

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 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

Decision on "Defence Submissions on the Testimony of CAR-D04-PPPP-0007"

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 QC

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

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the “Bemba case”), issues the following Decision on “Defence Submissions on the Testimony of CAR-D04-PPPP-0007” (“Decision”).

I. Background and Submissions

1. Witness CAR-D04-PPPP-0007 (“Witness D04-07”), called to provide testimony by the defence of Mr Jean-Pierre Bemba (“defence”), appeared before the Chamber between 19 and 21 September 2012.¹ The witness was questioned by the defence, the Office of the Prosecutor (“prosecution”), and partially by one of the legal representatives of victims, and the Chamber. On 24 September 2012, the Chamber informed the parties and participants that Witness D04-07 had left his accommodation to an unknown destination over the weekend and did not return to complete his testimony.²
2. At a status conference held on 27 June 2013, the defence submitted that Witness D04-07’s testimony should be considered complete because both the defence and the prosecution had completed their questioning.³ The Chamber directed the defence to file a request to that effect.⁴
3. On 19 July 2013, the defence filed its “Defence Submissions on the Testimony of CAR-D04-PPPP-0007” (“Defence Submissions”),⁵ requesting that the testimony of Witness D04-07 be considered complete and entered into the case record or, in the alternative, that the witness’s partial testimony remain part of the case record, in accordance with the

¹ ICC-01/05-01/08-T-248-CONF-ENG ET; ICC-01/05-01/08-T-249-CONF-ENG ET; ICC-01/05-01/08-T-250-CONF-ENG CT.

² ICC-01/05-01/08-T-251-CONF-ENG ET, page 3, lines 13 to 16.

³ ICC-01/05-01/08-T-331-CONF-ENG ET, page 56, lines 1 to 12.

⁴ ICC-01/05-01/08-T-331-CONF-ENG ET, page 56, lines 13 to 17.

⁵ Defence Submissions on the Testimony of CAR-D04-PPPP-0007, 19 July 2013, ICC-01/05-01/08-2732-Conf.

jurisprudence of other international criminal tribunals.⁶ The defence submits, *inter alia*, that both parties had completed their questioning,⁷ and notes that the legal representatives are “participants in and not parties to”,⁸ the trial and are not conferred a “right” to examine witnesses, unlike the defence, the prosecution, and the Chamber.⁹ In this regard, the defence submits that since the legal representatives “do not have an unqualified right to question either parties’ witnesses, but rather a qualified opportunity, where certain conditions are met”, Witness D04-07’s testimony may be considered “complete” and retained on the case record in spite of the interruption of the legal representatives’ questioning.¹⁰ Finally, the defence submits that Witness D04-07’s testimony should not automatically be ascribed less weight than others, but rather that the Chamber should weigh his testimony in the same manner as all other oral testimony in the case.¹¹

4. On 6 August 2013, the prosecution filed its “Prosecution’s Response to ‘Defence Submissions on the Testimony of CAR-D04-PPPP-0007’” (“Prosecution Response”),¹² requesting the Chamber to partially reject the Defence Submissions and declare the testimony of Witness D04-07 as incomplete evidence that may remain on the trial record but to accord minimal weight to it in its final assessment of the evidence.¹³ The prosecution submits that Witness D04-07’s testimony must be considered incomplete because neither the legal representatives, who had been authorised to question the witness, nor the Chamber, which has a right to question witnesses in order to ascertain the truth, were afforded a full

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

⁷ ICC-01/05-01/08-2732-Conf, paragraphs 13 to 17.

⁸ ICC-01/05-01/08-2732-Conf, paragraph 14.

⁹ ICC-01/05-01/08-2732-Conf, paragraphs 14, 15 and 17.

¹⁰ ICC-01/05-01/08-2732-Conf, paragraph 14.

¹¹ ICC-01/05-01/08-2732-Conf, paragraphs 28 to 31.

¹² Prosecution’s Response to “Defence Submissions on the Testimony of CAR-D04-PPPP-0007”, ICC-01/05-01/08-2736-Conf.

