

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 25 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 Defence Request for
Reconsideration of the 'Decision on "Defence request for recall of Witness P-178"',
ICC-01/05-01/08-3186-Conf, 6 November 2014, ICC-01/05-01/08-3197-Conf**

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 5 November 2014, the Defence filed a request for Trial Chamber III (“Chamber”) to reconsider its Decision not to recall Witness CAR-OTP-PPPP-0178 (“P-178”) (“Defence Request”).¹ The Defence Request followed the Chamber’s decision rejecting the recall of P-178.² The Defence argues that the reconsideration is warranted on the grounds that new circumstances have arisen since the issuance of the Decision and that the Chamber committed manifest errors of law by: imposing an unduly high evidential threshold for the recall of P-178; issuing final findings on the issue of collusion before the Defence has submitted its observations on CAR-OTP-PPPP-0169 (“P-169”), and outside the scope of final judgment; and relying on untested, unsworn information from the Victims and witnesses Unit (“VWU”) on matters concerning witness testimony.

2. The Office of the Prosecutor (“Prosecution”) opposes the Defence Request. The Chamber did not commit any error of law in its Decision nor has any new circumstance arisen that would justify such reconsideration. The Defence has not proven any error of law or new circumstance or fact that would warrant a different ruling from the Chamber. The Defence Request therefore does not satisfy the threshold required for the Chamber to reconsider its prior decision and, as such, should be rejected.

II. Confidentiality

3. The Prosecution requests that the Chamber receive this response as “confidential” pursuant to Regulation 23(2)*bis* of the Regulations of the Court, as it relates to a document that was filed with the same classification.

¹ ICC-01/05-01/08-3192-Conf, Defence Request for Reconsideration of the ‘Decision on “Defence request for recall of Witness P-178”’.

² ICC-01/05-01/08-3186-Conf.

III. Submissions

4. As ruled by Trial Chamber I in the case of *The Prosecutor vs Thomas Lubanga Dyilo*, the Chamber can reconsider its Decisions when: (i) a new fact has been discovered that was not known at the time when it made its original decision; (ii) there has been a material change in the circumstances since the original Decision was made; or (iii) there is reason to believe that the original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.³ The Defence Request has failed to meet the standard required to move this Chamber to exercise this exceptional measure for reconsideration.

5. The Chamber has already considered matters raised in the Defence Request and therefore there is no new circumstance to warrant a reconsideration of the previous Decision.

6. Though the VWU filed an updated report⁴ after the Chamber had issued its Decision, there is nothing new in that report that would warrant the Chamber reconsidering its Decision as the information contained in the VWU report was already available to the Chamber before making its Decision. The VWU report merely reinforces or clarifies the evidence already before the Chamber. In the VWU report, P-178 explains how he obtained the list of witnesses [REDACTED]. This information clarifies but does not alter the basis upon which the Chamber based its Decision. Even if that were to be considered a new fact, it still falls short of the threshold required for the Chamber to reconsider its Decision which is that the new information should significantly alter "...the basis on which the original decision was taken."⁵ P-178 states that he is willing to come before the Chamber to testify about the name of the VWU staff [REDACTED]. It is

³ ICC-01/04-01/06-2705, para. 17.

⁴ ICC-01/05-01/08-3190-Conf + Conf-Anx, Victims and Witnesses Unit's Updated Report pursuant to Decisions ICC-01/05-01/08-3077-Conf and ICC-01/05-01/08-3154-Conf.

⁵ ICC-01/04-01/06-2705, para. 14.

the Chamber that decides to recall witnesses and not for the witnesses to decide when they want to come back or not. This information could be obtained by VWU as part of its duty to investigate performance of its staff. The information could also be obtained by a joint VWU and Prosecution call to the witness. He need not to travel to The Hague to give this information. Moreover, there is nothing new in this information that would alter the previous Decision of the Chamber.

7. The Defence has failed to explain how the identity of [REDACTED] alone, without more, is relevant let alone probative or significant to warrant reconsideration of the Chamber's Decision. Moreover, as stated by the Registry, P-169's description of [REDACTED] does not accord to that of Intermediary 2.⁶

8. The Defence argues that the Chamber imposed an unduly high evidential threshold for the recall of P-178 without substantiating their claim.⁷ Instead the Defence relitigates the issues that have already been litigated and ruled upon by the Court. The Chamber has already ruled that it is not convinced that "...the recall of Witness P-178 is justified in order to further check the general credibility of Witness P-169..."⁸ The Defence does not explain or demonstrate how the Chamber imposed an unduly high evidential threshold for the recall of P-178.

