

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 3 November 2008

PRE-TRIAL CHAMBER III

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Mauro Politi

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

**Under Seal
URGENT**

***ex parte* Prosecutor and Victims and Witnesses Unit only**

Decision on the Security Situation of Witnesses

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

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

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 several requests for redactions on 1 August 2008,¹ 30 September 2008² and 17 October 2008³.

2. On 31 August 2008, Judge Hans-Peter Kaul, acting as Single Judge on behalf of the Chamber,⁴ issued the “First decision on the Prosecutor’s request for redactions” (“First Decision on Redactions”)⁵ partially granting redactions of information contained in the “Prosecutor’s Application for Warrant of Arrest under Article 58” (the “Prosecutor’s Application”) and the “Prosecutor’s Submission on Further Information and Materials” (the “Prosecutor’s Further Submission”).

3. On 1 October 2008, the Chamber issued the “Second Decision on the Prosecutor’s request for redactions” (“Second Decision on Redactions”)⁶ partially granting redactions in the annexes to the Prosecutor’s Application and the Prosecutor’s Further Submission and requesting summaries with regard to two witness statements.

4. In the First and the Second Decisions on redactions, the Chamber granted anonymity to three witnesses (Witnesses 0022, 0023 and 0029) and accepted the presentation of two summaries of statements (Witnesses 0033 and 0038).

5. In his two requests for redactions of 30 September 2008 and 17 October 2008 the Prosecutor informed the Chamber that he wished to rely firstly on eleven additional witnesses and secondly on one extra witness (Witness 0087). Among these twelve

¹ ICC-01/05-01/08-58-US-Exp.

² ICC-01/05-01/08-126-US-Exp.

³ ICC-01/05-01/08-164-US-Exp.

⁴ ICC-01/05-01/08-53.

⁵ ICC-01/05-01/08-85-Conf.

⁶ ICC-01/05-01/08-135-Conf.

additional witnesses, the Prosecutor requested authorisation for redactions in five witness statements (Witnesses 0042, 0068, 0080, 0081 and 0087) and the use of summaries for two of them (Witnesses 0047 and 0065).

6. On 6 October 2008 the Chamber decided⁷ to convene a status conference with the Prosecutor *ex parte* and *in camera* which was held on 8 October 2008.⁸ By oral decision during the hearing, the Prosecutor was ordered to submit to the Chamber by 10 October 2008 a risk assessment report with regard to the additional eleven witnesses, presented by the Prosecutor's filing of 30 September 2008. This report was duly submitted to the Chamber and the Victims and Witnesses Unit ("VWU").⁹

7. On 17 October 2008 the Prosecutor filed with the Chamber the risk assessment report with regard to additional Witness 0087.¹⁰

8. The Chamber notes articles 43(6), 57(3)(c), 61, 64(2), 67 and 68(1) of the Rome Statute (the "Statute") and rules 17 to 19, 81(2), 81(4), 87 and 121 of the Rules of Procedure and Evidence.

9. The Chamber notes that in his applications for redactions, the Prosecutor submits, *inter alia*, that these "witnesses are core witnesses necessary for the confirmation of charges hearing".¹¹

10. Mindful of its obligation under article 68 of the Statute, the Chamber recalls that the danger caused by the disclosure of the witness's identity to the Defence must be

⁷ ICC-01/05-01/08-141-Conf

⁸ ICC-01/05-01/08-T-6-EXP-CONF-ENG ET.

⁹ ICC-01/05-01/08-147-US-Exp and its annexes.

¹⁰ ICC-01/05-01/08-164-US-Exp-Anx2.

¹¹ ICC-01/05-01/08-126-US-Exp, para. 15. This formulation has also been used for witnesses 0022, 0023 and 0038, see ICC-01/05-01/08-58-US-Exp. paras 32, 34, 40.

assessed with regard to each individual witness taking into account his or her specific situation.

11. The Chamber further recalls that it has ordered the Prosecutor to continuously assess the risk to the safety and well-being of all those witnesses protected by the non-disclosure of their identity and to immediately inform the Chamber of any changes in their current security situation.¹²

12. The Chamber is well aware that even if a witness decides to authorise the use of his or her statement for the purpose of the confirmation hearing, knowing that his or her identity might be disclosed to the Defence, the witness is inevitably undertaking a certain amount of risk which is to be assessed by the Chamber.

13. With regard to witnesses 0042, 0068, 0080, 0081, 0087, 0047 and 0065 the Chamber considers that it is lacking substantial factual elements to properly assess the security situation of those witnesses. The risk assessment provided seems to be standardized in nature with no particular attention to each witness's personal situation. Furthermore, the Chamber has not so far received the statements of witnesses 0047 and 0065 to properly assess whether redactions of information in their statement would adequately protect them.

