

**Cour
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**International
Criminal
Court**

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PRE-TRIAL CHAMBER III

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

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

Public Document

With confidential Annex *ex parte* Prosecutor only

**PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf
Second Decision on the Prosecutor's requests for redactions**

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

The Office of the Prosecutor

Fatou Bensouda, Deputy Prosecutor
Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence for

Nkwebe Liriss
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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Silvana Arbia

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Victims and Witnesses Unit

Simo Vaatainen

Detention Section

**Victims Participation and Reparations
Section**

Other

1. **Pre-Trial Chamber III** (the “Chamber”) of the International Criminal Court (the “Court”) received on 22 September 2008 the “Prosecution’s Amended Application for Proposed Redactions Pursuant to rules 81(2) and 81(4)” (the “Prosecutor’s Amended Submission”)¹ in respect of the annexes to the “Prosecutor’s Application for Warrant of Arrest under Article 58” (the “Prosecutor’s Application”)² and the “Prosecutor’s Submission on Further Information and Materials” (the “Prosecutor’s Further Submission”)³.

2. On 31 August 2008, Judge Hans-Peter Kaul, acting as a Single Judge on behalf of the Chamber⁴, decided on the requests for redactions related to the Prosecutor’s Application and the Prosecutor’s Further Submission. Thus, the present decision deals only with the respective annexes to the aforementioned documents.

3. The present decision is classified as confidential because it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential or under seal, *ex parte*, Prosecutor only. The Chamber is of the view that the making of such references in the present decision is required by the principle of fairness of proceedings for the defence, and considers that it is not inconsistent with the nature of the documents referred to. Moreover, references to those documents have been kept to a minimum.

I. Procedural History

4. On 16 July 2008 the Prosecutor filed the “Prosecution’s Application for Redaction Pursuant to Rules 81(2) and 81(4)”⁵ concerning information contained in witness statements annexed to the Prosecutor’s Application and the Prosecutor’s Further Submission.

¹ ICC-01/05-01/08-114-US-Exp.

² ICC-01/05-01/08-26-US-Exp.

³ ICC-01/05-01/08-29-US-Exp.

⁴ ICC-01/05-01/08-53.

⁵ ICC-01/05-01/08-44-US-Exp.

5. Thereafter, the Chamber issued on 23 July 2008 the “Decision concerning the Prosecutor’s proposals for redactions”⁶ ordering the Prosecutor, *inter alia*, to re-submit by 31 July 2008 his proposed redactions to the witness statements and related documents with factual information and explanations to substantiate his requests in accordance with the applicable standards as summarized and developed in that decision.

6. On 31 July 2008 the Chamber issued a decision on the evidence disclosure system and set a calendar for disclosure.⁷ It was ordered that the Prosecutor disclose to the defence all evidence in the Prosecutor’s possession or control under article 67(2) of the Rome Statute (the “Statute”) as soon as practicable and on a continuous basis. Furthermore, disclosure of evidence falling under rules 76 and 77 of the Rules of Evidence and Procedure (the “Rules”) was ordered to be conducted as soon as possible and no later than 3 October 2008.

7. On 1 August 2008 the Prosecutor submitted the “Prosecutor’s Decision concerning the Prosecutor’s proposals for redactions”.⁸ In this submission, the Prosecutor requested redactions of the identity of eleven witnesses over fourteen. He consented to disclose the names of witnesses 0036, 0025 and 0006 to the defense.

8. On 18 August 2008 the Victims and Witnesses Unit (the “VWU”) submitted 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”.⁹

⁶ ICC-01/05-01/08-48-US-Exp.

⁷ “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, ICC-01/05-01/08-55.

⁸ ICC-01/05-01/08-58-US-Exp.

⁹ ICC-01/05-01/08-72-US-Exp.

9. On 26 August 2008 Judge Hans-Peter Kaul¹⁰ decided to convene a status conference *ex parte* and *in camera* with the Prosecutor and the VWU¹¹ on the Prosecutor's proposals for redactions with a view to receive further relevant information and clarifications, which was held on 28 August 2008. On 29 August 2008 the Prosecutor submitted further information - media articles - as requested by the Single Judge during the status conference of 28 August 2008.¹²

10. On 31 August 2008 the Single Judge issued the "First decision on the Prosecutor's request for redactions"¹³ (the "First Decision on Redactions"), authorizing some of the redactions of information contained in the Prosecutor's Application and the Prosecutor's Further Submission. In this decision the Single Judge *inter alia*:

- (i) authorized temporary redactions of the names and identifying information related to witnesses 0009, 0022, 0023, 0029, 0033 and 0038 ("part I witnesses") and that those temporary redactions be automatically lifted at the latest 30 days before the beginning of the confirmation hearing and without a new decision of the Chamber, unless the Prosecutor or VWU submitted new, precise and detailed information which would make it necessary for the Chamber to reconsider its decision; and
- (ii) denied authorisation to redact the names and identifying information related to witnesses 0007, 0015, 0026, 0031 and 0037.

11. On 4 September 2008 the Prosecutor shared with VWU the individual risk assessments for all fourteen witnesses.¹⁴

¹⁰ ICC-01/05-01/08-53.

