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

Date: 18 August 2008

PRE-TRIAL CHAMBER III

Before: Judge Fatoumata Dembele Diarra, Presiding Judge
Judge Hans-Peter Kaul
Judge Ekaterina Trendafilova

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

PUBLIC

**Public Redacted Version of ICC-01/05-01/08-72-Conf
“Victims and Witnesses Unit's observations on the protection measures available
in relation to the individuals concerned by the Prosecutor's proposal for redaction”**

Source: Registrar

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

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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

Registrar

Ms Silvana Arbia

Defence Support Section

-

Victims and Witnesses Unit

Mr Simo Väättäinen

Detention Section

-

**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 scellés concernant certains documents et à la modification du niveau de confidentialité de ceux-ci"¹;

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"² 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" of 4 July 2008³;

NOTING the "Prosecution's Application for Redaction Pursuant to Rules 81(2) and 81(4) of 16 July 2008⁴;

NOTING the Pre-Trial Chamber's "Decision concerning the Prosecutor's proposals for redactions" of 23 July 2008⁵;

NOTING the "Prosecutor's Decision concerning the Prosecutor's proposals for redactions" of 01 August 2008⁶ ("Prosecution's submission");

¹ ICC-01/05-01/08-21.

² ICC-01/05-01/08-31-US-Exp + Anxs.

³ ICC-01/04-01/08-39-US-Exp.

⁴ ICC_01/05-01/08-44-US-Exp.

⁵ ICC-01/05-01/08-48-US-Exp.

⁶ ICC-01/05-01/08-58-US-Exp.

NOTING Articles 68(1) and (4) and 43(6) of the Rome Statute, Rules 17 to 19, 81, 87 to 88 of the Rules of Procedure and Evidence and Regulations 23*bis* and 41 of the Regulations of the Court;

CONSIDERING that the Pre-Trial Chamber held that "cooperation among the organs of the Court and exhaustion of their resources and experience is crucial for ensuring the efficient and expeditious conduct of the proceedings with full respect for the rights of the defence and with due regard for the protection of victims and witnesses"⁷;

CONSIDERING that the Pre-Trial Chamber further ordered "the Prosecutor to consult immediately with the VWU and to provide VWU with all relevant information at the Prosecutor's disposal in order to establish which measures of protection are currently available for the individual persons concerned by the proposed redaction in conformity with rule 81(4) of the Rules and whether non-disclosure of the identity of the persons in question is the only appropriate measure under the current circumstances"⁸;

CONSIDERING that the Prosecution in its submission refers to the consultations with the VWU and the memorandum by the VWU⁹ and in particular refers to consultations with the VWU on the matter of risk assessment and possible alternative measures¹⁰;

CONSIDERING that the Prosecution further states that "[a]s soon as the identity of the witnesses is disclosed, they will be exposed to a security risk that cannot be managed according to the OTP with the present measures"¹¹;

⁷ ICC/-01/05-01/08-48-US-Exp, para. 41.

⁸ ICC/-01/05-01/08-48-US-Exp, page 15.

⁹ ICC-01/05-01/08-58-US-Exp, *inter alia* paras 6 *et seq.*, 24 *et seq.*

¹⁰ ICC-01/05-01/08-58-US-Exp, para. 8.

¹¹ ICC-01/05-01/08-58-US-Exp, para. 22.

SUBMITS the following observations on the measures of protection that are currently available for the individual persons concerned by the redactions proposed in the Prosecution's submission.

