



Original: **English**

No.: **ICC-01/05-01/08**
Date: **30 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-01/05-01/08-126-US-Exp

**Prosecution's Application for Proposed Summaries and Redactions Pursuant to
Article 68(5) of the Rome Statute and Rules 81(2) and 81(4) of the Rules of
Procedure and Evidence**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor	Counsel for the Defence of Jean-Pierre Bemba
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Legal Representatives of Victims	Legal Representatives of Applicants
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Unrepresented Victims	Unrepresented Applicants for Participation/Reparation
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The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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States Representatives	Amicus Curiae
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REGISTRY

Registrar Ms Silvana Arbia	Defence Support Section
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Victims and Witnesses Unit Mr Simo Väätäinen	Detention Section
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Victims Participation and Reparations Section	Other
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I. Procedural History

1. On 20 June 2008, Pre-Trial Chamber III (hereinafter referred to as “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 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 (hereinafter referred to as “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 PTC issued the “Decision concerning the Prosecutor’s proposal for redactions”.⁷

4. On 31 July 2008, the PTC issued its “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”.⁸

5. On 1 August 2008, the Prosecution filed the “Prosecutor’s Decision concerning the Prosecutor’s proposals for redactions”⁹ and on 18 August 2008, the VWU submitted its observations thereto.¹⁰ On 28 August 2008 the Single Judge held a

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-01/05-01/08-55.

⁹ ICC-01/05-01/08-58-US-Exp.

¹⁰ ICC-01/05-01/08-72-US-Exp.

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”¹¹ (hereinafter referred to as “First Decision”) with two Annexes.¹²

6. In the First Decision the Single Judge authorized temporary redactions of six witnesses after finding that the disclosure of their 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.¹³

7. Further, the Single Judge held that “[w]here there is an objectively justifiable risk for the safety of the witness concerned, the Single Judge accepts 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 2008.¹⁴ However, in the First Decision, the Single Judge allowed for either the Prosecution or the VWU to apply for the PTC to reconsider its decision¹⁵.

8. On 15 September 2008, the Single Judge issued its confidential and *ex parte* “*Décision relative à la Requête du Procureur aux fins d’expurgations pour les témoins 0009, 0033, 0038, 0022, 0023, 0029*”.¹⁶ In that decision, the Prosecution was ordered to provide an amended request for proposed redactions relating to the six witnesses who were the subject of temporary redactions.

¹¹ ICC-01/05-01/08-85-Conf.

¹² The Annexes were given in two parts on 1 and 2 September 2008 respectively.

¹³ ICC-01/05-01/08-85-Conf-Exp-Anx pp. 2-3; 6-7; 8-9; 11-12; 15-16; and 26.

¹⁴ ICC-01/05-01/08-85-Conf-Exp, paragraph 33.

¹⁵ Ibid, paragraph 35.

¹⁶ ICC-01/05-01/08-108-Conf-Exp.

9. On 22 September 2008, the Prosecution filed the “Prosecution’s Amended Application for Proposed Redactions Pursuant to Rules 81(2) and 81(4)” (hereinafter the “Prosecution’s Amended Application”).¹⁷

10. On 22 September 2008, the Single Judge issued the “*Ordonnance relative à la protection des témoins et au rapport d’évaluation des risques*” and sought additional material from the Prosecution.¹⁸ The material was provided on 23 September 2008.¹⁹

11. The Prosecution hereby files an application to inform the PTC that the Prosecution wishes to rely upon eleven additional witnesses for the confirmation hearing. The Prosecution is proposing to apply redactions to four and to use summaries for two out of the eleven witnesses at this stage of the proceedings.

II. Request for Sealing

12. The Prosecution requests that this application and its annexes be received by the PTC as “Under Seal, *Ex Parte*, Only available to the Prosecutor and the Victims and Witnesses Unit”, since they relate to material that is currently under seal and *Ex Parte* and depict information for which redactions are sought.

13. By a separate filing the Defence will be notified of the existence of this Application.

¹⁷ ICC-01/05-01/08-114-US-Exp.

¹⁸ ICC-01/05-01/08-111-US-Exp.

¹⁹ ICC-01/05-01/08-119-US-Exp, *Prosecution’s Response to “Ordonnance relative à la protection des témoins et au rapport d’évaluation des risques”* and its accompanying annexes.

