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No.: **ICC-01/05-01/08**  
Date: **5 September 2008**

**PRE-TRIAL CHAMBER III**

**Before: Judge Fatoumata Dembele Diarra, Single Judge**

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

**PUBLIC**

**Public Redacted Version of ICC-01/05-01/08-95-Conf  
“Request for clarification of the “First Decision on the Prosecutor’s request for  
redactions””**

**Source: REGISTRAR**

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

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**Unrepresented Applicants for  
 Participation/Reparation**

**The Office of Public Counsel for  
 Victims**

**The Office of Public Counsel for the  
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## **REGISTRY**

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**Registrar**  
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**Defence Support Section**

**Victims and Witnesses Unit**  
 Simo Vataainen

**Detention Section**  
 Anders Backman

**Victims Participation and Reparations  
 Section**

**Other**

**The Registrar of the International Criminal Court ("the Court");**

**NOTING** the "*Ordonnance sollicitant du Procureur et de la Division d'Aide aux Victimes et aux Témoins des observations relatives à la levée des scelles concernant certains documents et à la modification du niveau de confidentialité de ceux-ci*", rendered by Pre-Trial Chamber III ("the Chamber") on 20 June 2008;<sup>1</sup>

**NOTING** the Prosecution'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>2</sup> of 30 June 2008;

**NOTING** the "*Victims and Witnesses Unit's Observations on the Prosecution's Application Pursuant to Rules 81(2) and 81(4) for redaction to the Application for a Warrant of Arrest and the Further Submission*"<sup>3</sup> of 4 July 2008 ;

**NOTING** the "*Prosecution's Application for Redaction Pursuant to Rules 81(2) and 81(4)*"<sup>4</sup> of 16 July 2008;

**NOTING** the Chamber's "*Decision concerning the Prosecutor's proposals for redactions*"<sup>5</sup> of 23 July 2008;

**NOTING** the "*Prosecutor's Decision concerning the Prosecutor's proposals for redactions*"<sup>6</sup> of 01 August 2008 ("Prosecution's submission");

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<sup>1</sup> ICC-01/05-01/08-21.

<sup>2</sup> ICC-01/05-01/08-31-US-Exp.

<sup>3</sup> ICC-01/05-01/08-39-US-Exp.

<sup>4</sup> ICC-01/05-01/08-44-US-Exp.

<sup>5</sup> ICC-01/05-01/08-48-US-EXP.

<sup>6</sup> ICC-01/05-01/08-58-US-Exp.

**NOTING** the *“Victims and Witnesses Unit’s observations on the protection measures available in relation to the individuals concerned by the Prosecutor’s proposals for redaction”*<sup>7</sup> of 18 August 2008 (*“18 August Observations”*);

**NOTING** the Single Judge’s *“Decision to convene a status conference”*<sup>8</sup> dated 26 August 2008;

**NOTING** the status conference<sup>9</sup> of 28 August 2008;

**NOTING** the *“First decision on the Prosecutor’s request for redactions”*<sup>10</sup> issued by the Single Judge on 31 August 2008 (*“the First Decision”*);

**NOTING** Articles 57 (3) (c), 68(1) and (4) and 43(6) of the Rome Statute, Rules 17 to 19, 81, 87 to 87 of the Rules of Procedure and Evidence, Regulations 23bis, 24bis, 90 and 101 of the Regulations of the Court, and Regulations 173 to 184 of the Regulations of the Registry;

**CONSIDERING** that in the First Decision, the Single Judge states that he considers that *“further safeguards need to be taken in order to avoid breaches of the present decision which allows for the names of some witnesses to be disclosed fully to the defence at this stage of the proceedings;”*<sup>11</sup>

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<sup>7</sup> ICC-01/05-01/08-72-US-Exp.

<sup>8</sup> ICC-01/05-01/08-79-Conf-Exp.

<sup>9</sup> ICC-01/05-01/08-T-4-CONF-EXP-ENG ET 28-08-2008.

<sup>10</sup> ICC-01/05-01/07-85-Conf.

<sup>11</sup> ICC-01/05-01/08-85-Conf, p. 14, para 37.

