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No.: ICC-01/05-01/08
Date: **26 September 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
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO**

**Public Redacted Version of ICC-01/05-01/08-122-US-Exp
Prosecutor's Submission of Additional Information Demonstrating the Existence of
an Objectively Identifiable Risk**

Source: The Office of the Prosecutor

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

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Counsel for the Defence of Jean-Pierre Bemba

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

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural History

1. On 20 June 2008, Pre-Trial Chamber III ("PTC") issued an Order¹ requesting that the Prosecution submit a proposal in regards to the classification and requested redactions of the "Prosecutor's Application for Warrant of Arrest under Article 58"² as well as the "Prosecutor's Submission on Further Information and Materials".³
2. On 30 June 2008, the Office of the Prosecutor ("Prosecution") filed the "Prosecutor's Application Pursuant to Rules 81(2) and 81(4) for Redactions to the Application for a Warrant of Arrest and the Further Submission".⁴ On 4 July 2008, the Victims and Witnesses Unit ("VWU") provided its observations thereto.⁵
3. On 16 July 2008, the Prosecution filed the "Prosecutor's Application for Redaction Pursuant to Rules 81(2) and 81(4)".⁶ On 23 July 2008, the Pre-Trial Chamber issued the "Decision concerning the Prosecutor's proposal for redactions".⁷
4. On 1 August 2008, the Prosecution filed the "Prosecutor's Decision concerning the Prosecutor's proposals for redactions"⁸ and on 18 August 2008, the VWU submitted its observations thereto.⁹ On 28 August 2008 the Single Judge held a status conference on the redactions and on 29 August 2008 the Prosecution submitted additional information at the request of the Single Judge. On 31 August 2008, the Single Judge issued its First Decision on the Prosecutor's request for redactions"¹⁰ ("First Decision") with two Annexes.¹¹

¹ ICC-01/05-01/08-21-US-Exp.

² ICC-01/05-01/08-26-US-Exp.

³ ICC-01/05-01/08-29-US-Exp.

⁴ ICC-01/05-01/08-32-US-Exp.

⁵ ICC-01/05-01/08-39-US-Exp.

⁶ ICC-01/05-01/08-44-US-Exp.

⁷ ICC-01/05-01/08-48-US-Exp.

⁸ ICC-01/05-01/08-58-US-Exp.

⁹ ICC-01/05-01/08-72-US-Exp.

¹⁰ ICC-01/05-01/08-85-Conf.

¹¹ The Annexes were given in two parts on 1 and 2 September 2008 respectively.

5. In the First Decision, the Single Judge authorized temporary redactions of six witnesses (“Part I witnesses”) after finding that the disclosure of the identity or information about their personal circumstances to the defence would expose each of them to an increased “objectively justifiable safety risk” and that there were no alternative measures short of redaction available and feasible in the present circumstances.¹²
6. Further, the Single Judge accepted the “proposal submitted by the Prosecution and the VWU that the disclosure of the names is delayed as late as possible” but placed his decision within the timeframe of the evidence disclosure system set forth in the PTC’s decision of 31 July 2008.¹³ However, in the First Decision, the Single Judge allowed for either the Prosecution or the VWU to apply for the PTC to reconsider its decision.¹⁴
7. On 15 September 2008, the Single Judge issued its confidential and *ex parte* “*Decision relative à la Requête du Procureur aux fins d’expurgations pour les témoins 0009, 0033, 0038, 0022, 0023, 0029*”.¹⁵ In that decision, the Prosecution was ordered to provide a new request for proposed redactions relating to the six Part I witnesses, to be filed by 22 September 2008. The Single Judge further ordered that the amended request for redactions incorporate the results of the First Decision and that there be prior consultation with the VWU in relation to the proposed redactions. Subsequently, another status conference was held on 17 September 2008 which focused mainly on the redactions of the statements of other witnesses.¹⁶
8. On 22 September 2008, the Prosecution filed the “Prosecution’s Amended Application for Proposed Redactions Pursuant to Rules 81(2) and 81(4)”.¹⁷ In that application, the Prosecution sought, *inter alia*, the continued redaction of the

¹² ICC-01/05-01/08-85-Conf.-Exp, Annex, pp. 2-3; 6-7; 8-9; 11-12; 15-16; and 26.