¹¹ "Decision convening a status conference", ICC-01/05-01/08-79-Conf-Exp.

¹² ICC-01/05-01/08-82-US-Exp.

¹³ ICC-01/05-01/08-85-Conf.

¹⁴ See para. 28 of the Prosecutor's submission of 22 September 2008, ICC-01/05-01/08-114-US-Exp.

12. On 10 September 2008, Judge Fatoumata Dembele Diarra, acting as Single Judge on behalf of the Chamber,¹⁵ decided to convene a second status conference *ex parte* and *in camera* with the Prosecutor and the VWU seeking further clarifications with regard to the redactions proposed.¹⁶

13. On 15 September 2008 the Single Judge requested¹⁷ the Prosecutor to re-submit, after consultation with the VWU, his proposals for redactions concerning the part I witnesses (see paragraph 10(i) above).

14. On 17 September 2008 the status conference (the “17 September Hearing”)¹⁸ was held before the Single Judge during which she ordered the Prosecutor to re-submit his proposal for redactions concerning the other eight witnesses (witnesses 0006, 0007, 0015, 0025, 0026, 0031, 0036 and 0037) whose names had been ordered to be disclosed¹⁹ to the defence as soon as possible (“part II witnesses”).²⁰

15. On 22 September 2008 the Prosecutor submitted the “Prosecution’s Amended Application for Proposed Redactions Pursuant to rules 81(2) and 81(4)”²¹ (the “Prosecutor’s Amended Submission”) concerning both part I and part II witnesses. At the same time, the Prosecutor *inter alia* requested that the Chamber extend the temporary redactions for the part I witnesses beyond 3 October 2008.

¹⁵ ICC-01/05-01/08-86.

¹⁶ ICC-01/05-01/08-99-Conf-Exp.

¹⁷ ICC-01/05-01/08-108-Conf-Exp.

¹⁸ ICC-01/05-01/08-T-5-Conf-Exp-ENG ET 17-09-2008.

¹⁹ See letter (a) of the operative part in, and the annex to the “First decision on the Prosecutor’s request for redactions”, ICC-01/05-01/08-85-Conf-Exp.

²⁰ ICC-01/05-01/08-T-5-CONF-EXP-FRA 17-09-2008, p. 91, lines 11 and 12.

²¹ ICC-01/05-01/08-114-US-Exp.

16. On the same day, the Single Judge ordered that the Prosecutor submit all risk assessments undertaken relating to the fourteen witnesses which the Prosecutor intends to rely at the confirmation of charges hearing.²²

17. On 23 September 2008 the Prosecutor filed the "Prosecution's Response to *"Ordonnance relative à la protection des témoins et au rapport d'évaluation des risques"*"²³ in which he provided all the risk evaluations relating to the fourteen witnesses.

18. On 25 September 2008 the Chamber issued a "Decision requesting further information on the security situation of certain witnesses"²⁴ in which the Chamber ordered the Prosecutor to submit by 26 September 2008 any further available information concerning the existence of an objectively justifiable risk to which part I witnesses are exposed which would justify his request to redact their names and identifying information beyond 3 October 2008.

19. On 26 September 2008 the Prosecutor filed the "Prosecutor's Submission of Additional Information Demonstrating the Existence of an Objectively Identifiable Risk" (the "Prosecutor's Additional Information").²⁵

20. On 29 September 2008 the Prosecutor filed the "Prosecution's Submission of Proposed Redacted Statement of Witness 0009" submitting his proposals for redactions concerning information in the statement of witness 0009.²⁶

²² "Ordonnance relative à la protection des témoins et au rapport d'évaluation des risques", ICC-01/05-01/08-111-US-Exp.

²³ ICC-01/05-01/08-119-US-Exp.

²⁴ ICC-01/05-01/08-121-US-Exp.

²⁵ ICC-01/05-01/08-122-US-Exp.

²⁶ ICC-01/05-01/08-124-US-Exp.

II. The Law

21. The Chamber notes articles 21, 54(3)(f), 57(3)(c), 61(5), 64(2), 67 and 68(1) of the Statute and rules 81(2), 81(4), 87 and 121 of the Rules.

22. The Chamber wishes to recall the relevant law and principles as set out in its previous decisions and those of the Appeals Chamber which is to be applied in determining the issue of authorizing the proposed redactions.²⁷

23. The Chamber recalls once again that its principal responsibility related to redactions prior to the confirmation hearing is to ensure that the proceedings are fair and expeditious and that they are conducted with full respect for the rights of the defence and with due regard to the protection of victims and witnesses.²⁸

24. As the Chamber has continuously emphasized, the overriding principle is that *full* disclosure should be made and that non-disclosure is an *exception* to this general rule which requires prior authorisation from the Chamber pursuant to rule 81 of the Rules (emphasis added)²⁹. Furthermore, the Chamber stresses that any decision authorising non-disclosure will require a careful assessment by the Chamber on a case-by-case basis.³⁰

²⁷ Pre-Trial Chamber III, ICC-01/05-01/08-48-US-Exp, ICC-01/05-01/08-85-Conf and ICC-01/05-01/08-121-US-Exp; Appeals Chamber, "Judgement on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence'", ICC-01/04-01/06-568; Appeals Chamber, "Judgement on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", ICC-01/04-01/06-773; Appeals Chamber, "Judgement on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", ICC-01/04-01/06-774; Appeals Chamber, "Judgement on the 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'", ICC-01/04-01/07-475; Appeals Chamber, "Judgement on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", ICC-01/04-01/07-476.

