Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/05-01/08**
Date:**28/01/2013**

TRIAL CHAMBER III

Before: **Judge Sylvia Steiner, Presiding Judge**
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION INTHE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR
***v.*Jean-Pierre Bemba Gombo**

Public redacted version

Defence Motion for Disclosure of VWU Security Assessments of Defence Witnesses

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

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

The Office of the Prosecutor
Ms. Fatou Bensouda
Mr. Jean-Jacques Badibanga

Counsel for the Defence
Mr. Aimé Kilolo-Musamba
Mr. Peter Haynes

Legal Representatives of the Victims
Ms. Marie-Edith Douzima-Lawson
Mr. Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia
Deputy Registrar
Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

A. BACKGROUND

1. During the course of the Defence case, the Presiding Judge has questioned Defence witnesses on the basis of information from internal VWU Security Assessment Reports. This was acknowledged by Her Honour during her examinations of Witness D-64 and Witness D-55.[1]

2. These VWU Security Assessment Reports have not been disclosed to the Defence,[2] nor do they form part of the case file in the present proceedings.[3]

3. The Presiding Judge used information in VWU Security Assessment Reports to **contradict and undermine** the testimony of Defence witnesses during their sworn testimony.[4] This was done in spite of a contemporaneous Defence objection:[5]

> MR KILOLO: (Interpretation) Yes, Madam President, Defence would like to seek clarification and guidance on a procedural matter, on a procedural matter from the Chamber.
> A short while ago you made mention of information gathered on Facebook relating to the witness who is in the box. We tried to search quickly, but we were not able to find the source of this information in these proceedings. Would it be possible for the Chamber to assist us by providing us with the reference that may guide us in the exercise of the rights of the Defence?
> PRESIDING JUDGE STEINER: Yes, Maître Kilolo, we could just say that Facebook is a public site in which everyone could consult Facebook and find the information one wants to have, but the fact is that not only in relation to this information, but in relation to an information that the Chamber will address. As soon as we resume the

[1] ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012 pp. 31-36 ; ICC-01/05-01/08-T-265-CONF-ENG ET 30-10-2012, pp. 63-64.
[2] ICC-01/05-01/08-2410-Conf, para. 13.
[3] ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012, p. 67 "This is not evidence".
[4] See, for example: ICC-01/05-01/08-T-265-CONF-ENG ET 30-10-2012 63/69: PRESIDING JUDGE STEINER: The security evaluation in respect to your personal security and that of your family has been that it is a low risk, not high risk the way you are saying, so maybe there was a -- that's why I wanted a clarification because you give the impression that you can be assassinated because of your testimony at any time. This is your concern?
[5] ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012 33/67 et seq.

> questioning, the Chamber intends to disclose to the parties and participants some information that is contained in the report by VWU on protective measures. As the parties and participants know, **every time a request for protective measures is made for any witnesses, Prosecution or Defence witnesses, there is an assessment - a security assessment - made by the competent section of the VWU, and this is an assessment that is directed to the Chamber because it is up to the Chamber to decide on the appropriate protective measures**. In relation to this witness, 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. So 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.
> So if you -- if you are satisfied, we can ask the witness to come into the courtroom and we will continue and a proper -- a better reference will be given. Although I repeat this is a document directed to the Chamber and will not be part of the case file. This is not evidence.
> MR KILOLO: (Interpretation) Of course, your Honour, we shall follow your sage advice regarding procedure, but we would have -- we thought that if the information is not placed on the case record the information in principle should not be used during examination of the witness, but information -- the information was used as the basis for a number of questions and the transcript was prepared accordingly, so we do wonder with a view to clarifying the procedure for upcoming witnesses, might it not be better for all parties to receive notification of such information before it is used, or is placed on the transcript, or before questions are put to the witness?
> PRESIDING JUDGE STEINER: Maître Kilolo, the Chamber is allowed to put questions to the witnesses before, during and after the testimony in accordance with the Rules of Procedure and Evidence. The Chamber - the Judges of the Chamber - in this Court are truth finders. We are allowed to put to the witness whatever questions we deem necessary in order to help the Chamber in finding the truth. **So the Chamber is not bound by the documents of the case file…**

4. After having examined him on his alleged Facebook contacts list, the Presiding Judge went on to examine Witness D-64 on a statement he had allegedly given during an undisclosed interview with a VWU Protection Officer for the purposes of a security assessment [REDACTED].

