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TRIAL CHAMBER III

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

**Public Document
With Confidential Annex A**

Defence Observations on the "Seventh Transmission to the parties and legal representatives of redacted versions of applications for participation in the proceedings"

Source: Defence Team of Mr. Jean-Pierre Bemba Gombo

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

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I. Procedural Background

1. During the Status Conference on 24 September 2010, the honourable Trial Chamber issued an oral decision to the effect that 850 victims' applications will be notified to the parties, in redacted form, on a rolling basis, in batches of 200 to 300 applications. The parties would then have 10 days within which to present their observations.¹
2. The Trial Chamber subsequently confirmed that the deadline of 10 days would not start to commence until after the Defence had filed its observations on the preceding batch of applications.²
3. The Defence received the Seventh transmission of 373 applications ("the Seventh transmission") on 15 October 2010,³ and filed its observations concerning the Sixth transmission of applications on 15 November 2010.⁴
4. The Defence hereby files its observations on the Seventh transmission in accordance with its deadline of 26 November 2010.

II. General Observations

a) The timing of the submission of the applications

5. The observations set out in the Defence's filing of 11 October 2010 concerning the timing of the applications apply with equal force to the current applications.⁵ For example, many were received in The Hague as early as April or June this year. The tardy transmission of these applications to the Defence has severely jeopardised the ability of the Defence to dedicate its limited time and resources to reviewing prosecution disclosure, conducting any necessary investigations concerning upcoming Prosecution witnesses, and preparing its cross-examination strategy.

¹ Transcript, ICC-01/05-01/08-T-25-CONF-ENG, 24 September 2010, pp. 23- 24.

² Email from the Legal Advisor, Trial Division, 8 October 2010.

³ "Seventh transmission to the parties and legal representatives of redacted versions of applications for participation in the proceedings"; ICC-01/05-01/08-955, 15 October 2010; received on 15 October 2010) Containing 373 Annexes: Confidential Annexes 1-373 (ICC-01/05-01/08-955-Conf-Anx1 - ICC-01/05-01/08-955-Conf-Anx373).

⁴ Observations de la Défense sur les 82 demandes de participation à la procédure en qualité de victimes, ICC-01/05-01/08-1009.

⁵ Defence Response to the Third Transmission of Victims' Applications for Participation in the Proceedings, ICC-01/05-01/08-945, at paras 7-12.

6. In the event that the late disclosure of these application forms has prejudiced the ability of the defence to put relevant questions to the current Prosecution witnesses, the defence reserves its right to request the Chamber to recall these witnesses in order to permit the Defence to submit additional questions or exhibits based on information derived from the tardily disclosed victim applications.⁶

b) Redactions

Redactions concerning the date and place of the alleged events

7. The Defence reiterates the concerns set out in its previous filings,⁷ and emphasises that in many cases, the redactions exceed the scope of the directions provided by the Trial Chamber, and do not have any logical basis. For example, in some applications, the Victim Participation and Reparation Section (VPRS) has redacted the applicant's birth date from the attached identification documents, but not from the application form.⁸ Since the applicant's birth date has been provided in the application form, it is clear that the redaction to the respective identification document is neither necessary nor proportionate. Similarly, in many instance, VPRS has redacted the location of the events but not the location where the applicant currently resides.
8. The Defence therefore recalls its submissions as to whether the present exercise can in any sense be termed 'meaningful' if the Defence is unable to assess whether a key element of the criteria to be admitted as a participating victim is fulfilled. The principle of adversarial proceedings and the right of the Defence under rule 89(1) to be heard, require the Chamber to base its decision on the evidence available the Prosecution and Defence.⁹ Indeed, it is arguable that if the Chamber renders a prima

⁶ See for example, Prosecutor v. Katanga, Transcript of 25 May 2010, pages 6-7; 39-44, 45-46 [ICC-01/04-01/07-T-146-Red-ENG WT 25-05-2010]; Prosecutor v. Katanga, Transcript of 30 March 2010, pages 2-5 [ICC-01/04-01/07-T-126-Red-ENG WT 30-03-2010]; and Prosecutor v. Ndindiliyimana et al, Decision on Defence motions Alleging Violation of the Prosecutor's Disclosure obligations Pursuant to Rule 68, 22 September 2008, para. 61

⁷ Defence Response to the Third Transmission of Victims' Applications for Participation in the Proceedings ICC-01/05-01/08-945, 11 October 2010; Defence Observations on the "Fourth Transmission to the parties and legal representatives of redacted versions of applications for participation in the proceedings", 22 October 2010, ICC-01/05-01/08-968 at paras 7-12.

