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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 Redacted Document

Public redacted version of "Prosecution's Response to 'Defence Request for Leave to File Further Submissions and/or Adduce Further Evidence on the Credibility of P-33'", 21 September 2015, ICC-01/05-01/08-3299-Conf

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Jean-Jacques Badibanga

Counsel for the Defence of Jean-Pierre Bemba Gombo

Mr Peter Haynes
Ms Kate Gibson
Ms Melinda Taylor

Legal Representatives of Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of 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 Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Other Section

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber III (“Chamber”) to dismiss and strike out the Defence Application to re-open the case as it is an impermissible attempt to make additional closing arguments on the credibility of Prosecution Witness 33 (“P-33”) at the advanced stage of judicial deliberations.¹ In spite of the filing of the closing briefs, the closing arguments and the conclusion of the evidentiary phase of the case in 2014,² the Defence nonetheless advances further detailed submissions on the merits of the case without the Chamber’s authorisation. This deliberate tactic, under the guise of seeking leave, violates the Chamber’s orders against such practice and is an attempt to place additional arguments against the Prosecution’s evidence on the record.

2. The Defence Application fails to demonstrate any exceptional circumstances that would justify re-opening the case.³ Following a security meeting with P-33, the Prosecution duly disclosed relevant information regarding [REDACTED].⁴ The Defence Application, which focuses only on P-33’s credibility, claims that P-33 is biased against the Accused and benefitted financially by virtue of his status as a Prosecution witness. This is a purely speculative assertion. The information disclosed is insignificant in any event and cannot justify re-opening the case. At best, it is cumulative of other evidence already adduced at trial.

3. The Defence overstates the importance of the information disclosed, which does not meet the threshold of “fresh evidence” or to assist the Chamber in determining the truth pursuant to articles 64(6)(d) and 69(3) of the Rome Statute

¹ ICC-01/05-01/08-3294-Conf, Defence Request for Leave to File Further Submissions and/or Adduce Further Evidence on the Credibility of P-33, 10 September 2015 (“Defence Application”).

² Decision on closure of evidence and other procedural matters, 7 April 2014, ICC-01/05-01/08-3035, para.7(i).

³ ICC-01/05-01/08-3294-Conf, para.21. See, also, ICC-01/05-01/08-3154-Conf, Decision on “Prosecution’s Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169” (ICC-01/05-01/08-3138-Conf-Red) and [REDACTED].

⁴ CAR-OTP-0090-1893_R01 at 1894.

(“Statute”).⁵ At best, the Defence Application merely relies on insignificant information to rehash and further the same credibility arguments against P-33 that were addressed during trial, and in written and oral closing arguments;⁶ at worst, the Defence grasps at irrelevant opinions and speculations about *future events* to argue bias against the Accused. Neither approach justifies re-opening the case. Furthermore, the Accused is not prejudiced by the non-disclosure of the identities of P-33’s two sources regarding the information [REDACTED].

II. Request for Confidentiality

4. Pursuant to regulation 23(2)*bis* of the Regulations of the Court, the Prosecution requests that this document be received by the Chamber as “Confidential” as it responds to the Defence Application, which bears the same classification.

III. Submissions

(i) *The Defence Application should be stricken from the case record*

5. The Chamber should strike the Defence Application from the case record for breaching repeated judicial orders against filing substantive submissions without leave, and for constituting an attempt to place additional arguments on the record against the credibility of Prosecution witnesses at this critical stage of the judicial deliberations. The Defence Application, yet again, disregards the Chamber’s order that the Defence desist from presenting substantive arguments in requests for leave to file additional submissions.⁷ The Defence Application comes just *one month after*

⁵ ICC-01/05-01/08-3154-Conf, paras.26-30.

⁶ ICC-01/05-01/08-3294-Conf, see, for example, paras.9-13.