5. The record of the case reflects 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.

6. The following day, on 24 October 2012, the Defence wrote to VWU asking the two following questions:[6]

> (1) Whether security assessments regularly (or always) contain details regarding the basis for VWU's recommendations, including details of interviews with Defence witnesses or external investigations (such as Facebook pages etc).
>
> (2) Whether the witness is told in advance that the answers he gives will be directly transmitted to the Chamber, and may be used by the Chamber during his examination.

7. A week later, VWU responded to the Defence in the following terms:[7]

> All witnesses are informed by the VWU Protection staff that the purpose of the meeting is to discuss their security concerns with regards to a recommendation that would be made available to the Chamber for their decision. The decision for in-court protective measures lies solely with the Chamber.
>
> At the end of each meeting with the witness a report is drafted and the recommendation is transmitted to the Chamber. **If the Chamber requests for the full report, it is then sent to the Chamber.** The exact nature of information given by the witness can not be predetermined, and it is at the discretion of the Protection Officer who conducts the meeting as to what is included into the report to substantiate the recommendation to the Chamber for the in-court protective measures.
>
> There is no protocol in place for these meetings.

[6] Email Defence to VWU, entitled Request from the Defence: VWU Security Assessments of Defence Witnesses, 24 October 2012, 09.16.
[7] Email VWU to the Defence, entitled Request from the Defence: VWU Security Assessments of Defence Witnesses, 30 October 2012, 17:08.

8. On 26 October 2012, the Chamber **ordered** VWU to clarify, by 31 October 2012, via "**a confidential report available to the parties and participants**"[8]: "(i) Whether the information provided in the VWU protection report to the effect that the witness informed the VWU that [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 ("the First Decision").[9]

9. 15 minutes before this filing was due, VWU requested an extension of time due to the "sensitivity" of the matter.[10] The Chamber granted an extension until 16.00 on Friday, 2 November 2012.[11] Four days after this deadline had passed, on 6 November 2012, the Defence wrote to the Chamber, noting that the Defence was yet to see the VWU report, and asking to confirm whether a filing had been made in accordance with the First Decision.[12]

10. The Chamber ignored the Defence request, which remains unanswered. No report has ever been made available to the parties and participants.

11. On 14 November 2012, without having sought observations from the Defence, and in the absence of any further information having been forthcoming to from VWU, the Chamber rendered its "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'" (the "Second Decision").[13] The Second Decision revealed that VWU had provided the Chamber with its internal

[8]ICC-01/05-01/08-2394-Conf.
[9]ICC-01/05-01/08-2394-Conf, para. 4.
[10]Email VWU to the Chamber, entitled REQUEST FOR EXTENSION OF DEADLINE ICC-01/05-01/08-2394-Conf: Decision ordering the VWU to provide further information in relation to the statement of Witness D04-64, 31 October 2012.
[11]Email Chamber to VWU, 31 October 2012
[12]Email Defence to the Chamber, 6 November 2012.
[13] ICC-01/05-01/08-2410-Conf

Security Assessment Reports not only in relation to Witness D-64 and Witness D-55, but also for Witness D-51, and Witness D-57.[14]

12. The Second Decision stated that the VWU Security Assessment Reports were transmitted to the Chamber "in error",[15] and elsewhere as an "unfortunate procedural error".[16] This information contradicted the information received from VWU that they had been transmitted as a result **of a request** from the Chamber.[17]

