

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **23/09/2011**

**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**

*Confidential*

**Defence request for modification of redactions**

**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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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia

**Deputy Registrar**

Didier Preira

**Victims and Witnesses Unit**

**Defence Support Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## A. BACKGROUND

1. On 20 July 2010, Trial Chamber III ('the Chamber') rendered its *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)*,<sup>1</sup> in which it authorised redactions in the statement of witness CAR-OTP-WWW-0213, in the following terms:<sup>2</sup>

Partially grants the redactions sought pursuant to Rule 81(4) of the Rules in respect of the documents pertaining to witness 213. The redactions which are permitted include 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.

2. On 14 March 2011, the Defence wrote to the Prosecution regarding redactions in the statement of witness CAR-OTP-WWWW-0213. The Defence noted that "the statements of this witness (CAR-OTP-0056-315; CAR-OTP-0056-348; CAR-OTP-0056-0378) contain redactions which do not appear to relate to identifying particulars of the witness. The Defence would be grateful if these statements could be reviewed with a view to determining whether less-redacted versions could be provided to the Defence."<sup>3</sup>

3. The Prosecution responded by way of email on 14 March 2011, stating that "[a]ll redactions applied in the statements you referring to in your email below are those approved by The Chamber."<sup>4</sup>

4. Having been unable to resolve this question with the Prosecution, the Defence then wrote to the Chamber. The Defence drew the attention of the Chamber to "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

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<sup>1</sup> ICC-01/05-01/08-815-Red2, 20 July 2010.

<sup>2</sup> *Ibid*, para. 27.

<sup>3</sup> Email Defence of Mr. Jean-Pierre Bemba to Prosecution, 14 March 2011.

<sup>4</sup> Email Prosecution to Defence of Mr. Jean-Pierre Bemba, 14 March 2011.

paragraph); CAR-OTP-0056-0353 (4th and 6th paragraphs); and CAR-OTP-0056-0390 (12th paragraph).” The Defence stated that:

“the Defence has in mind the Chamber's decision of 20 July 2010 (ICC-01/05-01/08-815-Red2) regarding this witness, and is not asking for the disclosure of the names or addresses of the witness' family members. However, the Defence does request that the Prosecution be directed to disclose the conditions put in place by the witness before giving his agreement to testify, as well as whether these conditions were accepted by the Prosecution and put into place.”<sup>5</sup>

5. The Chamber responded in the following terms: <sup>6</sup>

“The Chamber has reviewed the redactions identified in your email. They are consistent with the Chamber's rulings in decision ICC-01/05-01/08-815. The redactions relate to (i) the location of Witness 0213; (ii) the location of Witness 0213's family; and (iii) Witness 0213's request, for security reasons, that [REDACTED] [REDACTED] They do not relate to any conditions agreed to by the prosecution in relation to Witness 0213's testimony. If, in light of the above, the defence believes that new facts or circumstances create a basis for decision 815 to be revisited, the appropriate way to raise the issue is via a formal motion.”

## B. APPLICABLE LAW

6. Article 64 of the Rome Statute of the International Criminal Court ('Statute) provides as follows:

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:  
(e) Provide for the protection of the accused, witnesses and victims.

7. Article 68(1) of the Statute provides

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and

<sup>5</sup> Email Defence of Mr. Jean-Pierre Bemba to the Chamber, 30 August 2011.

<sup>6</sup> Email Chamber to Defence of Mr. Jean-Pierre Bemba, 2 September 2011.

health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

8. It is evident that once redactions have been put in place, they can subsequently be modified, or removed. In fact, the Appeals Chamber has tasked the Chambers with reviewing the necessity of maintaining redactions. The Appeals Chamber held in the *Katanga* case that:<sup>7</sup>

Even if non-disclosure is authorised, this determination must be kept under review and altered should changed circumstances make that appropriate... The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of nondisclosure of information is the exception to this general rule.