⁷ See, ICC-01/05-01/08-2985, Decision on defence request for leave to reply to “Prosecution’s Response to ‘Defence Request for Interim Relief’”, 19 February 2014, para.5: “As a preliminary matter, the Chamber notes that in its 20-page long Request for Leave to Reply, the defence sets out substantial submissions in reply to the prosecution’s arguments. In the view of the Chamber, this clearly runs counter to the requirement under

the Chamber's latest warning against this practice. The Chamber "caution[ed] the Defence against making submissions on the merits of a judicial cause in a request for leave to reply, other than as is strictly necessary to substantiate said request."⁸ This reasoning necessarily applies to any request for leave, be it to file supplementary submissions or to inquiry into evidentiary matters. The Defence Application is thus a clear violation of the strict limitation imposed by the Chamber. The 13-page Defence Application is considerably devoted to detailed and additional closing arguments on the evidentiary matters related to P-33's testimony and the Prosecution's case.⁹

6. This deliberate tactic to submit additional closing arguments, without the Chamber's authorisation, is inappropriate and unacceptable.¹⁰ The Defence seeks to bolster its own witness while presenting further arguments on the same issues in order to discredit the Prosecution's witnesses and evidence.¹¹ This is an attempt to circumvent the Chamber's order that declared the submission of evidence closed, by submitting substantive arguments on the merits of the case and witness credibility matters at this advanced juncture of judicial deliberations on these issues.

7. The Defence conduct should not simply be dismissed. At a minimum, these belated additional submissions should not form part of the case record.

8. Additionally, this deliberate Defence attempt to intrude into the judicial deliberations process is not only based on information that is insignificant and/or cumulative, but also irrelevant contextual information. For instance, the Defence Application deliberately overstates P-33's speculations about *future events* by alleging

Regulation 24(5) of the Regulations of the Court ("Regulations") that "[p]articipants may only reply to a response with the leave of the Chamber [...]". Accordingly, the Chamber will not consider the arguments provided in paragraphs 7 to 71 of the Request for Leave to Reply."

⁸ ICC-01/05-01/08-3279, Decision on "Defence Request for Leave to Reply to the 'Prosecution's Response to 'Further Defence Request for Disclosure'", 6 August 2015, para.5.

⁹ ICC-01/05-01/08-3294-Conf, see, for example, paras.6-13, 20.

¹⁰ ICC-01/05-01/08-3294-Conf, paras.3 and 6: The Defence notes that "P-33 is a central witness in the Prosecution's case."

¹¹ ICC-01/05-01/08-3294-Conf, paras.6-13.

bias against the Accused.¹² However, P-33's opinions and feelings about the likely impact of the Chamber's judgment are simply irrelevant. It is unsurprising that witnesses who testify against a powerful Accused have fears regarding that person's release. Nor can the opinion of a *fact witness* on general security matters be significant.¹³

(ii) The information disclosed is insufficient to justify re-opening the case

9. The Defence Application is based on insignificant and/or insufficiently compelling information that is cumulative of other evidence in the trial record. As such, it fails to demonstrate the exceptional circumstances that would justify re-opening the case either by adducing further evidence and/or filing additional submissions on P-33's credibility.¹⁴

10. The Prosecution simply complied with its continuing obligations to disclose evidence that *may* affect the credibility of its witnesses.¹⁵ The Defence grasps at the *timing* and *classification* of the disclosed evidence to inflate its significance.¹⁶ This argument is unconvincing. The Prosecution's obligation to disclose "as soon as

¹² ICC-01/05-01/08-3294-Conf, paras.14-16.

¹³ ICC-01/05-01/08-3294-Conf, para.14.

¹⁴ ICC-01/05-01/08-3154-Conf, Decision on "Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169" (ICC-01/05-01/08-3138-Conf-Red) and [REDACTED]: "However, in line with the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the Chamber finds that in exceptional circumstances a case may be reopened to permit the presentation of 'fresh' evidence." The Chamber notes that 'fresh' evidence includes not only evidence which was not available at the closing of the case but also evidence that was previously available but the importance of which was revealed only in light of new evidence. In determining whether to reopen a case to allow for the admission of 'fresh' evidence, the Chamber must first consider whether, with reasonable diligence, the evidence could have been identified and presented prior to the closing of evidence. Further, in determining whether there are sufficient grounds to recall a witness, the Chamber shall consider whether good cause to recall the witness has been demonstrated. The Chamber has previously stated that 'judicial economy demands that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature'". [internal footnotes omitted]

¹⁵ Article 67(2) of the Statute.

¹⁶ ICC-01/05-01/08-3294-Conf, para.4.

practicable”¹⁷ continues regardless of the stage of the proceedings and leaves very little discretion on its timing. Having received the relevant information in the context of a witness security meeting,¹⁸ the Prosecution promptly seized the Chamber with a request to apply limited redactions to enable disclosure to the Defence.¹⁹ The Defence, however, argues that the Prosecution placed “new information” before the Chamber to counter allegations that P-33 received money in exchange for his testimony as a Prosecution witness.²⁰ This is unfounded. The Prosecution has not sought to rely on the information at all. The Chamber’s power to rule on redaction applications applies irrespective of the quality of the information, status of proceedings, or likelihood of admission as exhibit in the case.