⁸ a/0782/10, a/1014/10, a/1042/10, a/1242/10, a/1654/10, a/1711/10, a/1716/10, a/2224/10 a/2229/10.

⁹ The right to adversarial proceedings "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision." *Vermeulen v. Belgium*, Application no. 19075/91, Judgment of 22 Jan. 1996, para. 33. That Court noted that despite the fact of the independent avocet général's objectivity, the potential for bias and appearance of impropriety were sufficient to

facie factual determination concerning a particular applicant on the basis of evidence which has not been disclosed to the parties and which might never be disclosed to the parties, the impartiality of the Chamber could be contaminated.¹⁰

9. In such circumstances, if the protective measure in question would severely impede the right of the Defence to respond to such an application, then the appropriate approach would be for the Trial Chamber to either order the VPRS to modify the protective measure in question, as this Chamber expressly envisaged in its decision of 22 February 2010,¹¹ or, if to do so would endanger the security of the victim, then the application must be dismissed or suspended until a less invasive protective measure can be implemented.

constitute violations of Article 6.1. These principles have been endorsed by the ICC: “In keeping with the right to adversarial proceedings, the parties to a trial are afforded the opportunity to have knowledge of all evidence adduced or observations filed.” Situation in the Democratic Republic of the Congo ICC 01/04-135 Decision on the Prosecutor’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (31 March 2006), footnote 68.

In line with this principle, the ICTY has held that the adversarial process demands that the Chamber should not base its decisions on information which is only available to one of the parties. It would thus be unfair to permit the Prosecution to use the confidential decisions from other Chambers of the Tribunal as the basis for the arguments it puts forward in its submissions, since the Defence teams have no access to them”. The Chamber would therefore “not take into account any arguments based on confidential decisions for which the Prosecution has failed to obtain a public redacted version” Prosecutor v. Prlić, et al., Case No. IT-04-74-T, Decision on a Stojić Defence Request Regarding References to Confidential Decisions Rendered by other Chambers, p. 3 (23 Mar. 2009).

The principle of adversarial proceedings also requires that the parties are aware of the factual basis for a decision so that they can appeal if necessary. As the Appeals Chamber has noted, the Court “must identify which facts it found to be relevant ... [and] ‘indicate with sufficient clarity the grounds on which they based their decision ... [i]t is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him.’” See Prosecutor v. Lubanga, ICC-01/04-01/06-772, 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” para. 20 (14 December. 2006), citing to *Hadjianastassiou v. Greece*, Application no. 12945/87, Judgment of 16 December 1992, para. 33. The United Kingdom case of *Al Rawi and Others v. Security Service and Others* [2010] EWCA Civ. 482, paras. 12, 16 (4 May 2010) refers to the right to be heard as a fundamental principle and elaborates “[a]nother fundamental principle of our law is that a party to litigation should know the reasons why he won or lost, so that a judge’s decision will be liable to be set aside if it contains no, or even insufficient, reason.”

¹⁰ See Prosecutor v. Krnojeac, Case No. IT-97-25-PT, Decision on Prosecutor’s Response to Decision of 24 February 1999, (20 May 1999), paras. 11-12, describing how a Judge who rendered factual findings on an indictment on an *ex parte* basis would be contaminated from participating in later stages of the case. The ICTY later recognised that this contamination would not arise if the defence was subsequently disclosed the materials which had been provided to the confirming judge, and was provided with an opportunity to contest the factual findings at trial.

¹¹ In its decision of 22 February 2010 at para 28, this Trial Chamber noted that in the Lubanga case, the Chamber had modified the redactions which it had initially ordered in the Lubanga case due to the fact that the redactions to birthdates of the applicants rendered it impossible for the parties to submit meaningful observations concerning whether the applicants were under the age of 15 years at the date of the alleged events. In the present case, the place of the alleged events is an issue as according to the Prosecution evidence, the MLC were only present in certain villages during limited time periods. Prosecutor v. Bemba, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants, ICC-01/05-01/08-699.

