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Date: 10/09/2015

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 Defence Request for Leave to File Further
Submissions and/or Adduce Further Evidence on the Credibility of P-33**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. INTRODUCTION

1. The Prosecution's filing of a security report¹ and an exculpatory investigator's report² ("the Material") before the Trial Chamber during the "critical juncture of deliberations"³ is a significant step.

2. Having recently emphasised the "advanced stage of the proceedings" and the need not to "unnecessarily disturb" the Trial Chamber,⁴ the Prosecution's decision to intrude on the deliberations process to provide *ex parte* information concerning the credibility of its witnesses was a noteworthy one in terms of the significance of the information contained in the Material.

3. The provision of the Material at this stage of proceedings cannot be inconsequential. For the reasons set out below, the Defence seizes the Trial Chamber with a request for leave to file additional submissions on the impact of the Material on the credibility of P-33, a witness central to the Prosecution case, about whom new information has just been disclosed. The Prosecution's own conduct, seizing the Trial Chamber in this critical period in order to ensure prompt disclosure to the Defence pursuant to Article 67(2), is demonstrative of the significance of the Material, and the importance of the Defence being given an opportunity to address the Trial Chamber on its impact on the Prosecution's case.

B. SUBMISSIONS

i. The Material is exculpatory

¹ ICC-01/05-01/08-3281-Conf-Exp ("Security Report").

² CAR-OTP-0090-1892 ("Investigator's Report").

³ ICC-01/05-01/08-3275-Conf-Exp, para. 24.

⁴ ICC-01/05-01/08-3275-Conf-Exp, para. 24.

4. The Prosecution asserts and the Defence concurs that the Material is exculpatory. The Prosecution has disclosed the Investigator's Report pursuant to Article 67(2), being material which "shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." By the Prosecution's own admission, the Investigator's Report "contains information relevant to the credibility of Prosecution witnesses."⁵ The Defence agrees.

ii. The Material is exculpatory because it further undermines the credibility of P-33

5. Both the Security Report and the Investigator's Report rely solely on an interview between the Prosecution and P-33.

6. P-33 is a central witness in the Prosecution's case. [REDACTED].⁶ His evidence is cited well over 100 times in the Prosecution's Closing Brief, on a broad range of topics.⁷ He is the sole witness cited by the Prosecution for a wealth of factually implausible accusations, [REDACTED];⁸ and that [REDACTED].⁹

7. Significantly, he is at the heart of the Prosecution's allegation that Mr. Bemba had the requisite knowledge to justify a conviction under the doctrine of superior responsibility. He is the only witness who talks about [REDACTED].¹⁰

⁵ ICC-01/05-01/08-3283, para. 2.

⁶ [REDACTED].

⁷ ICC-01/05-01/08-3079-Conf, fn. 7; 12; 22, 39, 192, 451, 454, 456, 476, 1513-1527, 1695, 1697-1698, 1707, 1723-1724, 1727, 1732-1733, 1740, 1742, 1753-1754, 1756-1757, 1769, 1775-1776, 1779-1781, 1783-1788, 1795, 1802, 1808, 1832, 1836, 1853, 1855, 1860, 1880-1883, 1888-1889, 1893, 1895, 1897-1899, 1910, 1954, 1963-1965, 1991, 2013-2021, 2042-2043, 2046-2047, 2050, 2053, 2055-2056, 2083, 2110-2111, 2113-2114, 2127, 2177-2178, 2181-2182, 2186-2187, 2249-2251, 2290, 2312, 2316-2317, 2339-2340, 2342-2343.

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

8. P-33 testified to this effect in spite of being in no position to know either about events in Bangui, or military matters. [REDACTED], that he learnt for the first time in the courtroom that Mr. Bemba had visited the Central African Republic in 2002-2003.¹¹ When questioned further about “intelligence reports” concerning the Central African Republic, he eventually conceded:¹²

Well, I can't remember it very well now. I don't know Central African Republic. I've never been to Bangui. It would be very difficult for me to do this. These were names that were [REDACTED] of the territory and [REDACTED]. That's it. [...] Bangui was not part of [REDACTED] on military operations, as far as I'm concerned. So everything that [REDACTED] in this regard was an add-on, if you like. [REDACTED] the situation in Bangui.