13. The Second Decision acknowledged only that the Presiding Judge had questioned Witness D-64 on the alleged contradiction concerning [REDACTED]. It did not acknowledge that the Presiding Judge had also used other confidential information contained in internal VWU Security Assessment Reports to question Witness D-64 on other aspects of his testimony, nor that she had also adopted this practice with Witness D-55.[18]

B. CONFIDENTIALITY OF THE PRESENT MOTION

14. The Defence files this motion confidentially, given the confidential status of the underlying First Decision, the Second Decision, and the transcripts of the questioning of Witnesses D-64 and D-55 by the Presiding Judge. [19]

15. The Defence recalls in this regard, the important safeguard provided by public proceedings,[20] as well as Articles 61(7) and 64(7) of the Rome Statute. The

[14]ICC-01/05-01/08-2410-Conf, para. 13.
[15] ICC-01/05-01/08-2410-Conf, para. 9.
[16]ICC-01/05-01/08-2410-Conf, para.11.
[17] Email VWU to the Defence, entitled Request from the Defence: VWU Security Assessments of Defence Witnesses, 30 October 2012, 17:08.
[18] ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012 pp. 31-36 ; ICC-01/05-01/08-T-265-CONF-ENG ET 30-10-2012, pp. 63-64.
[19]ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012 pp. 31-36 ; ICC-01/05-01/08-T-265-CONF-ENG ET 30-10-2012, pp. 63-64.
[20]ECtHR, Judgement, *Werner v. Austria*, 24 November 1997, para. 45. The publicity of proceedings "protects litigants against the administration of justice in secret with no public scrutiny; it is also one

Defence also recalls the importance of Mr. Bemba's entitlement to adversarial proceedings, and his right to be heard on all relevant aspects of the proceedings. The Defence accordingly seizes the Chamber with a request to re-classify as public (i) the portions of the transcripts cited herein of the questioning of Witness D-64 and Witness D-55; (ii) the First Decision; (iii) the Second Decision; and (iv) the current motion, with redactions as strictly necessary to prevent the disclosure of the identity of the said witnesses.

C. APPLICABLE LAW

16. The governing documents of the ICC assign the Trial Chamber a fundamental role in safeguarding the dignity of individuals who appear before it. Article 64(2) of the Rome Statute of the International Criminal Court ("Statute") requires that the Trial Chamber must ensure that trials are conducted with "due regard for the protection of victims and witnesses." Under Article 64(6)(e), the Trial Chamber is able to "provide for the protection" of witnesses.

17. Article 67(1)(e) of the Statute gives the accused the right "to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf **under the same conditions as witnesses against him or her**."

18. The Statute also requires that evidence is submitted by the parties, and not by the Chamber. Article 69(3) provides that "**the parties** may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority **to request the submission** of all evidence that it considers necessary for the determination of the truth." This fundamental provision has been considered by

---

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."

the Appeals Chamber, who held that notwithstanding the obligation on the Trial Chamber to establish the truth, "the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or the relevance of evidence in trial proceedings **lies primarily with the parties**."[21]

19. The propriety of Judges questioning witnesses on the basis of documents or materials has been considered at length at the ICTY. The overarching consideration of Chambers at the ICTY was ensuring that the parties had adequate time to prepare and develop their strategy in relation to the documents the Chamber intended to use. In *Krajišnik*, for example, the Chamber questioned a witness whose evidence it considered might assist in the search for the truth. The Chamber emphasized that:[22]

> when questioning Mrs Plavšić, **the Chamber relied only on material already in evidence or material provided by the witness herself. In both cases the material was available to the parties in advance. The material included the witness statement, the interview transcript, the book excerpts, as well as a number of Prosecution interviews with Mrs Plavšić**. Accordingly, not only did the Defence know in advance what the scope of examination-in-chief would be, it was also able to anticipate and prepare the potential topics to be covered in cross-examination. […]
>
> **As for Mr Derić, while it is correct that he did not give the Chamber a statement in advance to his testimony, the parties knew that the examination-in-chief would be based on material already in evidence.** Accordingly, the parties could anticipate the topics on which the Chamber would examine this witness. Mr Derić, like Mrs Plavšić, was on the Defence list of witnesses until February 2006.