The Non-disclosure of the Applicants' Identity to the Prosecutor

10. The Defence incorporates by reference its submissions from its Observations dated 22 October 2010 concerning the need to disclose to the Prosecution forthwith the unredacted versions of the applications so that the Prosecution is in a position to fulfil its obligation to disclose to the Defence exculpatory information or information which is material to the preparation of the Defence.¹²

11. The majority of the applicants have not requested that their identities be withheld from the Prosecution.¹³ To the contrary, several applications contain letters, which are expressly addressed to the Prosecutor of the ICC.¹⁴ It would appear that these applicants considered that the submission of an application form together with an annex addressed to the Prosecutor was one of the means by which they could submit

¹² Defence Observations on the "Fourth Transmission to the parties and legal representatives of redacted versions of applications for participation in the proceedings", 22 October 2010, ICC-01/05-01/08-968 at paras 13-17.

¹³ a/0709/10, a/0725/10, a/0741/10, a/0747/10, a/0753/10, a/0754/10, a/0755/10, a/0756/10, a/0757/10, a/0759/10, a/0760/10, a/0761/10, a/0763/10, a/0765/10, a/0766/10, a/0768/10, a/0769/10, a/0770/10, a/0771/10, a/0783/10, a/0787/10, a/0808/10, a/0810/10, a/0838/10, a/0856/10, a/0859/10, a/0870/10, a/0872/10, a/0874/10, a/0876/10, a/0877/10, a/0880/10S, a/0886/10, a/0888/10, a/0889/10, a/0890/10, a/0893/10, a/0895/10, a/0897/10, a/0896/10, a/0898/10, a/0899/10, a/0900/10, a/0903/10, a/0905/10, a/0906/10, a/0908/10, a/0909/10, a/0911/10, a/0913/10, a/0914/10, a/0915/10, a/0916/10, a/0918/10, a/0919/10, a/0920/10, a/0923/10, a/0925/10, a/0926/10, a/0933/10, a/0935/10, a/0936/10, a/0939/10, a/0944/10, a/0946/10, a/0948/10, a/0985/10, a/0987/10, a/0988/10, a/0989/10, a/0991/10, a/0992/10, a/0993/10, a/0994/10, a/0995/10, a/0996/10, a/1004/10, a/1012/10, a/1013/10, a/1022/10, a/1023/10, a/1025/10, a/1026/10, a/1028/10, a/1032/10, a/1033/10, a/1034/10, a/1036/10, a/1037/10, a/1041/10, a/1042/10, a/1044/10, a/1053/10, a/1054/10, a/1240/10, a/1244/10, a/1247/10, a/1266/10, a/1268/10, a/1277/10, a/1276/10, a/1270/10, a/1280/10, a/1281/10, a/1282/10, a/1284/10, a/1289/10, a/1292/10, a/1371/10, a/1375/10, a/1372/10, a/1376/10, a/1377/10, a/1378/10, a/1379/10, a/1430/10, a/1432/10, a/1433/10, a/1434/10, a/1437/10, a/1443/10, a/1446/10, a/1453/10, a/1480/10, a/1539/10, a/1581/10, a/1582/10, a/1584/10, a/1587/10, a/1588/10, a/1591/10, a/1592/10, a/1594/10, a/1601/10, a/1602/10, a/1603/10, a/1604/10, a/1623/10, a/1634/10, a/1635/10, a/1636/10, a/1637/10, a/1638/10, a/1639/10, a/1640/10, a/1641/10, a/1642/10, a/1643/10, a/1644/10, a/1653/10, a/1654/10, a/1658/10, a/1660/10, a/1661/10, a/1662/10, a/1666/10, a/1667/10, a/1668/10, a/1671/10, a/1672/10, a/1673/10, a/1674/10, a/1675/10, a/1676/10, a/1678/10, a/1680/10, a/1682/10, a/1683/10, a/1686/10, a/1687/10, a/1691/10, a/1693/10, a/1694/10, a/1695/10, a/1696/10, a/1697/10, a/1702/10, a/1700/10, a/1703/10, a/1705/10, a/1706/10, a/1707/10, a/1708/10, a/1709/10, a/1710/10, a/1711/10, a/1712/10, a/1714/10, a/1715/10, a/1718/10, a/1749/10a/1750/10, a/1761/10, a/1765/10, a/1766/10, a/1767/10, a/1770/10, a/1811/10, a/1812/10, a/1813/10, a/1814/10, a/1816/10, a/1817/10, a/1818/10, a/1819/10, a/1820/10, a/1821/10, a/1822/10, a/1823/10, a/1826/10, a/1827/10, a/1830/10, a/1832/10, a/1833/10, a/1842/10, a/1843/10, a/1844/10, a/1845/10, a/1846/10, a/1848/10, a/1855/10, a/1858/10, a/1859/10, a/1889/10, a/1890/10, a/1893/10, a/1895/10, a/1896/10, a/1897/10, a/1899/10, a/1913/10, a/1988/10, a/1989/10, a/1991/10, a/1992/10, a/1993/10, a/1994/10, a/1996/10, a/1997/10, a/1998/10, a/2000/10, a/2001/10, a/2004/10, a/2005/10, a/2009/10, a/2010/10, a/2012/10, a/2014/10, a/2020/10, a/2021/10, a/2022/10, a/2189/10, a/2196/10, a/2197/10, a/2213/10, a/2214/10, a/2224/10, a/2226/10, a/2227/10, a/2229/10, a/2234/10, a/2235/10, a/2236/10, a/2242/10, a/2249/10, a/2262/10, a/2267/10, a/2271/10, a/2273/10, a/2274/10, a/2280/10, a/2412/10, a/2413/10, a/2414/10, a/0708/10, a/0762/10, a/0764/10, a/0767/10, a/0785/10, a/1024/10, a/1027/10, a/1035/10, a/1047/10, a/1241/10, a/1428/10, a/1429/10, a/1431/10, a/1692/10, a/1704/10, a/2238/10, a/2024/10, a/2026/10, a/1947/10, a/1957/10, a/1960/10, a/1962/10, a/1963/10, a/1966/10, a/1967/10, a/1968/10, a/1971/10, a/1972/10, a/1974/10, a/1975/10, a/1979/10, a/1980/10, a/1981/10, a/1982/10, a/1983/10, a/1984/10, a/1834/10, a/1835/10, a/1836/10, a/1837/10, a/1838/10, a/1839/10, a/1840/10, a/1841/10, a/1834/10, a/1835/10, a/1836/10, a/1837/10, a/1838/10, a/1839/10, a/1840/10, a/1841/10

