

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 1 May 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

Public redacted version of ICC-01/05-01/08-2400-Conf-Exp of 1 November 2012

**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)**

Source: Victims and Witnesses Unit

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

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Other

The Registrar of the International Criminal Court (“the Court”);

NOTING the instruction of Trial Chamber III (the “Chamber”) to the Victims and Witnesses Unit (the “VWU”) dated 22 September 2011 to provide an updated assessment on the in-court protective measures requested by the calling party prior to the start of the testimony of each witness;¹

NOTING the “Defence Request for Protective Measures” submitted by the Defence Counsel on 13 July 2012;²

NOTING the VWU’s assessment and recommendation submitted to the Chamber by email on 18 October 2012 (“VWU assessment”),³ to which a document entitled “In-court protection measures report” was annexed (“Protection Report”);

NOTING the Chamber’s “Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64” dated 26 October 2012 (“the Decision”);⁴

NOTING articles 43(6) and 68(1) and (4) of the Rome Statute, rules 16 to 19, 86 to 89 of the Rules of Procedure and Evidence, regulations 23*bis*, 24*bis* and 41 of the Regulations of the Court and regulations 79 and 92 to 96 of the Regulations of the Registry;

¹ Meeting between the Legal officer of Chambers and the VWU dated 22 September 2011.

² ICC-01/05-01/08-2244-Conf.

³ Exchange of emails between the VWU and the Chamber legal staff on 18 October 2012.

⁴ ICC-01/05-01/08-2394-Conf.

CONSIDERING that the Chamber instructed the VWU to provide clarification as to “(i). Whether the information provided in the VWU protection report to the effect that the Witness informed the VWU [REDACTED] is accurate; (ii). Whether the interview was video or audio recorded; and (iii). The language of the interview and the identities of the individuals who attended the interview” and to file a “confidential report, available to the parties and participants [...] by 16.00 on 31 October 2012”⁵ (“the instructions of the Chamber”);

CONSIDERING the extension of time exceptionally granted by the Chamber on 31 October 2012 at the request of the Registry;⁶

CONSIDERING that the Registrar deems necessary for the proper discharge of her functions, especially those falling under the mandate of the VWU, to address the present observations to the Chamber as a preliminary step prior to complying with the instructions of the Chamber;

CONSIDERING that, in order to have a chance to meet their purposes, the present observations require to be addressed in the first place to the Chamber on an *ex parte* – Registry only – basis under Regulation 23*bis* of the Regulations of the Court;

⁵ ICC-01/05-01/08-2394-Conf, p. 4

⁶ E-mail of 31 October 2012, 17.03.

RESPECTFULLY SUBMITS the following observations in connection to the instructions of the Chamber:

1. The instructions of the Chamber require the Registry to provide information in connection with a document transmitted by the VWU as an annex to its protection report. This request was triggered by apparent discrepancies between information contained in the Protection Report annexed and the information provided by Witness D04-64 over the course of his testimony. The Registry understands that the purpose of the Chamber's instructions is to provide the Chamber with additional information, which will be relevant for its assessment of Witness D04-64's evidence, in particular with respect to the abovementioned discrepancies.

(i) The Protection Report was transmitted by mistake

2. As a preliminary step, the VWU observes that the document containing the information the Chamber is seeking information on, namely the Protection Report, was transmitted to the Chamber as an annex to the security assessment on the in-court protective measures provided in compliance with the Chamber's instructions of 22 September 2011. Transmitting this document went beyond the Chamber's instructions of 22 September 2011, which were limited to the submission of the assessment only, without the annexed Report. The VWU observes that equivalent reports were never transmitted to the Chamber in the past for other witnesses. These reports are internal documents of the VWU, which are prepared in preparation of its security assessments. They contain 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. As such, the VWU committed a mistake by annexing the Protection Report to its assessment, for which the VWU presents its most sincere apologies to the Chamber.
3. The VWU observes that the same mistake was unfortunately made with respect to Defence witnesses D04-51, D04-55 and D04-57.

4. These mistakes were drawn to the attention of the Registrar, who will take all appropriate actions, once the circumstances of the transmission are clarified.
5. In the meantime, clear instructions have been given to VWU staff members not to transmit such reports to the Chamber any longer.

