

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 September 2010

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

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

**Public Document
URGENT**

Decision on the “Defence Application to Obtain the French Version of Certain Filings and Statements”

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

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Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, (“Bemba case”) issues the following decision on the “Defence Application to Obtain the French Version of Certain Filings and Statements” (“defence’s Application” or “Application”).¹

I. Background and Submissions

1. On 7 November 2008, the defence filed the “Request for Transmission of Pleadings in the Language Chosen by the Suspect, namely French,” in which it requested that “all pleadings filed in a language other than the one chosen by Mr Jean-Pierre Bemba Gombo (“Mr Bemba”) be translated and transmitted to him and his counsel in French.”²
2. On 4 December 2008, the Single Judge in Pre-Trial Chamber III issued a “Decision on the Defence’s Request Related to Language Issues in the Proceedings” (“Pre-Trial Decision”),³ partially rejecting the defence’s request. Only three categories of documents were ordered to be translated into French, namely (i) the Prosecutor’s application for a warrant of arrest and the Chamber’s decision thereon; (ii) the Document Containing the Charges and the List of Evidence as well as any amendment thereto; and (iii) the statements of prosecution witnesses.⁴ The Pre-Trial Chamber further stated the following:⁵

[...]

¹ Defence Application to Obtain the French Version of Certain Filings and Statements, 15 July 2010, ICC-01/05-01/08-832-Conf-tENG.

² Request for Transmission of Pleadings in the Language Chosen by the Suspect, namely French, 9 January 2009, ICC-01/05-01/08-221-tENG, page 7. The original filing in French was issued on 7 November 2008 (ICC-01/05-01/08-221).

³ Decision on the Defence’s Request Related to Language Issues in the Proceedings, 4 December 2008, ICC-01/05-01/08-307.

⁴ ICC-01/05-01/08-307, paragraph 16.

⁵ ICC-01/05-01/08-307, paragraphs, 12, 16 and 18.

12. In the Single Judge's opinion, (Article 67(1)(a) of the Rome Statute) suggests that the accused shall not be served with all documents in a language he fully understands and speaks but only with those documents which are essential for his proper preparation to face the charges presented by the Prosecutor and which form the basis of the determination by the Chamber of those charges.

[...]

16. In light of the foregoing, the Single Judge is of the opinion that the use of the phrase "as are necessary to meet the requirements of fairness" in article 67(1)(f) of the Statute shall not be read as granting Mr Jean-Pierre Bemba the right to have all evidentiary material disclosed by the Prosecutor and all documents in the proceedings translated into the language he fully understands and speaks. Rather, in accordance with article 67(1)(a) and (f) of the Statute, Mr Jean-Pierre Bemba should enjoy the right to interpretation throughout the whole proceedings but is only entitled to receive the French translation of such documents that inform him in detail of the nature, cause and content of the charges brought against him. Accordingly, Mr Jean-Pierre Bemba should be provided with a French version of the following documents: (i) the Prosecutor's application for a warrant of arrest and the Chamber's decision thereon; (ii) the Document Containing the Charges and the List of Evidence as well as any amendment thereto; and (iii) the statements of prosecution witnesses.

[...]

18. (...)Mr Jean-Pierre Bemba would benefit from the permanent assistance of a French-English interpreter in order to facilitate his adequate knowledge of the evidentiary materials and documents filed in English as well as his proper understanding of the decisions and orders of the Chamber pending their official written translations pursuant to regulation 40(3) of the Regulations.

3. The defence did not lodge any appeal against this Pre-Trial Decision.
4. On 7 October 2009, at the first status conference held by Trial Chamber III, the defence did not object to the continued use of an interpreter during the trial stage of proceedings in order to respond within established time-limits to documents filed by the prosecution.⁶ The Office of the Prosecutor ("prosecution") also informed the Chamber that all translations (French/English) of incriminatory witness statements relied on at the pre-trial stage were already available to the defence.⁷

⁶ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, page 35, lines 14 – 22.

⁷ ICC-01/05-01/08-T-14-ENG ET WT, page 22, lines 7 – 20.