Introductory remarks

1. The Victims and Witnesses Unit ("VWU") recognises the need to proceed without undue delay. In particular, the VWU wants to avoid creating a situation where unnecessarily late referrals for protection measures may impact on the expeditiousness of the proceedings.¹² Close cooperation between the VWU and the Office of the Prosecutor ("Prosecution") is vital for fulfilling the Court's obligation to protect witnesses and to explore all possible means of protection.
2. In this context, the VWU wishes to outline the measures of protection that are currently available for the individual persons concerned by the redactions proposed in the Prosecution's submission. This submission does not address the individual requests for redactions as included in the Annexes of the Prosecution's submission nor does it evaluate the individual cases concerned by the Prosecution's request for redactions.
3. Bearing in mind the importance of an overall Court wide approach, the views and observations submitted by the VWU herein are consistent with the arguments advanced in other situations and cases. At the same time, the VWU remains open to explore creative and innovative ways to facilitate fair and expeditious proceedings and to ensure the appropriate level of protection as envisaged in the Rome Statute.

¹² The VWU notes the Trial Chamber's decision in *The Prosecutor v Lubanga*, ICC-01/04-01/06-1311-Anx2, para. 81: "It is apparent that the prosecution, until the very recent past, had not commenced the process of identifying and creating alternative protective measures; [...]. It referred a significant portion of the witnesses to the Unit for protective measures excessively late, [...]."

Available protection measures

4. The system of protection, regardless of the measure taken, is based on managing the risk by limiting the exposure of the witnesses to the threats, providing an adequate response if required and as last resort hiding them from the threats.
5. Any measure taken to protect a witness must be based on a standardized assessment of the risk that carefully evaluates and tests the information that is put forward as a basis for conducting such a risk assessment. The proposed measures must be proportional to the risk and be least intrusive to the wellbeing of the witness.
6. The very foundation of the Court's protection system lies on the application of good practises by any representative of the Court who interacts with witnesses. Good practices are aimed at hiding a witness's interaction with the Court from potential threats. In many cases this will mean that a witness's interaction with the Court should be hidden from the public.
7. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
8. A protective measure of last resort is the entry to the Court's protection programme (ICCPP) and subsequent relocation or resettlement of the witness and his or her close relations away from the source of the threat. The VWU can only recommend participation in the ICCPP if, among the other

requirements, the threshold in relation to the level of risk has been met.¹³ Participation in the ICCPP should always be a measure of last resort as it significantly impacts and disrupts the life of the individual, not least due to the dramatic impact of being uprooted from his or her normal surroundings and family ties and cut off from social contacts and networks. [REDACTED]

[REDACTED] it is of particular importance that the level of risk assessed in each particular case is the key to participation in the ICCPP.

9. Participation in the ICCPP is not a condition of operation of the Court. It purely aims at keeping the witness safe, based on an assessed level of risk. It is an instrument of the Court to ensure the safety and security where a witness is at risk due to his or her interaction with the Court and cannot be used to hamper or expedite judicial proceedings.
10. In addition to the operational protection measures, the procedural in-court measures granted by a Chamber will have to be applied in a coherent and complementing manner. Participation in the ICCPP will not negate the need to protect a witness's identity towards the public.

Limitations of the Court's protection measures

11. It is essential to have a realistic picture of the limitations of the protection measures available to the Court in order to facilitate an informed decision on protection measures. Most of these limitations arise from the fact that the Court does not have the support structures which the domestic judicial bodies have to provide for these protection measures.
12. The ICCPP provides the Court with some of the services that domestic judicial bodies have available from specialized police or witness protection units. However, the Court does not have its own army or police force on which it

¹³ [REDACTED]

could rely on when operating in the field. [REDACTED]

13. [REDACTED]

14. [REDACTED]

15. Although the Court places no restrictions on the number of people that can be relocated, [REDACTED]
[REDACTED]. In addition, it cannot be assumed that all witnesses are potentially suitable applicants for ICCPP. [REDACTED]
[REDACTED]
[REDACTED]. However, The ICCPP by its very nature requires that participants be removed from the current life and location, replacing it with something new.

16. Participants in the ICCPP, although removed and protected from any immediate threat, do remain vulnerable to exposure if information relating to their identity, location or the modalities of their protection are rendered public. The effectiveness of protection measures can be further limited by the witness and family members themselves revealing their interaction with the Court, including their involvement with ICCPP, and by other compromising behaviour. For the most part this element is outside the control of the VWU.

