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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public

**Public redacted version of “Prosecution response to the Defence request seeking disclosure of routine expenses of Witness P-0113 under article 67(2)”,
19 August 2016, ICC-01/04-02/06-1477-Conf**

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

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Introduction

1. The Defence request that Trial Chamber VI (“Chamber”) order the Office of the Prosecutor (“Prosecution”) to disclose routine expenses incurred for Witness P-0113¹ should be rejected because the Defence has not demonstrated that they fall within the scope of rule 77² or are potentially exculpatory pursuant to article 67(2) of the Rome Statute. Nor has the Defence shown that there are particular circumstances which would render the requested information *prima facie* disclosable as per the Chamber’s previous decisions.³

2. First, contrary to the Defence’s assertions,⁴ Witness P-0113 did not categorically deny having received any payment from the Prosecution. In fact, Witness P-0113 did provide information about routine expenses incurred as a result of her cooperation with the Prosecution. Second, despite the Chamber’s order that [REDACTED],⁵ the Defence’s cross-examination questions were at times long and confusing or of a general nature, which must be taken into account when evaluating the witness’s answers. Third, the examples provided by the Defence as instances it asserts Witness P-0113 denied receiving any money from the Prosecution were in fact not about routine expenses. Rather, the questions related to *financial assistance, compensation and reparations*. In the context of these questions, the witness nonetheless provided certain evidence about routine expenses, such as for transport.

3. In fairness to Witness P-0113, her answers must be assessed in light of the questions put and their context, and it was incumbent on the Defence to establish what exactly Witness P-0113 denied if it intended to use it as impeachment on credibility or as a means to obtain access to reimbursement for routine expenses.

¹ ICC-01/04-02/06-1469-Conf.

² Of the Rules of Procedure and Evidence (Rules).

³ ICC-01/04-02/06-840, paras.57, 60; ICC-01/04-02/06-904, para.32.

⁴ ICC-01/04-02/06-1469-Conf, para. 3.

⁵ ICC-01/04-02/06-T-118-CONF-ENG, p.3, ll.7-8.

4. Lastly, even if the Defence had explicitly asked Witness P-0113 about routine expenses - which it failed to do - a witness's inability to recall individual routine expenses that were reimbursed over many years should not mean that they become relevant to the witness' credibility and therefore disclosable.

Confidentiality

5. The filing is classified as Confidential, pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, because it responds to a filing bearing the same classification and discusses information disclosed in closed session about a witness for which in-court protective measures were ordered. The Prosecution will file a public redacted version.

Procedural History

6. On 12 July 2016, the Defence cross-examined Witness P-0113.⁶

7. On 15 July 2016, the Defence requested that the Prosecution disclose information that would demonstrate that Witness P-0113 received "assistance" from the Prosecution.⁷ The Prosecution responded the same day that the witness had not received financial assistance, and that any expenses it incurred in relation to the witness were routine.⁸

8. On 18 July 2016, the Defence further requested disclosure of "any expenses or payments made by the OTP to Witness P-0113, routine or otherwise" because it considered that Witness P-0113 had "categorically denied" receiving any payment from the Prosecution.⁹ The Prosecution responded that the Defence characterisation of the witness's answers was incorrect and cited, as an example,

⁶ ICC-01/04-02/06-T-119-CONF-ENG.

⁷ Email from the Defence to the Prosecution, 15 July 2016, at 14:27.

⁸ Email from the Prosecution to the Defence, 15 July 2016, at 15:42.

⁹ Email from the Defence to the Prosecution, 18 July 2016, at 14:48.

her evidence regarding expenses made through Intermediary P-0154. The Prosecution disagreed that disclosure of routine expenses was warranted.¹⁰

9. The Defence reiterated its request as “limited to any payments made other than through Intermediary P-0154”.¹¹ On 21 July 2016, the Prosecution maintained its view but informed the Defence that it had since identified a non-routine expense of [REDACTED] for Witness P-0113.¹²

10. On 29 July 2016, the Defence filed the request for disclosure of “all payments, reimbursements, and record of other assistance of monetary value provided to Witness P-0113” (“Request”).¹³

Prosecution’s Submissions

11. The Defence has not demonstrated that the disclosure of information about routine expenses in this instance is warranted, in accordance with previous decisions of this Chamber.