5. On 15 July 2010, the defence filed its Application⁸ requesting that Trial Chamber III orders the prosecution to provide the defence with the French translations of three items of exculpatory evidence, namely the statements of Witnesses CAR-OTP-WWWW-0040 (“Witness 40”), CAR-OTP-WWWW-0130 (“Witness 130”) and CAR-OTP-WWWW-0162 (“Witness 162”), the In-Depth Analysis Chart of Incriminatory Evidence (“Analysis Chart”) and the Second Amended Document Containing the Charges (“Second Amended DCC”).
6. The Chamber notes that the defence filed its Application on a confidential basis as it contains the names of persons that the defence intends to summon. It submitted that it will undertake to provide a public redacted version of its Application “at a later date”.⁹ However, to date, the defence has not yet filed such a public redacted version of its Application. Although the Chamber refers in the present Decision to the confidential version of the Application, no confidential information contained therein is revealed to the public.
7. On 28 July 2010, the prosecution filed its response, submitting that in its Application, the defence erroneously relies on a misinterpretation of the provisions of the Rome Statute (“Statute”) and the Rules of Procedure and Evidence (“Rules”) and of the Pre-Trial Decision.¹⁰
8. Regarding the translation into French of the Analysis Chart, the prosecution emphasises that the Pre-Trial Decision does not mention this chart as a document that informs the accused in detail of the nature, cause and content of the charges brought against the accused such as defined in

⁸ ICC-01/05-01/08-832-Conf-tENG.

⁹ ICC-01/05-01/08-832-Conf-tENG, paragraph 27.

¹⁰ Prosecution’s Response to Defence Request for French translations of witness statements and other documents, 28 July 2010, ICC-01/05-01/08-842, paragraph 2.

paragraph 16 of the Pre-Trial Decision. The prosecution submits that the Analysis Chart is not listed in this paragraph. Referring to the definitions of an “Analysis Chart” as provided by Trial Chambers II and III, the prosecution further argues that the Analysis Chart is rather to be considered as a procedural tool.¹¹

9. With regard to the translation into French of the statements of three witnesses disclosed under Article 67(2) of the Statute and Rule 77 of the Rules, the prosecution argues that it is under no obligation to provide the defence with such translations as the statements in question are either exculpatory evidence or material for use in the preparation of the defence. Pursuant to Rule 76(3) of the Rules, the prosecution submits that its only obligation is to provide the defence with a French translation of statements of an incriminatory nature.¹²

10. Consequently, the prosecution requests that the defence’s Application is dismissed in its entirety, save for the request for a French translation of the updated version of the Second Amended DCC,¹³ which was provided to the defence on 18 August 2010.¹⁴

11. On 1 September 2010, the Chamber sought clarification as to the existence of translations of Witness 40’s statements, which were disclosed at the pre-trial stage as incriminatory evidence and were relied on at the confirmation hearing. It appeared that no link to the latter French translations could be found in the E-court system.¹⁵

¹¹ ICC-01/05-01/08-842, paragraphs 4 and 5.

¹² ICC-01/05-01/08-842, paragraphs 6 – 8.

¹³ ICC-01/05-01/08-842, paragraph 11. Traduction de la version révisée du Deuxième Document modifié de notification des charges, 18 August 2010, ICC-01/05-01/08-856-Conf-AnxB.

¹⁴ Traduction de la version révisée du Deuxième Document modifié de notification des charges, 18 août 2010, ICC-01/05-01/08-856-Conf-AnxB.

¹⁵ Email communication from the Legal Adviser of the Trial Division to the prosecution, 1 September 2010.

12. On 2 September 2010, the prosecution responded, explaining to the Chamber that the relevant information concerning the said translations was provided to the Registry on 26 and 27 November 2008, respectively. However, due to a technical problem, 23 transcribed statements of Witness 40's interview (disclosed pursuant to Rule 76(1) of the Rules) could not be linked to their corresponding French translations in the E-court system.¹⁶

13. On 3 September 2010, the Chamber was informed by the prosecution that the issue related to linking the statements in the E-Court system had been resolved, so that the translations of Witness 40's transcribed statements relied upon at the confirmation hearing were now available to the defence.¹⁷

II. Relevant provisions

Article 67 of the Statute Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

[...]

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

[...]

¹⁶ Email communication from the prosecution to the Legal Advisor of the Trial Division, 2 September 2010.

