

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 November 2010

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***

Confidential

**Decision on the « Requête de le Défense aux fins de reclassification d'un dépôt
ex parte du document ICC-01/05-01/08-974-Anx2 du 25 Octobre 2010, et de
divulcation des avantages octroyés aux témoins du Procureur »**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* hereby renders the following Decision on the "Requête de le Défense aux fins de reclassification d'un dépôt ex parte du document ICC-01/05-01/08-974-Anx2 du 25 Octobre 2010, et de divulgation des avantages octroyés aux témoins du Procureur".

I. Background and Submissions

1. On 25 October 2010, the Victims and Witnesses Unit ("VWU") filed additional observations on protective measures for vulnerable witnesses ("VWU Additional Observations") as Confidential *ex parte* VWU only, with two annexes, Annex 1 classified as Confidential *ex parte* VWU only, and Annex 2 classified as Public.¹
2. On the same day, at 18:54, the Chamber and the parties were notified that "annexes 1 and 2 have been inverted when brought for filing. The annexes have now been correctly stamped and are available through the above Trim link".²
3. Accordingly, the two Annexes were corrected and stamped appropriately. As a result, Annex 1 containing the "specific observations" was classified as confidential *ex parte* VWU only and Annex 2 containing the "Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses" was classified as public.

¹ Victims and Witnesses Unit's additional observations on protective measures for vulnerable witnesses, 25 October 2010, ICC-01/05-01/08-974-Conf-Exp, with Confidential *Ex Parte* Annex 1, ICC-01/05-01/08-974-Conf-Exp-Anx1, and Public Annex 2 ICC-01/05-01/08-974-Anx2.

² <http://edms.icc.int/webdrawer/webdrawer.dll/webdrawer/rec/957715>.

4. The Chamber was informed by the Court Management Section ("CMS") that, all parties and participants were informed about the annexes that had been mistakenly switched when filed, and requested the parties to destroy the document in case a copy had been made before the correction.³
5. On 26 October 2010, CMS informed the Chamber about the erroneous classification of the main filing, since "it reiterated its support of the Prosecution's request for procedural protective measures for vulnerable witnesses".⁴ It requested the main document to be reclassified as *ex parte* VWU and OTP only, which was authorized by the Chamber.⁵
6. On 4 November 2010, the defence of Mr Jean-Pierre Bemba Gombo filed its "Requête de le Défense aux fins de reclassification d'un dépôt ex parte du document ICC-01/05-01/08-974-Anx2 du 25 Octobre 2010, et de divulgation des avantages octroyés aux témoins du Procureur"⁶ ("defence Application"), in which the defence requests that the original Annex 2 to filing ICC-01/05-01/08-974 be made available to the defence, on the basis that it would contain information concerning advantages granted to at least one prosecution witness and false allegations made by an intermediary on alleged intimidation of witnesses by the defence.⁷
7. The VWU, *via* an email sent on 5 November 2010, asked the Chamber to authorise it to make its observations on the defence Application, prior to any decision on the reclassification of the annexes, and prior to inviting

³ Email communication from CMS to the Chamber on 25 October 2010 at 18:54.

⁴ Email communication from CMS to the Chamber through the Legal Adviser to the Trial Division on 26 October 2010 at 10:04.

⁵ Email communication from the Chamber to CMS through a legal officer of the Chamber on 26 October 2010 at 13.19.

⁶ Requête de le [*sic*] Défense aux fins de reclassification d'un dépôt ex parte du document ICC-01/05-01/08-974-Anx2 du 25 Octobre 2010, et de divulgation des avantages octroyés aux témoins du Procureur, 4 November 2010, ICC-01/05-01/08-994-Conf. The VWU was granted access to the defence Application on 5 November 2010.

⁷ ICC-01/05-01/08-994-Conf, paragraph 2.

parties and participants to make observations. The Chamber agreed upon this course of action.⁸

8. On 8 November 2010, the VWU filed the "Victims and Witnesses Unit's observations on the « Requête de la Défense aux fins de reclassification d'un dépôt ex parte du document ICC-01/05-01/08-974-Anx2 du 25 Octobre 2010, et de divulgation des avantages octroyés aux témoins du Procureur » and on the Prosecution's request to be granted access to document n° ICC-01/05-01/08-974-Conf-Exp-Anx1" ⁹ ("VWU Observations"), in which the VWU states that it has taken all actions related to vulnerable witnesses within the limits of its mandate, especially regarding Rule 17(2)(a)(iii) of the Rules of Procedure and Evidence ("Rules").¹⁰ The VWU also argues that "the content of psychological assessments is *per se* neutral and only reflects the expressed concerns, fears and anxiety of the witnesses", and that the sharing of the psychological assessment with the Chamber does not imply providing the Chamber with information on the level of risk.¹¹
9. Finally, the VWU is of the view that pre-assessments should be treated in the same way as final psychosocial assessments and should not be shared with parties and participants, and not disclosed to anyone else except the Chamber, in order to avoid these pre-assessments being used for purposes other than the ones to which they are dedicated, namely contesting the witnesses' credibility.¹² Further, the VWU argues that the witnesses approached by the VWU were assured in good faith that the information

⁸ Email communication from the Chamber to CMS through a legal officer of the Chamber on 8 November 2010 at 11.51.