20. Similarly, in *Hadžihasanović*, the Trial Chamber admitted documents as Chambers exhibits. The Appeals Chamber held that where a Chamber decides to admit exhibits *proprio motu*, the parties must be given adequate time and facilities to

[21]ICC-01/04-01/06 OA 9 and OA 10, para. 93.
[22]*Prosecutor v. Krajišnik*, IT-00-39-T, Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Derić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, 14 August 2006, paras. 16, 20.

develop their strategy with respect to the admitted exhibits, and that pre-trial disclosure of the exhibits was not necessarily sufficient.[23]

D. SUBMISSIONS

(a) Ex Parte Nature of VWU's Observations

21. The Chamber ordered VWU to file **a confidential report available to the parties and participants**,[24] responding to three (3) discrete questions. This report was subsequently filed *ex parte*,[25]and has not been made available to the Defence, even in redacted form.

22. Both Trial Chambers I and II have emphasized the exceptional nature of *ex parte* procedures.[26] Trial Chamber I held: [27]

> ex parte procedures are only to be used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the court must ensure that their use is proportionate given the potential prejudice to the accused. Second, even when an ex parte procedure is used, the other party should be notified of the procedure, and its legal basis should be explained, unless to do so is inappropriate.

23. The practice at the ICC, to which this Chamber has previously conformed, is for *ex parte* filings to be accompanied by the provision of a redacted version to the Defence.[28] In *Lubanga*, for example, Trial Chamber I held agreed that an *ex parte* filing was appropriate to prevent a protected identity being revealed, but ordered

---

[23]*Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Appeal Judgment, 22 April 2008, paras. 111-117
[24]ICC-01/05-01/08-2394-Conf.
[25]ICC-01/05-01/08-2410-Conf, para. 6, referring to ex parte filing ICC-01/05-01/08-2394-Conf ("VWU *Ex Parte* Observations")
[26] See, for example, ICC-01/04-01/07-T-240-Red-ENG CT WT 24-03-2011 40/78 PV T
[27]Decision on the procedures to be adopted for ex parte proceedings, ICC-01/04-01/06-1058, 16 December 2007, at para. 12.
[28]See, for example, ICC-01/05-01/08-2158, para. 8(e); See also ICC-01/04-01/06-T-222-ENG ET WT 09-12-2009 17/34 NB T ; ICC-01/04-01/07-T-200-Red-ENG CT WT 11-10-2010 2/88 PV T.

that "a redacted version of applications of this kind should always be served on the Defence"[29]

24. It is unclear to the Defence how information concerning the interview of a Defence witness by a VWU protection officer would necessitate an *ex parte* filing. The Chamber would have considered this before originally ordering that VWU's observations be made available to the parties. There is no risk that the identity of a protected witness, or an intermediary will be revealed, nor does it risk the revelation of the tactical or case strategy of a party.

25. As such, the procedure risks giving an unfortunate impression to the accused, namely, that the Chamber and the Registry, having discovered an irregularity in the way in which the confidential information of Defence witnesses was being used, decided to reach a solution behind closed doors, rather than ensuring the transparency which is a critical component of fair trials.

26. The Defence accordingly requests that the Chamber order that the Defence be provided with 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", as well as the Registry's original justification for the observations being filed *ex parte*.

(b) The Second Decision constituted a denial of the right to be heard

27. The Second Decision, which granted a remedy for the Presiding Judge's examination of a Defence witness on the basis of information which should not have been in the Chamber's possession, was rendered without the Defence having the right to be heard. Indeed most, if not all of the matters raised in this motion, by way of prejudice and remedy, ought properly and contemporaneously, have been

[29]ICC-01/04-01/06-T-170-ENG WT 07-05-2009 1/100 NB T

litigated at that time. As such, the Defence submits that there was no apparent legal basis for the Second Decision, which was rendered without submissions from the affected party.