¹⁷ Email exchange between the prosecution and the Registry sent to the Legal Advisor of the Trial Division, 3 September 2010.

2. 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.

Rule 76 of the Rules

Pre-trial disclosure relating to prosecution witnesses

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

[...]

3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

[...]

Rule 77 of the Rules

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.

III. Analysis and Conclusions

14. The Chamber observes that Witness 40 was a prosecution witness for the purposes of the confirmation hearing but is no longer relied upon by the prosecution at trial stage.¹⁸ The Chamber also notes that while some of Witness 40's statements were originally disclosed pursuant to Rule 76(1) of the Rules as incriminatory evidence at the pre-trial stage, some other statements were more recently disclosed at the trial stage as exculpatory evidence pursuant to Article 67(2) of the Statute.¹⁹

¹⁸ ICC-01/05-01/08-842, paragraph 6.

¹⁹ Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 1 March 2010, ICC-01/05-01/08-711-Conf-Exp-AnxA.

15. Since the translations of Witness 40's transcribed statements relied upon at the confirmation hearing are now available to the defence following the resolution of the problem in the Ecourt system, and now that the prosecution has provided the defence with the French version of the Second Amended DCC, on 18 August 2010,²⁰ as mentioned in paragraph 10 above, both of these requests by the defence for French translations are now moot.
16. Regarding the remainder of the defence's Application concerning translations of the statements of Witnesses 40, 130 and 162 and the Analysis Chart, the Chamber notes that although the accused has a right to an interpreter pursuant to Article 67(1)(f) of the Statute, as pointed out by the Single Judge at the pre-trial stage, this does not mean that Mr Bemba has the right to have *all* evidentiary material disclosed by the prosecution and *all* documents in the proceedings translated into a language that he fully understands.
17. The issue of translation of procedural documents and all evidentiary materials into an accused's chosen language has already been ruled on by both Pre-Trial and Trial Chambers of the Court.²¹ In addition, such interpretation of Article 67(1)(f) of the Statute is also supported by the jurisprudence at the European Court of Human Rights.²²

²⁰ Traduction de la version révisée du Deuxième Document modifié de notification des charges, 18 August 2010, ICC-01/05-01/08-856-Conf-AnxB.

²¹ See a similar approach taken in the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* case; Decision on the Defence for Mathieu Ngudjolo Chui's request for leave to appeal the Decision concerning translation of documents, ICC-01/04-01/07-538, page 6 and footnote 16 quoting the Court's jurisprudence in the *Prosecutor v Thomas Lubanga Dyilo* Case.

²² CEDH, *Diallo v. Sweden* (dec.), no. 13205/07, 5 January 2010, paragraph 23: The Court reiterates that paragraph 3 (e) of Article 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial (see, for example, *Hermi v. Italy*,

18. In addition, the Chamber recalls that the jurisprudence of this Court also interpreted Rule 76(3) of the Rules as the only provision which expressly imposes an obligation on the prosecution to provide an accused with evidentiary materials in a language that he fully understands.²³

19. For the sake of clarity, the Chamber deems that it is appropriate to address separately the translation issue of the documents and of the evidentiary materials, namely the statements of Witnesses 40, 130 and 162.

*French Translation of the Analysis Chart filed on 27 May 2010*²⁴

20. The Chamber notes that the defence acknowledged in its Application that it had received the Analysis Chart at the pre-trial stage only in English.²⁵ The Chamber recalls that at the pre-trial stage, a preliminary analysis chart and an up-dated analysis chart were filed in English on 24 October²⁶ and 24 November 2008,²⁷ respectively. The Pre-Trial Decision on language issues was filed on 4 December 2008, and since this decision was issued *after* the submission of the Analysis Chart by the prosecution, and since it was not considered necessary to provide a French translation of the

18114/02, §§ 69-70). The said provision does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an “interpreter”, not a “translator”. This suggests that oral linguistic assistance may satisfy the requirements of the Convention (see *Husain v. Italy* (dec.), no. 18913/03, 24 February 2005). [Emphasis added]

²³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* case; Decision on the Defence for Mathieu Ngudjolo Chui’s request for leave to appeal the Decision concerning translation of documents, ICC-01/04-01/07-538, page 6 and footnote 16 quoting the Court’s jurisprudence in the *Prosecutor v. Thomas Lubanga Dyilo* Case.