**CONSIDERING** that in the First Decision, the Single Judge orders the Registry “to actively monitor regularly the non-privileged communication via telephone of Jean-Pierre Bemba Gombo, subject to review by the Chamber”;<sup>12</sup>

**CONSIDERING** that pursuant to Regulations 23 bis (1) and (2) of the Regulations of the Court, the present submission is classified “Confidential” in line with the same level of classification chosen by the Single Judge in the First Decision;

**RESPECTFULLY** brings the following to the attention of the Single Judge for consideration:

#### **The 18<sup>th</sup> August Observations**

1. In the 18<sup>th</sup> August Observations, the VWU stated that any recommended protection measure will have to be based on the assessment of risk and be proportional to the assessed risk. With regard to the redactions, the VWU continued to recommend full redactions towards the public. In respect of redactions towards the defence, however, it was stated that at this stage and based on the information that has been provided to the VWU so far, the VWU does not object in principle that the identities of the witnesses concerned by the Prosecution’s proposal for redactions are disclosed to the defence.<sup>13</sup>

2. [REDACTED]

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<sup>12</sup> Ibid, p. 16, para. d.

<sup>13</sup> ICC-01/05-01/08-72-US-Exp, p. 14, para. 38.

3. As a further safeguard, the VWU recommended the monitoring of non-privileged communications of Mr. Jean-Pierre Bemba Gombo after information is disclosed to the defence at least on a random basis.<sup>14</sup> The suggestion made by the VWU in this regard for consideration by the Single Judge would imply recourse to Regulation 174(2) of the Regulations of the Registry, namely to implement a system of *post factum* listening of the recordings. Furthermore, it was briefly mentioned that consideration for full-time monitoring should be based "*on the available intelligence at the time.*"<sup>15</sup> However, it is acknowledged by the Registrar that, regrettably, the 18<sup>th</sup> August Observations did not specify the relevant regulation applicable to a system of monitoring.

#### **The monitoring system at the ICC Detention Centre**

4. In general terms, an in accordance with the Regulations of the Registry the term 'monitoring' delineates the following:
- a) Passive monitoring of telephone calls;
  - b) Active monitoring of telephone calls;
  - c) Monitoring of visits.
5. Passive monitoring of non-privileged telephone calls, as stipulated under Regulation 174(1) and (2) entails the recording of telephone calls but without simultaneous listening. Thus far, this has been the call monitoring system in place at the ICC Detention Centre vis-à-vis the non-privileged calls of Mr. Jean-Pierre Bemba Gombo.

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<sup>14</sup> Ibid. at para. 40.

<sup>15</sup> Ibid. at footnote 18.

6. Active monitoring of telephone calls), as stipulated under Regulation 174 (2) and 175 of the Regulations of the Registry, entails two distinctive processes. The first one being implementation of Regulation 174(2) of the Regulations of the Registry, entails a *post factum* listening of the recorded non-privileged communications ("*Post factum listening regime*"). The second one being active monitoring within the meaning of Regulation 175 of the Regulations of the Registry, implies a simultaneous listening (*real-time*) of the conversation between the detained person and his/her interlocutor ("*Simultaneous listening regime*").
  
7. Neither of the monitoring systems described in paragraph 6 has been applied to the non-privileged telephone calls of Mr. Jean-Pierre Bemba Gombo thus far as the Chief Custody Officer has not, to date, sought permission of the Registrar for implementation of such measures, as he has not been in possession of information which may lead him to conclude that there are reasonable grounds to believe that Mr. Jean-Pierre Bemba Gombo may be attempting to be engaged in activities that will result in the conduct listed under Regulation 175(1).<sup>16</sup>
  
8. With respect to 'monitoring of visits', Regulation 184 of the Regulations of the Registry stipulates that this type of monitoring measure entails the audio recording of the conversation held during a non-privileged visit. In the case of Mr. Jean-Pierre Bemba Gombo, circumstances have not been such that would have required resort to implementation of Regulation 184 of the Regulations of the Registry. This means that the Chief Custody Officer has not, to date, asked the Registrar for permission to implement this type of monitoring

