

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **4 June 2014**

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 Redacted Document
with
Confidential Annex A**

Public Redacted version of : "Corrected version of Prosecution's Response to the Defence Request for Leave to Appeal the Decision on "Defence Motion concerning 'Information [REDACTED]'", ICC-01/05-01/08-2938-Conf", ICC-01/05-01/08-2938-Conf-Corr, 21 January 2014

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Fabricio Guariglia

Counsel for the Defence of Jean-Pierre

Bemba Gombo
Peter Haynes
Kate Gibson

Legal Representatives of Victims

Marie-Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Natacha Schauder

Detention Section

**Victims Participation and Reparations Other
Section**

I. Introduction

1. The Defence seeks leave to appeal (“Application” or “Defence Application”)¹ the “Decision on ‘Defence Motion concerning ‘Information [REDACTED]’” (“Decision”)² on the following two issues:³
 - (a) Whether the Trial Chamber erred in law in failing to meet its obligations under Articles 64(7) and 67(1) and Regulation 20 by declining to order the provision of public redacted versions of the relevant filings, in the absence of any identified or concrete risk to the safety or well-being of any witness or victim; (“First Issue”);
 - (b) Whether the Trial Chamber erred in failing to consider the Defence arguments concerning the breach of witness protective measures in place, and preventing further investigation and exploration of issues central to the credibility of the Prosecution evidence in this case (“Second Issue”); (Collectively, “Issues”).
2. The Application should be rejected. The Issues as framed in the Application do not arise from the Decision, nor do they constitute appealable issues within the terms of Article 82(1)(d). Even if they did, the Defence fails to demonstrate that these Issues meet the criteria for leave to appeal under to Article 82(1)(d).
3. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Prosecution files these submissions as confidential since they respond to a filing that is currently subject to the same classification.

¹ ICC-01/05-01/08-2932-Conf.

² ICC-01/05-01/08-2924-Conf.

³ Application, para.13.

II. Procedural History

4. On 11 November 2013, the Defence filed its "Defence Motion concerning 'Information [REDACTED]'" ("Defence Motion").⁴ The Defence requested that the Chamber order:

- i. the provision of public redacted versions of all filings associated with the conduct of Witnesses 169 and 178;
- ii. the Prosecution to provide the Defence with a lesser redacted version of the Prosecution Submission and to formally disclose and attribute an Evidence Reference Number ("ERN") to Annexes A and B;
- iii. the disclosure of any requests for payments or other benefits made by Witness 169, Witness 178, or [REDACTED] and all details and dates of the payments or benefits provided by the prosecution, the VWU, or the Registry to Witnesses 169 and 178, or [REDACTED], including those made in the period between 25 June 2013 and 3 October 2013;
- iv. the disclosure of any recordings, statements or notes of interviews generated by the Prosecution during the contact with both Witness 169 and Witness 178, as well as Witness 119, Witness 42, Witness 38, Witness 68 and any of the other Individuals, as well as "[REDACTED]" or any other [REDACTED] with whom it has been in contact; and
- v. the recall of Witness 169 and Witness 178.⁵

5. The Prosecution,⁶ Victim's Representatives⁷ and the VWU⁸ responded to the Defence Motion.

6. On 26 November 2013, the Chamber held a confidential *ex parte*, Registry only, status conference to address issues related to the VWU's observations.⁹

⁴ ICC-01/05-01/08-2872-Conf.

⁵ ICC-01/05-01/08-2872-Conf, para.50.

⁶ ICC-01/05-01/08-2897-Conf.

⁷ ICC-01/05-01/08-2894-Conf.

⁸ ICC-01/05-01/08-2903-Conf.

7. On 29 November 2013, the VWU filed its confidential *ex parte*, VWU only, "Victims and Witnesses Unit's Report in relation to the Defence Motion ICC-01/05-01/08-2872-Conf pursuant to the Status Conference held on 26 November 2013" together with three confidential *ex parte*, VWU only, Annexes A, B, and C.¹⁰ On 6 December 2013, the VWU filed an addendum to Annex C, including information provided in Annex B and which the Chamber considered to be potentially "material to the preparation of the defence".¹¹
8. On 18 December 2013, the Trial Chamber issued the Decision.
9. On 10 January 2014, the Defence submitted the Application.

III. Submissions

A. The Issues do not arise from the Decision, nor do they constitute appealable issues

(a) The First Issue does not arise from the Decision or constitute an appealable issue

10. In the First Issue, the Defence questions whether the Trial Chamber erred in law in failing to meet its obligations under Articles 64(7) and 67(1) and Regulation 20 by declining to order the provision of public redacted versions of the relevant filings, in the absence of any identified or concrete risk to the safety or well-being of any witness or victim.¹²
11. This Issue does not arise from the Decision because it is based on a mischaracterisation of the Decision. The Chamber did identify certain security concerns. In the Decision the Chamber noted the submission of Legal

⁹ ICC01/05-01/08-2904, ICC-01/05-01/08-T-358-CONF-EXP-ENG ET.

