

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: **ICC-01/05-01/08**
Date: **22 September 2008**

PRE-TRIAL CHAMBER III

Before: Judge Fatoumata Dembele Diarra, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF**

THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Confidential

**Decision on the Monitoring of Jean-Pierre Bemba Gombo's Non-Privileged
Communications**

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, Trial Lawyer

Counsel for the Defence

Nkwebe Liriss
Tardja E. Van der Spoel
Aimé Kilolo-Musamba

Legal Representatives of Victims

Legal Representatives of 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

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Simo Vaatainen

Detention Section

**Victims Participation and Reparations
Section**

Other

1. **Judge Fatoumata Dembele Diarra**, judge at the International Criminal Court ("the Court"), acting as Single Judge on behalf of Pre-Trial Chamber III ("the Chamber"),¹ was seized on 5 September 2008 with a request for clarification from the Registrar, "Request for clarification of the 'First Decision on the Prosecutor's request for redactions'" ("the Request for Clarification").²
2. The Single Judge recalls that on 18 August 2008, in its response to the Prosecutor's request for redactions filed on 1 August 2008, the Victims and Witnesses Unit ("the VWU") saw no reason in principle not to disclose the names of the fourteen witnesses on whose statements the Prosecutor wishes to rely at the confirmation hearing. At the same time, in order to better ensure witness protection and in the event that the witnesses' names were indeed disclosed to the Defence, the VWU recommended monitoring the communications of Mr Jean-Pierre Bemba Gombo ("Mr Jean-Pierre Bemba"), without, however, specifying which method of monitoring might be the most appropriate in the circumstances.
3. The Single Judge notes that Judge Hans-Peter Kaul, then Single Judge on behalf of the Chamber for the period from 1 to 31 August 2008,³ issued on 31 August 2008 the *First decision on the Prosecutor's request for redactions* ("the Decision of 31 August 2008"),⁴ by which the Registry was requested to actively and regularly monitor Mr Jean-Pierre Bemba's telephone calls.
4. On 5 September 2008, the Registrar filed a request for clarification concerning the practical implications of executing the Decision of 31 August 2008.⁵
5. The Single Judge further notes that, on 5 September 2008, the Prosecutor submitted to her a request entitled "Prosecution's Submission of Information on the

¹ ICC-01/05-01/08-86.

² ICC-01/05-01/08-95-Conf.

³ ICC-01/05-01/08-53.

⁴ ICC-01/05-01/08-85-Conf.

⁵ ICC-01/05-01/08-95-Conf.

PTC's disclosure of identities of Witnesses 0007, 0009 and 0026 and Request for Appropriate Protective Measures for Witnesses 0007, 0009 and 0026" ("the Prosecutor's Request"),⁶ at point (e) of which he requested that the Registry immediately commence monitoring the non-privileged communications of Mr Jean-Pierre Bemba at the Detention Centre and provide regular reports to the Chamber and the Prosecutor.

6. On 10 September 2008, the Single Judge requested the Defence, pursuant to regulation 24(1) of the *Regulations of the Court*, to file its observations on the Registrar's Request for Clarification by 15 September 2008 at the latest.⁷

7. On 15 September 2008, Mr Jean-Pierre Bemba's counsel submitted their observations to the Chamber.⁸

8. That same day, the Prosecutor submitted a request to the Chamber entitled "Prosecution's Request for further measures to monitor non privileged communications of Mr. Jean-Pierre Bemba Gombo" ("Request of 15 September 2008"),⁹ by which he requested, *inter alia*, at point (a) of his request, further measures to monitor Mr Jean-Pierre Bemba's non-privileged communications.

9. The Single Judge notes articles 21, 43, 57(3)(c), 67 and 68 of the *Rome Statute* ("the Statute") and regulations 174, 175 and 184 of the *Regulations of the Registry*.

10. The Single Judge notes that, in her Request for Clarification, the Registrar specified the various methods of monitoring Mr Jean-Pierre Bemba's non-privileged communications which the Registry may implement at the Detention Centre. The Registrar states that under regulations 174(2), 175 and 184 of the *Regulations of the Registry*, there are three types of monitoring methods, respectively: passive

⁶ ICC-01/05-01/08-93-Conf.

⁷ ICC-01/05-01/08-98-Conf.

⁸ ICC-01/05-01/08-104-Conf.

⁹ ICC-01/05-01/08-107-Conf.

monitoring of telephone calls, active monitoring of telephone calls, and monitoring of visits. The Registrar indicates that, pursuant to regulation 174 of the *Regulations of the Registry*, Mr Jean-Pierre Bemba's telephone calls have so far been recorded but not listened to.

11. Furthermore, in her Request for Clarification, the Registrar states that the Chief Custody Officer has not sought the Registrar's permission to implement measures to actively monitor Mr Jean-Pierre Bemba's telephone calls or to monitor his visits, since he has so far had no reasonable grounds to believe that Mr Jean-Pierre Bemba would attempt to engage in any of the activities listed under regulation 175(1) of the *Regulations of the Registry*.¹⁰ The Registrar also expresses her concerns relating to the execution of the Decision of 31 August 2008, since it only provides for the monitoring of Mr Jean-Pierre Bemba's telephone calls and not his written correspondence or visits.¹¹ It is noted that the Decision of 31 August 2008 makes no mention of any possible restriction on Mr Jean-Pierre Bemba's contact with his fellow detainees at the Detention Centre.