¹⁴ See for example, a/0757/10, a/0767/10, a/0768/10, a/0838/10, a/0771/10, a/1025/10, a/1028/10, a/1446/10, a/1680/10, a/1889/10, a/1896/10

information to assist the Prosecutor in his investigations. As confirmed by the Appeals Chamber, victims have the right to participate in the investigations of the Prosecution by submitting information to the Prosecutor in accordance with articles 15(2) and 42(1) of the Statute.¹⁵ The exercise of this right is not subject to judicial oversight. Transmitting a redacted version of these complaint letters would both contravene the rights of the alleged victims, and interfere with the independence of the Prosecution's investigations. If, however, these complaints have in fact been notified to the OTP, then the Defence should be informed of that fact as it may trigger the Prosecutor's disclosure obligations under article 67(2) of the Statute.

The Non-disclosure of the Applicants' Identity to the Defence

12. As noted above, the Trial Chamber envisaged in its decision of 22 February 2010 that in the event that the applicants are granted a right to participate in the proceedings, the Chamber would review the status of the redactions.¹⁶ As was the case with the previous transmission of applications, many of the present applicants have either not requested that their identity be withheld from the Defence, or have actually expressly requested that it be provided to both parties (including the Defence).¹⁷ In addressing a similar situation in the Katanga and Ngudjolo case, Trial Chamber II ordered the Legal Representatives to liaise with their clients to confirm that the applications could

¹⁵ DRC Situation, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, at para 53.

¹⁶ Prosecutor v. Bemba, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, ICC-01/05-01/08-699, 22 February 2010, at para 31.