²⁸ Pre-Trial Chamber III, ICC-01/05-01/08-85-Conf, para. 12 and ICC-01/05-01/08-121-US-Exp, para. 17.

²⁹ Pre-Trial Chamber III, ICC-01/05-01/08-85-Conf, para. 13 and ICC-01/05-01/08-121-US-Exp, para. 18.

³⁰ Pre-Trial Chamber III, ICC-01/05-01/08-85-Conf, para. 13 and ICC-01/05-01/08-121-US-Exp, para. 18.

25. The Chamber equally recalls once again the criteria in respect of non-disclosure of identifying information of victims, witnesses and of their family members and other persons at risk on account of the activities of the Court, which comprise: (i) the danger caused by disclosure of their identity and whether non-disclosure could reduce that danger; (ii) the “necessity” of non-disclosure in the sense that less intrusive protective measures are not available; and (iii) proportionality of non-disclosure in view of the prejudice caused thereby to the rights of the accused and a fair and impartial trial. The danger must involve an objectively justifiable risk to the safety of the person concerned and must arise from disclosing the particular information to the defence, as opposed to the public at large. One of the factors to be considered in determining whether the rights of the suspect will be restricted only as far as strictly necessary is whether “non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect”.³¹

26. In assessing the present Prosecutor’s requests for redactions, the Chamber is mindful of the guidance given by the Appeals Chamber in its judgement of 13 May 2008,³² in particular the additional criteria set out in paragraphs 68 to 73, 98 and 99 which need to be taken into account while applying the test as set out above.

27. In addition, the Chamber also observes that the Appeals Chamber has held that “it may be permissible to withhold the disclosure of certain information from the defence prior to the hearing to confirm the charges that could not be withheld prior to trial”.³³

28. According to rule 81(2) of the Rules, the Prosecutor may request authorisation for redactions where material or information is in his possession or control and

³¹ Appeals Chamber, ICC-01/04-01/07-475, para. 72.

³² Appeals Chamber, ICC-01/04-01/07-475.

³³ Appeals Chamber, ICC-01/04-01/07-475, para. 68.

which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations.

29. The Chamber highlights that as held by the Appeals Chamber judgment of 13 May 2008, "it will be for the Prosecutor seeking redactions to establish that such redactions are warranted and, in particular, that disclosure of the information for which redactions are sought 'may prejudice further or ongoing investigations'".³⁴

30. In addition, the Chamber recalls that, according to the same Appeals Chamber judgment, those findings made in relation to redactions sought pursuant to rule 81(4) of the Rules "apply *mutatis mutandis* to redactions sought pursuant to rule 81(2) of the Rules".³⁵ Thus, for redactions to be granted, the Prosecutor will have to establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the defence (as opposed to the public) and could be overcome or reduced by redactions.³⁶

III. The Submissions

A. The Prosecutor's Amended Submission³⁷

31. In response to the then Single Judge's order of 15 September 2008,³⁸ the Prosecutor submitted an amended request for authorisation to redact witnesses statements pursuant to rules 81(4) and 81(2) of the Rules.

32. Based on the First Decision on Redactions which allowed the Prosecutor to submit new, precise and detailed information which would lead the Chamber to

³⁴ Appeals Chamber, ICC-01/04-01/07-475, para. 97.

³⁵ Appeals Chamber, ICC-01/04-01/07-475, para. 97.

³⁶ Appeals Chamber, ICC-01/04-01/07-475, para. 98.

³⁷ ICC-01/05-01/08-114-US-Exp.

³⁸ ICC-01/05-01/08-108-Conf-Exp.

reconsider the temporary nature of the redactions granted³⁹, the Prosecutor presents further information to evidence the risk run by the six witnesses concerned.

33. The Prosecutor submits that there has been no change in the individual circumstances of the six witnesses whose identifying information is not disclosed until 3 October 2008, [REDACTED]. However, the Prosecutor submits that for all six witnesses disclosure of such information would still expose them to a significant risk.⁴⁰

34. The Prosecutor further requests that the temporary redactions of the identifying information of the six witnesses, authorised by the First Decision on Redactions,⁴¹ be extended beyond 3 October 2008 as the disclosure of their identity would increase the risk to their safety. The Prosecutor refers in particular to four of the six witnesses for whom disclosure of their names and statements to the defence would “automatically increase knowledge of their contribution and likely draw attention to their case.”⁴² The Prosecutor contends that due to their psychological and financial situation the witnesses appear particularly vulnerable to intimidation attempts. In support of his request, the Prosecutor asserts [REDACTED]. The Prosecutor then informs the Chamber that “although these CAR officials do not believe that Jean-Pierre Bemba Gombo (“Mr Jean-Pierre Bemba”) could send individuals from the DRC to [intimidate witnesses], they appeared convinced that he could rely on CAR accomplices, especially supporters of former CAR President Patassé”.⁴³

35. Finally, in addition to seeking the authorisation for redactions, the Prosecutor submits an “Application for Prohibition, Regulation and/or Setting of Conditions for

³⁹ ICC-01/05-01/08-85-Conf, para. 35.

