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

Date: 05/11/2014

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**

Confidential

Defence Request for Reconsideration of the 'Decision on "Defence request for recall of Witness P-178"', ICC-01/05-01/08-3186-Conf

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda
Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC
Kate Gibson
Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Paolina Massida

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section Other**

A. INTRODUCTION

1. The Defence for Mr. Jean-Pierre Bemba Gombo hereby files this request for reconsideration of the ‘Decision on “Defence request for recall of Witness P-178”’, (“the Decision”)¹ on the grounds that:

- i. New circumstances have arisen since the issuance of the Decision, which undermine the bases of the Chamber’s conclusion; and
- ii. The Trial Chamber committed manifest errors of law by
 - a. Imposing an unduly high evidential threshold for the recall of P-178;
 - b. Issuing final findings on the issue of collusion before the Defence had submitted its observations on P-169, and outside the scope of the final judgment in this case; and
 - c. Relying on untested, unsworn information from VWU on matters concerning witness testimony.

B. SUBMISSIONS

a) The legal test for reconsideration

2. In this case, the Trial Chamber has indicated that it can reconsider a decision upon the provision of new information.² Trial Chamber I has further confirmed that the Court can reconsider decisions if they are “manifestly unsound and their consequences are manifestly unsatisfactory”.³

¹ ICC-01/05-01/08-3186-Conf.

² ICC-01/05-01/08-T-42-Red-ENG-ET, pp. 1-4.

³ Trial Chamber I, Prosecutor v. Lubanga, ‘Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010’, ICC-01/04-01/06-2705, 30 March 2011, para. 18.

b) New circumstances have arisen since the issuance of the Decision, which undermine the bases of the Chamber's conclusion

3. Mere hours after the Trial Chamber issued its decision, the VWU filed a report on their contacts with P-178.⁴ Of key importance, they note that:

- a. The Prosecution disclosed to them an additional number for P-178;
- b. P-178 appears to attribute the letters to "several witnesses";⁵
- c. At least four other individuals were involved, including P-42 and [REDACTED] and
- d. He allegedly obtained the list of witnesses [REDACTED]

[REDACTED].⁶

4. There is thus indicia that P-42 was more directly involved than he had conceded to VWU staff. P-178's account as to how he obtained the witness list is also an issue that goes to his credibility as a witness of truth.

5. On the same day, both the Registry and the Prosecution submitted filings that appear to contest the identification of [REDACTED] as 'Intermediary 2'.⁷

6. Given the Prosecutor's special responsibilities under Article 70, it is a matter of the utmost concern that they appear to have made no effort to ascertain his identity notwithstanding their possession of the means to contact P-178 and P-42, and are opposed to measures which might assist the Court to determine whether this person has been involved in influencing the testimony of witnesses.

7. The Trial Chamber recognised that there are grounds to believe that a person called [REDACTED] was involved in providing false information to the ICC. P-73

⁴ ICC-01/05-01/08-3190-Conf.

⁵ ICC-01/05-01/08-3190-Conf, para. 3.

⁶ ICC-01/05-01/08-3190-Conf, para. 10.

⁷ ICC-01/05-01/08-3188-Conf, para. 6; ICC-01/05-01/08-3189-Conf, para. 2.

confirmed that '██████████' had contacted P-42, and now both P-169 and P-178 have confirmed that ██████████ continues to interact with witness in relation to issues concerning expenses and testimony.

8. Irrespective as to whether ██████████ is Intermediary 2 or not, there is a clear need to obtain further information concerning his interaction with witnesses. Since P-178 has been described as being close to him, he is evidently the best source for such information. As will be elaborated below, this information cannot and should not be obtained through the VWU.