¹⁰ ICC-01/05-01/08-2912-Conf-Exp and confidential *ex parte* Annexes A, B and C.

¹¹ ICC-01/05-01-08-2917-Conf-Exp+ 2912-Conf-Exp-AnxD.

¹² Application, para.13.

Representative Maître Zarambaud that the provision of public redacted versions would risk compromising the security and the physical and psychological well-being of the victims he represents.¹³ The Chamber also noted that the VWU has been ordered to prepare a report on the issues addressed in the Prosecution Submission as soon as practicable, including an “[REDACTED]”.¹⁴

12. Moreover, the First Issue is raised prematurely in that the Chamber only refused reclassification as an *interim* measure: It held that “[p]ending completion of this report, the Chamber considers that publication of the relevant information [REDACTED]. In view of the above, the Chamber considers that, *at this stage*, the request for reclassification should be rejected.”¹⁵ Hence, currently, the final classification of the document is an abstract question or hypothetical concern - not an appealable issue pursuant to Article 82(1)(d).¹⁶

(b) The Second Issue does not arise from the Decision or constitute an appealable issue

13. In the Second Issue, the Defence questions whether the Trial Chamber erred in failing to consider the Defence arguments concerning the breach of witness protective measures in place, and preventing further investigation and exploration of issues central to the credibility of the Prosecution evidence in this case. The Second Issue does not arise from the Decision because it is based on several mischaracterisations of the Decision and the surrounding circumstances.
14. Firstly, the Chamber did not fail to consider any Defence arguments. In the original Defence Motion, the Defence made no arguments focussed *solely* on the breach of witness protective measures. The only reference to protective measures

¹³ Decision, para.10.

¹⁴ Decision, para.17.

¹⁵ Decision, para.17. Emphasis added.

¹⁶ ICC-01/05-01/08-532, para.17; ICC-01/05-01/08-75 para.11; ICC-02/04-01/05-367, para.22; ICC-01/09-01/11-301, para.34; ICC-01/09-02/11-406, paras.50, 61.

was in the context of allegations of collusion and financial impropriety – where the Defence argued

“notwithstanding the [REDACTED] application of measures of protection, they were not only [REDACTED], but acted as a collective bargaining unit. Accordingly, the material strongly suggests both a financial interest in testifying [REDACTED], and collusion between them.”¹⁷

15. The Chamber examined these Defence arguments extensively but found that the allegations were not substantiated. Regarding financial impropriety the Chamber held that

“In relation to this allegation, the Chamber notes the VWU's submission that none of the Individuals received any financial assistance that goes beyond the requirements of ordinary subsistence. This submission is further supported by ICC-01/05-01/08-2912-Conf-Exp-AnxA, which will be communicated to all parties and participants by virtue of the present Decision.”¹⁸

16. Regarding the allegations of collusion it held further that

“the Chamber is not convinced by the defence's assertion that the witnesses "acted as a collective bargaining unit" or that there was "collusion" between them. Indeed, the attempted [REDACTED] allegedly initiated by Witness 178 took place after the relevant witnesses testified and, as noted in the Prosecution Submission, those witnesses who [REDACTED] by the prosecution to verify the information stated that they [REDACTED]. Accordingly, on the basis of the material before it, the Chamber finds that the defence's assertion regarding "collusion" of witnesses is unsubstantiated.”¹⁹

17. Secondly, the Chamber did not prevent “further investigation and exploration of issues central to the credibility of the Prosecution evidence”. In fact, the Chamber appears to have taken every possible step (short of re-calling the witnesses) to ensure that the Defence receives all relevant information regarding the matters raised in the Defence Motion. In the Decision, the Chamber:

- i. granted the Defence Request for disclosure of a lesser redacted version of the Prosecution Submission;

¹⁷ Defence Motion, para.43.

¹⁸ Decision para.33. Footnotes omitted.

¹⁹ Decision, para.34.