11. The Prosecution’s disclosure of information as *potentially* exculpatory does not automatically imply that the information is *per se* exculpatory or *actually* affects witness credibility.²¹ Additionally, not all relevant information is significant for the purposes of the progress of a case. And in turn, not all significant information is sufficiently compelling to justify the high threshold required to re-open the case. Thus, the Defence must satisfy the Chamber that the information disclosed is sufficiently compelling to warrant re-opening the case.

12. The Defence Application fails to meet the high threshold required to justify re-opening the case. Although the information may be new in relation to [REDACTED], the allegations against P-33’s credibility have already been addressed. Over the course of three years of evidentiary proceedings,²² the Defence extensively addressed P-33’s testimony and credibility, including allegations of financial benefits due to his

¹⁷ See, article 67(2) of the Statute: “... the Prosecutor *shall, as soon as practicable*, disclose to the defence evidence in the Prosecutor’s possession or control which ... *may* affect the credibility of prosecution evidence.” [Emphasis added]

¹⁸ CAR-OTP-0090-1893_R01 at 1893.

¹⁹ ICC-01/05-01/08-3283+Conf-Exp-Anxs, Prosecution’s Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence, 13 August 2015.

²⁰ ICC-01/05-01/08-3294-Conf, para.20.

²¹ ICC-01/05-01/08-3294-Conf, para.4.

²² That is, between P-33’s testimony in 2011 and the closing of the case in 2014.

status as a Prosecution witness and his so-called bias against the Accused. Even *the Defence Application* reflects this.²³ Furthermore, those arguments were presented in the Defence closing briefs and final oral arguments. The information is not fresh evidence and cannot assist the Chamber's determination of the truth. As such, there are no exceptional circumstances to justify providing the Defence with an additional opportunity to re-package the same arguments against P-33.

13. At present, the Defence has placed before the Chamber additional and detailed submissions on matters that are currently subject to judicial deliberations. The Prosecution, for its part, cannot substantively address the Defence additional closing arguments against P-33's credibility. Although re-opening the case would allow the Prosecution to adduce more evidence, this would only serve to unnecessarily further prolong the proceedings.

(iii) *The redactions are not prejudicial or inconsistent with the rights of the Accused*

14. The limited redactions to P-33's two sources are necessary, and not prejudicial or inconsistent with the rights of the Accused. Firstly, the Chamber's authorisation to redact the information was based on security concerns and following independent advice from the Victims and Witnesses Unit ("VWU").²⁴ Further, as shown above, the disclosed information is of limited or no value to the Defence's allegations against P-33's credibility. The case law cited by the Defence relating to the disclosure of the identity of a Prosecution informant is inapposite;²⁵ the Prosecution is not relying upon this information,²⁶ nor is it detrimental to the Accused considering its insignificance. In fact, the Defence only expresses a nominal relevance by vaguely

²³ ICC-01/05-01/08-3294-Conf, paras.8-13, and footnote 40.

²⁴ ICC-01/05-01/08-3289, Decision on "Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence", 25 August 2015.

²⁵ ICC-01/05-01/08-3294-Conf, para.23.

²⁶ ICC-01/05-01/08-3294-Conf, para.20.

pointing to “potential further Defence investigations into P-33’s credibility.”²⁷ The fact that the Defence intends to embark on a fishing expedition is insufficient to justify removing the limited redactions.

15. Moreover, it is not part of Defence’s mandate to investigate security matters involving Prosecution witnesses.²⁸ The source information is only valuable for verifying and, if necessary, investigating how [REDACTED]. Neither the Prosecution nor the VWU has an obligation to inform the Defence of the status of any such activities.²⁹ As it did in the present instance, the Prosecution’s obligation is to disclose relevant information in its possession or control that may affect the credibility of its evidence.

IV. Relief Sought

16. In light of the above submissions, the Prosecution requests that the Chamber dismiss the Defence Application in its entirety and strike it out from the record.



Fatou Bensouda, Prosecutor

Dated this 9th October 2015
At The Hague, The Netherlands

²⁷ ICC-01/05-01/08-3294-Conf, para.22.

²⁸ ICC-01/05-01/08-3294-Conf, para.22. See, articles 43(6), 54, and 68 of the Statute.

²⁹ ICC-01/05-01/08-3294-Conf, paras.18 and 24.