12. In its decision on the disclosure of expenses, this Chamber held that:

“in the process of trial proceedings before the Court, certain expenses are incurred by the calling party and/or the VWU, including to arrange for the witness to be interviewed or to testify, such as expenses for transport, meals and accommodation. The Chamber considers that material pertaining to reasonable expenses paid by the Prosecution do not automatically fall under Rule 77 of the Rules and/or *a fortiori* Article 67(2) of the Statute and are thus not *per se* disclosable.”¹⁴

¹⁰ Email from the Prosecution to the Defence, 18 July 2016, at 18:00.

¹¹ Email from the Defence to the Prosecution, 18 July 2016, at 18:55.

¹² Email from the Prosecution to the Defence, 21 July 2016, at 17:21.

¹³ ICC-01/04-02/06-1469-Conf.

¹⁴ ICC-01/04-02/06-840, para.57.

13. The Chamber further found that:

“there may be particular circumstances which render information on such expenses *prima facie* material to the preparation of the defence, potentially exculpatory, or otherwise falling under Article 67(2) of the Statute.”¹⁵

a) The witness confirmed having received reimbursement for some routine expenses

14. The exchange about whether money was provided by Intermediary P-0154 for a routine expense - almost 10 years ago - reproduced in paragraph 14 of the Defence’s Request, demonstrates that Witness P-0113 did not “categorically” deny receiving payments from the Prosecution. The witness did not at first understand the scope of the question, and then responded to the best of her recollection about the type of expenses provided by P-0154 and their purpose, namely for transport.¹⁶

15. The Defence further argues that disclosure of routine expenses may be required on the basis of a party’s obligation to correct a statement by its witnesses that it knows to be false. The Prosecution, however, considers that the witness was truthful in her responses to the questions posed.¹⁷

16. Moreover, when the Defence asked a specific question about [REDACTED], the witness responded clearly and without hesitation: [REDACTED].¹⁸ Although [REDACTED]. The witness did not deny that she [REDACTED].

¹⁵ ICC-01/04-02/06-840, para.60.

¹⁶ ICC-01/04-02/06-T-119-CONF-ENG, p.35, lines 14-25 to p.36, lines 1-8. [REDACTED]

¹⁷ ICC-01/04-02/06-1469, para.20.

¹⁸ ICC-01/04-02/06-T-119-CONF-ENG, p.18, lines 17-20.

b) *The Defence questions related to financial assistance and not routine expenses and the witness did not categorically deny having received any payments from the Prosecution*

17. First, the Chamber ordered that [REDACTED]. Witness P-0113 is [REDACTED], [REDACTED],¹⁹ [REDACTED], [REDACTED].²⁰

18. However, the very first question of the Defence on the subject of finances was the following:

“Yesterday during your testimony, page 84, you were asked: "Did you receive any help or assistance following the 2002-2003 events, whether it being material, psychological or otherwise from the Congolese government, from NGOs or from any other source?" And your answer was: "We have not received anything to this day." Now, you didn't mean to say surely that you haven't received anything from the ICC, did you?"²¹

19. [REDACTED], the question was lengthy and too broadly framed.

20. Second, if the Defence intended to ask questions about routine expenses, it should have been explicit on this point. Instead, the scope of the Defence's first question regarding money related to “anything” received *for the purpose* of “help or assistance”, as it was following on from the question of the Legal Representative. The Legal Representative had asked whether support, compensation, or reparations were ever given to the witness. Accordingly, it was this type of financial assistance that framed the entirety of the exchange cited at paragraph 13 of the Defence Request, and the word ‘assistance’ is repeated throughout the subsequent questions put by the Defence to the witness.²² Indeed,

¹⁹ ICC-01/04-02/06-T-118-CONF-ENG, p.8, line 7.

²⁰ ICC-01/04-02/06-T-119-CONF-ENG, p.2, lines 15-23.

