

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 7 November 2008

PRE-TRIAL CHAMBER III

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

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

**URGENT
Confidential**

Prosecution's Urgent Application to Provisionally Vary the Disclosure Order in the "Third Decision on the Prosecutor's Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo", dated 6 November 2008, Pending Application for Leave to Appeal

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. On 6 November 2008 the Pre-Trial Chamber issued a Decision directing, by 7 November, the disclosure of the identity of seven witnesses. The disclosure thus must take place by 3 pm today. The Prosecution will seek leave to appeal on an expedited basis. However, if the order directing disclosure is not varied, disclosure by 7 November will effectively moot a request for leave to appeal and, necessarily, any subsequent appeal itself. Consequently, the Prosecution requests that the Chamber urgently grant this application.
2. A brief variance of the order to permit an application for leave, and an expedited appeal, will not prejudice the Accused's ability to prepare for the confirmation hearing. The Prosecution will not be calling these witnesses at the hearing, but instead will submit their written statements, copies of which will be available to the defence.
3. The cost to the defence of a brief delay in disclosure is thus not prejudicial. At the same time, the Prosecution submits that the consequences of disclosure to the witnesses and, if the charges are confirmed, ultimately to the Prosecution's ability to prove its case at trial, might be significant and irreparable. Balancing the competing interests, therefore, the Prosecution requests that the disclosure order be varied.

Procedural Background

4. On 31 August 2008, the Single Judge on behalf of the Chamber authorised certain redactions sought by the Prosecution, including redactions to protect the identities of witnesses 0022, 0023 and 0029.¹

¹ ICC-01/05-01/08-85-Conf; see Decision, para. 99.

5. On 30 September 2008 and 17 October 2008, the Prosecution sought the redaction of the identities of five additional witnesses on whose statements it intended to rely at the confirmation hearing.²
6. On 6 November, the Chamber issued a Decision, in which it rejected the Prosecution's application for redactions to protect the identities of four of the witnesses, and also ordered that the redactions to protect the identities of witnesses 0022, 0023 and 0029 be lifted. The Prosecution was ordered to disclose the statements of these witnesses by Friday 7 November 2008.³
7. The Prosecution intends to seek leave to appeal this aspect of the Decision. In order not to pre-empt that application for leave to appeal and render it moot, the Prosecution respectfully requests that the Pre-Trial Chamber vary the order on disclosure on a limited and temporary basis.

**Urgent request to vary the order on redactions and disclosure,
pending application for leave to appeal**

8. The Prosecution will seek leave to appeal the Decision, in respect of the denial of the redaction of the identities of witnesses 0042, 0068, 0080 and 0087, and the order lifting previous redactions of the identities of witnesses 0022, 0023 and 0029.
9. The Prosecution requests that the Chamber, in order not to render this application moot, urgently vary or suspend in part the Decision, and authorise the Prosecution to maintain, on a strictly limited and conditional basis, those redactions requested for the protection of the identities of

² ICC-01/05-01/08-126-US-Exp; ICC-01/05-01/08-169. In those applications, the Prosecution also sought to use summaries to protect the identities of a further two witnesses.

³ "Third Decision on the Prosecutor's Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo", ICC-01/05-01/08-215-Conf, 6 November 2008.

witnesses, pending the application for leave to appeal and the decision of the Chamber.⁴

10. If leave is denied, the Prosecution will promptly disclose copies of the statements without the redactions protecting the identities of the witnesses.
11. Alternatively, if the Chamber grants leave to appeal, the Prosecution respectfully requests that the Chamber continue to exceptionally authorize the Prosecution to maintain the relevant redactions pending a decision of the Appeals Chamber.⁵
12. The Court has been faced with a similar situation in the past. In *Prosecutor v Katanga*, the Prosecution sought leave to appeal a decision denying certain redactions. The Prosecution also sought a variation of the disclosure order pending the determination of that application for leave to appeal. The Single Judge in that case recognized that “the disclosure of the interview notes and statements of the above-mentioned witnesses [...] prior to a decision on the Prosecution’s Request for Leave to Appeal shall effectively pre-empt the subject of the Prosecution request”.⁶ As a result, the Single Judge authorized the Prosecution to provisionally maintain those redactions, pending determination of the application for leave to appeal.⁷
13. The Prosecution submits that maintaining these redactions on a strictly limited, conditional and temporary basis will not prevent the Defence from preparing for the confirmation hearing. The redactions apply only to

⁴ This request for a confined variation is without prejudice to the correctness of the Decision, or to any future order of the Appeals Chamber if leave to appeal is granted.

⁵ In so doing, the Chamber could set out the terms of any further extension in the decision on the application for leave to appeal, including any requirement that the Prosecution seek suspensive effect from the Appeals Chamber under Article 83(3).

⁶ *Prosecutor v Katanga*, ICC-01/04-01/07-94, 11 December 2007, p. 3.

⁷ *Ibid.* In that case, the Single Judge granted leave to appeal, and the Appeals Chamber upheld the Prosecution’s appeal in respect of some of the redactions – see ICC-01/04-01/07-108, 14 December 2007; ICC-01/04-01/07-475 OA, 13 May 2008.

the identity and identifying information of the witnesses. The Defence will have access to the substance of the statement. Further, withholding the identity of the witnesses at this stage, on a temporary basis while the forthcoming application for leave to appeal is pending, does not materially impact on the ability of the Defence to prepare for the confirmation hearing. The Prosecution will not be calling the witnesses to testify at the hearing, but will rather be submitting their statements in written form.

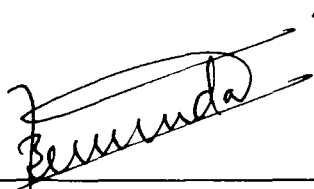
14. As the Chamber recalled, the Appeals Chamber has held that "it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial."⁸ The Appeals Chamber has also held, in the context of redactions to written statements to be presented at the confirmation hearing, that "[t]he right to challenge the evidence [...] must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect. [...] As the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested."⁹

⁸ Decision, para. 28, citing *Prosecutor v. Katanga, Judgment on Prosecution's Appeal against the First Redaction Decision*, ICC-01/04-01/07-475 OA, 13 May 2008, Para. 68.

⁹ *Prosecutor v. Lubanga, Judgment on Appeal against Second Redaction Decision*, ICC-01/04-01/06-774 OA6, 14 December 2006, Para. 47.

Conclusion

15. For the above referred reasons, the Prosecution respectfully requests that the Chamber urgently authorize the Prosecution to provisionally maintain the redactions to protect the identities of witnesses 0022, 0023, 0029, 0042, 0068, 0080 and 0087, pending the Chamber's decision on an application for leave to appeal the Decision and, if granted, any decision of the Appeals Chamber.



Fatou Bensouda, Deputy-Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 7th day of November 2008
At The Hague, The Netherlands