

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/05-01/08
Date: **25 October 2013**

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

Public Redacted Version of "Prosecution's Response to "Defence Submissions on the Testimony of CAR-D04-PPPP-0007""

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 23 September 2012, witness D04-07 willfully disappeared while testifying before Trial Chamber III (“Chamber”) in the instant case, after one of the two Legal Representatives of Victims (“LRVs”) had begun but not completed his questioning, and the other LRV had not even commenced.

2. On 19 July 2013, the Defence of Mr. Jean-Pierre Bemba Gombo (“Defence”) submitted an application requesting the Chamber to declare the testimony of CAR-D04-PPPP-0007 (“D04-07”) complete and part of the trial record, to be assessed in the same manner as other testimony evidence; or alternatively, to declare D04-07’s testimony as part of the trial record to be accorded the same weight as other testimonial evidence notwithstanding the fact that the LRVs had not fully questioned him (“Defence Application”).¹

3. The Office of the Prosecutor (“Prosecution”) partially opposes the Defence Application. D04-07’s testimony is incomplete due to the fact that both LRVs have not questioned him fully on either previously authorised questions or follow-up questions emanating from his testimony in line with the Chamber’s ruling.² Furthermore, the Chamber was deprived of the full opportunity to ask additional or follow-up questions that are typically posed to witnesses at any point during their testimony, including during or after questions from the LRVs. Although D04-07’s testimony is incomplete, the Prosecution submits that it may be admitted as part of the trial record pursuant to Article 69(4) of the Rome Statute (“Statute”).³ However

¹ ICC-01/05-01/08-2732-Conf, Defence Submissions on the Testimony of CAR-D04-PPPP-0007, 19 July 2013, para. 32.

² ICC-01/05-01/08-1023, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, para. 19.

³ Article 69(4) of the Rome Statute: “The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.”

the fact that D04-07's testimony was interrupted by his intentional disappearance,⁴ a factor within his control, should be considered in assessing his credibility and the reliability of his evidence. In the result minimal weight should be accorded to his testimony. In particular, the Prosecution submits that the Chamber should approach his testimony with great caution and disregard all facts in his testimony that are uncorroborated by other reliable evidence.

II. Request for confidentiality

4. The Prosecution submits this response as "Confidential", the same classification afforded to the Defence Application.

III. Prosecution's Submissions

5. On 24 September 2012, the Chamber informed the parties and participants of D04-07's disappearance and provided additional background information.⁵ After D04-07's last appearance in court on 21 September, [REDACTED].⁶ [REDACTED].⁷ [REDACTED]. [REDACTED].⁸ [REDACTED].⁹ [REDACTED].¹⁰ [REDACTED].¹¹

D04-07's Testimony is incomplete

6. D04-07 testified before the Chamber from 19 to 21 September 2012 and was fully questioned by both Defence and Prosecution.¹² The Chamber granted

⁴ ICC-01/05-01/08-T-251-Conf-ENG ET, page 1, line 14 to page 3, line 16.

⁵ ICC-01/05-01/08-T-251-Conf-ENG ET, page 1, line 14 to page 3, line 16.

⁶ ICC-01/05-01/08-T-251-Conf-ENG ET, page 1, lines 16-20.

⁷ ICC-01/05-01/08-T-251-Conf-ENG ET, page 2, lines 4-6.

⁸ ICC-01/05-01/08-T-251-Conf-ENG ET, page 2, lines 7-13.

⁹ ICC-01/05-01/08-T-251-Conf-ENG ET, page 2, lines 14-19.

¹⁰ ICC-01/05-01/08-T-251-Conf-ENG ET, page 2, line 24 to page 3, line 11.

¹¹ ICC-01/05-01/08-T-251-Conf-ENG ET, page 3, lines 3-5.

¹² See, ICC-01/05-01/08-T-248-Conf-ENG ET 19 September 2012, ICC-01/05-01/08-T-249-Conf-ENG ET 20 September 2012, and ICC-01/05-01/08-T-250-Conf-ENG CT 21 September 2012.

authorisation to both LRVs to question D04-07. Mr Zarambaud began but did not complete his questioning, whereas Maître Douzima-Lawson had not even commenced.¹³ On 24 September 2012, the Chamber informed the parties and participants of D04-07's disappearance and stated that "... for the record of the case, the testimony of Witness 07 is suspended". Therefore, the Defence's assertions that "all the authorized and/ or conceivable questions of the LRV's having been put to him"¹⁴ or that D04-07's testimony is complete, are clearly incorrect.