- ii. ordered the Prosecution to file by 13 January 2014 a lesser redacted version of the Prosecution Submission;²⁰
- iii. ordered the Prosecution to formally disclose by 13 January 2014 the lesser redacted versions of the letters of 7 and 8 June 2013 in accordance with the E-Court protocol;
- iv. ordered the Registry to reclassify documents ICC-01/05-01/08-2912-Conf-Exp, ICC-01/05-01/08-2912-Conf-Exp-AnxA, ICC01/05-01/08-2912-Conf-Exp-AnxC, and ICC-01/05-01/08-2912Conf-Exp-AnxD as confidential; and
- v. decided that any applications by the parties and participants for the admission into evidence of documents referred to in the present Decision are to be submitted by 20 January 2014.²¹

18. Moreover, the above instructions in the Decision should be viewed in light of the orders already made by the Chamber during the status conference held on 26 November 2013.²² During that status conference, the Chamber instructed the VWU to provide (i) a table enclosing updated information in relation to financial benefits allocated [REDACTED];²³ (ii) a report containing the history of the situation of Witnesses 169 and 178;²⁴ and (iii) a summary of this report containing information that can be shared with the parties.²⁵

19. Regarding the decision not to recall the two witnesses, the Chamber took note of the Defence Submissions,²⁶ analysed the relevant legal²⁷ and factual²⁸ framework, and found that the circumstances were not sufficiently compelling for there to be

²⁰ Accordingly, a lesser redacted version was filed by the Prosecution. See ICC-01/05-01/08-2827-Conf-Red2.

²¹ Decision para.38.

²² ICC01/05-01/08-2904, ICC-01/05-01/08-T-358-CONF-EXP-ENG ET.

²³ ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 23, line 18 to page 24, line 14.

²⁴ ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 22, lines 5 to 18.

²⁵ ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 27, lines 11 to 14.

²⁶ Decision para.5.

²⁷ Decision, para.34.

²⁸ Decision, para.35.

good cause to recall witness 178 and 169.²⁹ The Defence does not identify a legal, factual or procedural error in the reasoning of the Chamber. It merely disagrees with the conclusion arrived at by the Chamber. Such a disagreement does not constitute an appealable issue.³⁰

B. The Issues do not significantly affect the fair and expeditious conduct of the proceedings

(a) *First Issue*

20. The First Issue does not significantly affect the fair conduct of the proceedings.

Firstly, as noted above, the Chamber only refused reclassification as an *interim* measure while the VWU completes its assessment.³¹ As a result, the current submissions of the Defence on this issue are hypothetical and do not meet the requirements of Article 82(1)(d).³² Secondly, in light of the multiple orders for disclosure and the filing of lesser redacted versions of filings³³ the Defence has access to all the relevant information regarding [REDACTED] and other issues related to witness credibility, regardless of whether the same information is public. Hence, even if the Decision is wrongly decided on this point, this does not significantly affect the fair conduct of the proceedings.

21. Neither does the First Issue significantly affect the expeditious conduct of the proceedings. The Defence argues that further litigation as to the publicity of these filings and documents, coupled with the Chamber's decision to wait for [REDACTED] and submission of a report by VWU inevitably leads to delays.³⁴

²⁹ Decision, para.38 read with para.35.

³⁰ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

³¹ Decision para.17.

³² ICC-01/04-01/07-1958, para. 20.

³³ See, for example, Decision paras.32,36, 38. See further ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 27, lines 11 to 14.

³⁴ Application, para.14.

However, the Prosecution submits that an appeal at this point, on a hypothetical issue, in the absence of information from the VWU, would cause far greater delay.

(b) Second Issue

22. Firstly, the Prosecution reiterates in the context of the Second Issue that the Chamber did not fail to address the relevant Defence submissions. Moreover, the Chambers' duty to provide a reasoned decision does not "necessarily require reciting each and every factor that was before the respective Chamber to be individually set out".³⁵ Rather, it need only "identify which facts it found to be relevant in coming to its conclusion".³⁶ The Single Judge abided by these requirements – and hence there is no significant impact on the fair conduct of the proceedings.

23. Secondly, as noted earlier, the Chamber has taken every step (short of re-calling witnesses) to ensure that the Defence has access to all the relevant information regarding [REDACTED] and other issues related to witness credibility.³⁷ The Chamber has also allowed for an extension of the deadline for the submission of applications for the admission of material into evidence.³⁸ Moreover, the Chamber has allowed for the further investigation and exploration of issues relevant to the credibility of Prosecution evidence. Indeed, as noted by the Chamber,³⁹ even the Defence conceded that disclosure of the requested information may obviate the need to recall witnesses.⁴⁰ As a result, even if the Decision was decided wrongly in the context of the Second Issue, this would not significantly affect the fairness of the proceedings, also because

³⁵ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

³⁶ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

³⁷ See, for example, Decision paras.32, 36, 38. See further ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 27, lines 11 to 14.

³⁸ Decision para.37.

³⁹ Decision para.36.

⁴⁰ ICC-01/05-01/08-2872-Conf, para.49.

