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

Date: 28 June 2016

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 the 'Defence request for modification of redactions'", ICC-01/05-01/08-1857 of 21 October 2011

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

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Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on the “Defence request for modification of redactions”.

I. Background and submissions

1. On 20 May 2010, the Office of the Prosecutor (“prosecution”) requested the Chamber to apply redactions to the statements of witness CAR-OTP-WWWW-0213 (“Witness 213”) pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence (“Rules”) (“Prosecution’s Application”).¹ As an interim measure, while the Prosecution’s Application was pending before the Chamber, the statements were disclosed to the defence in redacted form on 20 May 2010.²
2. On 9 July 2010, the Chamber issued its “Decision on the prosecution’s applications for redactions (ICC-01/05-01/08-772-Conf, ICC-01/05-01/08-778-Conf and ICC-01-05-01-786-Conf)” (“July 2010 Decision”),³ ruling, *inter alia*, on the redactions sought in the Prosecution’s Application. With regard to Witness 213’s statements, the July 2010 Decision “[p]artially grant[ed] the redactions sought”, including “redactions to the exact address of the witness, the current location of members of his family, any reference [REDACTED] to the telephone number of the witness.”⁴
3. On 30 August 2011, the defence sent an email to the Chamber, addressing

¹ Prosecution’s Application for Redactions pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence and in accordance with the Chamber’s Order dated 5 May 2010, 20 May 2010, ICC-01/05-01/08-778-Conf Exp with confidential *ex parte* prosecution and VWU only annexes. Pursuant to the order of Trial Chamber III dated 26 May 2010, the main filing was re-classified as confidential – prosecution, Victims and Witnesses Unit and defence only. The statements of Witness 213 were collected in The Hague on 7, 8 and 9 December 2009 and they are available in Ringtail under the Evidence Registration Numbers CAR-OTP-0056-0315, CAR-OTP-0056-0348 and CAR-OTP-0056-0387.

² Prosecution’s Communication of Incriminatory Evidence Disclosed to the Defence on 20 May 2010, 20 May 2010, ICC-01/05-01/08-777 with confidential *ex parte* prosecution and defence only Annex A.

³ Redacted Decision on the prosecution’s applications for redactions (ICC-01/05-01/08-772-Conf, ICC-01/05-01/08-778-Conf and ICC-01/05-01/08-786-Conf), 20 July 2010, ICC-01/05-01/08-815-Red2.

⁴ ICC-01/05-01/08-815-Red2, paragraph 27(d).

certain matters of disclosure with regard to Witness 213.⁵ In its email, the defence explained that Witness 213's statements appeared to contain redactions unrelated to the identification of the witness or his family.⁶ While accepting redactions to the names or addresses of the family members as authorised in the July 2010 Decision, the defence requested the Chamber to direct the prosecution to disclose (i) "the conditions put in place by the witness before giving his agreement to testify"; and (ii) "whether these conditions were accepted by the prosecution and put into place".⁷

4. In an email response of 2 September 2011 ("2 September Email"),⁸ the Chamber informed the defence that the redactions to Witness 213's statements are consistent with the July 2010 Decision because they relate to either the location of Witness 213 or his family or "Witness 0213's request, for security reasons, that [REDACTED] or that measures for [REDACTED] be taken". The defence was further informed that it could raise the issue via a formal motion if it believed that new facts or circumstances created a basis for the July 2010 Decision to be revisited.

5. On 23 September 2011, the defence filed the "Defence request for modification of redactions"⁹ ("Defence Motion"), urging the Chamber to (i) lift redactions relating to demands made by Witness 213 in his statements; and (ii) order that the Defence be informed as to whether these demands were met.¹⁰ In the defence's reading, it appears from Witness 213's statements that "his demands [were] a pre-requisite for his testimony" and that he "has an interest in receiving a benefit from the court which goes beyond the ordinary costs involved

⁵ Email of 30 August 2011 at 15.59 from the defence to the Chamber's Legal Officer.

⁶ The redactions concerned relate to the following excerpts of Witness 213's Statements: CAR-OTP-0056-0323 (the two last paragraphs), CAR-OTP-0056-0325 (2nd paragraph), CAR-OTP-0056-0326 (13th paragraph), CAR-OTP-0056-0352 (2nd paragraph), CAR-OTP-0056-0353 (4th and 6th paragraphs) and CAR-OTP-0056-0390 (12th paragraph).

⁷ Email of 30 August 2011 at 15.59 from the defence to the Chamber's Legal Officer.

