

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29 June 2010

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

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

Public

Decision on the "Prosecution's Request to Apply Redactions to Audio-Video Recordings of Statements Already Disclosed to Defence" (ICC-01/05-01/08-724)

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 of Jean-Pierre Bemba

Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima

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

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

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 hereby delivers the following Decision on the “Prosecution’s Request to Apply Redactions to Audio-Video Recordings of Statements Already Disclosed to the Defence” (“Request”).¹

I. Background

1. On 1 February 2010, the Defence sent to the Office of the Prosecutor (“prosecution”) a letter requesting disclosure of all relevant audio-video materials in the possession of the prosecution.² The prosecution responded by letter of 5 February 2010,³ stating that the only audio-video materials in its possession are the audio-video tapes (“videos”) from the interviews of two witnesses, namely Witnesses 40 and 46, that will be disclosed to the defence once the redaction process is completed.⁴
2. In its Request of 17 March 2010, the prosecution seeks leave to apply minimal redactions to 25 of the 47 videos in this category.⁵ Specifically, redactions are sought to 23 videos of the interview of Witness 40⁶ and to 2 videos of the interview of Witness 46.⁷
3. The prosecution indicates that, relying on the Chamber’s “Order on disclosure of evidence by the Office of the Prosecutor”⁸ and in the interest of expediency, and

¹Prosecution’s Request to Apply Redactions to Audio-Video Recordings of Statements Already Disclosed to the Defence, 17 March 2010, ICC-01/05-01/08-724 with 2 confidential annexes (A and B) and 2 confidential *ex parte* prosecution and VWU only annexes (C and D).

²ICC-01/05-01/08-724-Conf-AnxA.

³ICC-01/05-01/08-724-Conf-AnxB.

⁴ICC-01/05-01/08-724-Conf-AnxB, paragraph 2.

⁵ICC-01/05-01/08-724, paragraph 1.

⁶ICC-01/05-01/08-724-Conf-Exp-AnxC.

⁷ICC-01/05-01/08-724-Conf-Exp-AnxD.

⁸Order on disclosure of evidence by the Office of the Prosecutor, ICC-01/05-01/08-590, paragraph 6.

to allow the defence adequate time to prepare for trial, it has disclosed the 47 videos, 25 in redacted form.⁹

4. The prosecution bases its application for redactions on Articles 54(3)(f) and 68(1) of the Rome Statute ("Statute") and Rule 81(4) of the Rules of Procedure and Evidence ("Rules"). Pursuant to these provisions, the prosecution submits that some redactions are necessary to protect the personal security and privacy of the witnesses and their family members. Furthermore, it is submitted that other proposed redactions are based on Rule 81(2) of the Rules, because they were necessary to protect future investigations, and they relate to the names of the field-staff present during the interviews.¹⁰ The prosecution further requests that, due to the nature of the videos, the redactions are applied by way of voice or image distortion.¹¹

5. The Defence did not file a response to the Request.

II. Applicable Law

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

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

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.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(c) Provide for the protection of confidential information.

[...]

⁹ ICC-01/05-01/08-724, paragraph 3.

¹⁰ ICC-01/05-01/08-724, paragraph 4.

¹¹ ICC-01/05-01/08-724, paragraph 5.

Article 68(1) of the Statute**Protection of the victims and witnesses and their participation in the proceedings**

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Rules 81(2) and 81(4) of the Rules**Restrictions on disclosure state**

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

[...]

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

7. Although the prosecution refers to Articles 72 and 93 of the Statute as providing the legal basis for the proposed redactions to ensure confidentiality of information,¹² these are entitled “Protection of national security information” and “other forms of cooperation” respectively. As the prosecution has not provided any justification for this suggested legal basis, and none is apparent to the Chamber, they are not considered further.

¹² ICC-01/05-01/08-724-Conf-Exp-AnxC, page 2 and ICC-01/05-01/08-724-Conf-Exp-AnxD, page 2.

