

**Cour
Pénale
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**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 Redacted Document

Prosecution's Reply to the "Defence Response to the Prosecution's list of documents to be submitted into evidence pursuant to Trial Chamber III's order of 31 May 2011"

Source: The Office of the Prosecutor

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

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I. Introduction

1. On 31 May 2011, Trial Chamber III (“Chamber”) issued an order setting out the procedure to be followed by parties in their submission into evidence of materials on the Prosecution list of evidence and other material used in Court.¹ The parties were ordered to file their lists of all materials that they intend to submit as evidence by 14 June 2011,² and any objections regarding the relevance or admissibility of specific material by 21 June 2011.³ The Chamber ordered that any response to the objections of the other party be filed by 27 June 2011.⁴

2. Both parties submitted their respective lists on 14 June 2011⁵ and the related objections on 21 June 2011.⁶ The Office of the Prosecutor (“Prosecution”) hereby submits its response to the Defence’s objections as ordered by the Chamber.

II. Request for confidentiality

3. The Prosecution requests that this filing and its annex be received as confidential as it responds to a submission currently classified as confidential.

¹ ICC-01/05-01/08-1470, Order on the procedure relating to the submission of evidence, 31 May 2011, at para. 3.

² *Ibid.*, at para. 3.

³ *Ibid.*, at para. 4.

⁴ *Ibid.*, at para. 4.

⁵ ICC-01/05-01/08-1514-Conf, Prosecution’s submission of the list of materials it requests to be admitted into evidence, 14 June 2011; ICC-01/05-01/08-1515-Conf, *Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l’ordonnance de la Chambre du 31 mai 2011*, 14 June 2011.

⁶ ICC-01/05-01/08-1557-Conf, Prosecution’s Response to the Defence’s “*Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l’ordonnance de la Chambre du 31 mai 2011*”, 21 June 2011; ICC-01/05-01/08-1558-Conf, Defence Response to the Prosecution’s List of documents to be submitted into evidence pursuant to Trial Chamber III’s order of 31 May 2011, 21 June 2011.

III. Submissions

Witness CAR-OTP-PPPP-0022 (“Witness 22”)

4. The Defence objects to the admission into evidence of CAR-OTP-0004-0316 (Medical certificate) and CAR-OTP-0007-0569 (Medical reports). The Defence alleges that these documents are not relevant to an issue in the case; they neither prove nor disprove rape and they do not identify physical injuries consistent with rape.⁷ CAR-OTP-0004-0316 is a medical certificate dated [REDACTED]. The report explicitly states that the witness reported that she had been raped by two *Mouvement de Libération du Congo* (“MLC”) troops in September 2002. It further states that HIV infection was detected in January 2003.⁸ The report also shows that there is a probable link between her rape by the MLC troops and the HIV infection. This document is relevant to rape charges as well as relevant to explain the impact of the said rape and HIV infection on the witness. CAR-OTP-0007-0569 is a document showing the results of a blood test that was taken to determine the effect of HIV infection to the health of the witness (CD 4 count). The document is dated [REDACTED]. This document is relevant to show the impact of the HIV infection to the witness.

5. These documents, considered in the context of the testimony of the witness, are relevant to confirm her testimony that she was raped by multiple soldiers and infected with the HIV virus by the MLC troops.⁹ The witness testified that she did not contract HIV through any consensual sexual encounter.¹⁰ Thus, the evidence that she is infected

⁷ ICC-01/05-01/08-1558-Conf, at para. 10.

⁸ The witness explained in her testimony that she had taken the first test at the national laboratory located within the general hospital. See ICC-01/05-01/08-T-42-CONF-ENG, 2 December 2010, pp. 10-11.

⁹ CAR-OTP-0004-0316.

¹⁰ [REDACTED]

with HIV corroborates her evidence that she was raped. In addition, the facts constitute aggravation evidence that is relevant at the sentencing phase.¹¹ This evidence was tendered into evidence at the trial phase in order to ensure that the proceedings are expeditious and to avoid recalling the witness unnecessarily at the sentencing phase if the Accused is convicted.¹²

6. The Defence also alleges that these documents do not “identify physical injuries consistent with rape”. That may be so, but they do not exclude the possibility of rape. That the evidence does not itself corroborate the presence of “physical injuries consistent with rape” is a matter that goes to the weight and probative value of the evidence, but not its admissibility.

7. The Defence alleges that evidence of contraction of HIV does not prove an element of the crimes charged and is therefore unnecessary in the case.¹³ Though infecting a victim with HIV is not an element of the crimes charged, the fact that HIV is often sexually transmitted and that the witness testified that she did not contract it through a consensual sexual act renders this evidence relevant to corroborate her testimony that she was a victim of rape, which is among the charged crimes.

