

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elisabeth Odio-Benito
Judge Joyce Aluoch

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

Public with Confidential Annex A

**Prosecution's Response to Defence "*REQUETE AUX FINS DE DIVULGATION*"
dated 5 October 2009 and Request for a Rule 87 (3) (b) Order**

Source: The Office of the Prosecutor

Document to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Introduction

1. The Defence seeks disclosure of all records in the possession of the Office of the Prosecutor ("Prosecution") bearing on admissibility, including the whole dossier related to the proceedings before national criminal courts in Bangui, as well as the notification addressed to the Democratic Republic of the Congo ("DRC") in accordance with Article 18 of the Rome Statute ("Statute") and any response received.¹

Procedural History

2. Between October and November 2008, pursuant to the "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties"² issued by the Pre-Trial Chamber III ("PTC III"), the Prosecution disclosed evidence to the Defence, including information falling under Article 67 (2) of the Statute and Rule 77 of the Rules of Procedure and Evidence ("Rules").

3. On 22 July 2009, the Defence filed its *"Requête Aux Fins De Divulgence Des Eléments Pertinents Relatifs A L'Admissibilité"*³ ("22 July 2009 Defence Application") requesting the Pre-Trial Chamber II ("PTC II") to order the Prosecution to disclose, *inter alia*, all relevant correspondence addressed to or received from the Central African Republic ("CAR") and DRC national authorities, which is likely to be useful for the question of admissibility.⁴ The Defence further referred to the Prosecutor's mission in the CAR and information related to admissibility as detailed in the "Prosecution's report pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the CAR" ("Prosecution's Report").⁵

¹ ICC-01/05-01/08-542, paragraph 12.

² ICC-01/05-01/08-55 and ICC-01/05-01/08-199.

³ ICC-01/05-01/08-458.

⁴ *Ibid* at paragraph 7.

⁵ *Ibid* at paragraph 7; see also ICC-01/05-7.

4. On 13 August 2009, the Prosecution filed its response (“13 August 2009 Prosecution Response”),⁶ informing PTC II, *inter alia*, that the Prosecution had thoroughly reviewed all documents in its possession or control, including the CAR and the DRC collections, and fully discharged its disclosure obligations. Thus the Defence had possession of the relevant documents related to admissibility, such as the Decision of the *Cour de Cassation* on the national criminal proceedings conducted in the CAR and other relevant documents from the *Cour d’Appel de Bangui*.⁷ Furthermore, by virtue of PTC III’s reclassification as “Confidential”, the Defence received other documents potentially bearing on admissibility, such as the referral and its supporting report provided by the CAR authorities.⁸ The Prosecution invited the Defence to specify any such undisclosed material, which the Defence deemed relevant to the issue of admissibility, so as to allow the Prosecution to identify this evidence and respond in a timely manner.⁹

5. On 18 September 2009, the Single Judge of PTC II rejected the 22 July 2009 Defence Application on the basis that the Defence no longer had *locus standi* to challenge the admissibility of the Case at the pre-trial level.¹⁰ The Single Judge made reference to the 15 June 2009 Confirmation Decision,¹¹ or the subsequent rejection of the Prosecution’s leave to appeal the Confirmation Decision,¹² as the concluding point of the pre-trial proceedings and thus PTC II’s automatic authority to determine a challenge to admissibility.

⁶ ICC-01/05-01/08-474.

⁷ These documents, noted in the “Prosecution’s report pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the CAR”: ICC-01/05-7, were referred to in paragraph 7 of the Defence Application and disclosed to the Defence in ICC-01/05-01/08-138-Conf-AnxA. In the same filing (ICC-01/05-7), the Prosecution referred to its Draft Report on Article 53(1), which is an internal work product protected under Rule 81(1) of the Rules and thus not subject to disclosure.

⁸ See ICC-01/05-01/08-301, “Decision on re-classification and unsealing of certain documents”: ICC-01/05-01/08-29-Conf-Anx1A and ICC-01/05-01/08-29-Conf-Anx1B.

⁹ ICC-01/05-01/08-474, paragraph 10.

¹⁰ ICC-01/05-01/08-529, paragraphs 13 and 14.

¹¹ ICC-01/05-01/08-424.

¹² ICC-01/05-01/08-532.

6. On 24 September 2009,¹³ using the operative *inter partes* disclosure process, the Defence reiterated the same request for documents related to admissibility directly to the Prosecution.

7. On 29 September 2009,¹⁴ the Prosecution responded by restating the position initially articulated in the 13 August 2009 Prosecution Response.

