

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 with Confidential Annex A and Confidential Annex B

**Public Redacted Version of Corrigendum to Defence Further Request for
Reclassification of Documents related to Witness 169 and Witness 178**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. INTRODUCTION

1. On 7 June 2013, CAR-OTP-WWWW-0169 (“Witness 169”) sent a letter identifying himself as a Prosecution witness, and [REDACTED]¹ to the Prosecutor of the ICC, with copies for information to the [REDACTED].² This letter prompted a significant number of filings, decisions and disclosed materials in the present case.³

2. Since 11 November 2013, the Defence has sought to have these filings and materials reclassified as public.⁴

3. Set out in the attached Confidential Annex A, these filings and materials demonstrate, *inter alia* (a) [REDACTED] in [REDACTED];⁵ (b) payments to Prosecution witnesses in the amounts of up to [REDACTED];⁶ and (c) that at least one Prosecution witness, Witness 169, is claiming “money promised by the Prosecutor for witnesses”.⁷

4. The continued confidentiality of these materials stands in marked contrast to the public nature of the proceedings in Case ICC-01/05-01/13 (“Article 70 Case”), where allegations concerning payments to **Defence** witnesses have consistently been made public by both the Prosecution and the Single Judge in that case.⁸

¹ ICC-01/05-01/08-2980-Conf, footnote 5.

² ICC-01/05-01/08-2827-Conf-AnxA-Red2.

³ See Confidential Annex A to the present motion.

⁴ ICC-01/05-01/08-2872-Conf, Defence Motion concerning “Information on [REDACTED] witnesses 169 and 178 [REDACTED]”, 11 November 2013; ICC-01/05-01/08-2932-Conf, Defence Request for Leave to Appeal the Decision on the Defence Motion concerning [REDACTED] Witness 169 and 178 [REDACTED], 10 January 2014.

⁵ ICC-01/05-01/08-2827-Conf-Red2, paras. 7, 10.

⁶ ICC-01/05-01/08-2912-Conf-AnxD.

⁷ ICC-01/05-01/08-2827-Conf-Red2, para. 9.

⁸ ICC-01/05-45-Conf-Exp, Decision designating a Single Judge, 6 May 2013; ICC-01/05-46-Conf-Exp Decision on the Prosecutor's 'Request for judicial assistance to obtain evidence for investigation under Article 70, 8 May 2013; ICC-01/05-50-Conf-Exp, “Decision on the 'Registry's Observations pursuant to regulation 24 bis of the Regulations of the Court on the implementation of the 'Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70"”, 27 May 2013; ICC-01/05-01/13-20-Conf “Decision on the Prosecutor's 'Urgent Request to extend the prohibition of contacts between the Suspects and With Third Parties””; ICC-01/05-01/13-48-Conf

5. The Defence efforts to bring these materials to light have thus far been rejected on the basis that the Chamber was waiting for a “VWU Security Assessment”.⁹ The Chamber has again recently clarified that it “has yet to issue a final decision on the reclassification of the relevant documents as public.”¹⁰

6. VWU was asked to undertake a security assessment for each of the [REDACTED] on 25 October 2013.¹¹ On 17 February 2014, VWU filed a three-page report revealing that it had spoken with three witnesses in the intervening four months.¹² This report was provided to the Defence on 28 February 2014.¹³

7. Given the advanced state of the proceedings, and the importance of these filings to the case, the Defence seizes the Chamber with the present request for an order that VWU finalise all outstanding security assessments and file any subsequent reports within fourteen (14) days. The Defence also reiterates its request that the documents set out in Confidential Annex A be reclassified, so that the public can also be informed of the irregularities concerning [REDACTED] and payments made to Prosecution witnesses in the present proceedings.

B. CONFIDENTIAL NATURE OF THE PRESENT FILING

"Decision on the 'Prosecution's request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel'", 4 February 2014; ICC-01/05-01/13-50-Conf, "Decision on 'Demande d'autorisation d'interjeter appel contre la 'Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings' (ICC-01/05- 01/13-41-Conf-Red)" 4 February 2014; ICC-01/05-01/13-51-Conf, "Decision on 'Defence request for leave to appeal decision ICC-01/05-01/13-41-Conf-Red'", 4 February 2014; ICC-01/05-01/13-103-Conf, "Decision on the requests submitted by the Defence for Mr Kilolo and the Defence for Mr Babala relating to the forensic acquisition and return of material seized in the proceedings", 4 February 2014.