Information available in the public domain may further exacerbate this problem by corroborating such information or by bringing added attention to the protected witness.

Risk assessment

17. In order to provide appropriate protection, a clear picture of the risk that is to be mitigated needs to be established. The VWU has consistently maintained that the Court is responsible to protect witnesses only from the risks arising from their interaction with the Court. It follows that the source of the risk is an organization or an individual acting with malicious intent seeking to harm, kill or otherwise negatively influence a witness in order to have an adverse impact on the proceedings before the Court, or retaliate against a witness.¹⁴

Distinction between disclosure to the public and to the defence

18. By disclosing witnesses' identities to the public, the number of people having access to this information will inevitably be uncontrollable. Consequently, individuals potentially acting with malicious intent can gain access to this information. In many cases, including the cases at hand, the VWU will therefore recommend to redact identifying information about witnesses towards the public.
19. Distinctly different to the question of disclosing information to the public is the question of whether witnesses' identities can be disclosed to the defence. Assuming that the legal teams will adhere to a professional code of conduct and handle sensitive information responsibly and appropriately, the risk that might evolve by disclosure of the witness' identity to the defence, needs to be evaluated separately from the making such information accessible in the public domain.

¹⁴ [REDACTED]

20. In this respect, the Victims and Witnesses Unit identified three potential areas of concern that might have an impact on the level of risk.
21. Disclosure of the witness' identity to the defence will inevitably increase the number of individuals having access to this information and might, as a consequence also have an impact on the level of risk for the respective witness, for example by increasing the risk of accidental exposure. However, this alone will not increase the level of risk to such an extent that participation in the ICCPP is required, and any such risk would best be countered by applying good practices and providing available responses for any negative reactions, as for example [REDACTED].
22. Investigative activities of the defence might also expose Prosecution witnesses, thereby making their identity known to individuals with malicious intent. Again, it is crucial that the defence will apply good practices when conducting investigations in the field. As long as those good practices are carefully and appropriately applied, investigative activities of the defence will not increase the level of risk to such an extent that participation in the ICCPP is an inevitable requirement.
23. After disclosure of a witness' identity to the defence this information could be communicated to individuals with malicious intent. This could increase the level of risk for the witness to an extent requiring participation in the ICCPP. If information was provided that such communications are taking place, an assessment should be conducted and resulting actions should be based on the outcome of that assessment.
24. Any individual or organisation acting with malicious intent to harm, kill or otherwise negatively influence the testimony of a witness in order to have adverse impact on the proceedings before the Court requires time to plan and act on such intent. Consequently, it can be in the interest of an effective

¹² ICC-01/04-01/06-1082-Conf, paras 1-3.

protection regime to disclose sensitive information as late as possible (rolling system of disclosure). This could be seen as a manageable unintrusive means to reduce the risk to the witness concerned.

Participation in the ICCPP

25. Any measure recommended upon an application for participation in the ICCPP is based on a careful and independent evaluation and assessment of the information provided by the referral body. It also includes an extensive interview of the witness and the family members as well as analysis of other information available to the VWU.¹⁵
26. The recommended measure of protection needs to be proportional to the level of risk and aims at being least intrusive in the life of the individual. The experience of the VWU so far has proven that participation in the ICCPP can have a detrimental or deleterious effect on the individuals concerned and further strengthened the need to consider participation in the ICCPP only as a measure of last resort. Participation in the ICCPP requires the informed consent of the witness to be included and the acceptance of the conditions of the ICCPP.
27. It is also important to note that the recommendation that a referral is not required and/or a rejection of an application for admittance to the ICCPP does not equate to an absence of protection for the witness. Instead, it means that the VWU considers that the person is adequately protected without the intrusion of the ICCPP.
28. The VWU fully appreciates that circumstances can and will change. For that reason, the VWU will readily review its risk assessment should new information, in relation to the threat the witness is exposed to, be brought to the VWU's attention and will provide immediate protection if required.