¹³ ICC-01/05-01/08-85-Conf-Exp, paragraph 33.

¹⁴ Ibid, paragraph 35.

¹⁵ ICC-01/05-01/08-108-Conf-Exp.

¹⁶ ICC-01/05-01/08-108-T-5-Conf.-Exp.-Eng.

¹⁷ ICC-01/05-01/08-114-Conf-Exp.

identities and identifying information of the Part I witnesses beyond 3 October 2008 so as to allow for rolling disclosure post-confirmation of the charges.

9. On 25 September 2008, the PTC ordered the Prosecution to submit by 26 September 2008 any “*further additional*” information at the disposal of the Prosecutor which demonstrates the existence of an objectively justifiable risk which could lead to the non-disclosure of the names and identifying information of part I witnesses beyond 3 October”.¹⁸

II. Request for Sealing

10. The Prosecution requests that this application be received as “Under Seal, *Ex Parte*, Prosecutor Only”, as it relates to material that is currently treated as confidential and *ex parte* and depicts information for which redactions are sought and communication of which would defeat the purpose for which the redactions are requested.

III. Additional Information Demonstrating the Existence of an Objectively Identifiable Risk

11. In accordance with the standards applied by the Single Judge, which is “to avoid to expose witness to an increased objectively justifiable safety risk”, the Prosecution submits that a prospective assessment of the risk is required. The additional information provided below is based not only on the evidence of past events, but even more on a likelihood of future events. Once the risks are materialized, it would be impossible for the Court to address adequately the

¹⁸ ICC-01/05-01/08-121-US-Exp.

situation of the witnesses.¹⁹ This is also the standard established in the Strategic plan of the Court, agreed by the Presidency, the Registry and the Prosecution which committed to “put in place a system to address all security risks, striving for maximum security of all participants.”²⁰ Any lower standard of risk would not permit the Court in general, or the Prosecution in particular, to discharge its obligations to protect victims and witnesses as mandated by Article 68(1) of the Statute.

12. The Prosecution has previously provided to the PTC factual details that demonstrate that the Part I witnesses are exposed to an “objectively justifiable risk to their safety”.²¹ On the basis of that information, the Single Judge already found that in relation to those witnesses an objectively identifiable risk for their safety exists²² and that “there are no alternative measures short of redaction available and feasible in the present circumstances.”²³ The Prosecution submits that all this information is still valid: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] With each new step in the proceedings, there is a higher risk level, as has been the experience in other cases.

13. The witnesses continue to be at risk. In particular, [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

¹⁹ See Haradinaj trial judgment (IT-04-84-T, 3 April 2008), where the measures adopted by the ICTY could not allay the witnesses’ fear, many of whom refused to provide their testimony (see para. 22).

²⁰ See Strategic Plan of the Court, ICC-ASP, 4 August 2006, paragraph 31 and Annex, page 14.

²¹ ICC-01/05-01/08-58-US-Exp.; ICC-01/05-01/08-T-2-Conf-Exp-Eng; ICC-01/05-01/08-T-4-Conf-Exp-Eng ET; ICC-01/05-01/08-T-5-Conf-Exp-Eng; and ICC-01/05-01/08-119-US-Exp. and Annexes; ICC-01/05-01/08-114-US-Exp.

²² First Decision, paragraph 33.

²³ First Decision, Annex I, pp. 2, 6, 8, 11, 15 and 26.

[REDACTED]

14. [REDACTED]

15. [REDACTED]

[REDACTED] Whether accurate or not, the perception of such a prospect constitutes a core element of the objectively identifiable risk.

16. [REDACTED]

²⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18. In light of the continuing and objectively justifiable risk already found by the Single Judge and which is confirmed by the additional information provided in this filing, the Prosecution submits that the limited non-disclosure of just the names and identifying information of Part I witnesses should be extended beyond 3 October 2008.

Requested measures are appropriate for the purposes of the confirmation hearing:

19. According to the AC "a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the Pre-Trial Chamber".²⁵

²⁵ ICC-01/04-01/07-475, paragraph 59.