III. Analysis and Conclusions

8. Although some of the documents referred to in this Decision are not part of the public record of the case, the Chamber is satisfied that the Decision can be issued publicly as there is no information in the documents referred to that requires protection.

Redactions under Rule 81(4) of the Rules

9. The Appeals Chamber in the *Lubanga* case indicated that “three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to Rule 81(4) of the Rules of Procedure and Evidence [are]: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why [...] the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹³
10. The Appeals Chamber has thereby developed the general criteria to be applied when assessing whether security concerns may, exceptionally, justify withholding information from the defence, and these self-evidently are engaged when considering an application to withhold the addresses and whereabouts of witnesses and their family members.
11. Only one redaction is sought pursuant to Rule 81(4) of the Rules, namely in a video of Witness 46’s interview,¹⁴ when his home address is referred to. This information is likely to endanger the witness’s safety, as well as the privacy and

¹³ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, ICC-01/04-01/06-773, paragraph 21; See also, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, paragraph 67.

¹⁴ ICC-01/05-01/08-724-Conf-Exp-AnxD, page 3 and CAR-OTP-0014-0008, from time 00.05.06 to 00.05.28.

security of members of his family. Given Witness 46's name has been disclosed to the defence and his image has not been altered, distorting the witness's voice for the short section when he gives his address and that of one of the members of his family, is not prejudicial to or inconsistent with the rights of the accused. On the information before the Chamber, these addresses are irrelevant to the known issues in the case, and if the defence wish to contact or investigate any relevant individual, the matter can be raised, if necessary, with the Chamber.

12. Therefore, the relevant redactions are granted under Rule 81(4) of the Rules.

Redactions under Rule 81(2) of the Rules

13. The Appeals Chamber has established that the criteria for proposed redactions pursuant to Rule 81(4) of the Rules "apply *mutatis mutandis* to redactions sought pursuant to Rule 81(2) of the Rules".¹⁵

14. In the *Lubanga* case Trial Chamber I has approved withholding the names of those referred to as third parties present during the interviews with witnesses when, *inter alia*, the information was irrelevant to the accusations faced by Mr Lubanga, so long as this course did not render the document in question in any way unintelligible or unusable.¹⁶

15. In the present case, redactions are sought by way of image distortion for the faces of the interpreters¹⁷ and voice distortion when they reveal their names.¹⁸

¹⁵ ICC-01/04-01/07-475, paragraph 97.

¹⁶ Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG, page 3, lines 3 to 13.

¹⁷ ICC-01/05-01/08-724-Conf-Exp-AnxC, page 2 to 3, CAR-OTP-0012-0005, from time 00.00.00 to 00.56.45; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 3, CAR-OTP-0012-0006, from time 00.00.00 to 00.17.31; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 3, CAR-OTP-0012-0007, from time 00.00.00 to 00.54.32; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 4, CAR-OTP-0012-0008, from time 00.00.00 to 00.46.29; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 4, CAR-OTP-0012-0009, from time 00.00.00 to 00.57.07; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 4, CAR-OTP-0012-0010, from time 00.01.16. to 00.56.57; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 5, CAR-OTP-0012-0011, from time 00.00.00 to 00.56.19; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 5, CAR-OTP-0012-0012, from time 00.00.00 to 00.57.28; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 5 to 6, CAR-OTP-0012-0013, from time 00.00.00 to 00.43.39; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 6, CAR-OTP-0012-0014, from time 00.00.00 to 00.55.13; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 6, CAR-OTP-0012-0015, from time 00.00.00 to 00.11.39; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 6 to 7, CAR-OTP-0012-0016, from time 00.00.00 to

