

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/05-01/08  
Date: 12 November 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**

**Order relating to the prosecution's communication of incriminatory evidence  
(ICC-01/05-01/08-985)**

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 Edith Douzima-Lawson

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**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**

**Detention Section**

**Victims Participation and Reparations  
Section**

**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 Order relating to the prosecution’s communication of incriminatory evidence.

## I. Background and Submissions

1. At a status conference on 21 October 2010, the Office of the Prosecutor (“OTP” or “prosecution”) informed the Chamber that it had disclosed to the defence a report provided by the expert witness on gender crimes and post-traumatic stress disorder, Dr Adeyinka Akinsulure-Smith, on 4 October 2010.<sup>1</sup> The prosecution further submitted that this expert witness had been on mission to the Central African Republic (“CAR”) at the end of September/early October and had met with three victims to conduct a psychological evaluation.<sup>2</sup> The prosecution then submitted as follows:

So our submission is that, should the Chamber wish to have this supplemental report, the Prosecution is available to provide this report that we think would be helpful for the Chamber as a sort of complement of the previous report already disclosed. We also think that, in light of the trial date and the current order of witnesses, this expert should be in a position to provide a supplement sufficiently in time not to prejudice the rights of the Defence so that the Defence would be given at least 30 days before testimony is given by this expert.<sup>3</sup>

2. The prosecution later confirmed the above position in submitting:

As I stated before, the Prosecution’s view is that this initiative of the expert may be of some assistance for the Court to complement the report that was already submitted [...]. At the same time we also think on the merits of the report that this might be of assistance for the Court. [...] it’s not new evidence; it’s simply a sort of follow-up of complementarity aspect of the report that was already submitted and disclosed with the French translation.<sup>4</sup>

3. Finally, consistent with the above, the prosecution emphasised that its submission was made with the intention of informing the Chamber about the

<sup>1</sup> Transcript of hearing on 21 October 2010, ICC-01/05-01/08-T-30-ENG-ET, page 17, lines 4 - 12.

<sup>2</sup> ICC-01/05-01/08-T-30-ENG-ET, page 17, lines 12 – 16.

<sup>3</sup> ICC-01/05-01/08-T-30-ENG-ET, page 17, line 17 to page 18, line 1.

<sup>4</sup> ICC-01/05-01/08-T-30-ENG-ET, page 34, line 12 to page 35, line 1.

availability of the supplementary information in order that the prosecution could disclose it to the Chamber, "should the Chamber wish to have this supplementary report".<sup>5</sup>

4. The defence objected to the prosecution's suggestion of providing a supplementary report and requested that the Chamber order the prosecution to make a written filing as it considered the supplementary report to be additional disclosure and the defence sought an opportunity to respond to the proposal.<sup>6</sup>
5. The defence questioned the need to disclose this supplementary information and its importance, given that the prosecution had distinguished it as a supplementary element to a report that has already been disclosed, rather than as new evidence.<sup>7</sup> The defence clarified that it was not opposed to the disclosure of this information<sup>8</sup> but it wanted the prosecution to provide an explanation as to the necessity of this additional information.<sup>9</sup>
6. In reply to the defence and in response to a clarification sought by the Chamber as to whether the prosecution intended this supplementary information to be for the benefit of the Chamber, the prosecution submitted:

Yes, Your Honour. This complement of the report would be -- would consist of psychological evaluation, more psychological evaluation of three victims that were recently met by the expert and, in the Prosecution's view, this might help the understanding of the issues that are at stake within the expertise of this expert. But again I reiterate that, essentially, we put the matter in the Chamber's hands. So if the Chamber didn't consider as helpful to have this further assistance the Prosecution is available to submit this supplemental report.<sup>10</sup>

7. The Chamber informed the parties that it would take a decision on the relevance and pertinence of this supplementary information and

<sup>5</sup> ICC-01/05-01/08-T-30-ENG-ET, page 36, lines 15 – 20.

<sup>6</sup> ICC-01/05-01/08-T-30-ENG-ET, page 30, lines 8 – 12 and page 33, line 8 to page 34, line 2.

<sup>7</sup> ICC-01/05-01/08-T-30-ENG-ET, page 35, lines 14 to page 36, line 3.

<sup>8</sup> ICC-01/05-01/08-T-30-ENG-ET, page 38, lines 9 – 11.

<sup>9</sup> ICC-01/05-01/08-T-30-ENG-ET, page 36, line 23 to page 37, line 18.

