



Original: English

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

Date: 6 April 2018

TRIAL CHAMBER III

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Chang-ho Chung
Judge Kimberly Prost

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v JEAN-PIERRE BEMBA GOMBO***

Public redacted version of "Report on issues concerning intermediaries' involvement in completion of applications for participation", 3 June 2011, ICC-01/05-01/08-1478-Conf

Source: Registry

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

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**Victims Participation and Reparations
Section**

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Other

The Registrar of the International Criminal Court (the “Court”);

NOTING article 68(1) and (3) of the Rome Statute, rules 86, 89(1) and 101(1) of the Rules of Procedure and Evidence; Regulations 23 bis (2), 86(2), 86(4), 86(6) and 86(7) of the Regulations of the Court; and Regulation 107(3) and 107(4) of the Regulations of the Registry;

NOTING the "Decision on 772 applications by victims to participate in the proceedings" dated 18 November 2010;¹

NOTING the "Decision on 653 applications by victims to participate in the proceedings" dated 23 December 2010;²

NOTING the "Report of the Registry drawing to the Chamber's attention an issue regarding an application for participation in the proceedings" dated 14 October 2010 ("the 14 October Registry Report");³

NOTING the instruction of Trial Chamber III ("the Chamber") to the Registry to investigate the issue raised in the 14 October Registry Report, jointly with the OPCV, and to report back to the Chamber by way of a formal filing by 28 February 2011;⁴

NOTING the Decision on the "Report of the Registry drawing to the Chamber's attention an issue regarding an application for participation in the proceedings" dated 14 January 2011 ("the Decision of 14 January 2011");⁵

¹ ICC-01/05-01/08-1017.

² ICC-01/05-01/08-1091.

³ ICC-01/05-01/08-953-Conf-Exp and annexes.

⁴ Email sent by the Chamber's Legal Adviser on 20 October 2010 to the Associate Legal Officer, Division of Court Services.

⁵ ICC-01/05-01/08-1125-Conf-Exp.

NOTING the “Final report on the investigations pursuant to the Chamber's Decision on the "Report of the Registry drawing to the Chamber's attention an issue regarding an application for participation in the proceedings”” dated 31 March 2011;⁶

NOTING the instruction of the Chamber of 20 May 2011 ordering the Registry to file a report notified to the parties and participants, including the OPCV, on issues related to the involvement of two intermediaries in completion of applications for participation;⁷

CONSIDERING that between [REDACTED] 2010 and [REDACTED] 2011 the Registry conducted interviews in the Central African Republic ("CAR") with approximately 200 applicants regarding the content of their applications for participation;

CONSIDERING that the Registry has also taken steps to respond to issues subsequently raised in relation to a second group of applications;

TRANSMITS to the Chamber, the parties and the participants the following report regarding the involvement of two intermediaries assisting victims to complete applications for participation and of the steps undertaken in response by the Registry.

⁶ ICC-01/05-01/08-1369-Conf-Exp.

⁷ Email sent from the Legal Officer, Pre-Trial Division, on 20 May 2011 to the Associate Legal Officer, Division of Court Services.

1 Background to this Report and preliminary remarks

1. The present report is filed in compliance with an instruction of the Chamber given on 20 May 2011.⁸ It aims to:
 - Inform the parties and participants of issues drawn to the attention of the Registry regarding the involvement of two intermediaries assisting victims to complete application for participation in the present case; and to
 - Inform the parties and participants of the steps undertaken by the Registry in response to those issues.

2 Explanation of the issues regarding the role of two intermediaries

2.1 Issues concerning Intermediary 1

2. On 14 October 2010, the Registry informed the Chamber that it had received information from an applicant for participation in the present case which might raise doubts regarding the correctness of the information contained in his application.⁹ At that time the application in question had not yet been submitted to the Chamber pursuant to rule 89(1) of the Rules of Procedure and Evidence. It was reported that the applicant, who was represented by the Office of the Public Counsel for Victims (the “OPCV”), had been assisted in making his application by a certain intermediary (“Intermediary 1”), who had allegedly included false information in the application.
3. Other information received around the same time had given the Registry cause for concern regarding the ethical behavior of Intermediary 1, as well as regarding the content of information included by him in the applications of the victims he had assisted. [REDACTED].

⁸ Email sent from the Legal Officer, Pre-Trial Division, on 20 May 2011 to the Associate Legal Officer, Division of Court Services.

⁹ ICC-01/05-01/08-953-Conf-Exp.

2.2 *Issues concerning Intermediary 2*

4. On 25 February 2011, Witness W-73, [REDACTED], made a number of statements during the course of a hearing,¹⁰ concerning the person who had assisted him to complete his application for participation (“Intermediary 2”). Following this testimony, at the request of the Chamber, the Registry submitted its observations to the Chamber, as well as recommendations on the course of action to be taken. The steps taken by the Registry as well as the content of the Registry’s recommendations to the Chamber will be further explained below.