(ii) *Consequences of the VWU's mistake*

6. This unfortunate mistake now places the VWU, and the Registry as a whole, in a very difficult position with respect to its neutrality. The Registry is also concerned about the impact of this mistake on the proceedings in the *Bemba* case.
7. As to the Registry's neutrality, it has been the consistent position of the Registry that its staff should not be put in a situation where it would provide information in support or against the evidence adduced by the parties at trial. The Registry quotes its previous submissions in the *Lubanga* case on the similar issue of having Registry staff members called as witnesses:⁷

"In general, and on the matter in question as raised by the Defence, the Registrar's position is that calling a staff member of the Registry -an impartial and neutral organ- as a witness before the Court, and most specifically, a staff member of the Victims Participation and Reparations Section (VPRS) in this case, is neither appropriate nor desirable for the reasons set out below. The Registrar respectfully draws the attention of the Chamber to the guiding findings of Pre-Trial Chamber II on this matter, that the "claim that contacts between the Registrar and the Chamber should be subject to as strict standard as contacts between the Chamber and participants in the proceedings is inconsistent with the neutral role vested in the Registry by the constitutive elements of the Court."⁸

2. Taking into consideration the neutral role of the Registry vis-à-vis judicial proceedings, it is a necessity - with a view to the proper discharging of her functions - for the Registrar and Registry staff to be safeguarded from being drawn into substantive case-related controversies.

3. The Registrar notes that in the case *The Prosecutor v. Delalić, Mucić, Delić and Landžo*, the Appeals Chamber held, *inter alia*, that "...the Registrar, in view of her official role at the International Tribunal which includes assisting Chambers and certain functions of a judicial nature, should not be drawn into proceedings before the International Tribunal to give evidence for either of the parties unless such evidence is

⁷ ICC-01/04-01/06-2162-Conf, par. 1-3.

⁸ ICC-02/04-01/05-147, par. 76.

*not available from another source and is otherwise necessary.*⁹ Within the scope of the above ICTY Appeals Chamber decision and in respect of the present case related to document ICC-01/04-01/06-912-Conf-Exp-Anx 2 and without prejudice to the Chamber's determination on this matter, the Registrar respectfully submits that in the specific circumstances, testimony by a Registry staff member on this matter is not necessary.

8. The Registry's neutrality has been consistently recognized as a fundamental requirement in order to be able to achieve its mandate.¹⁰ The Appeals Chamber even identified the neutrality of the Registry as the reason for the VWU to be placed within the Registry.¹¹ Neutrality is crucial to the fulfillment of the VWU's mandate, which is to protect equally all victims and witnesses according to the risk bearing on them and regardless of which party or participant is relying on evidence stemming from them. As such, the VWU should be in a position to receive confidential information from any witness, whichever party is calling him or her, and consider it for the only purpose of its security assessment without risk that this information be later on used in support of or against evidence adduced by the parties at trial. It is important to emphasize here that the information provided to the VWU by witnesses is not provided under oath and is provided with a clear caveat that it will not serve purposes other than the VWU security assessment. The VWU observes that this unfortunate mistake was committed with respect to Defence witnesses only, whereas the Chamber never received protection reports, or the information contained therein, with respect to Prosecution witnesses.
9. By transmitting the Protection Report to the Chamber, the VWU put itself *de facto* in the position it consistently tries to avoid: it provided the Chamber with information which was received on the basis of an understanding that it would be used for the purpose of the security assessment only, and not for assessing the witness' evidence at trial; it did so with respect to a Defence witness, whereas it never did for Prosecution witnesses; and it is now put in the position of providing

⁹ *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "VAVO"), Hazim Delić and Esad Landžoiaka "ZENGA")*, Case IT-96-21-A, Appeals Chamber "Order on motion of the appellant, Esad Landzo, for permission to obtain and adduce further evidence on appeal", 7 December 1999, p. 5.

¹⁰ ICC-02/04-147, par. 31-35; ICC-01/04-01/07-776, par. 74-80, 83-90.

¹¹ ICC-01/04-01/07-776, par. 90.

further information to the Chamber, for the purpose of assessing the witness' evidence.

10. Besides the impact of the VWU's mistake on the Registry's neutrality, the Registry is also concerned about the impact on the proceedings in the *Bemba* case. The Defence already complained about the Protection Report being transmitted to the Chamber. Should the unfortunate situation created by the VWU's mistake go any further – especially should information contained in the Protection Report be communicated to the parties, as per the Chamber's instructions, there is a real likelihood that the Defence will request communication of all Protection Reports with respect to all Protection witnesses who appeared in the case and may then request them to be recalled in order to cross-examine them on the basis of the information contained in the Protection Reports. The Registry feels thus deeply concerned about the disruptive effects for the whole proceedings in the case.

(iii) Proposed solution to the present situation

11. Being aware of its mistake, the VWU now seeks to propose solutions that could best address its consequences in order to minimize its impact on the Registry's neutral role and on the proceedings in the *Bemba* case.

12. In its decision following the above mentioned submissions of the Registry in the *Lubanga* case, Trial Chamber I found:¹²

"The Chamber recognises that this is a forensic point that the defence is fully entitled to develop, but it considers that it can be achieved in a straightforward, uncontroversial and fair manner, that will alleviate the Registrar's concerns."

13. The VWU also keeps in mind the following considerations of Pre-Trial Chamber II in the *Uganda* situation:¹³

"76. The Prosecutor's claim that contacts between the Registrar and the Chamber should be subject to as strict a standard as contacts between the Chamber and participants in the proceedings is inconsistent with the neutral

¹² ICC-01/04-01/06-2189-Red, par. 14.