¹³ ICC-01/05-01/08-2736-Conf, paragraph 15.

opportunity to do so.¹⁴ The prosecution acknowledges that, at the time Witness D04-07 went missing, both the defence and the prosecution had completed their questioning.¹⁵ However, the prosecution points out that because the legal representatives had questions approved by the Chamber they were entitled to complete their questioning.¹⁶ The prosecution draws a distinction between the jurisprudence of other international criminal tribunals where testimony would be deemed complete after questioning by the parties, and the case at hand, in which the legal representatives were authorised to question the witness on behalf of the victims.¹⁷ In addition, the prosecution submits that the fact that the legal representatives' questions were in part similar to questions already asked by the parties does not make them less significant or capable of assisting the Chamber in its determination of the truth. As such, according to the prosecution, it would be either impossible or speculative to prejudge the answers which Witness D04-07 would have given to the questions which were to be put to him.¹⁸ Finally, the prosecution submits that "the credibility issues raised by D04-07's intentional disappearance affect the reliability of his evidence to such an extent that the Chamber should accord minimal weight to that evidence and only rely on portions of his testimony that are corroborated by other reliable evidence".¹⁹

5. On 9 August 2013, the legal representatives of victims submitted their joint "Réponse des Représentants légaux des victimes aux 'Defence Submissions on the Testimony of CAR-D04-PPPP-0007 – ICC-01/05-01/08-2732-Conf'" ("Legal Representatives' Submissions"),²⁰ in which they request that the

¹⁴ ICC-01/05-01/08-2736-Conf, paragraphs 3 to 9.

¹⁵ ICC-01/05-01/08-2736-Conf, paragraph 6.

¹⁶ ICC-01/05-01/08-2736-Conf, paragraphs 6 and 8.

¹⁷ ICC-01/05-01/08-2736-Conf, paragraph 7.

¹⁸ ICC-01/05-01/08-2736-Conf, paragraph 8.

¹⁹ ICC-01/05-01/08-2736-Conf, paragraphs 3 and 10 to 14.

²⁰ "Réponse des Représentants légaux des victimes aux « Defence Submissions on the Testimony of CAR-D04-PPPP-0007 – ICC-01/05-01/08-2732-Conf »", 9 August 2013 (notified on 12 August 2013), ICC-01/05-01/08-2737-Conf.

Chamber declare the testimony of Witness D04-07 to be incomplete or, alternatively, that the Chamber take into account the impact upon the rights of the legal representatives and the doubts cast upon the witness's reliability and credibility when assessing his testimony.²¹ The legal representatives submit that the defence's argument that the testimony of Witness D04-07 is complete because both parties had concluded their questioning is based upon an erroneous distinction between the functions and rights accorded to "parties" and "participants". In this regard, the legal representatives note that even if the Chamber has not recognised the legal representatives as "parties" it nonetheless authorised them to question Witness D04-07.²² The legal representatives further submit that if the Chamber were to grant the defence's request, the legal representatives' "recognised right"²³ under Rule 93(1) of the Rules of Procedure and Evidence ("Rules") would be denied, thereby preventing the legal representatives from presenting the views and concerns of the victims they represent pursuant to Article 68(3) of the Rome Statute ("Statute").²⁴ The legal representatives add that it is not possible to prejudge the answers which Witness D04-07 would have given to the questions which were to be put to him and that, as such, the defence's submission that all conceivable questions had already been put to the witness is incorrect.²⁵

6. Moreover, the legal representatives contend that the unexpected and premature interruption of Witness D04-07's testimony made it impossible for the Chamber to make a full assessment of the witness's testimony, which cannot be considered complete as a result.²⁶ Additionally, the legal representatives assert that Witness D04-07's testimony contained no unique

²¹ ICC-01/05-01/08-2737-Conf, page 11.

²² ICC-01/05-01/08-2737-Conf, paragraph 7.

²³ Original in French: "droit reconnu".

²⁴ ICC-01/05-01/08-2737-Conf, paragraph 8.

²⁵ ICC-01/05-01/08-2737-Conf, paragraph 9.

²⁶ ICC-01/05-01/08-2737-Conf, paragraph 10.

evidence, when compared with the testimony of other witnesses who have already appeared before the Chamber, which would contribute to establishing the truth.²⁷

7. Furthermore, the legal representatives concur with the prosecution that caution should be exercised in the Chamber's assessment of the weight and probative value to attribute to Witness D04-07's testimony, if it is kept as part of the case record, in light of the prejudicial effect it may have on the good administration of justice and the fairness of the proceedings.²⁸ The legal representatives argue that their "exclusion" constituted a serious infringement of the rights of the victims,²⁹ adding that the Chamber cannot ignore this infringement in its assessment of the relevance and weight to attribute to Witness D04-07's testimony.³⁰

II. Analysis

8. For the purpose of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Statute, Articles 64(2), 67(1), 68(3), and 69(3) and (4) of the Statute, Rules 89, 90, 91, 93, and 140 of the Rules, and Regulation 43 of the Regulations of the Court.
9. As a preliminary matter, the Chamber notes that the documents underlying this Decision are classified as confidential and recognises that some information contained therein still warrants confidential treatment. That said, pursuant to the principle of publicity of proceedings enshrined in Articles 64(7) and 67(1) of the Statute, the Chamber issues the present

²⁷ ICC-01/05-01/08-2737-Conf, paragraph 12.