¹¹ ICC-01/04-01/06-2360, Decision on judicial questioning, 18 March 2010, at para. 36. The Chamber stated “...The concept of “other relevant matters” under Rule 140(2)(b) of the Rules, includes, inter alia, trial issues (e.g. matters which impact on the guilt or innocence of the accused such as the credibility or reliability of the evidence), sentencing issues (mitigating or aggravating factors), and reparation issues (properties, assets and harm suffered). The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, inter alia, to avoid recalling witnesses unnecessarily.

¹² *Ibid.*, at para. 38. See also ICC-01/04-01/06-T-99-ENG-ET, p. 39, line 11 to p. 40, line 4.

¹³ ICC-01/05-01/08-1558-Conf, at para. 10.

8. In addition, the evidence will be relevant at sentencing, if the Accused is convicted, to show the impact of the crimes on the victim. The evidence can be tendered now and considered at that stage.¹⁴

Witness CAR-OTP-PPPP-0068 ("Witness 68")

9. The Defence objection to document CAR-OTP-0020-0442 is due to the fact that this document was prepared in October 2004, nearly two years after the alleged attack on the witness. Based on this, the Defence argues that this document is neither "a contemporaneous nor corroborative account of the alleged November 2002 attack"¹⁵. This document provides medical documentary support for the witness's direct testimony that she was raped in 2002 by the MLC troops. The document was prepared by [REDACTED] to certify information that it obtained contemporaneously (in November 2002), when it examined the witness and determined that she had been raped.¹⁶ The fact that the report itself was prepared later is irrelevant, since it reflects information that it received at the time of the events.

10. The Defence further alleges that the lack of an address or telephone number for the witness undermines the document's probative value and reliability.¹⁷ To the extent that the argument assumes that addresses and phone numbers were readily available,

¹⁴ ICC-01/04-01/06-2360, at para. 38. The Chamber I in the *Lubanga* case stated "Therefore, in order to ensure the proceedings are expeditious and to avoid recalling witnesses unnecessarily, the Chamber may hear evidence, during the trial, which is relevant to a possible sentencing stage. For the determination of any sentence, under Rule 145(1)(b) of the Rules, the Chamber must "[b]alance all the relevant factors, including any mitigating and aggravating factors", and the Chamber considers that testimony relating to the particular defencelessness of the victims (Rule 145(2)(b)(iii)), and any "particular cruelty" they experienced as a result of their enlistment, conscription and use (Rule 145(2)(b)(iv)) may be relevant for determination of a sentence in this trial, should that stage be reached. Indeed, under Rule 145(1)(c), it is the duty of the Chamber to "give consideration [...] to the extent of the damage caused, in particular the harm caused to victims and their families".

¹⁵ ICC-01/05-01/08-1558-Conf, at para. 11.

¹⁶ See CAR-OTP-0020-0442.

¹⁷ ICC-01/05-01/08-1558-Conf, at para. 11.

that assumption is untrue. In 2002, few people in the Central African Republic (“CAR”) had access to either land-based or mobile telephones. The address system in the CAR is not based on the European or related address systems. To the contrary, an address in the CAR context means a Post Office Box rented from the Government at a fee. Only few people can afford to maintain such an address. It is therefore not surprising that in 2002, the witness had neither an address nor telephone. Thus, while an address and phone number would have provided additional confirmation that the report related to this witness, its absence is not proof that the report concerned another person and does not cast a doubt on its reliability.

11. The Defence also states that the fact that “the document refers to an alleged visit in 2002 further undermines its reliability, as it cannot be explained why no such letter was produced at the first meeting, or why records of the first meeting are neither attached nor referred to”¹⁸. Regarding the issue as to why such letter was not produced at the first meeting, the witness explains that the original document was lost, which is why she sought this letter. There was no need for this letter while she had the original document, and this explains the reason why she obtained this letter in 2004.¹⁹ Regarding the issue as to why records of the first meeting are neither attached nor referred to, the Prosecution submits that this is not necessary for the limited purpose for which this document is being admitted into evidence. The document explains that she was raped in 2002 and that she was examined by MSF.²⁰ A doctor certified that the witness was raped. The date of the rape is consistent with the presence of the MLC troops in her

¹⁸ *Ibid.*, at para. 11.

¹⁹ See ICC-01/05-01/08-T-50-CONF- ENG ET, pp. 23-24, lines 21-2: Q. Okay. Now, let me see if I understand you correctly. You had lost the original and the doctor didn't have a copy of the original any more, so this copy was produced; is that right? A. I said already that I lost the results of the first tests that were done with [REDACTED], but these are the results of the tests carried out by the doctors of [REDACTED]. I couldn't locate the results of the exams made at [REDACTED] office. That's what I couldn't find.

