

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 16 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**

**Public redacted version of "Decision on the 'Defence application concerning  
Witness CAR-OTP-WWWW-0042's evidence'" of 10 October 2013**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr Jean-Jacques Badibanga

**Counsel for the Defence**

Mr Aimé Kilolo Musamba  
Mr Peter Haynes

**Legal Representatives of the Victims**

Ms Marie Edith Douzima-Lawson  
Mr Assingambi Zarambaud

**Legal Representatives of the 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 Keïta

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”), issues the following Decision on the “Defence application concerning Witness CAR-OTP-WWWW-0042’s evidence”.

## I. Background and submissions

1. Witness CAR-OTP-WWWW-0042 (“Witness 42”) testified before this Chamber between 10 and 18 February 2011.<sup>1</sup> Before testifying, Witness 42 made the solemn undertaking required by Article 69(1) of the Rome Statute (“Statute”) and Rule 66(1) of the Rules of Procedure and Evidence (“Rules”).<sup>2</sup> During his testimony, Witness 42 testified that he knew of another witness, Witness 23, who had come to the Court to testify and returned to the Central African Republic (“CAR”).<sup>3</sup> When counsel for Mr Jean-Pierre Bemba Gombo (“defence”) asked Witness 42 how he knew that Witness 23 had returned, Witness 42 stated that he had met and spoken to Witness 42 at an airport in [REDACTED].<sup>4</sup>
2. On 17 February 2011, the defence orally requested that the Chamber order the disclosure of the dates upon which (i) Witness 42 travelled from the CAR to The Hague; and (ii) Witness 23 travelled from The Hague to the CAR.<sup>5</sup> The Chamber granted the defence application and ordered the Victims and Witnesses Unit (“VWU”) to provide the information by way

<sup>1</sup> Transcripts of Hearings from 10 to 18 February 2011, ICC-01/05-01/08-T-63-CONF-ENG ET to ICC-01/05-01/08-T-69-CONF-ENG ET and corresponding public redacted versions, ICC-01/05-01/08-T-63-Red-ENG to ICC-01/05-01/08-T-69-Red-ENG.

<sup>2</sup> Transcript of hearing, 10 February 2011, ICC-01/05-01/08-T-63-Red-ENG, page 53, lines 6 to 18.

<sup>3</sup> Transcript of hearing, 14 February 2011, ICC-01/05-01/08-T-65-CONF-ENG ET, page 47, lines 18 to 20.

<sup>4</sup> Transcript of hearing, 15 February 2011, ICC-01/05-01/08-T-66-CONF-ENG CT, page 53, line 2 to page 61 line 1.

<sup>5</sup> Transcript of hearing, 17 February 2011, ICC-01/05-01/08-T-68-CONF-ENG ET, page 2, line 2 to page 3, line 21.

of an email to the parties, participants and the Chamber by 16.00 on the same day.<sup>6</sup>

3. The VWU provided the required information, namely that Witness 23 left [REDACTED] airport at 07.40 on 4 February 2011 to return to Bangui (arrival scheduled at 12.30) and that Witness 42 travelled from Bangui to [REDACTED] at 13.20 on 4 February 2011 (arrival scheduled at 18.30).<sup>7</sup>

4. On 18 February 2011, the Office of the Prosecutor (“prosecution”) informed the defence by way of an email that:

[T]here were no variations in the times of the flights of both W23 and W42. As can be seen from the flight times W23 arrived at [REDACTED] on the 03 Feb at 20:30 and departed on the 04 Feb at 07.40. W42 arrived at [REDACTED] on the 04 Feb at 18:30. They could therefore not have met at [REDACTED]. W23 arrived at Bangui on 04 Feb at 12:30 and W42 departed Bangui at 13:30 the same day. W23 was at the arrival hall and W42 had already booked in for the departure at 13:30 and was in the departure hall and therefore they could not meet. The escorts of both W23 and W42 both confirm that they never met each other at Bangui, nor did they observe anything particular with the witnesses upon arrival or departure.<sup>8</sup>

