Cour Pénale Internationale

International Criminal Court

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

THE PRESIDENCY

Before: **Judge Philippe Kirsch, President**
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Confidential redacted

Reasons for the decision on the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008

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

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Mr Luis Moreno Ocampo
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REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar
Mr Didier Preira

Detention Section
Mr Anders Backman, Chief Custody Officer

The Presidency of the International Criminal Court (hereinafter "Court") has before it the applications of Mr Jean-Pierre Bemba Gombo for judicial review of the decision of the Registrar on the non-authorisation of private visits and the monitoring of non-privileged communications and visits and the resultant order of the Chief Custody Officer restricting the language, frequency and duration of visits.

The decision of the Registrar on the non-authorisation of private visits and the monitoring of non-privileged communications and visits is upheld. The resultant order is, in part, quashed and remitted.

I. PROCEDURAL HISTORY

1. On 10 November 2008, the Registrar issued the decision on the non-authorisation of private visits and the monitoring of non-privileged communications and visits[1] of Mr Jean-Pierre Bemba Gombo (hereinafter "detainee").[2] That decision (hereinafter "Impugned Decision") followed the decision of Pre-Trial Chamber III of 31 August 2008, which established that there were "reasonable grounds to believe that the [detainee] may be attempting to interfere with or intimidate a witness or to breach an order for non-disclosure".[3] Pre-Trial Chamber III consequently ordered the Registrar to "actively monitor regularly the non-privileged communications via telephone of [the detainee] subject to review by the Chamber".[4] The Registrar sought clarification of that order on 5 September 2008, (hereinafter "Request for clarification"), therein explaining the differences between the available monitoring regimes and noting that the effectiveness of the Chamber's order might be compromised since it was limited to the monitoring of telephone communications and did not extend to other non-privileged forms of communication such as visits, mail and contact with other detained persons.[5] On 22 September 2008, Pre-Trial Chamber III dismissed the Request for clarification on the ground that such request had no legal basis in the

[1] In this decision, all references to non-privileged communications and visits are to communications and visits from persons other than members of the defence team of the detained person, consular or diplomatic representatives, representatives of the independent inspecting authority and officers of the Court.
[2] Decision of the Registrar on the monitoring of the non-privileged communications and visits of Mr. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-231-Conf. A corrigendum to that decision was filed on 12 November 2008 and was registered in the record of the case as ICC-01/05-01/08-231-Conf-Corr.
[3] First decision on the Prosecutor's request for redactions, ICC-01/05-01/08-85-Conf, paragraph 40.
[4] ICC-01/05-01/08-85-Conf, paragraph 41 and page 16.
[5] Request for clarification of the "First Decision on the Prosecutor's request for redactions", ICC-01/05-01/08-95-Conf, paragraphs 4-23.

Rome Statute, the Rules of Procedure and Evidence or the Regulations of the Court.[6] The Registrar was ordered to monitor the detainee's non-privileged incoming and outgoing telephone calls by listening *post factum* to the recordings of telephone calls made and received by the detainee since his arrival at the detention centre on 3 July 2008 and report to it thereon (hereinafter "Decision of Pre-Trial Chamber III").[7]

2. On 10 November 2008, the detainee sought from the Presidency judicial review of the Impugned Decision, pursuant to regulation 106 of the Regulations of the Court, in essence, on the grounds that the Registrar had failed to substantiate her findings in the Impugned Decision and had violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Application").[8]

3. Also on 10 November 2008, pursuant to the Impugned Decision, the Chief Custody Officer informed the detainee of the way in which the monitoring of his non-privileged visits would be effected; entailing, *inter alia*, a reduction in the frequency and duration of such visits (hereinafter "Impugned Order").[9]

4. On 11 November 2008, the detainee supplemented his Application (hereinafter "Supplementary Application"),[10] therein alleging a breach of the Convention on the Rights of the Child and challenging the Impugned Order. By his Application and Supplementary Application (hereinafter "Applications"), the detainee requests the Presidency to set aside the Impugned Decision in its entirety.[11] In the alternative, the Presidency is requested to set aside the Impugned Decision in part, and allow the detainee to have private visits with his spouse and to maintain the familial and private character of his family visits.[12] The Presidency was requested to rule upon the matter urgently, in view of impending visits from the family of the detainee, scheduled for Thursday 13 November 2008 (with his spouse) and Saturday 15 and Sunday 16 November 2008 (with his spouse and five children).[13]