3 **Steps taken by the Registry in response to the issues identified**

3.1 *Steps taken regarding Intermediary 1*

5. The immediate action taken by the Registry, in conformity with instructions from the Chamber,¹¹ was to
- 1) identify the applications completed with the assistance of Intermediary 1;
 - 2) refrain from transmitting to the Chamber, the parties and the legal representatives those applications received from applicants who were assisted by Intermediary 1;¹² and
 - 3) to inquire jointly with the OPCV into the issue and to report back to the Chamber by way of a formal filing.

(a) Preparation for the inquiry

6. On 30 October 2010, the Registry received from the OPCV a list of its clients who had been assisted by Intermediary 1 in making their applications, and the contents of whose applications had since been verified by the OPCV.

¹⁰ See notably the transcripts of the hearings held on 24 and 28 February 2011: ICC-01/05-01/08-T-73-CONF-ENG and ICC-01/05-01/08-T-76-CONF-ENG.

¹¹ Email sent by the Chamber's Legal Adviser on 20 October 2010 to the Associate Legal Officer, Division of Court Services.

¹² In total 170 applications to participate were withheld. The Registry notes that prior to its 14 October Registry Report, approximately 200 applications had already been transmitted from persons assisted by the intermediary. In Decisions ICC-01/05-01/08-1017 and ICC-01/05-01/08-1091 the Chamber deferred its decision on the applications to participate of those applications already filed.

7. In a Decision of 14 January 2011, the Registry was ordered by the Chamber to “contact all applicants not contacted previously by the OPCV in order to verify their statements”.¹³ The Registry identified approximately 220 such applicants.
8. Following the Chamber’s order, the Registry sought the services of an external consultant with expertise in working with victims in conflict and post-conflict situations. This consultant assisted the Registry [REDACTED] to design an appropriate methodology for the inquiry, and trained the staff in procedures for the collection and reporting of information.
9. The methodology was designed to:
 - (i) obtain a full statement from each applicant on what allegedly happened to him or her, and to assess whether this confirmed or conflicted with the information provided in the person’s original application;
 - (ii) enable an overall assessment of the probable causes of any inconsistencies between accounts given by applicants and the accounts recorded in their original applications, including by reference to the general experience of victims and intermediaries in CAR.
10. The overall outcome sought was that the Registry would be in a position to provide additional information and recommendations concerning the individual applicants affected; but also to advise the Chamber regarding any broader issues relevant to the role of victims and intermediaries in the present case.
11. The methodology for conducting the inquiry was developed through meetings with intermediaries, in order to identify and assess the problems they encounter in the process of completing applications or contacting victims, as well as with ICC field staff, legal representatives of the victims, and interpreters. Discussions focussed on interactions with victims, cultural differences, linguistic expressions and other foreseeable difficulties in the work of intermediaries and arising in relation to victims in general.

¹³ ICC-01/05-01/08-1125-Conf-Exp, para. 23b).

(b) Observations on the methodology used

12. An assessment to verify information recorded in victims' applications is an inherently complex exercise. In order to adequately report the victims' answers and to draw accurate conclusions the Registry had to be mindful of the various factors which may influence the way in which victims describe events experienced by them, as well as the role of intermediaries in interpreting and recording those descriptions. At the same time, the Registry had to adopt an approach which would minimize the risk of the retraumatization to the applicants who were asked to recount painful events.

13. The methodology used for the Registry's interviews with applicants was designed to enable a consideration of the following:

- [REDACTED];
- [REDACTED];
- [REDACTED].

14. For the purpose of drawing accurate conclusions, the Registry was mindful of expert advice regarding the taking of statements on human rights violations, which indicated that discrepancies may arise between statements given at different times or through different interlocutors, without necessarily involving any *mala fides* on the part of the victim and/or the interlocutor. These discrepancies can be explained by a range of factors which influence the statement of a victim given at a particular point in time. These include, for example: perceptions of potential biases on the part of the interviewer, the

content and types of questions asked, as well as the questioning methods used. The particular context of victims and intermediaries in CAR, and the singularity of the process of the victim participation process before the ICC are also factors that can account for additional difficulties in recording victims' stories.

15. Notwithstanding, throughout the inquiry the Registry considered it appropriate to distinguish between discrepancies which affect the status of the victim (that is, where the discrepancy goes to an issue material under rule 85) and those which do not (that is, where the discrepancy is not material to the person's victim status).

(c) Overview of the results of the inquiry

16. To date the Registry has interviewed approximately 200 victim applicants as part of the inquiry ordered by the Chamber.

