

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 19 October 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

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

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

The Office of the Prosecutor

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Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

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Legal Representatives of the Applicants

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**Victims Participation and Reparations
Section**

Other

Trial Chamber III ("Chamber") of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case"), issues the following Decision on "Defence Request for Leave to File Further Submissions and/or Adduce Further Evidence on the Credibility of P-33" ("Decision").

I. Background

1. On 11 August 2015, the Office of the Prosecutor ("Prosecution") filed its "Report on security matters relating to Prosecution Witness 33" ("Prosecution Report"),¹ in which it informed the Chamber of an alleged incident [REDACTED] ("Incident"). According to the Prosecution Report, Witness P-33 ("P-33") reported [REDACTED] that [REDACTED] told [REDACTED]² and that he was "[REDACTED] who had received a lot of money from the Prosecution to testify against *Bemba*".³ Having been informed of the Incident, P-33 requested a meeting with the Prosecution.⁴
2. On 13 August 2015, the Prosecution filed its "Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence" ("Application for Redactions"),⁵ containing the Prosecution's proposed redactions to an investigator's report of the Incident ("Investigator Report").⁶ The Prosecution submitted that it considered the

¹ Report on security matters relating to Prosecution Witness 33, 11 August 2015, ICC-01/05-01/08-3281-Conf-Exp. A confidential redacted version was filed on 26 August 2015: Confidential redacted version of "Report on security matters relating to Prosecution Witness 33, 11 August 2015, ICC-01/05-01/08-3281-Conf-Exp, 26 August 2015, ICC-01/05-01/08-3281-Conf-Red.

² ICC-01/05-01/08-3281-Conf-Red, para. 2.

³ ICC-01/05-01/08-3281-Conf-Red, para. 3.

⁴ ICC-01/05-01/08-3281-Conf-Red, para. 2.

⁵ Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence, 13 August 2015, ICC-01/05-01/08-3283 and confidential *ex parte* Annexes A and B.

⁶ ICC-01/05-01/08-3283-Conf-Exp-AnxB-Corr.

Investigator Report disclosable under Article 67(2) of the Rome Statute ("Statute"), and Rule 77 of the Rules of Procedure and Evidence ("Rules"), as it contains "information relevant to the credibility of Prosecution witnesses", and that the redactions it proposed were "essential, as disclosure of the full non-redacted text of the report would put at risk a witness, his family members and third innocent parties".⁷

3. On 17 August 2015, the defence for Mr Jean-Pierre Bemba Gombo ("Defence") filed its "Defence Request concerning the 'Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence'" ("Defence Request"),⁸ in which it requested that the Chamber order the Prosecution to immediately inform the Defence of the witnesses to which the Application for Redactions refers and provide any further information which would assist the Defence in making submissions on the issues involved.⁹
4. On 19 August 2015, further to the Chamber's order,¹⁰ the VWU submitted its "Victims and Witnesses Unit's Observations on the Proposed Redactions in ICC-01/05-01/08-3283-Conf-Exp-AnxA and ICC-01/05-01/08-3283-Conf-Exp-AnxB-Corr",¹¹ in which it submitted that, following consultation with the Prosecution, it agreed in principle that all proposed redactions made by the Prosecution should be maintained, save for one

⁷ ICC-01/05-01/08-3283, para. 2.

⁸ Defence Request concerning the "Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence", 17 August 2015, ICC-01/05-01/08-3284.

⁹ ICC-01/05-01/08-3284, para. 4.

¹⁰ Email from the Chamber to VWU, copying the parties, of 14 August 2015 at 15.02.

¹¹ Victims and Witnesses Unit's Observations on the Proposed Redactions in ICC-01/05-01/08-3283-Conf-Exp-AnxA and ICC-01/05-01/08-3283-Conf-Exp-AnxB-Corr, 19 August 2015, ICC-01/05-01/08-3286-Conf-Exp.

proposed redaction which, in the VWU's view, did not relate to information affecting the relevant witness's security.¹²

5. On 21 August 2015,¹³ the Prosecution submitted its "Prosecution's Response to Defence Request concerning the 'Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence'",¹⁴ in which it requested that the Chamber dismiss the Defence Request.¹⁵
6. On 25 August 2015, the Chamber issued its "Decision on "Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence" ("Decision 3289"),¹⁶ in which it, *inter alia*, (i) partially granted the Application for Redactions; (ii) ordered the Prosecution to apply redactions to the Prosecution Report in line with the redactions authorised in relation to the Investigator Report; and (iii) rejected the Defence Request as unnecessary and moot.¹⁷
7. On 26 August 2015, the Prosecution (i) disclosed a redacted version of the Investigator Report; and (ii) filed a confidential redacted version of the Prosecution Report.¹⁸ In addition to P-33's comments on the alleged

¹² ICC-01/05-01/08-3286-Conf-Exp, pages 4 to 5.