28. The right to be heard, or the *audi alteram partem* principle, has been recognized as being a fundamental component of fair trials at the ICC.[30] It was discussed in some detail in the Dissenting Opinion of Judge Trendafilova and Judge Kourula in *Katanga*,[31] who considered the right to be heard is "a fundamental right that is guaranteed at the national level, such as in the procedural due process context, and also at the international level." Their Honours noted:

> The ECtHR likewise recognised that "the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective [...], this right can only be seen to be effective if the observations are actually 'heard', that is duly considered by the trial court" (citation omitted). It has also been stated that "no decision, which is not entirely unconditionally in favour of an individual, may be taken unless the person concerned was previously given an opportunity to state his or her position on the issue. [...] [Further] the right to be heard can be classified as an absolute guarantee". The fundamental nature of the right has also been referred to in the jurisprudence of the ad hoc tribunals.

29. In an earlier 2006 decision, of which the current Presiding Judge was a part, the Pre-Trial Chamber cited with approval the decision of the European Court of Human Rights that the right to adversarial proceedings "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision."[32]

---

[30]See, for example, ICC-01/04-01/07-2388, para. 36.

[31]ICC-01/04-01/07-2297

[32]Décision relative à la requête du Procureur solicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS

30. This is reflective of the position at the *ad hoc* tribunals, where the Appeals Chamber of the ICTY has held that "the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber."[33]

31. For the reasons explained more fully below, the Second Decision involves an issue which directly impacts the presentation of the accused's case. Rendering the Second Decision, without giving the Defence an opportunity to be heard on the impact of this procedural irregularity on the affected Defence evidence, was incompatible with the principle *audi alteram partem*. This failing denied the Defence the opportunity to make the below submissions regarding the prejudice suffered and appropriate remedies before the Chamber.

(c) The remedy granted for the questioning of Witness D-64 by the Presiding Judge is inadequate

---

2,VPRS 3, VPRS 4, VPRS 5 et VPRS 6, 31 March 2006, ICC-01/04-135, page 13, footnote 52 referring to: *Morel v. France*.

[33] *Prosecutor v. Jelisić*, Case No.IT-95-10-A, Judgement, 5 July 2001, para. 27. See also *Prosecutor v. Nzabonimana,* ICTR-98-44D-T, Decision on Callixte Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2012 Decision, 20 September 2012, paras 29-30: The Appeals Chamber considers that while a Trial Chamber may *proprio motu* decide to reconsider its own decision, this does not relieve it of its duty to hear a party whose rights may be affected by this reconsideration. In the present case, the Trial Chamber merely allowed the parties to present submissions in relation to the disclosure of the 16 March 2010 Documents, but failed to indicate that it considered the 16 March 2010 Documents to be a new circumstance and that it was inclined to reconsider its 4 March 2010 Decision in light thereof. Accordingly, the Appeals Chamber finds that the Trial Chamber violated Nzabonimana's right to be heard by failing to properly inform the parties of its intention to reconsider the 4 March 2010 Decision and in not inviting them to make submissions on the matter. See also *Prosecutor v. Karemera*, ICTR-98-4-T, Decision in the Matter of Proceedings under Rule 15Bis (D), 21 June 2004, paras. 8-10.

32. The Chamber overruled a contemporaneous Defence objection to the Presiding Judge's questioning of Witness D-64, on the basis that the Chamber that has the right to ask whatever questions deemed necessary in a search for the truth.[34]By contrast, as recognized in the Second Decision, information provided during protection meetings, "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."[35] The Second Decision states that this information "should have been used **solely** for the purpose of preparing a risk assessment."[36]

33. As such, there was a recognized procedural irregularity, which resulted in a witness being examined on the basis of information which not only cannot be verified, but should never have been used for that purpose.