⁴⁰ ICC-01/05-01/08-114-US-Exp, para. 24.

⁴¹ ICC-01/05-01/08-85-Conf.

⁴² ICC-01/05-01/08-114-US-Exp, para. 29.

⁴³ ICC-01/05-01/08-114-US-Exp, para. 27.

Contact” and addresses several additional requests to the Chamber (the “Additional Requests of the Prosecutor”)⁴⁴.

B. The Prosecutor’s Additional Information⁴⁵

36. The Prosecutor provides to the Chamber additional information “not only [based] on the evidence of past events, but even more on a likelihood of future events”. He submits that “once the risks are materialized, it would be impossible for the Court to address adequately the situation of the witnesses”.⁴⁶

37. The Prosecutor underlines that the witnesses “continue to be at risk” and is providing the Chamber with several reasons, such as the fact that four of the witnesses are direct victims of the crimes that Mr Jean-Pierre Bemba is accused of and “are likely to be the first targeted by anyone wanting to undermine the Prosecutor’s case”. He contends that [REDACTED].⁴⁷

38. The Prosecutor refers to a report [REDACTED].⁴⁸

39. The Prosecutor further asserts that redactions are sought to a limited extend,⁴⁹ that the defence is permitted full access to the substantive information of the witnesses⁵⁰ and that redactions are subject to review in case circumstances change⁵¹.

40. The Prosecutor finally maintains that, “in the absence of adequate protection for the part I witnesses, [he] may not be able to rely on their evidence, which may make it significantly more difficult (...) to bring Bemba on trial”.⁵²

⁴⁴ See in the Prosecutor’s Amended Submission, ICC-01/05-01/08-114-US-Exp, paras 31-33 and 34 (c) to (f).

⁴⁵ ICC-01/05-01/08-122-US-Exp.

⁴⁶ ICC-01/05-01/08-122-US-Exp, para. 11.

⁴⁷ [REDACTED]

⁴⁸ [REDACTED]

⁴⁹ ICC-01/05-01/08-122-US-Exp, paras 18 and 24.

⁵⁰ ICC-01/05-01/08-122-US-Exp, para. 25.

⁵¹ ICC-01/05-01/08-122-US-Exp, para. 27.

⁵² ICC-01/05-01/08-122-US-Exp, para. 29.

IV. Conclusions of the Chamber in respect to the Prosecutor's requests for redactions

41. The Chamber emphasizes that the burden of providing necessary information for the Chamber to conduct the analysis as required by the Appeals Chamber lies with the Prosecutor. In this regard, the Chamber regrettably notes that, despite two status conferences, subsequent orders by the Chamber for additional information concerning the security situation of witnesses, the Prosecutor at times has provided the Chamber with general information not of true relevance for the present case.⁵³

42. Furthermore, the Chamber notes with particular concern that during the status conferences held on 28 August and 17 September 2008,⁵⁴ the Prosecutor conceded, with regard to at least 115 of their specific proposals for redactions were inconsistent or contradictory or otherwise not justified,⁵⁵ or that the justification for those proposals was not based on rule 81(4) but rather on rule 81(2) of the Rules. Regrettably, such a large number of erroneous proposals for redactions, in the view of the Chamber does not seem to indicate that due diligence and thoroughness were applied during the preparation and review of the Prosecutor's requests for redactions before their submission to the Chamber. The Chamber finds it necessary to caution the Office of the Prosecutor against any lack of diligence and thoroughness during the preparation and review of the requests for redactions knowing that 'the Chamber will anyhow review each individual proposal for redaction'. If further proposals for redactions should create similar doubts, whether they were diligently and thoroughly prepared and reviewed before being submitted to the Chamber, the Chamber will not hesitate to draw appropriate conclusions.

⁵³ See the finding of the Single Judge in his First Decision on Redactions at para. 26, ICC-01/05-01/08-85-Conf.

⁵⁴ ICC-01/05-01/08-T-4-CONF-EXP-ENG ET 28-08-2008 ; ICC-01/05-01/08-T-5-CONF-EXP-ENG ET 17-09-2008.

⁵⁵ As an example, the Chamber to point out that, at times, the prosecutor seeks to redact the name of a deceased. See ICC-01/05-01/08-T-5-CONF-EXP-ENG ET 17 09 2008, p. 34.

43. The Chamber recalls that the Prosecutor committed himself to the following:

"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* (emphasis added). It is important to emphasize that nothing of the 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".⁵⁶

44. The Chamber is aware of the pre-trial nature of proceedings in which redactions are sought and mindful of the possibility to withhold the disclosure of certain information from the defence prior to the hearing to confirm the charges that could not be withheld prior to trial.⁵⁷ The Chamber carried out its assessment of the Prosecutor's requests for redactions bearing in mind its duty to equally protect victims and witnesses and the rights of the defence. In particular, the Chamber is guided by the fact that the defence has effective access to the substantial information in the witness statements, that the redactions are not prejudicial to or inconsistent with the rights of Mr Jean-Pierre Bemba and a fair and impartial trial and that any shortcoming of procedural rights towards the defence is counterbalanced.

