

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **23 August 2016**

TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
Judge Geoffrey Henderson
Judge Chang-ho Chung

**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 the “Defence Urgent Submissions on the 5 August Letter”, 16 September 2014, ICC-01/05-01/08-3144-Conf

Source: The Office of the Prosecutor

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 James Stewart

Mr Jean-Jacques Badibanga

Counsel for the Defence of Jean-Pierre Bemba

Mr Peter Haynes

Ms Kate Gibson

Legal Representatives of Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of 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 Keita

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 Other Section

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber III (“Chamber”) to reject, in part, the *Defence Urgent Submissions on the 5 August Letter* (“Defence Request”).¹ The Prosecution opposes Defence requests 1) to exclude the testimonies of 22 Prosecution witnesses; 2) to receive an unredacted copy of the 6 August 2011 letter; 3) to reclassify as public all filings and documents related to witness CAR-OTP-PPPP-0169 (“P169”); 4) to contact P169; 5) to file supplemental submissions to its Closing Brief; and 6) to suspend the timeframe for the filing of its closing reply brief.

2. The above Defence requests are not supported in law, are not justified under the circumstances, and are extreme remedies for issues that can be readily addressed in the Defence Closing Brief Reply and the Chamber’s Trial Judgement.

3. The Prosecution does not object to the admission of P169’s 5 August 2014 letter for the Chamber’s evaluation of his credibility as a witness. Should the Chamber admit the 5 August 2014 letter into evidence, the Prosecution requests that the Chamber consider admitting limited evidence from its Article 70 investigation in *The Prosecutor v. Bemba et al.* which may bear on P169’s letter. Or, in the alternative, to recall P169 to hold a limited evidentiary hearing confined to assessing the witness’ credibility in light of his recent behaviour. The Prosecution intends to examine the matter and if relevant evidence is obtained, to promptly disclose such evidence under the Prosecution disclosure obligations.

¹ ICC-01/05-01/08-3139-Conf, Defence Urgent Submissions on the 5 August Letter, 11 September 2014.

II. Confidentiality

4. This Information is filed as “confidential” pursuant to Regulation 23*bis* of the Regulations of the Court, as it refers to issues related to the protection of witnesses.

III. Background

5. The Prosecution incorporates herein paragraphs 6-12 in ICC-01/05-01/08-3138-Conf-Red.

IV. Submissions

The Chamber should reject the Defence request to exclude testimony

6. The Prosecution opposes the Defence request to the Chamber to exclude from its evaluation of evidence the entire testimonies of 22 Prosecution witnesses. The request is an extreme remedy that has no basis in law or in logic and should be rejected. The Defence argues that the Chamber should exclude the testimonies of 22 witnesses, instead of considering each of their testimonies in light of the evidence as a whole. The Defence inexplicably urges the Chamber to reject their testimonies on the basis of the 5 August letter of P169, a witness whom the Defence claims has no credibility.

7. The Chamber is entrusted to carefully assess the appropriate weight to be accorded to witness testimony and to make credibility determinations based on the entire record of trial. The Defence’s requested remedy would run contrary to the Chamber’s duty to discover the truth and hamper the Chamber’s ability to fully assess and deliberate upon the evidence. The Defence essentially asserts that, because it has grounds to challenge

the 22 testimonies, the Chamber should not consider their testimonies at all. Though it may assist the Defence strategy to attempt to challenge the credibility of the 22 witnesses, this does not mean that the Chamber must accept the Defence arguments. If contested evidence were routinely excluded merely on the basis that it was challenged by a party, the Chamber would be left to deliberate on solely undisputed facts.

8. The Defence Request is contrary to previous decisions of the Chamber. The Defence does not cite to previous analogous rulings. However the Chamber has previously rejected the Prosecution's objections to the admission of alleged false documents submitted by the Defence.² Additionally, over the Prosecution's objection, the Chamber accepted witness D04-0007's testimony into the record of trial and the Defence relied on his testimony in its Closing Brief.³ The Defence had requested the Chamber to consider D04-0007's testimony as complete and to enter it on the case record given that he was questioned by both the Defence and Prosecution, and all the authorised and/or conceivable questions of the Legal Representatives for Victims ("LRVs") had put to him.⁴ It was requested in the alternative, that the witness' partial testimony remain part of the case record, in accordance with jurisprudence of the international criminal tribunals.⁵ Inconsistent with its current position, the Defence further submitted that D04-0007's testimony should not be ascribed less weight because of incomplete questioning on the part of the LRVs but rather should be weighed by the Chamber in the same manner as all other oral testimony in the *Bemba* case.⁶

² ICC-01/05-01/08-3019-Conf, Decision on the admission into evidence of items deferred in the Chamber's previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber, 17 March 2014.

³ ICC-01/05-01/08-2839, Decision on 'Defence Submissions on the Testimony of CAR-D04-PPPP-0007', 21 October 2013, paras. 11-15.

⁴ ICC-01/05-01/08-2732-Conf, Defence Submissions on the Testimony of CAR-D04-PPPP-0007, 19 July 2013, paras. 13-17.