¹³ ICC-02/04-147, par. 76, 78.

role vested in the Registry by the constitutive instruments of the Court. In fact, the Registry, while exercising a broad range of responsibilities under the Statute, Rules and Regulations, is a neutral organ of the Court. It is not a participant in proceedings before the Chamber, and hence, cannot be said to have engaged in '*ex parte*' communications with the Chamber. Rather, as previously discussed, the registry's role is essential to ensure the proper functioning of the Court as required by the Statute. It is on this basis that the Chamber was in fact informed of the documents forming the subject of the Submission by the Registrar, and is more generally entitled to have contacts with the Registrar or his representative.

[...]

78. The Prosecutor has repeatedly requested the Chamber 'to supplement the record' with a description of informal communications between itself and the Registrar, or its representatives, as well as with a description 'of any instruction provided by the Chamber to the Registry' in respect of the letter at stake. It is the view of the Chamber that such a request is deprived of any legal and factual basis and should therefore be dismissed. From a legal standpoint, no basis for such a request can be found in any of the constitutive instruments of the Court. Given the reasons outlined above on the neutrality of the Registry, its distance from the parties and other participants in the proceedings and its crucial role in servicing the Court and allowing all of the organs to function properly, communications between a Chamber and the Registrar can under no circumstances qualify as 'particulars of the proceedings' within the meaning of rule 15 of the Rules, and as such necessitating inclusion in the database referred to in that provision. [...]"

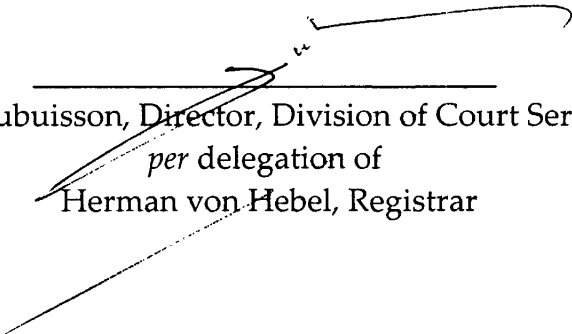
14. In line with the abovementioned findings by Trial chamber I and Pre-Trial Chamber II, the VWU proposes to provide the requested information to the Chamber on an *ex parte* – Registry only – basis, and not to the Parties. The requested information is detailed in the following section.
15. Should the Trial Chamber agree so, the Registry may then report by Friday 2 November 2012 on a confidential basis that the requested information were communicated to the Chamber as a result of a mistake on behalf of the VWU, which normally keeps these information internally for the purpose of its security assessment only, that the information provided to the VWU by the witness were collected for the only purposes of preparing the security assessment of the witness and were not collected under oath and that the Registry accordingly prays the Chamber to disregard this information.
16. The Registry will await the Chamber's instructions as to its filing of Friday 2 November 2012.

(iv) Information requested by the Chamber

17. The representatives of the VWU met with Witness D04-64 on [REDACTED] to conduct the assessment on the in-court protective measures requested by Defence.
18. The meeting started at 10 AM and ended at 11.50 AM.
19. The VWU staff who attended the meeting were [REDACTED] and [REDACTED].
The Registry hereby requests the Chamber to keep the names of the VWU staff members ex-parte to the Chamber only in order to preserve the confidentiality of the staff members who are involved in the direct management of witnesses so that future interaction with them would not be jeopardised¹⁴.
20. The meeting was conducted in French language. [REDACTED].
21. During the course of the meeting the VWU staff asked the witness to provide examples on potential situations which may identify the witness during the testimony, such as, for instance, [REDACTED]. When the witness requested clarification of the examples, the [REDACTED] explained to the witness that, for instance, [REDACTED]. The witness then gave two examples: first, when he stated that he [REDACTED] and the second example, when he [REDACTED]. The purpose to receive such information as stated above is limited for the sole purpose of developing a risk assessment in order for the [REDACTED] to be able to provide the Chamber with a recommendation for in-court protective measures.

¹⁴ The VWU staff are involved in daily management of protection of victims and witnesses. A vital component of protecting victims and witnesses is the ability for staff to conduct their activities discretely in all areas of operation. It is also important to note that the VWU operates under conditions that result from the fact that the VWU and the Court in general have no ability to operate covertly.

22. The meeting with the Witness was audio and video recorded. However, due to the limited capacity of the memory drive of the video camera used for this meeting, the recording stopped around 25 minutes before the end of the meeting. During this time period the part of the meeting the question on the potential situations which may identify the Witness during the testimony was not completely recorded, in particular, the part when the Witness mentioned the two occasions described in paragraph 5 above.



Marc Dubuisson, Director, Division of Court Services
per delegation of
Herman von Hebel, Registrar

Dated this 1 May 2013

At The Hague, The Netherlands