

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 November 2008

PRE-TRIAL CHAMBER III

Before: Judge Ekaterina Trendafilova, Single Judge

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

Public Document

**PUBLIC REDACTED VERSION OF ICC-01/05-01/08-295-Conf
Decision on the Prosecutor's Applications to Open an Inquiry with Respect to
Witnesses [REDACTED]**

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

Nkwebe Liriss
Karim A.A. Khan
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

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Simo Vaatainen

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge for Pre-Trial Chamber III (the "Chamber") of the International Criminal Court,¹ is seised with the "Prosecution's Application for an Inquiry and the Issuance of Comprehensive Guidelines under Articles 57(3)(c) and 68 of the Rome Statute, Rules 87 and 88 of the Rules of Procedure and Evidence" (the "First Application")² and the "Prosecution's Application for an Inquiry related to Witness REDACTED" (the "Second Application").³

I. Procedural History

1. On 31 August and 6 November 2008 the Chamber issued two decisions on redactions⁴ in which it ordered that the identity of witnesses REDACTED be disclosed to the Defence.⁵ In the decisions of 31 August and 6 November 2008, respectively, the Chamber requested that the Defence keep the identity of witnesses REDACTED confidential and ensure that the information not be passed on to the public, unless otherwise ordered.⁶ Subsequently, the Prosecutor filed his Document Containing the Charges and the List of Evidence,⁷ disclosing to the Defence the names of witnesses REDACTED.

2. On 1 October 2008 the Chamber issued the "Decision on the Prosecutor's request for the regulation of contacts of Jean-Pierre Bemba Gombo"⁸ in which it referred to

¹ "Decision Designating a Single Judge", ICC-01/05-01/08-293.

² ICC-01/05-01/08-162-Conf.

³ ICC-01/05-01/08-217-Conf.

⁴ "First decision on the Prosecutor's requests for redactions", ICC-01/05-01/08-85-Conf and "Third Decision on the Prosecutor's Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo", ICC-01/05-01/08-215-Conf.

⁵ ICC-01/05-01/08-85-Conf; "Second Decision on the Prosecutor's requests for redactions", ICC-01/05-01/08-135-Conf, para. 10 and p. 29 and ICC-01/05-01/08-215-Conf, para. 35.

⁶ ICC-01/05-01/08-85-Conf, p. 16, letter (c); "Decision on the Prosecutor's Request of 5 September 2008", ICC-01/05-01/08-117-Conf, para. 10 and ICC-01/05-01/08-T-8-CONF-ENG CT 22-10-2008, p. 54, line 21 to p. 55, line 2.

⁷ "Prosecution's Submission of the Document Containing the Charges and List of Evidence", ICC-01/05-01/08-129 and its annexes (ICC-01/05-01/08-129-Conf-Exp-Anx2.A and ICC-01/05-01/08-129-Conf-Exp-Anx2.C). Subsequently amended by the "Prosecution's Submission of Amended Document Containing the Charges and Amended List of Evidence", ICC-01/05-01/08-169 and its annexes (ICC-01/05-01/08-169-Conf-Anx2.A and ICC-01/05-01/08-169-Conf-Anx2.C) and by the "Prosecution's Submission of Second Amended List of Evidence", ICC-01/05-01/08-225 and its annexes (ICC-01/05-01/08-225-Conf-Anx and ICC-01/05-01/08-225-Conf-Anx2.A).

⁸ ICC-01/05-01/08-134-Conf, paras. 17, 30 and 32.

articles 8(4) and 8(3) of the Code of Professional Conduct for counsel (the “Code of Conduct”),⁹ and stated that “the defence team composed of professional counsels respecting secrecy and confidentiality [was] well aware of its obligations”.¹⁰

3. On 16 October and 7 November 2008 the Prosecutor filed his First and Second Applications, respectively, asking the Chamber to consider opening an inquiry into the circumstances of the alleged release of information related to REDACTED¹¹ and REDACTED.¹²

4. The reported incident related to witness REDACTED was discussed during the status conference held on 22 October 2008,¹³ and the Defence asserted that the information in the Prosecutor’s First Application was an “outrageous allegation”.¹⁴

5. On 28 October 2008 the Defence filed further observations on the First Application (the “First Observations”)¹⁵ and responded to the Second Application (the “Second Observations”) on 11 November 2008.¹⁶

II. Submissions of the Parties

6. In his First Application, the Prosecutor submitted that on 3 October 2008 witness REDACTED received a telephone call REDACTED.¹⁷

7. The Prosecutor’s Second Application was related to two incidents regarding witness REDACTED. REDACTED.¹⁸ REDACTED.¹⁹ According to the Prosecutor,

⁹ ICC-01/05-01/08-134-Conf, paras. 20 and 22.

¹⁰ ICC-01/05-01/08-134-Conf, para. 20.

