

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **29 June 2016**

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 Version of “Decision on the ‘Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests’”,
ICC-01/05-01/08-2236 of 27 June 2012**

Decision 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 Peter Haynes
Ms Kate Gibson
Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court” or “ICC”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on the “Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests”.

I. Background and submissions

1. On 24 February 2012, the Chamber issued its “Decision on Defence Disclosure and Related Issues” (“24 February 2012 Decision”).¹
2. On 24 May 2012, the Chamber issued its “Decision on the starting date of the defence presentation of evidence and related issues” (“24 May 2012 Decision”),² in which it, *inter alia*, instructed the defence to provide the Office of the Prosecutor (“prosecution”), the legal representatives of victims and the Chamber as soon as practicable and no later than 16.00 on 13 July 2012 with (i) the complete identities of its prospective witnesses; and (ii) statements of the witnesses whom it intends to call to testify or a summary of the key elements that each witness will address during their testimony.³
3. On 13 June 2012, the defence filed its “Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests” (“Defence

¹ Decision on Defence Disclosure and Related Issues, 24 February 2012, ICC-01/05-01/08-2141.

² Decision on the starting date of the defence presentation of evidence and related issues, 24 May 2012, ICC-01/05-01/08-2221.

³ ICC-01/05-01/08-2221, paragraphs 12 (c) and (e) and 19(b).

Request”),⁴ in which it requests the Chamber to (i) authorise the provision of unredacted witness identifying particulars and unredacted summaries of anticipated testimony to the prosecution and legal representatives 30 days prior to the anticipated testimony of 23 defence witnesses who are [REDACTED] (together “[REDACTED] Witnesses”);⁵ (ii) order the prosecution and the legal representatives to provide the Chamber and the defence with a complete list of all lawyers, paralegal, investigative or support staff who will have access to defence witness identities and summaries of anticipated testimony; and (iii) order that members of the prosecution and the legal representatives be prohibited, pursuant to Rule 87(3)(b) of the Rules of Procedure and Evidence (“Rules”), from disclosing the identity of [REDACTED] Witnesses to any third parties.⁶

4. The defence submits that the [REDACTED] Witnesses have expressed concerns for the safety of themselves and [REDACTED], arising out of their association with the defence of Mr Bemba. The defence further submits that these fears are expressions of objective and precisely identified risks of being subjected to harassment and pressure, or [REDACTED]. The defence, nevertheless, indicates that the evidence of these witnesses is of crucial importance to its evidence and to the

⁴ Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests, 13 June 2012, ICC-01/05-01/08-2226-Conf. The Chamber notes that the 24 February 2012 Decision orders the communication of the defence witnesses’ identities and statements or summaries to the prosecution, the legal representatives and the Chamber. The Chamber is of the view that the term “disclosure” used by the defence in their request is not entirely accurate in this context. Accordingly, in its analysis, the Chamber will refer to the “communication of the [REDACTED] witnesses’ identities”. See ICC-01/05-01/08-2141, paragraph 23.

⁵ The relevant witnesses are [REDACTED].

⁶ ICC-01/05-01/08-2226-Conf, paragraph 29.

exercise of Mr Bemba's rights pursuant to Article 67(1)(e) of the Rome Statute ("Statute").⁷

5. The defence suggests that the requested delay of disclosure will not impede the prosecution's investigations of defence witnesses and in fact is more likely to reflect the prosecution's actual investigative sequence.⁸ The defence thus requests the Chamber to authorise the provision of unredacted witnesses' identifying information and unredacted summaries of anticipated testimony to the prosecution and the legal representatives 30 days prior to the anticipated testimony of the relevant witnesses.⁹
6. On 19 June 2012, in line with the expedited schedule ordered by the Chamber,¹⁰ the prosecution filed its "Response to the Defence Request for Delayed Disclosure of Witnesses Identifying Particulars and Summaries of Anticipated testimony, and other Related Requests" ("Prosecution Response"),¹¹ in which the prosecution requests that the Chamber reject the Defence Request.¹²
7. To that end, the prosecution submits that the defence provides only vague and general assertions about possible threats to the

⁷ ICC-01/05-01/08-2226-Conf, paragraphs 15 - 18.

⁸ ICC-01/05-01/08-2226-Conf, paragraph 25.

⁹ ICC-01/05-01/08-2226-Conf, paragraphs 19 and 26.