²⁸ ICC-01/05-01/08-2737-Conf, paragraphs 13 to 15.

²⁹ ICC-01/05-01/08-2737-Conf, paragraph 10.

³⁰ ICC-01/05-01/08-2737-Conf, paragraph 16.

Decision as public, as it considers that none of the information contained herein requires confidential treatment.

A. Whether the testimony of Witness D04-07 is “complete”

10. As stated, the defence’s first request is that the Chamber declare the testimony of Witness D04-07 to be “complete” and “part of the case record to be assessed in the same manner as other testimony evidence heard in the present case.”³¹ The Chamber notes that Witness D04-07 had not finished providing testimony; at the point his testimony was interrupted, the witness was still to provide evidence in response to questioning by the legal representatives and potentially also by the Chamber. The question, therefore, is whether the fact that the Chamber and the legal representatives were denied a full opportunity—or in the case of Maître Douzima, any opportunity—to question the witness, renders his testimony “incomplete”.

Restriction of the legal representatives of victims’ questioning

11. The Chamber recalls its previous decisions on the victims’ rights to participate in the proceedings in accordance with Article 68(3) of the Statute and Rule 91(3) of the Rules.³² These rights, as acknowledged by the Chamber and in accordance with the jurisprudence of the Court,³³ include, *inter alia*, the possibility for the legal representatives to question witnesses,

³¹ ICC-01/05-01/08-2732-Conf, paragraphs 13 to 17, and 32.

³² *Corrigendum* to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr; Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005; and Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023.

³³ ICC-01/05-01/08-807-Corr, paragraphs 29 to 40; ICC-01/05-01/08-1005, paragraph 39; and ICC-01/05-01/08-1023, paragraphs 17 to 20. *See also*, Judgement on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paragraph 96. The Appeals Chamber has described this right in the following terms: “the Statute by virtue of article 68(3) establishes the right for victim participation, for the first time, in international criminal proceedings. This right may be exercised where the personal interests of victims are affected at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

subject to the Chamber's leave. In relation to Witness D04-07, the Chamber granted the legal representatives' applications to question the witness.³⁴

12. The Chamber notes that the role of the legal representatives is not equivalent to that of the parties. However, where (i) the interests of the victims they represent are affected, (ii) they have made an application to exercise their right to participate by questioning a witness, and (iii) the application has been granted by the Chamber, the legal representatives may lead evidence pertaining to the guilt or innocence of the accused and challenge the testimony of witnesses.³⁵

13. Moreover, when the legal representatives present or challenge evidence they may do so for the purpose of providing the Chamber with "all evidence that it considers necessary for the determination of the truth".³⁶ Indeed, in the present instance, the Chamber granted the legal representatives' applications to question Witness D04-07 "to better understand through the witness[']s testimony whether the charged crimes were allegedly committed by Bozizé's troops".³⁷ Taking this into account, along with the jurisprudence referred to in the preceding paragraphs, it is clear that the legal representatives' questioning would have formed part of the Chamber's overall assessment of Witness D04-07's testimony, including its credibility and reliability, as part of the Chamber's determination of the truth at the end of the case.

14. As to the defence's submission that the remaining authorised questions which the legal representatives did not get the opportunity to ask had

³⁴ Transcript of hearing of 19 September 2012, ICC-01/05-01/08-T-248-CONF-ENG ET, page 56, line 19, to page 57, line 8.

³⁵ ICC-01/05-01/08-807-Corr, paragraphs 31 and 38; ICC-01/05-01/08-1023, paragraph 20; and ICC-01/04-01/06-1432, paragraphs 93, 94, and 102.

³⁶ ICC-01/04-01/06-1432, paragraph 98.