²⁴ Second Updated In-Depth Analysis Chart of Incriminatory Evidence, 27 May 2010, ICC-01/05-01/08-781-Conf-Exp-AnxA.

²⁵ ICC-01/05-01/08-832-Conf-tENG, paragraph 11.

²⁶ Consolidated Incriminating Evidence Analysis Chart, 24 October 2008, ICC-01/05-01/08-187-Conf-AnxB.

²⁷ Prosecution’s Submission of an Updated, Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence, 24 November 2008, ICC-01/05-01/08-278-Conf-AnxB.

Analysis Chart at that stage,²⁸ the Chamber finds no reason to make a contrary finding.

21. As stated above at paragraph 3 of the present Decision, the defence did not lodge any appeal against the Pre-Trial Decision, so the Chamber's refusal to order the Analysis Chart to be translated into French is definitive. Further, a revised version of the Analysis Chart was filed on 30 March 2009 before Pre-Trial Chamber II.²⁹ This latter version of the Analysis Chart was also filed in English and it appears that at no point did the defence request to be provided with a French version of this chart.

22. The Chamber reiterates its previous "Decision on the "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart" issued on 29 January 2010,³⁰ and recalls that this document is to be considered as a procedural tool simply compiling in tabulated format the incriminatory prosecution witness statements to be relied upon by the prosecution and which are available in French to the defence.³¹ The purpose of the Analysis Chart is to assist the defence in better understanding the prosecution case and is not to be considered as a document informing the accused in detail of the nature, cause and content of the charges brought against him.

23. For those reasons, the Chamber considers that the prosecution is under no obligation to provide the defence with a translation in French of the

²⁸ ICC-01/05-01/08-307, paragraph 16.

²⁹ Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence, Amended In-Depth Analysis Chart of Incriminatory Evidence, 30 March 2009, ICC-01/05-01/08-395-Conf-Anx2E.

³⁰ Decision on the "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart", 29 January 2010, ICC-01/05-01/08-682, paragraphs 23 and 26.

³¹ See the prosecution's submission at the status conference on 7 October 2009, ICC-01/05-01/08-T-14-ENG, 7 October 2009, page 22, lines 12-15.

Analysis Chart and accordingly, rejects the defence's Application in this regard.

24. The Chamber is however mindful of the importance for the preparation of the defence of fully understanding the content of the 543-page Analysis Chart and recalls that, to this end, the accused has at his permanent disposal an interpreter (not a translator) provided by the Registry pursuant to Article 67(1)(f) of the Statute and following paragraph 18 of the Pre-Trial Decision.

Translation of witness statements

25. As to the translation into French of the statements of Witnesses 40, 130 and 162, the Chamber deems it necessary to consider them separately.

Witness 40's transcribed statements disclosed at the trial stage as evidence of an exculpatory nature

26. As stated above at paragraph 14 of the present decision, Witness 40 is no longer a prosecution witness at the trial phase and his last transcripts of interview were disclosed on 1 March 2010 pursuant to Article 67(2) of the Statute.³² No further French translations of the more recently disclosed transcripts of interview of Witness 40 have been so far provided to the defence.

27. The Chamber observes that the prosecution is under no obligation to provide the defence with translations of exculpatory evidence in the language of the accused under Article 67(2) of the Statute or Rule 77 of the Rules.

³² ICC-01/05-01/08-711-Conf-Exp-AnxA.

28. However, the Chamber notes the particular disclosure history concerning the evidence of Witness 40 and the fact that the defence should have received the translated statements of Witness 40 by November 2008, but only actually received these translations on 4 September 2010. The Chamber also observes that Witness 40's statements are of particular significance to the case,³³ and are therefore necessary for the proper preparation of the defence.

29. Exceptionally therefore, due to the evidence given by Witness 40, and for the sake of consistency and continuity as the defence has already received translations of the Witness 40's statements from the pre-trial stage, a translation into French of the more recently disclosed exculpatory evidence of Witness 40 should also be provided to the defence no later than 24 September 2010.