A. Redactions under rule 81(4) of the Rules

45. The Prosecutor requests authorisation to redact information pursuant to rule 81(4) of the Rules which can be classified into the following three categories:

- (i) Names and identifying information of witnesses;
- (ii) Names and identifying information of family members of witnesses; and

⁵⁶ ICC-01/05-01/08-122-US-Exp, para. 24.

⁵⁷ Appeals Chamber, ICC-01/04-01/07-475, para. 68.

- (iii) Names and identifying information of persons at risk on account of the activities of the Court.

(1) Names and identifying information of witnesses

46. For the sake of clarity, the Chamber recalls that pursuant to its First Decision on Redactions, the names and identifying information of the part II witnesses (see paragraph 14 above) have already been ordered to be disclosed to the defence and thus will not be dealt with in this decision.

47. The Prosecutor requests that the temporary redactions of the names and identifying information of part I witnesses authorized as *per* the First Decision on Redactions⁵⁸ be extended beyond 3 October 2008.

48. At the outset, the Chamber recalls that in this decision, it has been decided that the temporary redactions of the names and identifying information of the six witnesses “will be lifted automatically at the latest 30 days before the confirmation of the charges hearing and without a new decision of the Chamber, *unless the Prosecutor (...) submits new, precise and detailed information* which would make it necessary for the Chamber to reconsider its decision”⁵⁹ (emphasis added).

49. The Chamber first will examine if the information submitted by the Prosecutor is new, precise and detailed, as requested, to warrant the non-disclosure of the names and identifying information of the witnesses concerned beyond 3 October 2008.

⁵⁸ ICC-01/05-01/08-85-Conf.

⁵⁹ ICC-01/05-01/08-85-Conf, para. 35.

(a) Witnesses 0022, 0023, 0029, 0033 and 0038:

50. The Chamber is of the view that for witnesses 0022, 0023, 0029, 0033 and 0038, the risk assessed by the Single Judge on 31 August 2008⁶⁰ is still valid for the reasons explained in the Annex to his decision and as summarized below.

51. While it is uncertain that those witnesses may face negative repercussions once their names are disclosed to the defence, it has to be born in mind that [REDACTED] Mr Jean-Pierre Bemba has still a large number of supporters who have threatened and intimidated others in the past. The witnesses concerned are ordinary citizens and some of them are direct victims of the crimes Mr Jean-Pierre Bemba is charged with and therefore particularly vulnerable. [REDACTED].

52. The Chamber accepts the Prosecutor's further information which allows the Chamber to conclude that the names and identifying information of the aforementioned witnesses should continue to be redacted beyond 3 October 2008. Thus, the Chamber is of the view that disclosing at this stage the identity of witnesses 0022, 0023, 0029, 0033 and 0038 to the defence poses an objectively justifiable risk to their safety.

53. The Chamber further finds that, at this stage, there is no less intrusive alternative measure than the requested redactions to achieve the goal of protection. Furthermore, the Chamber considers that disclosing the names and identifying information of those witnesses could likely expose them to a greater risk of being threatened and re-victimised. The Chamber believes that relocation to a secure place

⁶⁰ ICC-01/05-01/08-85-Conf.

is too intrusive a measure, bearing in mind its enormous impact on the lives of the witnesses and the fact that the Prosecutor declared that he does not intend to call those witnesses to testify in Court at the confirmation of charges hearing.⁶¹

54. The Chamber is also equally concerned with the rights of the defence when dealing with the requested redactions. The Chamber ensures that those redactions are strictly limited to what is necessary to ensure the safety of witnesses 0022, 0023, 0029, 0033 and 0038 and are adequate to minimise this risk. As the Prosecutor has submitted, "nothing of the substance has been excluded; the redactions protect only the most sensitive information relating to their identifying information".⁶²

55. Finally, the Prosecutor shall continuously assess the risk to the safety and well-being of witnesses 0022, 0023, 0029, 0033 and 0038 and *immediately* inform the Chamber of any changes in the current security situation of any of these witnesses in order for the Chamber to be in a position to reconsider its decision on redactions.

56. Thus, the Chamber considers that the redaction of information contained in the statements of witnesses 0022, 0023 and 0029 as requested by the Prosecutor would not result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect.⁶³

57. With respect to witness 0033 and witness 0038 the Chamber finds that the redactions requested are so extensive that, if granted, the redacted statement which

⁶¹ ICC-01/05-01/08-T-5-CONF-EXP-ENG ET 28-08-2008, p. 11, lines 18-22: "With respect to your question on which witnesses we are intending to rely in the confirmation hearing, I would like to differentiate between calling witnesses and using witnesses in the charging document. For the time being the Prosecution does not intend to call any witnesses for the confirmation hearing".

⁶² ICC-01/05-01/08-122-US-Exp, para. 24.