7. The procedure in other international criminal tribunals does not provide for victim participation during trial. The Rome Statute recognises victims' participation and the International Criminal Court ("Court") supports the meaningful participation of victims in trial proceedings.¹⁵ A condition to this meaningful participation is that participation of victims and their LRVs at each stage of the trial is authorised by the Chamber on a case-by-case basis and in a manner that is consistent with the rights of the Accused and a fair trial.¹⁶ The Appeals Chamber has gone so far as to recognize the possibility of victims proposing to the Trial Chamber the admission of evidence pertaining to the guilt or innocence of the Accused and challenging the admissibility or relevance of evidence, provided that a Trial Chamber grants this specific authorisation.¹⁷

8. In relation to D04-07's testimony, the Chamber granted both LRVs the right to pose both pre-authorised and follow-up questions under its judicial control.¹⁸ The

¹³ ICC-01/05-01/08-T-250-CONF-ENG CT 21-09-2012, page 46, lines 24-25.

¹⁴ ICC-01/05-01/08-2732-Conf, Defence Submissions on the Testimony of CAR-D04-PPPP-0007, 19 July 2013, paras. 16-17.

¹⁵ ICC-01/04-01/06-1432 OA9 OA10, Prosecutor v. Lubanga, Judgment on Victims' Participation, 11 July 2008, para. 97.

¹⁶ ICC-01/04-01/06-1432 OA9 OA10, Prosecutor v. Lubanga, Judgment on Victims' Participation, 11 July 2008, paras. 4, 99, 101.

¹⁷ ICC-01/04-01/06-1432 OA9 OA10, Prosecutor v. Lubanga, Judgment on Victims' Participation, 11 July 2008, paras. 4, 104.

¹⁸ ICC-01/05-01/08-T-250-CONF-ENG CT 21-09-2012, page 46, lines 24-25: Her Honour Presiding Judge Steiner, "Mr Witness, the legal representatives of victims were authorised to put some questions to you."; and ICC-01/05-01/08-1023, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, para. 19.

Defence asserts that D04-07 “had quite literally been asked every conceivable question that the parties and participants had in mind for him”¹⁹ and that “[t]here is no sensible basis for suggesting, moreover, that they would have asked him anything new or different or elicited any novel responses”.²⁰ This is incorrect and purely speculative. The fact that LRVs may sometimes ask questions similar to those previously posed by the Prosecution or the Defence does not preclude them from asking these questions or make them less significant, as experience during this trial has shown that witnesses sometimes give different answers to the same question, which invariably assists the Chamber in determining the truth.²¹ Moreover, although the Defence asserts that “[n]o argument can be made that the role of LRVs in proceedings at the ICC is to test the evidence of the Defence witnesses”,²² LRVs may ask questions to clarify a witness’s evidence or elicit additional facts and therefore test that evidence in so far as it relates to victims’ interests.²³ To say that incomplete questioning by the LRVs as a result of D04-07’s intentional absence should be ignored and have no consequences is to effectively deprive victims of their right to meaningfully participate in the trial proceedings, after they had been granted authorisation to do so.

9. Moreover, the Chamber has the right to question all witnesses at any point until that testimony is concluded.²⁴ As the Appeals Chamber stated ‘[t]he fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that “must be convinced of the guilt of the accused beyond

¹⁹ ICC-01/05-01/08-2732-Conf, Defence Submissions on the Testimony of CAR-D04-PPPP-0007, 19 July 2013, para. 16.

²⁰ *Ibid*, para. 28.

²¹ ICC-01/05-01/08-1023, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, para. 17: “The Trial Chamber firstly recalls that victims are participants rather than parties to the trial and shall not be considered as a support to the prosecution. However, as they have a unique role, separate from that of the parties, their participation can assist the Chamber in its determination of the truth.” [Emphasis added]

²² ICC-01/05-01/08-2732-Conf, Defence Submissions on the Testimony of CAR-D04-PPPP-0007, 19 July 2013, para. 15.

²³ ICC-01/05-01/08-1023, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, para. 20.

²⁴ *Ibid*, paras. 5 and 7.

reasonable doubt” (article 66(3) of the Statute).’²⁵ In fact, the Chamber has availed itself of this right to question witnesses both during and after questioning by the LRVs during the Prosecution and Defence cases on various issues, including requesting clarification or addressing inconsistencies.²⁶ The Chamber has been effectively deprived of its right and opportunity to fully question D04-07, in the fulfillment of its duty to establish the truth.

