T-19-CONF-EXP-ENG, page 2, lines 14 to 18.

<sup>18</sup> ICC-01/05-01/08-T-19-CONF-EXP-ENG, page 4, lines 13 and 15.

dated 17 December 2004 and the *acte de pourvoi* before the *Cour the Cassation* dated 22 December 2004, in order for the Chamber to assess their relevance.<sup>19</sup>

## Analysis and Conclusions

13. Rule 77 of the Rules 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.

14. Under this provision, the prosecution has made a decision on the relevance of the material under items (b) and (c) in his possession and has decided it is unnecessary to disclose these materials to the defence.

15. The Chamber has an overarching responsibility to secure a fair trial of the accused (Article 64(2) of the Statute), and it has the power to rule on any relevant matters (Article 64(6)(f) of the Statute). Therefore, at the *ex parte* status conference, the Chamber investigated whether inspection should be ordered.<sup>20</sup>

16. The Chamber is satisfied that the letters are relevant to the preparation of the defence in the event of a credible challenge to admissibility under article 19 of the Statute, because they concern the potentially important issue of the ability of the national courts to deal with the substance of the present allegations against the accused.

17. Furthermore, the Chamber notes that the letter sent by President Bozizé to the Secretary General of the United Nations Security Council, dated 1 August

<sup>19</sup> E-mail by the prosecution to the legal officer of the Presiding Judge, on 9 December 2009 at 19.10.

<sup>20</sup> ICC-01/05-01/08-632, paragraphs 28 and 29.

2008, which refers in part to the ICC Prosecutor's letter dated 10 June 2008, has been published in its entirety in a Central African press article on 24 September 2008.<sup>21</sup>

18. Although this application is, in part, moot because to the extent that some of the material is available to the defence in any event, given its clear relevance to the proposed admissibility challenge, the prosecution is to disclose both letters by 18 December 2009, 16.00.
19. On the issue of additional disclosure from the dossier of the criminal proceedings before the national criminal courts in Bangui, the Chamber has compared this additional information with the list of the documents already disclosed to the defence on 12 October 2009.<sup>22</sup> The Chamber is of the view that the prosecution provided the Court with additional documents previously undisclosed to the defence, namely the extract of an appellate decision before the *Chambre d'Accusation* of the Appeal Court of Bangui dated 17 December 2009 and the *acte de pourvoi* dated 22 December 2004. The Chamber notes in addition that the first instance decision taken by an investigative judge on 16 September 2004 was disclosed to the defence on 3 October 2008.<sup>23</sup>
20. The Chamber considers that the judicial decisions requested by the defence should be disclosed in their entirety because the national criminal proceedings concern the crimes committed during the 2002-2003 conflict in the CAR and thus, are of potential of relevance to the admissibility challenge. Therefore, the Chamber orders disclosure of the outstanding material referred to in the previous paragraph by 18 December 2009, 16.00, together with any

<sup>21</sup> [http://www.lindependant-cf.com/Quand-Francois-Bozize-veut-s-assurer-a-lui-meme-et-a-ses-sbires-une-impunite-totale\\_a414.html](http://www.lindependant-cf.com/Quand-Francois-Bozize-veut-s-assurer-a-lui-meme-et-a-ses-sbires-une-impunite-totale_a414.html).

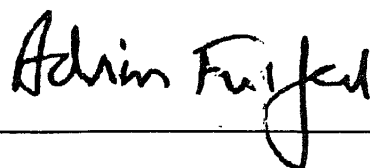
<sup>22</sup> *Ibid*, footnote 5.

<sup>23</sup> CAR-OTP-0019-0137 disclosed in batch 2.



other decisions in the possession of the prosecution which concern the crimes committed during the 2002-2003 conflict.


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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 14 December 2009

At The Hague, The Netherlands