9. The Defence also avers that the Chamber committed a manifest error of law by issuing final findings on the issue of collusion before the Defence has submitted its observations on P-169, and outside the scope of the final judgement in this case.⁹ To justify its claim the Defence selectively quotes paragraph 22 of the Chamber's Decision.¹⁰ Again the Defence mischaracterises the Chamber's Decision. At paragraph 21 of the

⁶ ICC-01/05-01/08-3192-Conf, para. 2.

⁷ ICC-01/05-01/08-3192-Conf, paras. 10-18.

⁸ ICC-01/05-01/08-3186-Conf, para. 21.

⁹ ICC-01/05-01/08-3192-Conf, paras. 19-23.

¹⁰ ICC-01/05-01/08-3192-Conf, para. 19.

Chamber's Decision, the Chamber clearly sets out its approach to the evaluation of the evidence on record. The Chamber states "Lastly, the Chamber is not convinced that the recall of Witness P-178 is justified in order to further check the general credibility of Witness P-169, which the Chamber will assess against the entire record of the case, in its determination pursuant to Article 74(2) of the Statute." The Chamber clearly stated that it will assess the credibility of the evidence of P-169 against the entire record.

10. The Defence misquotes and mischaracterises the Chamber's Decision regarding its findings on the list and the level of contact and/or collusion between witnesses by alleging that the Chamber's evaluation of the credibility of P-169 is final.¹¹ To the contrary, the Chamber's Decision is limited to the issue of collusion of witnesses, which is a discrete issue that arose during the trial based on statements from P-169 that was later withdrawn by the witness himself. There is nothing improper about the Chamber making such preliminary findings at this stage. Nowhere does the Chamber imply or even infer that this is a final finding regarding its evaluation of the testimony of witness P-169. The Chamber was responding to a specific issue before it and its Decision should be read and understood in that context.

11. Moreover, Defence submissions on the credibility of P-169 will form part of the court record, and as the Court has stated, it will evaluate the evidence in its entirety, including Defence submissions on P-169's credibility in assessing credibility of witnesses in the case. The Chamber has thus committed no error to warrant reconsideration of its Decision.

12. The Defence again states that the Chamber committed a manifest error of law by relying on untested, unsworn information from the VWU on matters concerning witness testimony.¹² This is blatantly disingenuous of the Defence and another clear case of the

¹¹See ICC-01/05-01/08-3192-Conf, paras. 20-23.

¹² See ICC-01/05-01/08-3192-Conf, paras. 24-32.

Defence misrepresenting facts. In its Decision,¹³ the Chamber relied on the reports from both the Prosecution and the VWU, testimony of P-169 and of course submissions and evidence relied upon by the Defence in their request.¹⁴ The Defence assertion that the Chamber solely relied on the VWU report to reach its Decision is both unsubstantiated and incorrect as the Chamber explicitly made reference to the Prosecution Report and testimony of P-169 as well in reaching its Decision.¹⁵

13. Instead of explaining the error of the Chamber, the Defence as usual, deviates into litigating afresh the issue of collusion of witnesses and their credibility which has already been raised and is before the Chamber for consideration. The Defence does not even attempt to demonstrate why a report of VWU is inadmissible or unreliable. Its claims about the VWU report are simply unsubstantiated. The Chamber does not require P-178's testimony to rule on the issue of collusion of witnesses.

14. The Defence avers that the burden should not be on the Defence to justify why P-178 should be recalled but rather on the Chamber.¹⁶ Again it is disingenuous for the Defence to shift the burden to the Chamber when it very well known that, as a basic principle of law, the burden is on it as the moving party.¹⁷

¹³ ICC-01/05-01/08-3186-Conf.

¹⁴ ICC-01/05-01/08-3186-Conf.

¹⁵ ICC-01/05-01/08-3186-Conf, para. 22.

¹⁶ ICC-01/05-01/08-3192-Conf, para. 13.

¹⁷ ICC-01/04-01/06-2705, para. 16 where Trial Chamber I made reference to ICTY case of *The prosecutor v Radovan Karadic*.

IV. Requested relief

15. For the above reasons, the Prosecution respectfully requests that the Chamber reject the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 25th Day of August 2016
At The Hague, The Netherlands