8. On 5 October 2009, the Defence filed its “*Requête Aux Fins De Divulgateion*” (“5 October 2009 Defence Application”),¹⁵ expanding the request for disclosure of documents bearing on admissibility to include the whole dossier related to the proceedings before national criminal courts in Bangui, as well as the notification addressed to the DRC in accordance with Article 18 of the Statute and any response received.¹⁶

9. Pursuant to Regulation 24 (1) of the Regulations of the Court (“Regulations”) and the order issued at the Status Conference of 7 October 2009¹⁷ by Trial Chamber III (“the Chamber”), the Prosecution hereby files this response to the 5 October 2009 Defence Application.

Request for Confidentiality

10. The Prosecution requests that Annex A to this filing be received as “Confidential” as this document is not known to the public, but it will be made available to the Defence and the Chamber in response to the specific Defence request stated in paragraph 8 above.

¹³ Reference: Email from Aimé KILOLO dated 24 September 2009 at 15:06 sent to Petra KNEUER, Fatou BENSOUA, Massimo SCALIOTTI, Cynthia TAI and Ibrahim YILLAH, copied to Nkwebe LIRISS and Jean-Jacques Kabongo MANGENDA, titled “*Aff Bemba=demande de divulgation adressée au Procureur*”.

¹⁴ Reference: Fax from Petra Kneuer, Senior Trial Lawyer, to Maître Aimé Kilolo Musamba at 0032 2 521 8520 on 29 September 2009, 19:27:58, titled “*Défense “demande de divulgation des éléments du dossier répressif” en date du 24 Septembre 2009*”.

¹⁵ ICC-01/05-01/08-542

¹⁶ ICC-01/05-01/08-542, paragraph 12.

¹⁷ ICC-01/05-01/08-T-14-ENG RT 07-10-2009, page 28.

Prosecution's Response

The Defence request for all minutes related to meetings and all correspondences exchanged with the CAR and DRC authorities

11. The Prosecution is not in possession of minutes related to meetings, or correspondences exchanged, with the CAR or DRC authorities, which record any facts that are relevant to the issue of the admissibility of the case against Jean-Pierre Bemba Gombo before the International Criminal Court.

The Defence request for the entire dossier of proceedings carried out before national criminal courts in Bangui

12. The Prosecution recalls that at the pre-confirmation stage, it reviewed and disclosed to the Defence all documents under Article 67(2) of the Statute or Rule 77 of the Rules that related to the criminal proceedings in Bangui national courts. The remaining documents, which were incriminating in nature, were not disclosed as the Prosecution chose not to rely upon them at that stage. In light of the specific request by the Defence, stating that all such documents may have a bearing on its challenge to admissibility and thus are material to its preparation, the Prosecution re-classified these remaining documents from the national proceedings in Bangui. On 12 October 2009, in accordance with the operative disclosure regime,¹⁸ the Prosecution disclosed these documents to the Defence under Rule 77 of the Rules.¹⁹

The Defence request for the letter addressed to the DRC authorities under Article 18 of the Statute and their response

13. In accordance with its obligations under Article 18 of the Statute, the Prosecution sent a confidential notification to all State Parties, including the DRC, of its determination that there was a reasonable basis to commence an investigation into the Situation in the CAR. This notification document is attached as Annex A to this

¹⁸ ICC-01/05-01/08-55; disclosure was conducted in accordance with the disclosure decision of PTC III.

¹⁹ ICC-01/05-01/08-554 and ICC-01/05-01/08-554-Conf-AnxA

filing. No response was received from the DRC within the one month period stipulated under Article 18 (2) of the Statute, nor has a response been received subsequently.

The Defence request for all internal documents related to admissibility

14. The Prosecution maintains its position, as reiterated in paragraph 4 above,²⁰ that it has disclosed all evidence it deems relevant to the issue of the admissibility of this case.

Relief Sought

15. As the evidence sought has been disclosed, the Prosecution respectfully requests that the Defence application be dismissed. Additionally, it requests the Chamber to issue an order, under Rule 87 (3) (b) of the Rules, prohibiting the Defence from disclosing to any third party, the information referred to in paragraph 12 above. Such an order will provide an appropriate measure to further protect the confidentiality of this information.



Luis Moreno-Ocampo, Prosecutor

Dated this 12th day of October 2009

At The Hague, The Netherlands

²⁰ This position was initially advanced in paragraph 9 of ICC-01/05-01/08-474.