16. The prosecution submits there is a very limited pool of interpreters able to work in the field, who may be needed for future investigations. The Chamber accepts that the disclosure of their names and faces would endanger their safety and the ability to conduct other investigations.
17. This information is irrelevant to the accusations faced by Mr Bemba, and, accordingly, distorting the interpreters' images is not prejudicial to, or inconsistent with, the rights of the accused, particularly since this step does not render the videos unusable or unintelligible.
18. There are a very limited number of locations where the prosecution conducts its interviews in the field, relevant to this and future investigations. Disclosure of this information could endanger other investigations and this information is irrelevant to any known issue in the case, and does not come within Rule 77 of the Rules. A discrete redaction is sought for the location of the interview with Witness 46,¹⁹ and in the circumstances withholding this information is not prejudicial to or inconsistent with the rights of the accused. The video remains intelligible and usable.
19. For the above reasons, the Chamber grants the limited redactions to the names

00.36.02; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 7, CAR-OTP-0012-0017, from time 00.00.00 to 00.18.39; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 8, CAR-OTP-0024-0010, from time 00.00.00 to 00.48.23; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 8, CAR-OTP-0024-0011, from time 00.00.00 to 00.57.25; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 8, CAR-OTP-0024-0012, from time 00.00.00 to 00.57.16; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 8 to 9, CAR-OTP-0024-0013, from time 00.00.00 to 00.57.11; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 9, CAR-OTP-0024-0014, from time 00.00.00 to 00.58.47; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 9, CAR-OTP-0024-0015, from time 00.00.00 to 00.57.42; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 9 to 10, CAR-OTP-0024-0016, from time 00.00.00 to 00.48.50; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 10, CAR-OTP-0024-0017, from time 00.00.00 to 00.57.02; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 10, CAR-OTP-0024-0018, from time 00.00.00 to 00.47.48; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 10 to 11, CAR-OTP-0024-0019, from time 00.00.00 to 00.07.05.

¹⁸ ICC-01/05-01/08-724-Conf-Exp-AnxC, page 2, CAR-OTP-0012-0005, from time 00.02.23 to 00.02.40, from time 00.08.38 to 00.08.44; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 3, CAR-OTP-0012-0007, from time 00.01.30 to 00.01.32. The Chamber notes that the correct time reference is from time 00.01.29 to 00.01.35; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 4, CAR-OTP-0012-0010, from time 00.01.42 to 00.01.46; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 5, CAR-OTP-0012-0011, from time 00.40.00 to 00.40.07; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 6 to 7, CAR-OTP-0012-0016, from time 00.01.45 to 00.01.48; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 7 to 8, CAR-OTP-0024-0010, from time 00.02.22 to 00.02.37, from time 00.07.39 to 00.07.46, from time 00.12.56 to 00.13.09; ICC-01/05-01/08-724-Conf-Exp-AnxC, page 10, CAR-OTP-0024-0017, from time 00.02.02 to 00.02.07.

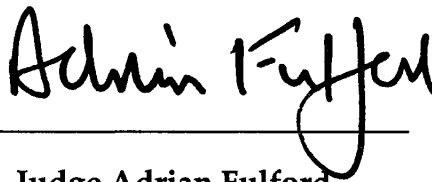
¹⁹ ICC-01/05-01/08-724-Conf-Exp-AnxD, page 2, CAR-OTP-0014-0005, from time 00.04.17 to 00.04.26.

and faces of the interpreters present during the interviews with Witnesses 40 and 46, as well as to the location of the interview with Witness 46, as requested by the prosecution under Rule 81(2) of the Rules.

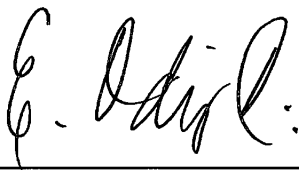
20. Disclosure is a continuing obligation, and the Prosecutor must ensure that as the evidence and issues in the trial unfold he has continued to discharge his obligations in full.²⁰

²⁰ See Decision on the lifting, Maintenance and Ordering of Redactions, 22 October 2009, ICC-01/04-01/07-1551-Red2, paragraph 72.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 29 June 2010

At The Hague, The Netherlands