5. On 13 November 2008, by way of an interim decision on the Applications, the Presidency decided that the Impugned Decision would remain in effect until the

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[6] Decision on the Monitoring of Jean-Pierre Bemba Gombo's Non-Privileged Communications, ICC-01/05-01/08-118-Conf-tENG, paragraph 15.
[7] Decision of Pre-Trial Chamber III, page 8.
[8] Defence Application for Review of the Registry's Decision of 10 November 2008 entitled *Decision of the Registrar on the Monitoring of the Non-privileged Communications and Visits of Mr Jean Pierre Bemba Gombo*, ICC-01/05-01/08-233-Conf-tENG.
[9] Explanation of the reasons behind the reduction in the frequency and the duration of non-privileged visits to Mr. Jean-Pierre Bemba Gombo, Annex 1, ICC-01/05-01/08-248-Conf-Anx1.
[10] Supplementary Defence Application for Review of the Registry's Decision of 10 November 2008 entitled *Decision of the Registrar on the Monitoring of the Non-privileged Communications and Visits of Mr Jean Pierre Bemba Gombo*, ICC-01/05-01/08-236-Conf-tENG.
[11] Application, paragraph 32; Supplementary Application, paragraph 28.
[12] Application, paragraph 33; Supplementary Application, paragraph 29.
[13] Application, paragraph 31; Supplementary Application, paragraphs 25 and 27.

Presidency had had the opportunity to fully consider the issues at hand and reach a final decision.[14]

6. Also on 13 November 2008, the Presidency ordered the Chief Custody Officer to provide it with the "reasons behind the reduction in the frequency and duration of non-privileged visits to the detainee" (hereinafter "Order of 13 November 2008").[15]

7. On 14 November 2008, the Registrar filed an explanation of the measures taken by the Chief Custody Officer pursuant to the Impugned Decision (hereinafter "Explanation of the Registrar").[16] In response thereto, the detainee filed observations on 16 November 2008 (hereinafter "Observations").[17]

8. By decision of 21 November 2008, the Presidency dismissed the Applications in part with reasons to follow. The Presidency upheld the Impugned Decision in its entirety and quashed the Impugned Order, in so far as it related to the duration of visits conducted in English or French and the frequency of weekend visits and remitted those issues to the Chief Custody Officer for a new determination if deemed necessary.[18] The reasons for that decision are set out below.

II. PRELIMINARY PROCEDURAL ISSUE

9. By its Order of 13 November 2008, the Presidency ordered the Chief Custody Officer to provide it, by 4 pm on 14 November 2008, with the "reasons behind the reduction in the frequency and duration of non-privileged visits to the detainee". The Explanation of the Registrar was filed at 4.47 pm on 14 November 2008 and was marked "urgent" on the cover page.

10. The Presidency notes that the Explanation of the Registrar was filed 47 minutes out of time without explanation. The Presidency will nevertheless accept the filing as the infringement of the time limit set out in its Order of 13 November 2008 was, in the instant case, negligible and caused no discernable delay to the proceedings.

11. However, the Presidency emphasises the importance of complying with prescribed time limits; failure by the Registrar or a participant to adhere to time limits may otherwise entail rejection of a document filed.

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[14] Interim Decision concerning the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008, ICC-01/05-01/08-242-Conf.
[15] Order concerning the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008, ICC-01/05-01/08-245-Conf.
[16] Explanation of the reasons behind the reduction in the frequency and the duration of non-privileged visits to Mr. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-248-Conf.
[17] Note d'Observations, ICC-01/05-01/08-250-Conf.
[18] Decision concerning the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008, ICC-01/05-01/08-271-Conf-Exp. A confidential redacted version of the decision was filed as ICC-01/05-01/08-272-Conf.