¹⁷ See for example, a/0709/10, a/0741/10, a/0747/10, a/0753/10, a/0754/10, a/0755/10, a/0756/10, a/0759/10, a/0760/10, a/0761/10, a/0763/10, a/0765/10, a/0766/10, a/0768/10, a/0769/10, a/0770/10, a/0771/10, a/0783/10, a/0787/10, a/0838/10, a/1025/10, a/1026/10, a/1028/10, a/1240/10, a/1242/10, a/1243/10, a/1244/10, a/1247/10, a/1292/10, a/1430/10, a/1432/10, a/1443/10, a/1446/10, a/1623/10, a/1644/10, a/1668/10, a/1671/10, a/1672/10, a/1673/10, a/1674/10, a/1675/10, a/1676/10, a/1678/10, a/1680/10, a/1682/10, a/1683/10, a/1686/10, a/1687/10, a/1691/10, a/1693/10, a/1694/10, a/1695/10, a/1696/10, a/1697/10, a/1702/10, a/1700/10, a/1703/10, a/1705/10, a/1706/10, a/1707/10, a/1708/10, a/1709/10, a/1710/10, a/1711/10, a/1712/10, a/1714/10, a/1715/10, a/1718/10, a/1751/10, a/1761/10, a/1811/10, a/1812/10, a/1813/10, a/1814/10, a/1816/10, a/1817/10, a/1818/10, a/1819/10, a/1820/10, a/1821/10, a/1822/10, a/1823/10, a/1825/10, a/1826/10, a/1827/10, a/1830/10, a/1832/10, a/1833/10, a/1842/10, a/1843/10, a/1844/10, a/1845/10, a/1846/10, a/1848/10, a/1889/10, a/1890/10, a/1891/10, a/1892/10, a/1893/10, a/1895/10, a/1896/10, a/1897/10, a/1899/10, a/1913/10, a/2213/10, a/2214/10, a/2217/10, a/2224/10, a/2226/10, a/2227/10, a/2229/10, a/2234/10, a/2235/10, a/2236/10, a/2242/10, a/2267/10, a/2280/10, a/0708/10, a/0762/10, a/0764/10, a/0767/10, a/0785/10, a/1024/10, a/1027/10, a/1035/10, a/1047/10, a/1241/10, a/1428/10, a/1429/10, a/1431/10, a/1692/10, a/1704/10, a/2238/10, a/1834/10, a/1835/10, a/1836/10, a/1837/10, a/1838/10, a/1839/10, a/1840/10, a/1841/10, a/1834/10, a/1835/10, a/1836/10, a/1837/10, a/1838/10, a/1839/10, a/1840/10, a/1841/10

be disclosed to the Defence, and thereafter, authorised their disclosure to the Defence.¹⁸

13. In the event that these applicants are granted a right to participate in the proceedings, the Defence requests the Honourable Trial Chamber to order that un-redacted versions of their applications be submitted to the Defence immediately, in order to facilitate the Defence's preparation for the trial.

14. With respect to the limited number of applicants who have requested that their identity be withheld from the Defence, the Defence submits that these applicants have failed to provide any concrete or objective concerns which would justify the drastic measure of withholding their identities from the Defence during the entire trial proceedings. The Trial Chamber has confirmed that the same principles which apply to the redaction of witness statements also apply to victim applications,¹⁹ in which case, the Chamber must consider "the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".²⁰ The Appeals Chamber has also held that in assessing whether procedural protective measures such as redactions and delayed disclosure are appropriate, "if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures."²¹

15. In the event that these applicants are granted a right to participate, the Defence requests the Trial Chamber to order the Victims and Witnesses Unit to conduct an assessment, firstly, as to whether there is an objective basis to consider that protective measures are required for the individual applicants in question, and secondly, whether there any other protective measures which could achieve the same objective.

¹⁸ Prosecutor v. Katanga and Ngudjolo, Deuxième décision relative à la divulgation de l'identité des victimes aux parties ICC-01/04-01/07-1650, 18 November 2009 at paras 4-5.

¹⁹ Prosecutor v. Bemba, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, ICC-01/05-01/08-699, 22 February 2010 at para 26.

²⁰ Prosecutor v. Katanga and Ngudjolo, 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", ICC-01/04-01/07-475, 13 May 2008 at para 67.

²¹ Prosecutor v. Lubanga, 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, ICC-01/04-01/06-773, 14 December 2006, at para 33.

16. Finally, the Defence submits that many of the redacted components of the application forms may contain information which could be considered exculpatory for the Defence or material to its preparation. For example, the application could include information concerning persons who were present at the time of the events relevant to the trial and who may be able to confirm or contradict the victims or other OTP witnesses' accounts of the events. Additionally, knowing the precise location of the events may be necessary to enable the Defence to track the movements of the MLC and to compare such to the Prosecution evidence. The identify of the village chiefs who have signed *proces verbales* may also be necessary to enable the Defence to verify if there has been any communication between victims and witnesses.
17. In a very recent decision in the Lubanga case, Trial Chamber I ordered the VPRS to lift redactions applied to information which was exculpatory or material to the preparation of the Defence.²² In so doing, the Trial Chamber referred to "the presumption that disclosure will be effected in full."²³ In so doing, Trial Chamber I recognised that it has an obligation to balance the security concerns of the victims/intermediaries with the right of the defence to receive article 67(2) and rule 77 information, but noted that the "mere assertion that someone is in danger "[...] of itself does not necessarily lead to a proper conclusion that the individual is, in fact, going to be in danger - just because counsel claims it".²⁴ Finally, Trial Chamber I implicitly acknowledged that it has a continuous obligation to review whether previously authorized redactions were still justified.²⁵
18. In the present case, the fact that the Defence did not appeal previous redaction decisions does not exempt the Trial Chamber from fulfilling its ongoing duty to monitor whether redactions continue to be necessary, and whether the rights of the Defence are adequately safeguarded.²⁶ The Defence therefore requests that this learned

²² Redacted Decision on the disclosure of information from victims' application forms (a/0225/06, a/0229/06 and a/0270/07), ICC-01/04-01/06-2586-Red, 23 November 2010.