D04-07’s Testimony may remain part of the trial record but should be accorded very little weight

10. The Prosecution concedes that there are instances where incomplete testimony may remain part of the trial record pursuant to Article 69(4) of the Statute. This may be particularly appropriate where the interruption emanates from circumstances beyond a witness’s control, such as death or illness. In relation to D04-07, the fact that both Defence and Prosecution concluded their questioning means that a significant part of the witness’s testimony is on the record. This would support maintaining his testimony as part of the case record in line with the three-stage admissibility test for evidence. The prejudicial effect of the incomplete testimony, however, must be taken into consideration in determining the weight to be attached to D04-07’s overall testimony.

11. The Prosecution submits that incomplete testimony caused by an intentional failure of the witness to conclude his testimony cannot be without consequence. It should not be viewed on par with other testimonial evidence of witnesses who have honored their commitment to fully testify before the Chamber despite any possible

²⁵ ICC-01/04-01/06-1432 OA9 OA10, Prosecutor v. Lubanga, Judgment on Victims’ Participation, 11 July 2008, para. 95.

²⁶ See, for example, ICC-01/05-01/08– T-330 ENG ET, 25/06/2013, page 27 line 20 to page 29 line 17; ICC-01/05-01/08– T-330 ENG ET, 25/06/2013, page 41 line 4 to line 14; ICC-01/05-01/08– T-327 ENG ET, 20/06/2013, page 47 line 22 to page 48 line 18; ICC-01/05-01/08– T-327bis ENG ET, 20/06/2013, page 17 line 1 to page 19 line 1; ICC-01/05-01/08 – T-324 ENG ET, 17/06/2013, page 7 line 24 to page 8 line 20; ICC-01/05-01/08 – T-324bis ENG ET, 17/06/2013, page 18 line 12 to page 20 line 20 .

inconvenience. D04-07's intentional disappearance prior to completing his testimony is an important factor that merits serious consideration by the Chamber when evaluating what weight, if any, should be accorded to his testimony.

12. The Defence implies a link between statements attributed to one of the LRVs, which were expressed to D04-07, and his subsequent disappearance by devoting three paragraphs to this issue.²⁷ The Defence concludes that "[t]he fact that the LRVs (whose role in discomfiting [*sic*] the witness the Chamber has noted) had not put their authorized questions to him should not result in less weight being ascribed to his testimony".²⁸ Any such link by the Defence is speculative. [REDACTED].²⁹ The parties and participants have not received any information to the contrary and such a link can neither be established nor reasonably inferred.

13. The Prosecution submits that a more reasonable inference from D04-07's behaviour [REDACTED], cumulatively indicate a pre-meditated and intentional decision to not conclude his testimony. This raises suspicions regarding his motivation to testify as well as his reasons for not completing his testimony. Due to D04-07's intentional disappearance, the Chamber is deprived of further clarification on these consequential issues that affect both the witness's credibility and the reliability of his evidence. As such, the probative value of his evidence is drastically diminished and, although admitted into evidence, very little weight should be attached to his testimony.³⁰

²⁷ ICC-01/05-01/08-2732-Conf, Defence Submissions on the Testimony of CAR-D04-PPPP-0007, 19 July 2013, paras. 4-6.

²⁸ *Ibid*, para. 31.

²⁹ ICC-01/05-01/08-T-251-Conf-ENG ET, page 1, lines 16-20.

³⁰ ICTY, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006: In dealing with a different scenario, the ICTY Appeals Chamber agreed with the Trial Chamber and ruled that "As well, it is entirely appropriate that arguments concerning the credibility and reliability of Milan Babić's testimony, although not deemed sufficient to merit its exclusion, be considered when assessing the weight, if any, to be attached to the evidence of Milan Babić in light of the entire trial record" [reference omitted]

14. The Defence further asserts broadly that details given by D04-07 are “consistent in significant part with much evidence presented during the Prosecution’s own case”,³¹ but fails to provide any citation to assist the Chamber. The Prosecution disputes the Defence’s assertion. The Prosecution submits that credibility issues raised by D04-07’s intentional disappearance affect the reliability of his evidence to such an extent that the Chamber should accord minimal weight to that evidence and only rely on portions of his testimony that are corroborated by other reliable evidence.

IV. Relief Requested

15. The Prosecution respectfully requests the Chamber to partially reject the Defence Application and declare D04-07’s testimony as incomplete evidence that may remain on the trial record but to accord minimal weight to this testimony in its final assessment on the evidence.



Fatou Bensouda, Prosecutor

Dated this 25th Day of October 2013

At The Hague, The Netherlands

³¹ ICC-01/05-01/08-2732-Conf, Defence Submissions on the Testimony of CAR-D04-PPPP-0007, 19 July 2013, para. 29.