5. On 18 February 2011, the defence again asked Witness 42 where he had spoken to Witness 23. In response, Witness 42 stated that the encounter occurred by chance while both of them were waiting for their respective flights.<sup>9</sup> The defence thereafter made oral submissions based on Article 70 of the Statute and Rules 165, 166 and 169 of the Rules, requesting that an investigation into Witness 42’s testimony be initiated.<sup>10</sup> The Chamber asked the defence to file a written application.<sup>11</sup>

<sup>6</sup> ICC-01/05-01/08-T-68-CONF-ENG ET, page 4, lines 4 to 12.

<sup>7</sup> Email sent on 17 February 2011 at 14.09, filed in Annex 1 to Victims and Witnesses Unit’s observations on the flight schedules of witnesses CAR-OTP-WWWW-0042 and CAR-OTP-WWWW-0023, 27 May 2011, ICC-01/05-01/08-1464-Conf-Anx1, page 2.

<sup>8</sup> Email sent on 18 February 2011 at 09.57 filed in Annex B to Defence application concerning Witness CAR-OTP-WWWW-0042’s evidence, 25 February 2011, ICC-01/05-01/08-1298-Conf-AnxB, page 1.

<sup>9</sup> Transcript of hearing, 18 February 2011, ICC-01/05-01/08-T-69-Red-ENG, page 50, line 15 to page 51, line 21.

<sup>10</sup> ICC-01/05-01/08-T-69-Red-ENG, page 54, line 17 to page 55, line 11.

<sup>11</sup> ICC-01/05-01/08-T-69-Red-ENG, page 55, lines 12 to 19.

6. On 25 February 2011, the defence filed its application concerning Witness 42's evidence ("Application"),<sup>12</sup> together with two confidential emails annexed thereto, showing the flight schedules of both Witnesses 42 and 23.<sup>13</sup> In its Application, the defence requests the Chamber "to order the competent organ of the Court to open and undertake an investigation into 0042's claims [that he met and spoke to Witness 23], the source of his knowledge of 0023's status as a witness who had already testified, his encounter with 0023 at [REDACTED] airport or elsewhere, and any contact between these witnesses after 0023 gave evidence".<sup>14</sup> The defence asserts that an investigation would resolve the alleged contradiction between Witness 42's evidence and the information provided by VWU in its email on 17 February 2011.<sup>15</sup> The Application does not rely on any specific provision of the Statute or the Rules.
7. On 11 March 2011, Mr Zarambaud, the legal representative of Witness 42 and Witness 23, filed his observations on the defence Application, which were notified on 16 March 2011.<sup>16</sup> Mr Zarambaud opposes the defence Application, arguing that an investigation would undermine the confidentiality of Witness 42's and Witness 23's court appearances.<sup>17</sup> Mr Zarambaud further observes that the two witnesses were apparently in Bangui at the same time for at least one hour, and that because Bangui airport is "very small", the witnesses could have met there.<sup>18</sup>

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<sup>12</sup> Defence application concerning Witness CAR-OTP-WWWW-0042's evidence, 25 February 2011, ICC-01/05-01/08-1298-Conf-tENG.

<sup>13</sup> ICC-01/05-01/08-1298-Conf-tENG and confidential annexes to Defence application concerning Witness CAR-OTP-WWWW-0042's evidence, 25 February 2011, ICC-01/05-01/08-1298-Conf-AnxA and ICC-01/05-01/08-1298-Conf-AnxB.

<sup>14</sup> ICC-01/05-01/08-1298-Conf-tENG, paragraph 14.

<sup>15</sup> ICC-01/05-01/08-1298-Conf-tENG, paragraph 13.

<sup>16</sup> Observations of Mr Zarambaud Assingambi, Legal Representative of the Victims on the "Defence application concerning Witness CAR-OTP-WWWW-0042's evidence", 11 March 2011 (16 March 2011), ICC-01/05-01/08-1332-Conf-tENG. Witnesses 23 and 42 are victims authorised to participate in the proceedings.