⁶³ Appeals Chamber, ICC-01/04-01/07-475, para. 72.

would be disclosed, would not allow the defence to prepare properly for the confirmation of the charges. On the other hand, without such extensive redactions, it would be easy for the defence to identify the witnesses. Therefore, the Chamber is of the view that the only option, if the Prosecutor intends to rely on that evidence for the purposes of the confirmation of the charges, is to present summaries of those witness statements. The Chamber notes in this regard that the use of summaries is explicitly provided for in article 61(5) of the Statute and that the Appeals Chamber has already found that "[The] presentation of summaries at the confirmation hearing without disclosure of the identities of the relevant witnesses to the defence, as envisaged by the Pre-Trial Chamber, is not per se prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".⁶⁴ The Chamber finally recalls that it is the duty of the Prosecutor to ensure that the summaries contain all information relevant to the case and all potentially exculpatory information which may be contained in the statement.⁶⁵

(b) Witness 0009

58. With respect to witness 0009 the factual circumstances justifying the fact that his name and identifying information were not disclosed immediately to the defence [REDACTED]. By comparison, another witness [REDACTED] with a similar profile was never considered by the Prosecutor as in need for protection.

59. Revealing the name and identifying information of witness 0009 thus creates no additional risk to the witness that could be minimized through redactions. Considering the individual facts and specific circumstances of this case, the Chamber is of the view that the redactions are not needed to protect this witness and would

⁶⁴ Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-773, para. 50.

⁶⁵ ICC-01/04-01/07-644.

thus be prejudicial to and inconsistent with the rights of the accused and a fair and impartial trial. The Chamber therefore does not grant the authorization to redact the name and identifying information related to witness 0009.

(2) Names and identifying information of family members of witnesses

60. The Prosecutor requests authorisation pursuant to rule 81(4) of the Rules to redact the names and any identifying information of family members of all fourteen witnesses. The Prosecutor further requests authorisation pursuant to rule 81(4) of the Rules to redact the whereabouts or the information that could lead to the identification of the whereabouts of family members of the aforementioned witnesses.

61. The Chamber accepts that information about the whereabouts of family members may lead to their identification. Therefore, the redactions sought for this particular information will be examined in the present sub-section.

62. The Chamber attaches particular importance to the fact that the family members of the abovementioned witnesses are not involved in the Court's activities and may even ignore that a member of their family cooperated with the Court. Moreover, the Chamber notes that, [REDACTED].

63. Thus, the Chamber is of the view that disclosing the names and identifying information of family members of all witnesses poses an objectively justifiable risk to their safety.

64. Additionally, the Chamber considers that the requested redactions are strictly limited to what is necessary to ensure the safety of family members of all witnesses. It considers that the redactions are adequate to minimise the risk they might face and that, at this stage, there is no less intrusive alternative measure that can be taken to achieve the goal of protection.

65. Furthermore, in the view of the Chamber the redaction of this information will not result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect⁶⁶ insofar as the defence will still have access to the substantial information contained in the witness statements and have the possibility to challenge them.

66. For these reasons, the Chamber grants pursuant to rule 81(4) of the Rules authorisation to redact the names and identifying information of the family members of all fourteen witnesses as detailed in the Annex to this decision.

(3) Names and identifying information of persons at risk on account of the activities of the Court

67. The Prosecutor requests, pursuant to rule 81(4) of the Rules read in conjunction with article 54(3)(f) of the Statute, authorisation to redact the names and any identifying information of persons who are not witnesses, victims or members of their families on the basis that such persons “could be erroneously perceived as prosecution sources or witnesses”.⁶⁷

⁶⁶ Appeals Chamber, ICC-01/04-01/07-475, para. 72.

⁶⁷ ICC-01/05-01/08-114-US-Exp, paras 17-22.

68. The Chamber notes that the Prosecutor justifies most of his requests concerning the names and any identifying information of individuals allegedly falling under this category with the following two arguments: (i) "they possess knowledge incriminating the suspect" or (ii) "they themselves were the subject of the suspect's bad behaviour".⁶⁸

69. The Chamber notes that in relation to some of the Prosecutor's requests falling under this category the Prosecutor has not provided the Chamber with the necessary information enabling it to conduct the analysis required by the Appeals Chamber. The Chamber is even more concerned that, during the 17 September 2008 Hearing, the Prosecutor submitted the following:

"This is one of those cases, your Honour, in which redaction was requested pursuant to Article 54(3) (f) because simply by mentioning the name in the statement, there might be the perception of that person being a source for the Prosecution. Therefore, we would like to leave it to your assessment as to whether or not you deem appropriate that redaction."⁶⁹

70. The Chamber once again reiterates that the burden of providing the necessary information for the Chamber to conduct the analysis required by the Appeals Chamber lies with the Prosecutor. Thus, in those instances where the Prosecutor has not provided such information the requested redactions are rejected *in limine* as the Chamber is not in a position to properly discharge its duties.

71. The Chamber wishes to clarify that concerning the other requests for redactions, those which are adequately supported by the necessary information, it will assess them on a case-by-case basis. Depending on the context in the witness statement, only in those cases where the information concerned reveals identifying information

⁶⁸ ICC-01/05-01/08-114-US-Exp, para. 19.

