

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 July 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
With Confidential, *Ex Parte*, Prosecution, Defence and Victims and Witnesses Unit
only Annex**

**Decision on the Prosecution's Request to Apply Redactions to Screening Notes
(ICC-01/05-01/08-689-Conf-Exp)**

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-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

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) hereby delivers the following Decision on the Prosecution’s Request to Apply Redactions to Screening Notes.

I. Background

1. On 14 January 2010, pursuant to the defence « Requête en vue de la divulgation de toutes les interviews préliminaires d’évaluations de tous les témoins du Procureur en vertu de l’article 67(2) du Statut et de la Règle 77 du Règlement de Procédure et de Preuve », ¹ the Office of the Prosecutor (“prosecution”) identified 26 documents of pre-interview assessments (“screening notes”) for disclosure to the defence.²
2. On 9 February 2010, the prosecution filed a request to apply redactions to the screening notes that are to be disclosed pursuant to the defence request (“prosecution Application”), filed as confidential *ex parte* Annexes A to N.³
3. The prosecution seeks to apply minimal redactions to 14 of the 26 screening notes. The prosecution bases its application 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 security and privacy of the witnesses and members of their families as they relate to their addresses, and in some instances

¹ Requête en vue de la divulgation de toutes les interviews préliminaires d’évaluations de tous les témoins du Procureur en vertu de l’article 67(2) du Statut et de la Règle 77 du Règlement de Procédure et de Preuve, 14 January 2010, ICC-01/05-01/08-668-Red.

² Prosecution’s Response to Defence ‘Requête en vue de la divulgation de toutes les interviews préliminaires d’évaluation de tous les témoins du Procureur en vertu de l’article 67(2) du Statut et de la Règle 77 du Règlement de Procédure et de Preuve’” dated 14 January 2010, 26 February 2010, ICC-01/05-01/08-688-Red.

³ Prosecution’s Request to Apply for Redactions to Documents to be disclosed pursuant to Defence’s ‘Requête en vue de la divulgation de toutes les interviews préliminaires d’évaluation de tous les témoins du Procureur en vertu de l’article 67(2) du Statut et de la Règle 77 du Règlement de Procédure et de Preuve’”, 9 February 2010, ICC-01/05-01/08-689-Conf-Exp-Anx 1.

their telephone numbers. It further submits that other redactions are based on Rule 81(2) of the Rules, as they are necessary to protect future investigations, and concern the names of field staff and intermediaries.

4. The prosecution also relies on the “Order on disclosure of evidence by the Office of the Prosecutor”⁴ in which the Chamber ordered the disclosure of redacted material as requested by the prosecution, pending a decision of the Chamber, in the interest of expediency and to allow the defence adequate time to prepare for trial.
5. Consequently, on 10 February 2010, the prosecution disclosed to the defence the 14 pre-interview assessments in redacted form.⁵

II. Applicable Law

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

Article 54(3)(f) of the Statute

Duties and powers of the Prosecutor with respect to investigations

[...]

3. The Prosecutor may:

[...]

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 64(3)(c) of the Statute

Functions and powers of the Trial Chamber

[...]

⁴ Order on disclosure of evidence by the Office of the Prosecutor, 4 November 2009, ICC-01/05-01/08-590, paragraph 6.

⁵ Following the prosecution Response, all 26 screening notes were disclosed, 14 of them in redacted form; See Annex A to “Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 9 February 2010”, 10 February 2010, ICC-01/05-01/08-690-Conf-Exp-AnxA and Annex A to “Prosecution’s Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 9 February 2010”, 10 February 2010, ICC-01/05-01/08-691-Conf-Exp-AnxA.

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.

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

[...]

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.

[...]

III. Analysis and Conclusions

7. The general principles applicable to the individual requests are set out in this “cover” part of the Decision, and the individual requests to impose redactions are addressed on a case-by-case basis in the Annex.

Redactions sought under Rule 81(4) of the Rules

8. Extensive jurisprudence on disclosure has been developed by the various Chambers of Court, which provides a general framework for Decisions on disclosure and protective measures. However, it is only necessary to refer in this Decision to the Appeals Chamber Judgment in the *Lubanga* case, when it established 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.”⁶

9. The Appeals Chamber thereby established the over-arching general criteria that are to be applied when assessing whether security concerns may, exceptionally, justify withholding information from the defence, and including applications for non-disclosure of, *inter alia*, the addresses of witnesses and their families.