9. In light of the resources and time that have been dedicated by the Prosecution and this Court to exploring issues of alleged false testimony pertaining to Defence witnesses (after the close of the Defence case), it is inexplicable that the Chamber would not be prepared to consider the recall of a very limited number of witnesses within a very short time frame when issues arise concerning the integrity of the Prosecution case.

c) The Trial Chamber imposed an unduly high evidential threshold for the recall of P178

10. Even if there were no 'collusion' between the 22 witnesses, the fact that P-169 and P-178 have been engaged in the activity of attempting to extort the ICC is an issue that goes to credibility. The question as to how P-178 obtained this information is also an issue that goes to his credibility. As such, the Defence should have had an absolutely right to put these issues to P-178 and the other issues when they testified.

11. Indeed, had the Trial Chamber allowed the Defence to retain possession of the August 2011 letter, the Defence would have been in a position to put its contents to P-178 when he testified. As a result of the intervention of the Prosecution, the

Defence was deprived of this opportunity for P-178 and all witnesses, who testified subsequently.

12. The current scenario is not therefore analogous to a typical reopening of a case to hear evidence that only become available later. This evidence (or at least, some of it) was available during trial but the Trial Chamber refused to allow the Defence to either retain a copy of the evidence or to put it to subsequent witnesses. As a result, the Defence was also deprived of the ability to conduct any further investigations on this issue in order to raise it as part of the Defence case.

13. In such circumstances, the burden should not be on the Defence to justify why recall is warranted, the burden should be on the Chamber to justify why they are not allowing recall to remedy the harm suffered by the Defence as a result of the unjustified and unfair confiscation of the August 2011 letter.

14. Moreover, the high evidential threshold set by the Chamber appears to ignore the fact that the Chamber has deprived the Defence of the ability to satisfy it. Whereas the Prosecution has been given free rein to contact all Defence witnesses, the Defence has been denied the right to contact this limited pool of persons. It has therefore been deprived of the ability to collect the very evidence, which the Chamber appears to consider necessary to warrant a reopening of the trial in relation to these matters.

15. Even on the evidence available from P-169's recall, it is apparent that it is impossible to assess the veracity of P-169's explanation for the letters without hearing from P-178. P-169 has sought to attribute all wrongdoing to P-178. The Chamber simply cannot accept such a position at face-value. If this position is in turn, contested by P-178, there would be ground to believe that P-169 has provided completely false testimony before the Court in order to evade the consequences of Article 70.

16. In its decision to recall P-169, the Chamber found that P-169's recall was warranted due to the fact that P-169 "claims that he has information on the "subordination" and ill-treatment of the Relevant Witnesses and "money transferred by the ICC prosecution".⁸ After having received legal advice in relation to self-incrimination, P-169 then advanced a definition of 'subordination' which is incapable of belief.

17. Unless the Chamber is only interested in hearing evidence that rehabilitates Prosecution witnesses, fairness dictates that the Defence should have the opportunity to call P-178 in order to explore this discrepancy between the plain written language in P-169's letters, and his testimony, in which he expressly said:⁹

A. On that day, well, it didn't take long. It didn't take up to two days, no. Was it one month? No, it was not one month. Well, I would like to refer to the letter that I sent to the Prosecutor. It is the Prosecutor who knows the date; the correct date. **If he gives me the date, that would be my answer.** (Emphasis added).

This is particularly so given P-169's new revelation that [REDACTED] was involved in this scheme, and that P-178 is very well acquainted with this person.

18. In this sense, the testimony of P-169 is intrinsically linked to P-178. To call one without the other does not assist the Chamber's determination of the truth, but merely obscures it further.

d) The Trial Chamber committed a manifest error of law by issuing final findings on the issue of collusion before the Defence had submitted its observations on P169, and outside the scope of the final judgment in this case

⁸ ICC-01/05-01/08-3154-Red.

⁹ ICC-01/05-01/08-T-361-CONF-ENG-ET p.69.

19. In the Decision, the Trial Chamber found:¹⁰

It is satisfied that the testimony of P-169, and the reports submitted by the prosecution and the VWU in relation to the alleged contacts between witnesses, is in line with the Chamber's assessment that the defence's allegations of collusion among witnesses called by the prosecution is unsubstantiated.

