

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 19 April 2013

TRIAL CHAMBER III

**Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki**

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

Public

**Decision on the “Defence Motion for Disclosure of VWU Security
Assessments of Defence Witnesses”**

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson
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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 Defence

States Representatives

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Mr Herman von Hebel

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Victims and Witnesses Unit

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Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Chamber”) of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on the “Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses” (“Decision”).

I. Background and submissions

1. During the hearing of 23 October 2012¹ the Presiding Judge questioned Witness D04-64 in relation to an apparent inconsistency between his testimony and the information provided in the “In court protection measures report CAR-D04-PPPP-0064” (“Witness D04-64’s Protection Report”) that was sent exclusively to the Chamber by the Victims and Witnesses Unit (“VWU”) by email on 18 October 2012.²

2. On 1 November 2012, further to the Chamber’s “Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64” of 26 October 2012 (“26 October 2012 Decision”)³ and after having been granted an extension of time,⁴ the VWU filed its *ex parte* Registry only “Registry’s Observations in connection with the ‘Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64’ (ICC-01/05-01/08-2394-Conf)” (“First VWU Report”).⁵ As a preliminary remark, the VWU stated that Witness D04-64’s Protection

¹ Transcript of hearing of 23 October 2012, ICC-01/05-01/08-T-260-CONF-ENG ET, page 38, line 11 to page 39, line 4 and page 39, lines 19 to 22.

² Email from the VWU’s Associate Protection Officer to the Chamber of 18 October 2012 at 19.54. The Protection Report was appended to the VWU’s email.

³ Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64, 26 October 2012, ICC-01/05-01/08-2394-Conf.

⁴ Email from the Assistant Legal Officer of the VWU to the Assistant Legal Officer of Trial Chamber III of 31 October 2012 at 15.45 and Email from the Assistant Legal Officer of Trial Chamber III to the Assistant Legal Officer of the VWU of 31 October 2012 at 17.03. The Chamber granted the VWU’s request on an exceptional basis and instructed the VWU to submit its report by 16.00 on 2 November 2012.

⁵ Registry’s Observations in connection with the “Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64” (ICC-01/05-01/08-2394-Conf), 1 November 2012, ICC-01/05-01/08-2400-Conf-Exp.

Report attached to its email of 18 October 2012 was transmitted to the Chamber in error since normally its obligations are limited to submitting to the Chamber the relevant security assessments but not the full Protection Reports, which constitute internal VWU documents “contain[ing] information obtained from the witnesses on a confidential basis and under the clear understanding that they will not be used for other purposes than the security assessment.”⁶ The VWU informed the Chamber that the same error was committed in relation to the Protection Reports for Witnesses D04-51, D04-55 and D04-57.⁷

3. On 14 November 2012 the Chamber issued its “Decision on the ‘Registry’s Observations in connection with the ‘Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64 (ICC-01/05-01/08-2394-Conf)’” (“14 November 2012 Decision”), in which it (i) shared with the parties and participants the relevant information contained in the First VWU Report; and (ii) clarified that it would disregard any information that was mistakenly submitted to it in relation to Witnesses D04-64, D04-51, D04-55 and D04-57.⁸ The Chamber noted that the Protection Reports were VWU internal materials which are, in principle, not subject to disclosure, and for this reason decided that there was no need to share any of the documents, or the information contained therein, with the parties and participants.⁹

4. On 28 January 2013 the defence filed its “Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses”

⁶ ICC-01/05-01/08-2400-Conf-Exp, paragraph 2.

⁷ ICC-01/05-01/08-2400-Conf-Exp, paragraph 3.

⁸ Decision on the ‘Registry’s Observations in connection with the ‘Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64 (ICC-01/05-01/08-2394-Conf), 14 November 2012, ICC-01/05-01/08-2410-Conf, paragraph 13.

⁹ ICC-01/05-01/08-2410-Conf, paragraphs 12 to 13.

("Request").¹⁰ In its Request, the defence submits, *inter alia*, that the accused suffered prejudice as a result of Witness D04-64 having been questioned on the basis of information from internal VWU Protection Reports, which had not been disclosed to the defence, and that the remedy granted by the Chamber is insufficient.¹¹ For these reasons, the defence requests that the Chamber order (i) the reclassification as public of (a) the portions of certain transcripts cited in the Request, (b) the 26 October 2012 Decision and the 14 November 2012 Decision, and (c) the Request, with the necessary redactions; (ii) that the defence be provided with the First VWU Report and the justification for this document having been filed *ex parte*; (iii) that the defence be provided with the Protection Reports for Witnesses D04-64, D04-55, D04-51 and D04-57 and "any other material improperly received by the Trial Chamber from VWU or the Registry concerning Defence witnesses"; and (iv) that the defence be given an opportunity "to make submissions on the prejudice suffered as a result of this procedural anomaly and request additional remedies as necessary."¹²

5. On 6 February 2013, in accordance with the schedule set by the Chamber,¹³ the VWU filed its observations on the Request ("Second VWU Report"), in which it addresses the first three requests made by the defence.¹⁴ First, the VWU submits that the reclassification of the documents listed by the defence requires the application of a number of redactions, as proposed therein.¹⁵ Second, in relation to the defence's request to be provided with the First VWU Report, the VWU submits that the document

¹⁰ Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses, 28 January 2013, ICC-01/05-01/08-2491-Conf.