9. The vast disparity between his claimed knowledge and actual knowledge was later explained during D-18's testimony, which was not contradicted by the Prosecution, [REDACTED] the notorious “Friends of the ICC” committee, formed with the goal of ensuring Mr. Bemba's conviction before the ICC.¹³ D-18 testified that “the committee was made up of [REDACTED] were supposed to be the implementation tools of this plan that had been drawn up.”¹⁴

10. In particular, D-18 [REDACTED] he was supposed to “harmonise” his evidence before meeting with ICC investigators.¹⁵ During his testimony, D-18 quoted [REDACTED]:¹⁶

[REDACTED].

¹¹ P-33, T-160-CONF-ENG-ET, p.15, line 4 – p.16, line 4.

¹² P-33, T-162-CONF-ENG-ET, p.50, lines 8-11; T-163-CONF-ENG-ET, p.13, lines 3-7.

¹³ D-18, T-317-CONF-ENG-ET, p.33, line 5 – p.36, line 19; T-320-CONF-ENG-ET, p.58, line 5 – p.65, line 15.

¹⁴ D-18, T-320bis-CONF-ENG-ET, p.7, lines 18-23.

¹⁵ D-18, T-317-CONF-ENG-ET, p.33, line 24 – p.34, line 5.

¹⁶ D-18, T-320-CONF-ENG-ET, p.58, lines 20-24.

11. This harmonisation took place at a meeting at [REDACTED] house, at which [REDACTED] was present. D-18 testified as follows:¹⁷

Q. During that meeting in [REDACTED] home, who gave you the instructions to be followed in the Bemba case if you were to appear before the Court?

A. I told you, it was [REDACTED], he's the one I met with, and I don't know how he came to speak to [REDACTED], but we were all together at [REDACTED] place, at his home. And we were thinking about it together while discussing the potential means to be used.

Q. What did [REDACTED] say to you during that meeting regarding the payment?

A. Well, each person had their own version. The question was to harmonise our positions. My position was to be able to accept the fact that Jean-Pierre Bemba asked [REDACTED] [...]

Q. Do you remember what [REDACTED] said, what was his version? What did he say?

A. [REDACTED], he had to organise things, to confirm the looting, the rapes, and the murders that took place in Bangui and link back to the command, the operations...

12. This harmonisation of evidence also had a financial aspect. D-18 testified that following this meeting, he met with Prosecution Senior Trial Attorney Mr. Badibanga, and asked him about payments. He was referred back to [REDACTED].¹⁸ D-18 was ultimately given \$3,000 in a khaki envelope. [REDACTED] "also confirmed that he got his share",¹⁹ which D-18 believed to be \$3,000.²⁰

¹⁷ D-18, T-320bis-CONF-ENG-ET, p.8, line 4 – p.9, line 9.

¹⁸ D-18, T-320bis-CONF-ENG-ET, p.4, lines 16-22. See also: T-320-CONF-ENG-ET, p.60, line 22 –p.61, line 7: The third meeting was with Jean-Jacques Badibanga at the [REDACTED]. We met and [REDACTED] had given the number, and I also explained my problems to him. I said, "Listen, I don't want to be sacrificed for Jean-Pierre just like that while I'm suffering. I've been unemployed for years." He said, "That's not our problem. That's not the ICC's problem. You have to arrange that with [REDACTED] and company in terms of your own -- your own organisation, but us, the ICC, what we're interested in is information that we need and we have no pressure." Honestly, he only said what the ICC wanted and, in terms of money or resources, I said clearly -- he said, "That isn't my business. You have to make your arrangements. What we need is this, that and the other. That's your testimony."

¹⁹ D-18, T-320-CONF-ENG-ET, p.64, lines 1-13.

²⁰ D-18, T-320-CONF-ENG-ET, p.65, lines 2-4.