¹⁵ [REDACTED]

Cooperation with the Prosecution

29. The Prosecution by default is the entity establishing the first contact with its witnesses. The Prosecution is therefore in a position to initially identify the potential need for protection measures and provide the necessary information to assess the appropriate level of protection. Close cooperation with the Prosecution from this early stage in the proceedings allows exploring and identifying the full range of possible protection measures to ensure appropriate protection and may help avoid more intrusive measures. The VWU invites and encourages the Prosecution at this early stage and throughout the proceedings to hold informal discussion to identify the protection needs of an individual.
30. Following these initial discussions and subject to circumstances of the individual case, the Prosecution as the referral body may decide whether to proceed with the application for participation in the ICCPP. This application process provides the Prosecution with the opportunity to present all the information that has led them to believe that the applicant should be considered for the ICCPP. The Prosecution plays an important role in providing the necessary information for the assessment of the VWU.
31. Should a referral for participation in the ICCPP not be deemed to be the appropriate action at a given time, the Prosecution can always consult with the VWU, provide further information and thereby trigger a new assessment process at any later stage of the proceedings. The overall aim throughout the proceedings is to ensure the appropriate protection of the individuals in question.
32. A referral for participation in the ICCPP will also be possible after a witness's identity has been disclosed to the defence, should the level of risk warrant such an action. It is therefore not necessary to redact a witness's identity

towards the defence temporarily so as to avoid pre-empting any possible protection measure.

Cases concerned by the Prosecution's proposal for redaction

33. In the case at hand, some cooperation has already taken place between the Prosecution and the VWU in respect to the concrete cases referred to in the Prosecution's submission. Following the Pre-Trial Chamber's decision of 23 July 2008, a meeting has taken place between representatives of the Prosecution and the VWU to explore the different options at this stage of the proceedings.

34. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]

35. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

¹⁶ See para. 15.

Concluding remarks

36. Any recommended protection measure will have to be based on the assessment of risk and be proportional to the assessed risk.

37. The VWU continues to recommend full redactions towards the public.

38. With regards to redaction towards the defence, to this date the VWU has not identified or been provided with any information to support that disclosure of witnesses' identities to the defence would result in communicating this information to individuals with malicious intent. Consequently, 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. As a result, the use of anonymous witnesses towards the defence is not required.

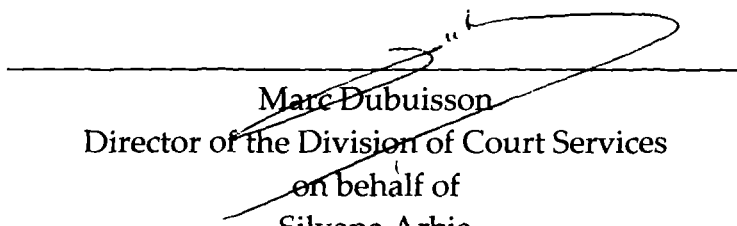
39. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] It is important to note that should new information arise that suggests any change in the level of risk, the possibility to refer for participation in the ICCPP will remain.

40. As a further safeguard, the VWU recommends monitoring the non-privileged communications of the accused after information is disclosed to the defence, at least on a random basis.¹⁸ It may be possible for the Court to assess the accused's financial and operational capabilities. [REDACTED]

¹⁷ [REDACTED]

¹⁸ Consideration of full-time monitoring should be based on the available intelligence at the time.

41. Bearing in mind that the risk of any information disclosed rises with the number of people having access to it and given the different standard of proof applicable in the pre-trial stage, the use of witnesses could be restricted to a minimum, thus ultimately also restricting the risk for witnesses. Such a system would also allow putting in place a system of rolling disclosure as outlined above for the remaining witnesses during the trial phase, should the respective Chambers deem such an approach to be appropriate.



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

Dated this 18 August 2008

At the Hague, the Netherlands