

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 11 February 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**

Confidential

**Prosecution's Response to Defence Motion for Disclosure of VWU Security
Assessments of Defence Witnesses**

Source: The Office of the Prosecutor

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

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I. Introduction

1. On 28 January 2013, the Defence filed a motion requesting, *inter alia*, reclassification of certain confidential court records, disclosure of security assessment reports ("Protection Reports") prepared for four Defence witnesses by the Victims and Witnesses Unit ("VWU") as well as "any other material improperly received by the Trial Chamber from VWU or the Registry concerning Defence witnesses" ("Defence Motion").¹ The Defence seeks this relief because, it alleges, the Chamber's limited and narrow questioning of two Defence witnesses on the basis of information contained in internal VWU Protection Reports that are not part of the case record, and without prior disclosure to the Defence, was improper and prejudicial, particularly where this information was used "to contradict and undermine the testimony of Defence witnesses during their sworn testimony".²

2. This request is wholly without merit. The Chamber has already fully addressed the underlying issues and particularly has acted to avoid any prejudice to the Defence. In a previous decision it ruled that the relevant information had in fact been disclosed to the parties, that Protection Reports are internal VWU reports not subject to disclosure and that the information contained in the reports and the questioning of the witnesses based on the reports would be disregarded in assessing witness testimony. In other words, recognizing that an error had been made, it rendered the error harmless by announcing that it would disregard the witnesses' testimony regarding the reports. Assuming the Defence believed the remedy to be inadequate, it could have appealed this ruling. This effort to resurrect the issue is, in effect, any attempt to seek reconsideration without advancing any justifiable new fact or change in circumstances. Moreover, the Defence has failed to properly demonstrate how this particular decision violates the Accused's right to a fair trial.

¹ ICC-01/05-01/08-2491-Conf, "Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses", 28 January 2013, para. 47.

² *Ibid*, see, for example, paras. 1, 2, 3, 4, 19, 27 and 31.

II. Procedural History

3. On 22 and 23 October 2012, Defence Witness 64 (“D04-64”) testified before the Chamber.³ During his testimony, the Chamber questioned D04-64 on the basis of information in the VWU Protection Report to address an apparent inconsistency between that information and his in-court testimony.⁴

4. On 26 October 2012, the Chamber requested the VWU to file a confidential report, available to the parties and participants, providing specific additional information on the circumstances surrounding D04-64’s statements to the VWU Protection Officer regarding how many times he met with the Accused (“First Decision”).⁵

5. From 29 to 31 October 2012, Defence Witness 55 (“D04-55”) testified before the Chamber.⁶ During his testimony, the Chamber asked D04-55 one question regarding his perception and understanding of his security risk in light of the VWU assessment in the Protection Report.⁷

6. On 1 November 2012, the VWU provided the further information requested by the Chamber in relation to D04-64 in an *ex parte* Registry only document (“Registry’s Report”), after obtaining the Chamber’s approval.⁸

³ ICC-01/05-01/08-T-259-CONF-ENG ET and ICC-01/05-01/08-T-260-CONF-ENG ET.

⁴ ICC-01/05-01/08-T-260-CONF-ENG ET, page 31, line 23 to page 39, line 5.

⁵ ICC-01/05-01/08-2394-Conf, “Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64”, 26 October 2012.

⁶ ICC-01/05-01/08-T-264-CONF-ENG ET, ICC-01/05-01/08-T-265-CONF-ENG ET and ICC-01/05-01/08-T-266-CONF-ENG ET.

⁷ ICC-01/05-01/08-T-265-CONF-ENG ET, page 63, line 2 to page 64, line 25.

⁸ ICC-01/05-01/08-2400-Conf-Exp, “Registry’s Observations in connection with the “Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64””, 1 November 2012; ICC-01/05-01/08-2410-Conf, “Decision on the “Registry’s Observations in connection with the ‘Decision requesting 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, para. 7.

7. On 14 November 2012, the Chamber issued a decision assessing, *inter alia*, the status of four Protection Reports regarding D04-55, D04-64, D04-51 and D04-57 that were provided to the Chamber by the VWU. The Chamber found that the four reports were provided to the Chamber in error, but there was no need to share the VWU Protection Reports or further information contained therein ("Second Decision").⁹ The Chamber found that the information that had been relied upon to question the witnesses had been shared with the parties, and further that it "... will share the relevant information [*in the Registry's Report*] with the parties and participants in the context of the present Decision".¹⁰ In addition, the Chamber decided that none of the information contained in the reports, or the questioning of the two witnesses that was based on the reports, would be relied upon by the Chamber. The Defence did not seek leave to appeal this decision.