III. STANDARD OF JUDICIAL REVIEW

12. It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.[19]

IV. MERITS

1. Relevant part of the Impugned Decision

13. By the Impugned Decision, the Registrar found, on the basis of her reports on the monitoring of the non-privileged telephone communications of the detainee, that the latter had been "using aliases and code names in order to avoid identifying people, locations, properties and amounts of money".[20] The Registrar found that the information contained in the reports provided "reasonable grounds to believe that the [detainee] may be attempting to 'interfere with the administration of justice' by making arrangements to avoid the identification and the freezing of his assets, and/or to 'jeopardise the interests of public safety or the rights or freedom of any person'".[21]

14. Based on the information provided to her on the identity of certain visitors, the Registrar found that it appeared that "they may be assisting [the detainee] to 'interfere with the administration of justice' and/or to 'jeopardise the interests of public safety or the rights or freedom of any person'".[22] She found reasonable grounds to believe that the aliases and code names identified through the monitoring of the detainee's non-privileged communications "could be agreed upon during visits taking place at the detention centre and that those visits may [...] serve as alternative means to 'interfere with the administration of justice' and/or to 'jeopardise the interests of public safety or the rights or freedom of any person'".[23]

15. On the basis of that reasoning, the Registrar decided not to grant private visits to the detainee for a period of 14 calendar days from the notification of the Impugned

[19] The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24.
[20] Impugned Decision, page 3.
[21] Impugned Decision, page 3.
[22] Impugned Decision, page 4.
[23] Impugned Decision, page 4.

Decision. The Registrar reminded the Chief Custody Officer to continue the careful and regular review of the detainee's incoming and outgoing mail, in accordance with regulation 169 of the Regulations of the Registry, and ordered him to continue monitoring the non-privileged communications of the detainee, pursuant to the Decision of Pre-Trial Chamber III (hereinafter all references to regulations are to the Regulations of the Registry ("Regulations") unless otherwise provided). Furthermore, the Chief Custody Officer was ordered to monitor all visits to the detained person for a period of 14 calendar days and, if necessary, to reduce the number of visits for the efficient and effective management of the detention centre and, at the end of the 14 calendar day period, report upon: the review of incoming and outgoing correspondence, the monitoring of non-privileged communications and the monitoring of visits.[24]

16. The Registrar stated that she remained seised of the situation and would review the necessity of continuing the monitoring of the non-privileged communications and visits and the non-authorisation of private visits at the end of the 14 calendar day period.[25]

2. Relevant part of the Impugned Order

17. Pursuant to the Impugned Decision, the Chief Custody Officer subsequently informed the detainee, by the Impugned Order, that the duration of his non-privileged weekly visits would be limited to one hour, where the language used is Lingala, or two hours, where the language used is English or French. The detainee was informed that, in addition to family visits taking place during the week, his spouse and children could pay him a visit every other weekend for one hour, where the language used is Lingala, or for two hours, where the language used is English or French. The detainee was required to inform the Chief Custody Officer, at least 48 hours before each visit, of the language that he and his visitors intended to use during the visit. The detainee was informed that an interpreter and a custody officer would be present during the visit, which would be terminated if the language spoken did not correspond to the language indicated to the Chief Custody Officer or if statements contravening the applicable provisions of the Regulations were made.[26]

3. Arguments of the detainee

18. The detainee argues that the wording of regulation 184 grants the Registrar a discretion as to whether to monitor "all" or "certain" visits and that consequently

[24] Impugned Decision, page 5.
[25] Impugned Decision, page 5.
[26] Impugned Order.

there is an obligation upon the latter to "indicate in a detailed manner why [she] chose to target all visits rather than only some of them", in order to avoid arbitrariness.[27] It is submitted that contrary to this principle of administrative law, the Registrar has failed to provide reasons for applying the exceptional measure to the detainee, particularly since it extends to visits from his spouse and five children.[28]

19. In addition, it is submitted that the Registrar has failed to provide evidence to support her allegation that the detainee used aliases and code names to conceal information and the identities of people.[29] It is argued that even if the detainee had used names unknown to the Registrar, the latter has not demonstrated how they expose witnesses or the administration of justice to risk.[30] Consequently, it is argued that there has been a "patent abuse of authority or misuse of power" by the Registrar.[31] In this context, the detainee draws the attention of the Presidency to opinions issued by the Victims and Witnesses Unit demonstrating that there is "no objective reason to fear that the [detainee] may endanger witnesses or interfere with the conduct of the proceedings".[32]

20. It is argued that by unilaterally removing the right of the detainee to receive private visits, the Registrar is preventing his contact with his family at a time when he needs their moral support the most, given his deprivation of liberty and the imminence of the confirmation hearing.[33] The detainee, who usually receives visits from his spouse every Wednesday and from his spouse and five children every Saturday and Sunday, argues that the close monitoring of these visits violates his right to privacy and family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "European Convention").[34] It is submitted that in order to determine whether the provisions of Article 8 of the European Convention have been respected, one must ask: whether the interference is authorised by law; whether it seeks to attain a legitimate objective; whether it is necessary; and lastly whether it is proportionate.[35]