²¹ ICC-01/04-02/06-T-119-CONF-ENG, p.18, lines 1-7.

²² ICC-01/04-02/06-T-119-CONF-ENG, p.18, lines 9-23:
[REDACTED]

the Defence question after that extract set out in paragraph 13 concerns compensation for harm suffered.²³

21. The Defence questions related to financial assistance or support, and not to money given to the Witness to cover routine expenses such as Witness P-0113's transportation, food, or accommodation costs while being interviewed or met by the Prosecution.

22. Chambers have previously decided that information pertaining to payments, benefits or other forms of assistance *"that go beyond the ordinary requirements of subsistence may affect the credibility of witnesses and information related thereto"* may be material to the preparation of trial and disclosable pursuant to rule 77 of the Rules.²⁴ However, in this instance the Prosecution has already confirmed that no extraordinary financial assistance or support was provided to Prosecution Witness P-0113, and she was correct when she stated in cross-examination that she had not received any such financial assistance.

23. As explained above, it was clear from the context and the Defence's questions that it was asking about *non-routine* financial support. Indeed, if there was any indication that the Defence's questions related instead to routine expenses the Prosecution would have objected to the line of questioning in the manner in which it was asked. This is because the initial and subsequent questions were based on the answers P-0113 gave to the Legal Representative concerning financial assistance or support, compensation or reparations. Therefore, if the Defence

²³ ICC-01/04-02/06-T-119-CONF-ENG, p.18, lines 24-25, p.19, lines 1-2 [REDACTED]

²⁴ See ICC-01/05-01/08-3167-Conf, para.33. ICC-01/05-01/08-1857-Conf, paras.10-12; ICC-01/04-01/06-T-294-ENG-CT-WT, p.28, ll.1-10: A request which *'could be interpreted properly as expressing a somewhat unusual financial interest in giving evidence before this Court [...] was always disclosable material to the Defence'*; 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, para.16; Decision on Defence Motion for Full disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para.7; 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, para.8. See also e.g. Special Tribunal for Lebanon ("STL"), *The Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra*, Decision on Prosecution Witness Expenses, 9 May 2014, paras.1, 7-16;

instead sought answers regarding routine expenses, the Defence needed to make this explicitly clear as its questions were otherwise unfairly misleading. However, there was no suggestion during this series of questioning that the Defence was seeking answers regarding routine expenses. Indeed, when the Defence requested disclosure to the Prosecution *via* email on 15 July and repeated the term “assistance”, the Prosecution understood it to mean “support”, in line with the questions posed during P-0113’s cross-examination, and not routine expenses.²⁵

24. There were a number of times that Witness P-0113 had to clarify what was being asked so she could understand the questions.²⁶ However, the remainder of P-0113’s answers during her testimony confirm the witness’s same understanding of the Defence’s questions regarding financial assistance, as meaning assistance in the form of support, compensation or reparation.²⁷

25. As the Defence is aware as a result of disclosure, Witness P-0113 [REDACTED].²⁸ Accordingly, the Defence should have known that an overly broad question related to accommodation such as “Did anyone ever help secure accommodation for you?”²⁹ would be particularly ambiguous for her, especially when prefaced with a reference to the Legal Representative’s question on reparations for victims. When Witness P-0113 responded “nobody”³⁰, it was reasonable that she understood the Defence to be asking if she had received a new home following [REDACTED]. If the purpose of the Defence’s question was to clarify instead whether routine accommodation expenses had been reimbursed directly to the witness for meeting with the Prosecution, the appropriate question could have been instead: “Did someone pay for your accommodation when you met with the Prosecution?” However, this was never asked.

²⁵ Email from the Prosecution to the Defence, 15 July 2016, at 15:42.

²⁶ ICC-01/04-02/06-T-119-CONF-ENG, p.18, lines 9-13: “A. What type of assistance do you mean, for example? Perhaps I’ve forgotten. Q. Money? A. Money? To pay me or what?”

²⁷ ICC-01/04-02/06-T-119-CONF-ENG, p.18.

²⁸ DRC-OTP-2091-0509.

²⁹ ICC-01/04-02/06-T-119-CONF-ENG, p.18, line16.