⁹ ICC-01/05-01/08-2980-Conf, para. 25.

¹⁰ ICC-01/05-01/08-2980-Conf, para. 25.

¹¹ ICC-01/05-01/08-2845-Conf-Red, para. 13.

¹² ICC-01/05-01/08-2999-Conf, p.3; ICC-01/05-01/08-2975-Conf-Anx-Red.

¹³ ICC-01/05-01/08-2975-Conf-Anx-Red.

8. Each of the documents and related filings concerning [REDACTED] Witness 169 and Witness 178 [REDACTED], and the payments and benefits provided to them, remain confidential.¹⁴ As such, the Defence files the present submissions confidentially.

C. APPLICABLE LAW

9. Article 64(7) of the Rome Statute stipulates that: “the trial shall be held in public”; thus setting publicity of hearings and proceedings as the rule. Resort to closed sessions or confidential filings is characterised as an exception to the right to a public hearing, requiring “special circumstances” before being implemented.

10. Trial Chamber II in the *Katanga* case has addressed the importance of the publicity of proceedings, and was explicit that:

“the public nature of proceedings is a fundamental principle which, furthermore, is enshrined by Article 64(7) of the Statute. This principle constitutes, for the Defence, a safeguard, an essential safeguard. It contributes to preserving the trust that all those subject to the law have to have in justice, and it is one of the best means of controlling the way in which such justice is rendered.”¹⁵

11. Article 67(1) of the Statute also provides that: “[i]n the determination of any charge, **the accused shall be entitled to a public hearing**, having regard to the provisions of this Statute, to a fair hearing conducted impartially and to the following minimum guarantees, in full equality [...]”. The provisions of the Statute concerning the importance of the publicity of the proceedings, like every provision, must be interpreted and applied in accordance with “internationally recognized human rights”.¹⁶

¹⁴ ICC-01/05-01/08-2924-Conf, para. 38.

¹⁵ Transcript, *Prosecutor v Katanga & Ngudjolo Chui*, ICC-01/04-01/07-T-189-ENG ET WT 20-09-2010, page 10.

¹⁶ ICC-01-04-01-06-722, paras. 36 and 37.

12. To this end, Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”) also provides that the accused shall be entitled to a public hearing, this right being regarded as an essential element of the concept of a fair trial.¹⁷ The right to a public hearing is also guaranteed by the European Convention on human Rights in its Article 6(1) and the American Convention on Human Rights in its Article 8(5).

13. The European Court of Human Rights (“ECHR”) has left no doubt as to the importance of public proceedings, finding that the public nature of trials:

“protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial”.¹⁸

14. In addition to being a right afforded to an accused, the ECHR recognises that public proceedings have a more general benefit to the public at large, holding that:

“[p]ublicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered”.¹⁹

15. Articles 20(2) and 21(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia (“ICTR” and “ICTY”) also guarantee the right of an accused to a fair and public hearing in the determination of charges against him or her. In a decision on a motion for the redaction of public records, an ICTY Trial Chamber held that:

¹⁷ “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

¹⁸ *Werner v. Austria*, 24 November 1997, para. 45.

¹⁹ *Pretto & Ors v. Italy*, (Series A, No. 71 (1984) 6 EHRR 182).