21. The detainee submits that the Impugned Decision fails at the first hurdle as the interference in the instant case is not authorised by law and is therefore illegal, given that children are unlikely to fall within the ambit of provisions on the monitoring of communications of a detained person.[36] Furthermore, the detainee submits that depriving children (who are not implicated in the charges brought against their father) of private congress with the latter is disproportionate to the objective sought, namely

[27] Application, paragraph 10.
[28] Application, paragraphs 10 and 11.
[29] Application, paragraphs 12 and 13.
[30] Application, paragraph 14.
[31] Application, paragraph 15.
[32] Application, paragraph 19.
[33] Application, paragraphs 16.
[34] Application, paragraph 17; Supplementary Application, paragraph 17.
[35] Supplementary Application, paragraph 18.
[36] Supplementary Application, paragraph 19.

to ensure the smooth conduct of proceedings and to protect the rights of third parties.[37] Whilst he does not object to the recording and subsequent listening to of his telephone conversations, the detainee states that barring cases of exceptional necessity supported by substantial evidence, which is not the instant case, he should be detained under a regime for prisoners on remand as opposed to a regime for convicted prisoners.[38]

22. The detainee argues that the Impugned Decision is at odds with, and misinterprets the orders in the Decision of Pre-Trial Chamber III.[39] It is submitted that the said decision, *inter alia*, rejected the Registrar's Request for clarification (which had recommended the active monitoring of the detainee's communications, including emails, telephone calls, contact with other detained persons and visits), ruling that such monitoring be limited to listening to the detainee's recorded non-privileged telephone communications *post factum*.[40] Consequently, it is argued that in taking "a decision on the same issue with a divergent bent [...] the Registrar evidently overstepped and misused her power".[41]

23. In relation to the Impugned Order, the detainee argues that the considerable reduction in the duration of family visits without explanation, from half a day to one or two hours, diminishes the value of visits from his spouse and five children, who travel from Belgium especially.[42] It is argued that the restrictions in duration do not allow for real family interaction, especially considering the number of children.[43] It is further argued that the reduction in the duration of family visits and the monitoring of such visits is likely to disrupt the relaxed atmosphere and the privacy of the family, to which the children in particular are entitled.[44] The detainee requests the authorisation of family visits of the usual length and the institution of a monitoring regime which takes into account the requirement to respect the mental health of his young children, with a view to sparing them from trauma arising from the sudden and unwarranted intrusion into their family life.[45]

24. The detainee argues that except for his eldest daughter, who has barely exceeded the age of minority (eighteen years of age), all of his children are minors falling squarely within the ambit of the Convention on the Rights of the Child, which prohibits the infliction upon children of punishment on the basis of their parents' "activities or

[37] Supplementary Application, paragraph 20.
[38] Application, paragraph 20.
[39] Application, paragraph 21.
[40] Application, paragraphs 22-25.
[41] Application, paragraph 27.
[42] Supplementary Application, paragraph 13. At paragraph 18 of his Observations, the detainee maintains that prior to the Impugned Decision, he was entitled to family visits on Saturdays and Sundays from 1pm to 4.45pm.
[43] Supplementary Application, paragraphs 11 and 13.
[44] Supplementary Application, paragraph 12.
[45] Supplementary Application, paragraph 14.

choices".[46] It is submitted that the said Convention requires States Parties to take into account the duties and obligations of parents in relation to the well-being of their children.[47] It is further submitted that his children's right to private life under the said Convention has been violated, as the Registrar failed to advance specific grounds for the interference.[48]

4. Determination of the Presidency

(a) Non-authorisation of private visits and the monitoring of visits

25. The detainee argues that the findings of the Registrar in the Impugned Decision are unsubstantiated.

26. With respect to private visits, regulation 185 provides: "[a] place within the detention centre may be made available for the detained person to meet with his or her spouse or partner". Private visits are granted to the detained person upon request, subject to regulation 180(1), after his or her having spent one month in the detention centre. Regulation 180(1) provides, in relevant part, that such visits shall be granted unless the Chief Custody Officer or Registrar has reasonable grounds to believe, *inter alia*, that a detained person may be attempting to interfere with the administration of justice or that the visit jeopardises public safety or the rights or freedom of any person.