10. In the present Application, the proposed redactions are limited, and in the Chamber’s judgment disclosing the fixed home addresses or the telephone numbers of witnesses or those individuals who were screened would endanger their safety and privacy, and that of their families. This applies particularly to individuals who were screened but not interviewed. Generally, the names of individuals who were screened (whether they were further interviewed or not) have been disclosed to the defence, and redacting their addresses or telephone numbers is not prejudicial to, or inconsistent with, the rights of the accused. This

⁶ 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 OA 5, 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.

information is irrelevant to any of the known issues in the case, and the redactions do not render the documents unusable or unintelligible. Furthermore, if the defence wishes to meet these individuals or to undertake other proper investigations, arrangements can be made with the Victims and Witnesses Unit without revealing their addresses or telephone numbers. If, after consideration of all options, it is still suggested that it is necessary to reveal this information, a discrete application may be filed.⁷ No lesser measures are feasible.

11. For the above reasons, the Chamber hereby grants the redactions to home addresses and telephone numbers of witnesses and members of their families, as requested by the prosecution under Rule 81(4) of the Rules.

Redactions sought under Rule 81(2) of the Rules

12. The Appeals Chamber has indicated that the criteria established for redactions pursuant to Rule 81(4) of the Rules are to "apply *mutatis mutandis* to redactions sought pursuant to Rule 81(2) of the Rules".⁸
13. In reaching its conclusion on the present application, the Chamber has noted the approach taken in the *Lubanga* case, in that Trial Chamber I approved redactions to the names of those referred to as third parties, intermediaries and NGOs (including their field-staff) when, *inter alia*, the information was irrelevant to the known issues in the case, so long as this course did not render the document in any way unintelligible or unusable.⁹ Trial Chamber I has revisited its decisions as necessary as the evidence and issues in the trial have unfolded.¹⁰
14. Addressing redactions to the names of field-staff, such as interpreters, the prosecution contends that there is a very limited pool of such individuals in the

⁷ See the approach taken in "Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents", 7 July 2010, ICC-01/05-01/08-813-Conf-Exp, paragraphs 65 – 68 and Annex A.

⁸ ICC-01/04-01/07-475, paragraph 97.

⁹ Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG ET WT, page 3, lines 3 to 13.

¹⁰ See for instance Redacted Decision on Intermediaries, 31 May 2010, ICC-01/04-01/06-2434-Red2 and Annex.

field and that disclosing their identities would endanger future investigations. In the circumstances, although the risks in the Central African Republic ("CAR") are not high, they are nonetheless appreciable and the Chamber accepts that disclosure of the names of the prosecution's field-staff may endanger their safety and compromise other investigations. Furthermore, the Chamber considers that the identities of the field-staff are irrelevant to the issues in the case (as revealed by the parties), and, applying the approach set out above, redacting their names is not prejudicial to, or inconsistent with, the rights of the accused. No lesser measures are feasible.

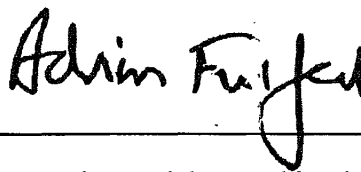
15. For the above reasons, the Chamber hereby grants the redactions to the names of field-staff as requested by the prosecution under Rule 81(2) of the Rules.
16. Turning to the redactions which are requested for the names of intermediaries, the prosecution submits that the intermediaries used in these proceedings may need to be retained for other investigations and revealing their identities would endanger future investigations and undermine their safety.
17. As set out above, in the *Lubanga* case, Trial Chamber I recently issued the "Decision on Intermediaries", which provided for, *inter alia*, the disclosure of the identities of a number of intermediaries following allegations that some of them had encouraged witnesses to give false testimony before the Court.¹¹ Whilst this has not been identified as an issue in the present case, the Chamber is nevertheless of the view that requests to redact the identifying information of intermediaries may require particular scrutiny.
18. In the present application, the prosecution seeks to redact the name and identifying information of an intermediary in relation to the screening notes of two individuals. However, in October 2009, the prosecution requested

¹¹ Decision on Intermediaries, 31 May 2010, ICC-01/04-01/06-2434-Red2.

permission to *lift* redactions to the name and identifying information for this individual¹² and the Chamber granted the request.¹³ Although the context in which the name is mentioned is not identical – particularly since it was not apparent in the documents relevant to the previous request that this individual was an intermediary – the Chamber considers that she is publicly known for her work with victims. In these particular circumstances, disclosure will not adversely affect the safety of this individual or compromise future investigations.

19. For these reasons, the Chamber hereby grants the redactions sought under Rule 81(2), save for the name and identifying information of the intermediary.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 9 July 2010

At The Hague, The Netherlands

¹² See “Prosecution’s Request to Lift, Maintain and Apply Redactions to Witnesses’ Statements and Related Documents, 27 October 2009, ICC-01/05-01/08-572-Red2, paragraphs 5 and 6. This is the Public Redacted version of this document.

¹³ ICC-01/05-01/08-813-Conf-Exp-AnxB, pages 55 and 102 – 103.