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<sup>16</sup> a) Arrange an escape; b) Interfere with or intimidate a witness; c) Interfere with the administration of justice; d) Otherwise disturb the maintenance of the security and good order of the detention centre; e) Jeopardise the interests of public safety or the rights or freedom of any person; or f) Breach an order for non-disclosure made by a Chamber.

system as he has not been in possession of information which may lead him to conclude that there are reasonable grounds to believe that Mr. Jean-Pierre Bemba Gombo may be attempting to be engaged in activities that will result in the conduct listed under Regulation 184(1).<sup>17</sup>

### Practical implications of the First Decision

9. In the First Decision, the Single Judge has ordered "*the Registry to actively monitor regularly the non-privileged communication via telephone of Jean-Pierre Bemba Gombo, subject to review by the Chamber.*"<sup>18</sup>
  
10. With respect to the measure to be put in place, the Registrar respectfully requests clarification of the Chamber as to the meaning of the term '*regularly*' in the decision. In this regard, it does not seem apparent from the First decision whether the order entails the application of a *post factum listening regime* on a random basis, or the application of a *simultaneous listening regime* as described in paragraph 6 of the present submission.
  
11. With respect to the First Decision, the Registrar wishes to bring to the attention of the Single Judge two matters related thereto. Firstly the practical implications of the First Decision, and secondly other matters related to the system of monitoring from a general perspective.
  
12. Firstly, on the matter of the practical implications of compliance with the First Decision at the ICC Detention Centre, the Registrar wishes to hereby inform the Single Judge of the modalities for implementation of the First Decision should the First Decision be understood as active monitoring in terms of the

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<sup>17</sup> Ibid.

<sup>18</sup> ICC-01/05-01/08-85-Conf, at page 16.



implementation of a *simultaneous listening regime* as established under Regulation 175 (1) of the Regulations of the Registry.

13. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

14. In the present case, the Registrar wishes to highlight that the monitoring order deriving from the First Decision would have an impact on the daily regime of Mr. Jean-Pierre Bemba Gombo and on the daily schedule of the ICC Detention Centre if a *simultaneous listening regime* is activated. Nevertheless, the modalities for monitoring as described in paragraph 15, which would be required for the proper management and good order of the ICC Detention Centre,<sup>19</sup> would not deprive Mr. Jean-Pierre Bemba Gombo of his basic rights as established under the applicable Regulations of the Court and the Regulations of the Registry.

15. With regard to the above, the Registry would be in a position to implement a *simultaneous listening regime* as envisaged under Regulation 175 of the Regulations of the Registry as follows:

- a) The detained person would be allowed to make non-privileged calls between 1:30 p.m. and 3:30 p.m. during weekdays;
- b) The detained person would be asked to inform the Chief Custody Officer or his delegate before 4:00 p.m. of the day prior to the call, of the

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<sup>19</sup> Regulation 90 of the Regulations of the Court.

identity of the person he would wish to contact via telephone and of the language to be used during the call. This would ensure that the person monitoring the call would be able to understand what is being said;

- c) If the conversation contravenes the applicable Regulations or the Chamber's First Decision, or if the detained person were to use a different language which is not understood by the person monitoring the call, the call would be terminated.
- d) The person monitoring the conversation would be asked to produce a brief summary of each conversation.

16. Secondly, on the matter of the monitoring system from a general perspective vis-à-vis the First Decision, the Registrar notes with concern that the First Decision seems to be restricted to the communications of Mr. Jean-Pierre Bemba Gombo via the telephone only.

17. The Registrar is of the opinion that if there is reasonable suspicion that there may be an attempt by the person to engage in activities listed under Regulation 175(1) and 184(1), an all-encompassing monitoring system would be most effective. However, it is not apparent to the Registrar whether the order might have to be considered applicable to other forms of communication by Mr. Jean-Pierre Bemba Gombo.

18. In this regard, the Registrar notes that whereas telephone monitoring could be a safeguard to avoid dissemination of confidential information, its effectiveness would be compromised by the fact that, the order for monitoring does not seem extend to other non-privileged forms of communication.