27. With respect to the monitoring of visits, regulation 184(1) provides that where the Chief Custody Officer has reasonable grounds to believe, *inter alia*, that a detained person may be attempting to interfere with the administration of justice or to jeopardise public safety or the rights or freedom of any person, he or she may seek the permission of the Registrar to monitor the visits of that person. In addition, regulation 184(2) provides, in relevant part, that the Registrar "may personally order that all or certain visits to the detained person concerned be monitored". Where the Registrar decides to exercise his or her own power to monitor visits pursuant to regulation 184(2), the test set out in regulation 184(1) applies, in that he or she must also have reasonable grounds to believe that the conditions set out therein have been met.

28. As such, in order to exercise his or her power to refuse, or to monitor, a visit, the Chief Custody Officer or Registrar must have reasonable grounds to believe that one or more of the grounds listed in regulations 180(1) or 184(1) exist in a particular case. That test forms a safeguard against the arbitrary exercise of power. Whether its conditions are satisfied in any particular case is essentially a question of fact depending on all the circumstances and is for the Chief Custody Officer or Registrar

[46] Supplementary Application, paragraphs 22 and 23.
[47] Supplementary Application, paragraph 24.
[48] Supplementary Application, paragraph 23.

to determine. The test is in part subjective, in that the Chief Custody Officer or Registrar must have formed a genuine belief in his or her own mind that, *inter alia,* the detained person may be attempting to interfere with the administration of justice or to jeopardise public safety or the rights or freedom of any person or that the private visit jeopardises public safety or the rights or freedom of any person. It is in part an objective test, in that there must also have been reasonable grounds for such a belief. The objective limb of the test does not require the Presidency to look beyond what was in the mind of the Chief Custody Officer or Registrar when the power was exercised. The information acted upon by the Chief Custody Officer or Registrar may have been within his or her personal knowledge or may have been reported to him or her and the reasonable belief may be based on information which turns out later to be wrong.[49]

29. In considering whether the Registrar had, in the instant case, reasonable grounds for deciding not to grant private visits to the detainee and to monitor all of his non-privileged visits, the Presidency has had regard to the reports on the monitoring of the non-privileged telephone communications of the detainee upon which the Impugned Decision was based.[50] [REDACTED]

30. [REDACTED] the Registrar was entitled to come to the conclusion to which she came in the instant case; her decision not being an irrational one. To this end, it is recalled that the test set out in regulations 180(1) and 184(1) is one of reasonable belief, requiring something less than knowledge on the part of the Chief Custody Officer or the Registrar. The Presidency finds the Registrar to have held a genuine belief that the detainee may have been attempting to interfere with the administration of justice or to jeopardise public safety or the rights or freedom of any person or that the private visit would jeopardise public safety or the rights or freedom of any person. That belief is held to be a reasonable one in all the circumstances of the instant case.

31. As to the arguments of the detainee that the Registrar erred in law by taking a decision which Pre-Trial Chamber III had declined to take, the Presidency notes that the Chamber dismissed the Registrar's Request for clarification on the grounds that it had no basis in the Rome Statute, the Rules of Procedure and Evidence or the Regulations of the Court and did not enter into the merits of the measures suggested therein.[51] The Registrar clearly has the power to refuse visits to detained persons or to order the monitoring of non-privileged visits, pursuant to regulations 180 and 184 respectively and, as found above, that power was properly exercised in the instant case.

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[49] See Decision of the Presidency of 4 November 2008, ICC-RoR217-01/08-10-Conf-Exp, paragraph 32.
[50] [REDACTED]
[51] See footnote 6 above. Whilst Pre-Trial Chamber III did not address the merits of the Request for clarification, by way of obiter it opined that "although further monitoring measures may enable witnesses to be protected more effectively, extending such measures to include all of [the detainee's] correspondence, visits, and contact with the other detained persons would make the conditions of his detention particularly difficult", paragraph 20.

(b) Violation of Article 8 of the European Convention on Human Rights

32. The detainee argues that the restrictions imposed upon his visits during his pre-trial detention are in breach of Article 8 of the European Convention (hereinafter all references to "Article 8" are to that of the European Convention).

33. Regulation 100(1) of the Regulations of the Court provides: "[a] detained person shall be entitled to receive visits". Regulation 179(1) of the Regulations of the Registry provides, in relevant part, that "[t]he Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links".