⁹ Victims and Witnesses Unit's observations on the « Requête de la Défense aux fins de reclassification d'un dépôt ex parte du document ICC-01/05-01/08-974-Anx2 du 25 Octobre 2010, et de divulgation des avantages octroyés aux témoins du Procureur » and on the Prosecution's request to be granted access to document n° ICC-01/05-01/08-974-Conf-exp-Anx1, 8 November 2010, ICC-01/05-01/08-1003-Conf.

¹⁰ ICC-01/05-01/08-1003-Conf, paragraph 1 a).

¹¹ ICC-01/05-01/08-1003-Conf, paragraph 1 b).

¹² ICC-01/05-01/08-1003-Conf, page 7.

shared would only be used in making decisions regarding special measures from which they may benefit, and that the establishment of a relationship of trust is a key element of the work of the VWU. The latter adds that the disclosure of information provided to the VWU in confidence by witnesses may jeopardize the future relationship between the VWU and these witnesses, who may feel betrayed.¹³ Consequently, the VWU suggests that the document ICC-01/05-01/08-974-Conf-Exp-Anx1 remains confidential and *ex parte* VWU only and further offers to file a confidential redacted version of the document.¹⁴

10. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber, in making its determination has considered Article 64(2), Article 64(6)(c) and (e), Article 67(2) and Article 68(1) of the Statute, Rule 17(2)(a)(iii) and (b)(ii), and Rule 86 of the Rules.

II. Analysis and Conclusions

11. Without going into the details of the *ex parte* annex, the Chamber notes that this annex only contains the psychological assessment of vulnerable witnesses, and at no point mentions any of the alleged advantages granted to prosecution witnesses. Contrary to the defence's multiple references to alleged "payments" purportedly granted to prosecution witnesses, the Chamber notes that not a single reference to "payments" or any other economic support given to witnesses is made in the annex. Therefore, the Chamber will not address in this Decision the argument that such "payments", if and when made, should be communicated to the other party.

¹³ ICC-01/05-01/08-1003-Conf, page 8.

¹⁴ ICC-01/05-01/08-1003-Conf, page 8.

12. By the same token, the Chamber notices that no reference to threats made by the defence, by the defence team, or by anyone related to the defence team, can be found in the annex.
13. The Chamber regrets that the defence decided to file an Application based on assumptions totally divorced from the actual content of the document, with a seemingly clear intention to obtain privileged information that is not available to any of the parties or participants in the present case, and based on the ill-founded argument that such information is to be disclosed under Article 67(2) of the Statute.
14. The Chamber urges the defence of Mr Bemba to limit itself to raising issues that are truly relevant for the preparation of the trial at this stage, and for the fair and expeditious conduct of the proceedings.
15. Article 64(2) of the Statute imposes a duty on the Chamber to ensure that proceedings are conducted in a fair and expeditious manner, and with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The Statute, in Article 64(6)(c) and (e), also imposes on the Trial Chamber the duty to protect confidential information, including information related to victims and witnesses. Finally, the Chamber recalls that Article 68(1) of the Statute imposes a duty on all organs of the Court to take all appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of victims and witnesses.
16. The Chamber will not allow information gathered by the VWU regarding the psychological state of mind of vulnerable witnesses to be used as a tool against them, on the premise that it could constitute exculpatory information under Article 67(2) of the Statute. The assumptions of the

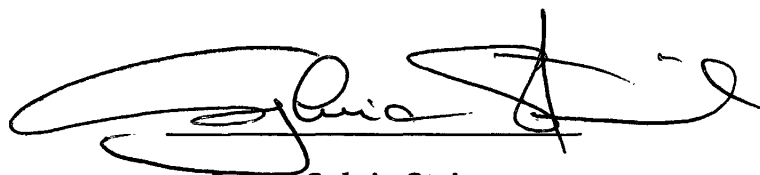
defence are devoid of any legal basis in the Statute and go beyond all reasonable interpretation to be given to the rights of an accused person, in accordance with Article 21(3) of the Statute. Furthermore, the psychological assessment contained in the annex is equally unavailable to the prosecution. Therefore, it cannot be "disclosed" by the latter under Article 67(2) of the Statute.

17. For the foregoing reasons, the Chamber:

Rejects *in limine*, as ill-founded, the defence Application;

Maintains the current respective levels of confidentiality of document ICC-01/05-01/08-974-Conf-Exp and its Annexes.

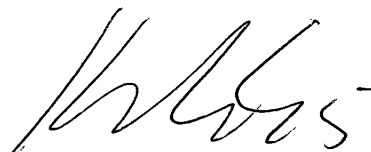
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this Tuesday 16 November 2010

At The Hague, The Netherlands