³⁰ ICC-01/04-02/06-T-119-CONF-ENG, p.18, line 14.

26. Although the Defence contends that the overly broad nature of its questions to Witness P-0113 is irrelevant,³¹ fairness to Witness P-0113 requires that her answers be assessed in light of the questions she was asked and their context. The fact that the questions were too broad and asked in the context of financial assistance, and not about routine expenses, was at the very least imprecise and potentially confusing. Cross-examination is meant to test the evidence to get to the determination of truth, and not to seek to exploit a witness's confusion.

27. Although it may be appropriate to start with a general question about assistance, it was then incumbent upon the Defence to pose specific questions about routine expenses if that is the topic it wanted to deal with. Questions such as: "Were you ever given or reimbursed money to pay for food while you met with the investigators?" would have enabled the Defence to test this witness's truthfulness or recall in a fair manner in line with [REDACTED]. Other than [REDACTED] that the witness confirmed she had received – the Defence did not explicitly enquire about any other standard types of routine expenses.

28. There is no justification for the Defence's failure to clearly explore the subject of routine expenses, or non-routine expenses with P-0113, which it was obliged to do if it intended to use any of P-0113's responses on this topic as impeachment on her credibility. Moreover, the Defence cannot benefit from its failure to address the topic of routine expenses clearly and fairly during cross-examination to justify at this late stage a fishing expedition by way of disclosure.

29. The Defence conceded that it had information about two payments of "small sum" – routine expenses - made by the Prosecution; and opted not to confront the witness about them because "the impeachment value [...] was not deemed sufficient".³² However, if the Defence intended to argue that the witness's

³¹ ICC-01/04-02/06-1469, para.16.

³² ICC-01/04-02/06-1469-Conf, para.3.

credibility was affected, it was under an obligation to confront the witness with that fact, and it was in a position to do so.

30. The Defence was in possession of sufficient information regarding the Prosecution's practice regarding routine expenses. The Prosecution has long been clear about incurring routine expenses for its witnesses as a standard practice.³³

31. Additionally, the Defence was – as conceded – in possession of precise information regarding certain specific routine expenses reimbursed to P-0113. The Defence was disclosed an investigator's note reporting [REDACTED]. The note set out the precise basic amount given to P-0113 for food and travel as a routine expense, so the Defence were already in receipt of this information in advance of P-0113's testimony.³⁴ This document put the Defence on notice that routine expenses were incurred in relation to Witness P-0113. Therefore, the Defence was able to explicitly question the witness on the subject, but it chose not to do so.

32. The Prosecution recalls the Chamber's decision that "the cross-examining party is required to put to the witness any facts or evidence, available at the time and upon which it intends to rely to impeach his or her credibility."³⁵ The Defence had information already that the witness received routine expenses – and examples of what those were – and did not put any suggestions to her in that regard, depriving her of the opportunity to respond, recall or explain herself. The Defence failure to put its case to the witness means it cannot then use any responses she provided as a basis for impeachment or for seeking additional, and unwarranted, disclosure of routine expenses.

33. Moreover, it is understandable if a witness cannot recall individual expenses for which she received reimbursement [REDACTED]. Even if Witness P-0113 had been clearly asked questions regarding routine expenses – which she was not –

³³ ICC-01/04-02/06-808, para.49.

³⁴ DRC-OTP-2053-0014.

³⁵ ICC-01/04-02/06-619, para.28.

any failure on her part to list all expenses reimbursed [REDACTED] should not be considered relevant to her credibility. Moreover, failure to recall detailed reimbursements should not trigger obligations to disclose such expenses under article 67(2) or rule 77.

34. In sum, the Defence did not establish that the witness categorically denied receiving any payments from the Prosecution. She responded clearly and truthfully to the question posed by the Defence. Therefore, the disclosure of routine expenses incurred for this witness is not relevant to assess her credibility pursuant to article 67(2), and nor is it material under rule 77.

Conclusion

35. For the foregoing reasons, the Prosecution requests that the Chamber reject the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 21st day of September 2016

At The Hague, The Netherlands