²⁰ See CAR-OTP-0020-0442.

neighborhood. Taking into account that the witness is a victim of sexual violence and that medical documents are private, no compelling reason has been advanced by the Defence as to why additional documents would be necessary. Necessity for additional medical documents in this case would be for examining the doctor and not this witness. Since she is not the doctor herself, she would not be able to explain intricate medical issues that are normally contained in a doctor's notes.

12. This document contains sufficient indicia of reliability, it was provided by the witness to the Prosecution and further identified by the witness in Court as the document provided to her by MSF.²¹ The document is further necessary to a fair evaluation of the witness's testimony because it confirms her testimony that she was raped and sought medical attention at the time. Since the Defence had notice of the Prosecution's intention to tender the document and has examined the witness about the document,²² no prejudice will be suffered by the Defence if this document is admitted into evidence.

Witness CAR-OTP-PPPP-0079 ("Witness 79")

13. With regard to the Defence objection at paragraph 25,²³ the Prosecution notes that the Defence's submissions on the tendering of the first page of CAR-OTP-0039-0135_R01 are contradictory. Firstly, the Prosecution wishes to clarify that it does not intend to tender Witness 79's statement as a whole. Furthermore, given that the Defence does not object to the admission into evidence of the first page of Witness 79's statement, it is not apparent why the Defence disputes the relevance of the same document. The

²¹ ICC-01/05-01/08-T-48-CONF-ENG ET, p. 39, lines 17 to 24.

²² ICC-01/05-01/08-T-50-CONF-ENG ET, p. 23, line 6 to p. 25, line 5.

²³ ICC-01/05-01/08-1558-Conf, at para. 25.

Prosecution submits that it befits the Chamber to decide on the weight to be attached to this document.

Witnesses CAR-OTP-PPPP-0023, CAR-OTP-PPPP-0042, and CAR-OTP-PPPP-0073 (“Witness 23”, “Witness 42”, “Witness 73”, respectively)

14. The Defence objects to the admissibility of the witness statements (including translations thereof) of Witnesses 23, 42, and 73. The Defence objections to the statements are meritless and the documents should be admitted into evidence. The witness statements are relevant, *inter alia*, to the Chamber’s fair evaluation of the testimony and credibility of the witnesses. They are submitted on an exceptional basis as prior consistent statements to rebut an express or implied charge against the witnesses of recent fabrication, taint, motive or collusion.²⁴

15. During its examinations of Witness 42 and Witness 73 the Defence spent a substantial amount of time asking the witnesses to explain previous contacts with each other and with Witness 23. The questions were designed to show that the witnesses

²⁴ As a non-binding illustration of the admissibility of prior consistent statements the Chamber may consider the logic applied to analogous cases in national courts. *See e.g.* R v. Stirling, [2008] 1 S.C.R. 272, 2008 SCC 10, para. 5 (citations omitted).

The Supreme Court of Canada concluded that “It is well established that prior consistent statements are generally inadmissible. This is because such statements are usually viewed as lacking probative value and being self-serving. There are, however, several exceptions to this general exclusionary rule, and one of these exceptions is that prior consistent statements can be admitted where it has been suggested that a witness has recently fabricated portions of his or her evidence. Admission on the basis of this exception does not require that an allegation of recent fabrication be expressly made – it is sufficient that the circumstances of the case reveal that the “apparent position of the opposing party is that there has been a prior contrivance”. It is also not necessary that a fabrication be particularly “recent”, as the issue is not the recency of the fabrication but rather whether the witness made up a false story at some point after the event that is the subject of his or her testimony actually occurred. Prior consistent statements have probative value in this context where they can illustrate that the witness’s story was the same even before a motivation to fabricate arose.

colluded or tainted each others' testimony.²⁵ During the questioning of Witness 42 the Defence leveled the charge that Witness 42 had tainted the testimony of the other witnesses thereby affecting the independence and reliability of their testimony.²⁶ Therefore the Prosecution submits the statements to rebut the Defence express or implied assertion of fabrication, taint, motive or collusion. The statements will establish that the three witnesses' testimonies are consistent with their prior statements and thereby disprove the Defence claim that witness contact necessarily resulted in tainted testimony.

16. The Defence complains that this is an inappropriate way to rebut the allegation of taint, asserting that the Prosecution could have re-examined the witnesses to address the consistency of their statements. However, the allegation of taint goes beyond one single witness and was not raised until Witness 23 had already testified. Moreover, even if that had been a feasible alternative, that is not enough to require exclusion of the statements themselves.