17. In the majority of cases the interview process confirmed the information given in the applicants' original applications. Some revealed minor inconsistencies that did not appear to the Registry to affect the requirements for victim status under rule 85. In respect of a smaller number of applicants the interview process revealed details or facts inconsistent with the requirements of victim status. The Chamber will be informed, through the reports prepared by the Registry in accordance with regulation 86(5) of the Regulations of the Court, which applications fall within each of these categories.

18. In compliance with rule 89(1) and the instructions of the Chamber,¹⁴ for each application covered by the inquiry process, the Registry will transmit to the parties and participants a redacted version of a consolidated application which includes any supplementary information collected during the interview process;¹⁵

¹⁴ Email sent from the Legal Officer, Pre-Trial Division, on 20 May 2011 to the Associate Legal Officer, Division of Court Services.

¹⁵ [REDACTED], the Registry recommends that a decision be issued on the merits of each of these applications, even as regards those that would not otherwise be filed with the Chamber for reasons such as that they do not appear to be linked with the case.

19. In the case of the applications already transmitted to the parties in previous filings, the Registry will re-transmit these applications together with the additional information collected, together with the original application.
20. Concerning the overall results of the inquiry process, the Registry notes that while some level of discrepancies between statements made by victims on different occasions is to be expected in the normal course of events, the results of this inquiry showed more significant discrepancies than would usually be expected. The Registry considers that in this instance this was due to the role of Intermediary 1 who appears to have adopted inappropriate, and potentially unethical, working practices. As discussed below at 33 the Registry is now implementing additional measures regarding intermediaries.

3.2 Steps taken regarding Intermediary 2

21. Following the testimony of W-73, the Registry provided the Chamber with its recommendations on whether, in light of that testimony, a second Registry inquiry should be launched, this time in relation to the applications of persons assisted by Intermediary 2. The Registry's advice was based on three factors, each of which is explained further below:

- A lack of reliable information suggesting that information provided in the applications had been falsified by Intermediary 2;
- Recognition that issues raised in W-73's testimony could be explained by reference to other factors; and
- Concern regarding the limitations and risks involved in conducting a further inquiry.

(a) Information concerning the working methods of Intermediary 2

22. [REDACTED].¹⁶

¹⁶ See paragraph 3 above.

(b) Possible explanations for issues raised in W-73's testimony

23. In formulating recommendations for the Chamber, the Registry also took into account its experiences of conducting the inquiry described above in relation to applicants assisted by Intermediary 1. This experience, and the advice of the expert consultant retained by the Registry, had revealed the possible reasons why discrepancies may arise between different statements made by a particular victim or applicant, and which can be due to various factors. For example:

- A victim's account will vary with memory, thus depending on the amount of time elapsed since the events, their traumatic impact and the circumstances in which they are recounted.
- The way in which an account is explained will vary depending on the way in which it is elicited, the identity and attitude of the interviewer and the victim's attitude toward that person. For example, a victim may consciously or unconsciously modify an account of past events if he or she does not trust the interviewer and is fearful of certain consequences; or similarly may seek to guess or fill gaps where information is not recalled, rather than admitting this.
- At times normal reactions to trauma (such as a reluctance to make eye-contact) may appear to an interviewer to indicate dishonesty or a cause for suspicion.

Cultural and linguistic factors have a particular impact on the way in which traumatic or stigmatizing events are described, and can lead to misunderstandings.

24. Based on these considerations and its experiences in the field, the Registry also considered certain aspects of the process by which applications for participation are completed and submitted in the field, including features of the work of intermediaries, which appeared potentially relevant in understanding the testimony of W-73. The following observations were made to the Chamber:
25. Victims in CAR may face difficulties in distinguishing between the different persons they may be in contact with about the Court. These may include staff from the OTP, the OPCV, different sections of the Registry, and intermediaries. An intermediary whose activities consist of assisting victims to fill in application forms will inevitably be carrying with him or her forms bearing the Court's logo, and may pay visits to the Court Field Office in Ngaragba. For this reason, it is very possible that a victim could perceive such a person to be an employee of the Court, even without any misrepresentation on the part of the intermediary.
26. The Registry is aware of reports that some intermediaries have at times adopted the practice of completing application forms in the absence of applicants. This practice is not encouraged by the Registry. However there have been circumstances in which the VPRS has been aware that this has been done for reasons such as to ensure the applicants' safety.¹⁷ This practice can be a cause of discrepancies between what a victim said to an intermediary, and what was written in his/her application form, especially if the intermediary does not sufficiently thoroughly review the form with the applicant afterwards.

