

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 January 2011

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

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

Public
With confidential *ex parte* Annex, Prosecution and Victims and Witnesses Unit
Only

Public redacted decision on the lifting of redactions in witness statements

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

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 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* (“Bemba case”) issues the following Decision on the lifting of redactions in witness statements.

I. Background and Submissions

1. On 26 October 2009, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents” (“prosecution’s Request” or “Request”),¹ in which it sought, *inter alia*, leave to lift all the redactions relating to five witnesses and to lift partially, and otherwise maintain, the redactions relating to twelve witnesses. The Chamber ordered the prosecution to serve the material that was the subject of the Request in its redacted form on the defence, pending a decision on the prosecution’s Request.²
2. The prosecution’s Request concerned the lifting of redactions to names of family members of witnesses, which were initially granted at the pre-trial stage, or to individuals who may have contributed to the prosecution’s investigations.³ The prosecution requested leave to lift redactions on the basis that these protective measures were no longer justified. The redacted identifying information concerned, *inter alia*, third parties who were either no longer at risk or who enjoyed sufficient protection.
3. On 7 and 20 July 2010, the Chamber issued a confidential *ex parte* “Decision on the Prosecution’s Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents” (“Decision of 7 July 2010”) and a public

¹ Prosecution’s Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 26 October 2009, ICC-01/05-01/08-572-Conf-Exp.

² Order on disclosure of evidence by the Office of the Prosecutor, 4 November 2009, ICC-01/05-01/08-590, paragraph 6.

³ See Rules 81(2) and (4) of the Rules of Procedure and Evidence.

redacted version thereto.⁴ The prosecution's specific request to lift redactions was addressed at paragraphs 76 to 79 of the Chamber's Decision of 7 July 2010. In confidential *ex parte* Annex B to this decision, the Chamber has generally accepted that "third parties" are no longer likely to be perceived as potential witnesses, and that the risk to them is consequently low. However, in certain instances, although the prosecution requested the lifting of identifying information concerning third parties, the Chamber was not satisfied by the security assessment provided by the prosecution. Thus, the Chamber ordered the prosecution to submit further information in response to the issues raised in confidential *ex parte* Annex B to its decision, related to witnesses 6, 32, 36, 44, 9, 15, 22, 29, 31, 45, 68, 80 and 87.⁵

4. On 24 September 2010, the prosecution filed its "Prosecution's Submission of Further Information as Ordered by the Chamber in its Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents" ("Submission"),⁶ which provided the Chamber with the requested information on the security situation of the third parties, in respect of whom disclosure to the defence of their identifying information is sought.⁷

II. Relevant provisions

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

⁴ Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, ICC-01/05-01/08-0813-Conf-Exp and confidential *ex parte* Annexes A and B; Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red.

⁵ ICC-01/05-01/08-813-Red, paragraph 89 letter p).

⁶ Prosecution's Submission of Further Information as Ordered by the Chamber in its Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 23 September 2010 (notified on 24 September 2010), ICC-01/05-01/08-898-Conf-Exp.

⁷ ICC-01/05-01/08-898-Conf-Exp.

Article 54 of the Rome Statute ("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 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:

[...]

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

[...]

Article 67 of the Statute**Rights of the Accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

Article 68 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 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.

[...]

Rule 81 of the Rules of Procedure and Evidence ("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.

[...]

Rule 87 of the Rules
Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted *ex parte*;

[...]

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

[...]

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

[...]

Article 8 of the Code of Professional Conduct for counsel
Respect for professional secrecy and confidentiality

1. Counsel shall respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.

2. The relevant provisions referred to in paragraph 1 of this article include, *inter alia*, article 64, paragraph 6 (c), article 64, paragraph 7, article 67, paragraph 1 (b), article 68, and article 72 of the Statute, rules 72, 73, and 81 of the Rules of Procedure and Evidence and regulation 97 of the Regulations of the Court. Counsel shall also comply with the relevant provisions of this Code and any order of the Court.

3. Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on this particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.

4. Subject to paragraph 3 of this article, counsel may only disclose the information protected under paragraphs 1 and 2 of this article, where such disclosure is provided for by a particular provision of the Statute, the Rules of procedure and Evidence, the Regulations of the Court or this Code or where such disclosure is ordered by the Court. In particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorised to do so by an order of the Court.