³⁷ ICC-01/05-01/08-T-248-CONF-ENG ET, page 56, line 16 to page 57, line 8.

already been asked and answered,³⁸ the Chamber considers this submission to be misconceived. In this regard, the Chamber concurs with the legal representatives and prosecution's submissions to the effect that it is either impossible or speculative to attempt to predict whether Witness D04-07 would have given the same answers to the legal representatives' questions as he had given to previous questions during his testimony.³⁹

Restriction of the Chamber's questioning

15. The Chamber stresses that its own questioning of witnesses may, *inter alia*, seek to clarify witnesses' testimony or as appropriate, challenge their credibility and reliability for the purpose of contributing to the determination of the truth.⁴⁰ In this regard, the Chamber notes that it has been the common practice of this Chamber to put most of its questions to witnesses after the conclusion of the legal representatives' questioning. Due to the interruption of Witness D04-07's testimony, the Chamber was not afforded a full opportunity to question the witness.

16. For the above reasons, the Chamber does not consider Witness D04-07's testimony to be "complete".

B. Whether the incomplete testimony of Witness D04-07 should remain on the case record

17. The Chamber notes that no specific guidance is provided by the Statute, the Rules, or the jurisprudence of the Court in the situation where a witness's testimony is only partially completed. In light of this, the Chamber is of the

³⁸ ICC-01/05-01/08-2732-Conf, paragraph 16.

³⁹ ICC-01/05-01/08-2736-Conf, paragraph 8; and ICC-01/05-01/08-2737-Conf, paragraph 9.

⁴⁰ See Rule 140(2)(c) of the Rules.

view that it should be guided in its determination by its overriding duty to ensure the fairness of the trial, as provided for in Article 64(2) of the Statute.

18. In determining what is required by the principle of fairness in the present circumstances, the Chamber considers that its approach to the admission of evidence, derived from Articles 64(9)(a) and 69(4) of the Statute,⁴¹ may be of guidance. Although used in a different context, the principles applied by the Chamber in this assessment determine when admitting evidence to the case record would be consistent with the fairness of the trial. As such, these principles may also be applied when determining whether keeping testimonial evidence on the case record would be prejudicial to the fairness of the trial.

19. In the present case, the Chamber considers that it must address two specific issues: (1) the relevance of Witness D04-07's testimony with regard to the crimes charged; and (2) whether the Chamber is in a position to assess the witness's testimony, including its credibility and reliability, in spite of it being incomplete.

The relevance of Witness D04-07's testimony

20. The Chamber notes that the defence makes extensive submissions as to the "importance" of Witness D04-07's evidence.⁴² While the prosecution does not address this issue in its response, the legal representatives submit that Witness D04-07's testimony contained no unique evidence which could

⁴¹ Namely that evidence must (i) be relevant; (ii) have probative value; and (iii) be sufficiently relevant and probative as to outweigh any prejudicial effect its admission may cause; *See* Public redacted version of the first decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red, paragraphs 13 to 16; Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012, 8 October 2012, ICC-01/05-01/08-2299-Red, paragraphs 7 to 9.

⁴² ICC-01/05-01/08-2732-Conf, paragraphs 29 to 31.

contribute to establishing the truth.⁴³ However, the legal representatives provide no further detail as to why they consider this to be the case, other than by pointing out that the defence has called other former *Forces Armées Centrafricaine* (“FACA”) soldiers as witnesses.⁴⁴ The Chamber does not consider the fact that other former FACA soldiers have also appeared before the Chamber as witnesses to necessarily render the testimony of Witness D04-07 superfluous. As has been the case throughout the trial, the Chamber paid close attention as to whether the witness’s testimony was unduly repetitive.

Whether the Chamber is in a position to assess the witness’s testimony

21. The Chamber considers that the most relevant factor to be considered in the present case is whether the Chamber will be in a position, at the end of the case, to assess Witness D04-07’s testimony, including his credibility and reliability, in spite of it being incomplete. If the impact of the incompleteness of Witness D04-07’s testimony were to put the Chamber in a position where it could not make this assessment, it could not rely on the evidence in question, and would have to strike it from the record.⁴⁵
22. The Chamber considers that the question is whether the Chamber has sufficient information—taking into account the extent of the parties, the participants, and the Chamber’s questioning of the witness, including questioning challenging his credibility and reliability⁴⁶—in the present case,

⁴³ ICC-01/05-01/08-2737-Conf, paragraph 12.

⁴⁴ ICC-01/05-01/08-2737-Conf, paragraph 12.

⁴⁵ See ICC-01/05-01/08-2012-Red, paragraph 15. Before evidence can be relied upon, the Chamber must satisfy itself that the evidence has sufficient probative value. Relevant factors to be assessed in determining whether evidence has probative value include credibility and reliability.