¹³ By email on 18 August 2015, the Chamber had informed the parties and the Legal Representative of Victims that any responses to the Defence Request shall be filed by 21 August 2015. Email from the Chamber to the parties and Legal Representative of victims of 18 August 2015 at 10.03.

¹⁴ Prosecution's Response to Defence Request concerning the "Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence", 21 August 2015, ICC-01/05-01/08-3288-Conf. A public redacted version was filed on the same day: ICC-01/05-01/08-3288-Red.

¹⁵ ICC-01/05-01/08-3288-Red, para. 8.

¹⁶ Decision on "Prosecution's Application for redactions pursuant to rule 81(4) of the Rules of Procedure and Evidence", 25 August 2015, ICC-01/05-01/08-3289.

¹⁷ ICC-01/05-01/08-3289, para. 13.

¹⁸ ICC-01/05-01/08-3281-Conf-Red.

[REDACTED] the Investigator Report provides that P-33 stated that he believed that [REDACTED].¹⁹

8. On 10 September 2015, the Defence filed its "Defence Request for Leave to File Further Submissions and/or Adduce Further evidence on the Credibility of P-33" ("Defence Application"),²⁰ in which it requests that the Chamber (i) order the Prosecution to remove the redactions from the Prosecution Report and the Investigator Report which conceal the identity of the source of P-33's information about the Incident ("Defence Request for removal of redactions"); and (ii) authorise the Defence to "adduce further evidence and/or file additional limited submissions on the impact of the [Investigator] Report on the credibility of both P-33 and the Prosecution case" ("Defence Request to adduce further evidence and/or file additional submissions").²¹
9. On 21 September 2015, the Prosecution filed its "Prosecution's Response to 'Defence Request for Leave to File Further Submissions and/or Adduce Further Evidence on the Credibility of P-33' (ICC-01/05-01/08-3294-Conf[...])" ("Response"),²² in which it requests that the Chamber "dismiss the Defence Application in its entirety" and "strike it out from the record" ("Prosecution Request to strike the Application from the record").²³

¹⁹ CAR-OTP-0090-1893 at 1894.

²⁰ Defence Request for Leave to File Further Submissions and/or Adduce Further Evidence on the Credibility of P-33, 10 September 2015, ICC-01/05-01/08-3294-Conf.

²¹ ICC-01/05-01/08-3294-Conf, para. 25.

²² 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.

²³ ICC-01/05-01/08-3299-Conf, para. 16.

II. Submissions and Analysis

10. For the purpose of the present Decision and in accordance with Article 21(1) of the Statute, the Chamber has considered Articles 64(2), (6)(b), (c),(d), and (f), and (10), and 67 of the Statute, and Rule 141 of the Rules.

(i) Defence Request to adduce further evidence and/or file additional submissions

Submissions

11. The Defence submits that the Prosecution Report and the Investigator Report are exculpatory as acknowledged by the Prosecution itself who disclosed the Investigator Report pursuant to Article 67(2) of the Statute,²⁴ and because they “further undermine[...] the credibility of P-33”²⁵ who is “a central witness in the Prosecution’s case”²⁶. According to the Defence, admitting the Investigator Report into evidence would “underline[...] and amplif[y]”²⁷ its submission that “P-33’s evidence is incapable of belief”,²⁸ since it appears “directly corroborative of [his] desire to ensure Mr. Bemba’s conviction and further incarceration”.²⁹

12. The Defence further submits that the information contained in the Investigator Report is “new material, which was not previously available

²⁴ ICC-01/05-01/08-3294-Conf, para. 4.

²⁵ ICC-01/05-01/08-3294-Conf, page 4.

²⁶ ICC-01/05-01/08-3294-Conf, para. 6.

²⁷ ICC-01/05-01/08-3294-Conf, para. 15.