¹⁰ Order shortening time for observations on the "Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests", 14 June 2012, ICC-01/05-01/08-2227-Conf. The Chamber ordered the prosecution and the legal representatives to file their observations on the Defence Request, if any, no later than 16.00 on 19 June 2012.

¹¹ Prosecution Response to Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests, 19 June 2012, ICC-01/05-01/08-2229-Conf.

¹² ICC-01/05-01/08-2229-Conf, paragraphs 2 and 16.

[REDACTED] Witnesses and, therefore, fails to demonstrate that the disclosure of the [REDACTED] Witnesses' identities to the prosecution would compromise their security or lead to the other grave consequences identified by the defence.¹³ The prosecution also submits that the defence has not demonstrated that the protective measures already in place are insufficient.¹⁴ The prosecution underlines that it is already prohibited from revealing to any third party that an individual is a witness in the present case without the express leave of the Chamber,¹⁵ and further it ensures that there is absolutely no danger that the disclosure of the [REDACTED] Witnesses' identities to the prosecution could lead to the exposure of such information to any third parties.¹⁶

8. The prosecution further submits that it would be prejudiced in its ability to prepare for the defence case if it is not provided with full disclosure within reasonable time limits before the beginning of the defence case.¹⁷ In particular, the prosecution asserts that the disclosure of the identities of the [REDACTED] Witnesses on a rolling basis would prevent the prosecution from having the full picture of the defence's evidence and being able to assess the influence of one witness's account on another, which might result in recalling the same witnesses later in the proceedings.¹⁸ The prosecution further argues that due to possible logistical and availability obstacles, the obligation to

¹³ ICC-01/05-01/08-2226-Conf, paragraph 16; ICC-01/05-01/08-2229-Conf, paragraphs 6 – 7.

¹⁴ ICC-01/05-01/08-2229-Conf, paragraph 7.

¹⁵ Decision on the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, ICC-01/05-01/08-813-Conf, paragraphs 83 – 84.

¹⁶ ICC-01/05-01/08-2229-Conf, paragraph 7.

¹⁷ ICC-01/05-01/08-2229-Conf, paragraph 9.

¹⁸ ICC-01/05-01/08-2229-Conf, paragraph 8.

communicate the [REDACTED] Witnesses' identities 30 days prior to their testimony might lead to delays in the proceedings.¹⁹

9. In addition, the prosecution draws the Chamber's attention to the Principal Defence Counsel's comments in the [REDACTED] media²⁰ indicating the type of the witnesses it will be calling and the nature of the evidence they will be giving, which, according to the prosecution, undermines the defence contention that the [REDACTED] Witnesses merit protection.²¹

10. In relation to the defence's request to prohibit the communication of the information related to the witnesses to third parties, the prosecution submits that such request is without merit, as well as broad and unnecessary because it fails to recognise the critical distinction between discussing a named individual with a third party and disclosing the fact that such individual is a defence witness in the present case. According to the prosecution, the failure to recognise this distinction would prohibit the prosecution from obtaining relevant information about the witnesses and the defence's evidence from third parties. This, according to the prosecution, would deprive it of the possibility to investigate the defence's evidence.²²

11. Finally, the prosecution asserts that the defence request to be provided with the list of prosecution staff with access to defence witness

¹⁹ ICC-01/05-01/08-2229-Conf, paragraph 8.

²⁰ See ICC-01/05-01/08-2229-Conf, footnote 10; ICC-01/05-01/08-2229-Conf-AnxA – D.

²¹ ICC-01/05-01/08-2229-Conf, paragraph 10.

²² ICC-01/05-01/08-2229-Conf, paragraph 11.

information is both unjustified and unnecessary and might create serious risks to the staff members themselves.²³ The prosecution further submits that the defence has not demonstrated the relevance of such information to the purported security risks to the [REDACTED] Witnesses.²⁴

12. The prosecution refers to Article 42 of the Statute and submits that although it will provide information on prosecution staff to the defence whenever necessary, a blanket order such as that requested by the defence would infringe the prosecution's prerogative in appointing its staff and deciding who will conduct investigations and proceedings in various cases.²⁵ The prosecution also stresses that every member of the prosecution staff is bound by the requirements of Article 68(1) of the Statute and undertakes an oath to protect the confidentiality of information including the information about witnesses.²⁶

13. The legal representatives did not file any observations on the Defence Request.

II. Relevant provisions

14. In accordance with Article 21(1) of the Statute, the Chamber has considered Articles 64(2) and 6(f), 67(1), and 68(1) of the Statute, Rules 79, 81(4) and 87 of the Rules and Article 8 of the Code of Professional Conduct for Counsel ("Code of Conduct").