34. The legal texts of the Court must be applied consistently with internationally recognised human rights, pursuant to article 21(3) of the Rome Statute. Under this ground for judicial review, without passing judgment on their applicability, the Presidency will have regard to the European Convention and the jurisprudence of the European Court of Human Rights (hereinafter "European Court") as the detainee has alleged a breach of that Convention.

35. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

36. The European Court has frequently considered the application of Article 8 in the context of family visits of detained persons, holding that:

> "[D]etention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family. Such restrictions as limitations imposed on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision. Nevertheless, any restriction of that kind must be applied 'in accordance with the law', must pursue one or more legitimate aims listed in paragraph 2 and, in addition, must be justified as being 'necessary in a democratic society'".[52]

[52] *Vlasov v. Russia*, no. 78146/01, Judgment of 12 June 2008, paragraph 123.

37. In the instant case, the detainee is subject to a detention regime involving the non-authorisation of private visits and the monitoring of non-privileged visits. The Presidency considers that these measures constitute an interference with the exercise of the detainee's right to respect for his private and family life within the meaning of Article 8. However, for the reasons set out below there has been no violation of Article 8.

38. In considering whether the interference in question is "in accordance with the law", a three-fold test of foreseeability is applied, whereby: the interference must have some basis in law; the law must be accessible; and the law must be formulated with sufficient precision to enable an individual to regulate his or her conduct. In addition, the law "must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference".[53]

39. In the instant case, the Presidency considers the interference to have been in accordance with the law. It is noted that the measures in question were prescribed by regulations 180 and 184 of the Regulations of the Registry and therefore had a basis in law. The curtailment of the right of a person in pre-trial detention to private visits with his or her spouse or partner and the monitoring of non-privileged visits are not, in themselves, incompatible with Article 8.[54] In addition, the Regulations of the Registry relevant to detention are public and accessible to detained persons by virtue of regulation 93(1) of the Regulations of the Court which provides that "[w]hen a detained person arrives at the detention centre, he or she shall be provided with a copy of [...] the Regulations of the Registry relevant to detention matters in a language which he or she fully understands and speaks". Furthermore, the regulations relevant to detention are formulated with sufficient clarity and do not confer upon the Registrar an unfettered discretion in relation to the issues at hand, as they define, in regulations 180(1), 184(1), 184(2) and 185(2), the circumstances in which visits may be refused or monitored.

40. The grounds put forward by the Registrar in the Impugned Decision, as justification for the interference, were: the attempt to interfere with the administration of justice and/or the attempt to jeopardise the public safety or the rights or freedom of any person. As to the legitimacy of those aims, the European Court has recognised that "les restrictions apportées aux visites familiales d'un détenu provisoire peuvent se

[53] *Vlasov v Russia*, no. 78146/01, Judgment of 12 June 2008, paragraph 125; *Silver and others v The United Kingdom*, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment of 25 March 1983, paragraphs 84-88.
[54] As regards the curtailment of private visits, see *Kalashnikov v. Russia*, no. 47095/99, Decision of 18 September 2001, paragraph 7 and *Aliev v Ukraine*, no. 41220/98, Judgment of 29 April 2003, paragraph 188. As regards the monitoring of visits, see *Messina v. Italy (No. 2)*, no. 25498/94, Judgment of 28 September 2000, paragraphs 66-71.

justifier par une multitude de facteurs – le risque de collusion ou de soustraction, la protection des témoins, la nécessité d'assurer un bon déroulement de l'instruction".[55] The aims pursued by the Registrar in the Impugned Decision are legitimate aims and are compatible with the aims listed in Article 8(2), particularly the prevention of disorder or crime and the protection of the rights and freedoms of others.

41. As to the necessity of the interference, the European Court has held that in order to be necessary in a democratic society the interference must correspond to a pressing social need and, in particular, must remain proportionate to the legitimate aim pursued. The Presidency recalls its finding at paragraph 30 above that the Registrar was entitled to reach the conclusion that the detainee may be attempting to interfere with the administration of justice, or to jeopardise the interests of public safety or the rights or freedom of any person or that the private visit would jeopardise public safety or the rights or freedom of any person.