⁶⁹ ICC-01/05-01/08-T-5-CONF-EXP-ENG ET 17-09-2008, p. 54, lines 1-7.

of those persons at risk on account of the activities of the Court, will the Chamber authorize the proposed redactions.

72. The Chamber observes that the persons considered by the Prosecutor to be at risk on account of the activities of the Court are in fact either alleged victims of the crimes referred to in the arrest warrant or members of the Mouvement de Libération du Congo ("MLC") or of the Forces armées centrafricaines ("FACA").

73. The Chamber considers that, in case of disclosure of their names and identifying information, those alleged victims and those who "possess knowledge incriminating the suspect" may be put at risk by being perceived as potential witnesses or collaborators with the Court. The Chamber accepts that they may face threats and retaliation by supporters of Mr Jean-Pierre Bemba. Therefore, the Chamber is of the view that, whenever adequately supported by facts, there is an objectively justifiable risk to the security of the aforementioned individuals if their names and any identifying information are disclosed to the defence.

74. In addition, the redactions of the names and identifying information of those individuals are strictly limited to what is necessary to ensure the safety of those persons at risk on account of the activities of the Court. The Chamber considers that, whenever adequately supported by facts, those redactions would minimise this risk and that at this stage of the proceedings, there is no less intrusive alternative measure that can be taken to achieve the goal of protection.

75. With regard to this specific category of individuals whose names and identifying information is redacted, the Chamber is aware that the defence may have an interest

in contacting them in order to challenge their version of the events. Therefore, the Chamber has the duty to carefully examine each request for redactions adequately supported by the necessary information on a case-by-case basis as detailed in the Annex of this decision. The Chamber ensured that the Defence has access to the substantial elements contained in the witnesses' statements.

76. However, in balancing the interests of the defence and the prejudice that might be caused to it against the rights of those individuals to be protected the Chamber concludes that, in light of the limited scope of the confirmation hearing, the few redactions which are strictly limited to their names and identifying information would not result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect.⁷⁰

77. For these reasons, the Chamber grants authorisation for redactions pursuant to rule 81(4) of the Rules, when adequately supported by facts, of the names and identifying information of persons at risk on account of the activities of the Court as detailed in the Annex of this decision.

B. Redactions under rule 81(2) of the Rules

78. As previously stated by the Chamber, the Prosecutor requests authorisation to redact information pursuant to rule 81(2) of the Rules. These requests for redactions can be classified into the following three categories:

- (i) Names and identifying information of potential prosecution witnesses;⁷¹

⁷⁰ Appeals Chamber, ICC-01/04-01/07-475, para. 72.

⁷¹ Appeals Chamber, ICC-01/04-01/07-476, para. 2: "The Appeals Chamber has defined potential prosecution witnesses as those individuals to whom reference is made in the statements of actual witnesses upon whom the

- (ii) Identifying information of persons present at the interviews with the witnesses; and
- (iii) Locations of interviews.

(1) Names and identifying information of potential prosecution witnesses

79. The Prosecutor requests, pursuant to rule 81(2) of the Rules, authorisation to redact information that could lead to the identification of individuals that the Prosecutor has interviewed or “seeks to interview in the foreseeable future”.

80. The Chamber considers that, in case of disclosure of their names and identifying information of the persons who have been interviewed or will be interviewed, they may be put at risk by being perceived as potential witnesses or collaborators with the Court. The Chamber considers that they may face threats and retaliation by the supporters of Mr Jean-Pierre Bemba which may compromise the ongoing and further investigation of the Prosecutor. The Chamber considers that the requested redactions are adequate to minimise this risk and are limited to what is strictly necessary to overcome any risk of prejudice to the ongoing and further investigation of the Prosecutor. The Chamber is also of the view that, at this stage of the proceedings, there is no less intrusive alternative measure that can be taken to achieve the goal of protecting ongoing or further investigation by the Prosecutor, and that authorising those redactions would not result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect.

81. For those instances where the Prosecutor’s requests for redactions are to be authorised, the Chamber will carefully assess and on a case by case basis the

Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the prosecutor or who the prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses”.

justification provided by the Prosecutor for seeking redactions and will provide in the Annex to this decision further details applying the principles set forth in this decision, mindful of the Appeals Chamber's guidance.

82. In instances where the Prosecutor fails to provide appropriate justification for his requests for redactions, the Chamber rejects the request for redactions *in limine*.

(2) Identifying information of persons present at the interviews with the witnesses

83. The Prosecutor requests authorisation to redact, pursuant to rule 81(2) of the Rules, the references to the names, signature and functions of the persons present during the interviews and who assisted in the process of taking the statements of the witnesses, such as interpreters and stenographers.

84. According to the Prosecutor, he has "a very limited pool of interpreters, stenographers and psycho-social experts for its investigations".⁷² In addition, the Prosecutor informed the Chamber that (i) the "psycho-social experts are retained on a consultancy basis"⁷³ and (ii) the Prosecutor "has a limited number of interpreters for [his] investigations, and some of them emanate from the CAR".⁷⁴

85. Under these circumstances, the Chamber accepts that disclosing to the defence the names and signatures of the interpreters and of the stenographers who assisted in the process of taking the statements would pose an objectively justifiable risk to the Prosecutor's further and ongoing investigations.