²³ ICC-01/05-01/08-2229-Conf, paragraphs 13 and 15.

²⁴ ICC-01/05-01/08-2229-Conf, paragraph 14.

²⁵ ICC-01/05-01/08-2229-Conf, paragraph 15.

²⁶ ICC-01/05-01/08-2229-Conf, paragraph 14.

III. Analysis and conclusions

15. In ruling on the Defence Request, the Chamber addresses in turn (i) the defence request for delayed communication of [REDACTED] Witnesses' identities; and (ii) the defence request for an order instructing the prosecution and the legal representatives to refrain from revealing the identities of the [REDACTED] Witnesses to third parties and to provide complete lists of individuals who will have access to defence witnesses' identities.

(i) Request for delayed communication of [REDACTED] Witnesses' identities

16. In ruling on the Defence Request, the Chamber needs to strike a balance between the obligation "to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" enshrined in Article 68(1) of the Statute and its duty, pursuant to Article 64(2) of the Statute, to ensure that the trial is fair and expeditious. In the present circumstances, the Chamber therefore needs to balance the alleged risks to the safety and integrity of the [REDACTED] Witnesses against the potential negative impact delayed communication of [REDACTED] Witnesses' identities could have on the fairness and expeditiousness of the proceedings.

The defence has failed to demonstrate that delayed communication is necessary to protect the safety and integrity of the [REDACTED] Witnesses [REDACTED]

17. The defence's request for delayed communication of the [REDACTED] Witnesses' identities is premised on the argument that such delay is necessary in order to protect the safety and integrity of the [REDACTED] Witnesses [REDACTED]. To that end, the defence submits that the [REDACTED] Witnesses have expressed "detailed and objective fears as to concrete acts for which they will be at risk should their link to the Defence become known [REDACTED]" and that delayed communication of their identities would reduce this risk.

18. The Chamber does not dispute, at this stage, the defence's contention that the safety of the [REDACTED] Witnesses might be compromised if their cooperation with the defence is revealed to the general public [REDACTED].²⁷ With this potential risk in mind, which can be deemed real only after the proper assessment to be made by the Victims and Witnesses Unit ("VWU") as a neutral organ of the Court, the Chamber has provided the defence with an opportunity to apply for in-court protective measures, protecting witnesses' identities *vis-à-vis* the general public, or for the inclusion of witnesses in the ICC Protection Programme.²⁸

²⁷ Against the background of the alleged risks resulting from a communication of the [REDACTED] Witnesses' identities and their involvement in the defence's presentation of evidence, the Chamber notes the public comments made by Principal Defence Counsel to the [REDACTED] media. Whilst not mentioning the names of the prospective defence witnesses, Principal Defence Counsel specifically indicated the type of witnesses the defence intends to call and thereby limited the group of potential witnesses that can be expected to testify for the defence (*See* ICC-01/05-01/08-2229-Conf, footnote 10; ICC-01/05-01/08-2229-Conf-AnxA – D). The Chamber is of the view that such comments increase the risk of identifying the relevant defence witnesses, which stands in clear contradiction with the defence's request for delayed communication of their identities.

²⁸ ICC-01/05-01/08-2141, paragraph 24.

19. However, the 24 February 2012 Decision limits the communication of identifying information of defence witnesses to the prosecution, the legal representatives and the Chamber, on a confidential basis. In this regard, the Chamber recalls that it has already ruled that parties and participants are not allowed to reveal to third parties the fact that an individual is a witness in the present case.²⁹ Moreover, it should be stressed that the prosecution is legally bound under Article 68(1) of the Statute to protect the safety and the well-being of witnesses. This includes a duty on the part of the prosecution to keep identifying information concerning defence witnesses confidential. The legal representatives, for their part, are required pursuant to Article 8(1) of the Code of Conduct to “respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.” Therefore, in the absence of any indication that the prosecution or the legal representatives may fail to comply with their obligations, the defence’s argument as to the potential risks for the [REDACTED] Witnesses in case their involvement in the defence presentation of evidence is known [REDACTED] is not relevant in the context of the present assessment.