⁸ Email of 2 September 2011 at 14.14 from the Chamber's Legal Officer to the defence.

⁹ Defence request for modification of redactions, 23 September 2011, ICC-01/05-01/08-1775-Conf.

¹⁰ ICC-01/05-01/08-1775-Conf, paragraph 19.

in testifying”.¹¹ The defence submits that the “expression of interest in receiving assistance over and above that which is necessary to facilitate giving evidence is disclosable to the Defence”¹² and that if the redactions are maintained, the defence will not be “in a position to explore this point during [Witness 213’s] testimony, or to submit on any effect it may have on his credibility.”¹³

6. The prosecution, in its response filed on 17 October 2011,¹⁴ submits that the Defence Motion should be rejected.¹⁵ The prosecution argues that (i) the redactions are necessary to protect the safety of Witness 213 and his family;¹⁶ (ii) the redactions are consistent with the July 2010 Decision;¹⁷ (iii) the defence fails to provide any new facts or circumstances justifying a modification of redactions;¹⁸ and (iv) the defence is already in possession of sufficient information to explore credibility issues during its examination of Witness 213.¹⁹

II. Analysis and conclusions

7. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber, in making its determination, has considered Articles 64, 67(2) and 68(1) of the Statute as well as Rules 76 and 81(4) of the Rules and Regulation 42 of the Regulations of the Court (“Regulations”).

Information relating to a witness’ expression of interest in receiving a benefit from the Court that go beyond ordinary subsistence may affect the credibility of a witness and must be disclosed to the defence

¹¹ ICC-01/05-01/08-1775-Conf, paragraph 13.

¹² ICC-01/05-01/08-1775-Conf, paragraph 15.

¹³ ICC-01/05-01/08-1775-Conf, paragraph 18.

¹⁴ Prosecution’s Response to Defence Request for Modification of Redactions, 17 October 2011, ICC-01/05-01/08-1845-Conf.

¹⁵ ICC-01/05-01/08-1845-Conf, paragraph 10.

¹⁶ ICC-01/05-01/08-1845-Conf, paragraph 2.

¹⁷ ICC-01/05-01/08-1845-Conf, paragraph 2.

¹⁸ ICC-01/05-01/08-1845-Conf, paragraph 6.

¹⁹ ICC-01/05-01/08-1845-Conf, paragraph 2.

8. The Defence Motion is premised on the argument that any information relating to a witness' expression of "interest in receiving a benefit from the court which goes beyond ordinary subsistence"²⁰ must be disclosed to the defence.

9. Article 67(2) of the Statute provides, in relevant part, that "the Prosecutor shall [...] disclose to the defence evidence in the Prosecutor's possession or control which [...] may affect the credibility of prosecution evidence". The question, therefore, is whether the information sought by the Defence Motion may affect Witness 213's credibility, which would require that it be disclosed under Article 67(2) of the Statute.

10. This question has already been dealt with by this Court, notably by Trial Chamber I, in the case of the case of *The Prosecutor v. Thomas Lubanga Dyilo*. While decisions of other Chambers are not binding upon this Chamber, the Chamber is of the view that this precedent is of relevance in the present context.

11. Trial Chamber I, when confronted with allegations relating to a witness' request for assistance regarding his dowry, held that such request "could be interpreted as expressing a somewhat unusual financial interest in giving evidence before this Court" and, as such, "was always disclosable to the Defence."²¹

12. Additional guidance can also be found in the practice of other international tribunals, where it was held that information concerning benefits paid and promises made to witnesses that go beyond the ordinary requirements are to be disclosed to the defence on the basis that such benefits or promises potentially affect the witnesses' credibility. In this respect, the International Criminal Tribunal for Rwanda ("ICTR") established the general principle that

²⁰ ICC-01/05-01/08-1775-Conf, paragraphs 14 to 15.

²¹ Trial Chamber I, Transcript of hearing on 25 May 2010, ICC-01/04-01/06-T-294-ENG CT WT, page 28, lines 1 to 10.

“[i]nformation and records relating to benefits or promises made to Prosecution witnesses or their families would fall under Rule 68 of the Rules [Disclosure of Exculpatory Evidence and Other Relevant Material] in that they may affect the credibility of prosecution evidence”²² and are therefore subject to disclosure.²³ In line with this precedent, the ICTR and other international criminal tribunals have ordered the prosecution to disclose, for instance, information regarding (i) measures taken by a government to ensure the protection of a witness and his family on its territory;²⁴ (ii) benefits paid and/or promises made beyond that which is reasonably required;²⁵ and (iii) assistance provided to witnesses in the context of asylum applications.²⁶

Witness 213's requests and any information related to the prosecution's response to the requests must be disclosed

13. As set out above, the information sought in the Defence Motion relates to the witness' request, for security reasons, that [REDACTED] or that measures for

²² ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber III, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, paragraph 16.