17. The Prosecution submission of the witness statements is consistent with Article 69(4) of the Rome Statute ("Statute") and the recent Appeals Chamber Judgment. The statements are relevant to live issues in the case and are "corroborative of other evidence",²⁷ and their submission is not prejudicial to the fair evaluation of the testimony of the witnesses. Without the statements, the Chamber will be unable to fully assess the express or implied allegations that they colluded in advance of their

²⁵ See *e.g.* ICC-01/05-01/08-T-76-CONF-ENG CT, p. 13, lines 24-25; ICC-01/05-01/08-T-66-CONF-ENG ET, p. 46, lines 17-18, p. 51 lines 3-4.

²⁶ [REDACTED]

²⁷ ICC-01/05-01/08-1386 OA5 OA6, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, p. 27, para. 78.

testimony to give false evidence. Thus their absence from the record would necessarily prejudice a fair evaluation of the testimonies of the witnesses.

Witness CAR-OTP-PPPP-0009 (“Witness 9”)

18. The Defence objects to the admission of each of the *procès-verbal d’audition de victime* listed on the Prosecution’s list of documents, together contained in a *dossier* which it proposes to offer into evidence through Witness 9.²⁸

19. The Prosecution submits that this *dossier* has been satisfactorily authenticated. Witness 9 authenticated the materials in his in-court testimony²⁹ that the entirety of the *dossier* as such is true and genuine, that it is what it purports to be³⁰ - the result of the investigations he conducted into the crimes committed in the CAR during the 2002/2003 conflict.

20. In addition, the *procès-verbaux* contained in the *dossier* bear sufficient indicia of reliability; they show in particular the nature of the material (official Court documents), the authorship (Witness 9) and the purpose of its creation (statements before investigating judge Witness 9). As regards the chain of custody of the *dossier*, Witness 9 confirmed that it had been in his custody before transferring them to the International Criminal Court.³¹

²⁸ ICC-01/05-01/08-1514-Conf-AnxA, pp. 17-34.

²⁹ ICC-01/05-01/08-T-104-CONF-ENG ET, pp. 31-32.

³⁰ See also ICTY, Blaskic, Decision on the defense motion for reconsideration of the ruling to exclude from evidence authentic and exculpatory documentary evidence, 30 January 1998, at para. 12.

³¹ ICC-01/05-01/08-T-104-CONF-ENG ET, p. 32.

21. The Defence argument that the evidence cannot be admitted because the Prosecution failed to question the witness in depth about each and every *procès-verbal*. The fact that the witness was not questioned about each entry does not require the exclusion of the *dossier*.

22. Furthermore, the Defence fails to recognize that the *dossier* is a comprehensive document and as such constitutes one piece of evidence. Accordingly, the witness confirmed the authenticity and the veracity of the dossier of the investigations that he conducted himself. The relevance and probative value of the *procès-verbaux* roots in the entirety of the *dossier* which corroborates testimony given by other witnesses in this trial up to present.

23. The Prosecution reiterates that the complete *dossier* as tendered through Witness 9, including *procès-verbaux* of allegedly false victims, is also necessary for the Chamber to fairly evaluate the testimony of the witness. As an investigating judge who conducted investigations into the crimes committed by the MLC troops during the relevant period, the *procès-verbaux* formed the basis of the findings of Witness 9. The *dossier* will assist the Chamber in assessing the weight to be given to the investigations conducted by the witness, and thus to the value of the witness's conclusions. It also will assist the Chamber in evaluating the widespread nature of the crimes committed during the 2002/2003 conflict in the CAR.

24. Moreover, the Prosecution notes that the Defence itself seeks to admit one victim statement contained in the *dossier*.³² It thus contradicts and, the Prosecution submits, forfeits its complaint that the dossier is inadmissible as a matter of law.³³

Witness CAR-OTP-PPPP-0209 ("Witness 209")

25. The Prosecution wishes to rely on its prior submission in ICC-01/05-01/08-1514-Conf-AnxA, pages 38 – 40.

IV. Conclusion

26. The Prosecution respectfully requests the Chamber to deny the Defence's objections.



Luis Moreno-Ocampo, Prosecutor

Dated this 20th Day of January 2012

At The Hague, The Netherlands

³² ICC-01/05-01/08-1515-Conf, p. 4; the Defence seeks to admit through Witness 79 document CAR-OTP-0001-0539, *Procès-verbal d'audition de victime*, which forms part of the *dossier*.

³³ ICC-01/05-01/08-1558-Conf, p.11, para. 26.