19. Considering this, the Registrar wishes to bring to the attention of the Single Judge that in addition to privileged visits, Mr. Jean-Pierre Bemba Gombo is entitled to receive non-privileged visits<sup>20</sup> (which are supervised<sup>21</sup> but not monitored) pursuant to Regulation 100 of the Regulations of the Court and Regulations 177, 179, 180, 181 and 183 of the Regulations of the Registry; and to receive private visits pursuant to Regulation 185 of the Regulations of the Registry.

20. Considering the fact that mail and correspondence is a means of communication used by detained persons at the ICC Detention Centre, and that all items of non-privileged mail are inspected,<sup>22</sup> the Registrar notes that the First Decision is silent on any specific measures to be taken at the ICC Detention Centre concerning the incoming and outgoing mail of Mr. Jean-Pierre Bemba Gombo. It is unclear to the Registrar whether for instance; specific attention would have to be paid to certain categories of correspondence.

21. Lastly, the Registrar wishes to highlight the potential for breach of confidentiality within the ICC Detention Centre itself. In this regard, the First Decision does not seem to address the matter of possible restriction of communications between detained persons such as the establishment of any conditions for contact between Mr. Jean-Pierre Bemba Gombo and any other detained person.

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<sup>20</sup> Annex A ex parte to the Defence only, gives an overview of the non- privileged visits received by Mr. Jean Pierre Bemba Gombo at the ICC Detention Centre thus far.

<sup>21</sup> Supervision of visits entails that such visits are conducted within the sight and hearing of the staff of the ICC Detention Centre and are monitored (thus not recorded) by video surveillance in accordance with Regulation 183 (1) of the Regulations of the Registry.

<sup>22</sup> Regulation 169 of the Regulations of the Registry.

22. At present, neither the Chief Custody Officer, nor the Registrar have information in their possession that would warrant monitoring of visits, consideration of a change in the private visits regime, a higher state of alert concerning mail communications or any type of restriction of communications or segregation. Thus, such restrictions or prohibitions as applicable under the Regulations of the Court and the Regulations of the Registry are currently not being applied.

23. Furthermore, whereas the Registrar can guarantee implementation of the First Decision, its effectiveness cannot be guaranteed for the factors mentioned in the preceding paragraphs.

#### **Time frame for implementation**

24. Lastly, the Registrar wishes to seek further clarification from the Single Judge as to the time duration of the order for monitoring as issued through the First Decision. In this regard, according to Regulation 175 (2) and (4), when such measure is applied by the Registry, telephone monitoring does not exceed a period of 14 calendar days. At the end of such period, the measure in place may be extended upon review.

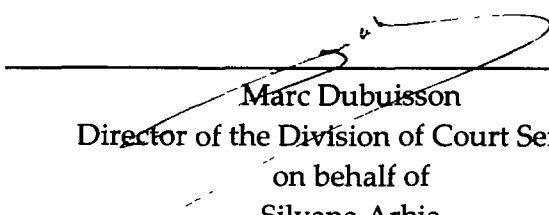
25. From an operational point of view, and in the interests of the proper management of the ICC Detention Centre, the Registrar would respectfully request the Single Judge an indication as to the time frame for applicability of the First Order.

**Conclusion**

26. In short, and with a view to the proper execution of the First Order related to the monitoring regime applicable to Mr. Jean Pierre Bemba, the Registrar respectfully requests clarification of the Single Judge on the following:

- a) Does the First Order entail a *post factum listening regime* on a random basis?
- b) If not, does the First Order entail a simultaneous *listening regime*?
- c) Does the First Order entail, applicability by the Registry of a broader monitoring regime to include non-privileged visits and possible prohibition of private visits?
- d) Does the First Order entail any specific action to be taken in respect of incoming and outgoing correspondence?
- e) Does the First Order entail any restrictions on contact with co-detained persons?
- f) What is the time frame for applicability of the First Order?

**RESPECTFULLY** submitted,



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Marc Dubuisson  
Director of the Division of Court Services  
on behalf of  
Silvana Arbia  
Registrar

Dated this 5 September 2008

At the Hague, the Netherlands