“The proceedings before the International Tribunal are, in essence, public. The right of every accused to a public hearing is a fundamental principle of justice and a basic human right of every accused person”.²⁰

16. The Chamber also stated that:

“Subject to the provisions of The Directive for the Registry, Judicial Support Services (IT-121) public access to the records of the International Tribunal is allowed in furtherance of the public interest in the proceedings before the International Tribunal. Thus, it is evident that the Judges of the International Tribunal place considerable importance on the need to ensure a public and transparent judicial process”.²¹

17. In ordering the Registrar to reclassify exhibits and transcripts, the Trial Chamber I of the ICTY held that:

“The principle of publicity of the proceedings is of paramount importance to the public perception of the judicial process in ensuring not only that justice is done but also that it is seen to be done”.²²

18. The importance of the publicity of proceedings is not limited to international criminal trials, but is also an important component of the fairness of domestic criminal proceedings. The United States Supreme Court, having the opportunity to rule on the importance of the publicity of proceedings, held that:

“There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously [. . .]”²³

²⁰ *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Decision on the Prosecution’s motion for the redaction of the public record, IT-96-21, 5 June 1997, para. 23.

²¹ *Ibid.*, para. 26.

²² *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on prosecution’s motion to change private/closed session testimony and 92^{ter} statements admitted under seal to public status, IT-98-3 2/1-T, 10 July 2009, page 3.

²³ *Estes v Texas*, 381 U.S. 532 at 583 (1965).

D. SUBMISSIONS

(a) Finalisation of VWU security assessments of the [REDACTED]

19. The letter sent by Witness 169 on 7 June 2013 demonstrates, at a minimum, that the [REDACTED] are known, if not to the public at large, then [REDACTED].²⁴ Witness 169's letter annexes a [REDACTED] in the present case.²⁵

20. On 25 October 2013, as a result of this [REDACTED] of numerous orders for protective measures, the Chamber ordered VWU to conduct an assessment of the security situation of the [REDACTED] on Witness 169's [REDACTED].²⁶ Given the evident urgency arising from the [REDACTED], VWU's report was to be filed "as soon as practicable".²⁷

21. On 17 February 2014, the Registry filed a three-page report revealing that it had spoken with three witnesses in the intervening four months.²⁸ This report was provided to the Defence on 28 February 2014.²⁹

22. Concerning the three witnesses with whom it made [REDACTED], VWU concludes:³⁰

[REDACTED].

²⁴ ICC-01/05-01/08-2827-Conf-AnxA-Red2.

²⁵ ICC-01/05-01/08-2827-Conf-Red2, paras. 7, 10; ICC-01/05-01/08-2980-Conf, footnote 5.

²⁶ ICC-01/05-01/08-2845-Conf-Red, "Decision on the Prosecution's Information [REDACTED] of Witnesses 169 and 178 [REDACTED]" (ICC-01/05-01/08-2827-Conf-Exp) of 25 October 2013, paras. 7 and 13.

²⁷ ICC-01/05-01/08-2845-Conf-Red, "Decision on the Prosecution's Information [REDACTED] of Witnesses 169 and 178 [REDACTED]" (ICC-01/05-01/08-2827-Conf-Exp) of 25 October 2013, paras. 13.

²⁸ ICC-01/05-01/08-2999-Conf, p.3; ICC-01/05-01/08-2975-Conf-Anx-Red.

²⁹ ICC-01/05-01/08-2975-Conf-Anx-Red.

³⁰ ICC-01/05-01/08-2975-Conf-Anx-Red, p.4.

23. The delay in the provision of VWU's security assessment has caused concrete prejudice to the Accused. The Chamber based its most recent refusal to reclassify the materials set out in Confidential Annex A on "the concerns raised by Maître Zarambaud" and the fact that VWU's Security Assessment was still pending.³¹

24. The Defence notes that while the late Maître Zarambaud raised concerns related to the reclassification of documents, he also asked that he be consulted as to the redactions to be applied in the event of reclassification.³² As such, he did not object to these documents being made public *per se*.

25. As such, it is the pace of VWU's compliance with the Chamber's order of 25 October 2013 that is effectively blocking the reclassification of these decisions, filings, and disclosed materials which are of seminal significance to the proceedings.

26. To ensure the publicity of the proceedings and in compliance with the Accused's right to a public and expeditious trial, the Defence accordingly seizes the Chamber with a request to order VWU to seek to complete any outstanding security assessments and file any subsequent reports within fourteen (14) days. The Defence notes, however, VWU's assertion that it may not be in a position to do so.³³ As such, and given that the assessments conducted thus far give no discernible basis for the continued confidentiality of the materials set out in Annex A, the Defence submits that following the expiration of the 14 day period, reclassification should be ordered.

