

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29 October 2008

PRE-TRIAL CHAMBER III

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

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

Confidential

**Decision on the status of documents as referred to in article 54(3)(e) of the Rome
Statute**

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

1. **Pre-Trial Chamber III** (the “Chamber”) of the International Criminal Court (the “Court”) raises the issue of documents received by the Prosecutor under the condition of confidentiality in accordance with article 54(3)(e) of the Rome Statute (the “Statute”).¹

2. On 17 June 2008 the Chamber issued its “Decision convening a status conference”² in which it requested the Prosecutor to submit a report to the Chamber on the number of documents received under the condition of confidentiality pursuant to article 54(3)(e) of the Statute and on the status of lifting the restrictions.

3. On 30 June 2008 the Prosecutor submitted a report³ to the Chamber which stated *inter alia* that he had identified five documents in his collection (one report and its four annexes) relating to the Central African Republic (CAR) subject to the restriction imposed by article 54(3)(e) of the Statute. He suggested that these documents contained information of exculpatory nature, and for the purpose of lifting the restriction, a letter had been sent to the information provider. With respect to other documents contained in the collection pertaining to the investigation in the Democratic Republic of the Congo (the “DRC”), he contended that a search was still ongoing. He finally informed the Chamber that the CAR government had provided the Prosecutor with 1200 documents under no confidentiality restrictions. However, with reference to possible third parties’ interests, the Prosecutor indicated his intention to consult with the CAR government to ascertain whether protective measures were necessary.

¹ ICC-01/05-01/08-137-Conf-Exp and its annexes.

² ICC-01/05-01/08-17-Conf-Exp.

³ “The Prosecutor’s submission regarding Article 54(3)(e) of the Rome Statute Requested by the Pre-Trial Chamber III in the Decision convening a status conference dated 17 June 2008”, ICC-01/05-01/08-31-US-Exp.

4. On 10 September 2008 Judge Fatoumata Dembele Diarra, acting as Single Judge on behalf of the Chamber,⁴ issued the “Decision requesting the Prosecutor to submit a report on documents affected by article 54(3)(e) of the Rome Statute”.⁵

5. On 22 September 2008 the Prosecutor filed a second report⁶ as requested by the Chamber concerning the status of the five documents received under article 54(3)(e) of the Statute. In this report he identified that only one document (the report) contained “potentially exculpatory material” and that requests for the lifting of the confidentiality restrictions had been forwarded to the information provider. Furthermore, the search remained in progress for other relevant documents of evidentiary value and potentially exonerating in nature relating to the investigation in the DRC. Finally, with reference to possible third parties’ interests, the Prosecutor stated that he had already consulted the CAR government, which had not “indicated particular requirements” as to protective measures. However, the CAR government recommended that the Prosecutor address directly the third parties referred to in the documents concerning the need for protective measures; these consultations were underway.

6. On 8 October 2008 the Chamber convened a status conference, during which the Prosecutor committed to submit to the Chamber an updated report on the status of the five documents received under article 54(3)(e) of the Statute and other relevant documents that might have been found in the DRC collection.⁷

7. On 14 October 2008 the Prosecutor submitted to the Chamber his third report⁸ stating that he had met with the information provider of the five documents mentioned above and “expects a resolution of this issue”. Moreover, he had

⁴ ICC-01/05-01/08-86.

⁵ ICC-01/05-01/08-100-Conf-Exp.

⁶ “Prosecution’s Second Report on the Status of Documents Received under Article 54(3)(e) of the Rome Statute”, ICC-01/05-01/08-113-Conf-Exp.

⁷ ICC-01/05-01/08-T-6-CONF-EXP-ENG ET, p. 40, lines 13-22.

⁸ “Prosecution’s Third Report on the Status of Documents Received under Article 54(3)(e) of the Rome Statute”, ICC-01/05-01/08-157-Conf-Exp.

identified in the DRC collection four additional documents of “potentially exonerating and rule 77 evidentiary value” which were obtained under article 54(3)(e) of the Statute. A request for lifting confidentiality restrictions on the nine documents had been sent to the information provider.

8. The Chamber notes articles 54(3)(e) and 67 of the Statute, rule 77 of the Rules of Procedure and Evidence, and regulation 23 *bis* (3) of the Regulations of the Court (the “Regulations”).