²⁸ ICC-01/05-01/08-3294-Conf, para 15, referring to paras 136 to 144 of the Closing Brief of Mr. Jean-Pierre Bemba Gombo, 25 August 2014, ICC-01/05-01/08-3121-Conf.

²⁹ ICC-01/05-01/08-3294-Conf, para. 14.

to the Defence" and that "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".³⁰ In relation to 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 testimony'", the Defence submits that these statements "are plainly designed to counter the suggestion [...] that P-33 **did** materially benefit from his testimony" and that "the Defence should be permitted to provide additional submissions on the credibility of these statements, and to counter this new information [...]".³¹

13. Finally, the Defence suggests that "[t]he mechanics of the partial reopening of the case need not be cumbersome" and "[w]hilst 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 Report] as proof of the fact of the making of the allegations but not of the truth of them."³²

14. The Prosecution avers that the Application is based on "insignificant and/or insufficiently compelling information that is cumulative of other evidence in the trial record" and, as such, "fails to demonstrate the exceptional circumstances that would justify reopening the case either by adducing further evidence and/or filing additional submissions on P-33's

³⁰ ICC-01/05-01/08-3294-Conf, para. 19.

³¹ ICC-01/05-01/08-3294-Conf, para. 20 (emphasis in original).

³² ICC-01/05-01/08-3294-Conf, para. 21.

credibility.”³³ Specifically, the Prosecution submits that (i) the Defence’s allegation 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 is unfounded, as the Prosecution “has not sought to rely on the information at all”;³⁴ (ii) “[t]he Prosecution’s disclosure of information as *potentially* exculpatory does not automatically imply that the information is *per se* exculpatory or *actually* affects witness credibility”;³⁵ (iii) the Application fails to meet the “high threshold” required to justify reopening the case since, “[a]lthough the information may be new in relation to [REDACTED], the allegations against P-33’s credibility have already been addressed”;³⁶ and (iv) “[a]lthough reopening would allow the Prosecution to adduce more evidence, this would only serve to unnecessarily further prolong the proceedings”.³⁷

Analysis

15. The Chamber recalls that the presentation of evidence in the *Bemba* case was originally closed on 7 April 2014,³⁸ and, after having been reopened for the limited purpose of hearing Witness P-169 in relation to issues

³³ ICC-01/05-01/08-3299-Conf, para. 9.

³⁴ ICC-01/05-01/08-3299-Conf, para. 10.

³⁵ ICC-01/05-01/08-3299-Conf, para. 11 (emphasis in original).

³⁶ ICC-01/05-01/08-3299-Conf, para. 12.

³⁷ ICC-01/05-01/08-3299-Conf, para. 13.

³⁸ Decision on closure of evidence and other procedural matters, 7 April 2014, ICC-01/05-01/08-3035, paragraph 7(i).

arising out of his various allegations and issues of witness credibility,³⁹ closed again on 24 October 2014.⁴⁰

16. In its decision to reopen the presentation of evidence for the limited purpose of hearing Witness P-169,⁴¹ the Chamber considered that although "the Statute and Rules [do] not expressly provide for a reopening of the case in order to permit the submission of additional evidence, [...] in *exceptional circumstances* a case may be reopened to permit the presentation of 'fresh' evidence".⁴² The Chamber noted 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.⁴³

17. The Chamber thus established a high standard for the reopening of the presentation of evidence. This standard will not necessarily be met by an unsubstantiated allegation that a witness has been paid or received other benefits in compensation for his or her testimony, in itself, or by a statement expressing a perceived bias of a witness against the Accused.

³⁹ Notice of limited reopening of the presentation of evidence and rescheduling of closing statements, 2 October 2014, ICC-01/05-01/08-3155.

⁴⁰ Decision on 'Defence Request for Disclosure of Information concerning Intermediary 2' (ICC-01/05-01/08-3185-Conf)", 6 November 2014, ICC-01/05-01/08-3196. A public redacted version was filed on 11 December 2014, Public redacted version of "Decision on 'Defence Request for Disclosure of Information concerning Intermediary 2' (ICC-01/05-01/08-3185-Conf)", 11 December 2014, ICC-01/05-01/08-3196-Red.

⁴¹ Decision on 'Prosecution's Information to Trial Chamber III on issues involving witnesses CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter' (ICC-01/05-01/08-3139-Conf)", 2 October 2014, ICC-01/05-01/08-3154-Conf. A public redacted version of that decision was filed on 10 October 2014, ICC-01/05-01/08-3154-Red.