42. Contrary to the submissions of the detainee that the monitoring of his visits denies him the right to receive visits from his family in private, the Presidency notes that such visits are not, in any case, ordinarily of a private character. Non-privileged visits, including family visits, are always subject to supervision in accordance with regulation 183(1), which provides, in relevant part, that "[v]isits should be conducted within the sight and hearing of the staff of the detention centre and shall be monitored by video surveillance". This is to be contrasted with "private visits" (i.e. conjugal visits) between a detained person and his or her spouse or partner, pursuant to regulation 185, which, by their very nature and by virtue of regulation 183(1), may not be supervised. It is noted that, in the instant case, whilst the detainee may not receive private visits from his spouse, he may still receive visits from the latter and has not been prohibited from receiving visits from his family, albeit under increased surveillance. As such, it cannot be said that the interference in the instant case destroys the essence of the detainee's right to a private and family life. In light of all the above, the Presidency finds that the decision of the Registrar not to grant private visits to the detainee and to monitor all non-privileged visits to the detainee was proportionate to the legitimate aims pursued.

43. In relation to the arguments of the detainee that the interference may have an adverse effect on the mental health of his children, the Presidency recognises that the notion of "private life" in Article 8 encompasses the moral and physical integrity of the person and that mental health is a crucial part of private life associated with the aspect of moral integrity.[56] However, not every act or measure which may be said to affect adversely the moral integrity of a person necessarily gives rise to an interference with

[55] *Lavents v. Latvia*, no. 58442/00, Judgment of 28 November 2002, paragraph 141.
[56] *X and Y v. The Netherlands*, no. 8978/80, Judgment of 26 March 1985, paragraph 22; *Bensaid v. The United Kingdom*, no. 44599/98, Judgment of 6 February 2001, paragraph 47.

that person's private life.[57] In the instant case, the detainee has failed to establish that his children's moral integrity has been substantially affected to a degree falling within the scope Article 8. As noted in the preceding paragraph all visits by the detainee's children would, in any event, have been supervised prior to the Impugned Decision. Moreover, in light of the above findings, any such interference would not be in breach of Article 8.

(c) Violation of the Convention on the Rights of the Child

44. The detainee argues that there has been a violation of the Convention on the Rights of the Child.

45. As noted at paragraph 34 above, the legal texts of the Court must be applied consistently with internationally recognised human rights, pursuant to article 21(3) of the Rome Statute. Under this ground for judicial review, without passing judgment on its applicability, the Presidency will have regard to the Convention on the Rights of the Child as the detainee has alleged a breach of that Convention.

46. With respect to the detainee's argument that his children may not be punished for his alleged activities or choices pursuant to Article 2(2) of the Convention on the Rights of the Child, the Presidency considers that the monitoring measures taken by the Registrar in relation to the detainee's visits do not constitute a form of punishment; rather, they constitute a security measure, which has been deemed proportionate to the legitimate aims pursued.

47. As regards the arguments of the detainee that the Impugned Decision infringes the rights of his children to privacy under the Convention on the Rights of the Child, the Presidency notes the terms of Article 16(1) of the said Convention, which stipulates, in relevant part, that "no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence". In light of the finding of the Presidency at paragraphs 37 to 43 above, it cannot be said that there has been a breach of the said article.

(d) Language, frequency and duration of visits

48. The detainee contests the restrictions on the frequency and duration of his visits imposed by the Impugned Order. The Presidency will consider the arguments of the detainee with respect to the Impugned Order, since it results from the Impugned Decision and was endorsed by the Registrar.[58]

[57] *Costello-Roberts v. The United Kingdom*, no. 13134/87, Judgment of 25 March 1993, paragraph 36.
[58] See Explanation of the Registrar, paragraphs 1-3.

49. The Presidency finds the restriction of the languages used during visits to the detainee to Lingala, French or English to be reasonable as they are the languages spoken by the detainee and those that the Court has the capacity to monitor.[59] Similarly, the Presidency, being mindful of the [REDACTED],[60] finds reasonable the restriction on the duration of visits to one hour where the language used is Lingala.

50. However, the Presidency does not consider that adequate reasons for the restriction on the frequency and duration of visits where the language used is French or English have been provided in the Explanation of the Registrar. It was indicated, with respect to such visits, that [REDACTED].[61] The monitoring scheme currently in place for visits to the detainee where the language used is French or English [REDACTED].[62] The task of the language assistant is to inform the custody officer if the language used during the visit does not correspond to the language the detainee indicated to the Chief Custody Officer or if statements contravening the applicable provisions of the Regulations are made, so as to enable the immediate termination of the visit if deemed necessary.[63] The Presidency notes that [REDACTED]. The Presidency considers that it has not been adequately made out that a custody officer requires the support of a language assistant if the visit between the detainee and his visitor(s) is conducted in a language in which the custody officer present is proficient. Furthermore, in light of the requirement that the detainee notify the Chief Custody Officer at least 48 hours in advance of the language to be used during a visit,[64] it has not been adequately explained why the monitoring of the detainee's visits could not be planned in such a way as to only require the presence of a custody officer fluent in French or English.