8. On 28 January 2013, the Defence Motion was belatedly filed, requesting, *inter alia*, reclassification of certain confidential court records, disclosure of Protection Reports for four Defence witnesses and any other information regarding Defence witnesses provided by VWU or the Registry.¹¹

III. Request for confidentiality

9. The Office of the Prosecutor ("Prosecution") requests that this document be received as "Confidential" pursuant to Regulation 23 *bis* (2) of the Regulations of the

⁹ ICC-01/05-01/08-2410-Conf, "Decision on the "Registry's Observations in connection with the 'Decision requesting 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.

¹⁰ *Ibid*, para. 8.

¹¹ ICC-01/05-01/08-2491-Conf, "Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses", 28 January 2013, para. 47.

Court, as it responds to the Defence Motion and other related court documents, which are currently classified as confidential.

IV. Submissions

10. As part of its function, the VWU produces Protection Reports for all witnesses and transmits the recommendations contained in these Reports to the Chamber, which then makes its own determination on protective measures based on all of the information before it. The Chamber and the parties and participants do not receive the full Protection Reports as a matter of course, and the four full reports at issue in this case were submitted to the Chamber by the VWU in error.¹² The Chamber held that “[g]iven that the protection reports of those witnesses 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”.¹³ [Emphasis added] Throughout its case, the Prosecution did not receive disclosure of Protection Reports for witnesses called by it.

11. The Defence has failed to provide sufficient reason for each of its requests to justify producing the four reports in an extraordinary departure from the current practice of this Chamber.

Request for VWU Report of D04-64:

12. Regarding D04-64, the Chamber already disclosed the relevant information to the parties and participants prior to the close of D04-64’s testimony, thereby

¹² ICC-01/05-01/08-2410-Conf, “Decision on the “Registry’s Observations in connection with the ‘Decision requesting 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, paras. 9 and 11.

¹³ *Ibid*, para. 13.

affording the Defence an opportunity to address any additional issues. After questioning by the Defence and Prosecution, but before that of the legal representatives, the Chamber asked a number of questions within the context of witness security based on information in its possession. The Chamber specifically stated that:

“As soon as we resume the questioning, the Chamber intends to disclose to the parties and participants some information that is contained in the report by the VWU on protective measures ... the security assessment contains two, among other information that is not relevant, contains two informations that are in the view of the chamber relevant to the chamber and that’s why this information was released very briefly before the break by the Chamber and we will continue with the second part of the information”.¹⁴ [Emphasis added]

13. In fact, not only did the Chamber disclose the relevant information to the parties and participants, it quoted directly from the Protection Report where necessary.¹⁵ The Chamber explicitly stated that “... it’s not at all the intention of the Chamber, has never been, to conceal any information from the parties or participants that could be deemed relevant to the case”.¹⁶ Thus the information used by the Chamber was disclosed to the Defence during the testimony of D04-64 verbally.¹⁷ Moreover, the Chamber subsequently cited extracts of the relevant information from the Registry’s Report in the Second Decision.¹⁸ Other information contained in the Protection Reports was considered by the Chamber to be irrelevant to the parties and participants and the Defence has failed to show that it is entitled to further

¹⁴ ICC-01/05-01/08-T-260-CONF-ENG ET, page 34, lines 10 to 22.

¹⁵ *Ibid*, page 38, lines 11 to 17.

¹⁶ *Ibid*, page 34, lines 23 to 24.

¹⁷ *Ibid*, page 31, line 23 to page 39, line 5.

¹⁸ ICC-01/05-01/08-2410-Conf, “Decision on the “Registry’s Observations in connection with the ‘Decision requesting 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, paras. 8 and 10. The Chamber explicitly stated that it “... will share the relevant information with the parties and participants in the context of the present Decision”.

disclosure.¹⁹ The fact that the Protection Reports were erroneously shared with the Chamber, rather than a party or participant with interest in the proceedings, is not sufficient a basis to warrant disclosure.