34. The Chamber's remedy for this breach, which it formulated without having heard any submissions from the Defence as the affected party, was a statement that "the Chamber will not take the information contained in the Protection Report into account in its assessment of the witness' testimony."[37]

35. This relief is manifestly insufficient. Firstly, this remedy fails to take into account the impact of the Presiding Judge questioning the witness, at length, in a manner that could only be reasonably equated to cross-examination, on the basis of information which he had given to VWU without any indication that it could be used to impeach his sworn testimony. The Presiding Judge made it clear to Witness D-64 that his testimony contradicted information coming from an organ of the

[34] ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012 35/67
[35] ICC-01/05-01/08-2410-Conf, para. 12.
[36] ICC-01/05-01/08-2410-Conf, para. 11.
[37]ICC-01/05-01/08-2410-Conf, para. 12.

International Criminal Court. This is demonstrated, for example, by the following exchange:[38]

[REDACTED]

36. As such, it would have been clear to the witness that in order to accept his account, the Presiding Judge was required to accept that staff members of the International Criminal Court made a mistake in a report to the Chamber. In such circumstances, the potential impact on the morale, self-confidence, comfort and willingness to participate on the part of the witness is incalculable.

37. To compound this, the Presiding Judge revealed that she had access to the witness' alleged Facebook page, and an alleged list of Facebook "contacts", which she discussed in front of the parties, participants, and everyone in the courtroom. Her Honour used this information to contradict the witness' sworn testimony that he had not had contact with a certain individual for a particular period, on the basis that he was allegedly listed as a "contact" on the witness' page.[39]It is difficult to accept that the revelation that the Presiding Judge was in possession of details such as his Facebook contact list would have had no impact on the witness' comfort, dignity, and morale.

38. The Defence notes that Her Honour's questioning occurred after the witness had expressed an objective fear to VWU for his security and safety on the basis of his testimony, and had been granted protected measures as a result,[40] and in the context of the Chamber being responsible for protecting the witness' dignity and ensuring his comfort during his testimony.

[38]ICC-01/05-01/08-T-260-CONF-ENG ET, page 38.
[39]ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012 33/67
[40]ICC-01/05-01/08-T-259-CONF-ENG CT 22-10-2012 4/65

39. After his examination by the Presiding Judge, the witness went on to face two more hours questioning by the Legal Representatives of Victims, who also posed questions aimed at challenging or destabilizing his credibility. The Chamber's assertion that it "will not take the information contained in the Protection Report into account in its assessment of the witness's testimony" does not take into account the impact of the Presiding Judge's examination on Witness D-64's remaining testimony, and the prejudice suffered by the accused as a result.

40. Nor does the Second Decision take into account the incompatibility of the Presiding Judges' questioning with Article 67(1)(e) of the Statue, which safeguards the right of the accused "to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf **under the same conditions as witnesses against him or her**." In this case, the Presiding Judge has only used internal VWU Security Assessment Reports to challenge the evidence of Defence witnesses. Mr. Bemba is entitled to a concrete remedy for this violation of the rights.[41]

41. Moreover, as noted by Her Honour during her response to the Defence objection: "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."[42] Plainly, the Defence's ability to "follow up" on the matters raised by the internal VWU Security Assessment Report is greatly reduced by the non-disclosure of this report, either at the time the witness was on the stand or since. The situation is tantamount to the Prosecution being allowed to cross-examine a Defence witness on the basis of documents which have not been disclosed to the Defence, and finding that this does not jeopordise the fairness of the proceedings because the Defence can re-examine, despite not having access to the said documents.

---

[41]See, for example, *Laurent Semanza v. The Prosecutor*, Case No.ICTR-97-20-A, Decision, 31 May 2000, para.125.

[42]ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012 35/67

42. For these reasons, the Defence seeks disclosure of the internal VWU security assessment report relied upon by the Presiding Judge during the questioning of the Witness D-64, in order to perform any further investigations if necessary, and allow the accused to make an informed decision as to whether to recall the witness for the follow-up questioning referred to by Her Honour. The Defence also notes Her Honour's statement that "Facebook is a public site in which everyone could consult Facebook and find the information one wants to have".[43] The Defence therefore wishes to confirm that the information relied upon by Her Honour concerning the witness' alleged Facebook page and contacts list was indeed contained in the VWU Security Assessment for Witness D-64, and not accessed independently.