⁷² ICC-01/05-01/08-114-US-Exp-AnxD1, p.1

⁷³ ICC-01/05-01/08-114-US-Exp-AnxD1, p.1

⁷⁴ ICC-01/05-01/08-114-US-Exp-AnxE1, pp. 1-2.

86. Moreover, the Chamber considers that the requested redactions are adequate to minimise this risk and are limited to what is strictly necessary to overcome any risk of prejudice to the ongoing and further investigation of the Prosecutor. The Chamber is also of the view that, at this stage of the proceedings, there is no less intrusive alternative measure that can be taken to achieve the goal of protecting ongoing or further investigation by the Prosecutor, and that authorising those redactions would not result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect.

87. For these reasons, the Chamber grants authorisation, pursuant to rule 81(2) of the Rules, to redact only the names and signatures of the interpreters and stenographers who assisted in the process of taking the witness statements.

88. However, with regard to the Prosecutor's requests to redact the functions of those persons, such as "interpreters" or "stenographers", the Chamber considers that the redaction of this particular information seems not necessary as the disclosure of this information without the name of the interpreter/stenographer would not lead to the identification of the person concerned. In addition, the Chamber observes the many inconsistencies in the Prosecutor's requests: while in some statements those functions are proposed to be redacted, in other statements the Prosecutor does not seek redactions.

89. Therefore, the Chamber denies authorisation to redact the functions of those employees who assisted in the process of taking the statements of the witnesses.

(3) Locations of interviews

90. In some instances, the Prosecutor requests authorisation to redact, pursuant to rule 81(2) of the Rules, the references [REDACTED] as locations where the interviews occurred.

91. [REDACTED], the Prosecutor asserts that disclosing the location [REDACTED] would prejudice the Prosecutor's investigations because [REDACTED]⁷⁵[REDACTED].⁷⁶

92. [REDACTED] the Prosecutor advances that [REDACTED] and that "revealing this information would not only affect the security of OTP witnesses, but also jeopardize ongoing investigation[s]".⁷⁷

93. The Chamber notes that despite such assertion, there are some inconsistencies in the Prosecutor's requests for redactions and while he requests to redact the interview locations in the statements of witnesses 0006, 0009, 0026, 0029, 0033 and 0038, he does not request the redaction of the exact same information in the statements of witnesses 0022, 0023, 0025 and 0036.

94. The Chamber finds that, for the abovementioned reason, the authorisation for the redaction of the references to [REDACTED] is denied.

⁷⁵ [REDACTED]

⁷⁶ [REDACTED]

⁷⁷ [REDACTED].

VI. Conclusions of the Chamber in respect to the Additional Requests of the Prosecutor.

95. With regard to the Prosecutor's "Application for Prohibition, Regulation and/or Setting of Conditions for Contact" (see paragraphs 34(c) to 34(f) of the Prosecutor's Amended Submission) the Chamber notes that the Prosecutor requests the Chamber to issues several orders related to the contacts which may have the defence team or the defendant with respect to the names of part I and part II witnesses. For the sake of clarity, this decision will only address the issue of granting the Prosecutor's requests for redactions. The issue of regulating the contacts will be dealt with in a separate decision.

FOR THESE REASONS, THE CHAMBER

(a) decides to partially grant the Prosecutor's requests for redactions to the witness statements and related documents concerning witnesses 0006, 0007, 0009, 0015, 0022, 0023, 0025, 0026, 0029, 0031, 0036 and 0037 as specified in the Annex to this decision;

(b) decides that the Prosecutor shall, by no later than Friday 3 October 2008 at 16h00:

- (i) make available to the defence for Jean-Pierre Bemba Gombo the above-mentioned statements and related documents concerning witnesses 0006, 0007, 0009, 0015, 0022, 0023, 0025, 0026, 0029, 0031, 0036 and 0037 with the redactions as granted in the Annex to this decision;
- (ii) file in the record of the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the statements and related documents concerning witnesses 0006, 0007, 0009, 0015, 0022, 0023, 0025, 0026, 0029, 0031, 0036 and 0037 in conformity with the Chamber's decision of 31 July 2008 (ICC-01/05-01/08-55);

(c) orders the Prosecutor, in case he intends to rely on the statements of witness 0033 and witness 0038, to prepare a summary of those statements, to make them available to the defence for Jean-Pierre Bemba Gombo and to file them in the record of the case of The Prosecutor v. Jean-Pierre Bemba Gombo by no later than Friday 3 October at 16h00 in conformity with the Chamber's decision of 31 July 2008 (ICC-01/05-01/08-55);

(d) orders the Prosecutor to inform all witnesses immediately about the disclosure of their identities to the defence, in case they have not been informed yet;

(e) orders the Prosecutor to continuously assess the risk to the safety and well-being of witnesses 0022, 0023, 0029, 0033 and 0038 and to immediately inform the Chamber of any changes in the current security situation of any of the aforementioned witnesses.

Done in both English and French, the English version being authoritative.

Judge Fatoumata Dembele Diarra
Presiding Judge

Judge Hans-Peter Kaul

Judge Ekaterina Trendafilova

Dated this Wednesday 1 October 2008

At The Hague, The Netherlands