III. Analysis and Conclusions

6. The Chamber reiterates the principles stated in its previous Decision of 7 July 2010 according to which: (1) the presumption is that the material to be disclosed will be served in full and redactions need to be justified individually;⁸ (2) once redactions imposed under Rule 81(2) of the Rules are no longer necessary, disclosure does not require leave of the Chamber;⁹ and (3) the leave of the Chamber is necessary to lift redactions authorised in accordance with Rule 81(4) of the Rules because these were imposed to protect witnesses and victims, their family members and other persons at risk on account of activities of the Court, for whom the Chamber has ultimate responsibility pursuant to Article 68(1) of the Statute.¹⁰

7. In the Submission, the prosecution mainly reiterates its initial Request of 26 October 2009 for leave to lift redactions but, in some instances where redactions are made to information identifying witnesses' family members, it seeks to maintain redactions, thereby amending its initial Request.

⁸ ICC-01/05-01/08-813-Red, paragraph 61.

⁹ ICC-01/05-01/08-813-Red, paragraph 76.

¹⁰ ICC-01/05-01/08-813-Red, paragraph 77.

8. Based on the further information provided by the prosecution relating to Witnesses 6, 32, 36, 44, 9, 15, 22, 29, 31, 45, 68, 80 and 87, the Chamber has analysed the current security situation relating to third parties mentioned in the statements of these thirteen witnesses. Given the potentially serious consequences of disclosing information which may pose a risk to witnesses, victims, members of their families and others, the Chamber has addressed each suggested justification provided by the prosecution for lifting or maintaining redactions. The individual security information has been analysed on a case-by-case basis in an Annex to the present Decision.

9. In making its determination on the prosecution's Submission, the Chamber has considered whether or not there is a risk to the security of the third parties concerned and whether or not they may benefit from protective measures other than redactions to their identifying information in the related witness statements. As previously stated in its Decision of 7 July 2010,¹¹ the relative stability of the Central African Republic ("CAR") is a factor that the Chamber has taken into account when assessing whether the requests to lift redactions will have an adverse impact on an individual's security. In line with the principles rehearsed in paragraph 6 above, the Chamber has also balanced the need for protection of the third parties as enshrined in Article 68(1) of the Statute and the right of the accused to have adequate time and facilities for the proper preparation of his defence pursuant to Article 67(1)(b) of the Statute.

10. As to the specific situation of Witness 80, the prosecution submits that [REDACTED]. In these circumstances, the prosecution's request to lift redactions with respect to this witness is moot and it is therefore unnecessary

¹¹ ICC-01/05-01/08-813-Red, paragraph 69.

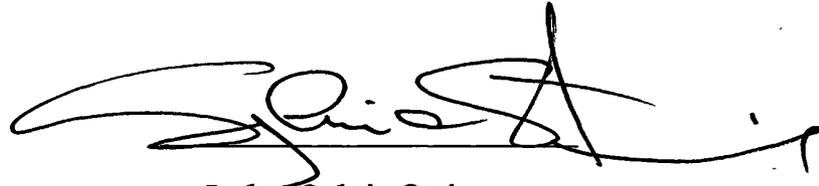
for the Chamber to make a finding on the lifting of redactions to Witness 80's statements.

11. Following the criteria stated in paragraph 9 above and the analysis provided in Annex, the Chamber:

- a) authorises the lifting of the remaining redactions initially sought under Rule 81(4) of the Rules in the prosecution's Request related to witnesses 36, 44, 15, 22, 31, 45, 68 and 87.
- b) partially authorises the lifting of redactions relating to witnesses 6, 29 and 32.
- c) authorises the lifting of redactions to family members of witnesses 6, 9 and 15 provided that [REDACTED].

12. Accordingly, the Chamber orders the prosecution to disclose the redacted versions of this material by 1 November 2010.

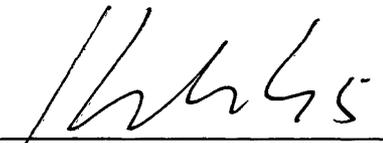
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 26 January 2011

At The Hague, The Netherlands