Request for VWU Reports of D04-55, D04-51 and D04-57:

14. The Defence Motion fails to properly substantiate requests for Protection Reports of witnesses D04-55, D04-51 and D04-57. Moreover, the Chamber categorically stated that it “will disregard any information that was submitted to it in error in relation to Witnesses D04-51, D04-55 and D04-57”.

15. In relation to D04-55, the Chamber’s questioning based on the Protection Reports was limited to one question regarding the evaluation of his personal security. Whilst highlighting VWU’s assessment, the Chamber sought clarification on the witness’ own perception and understanding of his security risk. It is perfectly in order for a witness to evaluate his own personal risk that is different from VWU’s expertise judgment. This limited exchange neither affects D04-55’s credibility nor is it relevant to the case.

16. Regarding D04-57 and D04-51, the Defence request is speculative and baseless. The Defence acknowledges that the Chamber did not make specific reference to information in the Protection Reports during its questioning of these two witnesses.²⁰

¹⁹ See, for example, ICC-01/05-01/08-T-260-CONF-ENG ET, page 34, lines 10 to 22.

²⁰ ICC-01/05-01/08-2491-Conf, “Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses”, 28 January 2013, para. 45.

The Chamber's questioning of Defence witnesses on the basis of Protection Reports is not prejudicial:

17. The Chamber posed very limited and specific questions to D04-64 and D04-55 on the basis of the Protection Reports in the context of witness security. Once the information regarding D04-64 and D04-55 that formed the basis of the Chamber's questions was disclosed by the Chamber, the Defence had the additional opportunity to ask further questions.²¹ The purpose of re-examination by the calling party is precisely to address new information arising out of questions posed by the Chamber, other party and participants. It prevents the calling party from later claiming unfair prejudice. The Defence chose not to re-examine these witnesses on those issues or to request more time and/ or additional disclosure to address the issues while the witnesses were present. Moreover, the Chamber expressly stated that this information "... should not be used as evidence in the case as it was not given under oath and was obtained from the witness on a confidential basis and under the clear understanding that it would not be used for purposes other than the security assessment".²² It ruled that this information was received and used by it in error and would therefore not be considered as evidence.²³ The Chamber, composed of professional judges, has the ability to set aside this information in its deliberations. Thus, the Defence's claims of prejudice are unfounded.

Allegations of unfair treatment of Defence witnesses are without merit:

²¹ 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."

²² ICC-01/05-01/08-2410-Conf, "Decision on the "Registry's Observations in connection with the 'Decision requesting 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, para. 12.

²³ *Ibid*, para. 11.

18. The Defence alleges bias when it states that “the Presiding Judge has not used information contained in internal VWU Security Assessments to contradict the testimony of Prosecution witnesses who, presumably, were, all or mostly, the subjects of such assessments, this was only done in relation to Defence witnesses”.²⁴ The intimation that the Chamber deliberately treated Prosecution and Defence witnesses differently is baseless. Based on the information available to the parties and participants, the Prosecution understands that the Chamber did not receive Protection Reports for the Prosecution witnesses²⁵ nor did it receive them for 11 out of 15 Defence witnesses called thus far.²⁶ Nor did the Chamber ask for the four reports. Additionally, the Chamber stated unequivocally that it will not use the information it received on the four Defence witnesses in any way, including in its very limited questioning of two of the witnesses, in assessing the witnesses’ credibility or the Accused’s guilt or innocence. Accordingly, there is no evidence that the Chamber is applying disparate standards to Defence and Prosecution witnesses, or that it singled out Defence witnesses and is treating them unfairly.

²⁴ ICC-01/05-01/08-2491-Conf, “Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses”, 28 January 2013, para. 5.

²⁵ ICC-01/05-01/08-2501-Conf, “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, para. 6: “... the reports have been transmitted to the Chamber in error and such situation has never occurred in relation to the Prosecution witnesses”.

²⁶ ICC-01/05-01/08-2410-Conf, “Decision on the “Registry’s Observations in connection with the ‘Decision requesting 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, para. 11.

V. Conclusion

19. In light of the above submissions, the Prosecution respectfully requests the Chamber to dismiss the Defence Motion for disclosure of four VWU Protection Reports and other confidential material received from VWU or the Registry, as well as the Defence request to make additional submissions on allegations of prejudice suffered.



Fatou Bensouda, Prosecutor

Dated this 11th Day of February 2013

At The Hague, The Netherlands