

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 1 October 2008

**PRE-TRIAL CHAMBER III**

**Before:** Judge Fatoumata Dembele Diarra, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Ekaterina Trendafilova

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

**Confidential  
URGENT**

**Decision on the Prosecutor's request for the regulation of contacts  
of Jean-Pierre Bemba Gombo**

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

**The Office of the Prosecutor**

Fatou Bensouda, Deputy Prosecutor  
Petra Kneuer, Senior Trial Lawyer

**Counsel for the Defence for**

Nkwebe Liriss  
Tjarda E. Van Der Spoel  
Aimé Kilolo-Musamba

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Simo Vaatainen

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. **Pre-Trial Chamber III** (the “Chamber”) of the International Criminal Court (the “Court”) received on 22 September 2008 the “Prosecution’s Amended Application for Proposed Redactions Pursuant to rules 81(2) and 81(4)” (the “Prosecutor’s Amended Submission”)<sup>1</sup> in respect of the annexes to the “Prosecutor’s Application for Warrant of Arrest under Article 58” (the “Prosecutor’s Application”)<sup>2</sup> and the “Prosecutor’s Submission on Further Information and Materials” (the “Prosecutor’s Further Submission”)<sup>3</sup> in which the Prosecutor applied for the prohibition, regulation and/or setting of conditions for contact between the detained person and any other person.

2. The present decision is classified as confidential because it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential or under seal, *ex parte*, Prosecutor only. The Chamber is of the view that the making of such references in the present decision is required by principle of fairness of proceedings for the defence, and considers that it is not inconsistent with the nature of the documents referred to.

### **I. Procedural History**

3. The Chamber recalls that on 1 August 2008, the Prosecutor submitted the “Prosecutor’s Decision concerning the Prosecutor’s proposals for redactions”.<sup>4</sup> In this submission, the Prosecutor requested redactions of the identity of eleven witnesses over fourteen. He consented to disclose the names of witnesses 0006, 0025 and 0036 to the defence, thus submitting that there was no objectively justifiable risk for those three witnesses for their identity to be disclosed to the defence.

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<sup>1</sup> ICC-01/05-01/08-114-US-Exp.

<sup>2</sup> ICC-01/05-01/08-26-US-Exp.

<sup>3</sup> ICC-01/05-01/08-29-US-Exp.

<sup>4</sup> ICC-01/05-01/08-58-US-Exp.

4. On 31 August 2008 Judge Hans-Peter Kaul, acting as a Single Judge on behalf of the Chamber,<sup>5</sup> issued the “First decision on the Prosecutor’s request for redactions”<sup>6</sup> (the “First Decision on Redactions”), authorizing some of the redactions of information contained in the Prosecutor’s Application and the Prosecutor’s Further Submission. In this decision, the Single Judge *inter alia*:

- (i) authorized temporary redactions of the names and identifying information related to witnesses 0009, 0022, 0023, 0029, 0033 and 0038 (“part I witnesses”) and that those temporary redactions be automatically lifted at the latest 30 days before the beginning of the confirmation hearing and without a new decision of the Chamber, unless the Prosecutor or the Victims and Witnesses Unit (“VWU”) submitted new, precise and detailed information which would make it necessary for the Chamber to reconsider its decision; and
- (ii) denied authorisation to redact the names and identifying information related to witnesses 0007, 0015, 0026, 0031 and 0037; and
- (iii) requested the defence to keep the information disclosed confidential and to ensure that it is not passed on to the public.

5. On 22 September 2008 Judge Fatoumata Dembele Diarra, acting as Single Judge on behalf of the Chamber,<sup>7</sup> rendered a decision entitled “Décision sur la surveillance des communications non privilégiées de Jean-Pierre Bemba Gombo”<sup>8</sup> ordering the Registry to put under surveillance the non-privileged telephone communication of Jean-Pierre Bemba Gombo (“Mr Jean-Pierre Bemba”) and to regularly report to the Chamber and the Prosecutor on any issue related to the protection of witnesses.

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<sup>5</sup> ICC-01/05-01/08-53.

<sup>6</sup> ICC-01/05-01/08-85-Conf.

<sup>7</sup> ICC-01/05-01/08-86.

<sup>8</sup> ICC-01/05-01/08-118-Conf.