<sup>17</sup> ICC-01/05-01/08-1332-Conf-tENG, paragraph 12.

<sup>18</sup> ICC-01/05-01/08-1332-Conf-tENG, paragraph 11.

8. On 21 March 2011, the prosecution filed its response to the defence Application (“Response”),<sup>19</sup> together with a list of authorities annexed thereto. In its Response, the prosecution opposes the defence Application, arguing that the matter relates to the credibility of Witness 42’s testimony, which is to be tested during questioning at trial, rather than through an independent investigation.<sup>20</sup> The prosecution argues that “it is not necessary or desirable to establish an extraordinary mini-tribunal in the middle of trial to deal with what the defence suggests is false testimony”.<sup>21</sup> Further, the prosecution submits that there is nothing “in the alleged event that merits suspicion of a concerted effort to give false testimony”.<sup>22</sup> According to the prosecution, the issue of alleged witness collusion or contact can best be addressed through the normal trial processes. Finally, the prosecution asserts that the normal trial process provides a built-in remedy for any alleged inconsistency in Witness 42’s testimony, namely that the Chamber may “assess probative value and give weight to the evidence, including by considering whether any witnesses are incredible in whole or in part”.<sup>23</sup>
9. On 27 May 2011, upon the Chamber’s instruction,<sup>24</sup> the VWU formally filed in the record of the *Bemba* case its submissions on the flight schedules of Witnesses 23 and 42 and whether they could have met at any time during their respective travel, as reported by Witness 42 during his testimony.<sup>25</sup> The VWU states that the flight schedules<sup>26</sup> demonstrate “that

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<sup>19</sup> Prosecution’s Response to « Requête de la Défense relative aux dépositions du témoin CAR-OTP-WWWW-0042 », 21 March 2011, ICC-01/05-01/08-1344-Conf and confidential annex, ICC-01/05-01/08-1344-Conf-AnxA.

<sup>20</sup> ICC-01/05-01/08-1344-Conf, paragraph 8.

<sup>21</sup> ICC-01/05-01/08-1344-Conf, paragraph 1.

<sup>22</sup> ICC-01/05-01/08-1344-Conf, paragraph 8.

<sup>23</sup> ICC-01/05-01/08-1344-Conf, paragraph 11.

<sup>24</sup> Email sent to the VWU on 23 May 2011 at 15.54.

<sup>25</sup> Victims and Witnesses Unit’s observations on the flight schedules of witnesses CAR-OTP-WWWW-042 and CAR-OTP-WWWW-0023, 27 May 2011, ICC-01/05-01/08-1464-Conf and confidential annex, ICC-01/05-01/08-1464-Conf-Anx1.

<sup>26</sup> Confidential annex to Victims and Witnesses Unit’s observations on the flight schedules of witnesses CAR-OTP-WWWW-042 and CAR-OTP-WWWW-0023, 27 May 2011, ICC-01/05-01/08-1464-Conf-Anx1.

both witnesses were at the airport in Bangui on the same day, 4 February 2011, around the same time".<sup>27</sup> The VWU notes, however, that "Bangui's airport layout prevents the arriving and departing passengers from crossing path due to the physical division between the arrival and the departure halls".<sup>28</sup> The VWU submits that the witnesses and their assigned escorts could not have crossed paths at Bangui airport because Witness 42 and his escort "were taking the same plane in which [Witness 23] and escort took to go to [REDACTED] and then to The Hague".<sup>29</sup> The VWU concludes that "both witnesses had no possibilities to communicate with each other during their stay in Bangui airport as they were located in two separated areas of the airport".<sup>30</sup>

## II. Analysis and Conclusions

10. In accordance with Article 21(1) of the Statute, the Chamber has considered Article 70 of the Statute and Rules 165 and 166 of the Rules.