²³ At para 4.

²⁴ At para 6.

²⁵ At para 4.

²⁶ This obligation has been emphasized by the ICC Appeals Chamber. See for example, Prosecutor v. Katanga and Ngudjolo, Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476 at para 64 "Even if non-disclosure is authorised, this determination must be kept under review and altered should changed circumstances make that appropriate. In this regard, the Prosecutor should assist the Pre-Trial Chamber by bringing to its attention factors that may cause it to reconsider its ruling on non-disclosure. The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of nondisclosure of information is the exception to this general rule."

Trial Chamber lift any redactions covering information which could be considered to be exculpatory or material to the preparation of the Defence.

c) Vagueness of the allegations

19. Many of the applicants provide insufficient details to enable the Defence to determine whether the elements of an offence set out in the charges have been met. For example, several applicants simply state that their personal items have been pillaged, without providing the context of the events, or any description of the items taken.²⁷
20. The Defence notes, in this regard, that the Trial Chamber cannot base its decision on the legal characterisation of the events provided by the applicant, but must make an independent determination as to whether the facts described by the applicant fulfil the elements of the offence in question.²⁸ An application will be dismissed as being incomplete if the applicant does not provide sufficient information to enable the Chamber to determine whether the elements of the offence in question are met.
21. In terms of the requirements of pillage in particular, Pre-Trial Chamber III held in its decision confirming the charges against the Accused that “cases of petty property expropriation may not fall under the scope of article 8(2)(e)(v) of the Statute”,²⁹ and, furthermore, that “to the extent possible, a description of the "expropriated" property is required in order to ascertain whether indeed "certain property" was appropriated without the consent of the rightful owner”.³⁰
22. It follows, therefore, that in the absence of a description of the property taken, the Chamber would not be in a position, *inter alia*, to assess whether the gravity criterion

²⁷ See for example, a/1268/10, a/1281/10, a/1371/10, a/1379/10, a/1581/10, a/1660/10, a/1661/10, a/1662/10, a/1666/10, a/1678/10, a/1684/10, a/1688/10, a/1702/10, a/1751/10, a/1760/10, a/1761/10, a/1765/10, a/1766/10, a/17770/10, a/1812/10, a/1855/10, a/1858/10, a/1991/10, a/1992/10, a/1993/10, a/1994/10, a/1996/10, a/1998/10, a/2000/10, a/2001/10, a/2004/10, a/2009/10, a/2010/10, a/2012/10, a/2014/10, a/2020/10, a/2021/10, a/2022/10, a/2189/10, a/2197/10, a/2211/10, a/2234/10, a/2271/10, a/2273/10, a/2274/10, a/2412/10, a/2413/10, a/2414/10.

²⁸ During the pre-confirmation stage in this case, the Single Judge held that “the legal characterisation of the incidents advanced by the victim applicants is only an indicative but not a decisive factor. The Single Judge will have to ascertain whether the incidents described by the victim applicants fall within the factual scope of the case to be examined during the confirmation hearing by the Chamber.” Prosecutor v. Bemba, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 13 December 2008, at para 63.

²⁹ The Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, at para 317.

³⁰ Para 318.


is met and whether the property was appropriated without the consent of the rightful owner. These applications should therefore be dismissed as being incomplete.

23. In addition to all the aforementioned problems which characterise the applications contained in the Seventh transmission, the Defence also submits that none of the applications fulfil the requirements to warrant the granting of participatory rights as victims in the present proceedings, and should be rejected on the grounds set out in the attached Annex.

FOR ALL THE ABOVE REASONS:

24. The Defence of Mr. Jean-Pierre Bemba respectfully requests that the Chamber:

- rejects the 373 requests for participation pursuant to Rule 89(2) of the Rules of Procedure and Evidence; and
- orders the VPRS to disclose the unredacted versions of the applications to the Prosecution and the Defence.



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Dated this 26th of November 2010

At The Hague, The Netherlands