6. The same day, the Prosecutor submitted the "Prosecution's Amended Application for Proposed Redactions Pursuant to rules 81(2) and 81(4)" (the "Prosecutor's Amended Submission")<sup>9</sup>. In addition to the Prosecutor's requests for redactions, which have been addressed by the Chamber in a separate decision, the Prosecutor requested the following (the "Additional Requests of the Prosecutor"):<sup>10</sup>

"(c) orders that there be no dissemination of names of any of the Part II witnesses [0006, 0007, 0015, 0025, 0026, 0031, 0036 and 0037] beyond the defence team and that the defence team be required to maintain a log of contact of anyone to whom they may disclose the identity and, should the Single Judge not extend the temporary redactions on the Part I witnesses, make a similar order in relation to them and that the order commence as of disclosure of that information to the defence or 3 October 2008 whichever is later; and

(d) an order that the defendant not disclose the names of the Part II witnesses and, should the Single Judge not extend the temporary redactions on the Part I witnesses, make a similar order in relation to them and that the order commence as of disclosure of that information to the defence or 3 October 2008 whichever is later;

(e) an order that no attempt be made by the Defence team to contact directly or indirectly any of the Part I or II witnesses except through the Office of the Prosecutor, should the witness consent to such contact; and

(f) an urgent order under Regulation 101(2)(b),(c), (d), (e) and/or (f) that the defendant have no contact directly or indirectly with any of the named Part II witnesses and, should the Single Judge not extend the temporary redactions on the Part I witnesses, make a similar no contact order in relation to them."

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<sup>9</sup> ICC-01/05-01/08-114-US-Exp.

<sup>10</sup> ICC-01/05-01/08-114-US-Exp, para. 34.

7. On 22 September 2008 the Single Judge ordered that the Prosecutor submit all risk assessments undertaken relating to the fourteen witnesses which the Prosecutor intends to rely at the confirmation of charges hearing.<sup>11</sup>

8. On 23 September 2008 the Prosecutor filed the "Prosecution's Response to *"Ordonnance relative à la protection des témoins et au rapport d'évaluation des risques"*"<sup>12</sup> in which he provided the risk evaluations relating to the fourteen witnesses.

9. On 25 September 2008 the Chamber issued a "Decision requesting further information on the security situation of certain witnesses"<sup>13</sup> in which the Chamber ordered the Prosecutor to submit by 26 September 2008 any further available information concerning the existence of an objectively justifiable risk to which part I witnesses are exposed which would justify his request to redact their names and identifying information beyond 3 October 2008.

10. On 26 September 2008 the Prosecutor filed the "Prosecutor's Submission of Additional Information Demonstrating the Existence of an Objectively Identifiable Risk".<sup>14</sup>

## **II. The Law**

11. The Chamber notes articles 21, 57(3)(c), 61, 64(2), 67 and 68(1) of the Rome Statute (the "Statute"), rule 121 of the Rules of Procedure and Evidence (the

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<sup>11</sup> "Ordonnance relative à la protection des témoins et au rapport d'évaluation des risques", ICC-01/05-01/08-111-US-Exp.

<sup>12</sup> ICC-01/05-01/08-119-US-Exp.

<sup>13</sup> ICC-01/05-01/08-121-US-Exp.

<sup>14</sup> ICC-01/05-01/08-122-US-Exp.

"Rules"), regulation 101 of the Regulations of the Court (the "Regulations") and article 8 of the Code of Professional Conduct for counsel.

12. The Chamber is seized of the present requests of the Prosecutor in the context of restrictions on disclosure. The Chamber recalls once again that its principal responsibility in preparation of the confirmation of charges is to ensure that the proceedings are fair and expeditious and that they are conducted with full respect for the rights of the defence and with due regard to the protection of victims and witnesses.

13. The Chamber recalls that regulation 101 within Chapter 6 of the Regulations entitled "Detention matters" concerns restrictions to access to news and contact. Regulation 101(2) of the Regulations provides:

"The Prosecutor may request the Chamber seized of the case to prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel, if the Prosecution has reasonable grounds to believe that such contact:

- a) Is for the purposes of attempting to arrange the escape of a detained person from the detention centre;
- b) Could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation;
- c) Could be harmful to a detained person or any other person;
- d) Could be used by a detained person to breach an order for non-disclosure made by a judge;
- e) Is against the interests of public safety; or
- f) Is a threat to the protection of the rights and freedom of any person."