¹¹ ICC-01/05-01/08-2491-Conf, paragraphs 1 and 2.

¹² ICC-01/05-01/08-2491-Conf, paragraph 47.

¹³ Decision setting a schedule for observations on the "Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses", 30 January 2013, ICC-01/05-01/08-2495-Conf, paragraph 3.

¹⁴ Victims and Witnesses Unit's Observations Pursuant to the "Decision setting a schedule for observations on the 'Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses'" (ICC-01/05-01/08-2495-Conf), 6 February 2013, ICC-01/05-01/08-2501-Conf and two confidential *ex parte* annexes.

¹⁵ ICC-01/05-01/08-2501-Conf, paragraphs 1 to 3.

can be shared with the defence, subject to the implementation of a number of redactions suggested in confidential *ex parte* Annex 1 to the Second VWU Report.¹⁶

6. Third, in relation to the defence's request to be provided with the Protection Reports of Witnesses D04-64, D04-55, D04-51 and D04-57, the VWU submits:

6. Taking into account the concerns expressed by the Defence, the VWU has no objections to share the [Protection Reports] with the Defence, only in this particular instance, and for the following reasons that (a) the reports have been transmitted to the Chamber by error and such situation has never occurred in relation to the Prosecution witnesses; (b) the same unfortunate mistake will not occur in future and clear instructions have been provided to the VWU staff members; and (c) that the Chamber in its Decision dated 14 November 2012 stated that the information contained in the Protection Report will not be taken into account in [the] Chamber's assessment of the witness' testimony and "in the same manner, the Chamber will disregard any information that was submitted to it in error in relation to Witnesses D04-51, D04-55 and D04-57."

7. Therefore, the VWU hereby registers the Protection Assessment Reports on witness D04-64, D04-51, D04-55 and D04-57 in Annex 2 in the case file, confidential *ex parte*, VWU only, for the consideration of the Chamber and for further reclassification if ordered by the Chamber.¹⁷

7. The Office of the Prosecutor ("prosecution") filed its observations on 11 February 2013.¹⁸ Asserting that "[t]he Defence has failed to provide sufficient reason for each of its requests to justify producing the four requests in an extraordinary departure from the current practice of this Chamber", the prosecution requests the Chamber to dismiss the request for disclosure of four VWU Protection Reports and other confidential material from the VWU or the Registry, as well as the request to make additional submissions on allegations of prejudice suffered.¹⁹ In support of this approach, the prosecution asserts that the relevant information in relation to

¹⁶ ICC-01/05-01/08-2501-Conf, paragraphs 4 to 5.

¹⁷ ICC-01/05-01/08-2501-Conf, paragraphs 6 to 7.

¹⁸ Prosecution's Response to Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses, 11 February 2013, ICC-01/05-01/08-2508-Conf.

¹⁹ ICC-01/05-01/08-2508-Conf, paragraphs 11 and 19.

Witness D04-64 has already been shared with the parties and participants prior to the close of Witness D04-64's testimony while the rest of the information was considered to be irrelevant to the parties and participants.²⁰ According to the prosecution, the defence has failed to demonstrate that it is entitled to further disclosure. In particular, the prosecution contends that the defence failed to properly substantiate requests for Protection Reports for Witnesses D04-64, D04-55, D04-51 and D04-57, especially since (i) the Chamber stated that it will disregard any information submitted to it in error in relation to these witnesses; (ii) the Chamber's questioning of defence witnesses on the basis of the Protection Reports was not prejudicial; and (iii) the allegations of unfair treatment of defence witnesses are without merit.²¹

II. Analysis and conclusions

8. For the purpose of the present Decision, in accordance with Article 21 of the Rome Statute ("Statute"), the Chamber has considered Articles 43(6), 64(2), 64(6)(e) and 64(7), 67(1), 68(1) and (4) of the Statute, Rules 16 to 19, 86 and 87 of the Rules of Procedure and Evidence, Regulation 20 of the Regulations of the Court ("Regulations") and Regulation 88 of the Regulations of the Registry.

9. In view of this framework, the Chamber will first address the defence's general submissions as to the alleged violation of the accused's rights and insufficiency of the remedy granted by the Chamber and subsequently turn to the specific remedies sought by the defence.