9. The Chamber expresses its deep concern with respect to those documents that are still subject to article 54(3)(e) restrictions. Despite several attempts made by the Chamber on 17 June 2008, 10 September 2008 and 8 October 2008 concerning the lifting of the confidentiality restrictions on these materials, the Prosecutor is not yet in a position to disclose these documents.

10. The Chamber recalls its duty to safeguard the rights of the defence as set out in article 67 of the Statute and, in particular, the right to proper disclosure of exculpatory evidence in the Prosecutor’s possession or control⁹ provided in its second paragraph. In the case of the *Prosecutor v. Thomas Lubanga Dyilo* (the “Lubanga Case”), Trial Chamber I stated that article 67(2) of the Statute “establishes that the Chamber is the arbiter of whether or not material falls to be disclosed”.¹⁰ This finding has been upheld later by the Appeals Chamber in its judgment of 21 October 2008, in which it stated that the last sentence of article 67(2) of the Statute “indicates that the final assessment will have to be carried out by the (...) Chamber

⁹ See, *inter alia*, European Court of Human Rights, *Botmeh and Alami v United Kingdom*, Judgement, of 7 June 2007, Application no. 15187/03, paras 37-38; *Dowsett v. United Kingdom*, Judgement of 24 June 2003, Application no. 39482/98, para. 44; *Rowe and Davis v United Kingdom*, Judgement of 16 February 2000, Application no. 28901/95, paras 60, 63.

¹⁰ “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, para. 50.

and that therefore the Chamber should receive the material”.¹¹ Thus, the Chamber considers that, in order to be in a position to fulfil this role in the present case, documents obtained under article 54(3)(e) agreements need to be provided to it.

11. The Chamber is also mindful that the Prosecutor seems to have resolved the problems concerning documents obtained under article 54(3)(e) agreements in the *Lubanga Case* before Trial Chamber I,¹² and accordingly expects him to obtain the consent of the information provider with respect to those documents subject to confidentiality restrictions in the present case.

12. The Chamber finally considers it necessary at this stage to re-classify documents (i) ICC-01/05-01/08-17-Conf-Exp; (ii) ICC-01/05-01/08-31-US-Exp; (iii) ICC-01/05-01/08-100-Conf-Exp; (iv) ICC-01/05-01/08-113-Conf-Exp; and (v) ICC-01/05-01/08-157-Conf-Exp as confidential in accordance with regulation 23 *bis* (3) of the Regulations to enable the Defence to have access to their content.

FOR THESE REASONS, THE CHAMBER

a) decides to re-classify the following documents as confidential:

ICC-01/05-01/08-17-Conf-Exp;

ICC-01/05-01/08-31-US-Exp;

ICC-01/05-01/08-100-Conf-Exp;

ICC-01/05-01/08-113-Conf-Exp;

ICC-01/05-01/08-157-Conf-Exp.

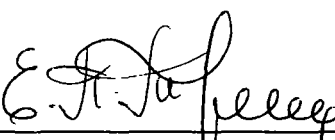
¹¹ “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, ICC-01/04-01/06-1486, para. 45.

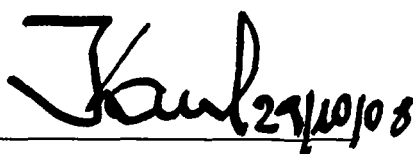
¹² “Prosecution’s application for Trial Chamber to Review all the undisclosed Evidence obtained from Information Providers”, ICC-01/04-01/06-1478.

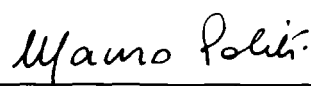
b) orders the Prosecutor to immediately take all necessary steps to obtain the consent of the information provider to lift the confidentiality restrictions on all documents containing information of potentially exculpatory nature, with a view to making them available to the Chamber in a non-redacted form no later than 12 November 2008.

c) requests the Prosecutor to report to the Chamber no later than 12 November 2008 on (i) whether consultations with third parties have been finalised in relation to the 1200 documents revealed in his reports with a view to ascertaining if protective measures are necessary; and (ii) whether any of these documents is of exculpatory nature.

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



Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul

Judge Mauro Politi

Dated this Wednesday, 29 October 2008

At The Hague, The Netherlands