14. With regard to witnesses 0022, 0023, 0029, 0033 and 0038 the Chamber notes that their statements have been disclosed to the Defence in redacted form. However, the Chamber has not received to date any update on their security situation and on the impact of the possible disclosure of their identity to the Defence with a view to the confirmation of charges hearing scheduled on 8 December 2008.

¹² Pre-Trial Chamber III, ICC-01/05-01/08-135-Conf, letter (e) of the operative part.

15. Further, the Chamber wishes to recall the principles which underlie the disclosure process and which need to be taken into account by the Chamber.

16. As has been emphasized by this Chamber in previous decisions, the overriding principle is that *full* disclosure is the rule and that non-disclosure is the exception to this general rule which requires prior authorisation by the Chamber.¹³

17. The Chamber further finds it necessary to point out the principles governing the use of anonymous witnesses in criminal proceedings and in particular the pre-trial stage of the proceedings.¹⁴ As acknowledged by the Appeals Chamber, for the purposes of the confirmation hearing, "[it] is not *per se* prejudicial or inconsistent with the rights of the accused and a fair and impartial trial"¹⁵ if the Prosecutor relies on witnesses whose identities are unknown to the Defence. However, this does not support the conclusion that resort to such a practice is without any limitations. The Chamber draws the Prosecutor's attention to the jurisprudence of the European Court of Human Rights which established that "a conviction should not be based either solely or to a decisive extent on anonymous statements."¹⁶ This principle applies equally to the present stage of the proceedings.

18. Having said this, the Chamber wishes to point out that, if it was to follow the Prosecutor's approach, twelve out of twenty-six witnesses would be granted anonymity, all of them being "core witnesses" and witnesses who have allegedly suffered from crimes Mr Jean-Pierre Bemba is charged with.

¹³ Pre-Trial Chamber III, ICC-01/05-01/08-85-Conf, para. 13; ICC-01/05-01/08-135-Conf, para. 24.

¹⁴ Pre-Trial Chamber III, ICC-01/05-01/08-48-US-Exp., para. 28.

¹⁵ Appeals Chamber, ICC-01/04-01/06-773, para. 50.

¹⁶ European Court of Human Rights (ECtHR), case of *Doorson v the Netherlands*, judgement of 26 March 1996, Reports 1996-II, para. 76; case of *Van Mechelen and others v the Netherlands*, judgement of 23 April 1997, Reports of Judgements and Decisions 1997-II, paras 54 and 55; case of *Krasniki v the Czech Republic*, application no 51277/99, judgement of 28 February 2006, paras 76, 78 and 79.

19. Therefore, the Chamber deems it necessary to receive further clarifications on the present security situation of witnesses 0022, 0023, 0029, 0033, 0038, 0042, 0047, 0065, 0068, 0080, 0081 and 0087 to properly assess their personal security situation. In particular, the Chamber wishes to be informed whether those witnesses have received any threats so far and whether they consent to fully disclose to the Defence their identity and related identifying information contained in their statements. In light of the Prosecutor's submission during the status conference on 8 October 2008, namely that the Prosecutor is in contact with the witnesses on a daily basis,¹⁷ the Chamber deems it feasible to receive further clarifications on short notice.

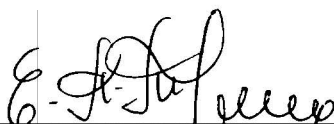
20. With a view to preventing delays of proceedings, the Chamber considers it necessary that the Prosecutor cooperate closely with the VWU on this issue. The Chamber wishes to emphasise that cooperation amongst the organs of the Court is crucial for ensuring the efficient and expeditious conduct of the proceedings with full respect of the rights of the Defence and with due regard for the protection of victims and witnesses.

FOR THESE REASONS, THE CHAMBER

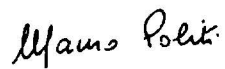
orders the Prosecutor, in consultation with the Victims and Witnesses Unit, to urgently contact witnesses 0022, 0023, 0029, 0033, 0038, 0042, 0047, 0065, 0068, 0080, 0081 and 0087 and to file with the Chamber no later than **5 November 2008 at 12h00** a report with regard to their individual security situation and the witnesses' possible consent to disclose their identity and related identifying information to the Defence in the proceedings leading to the confirmation of charges hearing.

¹⁷ ICC-01/05-01/08-T-6-CONF-EXP-ENG ET, p. 12, lines 1 and 2.

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



Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul

Judge Mauro Politi

Dated this Monday, 3 November 2008

At The Hague, The Netherlands