20. While the considerations of fairness of the proceedings require that the defence must be aware of the identities of the witnesses giving evidence against an accused at trial, this is not necessarily the case for the purposes of the confirmation hearing. The AC found “it may be permissible to withhold the disclosure of certain information from the defence prior to confirmation of the charges that could not be withheld prior to trial”.²⁶ In fact, the AC expressly allowed for the possibility that for the purposes of the confirmation hearing, the Prosecution can “rely on witnesses whose identities are unknown to the defence (anonymous witnesses)”.²⁷

21. In the case at hand, the right to challenge the evidence presented by the Prosecution must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect. The AC has ruled that “[a]s the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the PTC that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested.”²⁸

The requested measures are necessary and any restrictions to the rights of the suspect can be sufficiently counterbalanced:

22. Before authorizing redactions, “a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the ... Chamber”.²⁹

23. The Prosecution submits that the necessity of the requested redactions beyond 3 October 2008 is demonstrated by the existence of an objectively justifiable risk to

²⁶ ICC-01/04-01/07-475, paragraph 68.

²⁷ ICC-01/04-01/06-773, paragraph 50. See also ICC-01/04-01/06-774.

²⁸ ICC-01/04-01/06-774 paragraph 47.

²⁹ ICC-01/04-01/07-475, paragraph 59.

their safety of the witnesses.³⁰ Any restrictions to the rights of the suspect may be sufficiently counterbalanced by the procedures put in place by the Single Judge.

24. In this matter, to counter-balance the interests of all concerned after the 30 day deadline, the Prosecution will provide the statements to the defence of the six witnesses with only limited and careful redactions. It is important to emphasize that nothing of substance has been excluded; the redactions protect only the most sensitive information relating to their identifying information. Thus, the Prosecution has provided to the defence the maximum amount of information that is feasible under these circumstances, to enable the defence to prepare for trial.
25. The redactions, which preserve and permit the defence full access to the substantive information of the witnesses while removing only the information that identifies the witnesses themselves, are thus a measure which ensures a level of protection for these witnesses.
26. There exists another important guarantee to counterbalance the withholding of the witnesses' identities. According to the AC, "the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleged should be protected".³¹ Thus, the Defence may provide submissions upon request.
27. Finally, even after non-disclosure is authorized, such a determination may be kept under review and altered should changed circumstances make that appropriate.³² The availability of such a review provides an additional safeguard to the rights of the accused.

³⁰ First Decision, Annex 1, pp. 2, 6, 8, 11, 15 and 26.

³¹ ICC-01/04-01/07-475, paragraph 73(b).

³² ICC-01/04-01/07-475, paragraph 73(c); ICC-01/04-01/07-476, para. 64.

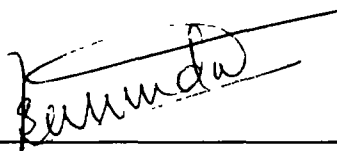
Additional relevant factors in support of a continuation of the previously ordered redactions:

28. The Single Judge has previously found that “there are no alternative measures short of redaction available and feasible in the present circumstances”.³³ The Prosecution submits that this continues to be the case also after 3 October 2008. Moreover, the redactions sought are the least intrusive measure for victims and witnesses, which is another factor to be taken into consideration.³⁴
29. Finally given that in the absence of adequate protection for the Part I witnesses the Prosecution may not be able to rely on their evidence, this may make it significantly more difficult for the Prosecution to bring Bemba on trial.

IV. Relief Sought

30. The Prosecution respectfully requests that the PTC

- a) take into consideration the above additional information which demonstrate the continued existence of an objectively justifiable risk; and
- b) authorize the non-disclosure of the names and identifying information of the Part I witnesses beyond 3 October 2008.



 Fatou Bensouda, Deputy Prosecutor
 On behalf of
 Luis Moreno-Ocampo, Prosecutor

Dated this 26th day of September 2008

At The Hague, The Netherlands

³³ First Decision, Annex 1, pp. 2, 6, 8, 11, 15 and 26.

³⁴ ICC-01/04-01/07-568 OA3, paragraph 39.