20. This is not a provisional finding or a finding tailored to the specific threshold for the recall of P-178. The Chamber made a final finding of fact in relation to the existence or not of collusion among witnesses, based on the Prosecution and VWU reports on contacts, before the Defence had been provided with an opportunity to file its submissions in relation to such matters.

21. This predetermination of pending issues runs roughshod over the notion of adversarial proceedings, and creates an objective (if not subjective) appearance that it will be impossible for the Chamber to consider the Defence submissions on P-169 with the requisite level of impartiality.

22. The Defence is not a token feature of this Court. It is inutile to allocate superficial rights to the Defence if substantive decisions have been taken without Defence input.

23. Accordingly, unless the Chamber is prepared to withdraw this finding, there will be an appearance that the Chamber will be unable to consider either the Defence submissions on P-169 or indeed, hear the relevant components of the closing submissions with an open mind.

¹⁰ The Decision, para. 22.

e) The Trial Chamber committed a manifest error of law by relying on untested, unsworn information from VWU on matters concerning witness testimony

24. As noted above, the Trial Chamber's determination as to whether there was collusion between witnesses was based on VWU reports on such contacts. To rely on Registry reports on questions of fact in order to deny a request to recall a witness to hear them on such questions of fact is unprecedented.

25. The credibility and interaction between the 22 witnesses in an issue of key evidential concern. It is the position of the Defence that this interaction potentially undermines the credibility and reliability of these witnesses as witnesses of truth. This is not a procedural issue but an issue that goes to the heart of the evidence supporting the charges against Mr. Bemba.

26. It therefore follows that the Defence has an absolute entitlement to cross-examine these witnesses on any information that might play a role in the Trial Chamber's determination of their credibility. In particular, if the Trial Chamber wished to rely on information from the VWU reports to rebut an allegation of collusion, then the appropriate procedure should have been to call the witnesses to give evidence so that this information can be elicited under oath, and tested under cross-examination.

27. The current course of action has, however, resulted in an *ex parte* trial which has been conducted outside of the presence of the Defence and Mr. Bemba and without their participation. There is no Statutory authority for this course of action, which violates the rights of the Accused.

28. Although the Trial Chamber has the power to request the admission of any evidence that might be relevant to the determination of the truth, it does not have

the power to transform the Victims and Witnesses Unit into a *de facto* investigative arm of the Chamber.

29. VWU staff are mostly not lawyers. They are not bound by the investigative duties of the Prosecution nor do they possess its investigative powers. VWU does not obtain information from witnesses under oath, nor is there any indication that they caution the witness in relation to the provision of false information. There is no record which would enable the Defence to evaluate the demeanour of the witnesses when they provided this information.

30. Given that their mandate concerns issues of protection and security, and they are required to consider the best interests of the witnesses, they do not question witnesses with a view to ascertaining their credibility, or matters that might be exculpatory for the Defence. It is in fact clear from the VWU reports that their questions were concerned with issues of protective measures, not collusion.

31. Moreover, given that both P-169 and P-178 have accused VWU of wrongdoing, there is also an appearance that VWU would have a conflict of interest as concerns its ability to question witnesses in relation to such matters.

32. Article 69(2) also sets out the principle of orality of evidence. Although Rule 78 allows for an exception, it also stipulates that the Defence should have the ability to cross-examine the witness in relation to such matters at some juncture of the proceedings. To hold otherwise violates Article 67(1)(e) of the Statute.

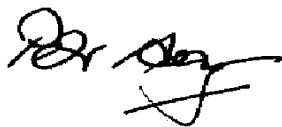
C. RELIEF SOUGHT

33. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Trial Chamber to:

RECONSIDER its 'Decision on "Defence request for recall of Witness P-178"''; and

RECALL Witness P-178.

The whole respectfully submitted.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

05 November 2014