11. The Chamber notes that the defence relied on these provisions in its oral request, but failed to cite any legal basis for initiating an investigation into Witness 42's testimony in its written Application. Despite this omission, the Chamber will consider the Application in light of Article 70 of the Statute and the related Rules.

*The competent organ of the Court for initiating the investigation sought by the defence*

12. Article 70(1) (a) and (b) of the Statute provides the Court with jurisdiction

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<sup>27</sup> ICC-01/05-01/08-1464-Conf, paragraph 4.

<sup>28</sup> ICC-01/05-01/08-1464-Conf, paragraph 5.

<sup>29</sup> ICC-01/05-01/08-1464-Conf, paragraph 5.

<sup>30</sup> ICC-01/05-01/08-1464-Conf, paragraph 5.

over the following offences against the administration of justice when committed *intentionally* (emphasis added):

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged.

13. The Chamber notes that Article 70(1) of the Statute states that the “Court” has jurisdiction over offences against the administration of justice, but does not specify which organ of the Court has the competence for *investigating* such conduct. Rule 165(1) of the Rules, however, specifies that the authority “to initiate and conduct investigations” into possible Article 70 offences lies with the “Prosecutor”, acting *proprio motu* or “on the basis of information communicated by a Chamber or any reliable source”.<sup>31</sup> In analogous situations, Trial Chambers I and II of the Court have held that, under Rule 165(1), the prosecution is the organ of the Court that is empowered to conduct investigations into Article 70 offences.<sup>32</sup> Along the same line, the Chamber finds that the prosecution is the “competent organ” to initiate and conduct an investigation.

14. The Chamber is mindful that Rule 165(1)’s allocation of investigatory authority may give rise to conflicts of interest in situations where a prosecution witness appears to have committed an offence under Article 70 of the Statute. In a situation where a prosecution witness is alleged to have provided false testimony, the prosecution may decline to initiate an investigation of its own witness. In such circumstances, the Chamber may if appropriate, pursuant to Articles 64(2) and 64(6)(f) of the Statute, remind the prosecution of the authority that it has under Rule 165(1) of the Rules,

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<sup>31</sup> Rule 165(1) of the Rules.

<sup>32</sup> Trial Chamber II’s Oral Decision on 22 September 2010, ICC-01/04-01/07-T-190-Red-ENG, page 3, lines 14 to 22; Trial Chamber II, “Decision on the Prosecution’s renunciation of the testimony of witness P-159”, 24 February 2011, ICC-01/04-01/07-2731, paragraph 18; Trial Chamber I’s Oral Decision on 14 April 2011, ICC-01/04-01/06-T-350-Red-ENG CT3, page 16, lines 13 to page 17 line 1.



and communicate to the prosecution any information the Chamber may have in relation to a possible Article 70 offence.<sup>33</sup> Furthermore, the Court has the option to “request a State Party to exercise jurisdiction pursuant to Article 70(4) of the Statute” and Rule 162 of the Rules.<sup>34</sup>

*Merits of the defence Application for initiating and conducting an investigation into Witness 42's testimony*

15. The Chamber notes the approach taken by Trial Chamber II when faced with a similar defence application to initiate Article 70(1) proceedings against a prosecution witness in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.<sup>35</sup> In relation to that application, Trial Chamber II ruled that:

[I]nconsistencies pointed out by the Defence in the testimony of [the witness] are related before everything on the credibility of his testimony, rather than on a belief that he intentionally lied to the Court. If there is a doubt on the reliability of testimony, whether it relates to uncertainty about age of the witness, it cannot, in any way, be sufficient to constitute false testimony, and the inconsistencies that could be identified in a testimony cannot also constitute false testimony.<sup>36</sup>

16. A similar approach was taken by the International Criminal Tribunal for Rwanda (“ICTR”) in the case *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, where the Trial Chamber rejected a defence motion on the ground that “the arguments [...] submitted by the defence are pertinent only to raising doubts as to the credibility of the statements made by the witnesses rather than to showing that there were strong grounds for believing that there may have been false testimony”.<sup>37</sup> In its

<sup>33</sup> See for a similar approach, Trial Chamber II, ICC-01/04-01/07-T-190-Red-ENG, page 1, line 22 to page 5, line 24 and Trial Chamber I, ICC-01/04-01/06-T-350-Red-ENG CT3, page 16, line 18 to page 17 line 1.