⁴² ICC-01/05-01/08-3154-Red, paragraph 25 (emphasis added) (internal citations omitted).

⁴³ ICC-01/05-01/08-3154-Red, paragraph 25, referring to ICTY, *Prosecutor v. Jadranko Prlic, Bruno Stojić, Slobodan Praljak, Milivok Petkovic, Valentin Coric, and Berislav Pusic, Case No. 17-04-74-7*, Decision on the Stojić defence request to reopen its case ("*Stojić Decision*"), 25 November 2010, paragraph 17.

Whether any specific such allegation meets the relevant standard needs to be assessed on a case-by-case basis in light of the relevant circumstances.

18. With regard to the Application at hand, the Chamber notes, first, that the alleged statement that P-33 was paid for his testimony was made in the context of [REDACTED].⁴⁴ The Chamber also notes that P-33 was informed about the alleged statement by a source who, in turn, had received that information from another source.⁴⁵

19. The Chamber further observes that according to the Investigator Report, in his meeting on [REDACTED] with the Prosecution, P-33 stated that “no promises were made and no money was offered to him in exchange for his testimony by the Prosecution or anyone else in relation to the Prosecution case”.⁴⁶ The Defence describes this statement as “self-serving” and “plainly designed to counter the suggestion [...] that P-33 **did** materially benefit from his testimony”, and that it “should be permitted to provide additional submissions on the credibility of these statements, and to counter this new information [...]”.⁴⁷ However, the Chamber is not convinced that P-33’s statement qualifies as new information reaching the standard of “fresh” evidence warranting the reopening of the presentation of evidence or the presentation of additional submissions.

20. Moreover, the Chamber underlines that the Defence had an opportunity to challenge P-33’s credibility during its questioning of the witness in

⁴⁴ CAR-OTP-0090-1893 at 1894.

⁴⁵ ICC-01/05-01/08-3281-Conf-Red, para. 3.

⁴⁶ CAR-OTP-0090-1893 at 1895.

⁴⁷ ICC-01/05-01/08-3294-Conf, para. 20 (emphasis in original).

court, and, in that context, questioned the witness in relation to any benefits he may have received in exchange for his testimony.⁴⁸ In relation to its allegation that [REDACTED] the so-called “friends of the ICC”,⁴⁹ the Chamber notes that the Defence further addressed this issue during its questioning of Witness D-18.⁵⁰

21. Finally, the Chamber notes that in its Closing Brief,⁵¹ the Defence makes extensive submissions on the credibility of P-33, including on issues related to financial and other benefits allegedly received by P-33 in exchange for his testimony.⁵² In the Chamber’s view, the presentation of additional evidence to “underline[...] and amplif[y]”⁵³ the Defence’s submissions on P-33’s credibility is not necessary.

22. In view of the circumstances described above, the Chamber finds that the information contained in the Prosecution Report and the Investigator Report does not constitute *fresh evidence* and that there are no *exceptional circumstances* warranting the reopening of the presentation of evidence. As no additional evidence will be presented, the Chamber sees no reason to authorise the filing of additional submissions. Accordingly, the Chamber rejects the Request to adduce further evidence and/or file additional submissions.

⁴⁸ ICC-01/05-01/08-T-164-Conf, pages 14 to 19 and 27 to 31.

⁴⁹ ICC-01/05-01/08-3294-Conf, paras 9 and 10.

⁵⁰ ICC-01/05-01/08-T-320-Conf, pages 58 to 65.

⁵¹ ICC-01/05-01/08-3121-Conf.

⁵² ICC-01/05-01/08-3121-Conf, paras 136 to 144. For instance, the Defence submits that [REDACTED] the notorious ‘Friends of the ICC’, described by Witness D-18, and comprised of MLC defectors, some of whom have given evidence for the Prosecution against the Accused in this case with the explicit promise of financial benefit [...]. ICC-01/05-01/08-3121-Conf, para. 137.

⁵³ ICC-01/05-01/08-3294-Conf, para. 15.