⁴⁶ The Chamber notes that the sufficiency of the questioning by the non-calling party has already been set out before the *ad hoc* international criminal jurisdictions as a criterion for the Chamber to consider when deciding upon retaining incomplete testimony on the case record. See Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence, IT-95-11-T, 9 June 2006, paragraph 70. The Trial Chamber, albeit under different circumstances in which the witness in question had died, held that a witness’s incomplete testimony could be kept on the case record when the extent of

to be in a position to assess Witness D04-07's testimony. In this respect, the Chamber notes that:

- (i) the defence had a full opportunity to question Witness D04-07;⁴⁷
- (ii) the prosecution, enjoyed a full opportunity,⁴⁸ to question Witness D04-07 and challenge his evidence and credibility;
- (iii) the Chamber partially questioned the witness;⁴⁹ and
- (iv) Maître Zarambaud partially questioned the witness;⁵⁰

whereas:

- (i) the legal representatives were precluded from completing their questioning;
- (ii) the Chamber was not afforded a full opportunity to question the witness; and
- (iii) the defence did not have its final opportunity to question the witness.

23. In addition, the Chamber notes that the witness testified under oath, in person before the Chamber.⁵¹

24. In light of the above, the Chamber considers that any prejudice to the fairness of the trial and to the fair evaluation of Witness D04-07's testimony that may have been caused by the witness's failure to complete his

questioning by the non-calling party "was sufficient for the Trial Chamber to fairly judge the credibility and reliability of [the witness]" The Trial Chamber's approach in *Martić* was affirmed by the ICTY Appeals Chamber: Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, IT-95-11-AR73.2, 14 September 2006, paragraphs 14 to 15; *See also Prosecutor v. Radoslav Brđanin*, IT-99-36, Oral Decision, 24 February 2004, transcript 25086; and *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Decision on the Ngeze Defence's Motion to Strike the Testimony of Witness FS, 16 September 2002, ICTR-99-52-T. In this case the questioning of the witness was agreed to have been completed save for residual questions.

⁴⁷ The defence questioned Witness D04-07 for 2 hours and 55 minutes – figures based on Chamber's calculation.

⁴⁸ The prosecution questioned Witness D04-07 for 4 hours and 26 minutes – figures based on Chamber's calculation; ICC-01/05-01/08-T-250-CONF-ENG CT, page 46, line 23 to page 47, line 3.

⁴⁹ The Chamber questioned Witness D04-07 for 15 minutes – figures based on Chamber's calculation.

⁵⁰ Maître Zarambaud questioned Witness D04-07 for 37 minutes – figures based on Chamber's calculation.

⁵¹ This was analysed as a factor to be considered in similar circumstances by the Trial Chamber in the *Martić* case, *see* Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence, IT-95-11-T, 9 June 2006, paragraph 23.

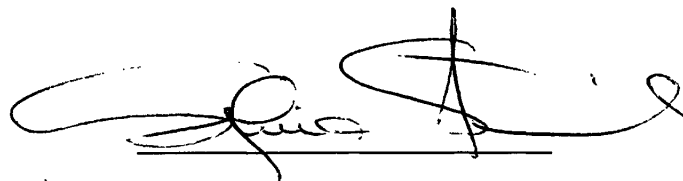
testimony is limited and does not require the exclusion of the testimony from the record of the case. The Chamber is of the view that it has sufficient information to be able to assess the witness's testimony, including its reliability and credibility, at the time it considers the evidence of the case as a whole. The Chamber stresses that the finding that Witness D04-07's testimony may be retained on the case record has no bearing on the Chamber's final determination of the credibility or reliability of Witness D04-07's testimony, or whether it will be afforded any weight at the end of the case. When making this determination, the Chamber will fully consider the parties and participants' submissions as to the weight to afford to the testimony of Witness D04-07 and the circumstances surrounding the witness's failure to complete his testimony.

III. Conclusions


25. For the above reasons, the Trial Chamber hereby:

- (i) REJECTS the defence's request that the Chamber declare the testimony of Witness D04-07 to be complete;
- (ii) DECIDES that Witness D04-07's incomplete testimony should remain as part of the case record; and
- (iii) INSTRUCTS the parties and participants to file public redacted versions of the documents underlying the present Decision by 1 November 2013 at the latest.

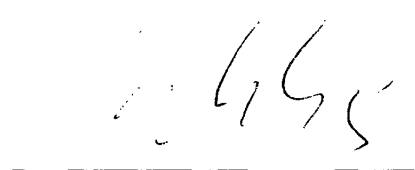
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 21 October 2013

At The Hague, the Netherlands