⁵ ICC-01/05-01/08-2732-Conf, paras. 18-31.

⁶ ICC-01/05-01/08-2732-Conf, para. 32.

9. In the subsequent Decision on “Defence Submissions on the Testimony of CAR-D04-PPPP-0007” the Chamber did not consider D04-0007’s testimony to be “complete” in view of the restriction of the LRVs and Chamber’s questioning (the Chamber having not been afforded the full opportunity to question the witness).⁷ Nevertheless, the Chamber decided to maintain D04-0007’s testimony as part of the case record, having established that any prejudice to the fairness of the trial and the fair evaluation of the witness’ testimony that may have been caused by his failure to complete his testimony was limited and did not warrant its exclusion from the record of the case.⁸ It was further held that the Chamber had insufficient information to assess the witness’ testimony, including its reliability and credibility but that the testimony’s maintenance in the record had no bearing on the Chamber’s final determination of the credibility or reliability of D04-0007’s testimony, or whether it would be afforded any weight at the end of the case.⁹

10. The Chamber has the full discretion to assess the appropriate weight and credibility to be accorded to the testimony of a witness. The *Martić* case in the ICTY is illustrative of this point of law.¹⁰ In *Martić* the Trial Chamber rejected a Defence motion to exclude the testimony of the witness Babic, after Babic had committed suicide prior to the completion of a Defence cross-examination.¹¹ The Trial Chamber decision was upheld on interlocutory appeal.¹² The ICTY Appeals Chamber affirmed that arguments as to credibility and reliability should be considered as a matter of weight.¹³ Furthermore, the Appeals Chamber found that the Trial Chamber, in rejecting the

⁷ ICC-01/05-01/08-2839, paras. 11-15.

⁸ ICC-01/05-01/08-2839, para. 24.

⁹ ICC-01/05-01/08-2839, para. 24.

¹⁰ ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Motion to Exclude the Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence, 9 June 2006.

¹¹ *Ibid.*, paras.61,69,77.

¹² ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, 4 September 2006.

¹³ *Ibid.*, paras.15, 22.

Defence motion, had properly considered whether the event calling into question Babic's credibility substantially outweighed the probative value of his testimony such that it should be excluded.¹⁴ The Trial Chamber relied on Babic's testimony to convict Martić, and the Trial Chamber Judgement was upheld on appeal.¹⁵ Similar to *Martić*, in this case the Chamber must weigh the character evidence of P169 with his actual testimony given under oath and in light of the entire record. The exclusion of the evidence is not warranted under the circumstances.

11. It is squarely within the competence of the Chamber to evaluate P169's testimony in light of his post-testimony actions. P169's testimony in court, which occurred years before the current events, is not significantly impacted by P169's post-testimony behaviour. The Prosecution invites the Chamber to cautiously scrutinise P169's testimony, however, it remains that his testimony is consistent with other evidence in the case, is internally consistent, is plausible and clear, and is largely corroborated by other evidence. Further, P169 had no apparent motive to lie to the Chamber. While it is true that by his letters, P169 appears to be interested in money he believes he is entitled to have, he would now be in the same position to make successive attempts to gain financially if he provided less favourable testimony to the Prosecution. Thus, his apparent desire for compensation for his perceived losses does not appear to have had any direct connection with a motive to lie and his apparent self-centredness alone does not make his testimony untrue.

12. Nothing in P169's testimony itself casts any doubt about his experiences in the Central African Republic in 2002-2003. Had he wanted to exaggerate or lie he would have had plenty of opportunities to do so, for example, he could have stated that he was

¹⁴ *Ibid.*, paras.24, 29-30.

¹⁵ ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Judgment, paras.537-539.

in a position to directly hear Bemba speak to [REDACTED]. Instead he testified that he inferred that fact through [REDACTED] words and actions. The fact that he did not make such embellishments in his testimony lends credence to what he told the Court and should be believed.

13. The Prosecution notes that the 5 August letter was disclosed under Article 67(2) of the Rome Statute (“Statute”) as it **may** affect the credibility of Prosecution evidence. The Defence misstates the legal standards of Article 67(2) of the Statute claiming that the Prosecution believes the letter to actually exculpate the Accused.¹⁶ The letter merely has the **potential** to assist the Accused in his efforts to undermine the Prosecution’s evidence, and was therefore rightly and promptly disclosed to the Defence. The discharge of this statutory duty, however, does not detract from the Prosecution’s firm belief that the letter is effectively incapable of affecting the credibility of the witness’ testimony before the Chamber or otherwise adversely affect the strength of the Prosecution’s case.

The Chamber should reject the Defence requests to receive an unredacted copy of the 6 August 2011 letter

14. The Chamber has previously ordered the provision of a redacted copy of P169’s 6 August 2011 letter in order to enable the Defence to challenge the credibility of P169 with information contained in the letter.¹⁷ Nothing in the remaining redacted portions of the letter further enable the Defence to mount additional arguments pertaining to P169’s credibility and therefore the Chamber should reject the Defence request.

¹⁶ ICC-01/05-01/08-3139-Conf, paras. 16, 24.