²⁰ ICC-01/05-01/08-2508-Conf, paragraph 13.

²¹ ICC-01/05-01/08-2508-Conf, paragraphs 12 to 18.

10. Before addressing the merits of the Request, the Chamber underlines that the present Decision refers to a number of confidential or *ex parte* documents. However, in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, the present Decision is filed publicly. To the extent that the Decision makes reference to confidential or *ex parte* documents, the Chamber considers that the information referred to does not warrant confidential or, as the case may be, *ex parte* treatment at this time.

A. General submissions regarding the alleged violation of the accused's rights and insufficiency of the remedy granted by the Chamber

11. At the outset, the Chamber considers that there is no merit to the defence's allegation that in rendering the 24 November 2012 Decision, the Chamber denied the defence's right to be heard. The purpose of the 24 November 2012 Decision was to communicate to the parties and participants any information that was related to issues raised during the hearing of 23 October 2012. As a result, rather than constituting a denial of the right to be heard, the 24 November 2012 Decision provided the necessary basis for the defence to make meaningful submissions.

12. Further, the Chamber is not persuaded by the defence's allegation that the Chamber violated the accused's fundamental right under Article 67(1)(e) of the Statute "to obtain the [...] examination of witnesses on his [...] behalf under the same conditions as witnesses against him [...]". When questioning the witness on the basis of the internal VWU Protection Report, the Presiding Judge was not challenging the evidence of the witness. Rather, the Presiding Judge sought clarification on a very precise statement made

by the witness in the context of his interview with a VWU Security Officer in order to justify his request for protective measures.

13. Furthermore, the Chamber underlines once again that it had not asked for the submission of these reports and that they were transmitted to the Chamber in error in relation to four defence witnesses.²² The Chamber acknowledged this procedural error²³ and informed the parties and participants that the information contained in these reports would be disregarded and not considered as evidence in the case.²⁴

14. Concerning the defence's submission that the remedy granted by the Chamber was insufficient insofar as it "does not take into account the impact of the Presiding Judge's examination on Witness D04-64's remaining testimony", the Chamber finds that at this stage the defence has failed to substantiate if and to what extent the testimony was prejudiced as a result of the questioning by the Presiding Judge. In effect, after the relevant information had been shared with the parties and participants, the defence had the opportunity to ask further questions,²⁵ but chose not to do so. The defence's allegation that the impact of the Presiding Judge's examination on the remainder of the witness's testimony should be taken into account is ill-founded.

²² ICC-01/05-01/08-2410-Conf, paragraphs 9 and 11; ICC-01/05-01/08-2501-Conf, paragraph 6.

²³ ICC-01/05-01/08-2410-Conf, paragraph 11.

²⁴ ICC-01/05-01/08-2410-Conf, paragraphs 12 and 13.

²⁵ Transcript of hearing of 23 October 2012, ICC-01/05-01/08-T-260-CONF-ENG ET, page 35, lines 20 to 22: "And, of course, being the Defence, the last one to take the floor, Defence will have the opportunity if Defence so wishes to go further in the questioning on these points for which the Chamber asked or sought a follow-up or clarification, et cetera."

B. The remedies sought by the defence

(i) Reclassification of documents

15. The defence requests the reclassification as public of a series of documents, including (a) the portions of the transcripts cited in the Request, (b) the two relevant underlying decisions issued by the Chamber on 26 October and 14 November 2012, and (c) the Request, with the necessary redactions.

16. By Article 67(1) of the Statute, the accused is entitled to a public hearing having regard to the provisions of the Statute; any derogation from that principle must be for a satisfactory reason; and the proceedings must remain fair. On the other hand, under Article 68(2) of the Statute, the Court's obligation to protect witnesses and victims is expressly stipulated as an exception to the principle of public hearings provided for in Article 67 of the Statute. Therefore, in considering this request, the Chamber underscores its duty to take all necessary steps in order to safeguard the safety, physical and psychological well-being, dignity and private life of victims and witnesses, pursuant to Article 68(1) of the Statute. Against this background, the Chamber has reviewed the information requested to be reclassified and it has applied a case-by-case analysis of the relevant circumstances, as set out below.

17. In relation to the relevant portions of the transcripts, the Chamber agrees with the VWU's recommendation that the parts of the transcripts cited in paragraph 35 of the Request should remain redacted since the information contained therein could potentially identify the witness. The

Chamber further agrees with the VWU recommendation that the portion of transcript quoted in paragraph 43 of the Request should remain redacted since it is part of the internal VWU protection report that in principle is not shared with the parties or the public. Due to the specific circumstances in the present case, this information was shared with the parties and participants. However, the Chamber is of the view that in accordance with Regulation 88 of the Regulations of the Registry, this information should not be shared with the public. Accordingly, the Chamber decides that only the portion of transcript quoted in paragraph 3 of the Request is to be reclassified as public.