Statements of Witnesses 130 and 162 disclosed pursuant to Article 67(2) of the Statute and Rule 77 of the Rules

30. The Chamber notes that three statements of Witness 130 have been disclosed in English to the defence pursuant to Rule 77 of the Rules³⁴ and four statements of Witness 162 have been disclosed in English to the defence pursuant to Article 67(2) of the Statute.³⁵

³³ See for example information provided by Witness 40 as stated in the "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, paragraphs 243, 258, 261, 381, 392, 456, 468, 471, 473, 474, 476, 477, 485, 494 and 496.

³⁴ CAR-OTP-0040-0026, CAR-OTP-0040-0050, CAR-OTP-0040-0070, Prosecution's Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 30 November 2009, 30 November 2009, ICC-01/05-01/08-627-Conf-Exp-AnxA.

³⁵ CAR-OTP-0048-0002, CAR-OTP-0048-0022, CAR-OTP-0048-0054 and CAR-OTP-0048-0105, Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 30 November 2009, 30 November 2009, ICC-01/05-01/08-628-Conf-Exp-AnxA.

31. After a preliminary review of the prosecution's disclosure of potentially exculpatory evidence and material for the preparation of the defence, the Chamber observes that, in their statements, both witnesses declared that French is their spoken and written language although the language used in interview is English and French for Witness 130, and only French for Witness 162. In addition, it appears that the prosecution has collected some exculpatory evidence in French which is available to the defence and has also provided the defence with translations of most of the witness statements disclosed pursuant to Article 67(2) of the Statute³⁶ and Rule 77 of the Rules.³⁷

32. More specifically, it appears that out of the 4 witnesses whose statements were disclosed pursuant to Article 67(2) of the Statute, only the statements of Witness 162 were not translated into French. Further, out of the 7 witnesses whose statements were disclosed pursuant to Rule 77 of the Rules, the statements of only 2 witnesses (including Witness 130) were not translated into French.

33. Based on this review, the Chamber requested clarification from the prosecution as to the availability of these statements in French, pursuant to Regulation 28 of the Regulations of the Court.³⁸ On 2 September 2010, the prosecution clarified that for evidence of exculpatory nature, translations, if any, are made on an exceptional basis for internal purposes and, if completed, are provided to the defence as a matter of courtesy for its preparation. The prosecution further submitted that there are no translations of statements given by Witnesses 130 and 162.³⁹

³⁶ Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 30 November 2009, 30 November 2009, ICC-01/05-01/08-628-Conf-Exp-AnxA.

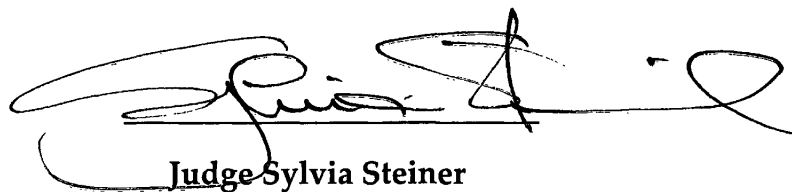
³⁷ Prosecution's Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 30 November 2009, 30 November 2009, ICC-01/05-01/08-627-Conf-Exp-AnxA.

³⁸ Email communication from the Legal Advisor to the Trial Division from the prosecution, 1 September 2010.

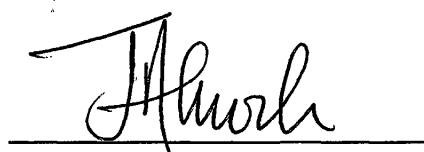
³⁹ Email communication from the prosecution to the Legal Advisor of the Trial Division, 2 September 2010.

34. Following the above reasoning, the Chamber is satisfied that the prosecution has fulfilled its disclosure obligations as to the statements of Witnesses 130 and 162. The Chamber therefore rejects the defence's Application save for the translations into French of Witness 40's statements disclosed on 1 March 2010 pursuant to Article 67(2) of the Statute.
35. The Chamber reiterates that the accused may request the assistance of an interpreter to better understand the Analysis Chart and the statements of Witnesses 130 and 162.
36. Finally, for the reasons stated above, the Chamber orders the defence to file a public redacted version of its Application no later than 13 September 2010.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 8 September 2010

At The Hague, The Netherlands