¹¹ REDACTED

¹² REDACTED

¹³ ICC-01/05-01/08-T-8-CONF-ENG CT 22-10-2008, p. 53, line 22 to p. 55, line 2.

¹⁴ ICC-01/05-01/08-T-8-CONF-ENG CT 22-10-2008, p. 54, lines 16 to 20.

¹⁵ REDACTED

¹⁶ REDACTED

¹⁷ REDACTED

¹⁸ ICC-01/05-01/08-217-Conf, paras. 10 and 11.

¹⁹ REDACTED

witness REDACTED interpreted these two incidents as hidden or indirect threats.²⁰ In conclusion, the Prosecutor asserted that witness REDACTED allegations were serious and detailed enough to justify further investigation,²¹ REDACTED.²²

8. In relation to both witnesses, the Prosecutor submitted that he had informed the Victims and Witnesses Unit ("VWU") about these incidents. However, VWU indicated, in relation to witness REDACTED, that due to his profile REDACTED it was not in a position to provide any greater protection REDACTED.²³ In relation to witness REDACTED, VWU stated that given his profile, the current protection measures were adequate and appropriate.²⁴

9. The Defence submitted in its First Observations that it was well aware of its obligations under article 8 of the Code of Conduct and did not violate its professional duties of secrecy and confidentiality.²⁵ Furthermore, the Defence asserted that Mr Jean-Pierre Bemba never tried to intimidate witnesses in the case.²⁶ REDACTED.²⁷

10. In its Second Observations, the Defence reiterated its awareness of its obligations pursuant to the Code of Conduct,²⁸ and asserted that neither Mr Kilolo nor any other member of the Defence team or Mr Jean-Pierre Bemba, revealed any information in relation to witness REDACTED or ever tried to intimidate witnesses in the case.²⁹ REDACTED.³⁰

III. The Applicable Law

²⁰ REDACTED

²¹ REDACTED

²² REDACTED

²³ REDACTED

²⁴ REDACTED

²⁵ ICC-01/05-01/08-192-Conf, paras. 8 and 9.

²⁶ ICC-01/05-01/08-192-Conf, para. 11.

²⁷ REDACTED

²⁸ ICC-01/05-01/08-235-Conf, para. 11.

²⁹ ICC-01/05-01/08-235-Conf, paras. 12 and 13.

³⁰ REDACTED

11. The Single Judge notes articles 57(3)(c) and 68 (1) of the Rome Statute (the “Statute”), rule 87 of the Rules of Procedure and Evidence (the “Rules”), regulations 41 and 42 of the Regulations of the Court and articles 8, 31(a), 33(1), 34 and 39 of the Code of Conduct.

12. The Single Judge underlines that articles 57(3)(c) and 68(1) of the Statute and rule 87 of the Rules empower the Court to take appropriate measures to protect *inter alia* the safety, physical and physiological well-being, dignity and privacy of witnesses in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Among these measures, the Chamber may order “the Prosecutor, the defence or any other participant in the proceedings” not to disclose a witness’ identity or location to a third party pursuant to rule 87(3)(b) of the Rules.

13. As pointed out in paragraph 1 of this decision, the Chamber has already requested that the Defence keep any information related to a witness’ identity confidential and ensure that it not be passed on to the public, unless otherwise ordered.

14. With regard to the Prosecutor’s First and Second Applications related to witnesses REDACTED, the Single Judge notes that according to article 34 (1)(b) of the Code of Conduct, “[c]omplaints against counsel regarding misconduct as referred to in articles 31(...) of [the] Code may be submitted to the Registrar by (...) the Prosecutor.” Counsel commits misconduct in breach of article 31 of the Code of Conduct “when he or she: (a) [v]iolates or attempts to violate any provisions of this Code, the Statute, [or] the Rules of Procedure and Evidence (...)”. Among these provisions is article 8 of the Code of Conduct which governs the counsel’s respect for professional secrecy and confidentiality of information.

15. In view of the Single Judge these provisions are *lex specialis* which govern the subject-matter of the Prosecutor’s First and Second Applications. Thus, in filing them

with the Chamber, the Prosecutor has failed to follow the appropriate legal path. Instead, the Prosecutor should have submitted his complaint regarding the Defence's alleged misconduct to the Registry, who in turn should transmit it to a Commissioner, appointed pursuant to article 33 of the Code of Conduct, responsible for investigating the matter pursuant to article 39 of this code.

FOR THESE REASONS, THE SINGLE JUDGE

(a) rejects the Prosecutor's First and Second Applications.

(b) orders the Prosecutor and VWU to continuously assess the risk to the safety and well-being of witnesses REDACTED, and to immediately inform the Chamber of any changes in their security situation.

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

Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday 27 November 2008

At The Hague, The Netherlands