12. The Single Judge notes that, lastly, the Request for Clarification concerns the nature and scope of the monitoring measures to be implemented and the duration thereof.

13. For their part, Mr Jean-Pierre Bemba's counsel consider that the Registry is exceeding its functions under article 43 of the Statute, since the Registrar's questions go beyond a mere request for clarification, and instead is proposing "[TRANSLATION] to extend monitoring of Mr Jean-Pierre Bemba Gombo's communications to all other means of communication (e-mail, non-privileged visits, private visits, contacts with the other detained persons)".¹² The Defence considers that "[TRANSLATION] the Decision of 31 August 2008 is clear" and "[TRANSLATION] provides solely for taking

¹⁰ ICC-01/05-01/08-95-Conf paras. 7 and 8.

¹¹ ICC-01/05-01/08-95-Conf. paras. 16 to 20.

¹² ICC-01/05-01/08-104-Conf. paras. 4 and 5.

minimal precautionary measures consisting of recording telephone calls which may subsequently be listened to within the meaning of regulation 174(2) of the *Regulations of the Registry*".¹³

14. The Single Judge further notes that, in his Request of 15 September 2008, the Prosecutor requests that the monitoring cover both incoming and outgoing telephone calls. In addition to monitoring of Mr Jean-Pierre Bemba's telephone calls, the Prosecutor requests (a) that measures be put in place to monitor both his postal and e-mail correspondence and his visits and (b) regular updates on any conversations that might affect the security of Prosecution witnesses.

15. In light of the foregoing, the Single Judge recalls – as Pre-Trial Chamber II has already stated twice – that there is no provision for requests for clarification in the Statute, the Rules or the *Regulations of the Court*.¹⁴ The Single Judge is therefore of the opinion that the Registry's Request for Clarification has no legal basis.

16. The Single Judge points out that the *Regulations of the Registry* are not binding upon judges and apply solely to internal measures within the Registry, and recalls that she has an obligation to protect the safety and security of witnesses, *inter alia*, pursuant to articles 57(3)(c) and 68(1) of the Statute.

17. To this end, the Single Judge notes that she currently has before her requests under rule 81 of the Rules for redactions of certain information contained in the witness statements on which the Prosecutor intends to rely at the confirmation hearing.¹⁵

18. The Single Judge considers that, in view of the forthcoming disclosure of the names of the said witnesses as well as their statements as part of the disclosure

¹³ ICC-01/05-01/08-104-Conf. para. 7.

¹⁴ Decisions of Pre-Trial Chamber II of 18 July 2005, ICC-02/04-01/05-18, p. 2 and 28 October 2005, ICC-01/05-01/08-60, para. 25.

¹⁵ ICC-01/05-01/08-114-US-Exp, Anx A-N.

process, further measures should be taken to protect the witnesses, including measures to monitor Mr Jean-Pierre Bemba's non-privileged communications.

19. The Single Judge recalls her obligation under article 67 of the Statute to protect the rights of the Defence. The Single Judge observes that for the time being, Mr Jean-Pierre Bemba's attitude in detention has led to the conclusion that, in principle, there is no reason why he should not know the names of the witnesses on whom the Prosecutor intends to rely at the confirmation hearing.

20. The Single Judge is of the opinion that, although further monitoring measures may enable witnesses to be protected more effectively, extending such measures to include all of Mr Jean-Pierre Bemba's correspondence, visits, and contact with the other detained persons would make the conditions of his detention particularly difficult.

21. The Single Judge concludes that measures should be taken to monitor his non-privileged incoming and outgoing telephone calls. The recordings of the calls will subsequently be listened to and regular reports thereon transmitted to the Chamber.

22. The Single Judge considers that these reports must relate solely to the protection of witnesses insofar as the names of the fourteen witnesses on whose statements the Prosecutor intends to rely at the confirmation hearing will be disclosed to the Defence by 3 October 2008 at the latest.

FOR THESE REASONS, THE SINGLE JUDGE

a) dismisses the Registrar's Request for Clarification;

b) dismisses point (a) of the Request of 15 September 2008 submitted by the Prosecutor;

- c) **orders** the Registrar to implement measures to monitor Mr Jean-Pierre Bemba Gombo's non-privileged telephone calls by enabling – as indicated at paragraph 21 of this decision – the post facto listening to his incoming and outgoing telephone calls recorded since his arrival at the Detention Centre on 3 July 2008;
- d) **orders** the Registrar to report to the Chamber and the Prosecutor any matter concerning the protection of the witnesses by 6 October 2008 at the latest;
- d) **orders** the Registrar to make a second listening report to the Chamber and the Prosecutor by 20 October 2008 at the latest, under the same conditions stated under point (c);
- e) **reserves** the right, upon reviewing the second listening report, to prolong the monitoring of Mr Jean-Pierre Bemba Gombo's non-privileged incoming and outgoing telephone calls, if she deems it necessary.

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

[signed]

Judge Fatoumata Dembele Diarra,
Single Judge

Dated this 22 September 2008
At The Hague, The Netherlands