(b) Reclassification of the relevant filings

³¹ Decision on 'Defence Request for Leave to Appeal the Decision on the Defence Motion concerning [REDACTED] Witnesses 169 and 178 [REDACTED]', 14 February 2014, ICC-01/05-01/08-2980-Conf, para. 25.

³² ICC-01/05-01/08-2894-Conf, page 8.

³³ ICC-01/05-01/08-2975-Conf-Red, para. 7.

27. Without prejudice to the above submissions, the Defence reiterates that it is not seeking the publication of names, locations, or any other information which could result in the identity of [REDACTED]. Rather, the Defence submits that with appropriate redactions, the majority of information contained in the documents set out in Confidential Annex A could already be made public without any adverse impact on the security of witnesses, or the risk of revealing the identities of any of the individuals concerned, be they witnesses or ICC field staff. The conclusions of the VWU report, in particular that the publication of the letter has not had any impact on the security situation of the witnesses, supports the Defence position.³⁴

28. The Defence recalls that in other cases before both the International Criminal Court³⁵ and other international tribunals, documents and filings detailing payments to witnesses have been issued publicly.³⁶ There is perhaps no better example than the current Article 70 Case before Pre-Trial Chamber II, where an absolute wealth of information concerning allegations of payments to **Defence** witnesses in the instant case are in the public domain. In the Article 70 case, considerations of the security of witnesses have been dealt with in the normal manner, namely through redacting the name or location of witnesses. The Defence submits that the same exercise could easily be undertaken in relation to the documents listed in Confidential Annex A, regardless of the outcome of any pending VWU security assessment.

³⁴ ICC-01/05-01/08-2975-Conf-Anx-Red, page 4.

³⁵ See, for example, *Prosecutor v. Lubanga*, Corrigendum to Public to Redacted Decision on the defence 422 documents ICC-01/04-01/06-2595-Red-Corr, 8 March 2011, paras. 63-65; See also *Prosecutor v. Lubanga*, Judgement, ICC-01/04-01/06, 14 March 2012, paras. 294, 325, 460.

³⁶ See, for example, *Prosecutor v. Charles Ghankay Taylor*, Judgement, SCSL-03-01-T, 26 April 2012, paras. 190-192; *Prosecutor v. Martić*, Judgement, IT-95-11-T, 12 June 2007, paras. 36-37; *Prosecutor v. Nahimana et al.*, (Transcript of 26 November 2001 at page 10, Exhibit #3D73 admitted on 19 November 2001) ICTR-99-52-T; *Prosecutor v. Casimir Bizimungu et al.*, Judgement and Sentence, ICTR-99-50-T, 30 September 2011, para. 830 and Annex A Procedural History, para. 35; *Prosecutor v. Édouard Karemera et al.*, Decision on Joseph Nzirorera's Motion For Reconsideration Of Oral Decision On Motion To Compel Full Disclosure Of ICTR Payments For The Benefit Of Witnesses G And T And Motion For Admission Of Exhibit: Payments Made For The Benefit Of Witness G, ICTR-98-44-T, 29 May 2008, paras. 8-9.

29. The implications for equality of arms in the present case is plain. It cannot be the case that allegations concerning payments to Defence witnesses is fit for public consumption, while demonstrated [REDACTED] Prosecution witnesses with the purpose of seeking payments or additional payments must remain out of the public domain.

E. RELIEF SOUGHT

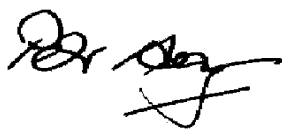
30. In light of all of the above, the Defence requests that the Chamber:

ORDER that VWU finalise the completion of any security assessments and file any subsequent reports, within fourteen (14) days;

ORDER that VWU file simultaneously a redacted version of any subsequent report available to the Defence, with redactions being limited to information revealing the [REDACTED]; and

ORDER the reclassification of the documents set out in Confidential Annex A as public.

The whole respectfully submitted.



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24 September 2014