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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**

**Public Redacted Version of ICC-01/05-01/08-114-US-Exp**

**Prosecution's Amended Application for Proposed Redactions Pursuant to  
Rules 81(2) and 81(4)**

**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

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**

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Registrar

Defence Support Section

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

Mr Simo Väättäinen

Victims Participation and Reparations  
Section

Other

## I. Procedural History

1. On 23 June 2008, Pre-Trial Chamber III (hereinafter referred to as “PTC III” or the “PTC”) issued an Order<sup>1</sup> 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”<sup>2</sup> as well as the “Prosecutor’s Submission on Further Information and Materials”.<sup>3</sup>

2. On 30 June 2008, the Office of the Prosecutor (hereinafter referred to as 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”.<sup>4</sup> On 4 July 2008, the Victims and Witnesses Unit (hereinafter “VWU”) provided its observations thereto.<sup>5</sup>

3. On 16 July 2008, the Prosecution filed the “Prosecutor’s Application for Redaction Pursuant to Rules 81(2) and 81(4)”.<sup>6</sup> On 23 July 2008, the PTC issued the “Decision concerning the Prosecutor’s proposal for redactions”.<sup>7</sup>

4. On 1 August 2008, the Prosecution filed the “Prosecutor’s Decision concerning the Prosecutor’s proposals for redactions”<sup>8</sup> and on 18 August 2008, the VWU submitted its observations thereto.<sup>9</sup> On 28 August 2008 the then Single Judge held a status conference on the redactions and on 29 August 2008 the Prosecution submitted additional information at the request of the PTC. On 31 August 2008, the then Single Judge issued its First Decision on

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<sup>1</sup> ICC-01/05-01/08-21-US-Exp

<sup>2</sup> ICC-01/05-01/08-26-US-Exp

<sup>3</sup> ICC-01/05-01/08-29-US-Exp

<sup>4</sup> ICC-01/05-01/08-32-US-Exp

<sup>5</sup> ICC-01/05-01/08-39-US-Exp

<sup>6</sup> ICC-01/05-01/08-44-US-Exp

<sup>7</sup> ICC-01/05-01/08-48-US-exp

<sup>8</sup> ICC-01/05-01/08-58-US-exp

<sup>9</sup> ICC-01/05-01/08-72-US-exp

the Prosecutor's request for redactions"<sup>10</sup> (hereinafter "First Decision) with an Annex.<sup>11</sup>

5. In the First Decision the then Single Judge authorized temporary redactions of six witnesses (hereinafter referred to as "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.<sup>12</sup>

6. Further, due to the "objectively justifiable risk for the safety of the witness concerned", the then 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.<sup>13</sup> However, in the First Decision, the then Single Judge allowed for either the Prosecution or the VWU to apply for the PTC to reconsider its decision<sup>14</sup>.

7. 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".<sup>15</sup> 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 new request for redactions incorporate the results of the First

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<sup>10</sup> ICC-01/05-01/08-85-Conf

<sup>11</sup> The Annex was given in two parts on 1 and 2 September 2008 respectively

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

<sup>13</sup> ICC-01/05-01/08-85-Conf-Exp. paragraph 33

<sup>14</sup> Ibid, paragraph 35

<sup>15</sup> ICC-01/05-01/08-108-Conf-Exp

Decision and that there be prior consultation with 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.<sup>16</sup>

## II. Request for Sealing

8. The Prosecution requests that this request and its annexes be received by the Single Judge 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 depicts information for which redactions are sought.

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

## III. Prosecution' Submission

10. The scope, object and purpose of the confirmation hearing is to determine if there is sufficient evidence to establish substantial grounds to believe that the person committed the crimes with which he has been charged.

11. According to Article 61(5) of the Rome Statute (hereinafter referred to as the "Statute"), the Prosecution may rely on documentary or summary evidence during the confirmation hearing and need not call the witnesses who are expected to testify at trial. The Single Judge in the case of *The*

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<sup>16</sup> *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..

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* affirmed the use of anonymous witnesses, permitting their statements to be used for the purpose of the confirmation hearing in a summary or redacted form.<sup>17</sup>

12. Further, the procedural activities carried out for the purpose of the confirmation hearing must also aim at facilitating the preparation for trial in the event that the charges are confirmed.<sup>18</sup> The Appeals Chamber (hereinafter referred to as “AC”) has held that “it may be permissible to withhold the disclosure of certain information from the defence prior to confirming the charges that could not be withheld prior to trial”.<sup>19</sup>

13. In that regard, it is submitted that the use of temporary redactions beyond 3 October 2008 will permit the Trial Chamber to have the benefit of rolling disclosure should the charges be confirmed in this case. From the point of view of risk management, it reduces the potential risk to a victim or witness in that it reduces the length of time that their identity is known to the Defence and potentially others associated with the Defence.