24. Thirdly, the decision not to recall the two witnesses does not, *per se*, affect the fair and expeditious conduct of the proceedings. Otherwise every refusal to recall would automatically have the same effect. The burden on the Defence is to show why in the concrete circumstances of this case, the decision to not recall these specific witnesses impacts on fairness and expeditiousness. They have failed to do so.

25. Finally, the Chamber may take into consideration any difficulties encountered by the Defence in presenting evidence when weighing the entirety of the evidence at the end of the trial. In so doing, it may resolve any unfairness in favour of the accused.⁴¹ Since the Chamber is already fully briefed on the matter, no further litigation in the first instance is required. Whether any litigation on the matter at second instance is required will depend on the judgement of the Trial Chamber pursuant to Article 74.

C. The Issues do not significantly affect the outcome of the proceedings

26. Regarding the First Issue, in light of the multiple orders for disclosure and the filing of lesser redacted versions of filings,⁴² the Defence has access to all the relevant information regarding [REDACTED] and other issues related to witness credibility, regardless of whether the same information is public.

27. Similarly in the context of the Second Issue, the Chamber has sought to ensure that the Defence has access to all the relevant information regarding [REDACTED] and other issues related to witness credibility,⁴³ allowed for an extension of the deadline for the submission of applications for the admission of

⁴¹ ICC-02/05-03/09-410, para.102.

⁴² See, for example, Decision paras.32,36, 38. See further ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 27, lines 11 to 14.

⁴³ See, for example, Decision paras.32,36, 38. See further ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 27, lines 11 to 14.

material into evidence,⁴⁴ and has left it open to the Defence to use such evidence to make any related submissions on witness credibility.⁴⁵ Hence, even if the Decision is wrongly decided on this point, this would not significantly affect the outcome of the trial.

D. Immediate resolution by the Appeals Chamber of the Issues would not materially advance the proceedings

28. Intervention by the Appeals Chamber at this highly advanced stage of the proceedings would not materially advance the proceedings. Barring exceptional circumstances, when a case has reached such an advanced stage, issues concerning the proceedings raised by the parties can and should be dealt with in the context of a final appeal. It would be detrimental to the efficient conduct of the proceedings and cause unnecessary delay to allow an interlocutory appeal at this stage, when an adequate remedy will become available in the near future as part of an appeal against the Trial Chamber's judgement under Article 74.⁴⁶

29. In addition, as already stated above, the First Issue is raised prematurely in that the Chamber only refused reclassification as an interim measure pending the submission of the report by the VWU. Appellate review at this point, before the

⁴⁴ Decision, para.37.

⁴⁵ Decision, para.37.

⁴⁶ In the ICTY *Strugar* case, for instance, the Trial Chamber denied certification under Rule 73(B) to appeal a decision finding the accused fit to stand trial, noting that, should the accused be found guilty at the end of the trial, he was entitled to raise the issue as part of his final appeal (*Prosecutor v. Strugar*, IT-02-54-T, Decision on Defence Motion for Certification, 17 June 2004, para.6); in *Halilovic*, certification to appeal a decision denying the Prosecution leave to amend charges was rejected due to, *inter alia*, considerations as to the further delay that an interlocutory appeal could cause to the proceedings; it was simultaneously noted that if the accused were acquitted of the charges, the Prosecution could appeal the judgment (see *Prosecutor v. Halilovic*, IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 12 January 2005, and also *Prosecutor v. Halilovic*, IT-01-48-PT, Separate and Concurring Opinion of Judge O-Gon Kwon Appended to Trial Chamber Decision Dated 12 January 2005 on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 14 January 2005, para.6).

Trial Chamber has made a final decision, and in the absence of relevant information from the VWU, would not materially advance the proceedings.

30. Finally, regarding the Second Issue, as noted above, the Chamber has sought to ensure that the Defence has access to all the relevant information regarding [REDACTED] and other issues related to witness credibility.⁴⁷ It also allowed for an extension of the deadline for the submission of applications for the admission of material into evidence,⁴⁸ and has left it open to the Defence to use such evidence to make any related submissions on witness credibility.⁴⁹ The Chamber can take into consideration such submissions on credibility as well any difficulties encountered by the Defence in locating and presenting evidence on credibility, when weighing the entirety of the evidence at the end of the trial and it may, at that stage, resolve any unfairness towards the accused.⁵⁰

IV. Conclusion

31. For the above reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 4th Day of June 2014
At The Hague, The Netherlands

⁴⁷ See, for example, Decision paras.32, 36, 38. See further ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 27, lines 11 to 14.

⁴⁸ Decision, para.37.

⁴⁹ Decision, para.37.

⁵⁰ ICC-02/05-03/09-410, para.102.