<sup>34</sup> See for a similar approach, Trial Chamber I, ICC-01/04-01/06-T-350-Red-ENG CT3, page 17, lines 1 to 6.

<sup>35</sup> Requête de la Défense de Mathieu Ngudjolo aux fins de solliciter le déclenchement des poursuites judiciaires à charge du Témoin P-279 de l'Accusation pour atteintes à l'administration de la justice – Article 70 (1) (a) (b) du Statut de Rome, 22 September 2010, ICC-01/04-01/07-2195-Red.

<sup>36</sup> Transcript of hearing, 22 September 2010, ICC-01/04-01/07-T-190-ENG Red, page 5 lines 1-10.

<sup>37</sup> ICTR, *The Prosecutor v. Rutaganda*, Trial Chamber I, Decision on the Defence Motion to Direct the Prosecutor to investigate the matter of false testimony by Witness “CC”, 10 March 1998, page 4; See also,

ruling, the ICTR Trial Chamber stated that “in the context of the ongoing trials [...] inaccuracies and other contradictions could eventually be raised during the overall evaluation of credibility upon the final determination of the probative value of the evidence presented at trial”.<sup>38</sup>

17. The Chamber is mindful of the fact that the decisions of other international courts are not directly part of the applicable law under Article 21 of the Statute. Moreover, although the decisions of other Trial Chambers of the Court with concurrent jurisdiction are not binding on each other, they may be of persuasive value. In this respect, the Chamber broadly agrees with the general approach set out above and, in the present circumstances, adopts a similar approach. While the evidence before the Chamber may raise doubts as to the circumstances of Witness 42’s alleged encounter with Witness 23 and as to Witness 42’s knowledge of Witness 23’s status as a witness before the Court, the Chamber is not persuaded that Witness 42 *intentionally* tried to mislead the Court during his testimony.

18. Additionally, the Chamber is still to analyse the impact, if any, of the alleged contradictions on the whole of the witness’s testimony. In this regard, the Chamber will assess Witness 42’s credibility in light of the apparent inconsistencies raised by the defence, and in the context of the totality of the evidence that Witness 42 provided.

19. On that basis, the Chamber is not satisfied that there are sufficient *indicia* to support an inference of false testimony at this stage.

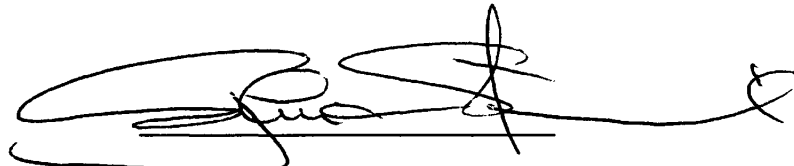
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ICTR, *The Prosecutor v. Rutaganda*, Trial Chamber I, Decision on the Defence Motion to Direct the Prosecutor to investigate the matter of false testimony by Witness “E”, 10 March 1998, page 4; ICTR, *The Prosecutor v. Akayesu*, Trial Chamber I, “Decision on the Defence Motions to Direct the Prosecutor to investigate the matter of false testimony by Witness “R”, 9 March 1998, page 4.


<sup>38</sup> *Ibid.*

20. Therefore, the Chamber DENIES the defence Application.

Done in both English and French, the English version being authoritative.



**Judge Sylvia Steiner**



**Judge Joyce Aluoch**



**Judge Kuniko Ozaki**

Dated this 16 October 2013

At The Hague, The Netherlands