14. In compliance with the Single Judge’s order, the Prosecution respectfully submits this amended request for authorisation to apply redactions as set out in Annexes A through N respectively. The attached Annexes fall into two groups. The first group relates to the witnesses that are subject to the current temporary redactions until 3 October 2008 namely, Witnesses 0009 (Annex A), 0022 (Annex B), 0023 (Annex C), 0029 (Annex D), 0033 (Annex E) and 0038 (Annex F). The second group relate to the remaining witnesses (i) for which no redactions have been sought and (ii) for which the

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<sup>17</sup> Ibid, paragraph 83 et seq. Also at paragraph 107, she alluded to the use of rolling disclosure after the confirmation hearing.

<sup>18</sup> Ibid, paragraph 7.

<sup>19</sup> ICC-01/04-01/07-475, paragraph 68

then Single Judge has ordered that no redactions should apply namely, Witnesses 0006 (Annex G), 0007 (Annex H), 0015 (Annex I), 0025 (Annex J), 0026 (Annex K), 0031 (Annex L), 0036 (Annex M) and 37 (Annex N). Each annex contains the redactions table, the redacted statement and the redacted annexes associated with that statement.

15. The redactions proposed in this application are requested pursuant to Rules 81(2) and (4) of the Rules of Procedure and Evidence (hereinafter referred to as the "Rules"). 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, on occasion the name of a witness was not redacted because the identity of the witness would be highlighted to the defence if it were to be redacted in that particular context. Lastly, the submitted Charts have been modified as per the direction of the then Single Judge at the 28 August 2008 status conference.<sup>20</sup>

#### **IV. Legal Justification for the Requested Redactions**

16. In order to protect the safety of witnesses, victims and members of their families pursuant to Rule 81(4) of the Rules, the Prosecution considers it necessary to redact the names as well as any identifying information of the witnesses, victims and their respective family members. Otherwise, the disclosure of their identity to the suspect may place them at risk.

<sup>20</sup> ICC-01/05-01/08-T-4-CONF-EXP-ENG ET.

17. The Prosecution also requests a limited number of redactions to protect “persons at risk on account of the activities of the Court” as defined by the AC in its “Judgment on appeal of the Prosecutor against the decision of Pre-Trial Chamber I” entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”.<sup>21</sup>

18. The AC found that persons other than witnesses, victims and members of their families, may be protected through the non-disclosure of their identities if the disclosure of the information concerned would pose a danger to the particular person. The AC identified factors to be considered in determining whether or not disclosure of the information concerned would pose a danger to the particular person. The AC stated that there is a two-pronged analysis in the first stage. The analysis contemplates whether (i) the danger involves an objectively justifiable risk to the safety of the person concerned, and (ii) whether the risk must arise from disclosing the particular information to the defence, as opposed to disclosing the information to the public at large.

19. In this Application, the Prosecution is also seeking redactions pursuant to this analysis. There are a number of locations where individuals who are not witnesses, victims or members of their families are identified. The common feature between these individuals is that: (i) they possess knowledge incriminating the suspect or (ii) they themselves were the subject of the suspect’s bad behaviour. For those reasons, these individuals suffer from an objectively justifiable risk as they could be erroneously perceived as prosecution sources or witnesses. This risk cannot be reduced unless this information is withheld from the Defence.

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<sup>21</sup> ICC-01/04-01/07-475



20. The AC went on to state that the second stage of the analysis requires the Chamber to consider whether the proposed redactions overcome or reduce the risk posed to the person. In other words, the Chamber should consider whether less restrictive protective measures (than redactions) are sufficient and feasible. The third stage of the analysis considers whether the proposed redactions restrict the suspect's rights only as strictly necessary.

21. With respect to the second stage of the analysis, the Prosecution asserts that redactions reduce the risk posed to the individuals by concealing their identities. There are no other less restrictive measures that are applicable to these witnesses given the fact that the suspect's previous history reflects that he has intimidated people, and he would likely repeat such behaviour towards witnesses.

22. Accordingly, the Prosecution submits the proposed redactions pursuant to the terms of the AC's decision, and in accordance with Rule 81(4) read in conjunction with Article 54(3)(f) of the Statute.

23. The remaining proposed redactions are sought in order to protect information related to the Prosecution's ongoing investigations pursuant to Rule 81(2).