13. Relevantly, P-33's testimony revealed a palpable animus against Mr. Bemba, and an unwavering determination to incriminate him at any cost. He ascribed full responsibility for any and all crimes in the Central African Republic to Mr. Bemba, refusing to acknowledge even the possibility that Central African soldiers may have committed crimes.²¹ He rejected genuine documents as forgeries where they tended to show that Mr. Bemba took steps to punish crimes in the DRC,²² and gave a caricature portrait of Mr. Bemba as an omnipotent dictator.²³

14. The Investigator's Report is of course not evidence in the case, however, its contents, insofar as they relate to P-33 appear directly corroborative of this desire to ensure Mr. Bemba's conviction and further incarceration. In the newly-disclosed document, P-33 states, *inter alia*, that:²⁴

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

15. The Defence submission that P-33's evidence is incapable of belief²⁵ would be underlined and amplified by evidence of this calibre. An obvious bias against an accused, or a personal interest in his conviction, affects a witness' credibility.²⁶ This is because of the risk that a witness' desire to see his own interests met, will take precedence over his undertaking to tell the truth. Trial Chambers at both the ICC

²¹ P-33, T-163-CONF-ENG-ET, p.14, line 2 – p.16, line 15.

²² P-33, T-163-CONF-ENG-ET, p.18, line 4 – p.20, line 11.

²³ See for example, P-33, T-163-CONF-ENG-ET, p.9, line 20 – p.10, line 3.

²⁴ CAR-OTP-0090-1893.

²⁵ ICC-01/05-01/08-3121-Conf, paras. 136-144.

²⁶ See, for example, *Prosecutor v. Ndahimana*, ICTR-01-68-T, Judgement, 30 December 2011, paras. 452-453. *Prosecutor v. Hategekimana*, ICTR-00-55B-T, Judgement, 6 December 2010, para. 94; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006, para. 206.

and the *ad hoc* Tribunals have rejected the testimony of witnesses (or rejected parts of their testimony), when their version of events tended to support their own political interests, or were strategically directed towards their own opportunism. In *Prlić*, the Trial Chamber reasoned that, given that the testimony of a particular witness concerned the central issue of the command responsibility of the accused, particularly close attention must be paid to his impartiality.²⁷ Given that his political leanings cast serious doubt on his impartiality, his testimony was rejected.²⁸ Similarly in *Katanga*, a witness who “undoubtedly grasp[ed] the political issues at stake in a given situation”, gave testimony which tended above all to protect his own interests, and demonstrated that he was capable of taking unilateral action out of pure opportunism.²⁹ The affected portions of his testimony were accordingly disregarded.

16. Pre-Trial Chamber II, responsible for the confirmation of charges against Mr. Bemba, explicitly recognised that underlying motives such as political inclination may cast doubt on the reliability of the witness, calling for an individual assessment of the witness’ credibility on each issue.³⁰ The same approach was followed during the confirmation stage of the *Kenya II* case in relation to witnesses who had a political or other underlying motive.³¹

17. P-33’s third-hand hearsay account of [REDACTED] is inherently implausible. Although born in [REDACTED],³² P-33 studied and lived in [REDACTED].³³ P-33 has long since retired from public life.³⁴ It appears from his earlier testimony that he

²⁷ *Prosecutor v Jadranko Prlić et al.*, IT-04-74-T, Judgment, Volume 1, 29 May 2013, para. 378.

²⁸ *Ibid.*, para. 279.

²⁹ See, for example, ICC-01/04-01/07-3436-tENG, paras. 406-408.

³⁰ ICC-01/05-01/08-424, para. 57.

³¹ ICC-01/09-01/11-373, para. 83.

³² P-33, T-157-CONF-ENG-ET, p.64, line 17.

³³ P-33, T-157-CONF-ENG-ET, p.68, line 7 et seq.

³⁴ P-33, T-157-CONF-ENG-ET, p.65, lines 2-6.

[REDACTED].³⁵ That any attendees [REDACTED] would have any idea who he was is objectively extremely unlikely, and undermines the plausibility of [REDACTED]?