14. The Chamber notes that regulation 101(3) of the Regulations further stipulates that:

"[t]he detained person shall be informed of the Prosecutor's request and shall be given opportunity to be heard or to submit his or her views. In exceptional circumstances such as in an emergency, an order may be made prior to the detained person being informed of the request. In such a case, the detained

person shall, as soon as practicable, be informed and shall be given the opportunity to be heard or to submit his or her views.”

### **III. The Prosecutor’s Submission**

15. The Prosecutor in the Prosecutor’s Amended Submission submits that “Regulation 101 is applicable for a non-contact order such that Mr. Bemba is to have no contact directly or indirectly with the witnesses whose names will be disclosed to the defence as part of this Chamber’s redaction decisions”.<sup>15</sup> He further states that “Regulation 101 permits that an order be made prior to informing the detained person of the request in exceptional circumstances such as in an emergency situation”. He thus requests that “[g]iven the prior findings of the then Single Judge and the circumstances of this case, (...) the order be made prior to informing the detained person of the request and that the detained person not be informed until the 31 August 2008 order for monitoring is implemented and not earlier than 3 October 2008, “. <sup>16</sup>

### **IV. The Chamber’s Conclusions**

16. With regard to the Additional Requests of the Prosecutor set out in part (d)<sup>17</sup> and paragraph 34 of the Prosecutor’s Amended Submission the Chamber notes that the Prosecutor presents only one legal basis, namely regulation 101 of the Regulations, to substantiate his requests.

17. Further, in particular with regard to the requests in paragraph 34(c) to 34(e) in the Prosecutor’s Amended Submission, the Chamber notes that the Prosecutor did not provide any reasoning or facts to substantiate these additional requests.

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<sup>15</sup> ICC-01/05-01/08-114-US-Exp, para. 32.

<sup>16</sup> ICC-01/05-01/08-114-US-Exp, para. 33.

<sup>17</sup> “Application for Prohibition, Regulation and/or Setting of conditions for Contact”, ICC-01/05-01/08-114-US-Exp.

18. With regard to letter (c) of the Additional Requests of the Prosecutor, the Prosecutor asks first the Chamber to order that there be no dissemination of names of any of the part II witnesses beyond the defence team.

19. The Chamber recalls its decisions of 31 August 2008<sup>18</sup> and 22 September 2008<sup>19</sup> by which the Chamber already requested the defence to keep the information disclosed confidential and to ensure that it is not passed on to the public.

20. The Chamber also notes once again article 8(4) of the Code of Professional Conduct for counsel and considers that the defence team composed of professional counsels respecting secrecy and confidentiality is well aware of its obligations.

21. Furthermore, the Prosecutor requests in letter (c) the Chamber to order that the defence team be required "to maintain a log of contact of anyone to whom they may disclose the identity and, should the Single Judge not extend the temporary redactions on the Part I witnesses, make a similar order in relation to them and that the order commence as of disclosure of that information to the defence or 3 October 2008 whichever is later."

22. The Chamber notes that pursuant to article 8(3) of the Code of Professional Conduct for counsel, counsel may only reveal the redacted statements of the fourteen witnesses to co-counsel, assistants and other staff working on the particular case to which the statements relate and solely to enable the exercise of his or her functions in relation to that case.

23. The Chamber thus finds the Prosecutor's request under letter (c) of the Additional Requests of the Prosecutor without merit.

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<sup>18</sup> See in the operative part letter (c), ICC-01/05-01/08-85-Conf.

<sup>19</sup> See para. 10, ICC-01/05-01/08-117-Conf.

24. With regard to letter (d) of the Additional Requests of the Prosecutor, the Prosecutor requests the Chamber to order that the suspect, Mr Jean-Pierre Bemba, does not disclose the names of the non redacted identities of witnesses as decided by the Chamber in its second decision on redactions.

25. For the reason that the Chamber has already ruled on this request as set out in paragraph 18 above, the Chamber finds the Prosecutor's request under letter (d) of the Additional Requests of the Prosecutor without merit.