¹⁷ ICC-01/05-01/08-1727-Conf, “.Decision on the prosecution's application regarding a letter dated 6 August 2011”, 9 September 2011, para. 12.

The Chamber should reject the Defence request to reclassify as public related filings and documents

15. The Chamber previously rejected a Defence request to reclassify as public related filings and documents.¹⁸ The risk to witnesses that would be present were the information from P169 be reclassified as public does not appear to have changed since the Chamber last decided this issue. It is the Chamber's responsibility to balance its duty to observe the principle of publicity of proceedings against its obligation under Article 68 "to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". That balance weighs heavily in favour of maintaining the current level of confidentiality.

The Chamber should reject the Defence request to contact P169

16. The Defence signals its intention to interview P169 in order to explore his statement concerning a) the reconsideration of his testimony, and b) the "proof" which the other 22 witnesses are ready to bring concerning the fact of their "subordination".¹⁹ The Chamber denied a previous similar request.²⁰ The Chamber, *inter alia*, found that "none of the individuals received any financial assistance that goes beyond the requirements of ordinary subsistence" and that "the attempted contact allegedly initiated by Witness 178 took place after the relevant witnesses testified and... those witnesses who could be contacted by the prosecution to verify the information stated that they refused to attend any such meeting". The Chamber also found that "there is no good cause to order the recall of Witnesses 169 and 178."²¹

¹⁸ ICC-01/05-01/08-2924-Conf, para. 16.

¹⁹ ICC-01/05-01/08-3139-Conf, para. 22.

²⁰ ICC-01/05-01/08-2924-Conf, para. 38.

²¹ ICC-01/05-01/08-2924-Conf, paras. 33-37.

17. The Prosecution submits that the Chamber's above findings are still valid. Therefore, based on their on-going relevance and on a) the Prosecution's latest submission to introduce evidence from the Article 70 case bearing on the 5 August 2014 letter, were the Chamber to grant it,²² and b) the acceptance by the Prosecution of Defence's request to admit the letter of 5 August as evidence in the proceedings, the Prosecution submits that the Chamber should reject the Defence's request to contact P169 with the view to interviewing him.

18. However, even if the Chamber, as, alternatively, posited by the Prosecution in its latest filing on the subject, deems fit to recall P169,²³ the Prosecution submits that the requested contact of the Defence with P169 should still not be authorised. In the event the Chamber decides to recall P169, the Prosecution undertakes to take a statement from P169 exploring all potential incriminating and exonerating aspects of the issues arising out of the letters allegedly authored by him. The Defence has submitted that it owes a duty to its client to act skilfully and *with loyalty*.²⁴ Unlike the Defence, the Prosecution has a statutory duty to investigate incriminating and exonerating circumstances equally.²⁵ In addition, as noted by the Victims and Witnesses Unit, "none of the [REDACTED], and that the Prosecution remains the focal point of contact with these witnesses."²⁶ As the Chamber has observed, the Prosecution is statutorily obliged to take measures to respect the interests and personal circumstances and protect the safety, physical and psychological well-being of victims and witnesses.²⁷

²² ICC-01/05-01/08-3138-Conf-Red, paras. 16 and 17.

²³ ICC-01/05-01/08-3138-Conf-Red, para. 21.

²⁴ ICC-01/05-01/08-3139-Conf, para. 29, emphasis added.

²⁵ Article 54 of the Rome Statute.

²⁶ ICC-01/05-01/08-2975-Conf-Red, para. 1.

²⁷ ICC-01/05-01/08-3070, para. 17.

19. Having explored all potential issues with P169 arising from his letter, including his statement therein concerning a) the reconsideration of his testimony, and b) the “proof” which the other 22 witnesses are allegedly ready to bring concerning the fact of their “subordination”, which the Defence highlights in its filing, the Prosecution will disclose the statement to all parties and participants in these proceedings subject to any redaction concerning the safety and well-being of P169 and that of any other victims or witnesses. The statement may then serve as the basis of their own questioning at the time the witness is recalled by the Chamber.

The Chamber should reject the Defence requests to file supplemental submissions and suspend the timeframe for filing its closing reply brief

20. The Defence has had ample time to make its arguments on this issue in its Defence Request and its position should be clear. The Defence will have a second opportunity to present its arguments to the Chamber in its closing reply brief to be filed on 29 September 2014. The Defence has not shown good cause under Regulation 35(2) to extend the time limits already imposed by the Chamber. There is no reason the Defence can provide that justifies further submissions or extensions of the times limits already imposed. Should new information become available and/or disclosable the Defence may seek a remedy at that time.

V. Relief Requested

21. The Prosecution respectfully requests the Chamber to reject Defence requests to

- 1) exclude the testimonies of 22 Prosecution witnesses;
- 2) receive an unredacted copy of the 6 August 2011 letter;
- 3) reclassify as public all filings and documents related to witness P169;

- 4) contact P169;
- 5) file supplemental submissions to its closing brief; and
- 6) suspend the timeframe for the filing of its closing reply brief.



Fatou Bensouda, Prosecutor

Dated this 23rd Day of August 2016

At The Hague, The Netherlands