18. The credence attributed to these allegations by the Prosecution and VWU is evidenced by the steps they have taken to investigate them and/or to seek or offer protective measures to P-33. Although the security incident allegedly took place at [REDACTED], by its own admission the Prosecution has not troubled to establish whether the event in question even took place.³⁶ There is no indication that either the Prosecution or VWU have spoken with [REDACTED],³⁷ or spoken with any potential eye-witnesses [REDACTED], or consulted open sources. So far as the Defence is aware the incident has generated no VWU security assessment, nor any application for relief to the Chamber.

19. It is in this context that the Defence respectfully seizes the Trial Chamber with a request for leave to file further submissions and, if necessary, submit further evidence in relation to the impact of the information contained in the Investigator's Report on the credibility of P-33, and the Prosecution's overall case, particularly as it concerns Mr. Bemba's alleged knowledge of events in the Central African Republic in 2002 and 2003. The information contained in the Investigator's Report is new material, which was not previously available to the Defence. As discussed above, the Prosecution's choice to provide this information to the Trial Chamber reveals the importance they ascribe to its contents, and further submissions from the Defence would safeguard Mr. Bemba's statutory right to be given the necessary time and means to counter the Prosecution's case against him.

20. The Defence also notes P-33's self-serving statements to the effect that "no promises were made and no money was offered to him in exchange for his

³⁵ CAR-OTP-0090-1893 at 1894.

³⁶ ICC-01/05-01/08-3281-Conf-Red.

³⁷ ICC-01/05-01/08-3281-Conf-Red, para 3: [REDACTED].

testimony”.³⁸ These statements are plainly designed to counter the suggestion (made during the cross-examination of P-33,³⁹ Mr. Bemba’s Closing Brief,⁴⁰ [REDACTED])⁴¹ that P-33 **did** materially benefit from his testimony. In such circumstances, the Defence should be permitted to provide additional submissions on the credibility of these statements, and to counter this new information recently provided to the Trial Chamber by the Prosecution.

21. The mechanics of the partial re-opening of the case need not be cumbersome. Whilst not in any way conceding a limitation to its right to address this important matter, the fact that these assertions have been made by P-33 at this juncture could initially be admitted into evidence by a simple agreed fact or by the admission of the investigator’s report as proof of the fact of the making of the allegations but not of the truth of them. The defence could make further submissions on the new material concisely within a limited time-frame.

(iii) There is no basis for the redaction of the identity of P-33’s sources

22. The Material states that P-33 was told about [REDACTED]. The names of both individuals are redacted from the Defence.⁴² The identity of these intermediaries is relevant to the Defence’s assessment of both the Security Report and the Investigator’s Report. Their identities are also relevant to potential further Defence investigations into P-33’s credibility.

23. As was held in the *Military I* case at the ICTR, “a statement cannot be properly understood without knowing the author’s ability to observe the events he

³⁸ CAR-OTP-0090-1893 at 1895.

³⁹ P-33, T-164-CONF-ENG-ET, p.15, lines 10-20, p.27, line 16 – p.37, line 3.

⁴⁰ ICC-01/05-01/08-3121-Conf, para. 137.

⁴¹ [REDACTED].

⁴² CAR-OTP-0090-1893.

describes; his possible biases or point of view; or the consistency of his account with any other statements he may have given.”⁴³

24. There can be no legitimate security concerns for the two individuals involved, given that neither VWU nor the Prosecution have attempted to contact them to provide protection or other measures as a result of their contact with P-33. Indeed there are palpably no current security concerns for P-33 himself. In such circumstances, the Defence requests that the Prosecution be ordered to remove the redactions to those portions of the Material which conceal the name of the two intermediaries who provided the information about the alleged [REDACTED].

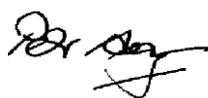
D. RELIEF REQUESTED

25. In light of the above, the Defence respectfully requests that the Trial Chamber:

ORDER the Prosecution to remove the redactions from the Material which conceal the identity of the sources of P-33’s information about [REDACTED]; and

GRANT the Defence request for leave to adduce further evidence and/or file additional limited submissions on the impact of the Investigator’s Report on the credibility of both P-33 and the Prosecution case.

The whole respectfully submitted.



⁴³ *Prosecutor. v. Bagosora et al.*, ICTR-98-41-T, Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006, at para. 5.

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Done at The Hague, the Netherlands

10 September 2015