26. With regard to letter (e) of the Additional Requests of the Prosecutor, the Prosecutor asks the Chamber to order that "no attempt be made by the Defence team to contact directly or indirectly any of the Part I or II witnesses except through the Office of the Prosecutor, should the witness consent to such contact".

27. The Chamber underlines that it is its duty to ensure equally the protection of victims and witnesses pursuant to article 68(1) of the Statute as well as the respect of the rights of the defence pursuant to article 67 of the Statute.

28. The Chamber strongly highlights that Mr Jean-Pierre Bemba is entitled to a fair hearing conducted impartially, and to the minimum guarantees as set forth in article 67(1) of the Statute, in full equality, such as to examine, or have examined, the witnesses against him pursuant to article 67(1)(e) of the Statute.

29. The Chamber considers that preventing the defence team "to contact directly or indirectly any (...) witnesses except through the Office of the Prosecutor, should the witness consent to such contact" would be an order violating the basic rights of the defence to examine the witnesses and thus be able to have access to them.

30. Furthermore, the Chamber notes that the Prosecutor does not substantiate this request in his submission. Thus, the Chamber finds the Prosecutor's request under letter (e) of the Additional Requests of the Prosecutor without merit.

31. With regard to letter (f) of the Additional Requests of the Prosecutor, the Prosecutor requests the Chamber to issue "an urgent order under Regulation 101(2)(b), (c), (d), (e) and/or (f) that the defendant have no contact directly or indirectly with any of the named Part II witnesses and, should the Single Judge not extend the temporary redactions on the Part I witnesses, make a similar no contact order in relation to them."

32. The Chamber first notes with concern that the Prosecutor has not provided any facts to substantiate his request that he has reasonable grounds to believe that such contact would fulfill any of the alternatives set out in regulation 101(2) of the Regulations. He further also does not substantiate in any way the "exceptional circumstances" of his request in accordance with regulation 101(3) of the Regulations of the Court.

33. The Chamber notes that in the Prosecutor's Amended Submission the Prosecutor justifies the emergency requirement, which would warrant an urgent order without giving any notice to Mr Jean-Pierre Bemba and without granting him a delay to give his observation, with "the prior findings of the then Single Judge and the circumstances of this case". However, the Chamber recalls first that Mr. Jean-Pierre Bemba's non-privileged communications are currently monitored in conformity with the "Décision sur la surveillance des communications non privilégiées de Jean-Pierre Bemba Gombo".<sup>20</sup> Secondly, the Chamber considers that the authorization of redactions of information contained in the fourteen witness statements is an adequate protective measure.

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<sup>20</sup> ICC-01/05-01/08-118-Conf.

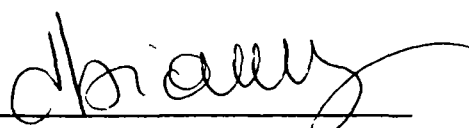
34. The Chamber concludes that in discharging its duties to adequately balance the protection of victims and witnesses and the respect of the rights of the defence, these two latter measures are sufficient considering the information available so far on the capacity of Mr. Jean-Pierre Bemba to intimidate any witness whose identity has been disclosed to him from the Court's detention centre.

35. Thus, the Chamber finds the Prosecutor's request under letter (f) of the Additional Requests of the Prosecutor without merit.

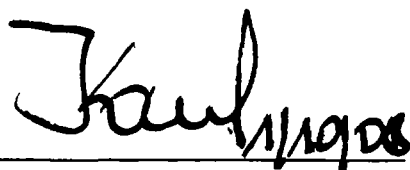
**FOR THESE REASONS, THE CHAMBER DECIDES**

**to reject** the Prosecutor's Additional Requests in their entirety.

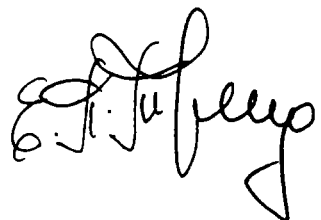
Done in both English and French, the English version being authoritative.



**Judge Fatoumata Dembele Diarra**  
**Presiding Judge**



**Judge Hans-Peter Kaul**



**Judge Ekaterina Trendafilova**

Dated this Wednesday, 1 October 2008

At The Hague, The Netherlands