20. In addition, the Chamber notes the defence’s reference to the decision of Trial Chamber II to authorise delayed disclosure of the identities of two prosecution witnesses.³⁰ In this context, it should be emphasised

²⁹ Redacted Decision on the Prosecution’s Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2012, ICC-01/05-01/08-813-Red, paragraphs 83 - 84.

³⁰ ICC-01/05-01/08-2226-Conf, paragraph 23, footnote 10, which refers to the public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-

that in order to determine whether delayed disclosure of the witnesses' identities was "strictly necessary", ³¹ Trial Chamber II considered it necessary to "assess whether they are actually facing an objective and precisely identified risk", "on the basis of their specific situation".³² In the present circumstances, given the defence's failure to provide specific and individual information in relation to the witnesses concerned by the request, the Chamber is not in a position to assess whether delayed communication of the [REDACTED] Witnesses identities to the prosecution, the legal representatives and the Chamber is necessary to protect the relevant witnesses. Having said this, the Chamber specifies that this will not prevent it from requesting individual risk assessments by the VWU of the security situation of the [REDACTED] Witnesses in order to ascertain whether these witnesses face an objectively justifiable risk, and accordingly, to decide on any requests for in-court protective measures, as the case may be.

21. Finally, the Chamber recalls that in its decision of 20 July 2010,³³ it determined that if a party or participant intends to contact a witness called by an opposing party or participant, the consent of the witness is to be sought by the party or participant calling the witness which further has the possibility to submit an application objecting to the meeting.³⁴ Accordingly, the Chamber finds that there is no risk that the

1156-Conf-Exp), 31 December 2009, ICC-01/04-01/07-1179-tENG. In relation to one of these two witnesses, the Chamber authorised the prosecution to delay disclosure of the witness's identity until 45 days prior to the witness's testimony.

³¹ ICC-01/04-01/07-1179-tENG, paragraph 34(a).

³² ICC-01/04-01/07-1179-tENG, paragraph 35.

³³ Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red.

³⁴ ICC-01/05-01/08-813-Red, paragraphs 67 and 68 .

prosecution establishes contact with [REDACTED] Witnesses without involving the defence and putting the safety and integrity of the witnesses at risk.

22. For these reasons, the Chamber concludes that the defence has failed to demonstrate that delayed communication of the [REDACTED] Witnesses' identities to the prosecution, the legal representatives and the Chamber would reduce the alleged risks for the witnesses concerned and, as such, would be warranted pursuant to Article 68(1) of the Statute.

Delayed communication of the [REDACTED] Witnesses' identities risks compromising the efficiency and expeditiousness of the proceedings

23. The defence submits that delayed communication of the [REDACTED] Witnesses' identities would not necessarily "impinge on Prosecution preparation of evidence".³⁵ For that purpose, the defence submits that redacted summaries will offer sufficient information as to the content of the testimonies, that 30 days are sufficient for the prosecution to complete its preparations, including any potential investigations, and that the schedule requested by the defence will likely reflect the prosecution's actual investigative sequence.

24. The Chamber notes that the Defence Request concerns 23 out of 60 prospective defence witnesses. The Chamber is of the view that the

³⁵ ICC-01/05-01/08-2226-Conf, paragraph 25.

defence's arguments fail to negate the prejudice to the prosecution, in particular with regard to the prosecution's right to adequately prepare for the defence's presentation of evidence. The Chamber considers that being deprived of the identity of one third of the prospective defence witnesses at the beginning of the defence's presentation of evidence would effectively prevent the prosecution as well as the victims' legal representatives from having a complete and comprehensive picture of the defence's evidence and therefore prejudice, *inter alia*, the prosecution in its preparation. In addition, the Chamber considers that the provision of redacted witness summaries does not constitute an appropriate remedy. Indeed, summaries of the witnesses' statements with redactions to their identifying information would hinder the prosecution, as well as the legal representatives, from collecting relevant information in relation to the prospective [REDACTED] Witnesses.

25. The Chamber is also concerned that delayed communication of the [REDACTED] Witnesses' identities could lead to interruptions in the proceedings. Indeed, as pointed out by the prosecution, the defence's proposed approach might require that a witness is recalled once the prosecution has been informed of the full list of defence witnesses. In addition, the Chamber notes that the communication of the relevant witnesses' identities 30 days in advance of their testimonies could result in unavoidable delays in the event of unexpected changes in the defence's order of witnesses. Therefore, the Chamber concludes that delayed communication of the [REDACTED] Witnesses' identities

risks undermining the expeditiousness of the trial proceedings, which would be to the detriment of the rights of the accused person.