III. Prosecution's Submission for the Requested Redactions

14. Pursuant to its continuing obligations under Article 54 of the Rome Statute (hereinafter referred to as "Statute"), the Prosecution has continued its investigation²⁰ as contemplated by Article 61(4) of the Statute. The Prosecution is preparing the Document Containing the Charges as well as the corresponding List of Evidence pursuant to Rule 121(3) of the Rules of Procedure and Evidence (hereinafter referred to as "Rules"). The Prosecution wishes to rely upon the following eleven additional witnesses for the confirmation hearing: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

15. Bearing in mind the provision of Article 69(4) of the Statute, it is submitted that the proposed evidence of those eleven witnesses are probative and their admission would not prejudice Mr. Bemba's right to fair trial especially due to the fact that the Prosecution has not yet filed its Document Containing the Charges. It is submitted that all of these witnesses are core witnesses necessary for the confirmation hearing and relate directly to the widespread and systematic nature of the MLC's attacks on civilians.

16. Mindful of its obligations pursuant to Article 68(1) of the Statute, in particular where the crimes charged involve sexual violence, the Prosecution is therefore seeking redactions as measures to protect the safety of witnesses.

²⁰ ICC-01/04-01/06-568 OA3, paragraphs 49 to 51, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on Disclosure Restriction pursuant to Rule 81(2) and (4).

17. Further to earlier submissions, the Prosecution has prepared individual risk assessments for the eleven additional witnesses. Those individual risk assessments will be reassessed on an ongoing basis as the proceedings progress.

18. Regarding Witnesses 0032, 0040, 0044, 0045 and 0046, after a careful review of their anticipated evidence, their personal circumstances and the circumstances at hand, including the ongoing situation in the Central African Republic (hereinafter referred to as "CAR"), the Prosecution is not seeking redactions in relation to the identity of those five witnesses, given their identities and the circumstances in which they obtained information. Redactions are however proposed for members of their families and innocent third parties.

19. After the same review, the Prosecution also seeks to redact the identities and other identifying personal information *vis-à-vis* four witnesses victims of alleged crimes (i.e crime-based witnesses) namely, Witnesses 0042, 0068, 0080, and 0081.

20. The redactions proposed in this application are requested pursuant to Rules 81(2) and 81(4). Following previous practice of the Court, red highlights are used for the redactions sought under Rule 81(4) and blue highlights mark redactions requested pursuant to Rule 81(2). It should be noted that, while the Prosecution made all efforts to incorporate the content of the First Decision and the instructions given at the last two status conferences into the amended proposed redactions, [REDACTED]

[REDACTED]

[REDACTED] Further, the submitted charts have been modified as per the instructions of

the Single Judge at the 28 August 2008 status conference²¹ in conjunction with directions given by the Single Judge at the 17 September 2008 status conference.²²

21. Lastly, the Prosecution intends to rely on summaries for the two remaining witnesses namely, Witnesses 0047 and 0065, pursuant to Article 68(5) of the Statute.

a. Additional Request for Redactions Related to the Four Crime-Based Witnesses

22. To date, none of these four witnesses, whose identity has been kept confidential, have been the recipient of threats or violence since the alleged crimes. As will be detailed below however, the disclosure of their identities or information relating to their personal circumstances would expose them or their family members to an increased objectively justifiable safety risk.

23. It is submitted that the four witnesses may face repercussions once their names are disclosed to the defence. [REDACTED]

[REDACTED] it is submitted that redactions in the present circumstances would still be necessary at this stage of the proceedings : [REDACTED]

[REDACTED] continued redactions at this time would be essential in limiting the time exposure of the witnesses [REDACTED]

[REDACTED] As a result, it is submitted that continued redactions in the present circumstances would be a critical contribution to protect the witnesses from a justifiably objective risk.

²¹ ICC-01/05-01/08-T-4-CONF-EXP-ENG ET.

²² *Décision relative à la Requête du Procureur aux fins d'expurgations pour les témoins 0009, 0033, 0038, 0022, 0023, 0029*, ICC-01/05-01/08-108-Conf-Exp.

24. The Prosecution's prior submissions to the PTC have shown Mr. Bemba's past behaviour against opponents, and the capability of his large number of supporters to threaten and intimidate persons and organize public unrest in the Democratic Republic of Congo (hereinafter referred to as "DRC"), in the CAR and in other countries as far as Europe : eight persons have been threatened in the DRC and the CAR because of their supposed association with the ICC investigation in relation to BEMBA; upon news of his arrest, MLC supporters have been mobilized to attack MONUC, one NGO compound but also to organize targeted demonstrations in Belgium. The new phase of the proceeding can objectively trigger other forms of reaction. This is of relevance to the four witnesses.

25. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Mr.
Bemba could send individuals from the DRC to that end, they appeared convinced that he could rely on CAR accomplices, especially amongst those individuals and entities who used to support former President Patasse and to provide for his security. In their view, the disclosure of certain witnesses' names would expose these persons to such intimidation attempts.

[REDACTED]

26. [REDACTED]
[REDACTED]

²³ ICC-01/05-01/08-114-Conf-Exp. para. 27

²⁴ The Prosecution hereinafter refers to each witness in a gender neutral manner.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

27. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

28. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

29. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30. [REDACTED]

31. [REDACTED]

b. Notice of Intended Use of Summary Witnesses

32. Article 61(5) of the Statute permits the Prosecutor to rely on summary evidence at the confirmation hearing. Article 68(5) of the Statute states in pertinent part that "Where disclosure of evidence or information...may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor, may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof". Redactions would not adequately protect either Witness 0047 or 0065 since disclosure of their statements even in a redacted form would undoubtedly reveal their identities. Summaries are therefore the most efficient measure at this stage of the proceedings.

(i) Witness 0047

33. [REDACTED]

[REDACTED]

(ii) Witness 0065

34. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IV. Legal Justification for the Requested Redactions

35. This Application is brought pursuant to Articles 61(5) and 68(5) of the Statute and Rules 81(2) and 81(4) as noted above. The Prosecution hereby incorporates by reference its submissions in paragraphs 16 to 23 of the Prosecutor's Amended Application. Further, the Prosecution seeks that the redactions continue past the confirmation hearing commensurate with paragraphs 29 and 30 of the same Application.

V. Application for Prohibition, Regulation and/or Setting of Conditions for Contact

36. Regulation 101 of the Regulations of the Court provides, in part, that the Prosecution 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: (b) could prejudice or otherwise affect the outcome of the proceedings against a detained person [...]; (c) could be harmful to [...] 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". Notice of such monitoring must be given to the detained person. Regulation 101 further states that "the 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".

37. Given the pending request on the monitoring of Mr. Bemba's non-privileged communications, the Prosecution will not make another application under Regulation 101 for such but instead 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.

38. 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. Given the prior findings of the then Single Judge and the circumstances of this case, the Prosecution respectfully requests that the order be made prior to informing the detained person of the request and that the detained person not be informed until the

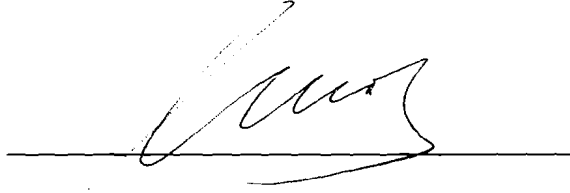
31 August 2008 order for monitoring is implemented and not earlier than 3 October 2008.

VI. Relief Sought

For the foregoing reasons, the Prosecution respectfully requests that the PTC:

- (a) authorizes the proposed redactions as submitted in the Annexes to this Application;
- (b) authorizes the non-disclosure of the identity of two witnesses and their statements pursuant to Rule 81(4) and to rely on the attached summaries pursuant to Article 68(5);
- (c) orders that there be no dissemination of names of any of the five witnesses for which the Prosecution is not seeking redactions in relation to the identity 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 PTC not authorize the redactions to the identity of any of the four crime-based witnesses, to make a similar order in relation to them and that the order commence as of disclosure of that information to the Defence;
- (d) orders that the defendant not disclose the names of the five witnesses for which the Prosecution is not seeking redactions in relation to the identity and should the PTC not authorize the redactions to the identity of any of the four crime-based witnesses, make a similar order in relation to them and that the order commence as of disclosure of that information to the Defence;
- (e) orders that no attempt be made by the Defence team to contact directly or indirectly any of the non-redacted witnesses except through the Office of the Prosecutor, should the witness consent to such contact; and
- (f) urgently orders under Regulation 101(2)(b), (c), (d), (e) and/or (f) that the defendant have no contact directly or indirectly with any of the five witnesses for

which the Prosecution is not seeking redactions to the identity and, should the PTC not authorize the redactions to the identity of any of the four crime-based witnesses, the Prosecution seeks a similar order in relation to those other witnesses.



Luis Moreno-Ocampo, Prosecutor

Dated this 30th day of September 2008

At The Hague, The Netherlands