51. Similarly, [REDACTED] have been raised, in the Explanation of the Registrar, as a justification for the restriction on the frequency of visits to the detainee, namely that [REDACTED].[65] In view of the finding in the foregoing paragraph, these reasons have not been made out and the Presidency has not considered the issue of frequency separately.

52. In addition, it is not clear from the reasoning contained in the Explanation of the Registrar, whether the Chief Custody Officer put his mind to alternative measures, available and feasible in the circumstances, which would be less restrictive to the detainee.

53. In light of the above, the Impugned Order, in so far as it concerns the duration of visits where the language used is French or English and the frequency of weekend

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[59] [REDACTED] Explanation of the Registrar, Annex 2, paragraph 1.
[60] Explanation of the Registrar, Annex 2, paragraphs 1-2.
[61] Explanation of the Registrar, Annex 2, paragraph 2.
[62] Impugned Order; Explanation of the Registrar, Annex 2, paragraph 1e.
[63] Impugned Order.
[64] Impugned Order
[65] Explanation of the Registrar, Annex 2, paragraph 3.

visits to the detainee, is quashed and remitted for re-determination to the Chief Custody Officer. Upon proper consideration of the issues raised herein, the Chief Custody Officer may reach the same or a different conclusion.

54. In relation to the classification of Annex 2 to the Explanation of the Registrar, the Presidency is unconvinced that the entire annex need retain the classification of "*ex parte* Registrar only".[66] The Registrar is therefore ordered to file a redacted version of Annex 2 to the Explanation of the Registrar.

V. OBSERVATIONS

55. The detainee has drawn the attention of the Presidency to the manner in which the visit with his spouse, on Thursday 13 November 2008, as well as the visit with his spouse and his children, on Saturday 15 November 2008, was monitored. During the visit of 13 November it is asserted that the language assistant, equipped with a tape recorder, placed herself at close proximity to the detainee and his spouse, which was degrading and humiliating.[67] Similarly, the detainee reported that during the visit of 15 November, the language assistant, equipped with a tape recorder, placed herself between the detainee and his children, which the detainee claims was traumatising for them, taken together with the fact that they were told that the visit would be terminated if they failed to speak French and articulate distinctly.[68]

56. Whilst the implementation of the monitoring regime is left entirely to the discretion of the Chief Custody Officer, the latter should endeavour, in so far as possible, to apply the least intrusive measures necessary to safeguard the interests that the monitoring regime seeks to protect.

57. Any decision taken by the Chief Custody Officer or Registrar to monitor the visits of a detained person is, pursuant to regulation 184(4), subject to review by the Registrar in consultation with the Chief Custody Officer, every 14 calendar days; whereafter the Registrar may decide to extend the monitoring period or to return to the normal regime of visits. Whilst there is no express corresponding obligation, in the Regulations, upon the Registrar to review decisions refusing authorisation of private visits, the latter has correctly recognised in the Impugned Decision the need for a regular review of such decisions. The review of the necessity of continuing to monitor the non-privileged visits of the detainee and the non-authorisation of private visits

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[66] The Explanation of the Registrar states that "the explanation given by the Chief Custody Officer shall be treated as confidential and has been filed as *ex parte Registrar only* because the document provides sensitive information related to the security and good order of the detention centre the knowledge of which by other parties would defeat the purpose of its content", page 4.
[67] Observations, paragraph 23.
[68] Observations, paragraph 21.

requires a careful assessment by the Registrar of whether grounds for a renewed decision exist. The Registrar must subject all circumstances surrounding the case to rigorous scrutiny.

The Applications are dismissed in part.

The decision of the Registrar is upheld.

The order of the Chief Custody Officer is quashed, in so far as it relates to the duration of visits conducted in English or French and the frequency of weekend visits. Those issues are remitted to the Chief Custody Officer for a new determination if deemed necessary.

The Registrar is ordered to file a redacted version of Annex 2 to the Explanation of the Registrar (ICC-01/05-01/08-248-Conf-Exp-Anx2).

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

Judge Philippe Kirsch

President

Dated this 5 December 2008

At The Hague, The Netherlands