26. Having balanced the alleged risks to the safety and integrity of the [REDACTED] Witnesses [REDACTED], against the requirements of efficiency and expeditiousness of the proceedings, the Chamber rejects the defence's request for delayed communication of the [REDACTED] Witnesses' identities to the prosecution, the legal representatives and the Chamber.

27. As a result, the information to be provided by the defence to the prosecution, the legal representatives and the Chamber by 16.00 on 13 July 2012, shall include the complete identities of all witnesses, including [REDACTED] Witnesses. The summaries of anticipated testimony should contain all relevant information listed in paragraph 29 of the 24 February 2012 Decision.³⁶

28. In case the defence intends to apply redactions to information other than identifying details, it needs to seek the Chamber's authorisation for that purpose. In this regard, the Chamber notes that in its 24 May 2012 Decision, it set 13 July 2012 as the deadline for the communication of the relevant information to the prosecution, the legal representatives

³⁶ According to paragraph 29 of the 24 February 2012 Decision, the summaries must contain at a minimum the following information: basic identifying information such as the witness' name, pseudonym, aliases, date and place of birth; (ii) the witness' occupation at the time of the relevant events; (iii) the witness' physical location at the time of the events; (iv) the witness' relationship to the accused, if any; (v) whether the witness has previously provided sworn testimony or formal statements in relation to the events at issue in the *Bemba* case, and if so, to whom and in which context; and (vi) the issues upon which the witness is expected to testify and how those issues relate to the charges.

and the Chamber and for the filing of requests for redactions.³⁷ However, for case management purposes and for the proper conduct of the proceedings in order to ensure that defence disclosure is effected in due time, the Chamber hereby modifies the deadline for the filing of redaction requests, if any, to 5 July 2012. Accordingly, any requests for redactions are to be filed on a rolling basis with the last request to be submitted by 5 July 2012.

(ii) Defence request for an order instructing the prosecution and the legal representatives to refrain from revealing the identities of the [REDACTED] Witnesses to third parties and to provide complete lists of individuals who will have access to defence witnesses' identities

29. As set out above in paragraph 19, the Chamber has already ordered the parties and participants not to reveal to third parties that an individual is a witness in the case. The Chamber therefore finds that the defence request is moot.

30. With regard to an order to provide a complete list of all individuals who will have access to defence witness identities, the Chamber considers that the prosecution's duty enshrined in Article 68(1) of the Statute applies to all staff members of the prosecution. This duty is further consolidated by virtue of the confidentiality obligations

³⁷ ICC-01/05-01/08-2221, paragraph 12. The deadline of 13 July 2012 set in the 24 May 2012 Decision was based on the defence's submission that it did not intend to request redactions for material to be used during the presentation of its evidence. *See* ICC-01/05-01/08-2214-Conf-Exp, paragraph 8 (while this reference relates to a paragraph that was redacted in the public version of defence filing 01/05-01/08-2214-Conf-Exp, the Chamber is of the view that this information does not warrant *ex parte* treatment and that the reference to this submission does not prejudice the defence).

enshrined in Rule 101.4 (c) of the ICC Staff Rules and the oath taken by each staff member pursuant to Regulation 1.1(b) of the Staff Regulations. With regard to the legal representatives, the Chamber underlines that Article 8(3) of the Code of Conduct provides that confidential information shall only be provided to co-counsel, assistants and other staff working on the particular case to which the information relates.

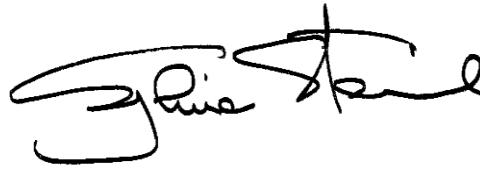
31. Accordingly, the Chamber finds that an order instructing the prosecution and the legal representatives to provide complete lists of individuals who will have access to defence witnesses' identities has no legal basis and is not warranted.

32. For these reasons, the Chamber hereby

REJECTS the Defence Request in its entirety; and

ORDERS the Defence, in line with paragraph 28 above, to file any requests for redactions by 5 July 2012.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 29 June 2016

At The Hague, The Netherlands