²³ ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-I, Trial Chamber III, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, paragraph 18; *See also* ICTR, *Prosecution v. Karemera et al.*, Case No. ICTR-98-44-PT, Trial Chamber III, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, paragraph 7; ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber III, Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit: Payments made for the Benefit of Witness G, 29 May 2008, paragraph 8.

²⁴ ICTR, *Prosecution v. Karemera et al.*, Case No. ICTR-98-44-PT, Trial Chamber III, Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement, 19 April 2005, paragraphs 2 and 10.

²⁵ ICTR, *Prosecution v. Karemera et al.*, Case No. ICTR-98-44-PT, Trial Chamber III, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, paragraph 7; *See also* ICTR, *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza*, Case No. ICTR-99-50-T, Trial Chamber II, Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, paragraph 13; ICTR, *Prosecutor v. Zigiraniyrazo*, Case No. ICTR-2001-73-T, Trial Chamber III, Décision relative aux Requêtes déposées par la Défense et par le Procureur concernant le témoin ADE, 31 January 2006, paragraphs 20 and 23; SCSL, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Trial Chamber II, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010, paragraphs 21 to 22.

²⁶ ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Chamber I, Judgement, 12 June 2007, paragraphs 36 to 38. Here, the Trial Chamber considered that assistance provided to witnesses in the context of their asylum cases creates a significant doubt as to the credibility of the witnesses and therefore approved the disclosure by the prosecution to the defence of information providing details of its assistance provided to the witness.

[REDACTED] be taken. In the Chamber's view, this goes beyond the ordinary requirements of subsistence and has the potential to affect the credibility of the witness. As such, it qualifies as information that must be disclosed under Article 67(2) of the Statute.

14. While there is some merit to the prosecution's argument that, in light of the Chamber's 2 September Email, the defence has adequate information to explore credibility issues during its questioning of Witness 213,²⁷ it ultimately fails. The defence is entitled to put questions to Witness 213 regarding requests he made to the prosecution. The defence is entitled to put questions to Witness 213 regarding requests he made to the prosecution and to discuss any potential inconsistencies. To this end, the redactions are to be lifted so that they reveal the requests Witness 213 made to the prosecution. .

15. In addition, the Chamber recalls that the redactions were originally granted as a protective measure under Rule 81(4) of the Rules. As the safety of [REDACTED] is no longer an issue, the Chamber is of the view that this protective measure can be varied pursuant to Regulation 42 of the Regulations. However, the redactions applied to the witness' current and past place of residence, the whereabouts of his family and their respective current and past contact details (such as phone numbers) are to be maintained pursuant to Rule 81(4) of the Rules.

16. For the reasons discussed above, particularly in paragraph 13, the Chamber is also of the view that the defence is entitled to information concerning the prosecution's response to the witness' requests, if any. In principle, the defence should have requested this information from the prosecution in the first instance before seeking the Chamber's intervention. Nothing in the Defence Motion suggests that such a request was made. However, the Chamber notes that

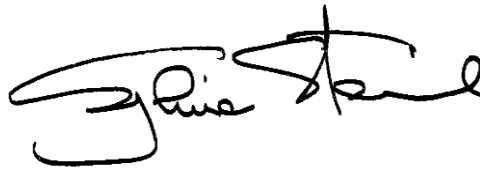
²⁷ ICC-01/05-01/08-1845-Conf, paragraph 8.

any information in the prosecution's possession relating to the granting of Witness 213's requests is required to be disclosed under Article 67(2) of the Statute. Therefore, to expedite matters, and to the extent that such information exists and has not yet been disclosed, this information is to be disclosed to the defence. Such disclosure must be effected sufficiently in advance of Witness 213's testimony, so as to enable the defence to adequately prepare for their questioning of the witness.

17. For these reasons, the Chamber hereby

- (a) GRANTS the Defence Motion;
- (b) ORDERS the prosecution to lift redactions in Witness 213's statements in accordance with the principles set out in paragraph 15; and
- (c) ORDERS the prosecution to disclose any information in its possession relating to the granting of Witness 213's requests pursuant to paragraph 16.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 28 June 2016

At The Hague, The Netherlands