<sup>10</sup> ICC-01/05-01/08-T-30-ENG-ET, page 37, line 22 to page 38, line 7.

communicate its decision to the parties as to whether it wished to receive the complimentary information concerned.<sup>11</sup>

8. The Chamber duly conveyed its decision by email sent to the parties and participants on 25 October 2010 ("Chamber's email of 25 October 2010"), in which it indicated that pursuant to Article 64(2) of the Rome Statute ("Statute"), it did not wish to receive the additional information at this time due to the imminent commencement of the trial.<sup>12</sup>
  
9. On 1 November 2010, the prosecution submitted its communication of incriminatory evidence disclosed to the defence on 26 October 2010 ("Communication of Incriminatory Evidence"), in which it notifies the Chamber that it disclosed eight items of incriminatory evidence to the defence on 26 October 2010 which include "a slightly amended version of the report on gender crime and post-traumatic stress disorder ("PTSD"), [...]; and three annexes to the report, which are the psychological assessments of three victims of sexual violence that the expert on gender crime and PTSD conducted in the field[...]"<sup>13</sup>
  
10. The prosecution submits that the three psychological assessments complement the report and provide specific examples of the consequences that PTSD can have on victims of sexual violence. Further the prosecution argues that the disclosure of the report and its annexes will not prejudice the right of the accused to have adequate time to prepare his defence as these documents have been provided at least 30 days prior to the anticipated testimony of the expert on gender crime, in compliance with the time limit set

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<sup>11</sup> ICC-01/05-01/08-T-30-ENG-ET, page 38, line 16 to page 39, line 6.

<sup>12</sup> Email communication from a legal officer to the prosecution, defence and legal representatives on 25 October 2010.

<sup>13</sup> Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 26 October 2010, 1 November 2010, ICC-01/05-01/08-985 and Conf-AnxA.

by the Chamber.<sup>14</sup>

## II. Relevant provisions

11. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Trial Chamber has considered the following provisions:

### **Article 64(2) of the Statute Functions and powers of the Trial Chamber**

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

[...]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

### **Article 67(2) of the Statute Rights of the accused**

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.

### **Article 69 of the Statute Evidence**

[...]

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the necessary authority to request the submission of all evidence that it considers necessary for the determination of the truth.

### **Rule 77 of the Rules of Procedure and Evidence (“Rules”) Inspection of material in possession or control of the Prosecutor**

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<sup>14</sup> ICC-01/05-01/08-985, paragraphs 3 and 4.

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.

**Rule 84 of the Rules**

**Disclosure and additional evidence for trial**

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3(c) and 6(d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

**III. Analysis and conclusions**

12. The material disclosed as incriminatory material in the prosecution's Communication of Incriminatory Evidence would appear to be, at least as regards the three psychological assessments contained in the three annexes, the same material that was referred to by the prosecution throughout the status conference on 21 October 2010 as being supplementary or additional information.
13. Despite the Chamber's email of 25 October 2010 stating that the Chamber did not wish to receive the supplementary information at this stage, it was certainly necessary for the information concerned to be disclosed to the defence since it is information in possession and control of the prosecution which could be material to the preparation of the defence. However, it is deeply troubling, not to mention confusing, that this supplementary information was disclosed to the defence as incriminatory evidence.
14. Aside from the prosecution's contentions to the contrary about the status of this supplementary information during the hearing on 21 October 2010, as

quoted above, if the prosecution was seeking to disclose additional incriminatory evidence at this stage of the proceedings, it would need to apply to the Chamber for leave to do so, as has been the practice.<sup>15</sup> The prosecution failed to request leave to add evidence with an accompanying explanation as to why the material concerned was not provided by 30 November 2009 deadline for disclosure of the prosecution's evidence set by the Chamber.

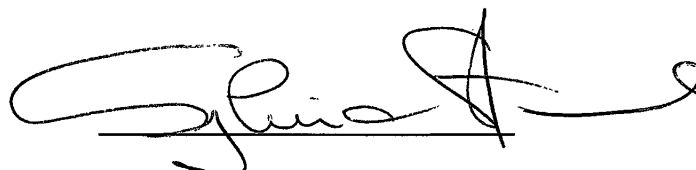
15. The Chamber is of the view that neither the three psychological assessments contained in the three annexes nor the other items, mentioned in paragraph 9 above, should have been disclosed as incriminatory evidence. The prosecution will therefore not be allowed to rely on any of this evidence at trial.
16. For the above reasons, the Chamber orders that the material referred to above and erroneously disclosed as incriminatory is reclassified as material disclosed pursuant to Rule 77 of the Rules.

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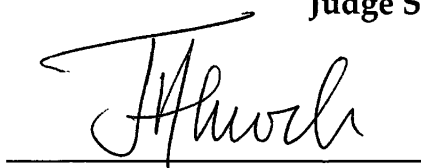
<sup>15</sup> See Prosecution's request to add and disclose additional evidence to be relied on at trial beyond 30 November 2009, 30 November 2009, ICC-01/05-01/08-626 and Conf-Exp-AnxA; Oral decision of the Trial Chamber, Transcript of hearing on 8 December 2009, ICC-01/05-01/08-T-18-CONF-ENG-ET, page 29, line 18 to page 36, page 3; Prosecution's second request pursuant to Regulation 35(2) of the Regulations of the Court, 27 January 2010, ICC-01/05-01/08-680 and Decision on the prosecution's second application for disclosure of additional evidence, 5 May 2010, ICC-01/05-01/08-767-Conf-Exp.



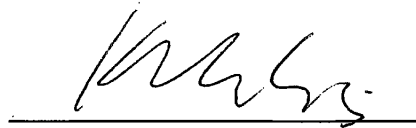
Done in both English and French, the English version being authoritative.



**Judge Sylvia Steiner**



**Judge Joyce Aluoch**



**Judge Kuniko Ozaki**

Dated this 12 November 2010

At The Hague, The Netherlands