**a. Individual Risk Assessments**

24. Updated Individual Risk Assessments of the Part I witnesses have been prepared since the Prosecution's 1 August 2008 filing. Although there has been no change in their individual circumstances [REDACTED] [REDACTED] the Prosecution maintains and incorporates herein its earlier submissions of a significant risk associated with the disclosure of their

identities and the disclosure of information relating to their personal circumstances.<sup>22</sup>

25. The Prosecution also wishes to advise the Single Judge that the Office of the Prosecutor has made efforts to contact the eight Part II witnesses. The Office of the Prosecutor contacted six of the eight witnesses and informed them of the content of the First Decision and that their names will be disclosed to the Defence. They raised no objection. [REDACTED]

**b. Consultation with VWU**

26. Further to its ongoing communication with VWU and, as per the Single Judge's Decision of 15 September 2008, another joint meeting took place on 19 September 2008 to discuss witness protection issues related to the Part I witnesses. In that meeting, VWU indicated that it had no objection with the methodology behind the redactions that are the subject of this Application as it appeared to be in conformity with the decision of the Single Judge of 31 August 2008.

27. [REDACTED]

[REDACTED] Both

expressed the view that Mr. Bemba possesses the will and ability to take

<sup>22</sup> ICC-01/05-01/08-58-US-exp. paragraphs 15-40, 44-45 and 54-56.

action aiming at hampering the current ICC proceedings against him, including by intimidating witnesses whose names could be brought to his knowledge. Although these CAR officials do not believe that 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 Patassé and to provide for his security. In their view, the disclosure of certain witnesses' names would expose these persons to such intimidation attempts.

28. The Prosecution shared with VWU on 4 September 2008 Individual Risk Assessments for all fourteen witnesses and a Summary Security Risk Assessment.

**c. Application for Continued Redactions**

29. The Prosecution is of the view that the disclosure of the identity and/or information about the personal circumstances of these six witnesses will increase the risk to their safety. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is believed that the disclosure of their names and statement to the defence will automatically increase knowledge of their contribution and likely draw attention to their case. The defence may for instance, in good faith, increase the profile of these persons by performing investigative activities about them. [REDACTED]

[REDACTED]

[REDACTED] In the event of disclosure, these witnesses are likely to become the most obvious target of anyone, not necessarily linked to the

defence of Mr. Bemba, seeking to hamper ICC investigations and prosecutions in the Central African Republic.

30. The Prosecution is further of the view that the non-disclosure of these (6) witnesses' names and identifying information up until the trial phase would not significantly prejudice on the rights of the defence, as has been recognised by the Appeal Chamber in *The Prosecutor v. Thomas Lubanga Dyilo*.<sup>23</sup> The Prosecution believes that redactions constitute an appropriate risk management tool and emphasizes that, in absence of any less intrusive and other proportionate measure, it would be particularly appropriate with respect to these 6 witnesses. Lastly, the Prosecution also is of the view in considering that postponing the disclosure of these witnesses' names and identifying information until the trial phase would be consistent with the concept of rolling disclosure which entails withholding the witnesses' identity until a short delay prior giving oral testimony in court.

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

31. 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

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<sup>23</sup> ICC-01/04-01/06-773 OA5, paragraph 50; and ICC-01/04-01/06-568 OA3, paragraph 36.

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".

32. 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 submit 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.

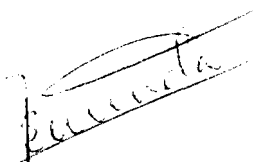
33. Regulation 101 permits that an order be made prior to informing the detained person of the request in exceptional circumstances such as in an emergency situation. Given the prior findings of the then Single Judge and the circumstances of this case, the Prosecution respectfully requests that the order 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.

## **V. Relief Sought**

34. For the foregoing reasons, the Prosecution respectfully requests that the Chamber:

- (a) authorizes the proposed redactions as submitted in the Annexes to this Application;
- (b) extends the temporary redactions for the Part I witnesses beyond 3 October 2008;

- (c) orders that there be no dissemination of names of any of the Part II witnesses 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 Single Judge not extend the temporary redactions on the Part I witnesses, make a similar order in relation to them and that the order commence as of disclosure of that information to the defence or 3 October 2008 whichever is later; and
- (d) an order that the defendant not disclose the names of the Part II witnesses and, should the Single Judge not extend the temporary redactions on the Part I witnesses, make a similar order in relation to them and that the order commence as of disclosure of that information to the defence or 3 October 2008 whichever is later;
- (e) an order that no attempt be made by the Defence team to contact directly or indirectly any of the Part I or II witnesses except through the Office of the Prosecutor, should the witness consent to such contact; and
- (f) an urgent order under Regulation 101(2)(b),(c), (d), (e) and/or (f) that the defendant have no contact directly or indirectly with any of the named Part II witnesses and, should the Single Judge not extend the temporary redactions on the Part I witnesses, make a similar no contact order in relation to them.



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**Fatou Bensouda, Deputy Prosecutor**  
**On Behalf of**  
**Luis Moreno-Ocampo, Prosecutor**

Dated this 22nd day of September 2008

At The Hague, The Netherlands