18. As for the level of confidentiality of the 26 October and 14 November 2012 Decisions, and considering the VWU's submissions on this matter, the Chamber intends to issue public redacted versions of these decisions in due course.

19. Lastly, concerning the reclassification of the Request, the Chamber notes the VWU's submission that with the exception of the redaction proposals made in relation to the portions of transcripts cited in paragraphs 35 and 43 of the Request, no further redactions need to be applied. However, the Chamber observes that other paragraphs of the Request contain additional information that might identify the witness.²⁶ Accordingly, the Chamber orders the defence to consult with the VWU in order to file a public redacted version of its Request, with applicable redactions as suggested by the VWU.

²⁶ See for example the references in paragraphs 4, 8 and 13 of the Request.

(ii) *Access to the First VWU Report and related justification*

20. In relation to the defence's request to be provided with the First VWU Report as well as with the original justification for the observations being filed *ex parte*, the VWU submits that the First VWU Report can be shared with the defence, subject to the redactions proposed in the confidential *ex parte* Annex 1.²⁷ The Chamber agrees with the VWU's suggestion to apply redactions to the names of VWU staff members in order to avoid jeopardising future interaction between the staff members and witnesses. However, the Chamber is not persuaded by the VWU's request to redact paragraph 10 of the First Report. Indeed, the Chamber is of the view that the information provided in paragraph 10 does not relate to the protection of the witness or otherwise fall within the scope of information requiring protection under the Rome Statute framework. Accordingly, it does not warrant confidential or *ex parte* treatment at this stage.

21. In addition, the Chamber considers that for the purpose of ensuring transparency and the fairness of the proceedings, the relevant information should be shared not only with the defence, but also with the prosecution, the legal representatives of victims and the public. For these reasons, the Chamber orders the VWU to file a public redacted version of the First VWU Report, applying the redactions proposed in confidential *ex parte* Annex 1 with the exception of the redactions proposed to paragraph 10. In view of the fact that the First VWU Report will be made public, the VWU is instructed to apply any additional redactions that may be necessary to protect any additional witness identifying information.²⁸

²⁷ ICC-01/05-01/08-2501-Conf, paragraphs 4 to 5.

²⁸ In this regard, the Chamber notes that the information provided in the last paragraph of page 4 as well as in paragraph 21 needs to be redacted in the public redacted version of the First VWU Report.

(iii) Communication of the relevant VWU Protection Reports

22. In the 14 November 2012 Decision, the Chamber held that “[g]iven that the protection report[s] of Witnesses D04-64, D04-51, D04-55, and D04-57] are VWU internal materials which are, in principle, not subject to disclosure, the Chamber is of the view that there is no need to share any of those documents, or the information contained therein, with the parties and participants.”²⁹ However, in this specific instance and noting that the VWU does not oppose the Defence Request, the Chamber considers it appropriate for the Protection Reports to be communicated to the defence.

(iv) Request to make further submissions and ask for additional remedies

23. In relation to the defence’s request to be given the opportunity to make further submissions following receipt of the First VWU Report and the relevant Protection Reports, the Chamber notes that the defence has already presented its submissions on the matter in the Request underlying the present Decision. Considering that the Chamber decided to disregard any information that was submitted to it in error,³⁰ the Chamber is of the view that no further submissions by the defence are required.

²⁹ ICC-01/05-01/08-2410-Conf, paragraph 13.

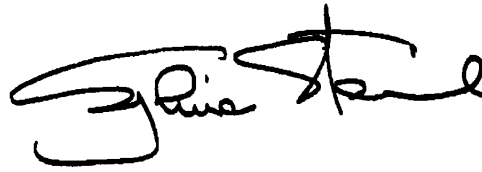
³⁰ ICC-01/05-01/08-2410-Conf, paragraphs 12 and 13.

Disposition

24. In view of the foregoing, the Chamber hereby PARTIALLY GRANTS the defence's Request and ORDERS

- (i) the Registry to reclassify as public the portion of transcript quoted in paragraph 3 of the Request (ICC-01/05-01/8-T-260-Conf-ENG ET, page 33, line 24 to page 35, line 17);
- (ii) the defence, after consultation with the VWU, to file by 1 May 2013 a public redacted version of the Request in accordance with the instructions set out in paragraph 19 above;
- (iii) the VWU to file by 1 May 2013 a public redacted version of the First VWU Report, in accordance with the instructions set out in paragraphs 20 and 21 above;
- (iv) the Registry to reclassify document ICC-01/05-01/08-2501-Conf-Exp-Anx2 as confidential *ex parte*, available to the VWU and the defence only.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 19 April 2013

At The Hague, The Netherlands