(ii) Defence Request for removal of redactions

Submissions

23. The Defence submits that there is no basis for the redaction of the identities of the sources of the information that was transmitted to P-33, as this information is relevant to the Defence's assessment of the Prosecution Report and the Investigator Report and to "potential further Defence investigations into P-33's credibility".⁵⁴

24. The Prosecution submits that the redactions are "necessary, and not prejudicial or inconsistent with the rights of the Accused", as they are based on security concerns and independent advice from the VWU, and "of limited or no value to the Defence's allegations against P-33's credibility".⁵⁵

Analysis

25. The Chamber recalls that in Decision 3289, when ruling on the Application for Redactions, it considered that except for one proposed redaction noted by the VWU, which the Chamber considered not to relate to information affecting the relevant witness's safety, the redactions are necessary to protect the safety of witnesses, witnesses' family members, and relevant third parties, and would cause no prejudice to the preparation of the

⁵⁴ ICC-01/05-01/08-3294-Conf, para. 22.

⁵⁵ ICC-01/05-01/08-3299-Conf, para. 14.

Defence.⁵⁶ The Chamber considers that the redactions to the identities of P-33's sources are in line with the Chamber's orders in Decision 3289.

26. Given its decision to reject the Request to adduce further evidence and/or file additional submissions, the Chamber further finds that information on the identities of the sources is not relevant to the Defence's assessment of the Prosecution Report and the Investigator Report and to "potential further Defence investigations into P-33's credibility".⁵⁷ The Chamber therefore rejects the Defence Request for removal of redactions.

(iii) Prosecution Request to strike the Application from the record

Submissions

27. The Prosecution urges the Chamber to strike the Request from the case record on the basis that it (i) "breach[es] repeated judicial orders against filing substantive submissions without leave" and constitutes an "attempt to place additional arguments on the record against the credibility of Prosecution witnesses at this critical stage of the judicial deliberations";⁵⁸ (ii) "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";⁵⁹ and (iii) "is not

⁵⁶ ICC-01/05-01/08-3289, para. 10.

⁵⁷ ICC-01/05-01/08-3294-Conf, para. 22.

⁵⁸ ICC-01/05-01/08-3299-Conf, para. 5.

⁵⁹ ICC-01/05-01/08-3299-Conf, para. 6.

only based on information that is insignificant and/or cumulative, but also irrelevant contextual information”.⁶⁰

28. Noting that the statutory framework does not provide for the striking of a document from the record of a case, and considering its duty under Article 64(10) to “ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar”, the Chamber is of the view that this measure should be resorted to with caution and where no other more appropriate remedies are available.⁶¹

29. In the present case, the Chamber notes that the Application constitutes the basis of the Response and the present Decision. Striking the Application from the record of the case would therefore run counter to the Chamber’s duty under Article 64(10) to ensure the maintenance of “a complete record of the trial, which accurately reflects the proceedings”. The Chamber further finds that in its Response, the Prosecution makes extensive submissions to address the arguments in the Application, providing relevant contextual information in relation to the Defence’s submissions, and is therefore not prejudiced by the maintenance of the Application in

⁶⁰ ICC-01/05-01/08-3299-Conf, para. 8.

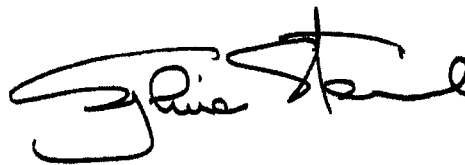
⁶¹ The Chamber recalls that, in line with this approach, where it considered that the presentation of submissions ran counter to the requirements under Regulation 24(5) of the Regulations, it decided not to consider the relevant submissions: Decision on defence request for leave to reply to “Prosecution’s Response to ‘Defence Request for Interim Relief’”, 19 February 2014, ICC-01/05-01/08-2985, para. 5. Where the Chamber found documents to be in breach of Regulation 37(2), it instructed the refiling of the relevant documents: Decision on defence request for an extension of the page limit, 26 November 2014, ICC-01/05-01/08-3210, paras 10 and 12(b). On one occasion, the Chamber ordered the Registry to strike a document from the case record on the basis that it did not comply with the procedure for filing a public redacted version of a document: Order to Strike a Document from the Case Record, 6 September 2011, ICC-01/05-01/08-1710, para. 5(a).

the record of the case. Accordingly, the Chamber rejects the Prosecution Request to strike the Application from the record.

30. In view of the above, the Chamber hereby:

- (i) **REJECTS** the Defence Request to adduce further evidence and/or file additional submissions;
- (ii) **REJECTS** the Defence Request for removal of redactions;
- (iii) **REJECTS** the Prosecution Request to strike the Application from the record.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 19 October 2015

At The Hague, the Netherlands