¹⁷ For example, some intermediaries may have adopted the practice of taking note of applicants' statements, using them to complete the application form at a later point and then come back to the applicant later to have him confirm and sign the form to gain time and ensure that they can meet with all the victims who come forward at a specific time, and/or to diminish exposure to risk for the victims and themselves by minimizing the time they spend together, in particular when the place where they meet the victims is exposed and not very safe. The objective for the intermediary might also be to have the time to take great care to write properly in the form at an appropriate time.

27. Intermediaries receive no financial gain from the VPRS. Some receive very little material support, others receive none. However, their work inevitably involves some costs, such as travel expenses to meet victims, or the costs of photocopying documents to include in the applications. The VPRS informs intermediaries that they may ask the Court to cover some of these costs, such as the cost of photocopying identity documents, and not to ask the victims for any money. It is however conceivable that an intermediary may ask applicants for reimbursement of such costs, without necessarily acting male fides, out of a wish for personal gain, or in infringement of any rules of the Court. The VPRS has been monitoring any reported case of intermediaries charging victims for such costs.
28. Finally, issues of translation and how a person may interpret and transcribe what an applicant is saying must also be taken into account when reading a victim's application. For example, the Registry has been made aware of a lack of clear and distinct terminology in Sango for consensual sex, as opposed to rape, which creates difficulties for a person who is not a trained interpreter with translation into French of terminology relating to sexual acts, especially in a context of violence. Discrepancies can also arise from the intermediary assisting a large number of victims and transcribing stereotypical presentation of facts in the form due to repetition or an attempt to summarise.

(c) Limitations and risks associated with a further inquiry

29. Lastly, in advising the Chamber on the advisability of conducting a further inquiry, this time regarding applicants assisted by Intermediary 2, the Registry was mindful of the Court's obligation under article 68 of the Rome Statute to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". In particular, the Registry was informed by its experience during the first inquiry process, as explained above, and alerted to the important drawbacks of performing this exercise, taking into account the precariousness of the victims' personal circumstances and their high expectations regarding the outcome of ICC proceedings. An inquiry of the

kind undertaken in respect of Intermediary 1 notably entails the risks of re-traumatization and of sending confusing messages to victims, including a message that their accounts are not believed by the Court.

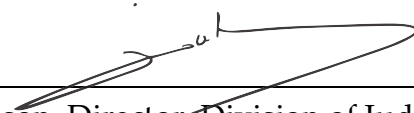
(d) The Registry's recommendations

30. Bearing these factors in mind the Registry sought to balance the negative impact that could result to the security and well-being of participating victims if the Registry went back to verify the content of their applications, as against the potential benefits to be gained from such an inquiry.
31. The Court's jurisprudence has established that the participation of victims follows a *prima facie* assessment of their applications by the relevant Chamber, whereby the application is assessed on the merits of its intrinsic coherence and on information otherwise available to the Chamber, without assessing the credibility of the applicant's statement or engaging in a process of corroboration *stricto sensu*.¹⁸ Such an approach is proportional to the limited procedural rights granted to participating victims.
32. The Registry notes that the only way to ensure that all information contained in the application forms is entirely accurate would be to investigate each individual application individually. The role of the Registry as set out in the legal texts does not extend to the individual verification of applications for participation in the proceedings in the normal course of events, and the resources available to it fall far short of what would be required for such work. The standard of proof for acceptance as a participating victim, as noted above, is such that such individual verification does not appear to be appropriate other than in exceptional cases where, as occurred in relation to applicants assisted by Intermediary 1, doubts are raised as to the reliability of information contained in specific applications.
33. In that regard, even before the developments described in the present report, the Registry had begun to review its approach regarding intermediaries. Plans are

¹⁸ ICC-02/05-111-Corr, para 5, ICC-02/05-110, para. 8. ICC-01/05-01/08-807, para. 25.

being developed for revised policies concerning the assessment, evaluation and formalization of relationships with intermediaries in CAR, in line with the process to develop a Court-wide set of guidelines on intermediaries. The Registry will also continue its practice of monitoring the intermediaries assisting victims in CAR, in order to identify potential problems in the way intermediaries work, as well as to provide training on ethical issues as well as on best practices in interacting with victims and assisting them in completing their applications.

34. Taking into account all of the above factors, the Registry has advised the Chamber that at this stage it does not recommend a further inquiry into the correctness of the information contained in the applications of the victims assisted by Intermediary 2.
35. As the victims in question have already been accepted as participants and are represented by legal representatives who will meet with them in the course of their normal duties, the Registry took the view that it would be appropriate and beneficial that the legal representatives play a role in this regard.
36. Should additional information come to light that appear to justify doubts concerning the working methods of this, or any intermediary in CAR, the Registry will inform the Chamber and propose appropriate measures.



 Marc Dubuisson, Director, Division of Judicial Services
per delegation of Herman von Hebel, Registrar

Dated this 6 April 2018

At The Hague, The Netherlands