(d) Witnesses D-55

43. Regrettably, and despite the impression given by the Second Decision, the questioning by the Presiding Judge on the basis of internal VWU Security Assessments was not limited to the evidence of Witness D-64. During her examination of Witness D-55, Her Honour stated as follows:[44]

[REDACTED]

44. As such, the Defence has the same concerns regarding the testimony of this witness as with Witness D-64. During his questioning, the Presiding Judge made it clear to the witness that his testimony was incompatible with a security evaluation prepared by an organ of the Court. As such, the proposed remedy that "the Chamber will disregard any information that was submitted to it in error" is also manifestly insufficient.[45]

[43]ICC-01/05-01/08-T-260-CONF-ENG ET 23-10-2012 33/67 et seq.
[44]ICC-01/05-01/08-T-265-CONF-ENG ET 30-10-2012, pp. 63-64.
[45]ICC-01/05-01/08-2410-Conf, para. 11.

(e) Witnesses D-57 and D-51

45. Although the Presiding Judge did not make specific reference to alleged contradictions to the internal VWU Security Assessments during the examination of Witnesses D-57 and D-51, the Second Decision has revealed that the Chamber had these reports before it during the testimony of these witnesses. Upon review, the questioning by the bench of these two witnesses on can only be described as extensive.[46] The Defence cannot know whether this questioning was based upon or influenced by the external information provided to the Chamber by VWU. This was not addressed in the Second Decision. Disclosure of the VWU Assessment Reports for Witnesses D-57 and D-51 would allow the Defence to assess any link between these reports and the extensive examination by the Chamber, and seek further relief as necessary.

D. CONCLUSION

46. The fact that no alarm bells rang to anyone other than the Defence when a Presiding Judge of a Chamber of the ICC examined a Defence witness on internal VWU working documents which had not been disclosed, is staggering.[47] The Prosecution has a vested interest in ensuring the fairness of the proceedings, and yet it stayed silent. As eventually recognized in the Second Decision, information provided during protection meetings, "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."[48] The Second Decision, rendered without

[46] See, for example, ICC-01/05-01/08-T-263-CONF-ENG ET 26-10-2012, pp. 20-25; ICC-01/05-01/08-T-256-CONF-ENG ET 17-10-2012, p. 52 ;ICC-01/05-01/08-T-258-CONF-ENG CT 19-10-2012 pp. 23 – 28.
[47]See, for example, *Prosecutor v. Krajišnik*, IT-00-39-T, Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Derić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, 14 August 2006, paras. 16, 20; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Appeal Judgment, 22 April 2008, paras. 111-117.
[48] ICC-01/05-01/08-2410-Conf, para. 12.

having heard Defence, does not address the prejudice which resulted from this procedural anomaly. As such, the Defence requests the remedy as set out below.

E. RELIEF REQUESTED

47. On the basis of the above submissions, the Defence requests that the Chamber:

ORDER the reclassification as public of (i) the portions of the transcripts cited herein of the questioning of Witness D-64 and Witness D-55; (ii) the First Decision; (iii) the Second Decision; and (iv) the current motion, with redactions as strictly necessary to prevent the disclosure of the identity of Defence witnesses.

ORDER that the Defence to be provided with 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", as well as the Registry's original justification for the observations being filed *ex parte*;

ORDER that the Defence be provided with the impugned VWU Security Assessment Reports for Witness D-64, Witness D-55, Witness D-51, and Witness D-57, and any other material improperly received by the Trial Chamber from VWU or the Registry concerning Defence witnesses;

ORDER that following receipt of the above, the Defence then be given an opportunity to make submissions on the prejudice suffered as a result of this procedural anomaly and request additional remedies as necessary.

The whole, respectfully submitted.

Aimé Kilolo Musamba
Lead Counsel

Peter Haynes
Co- Counsel

Done on the 28th of January 2013
At The Hague, The Netherlands