9. In this regard, Chambers have previously reversed their positions on redactions due to the fact that the Chamber was only in a position to fully evaluate the impact on the rights of the Defence, after having been apprised of information about Defence strategy and preparation.<sup>8</sup>

### C. SUBMISSIONS

10. The Defence accepts that, in line with decision ICC-01/05-01/08-815-Red2, the Defence is not entitled to disclosure of the exact address of the witness, the location of his family, or his telephone number.<sup>9</sup> The Defence has not sought, nor is it seeking this information.

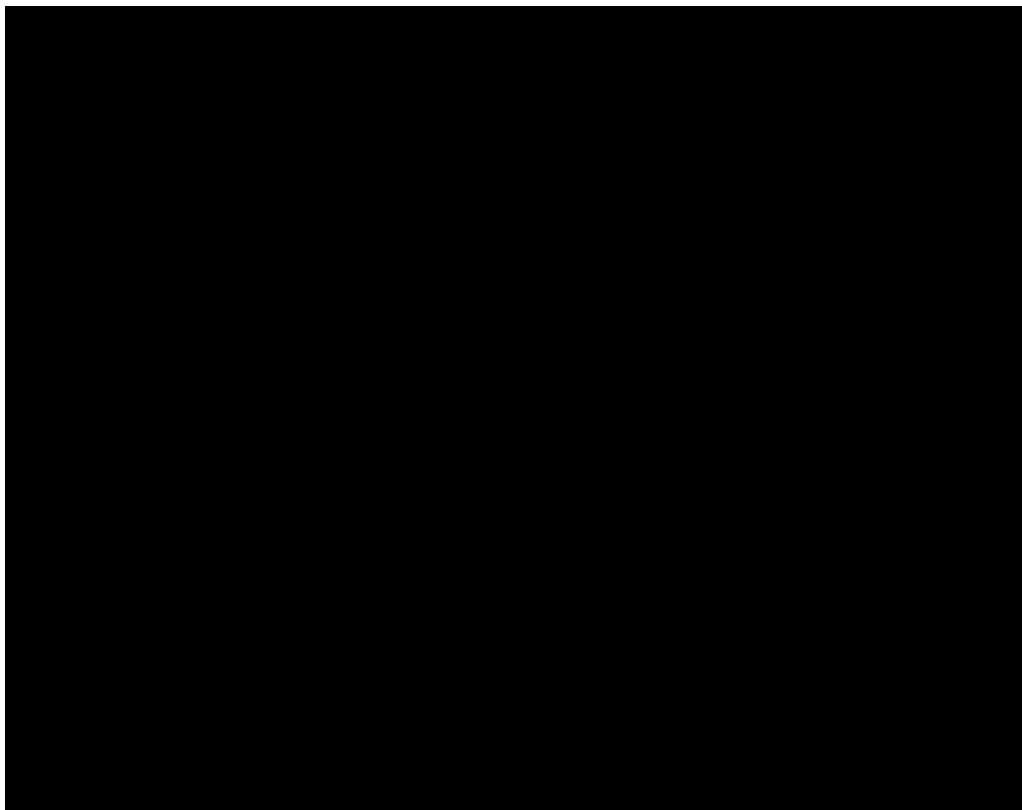
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<sup>7</sup> Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" ICC-01/04-01/07-476 13-05-2008, para. 64

<sup>8</sup> See for example, Prosecutor v. Lubanga, Redacted Decision on Intermediaries, ICC-01/04-01/06-2434-Red2, 31 May 2010; Prosecutor v. Katanga, Oral Decision, Transcript of 14 May 2010, pages 13-18, ICC-01/04-01/07-T-141-Red; Prosecutor v. Katanga, Oral Decision, Transcript of 21 October 2010, pages 2-3, ICC-01/04-01/07-T-208 ; Prosecutor v. Lubanga, Oral decisions, 4-5 March 2009, pages 21-23 (4 March), ICC-01/04-01/06-T-142-ENG, and pages 1-2 (5 March) ICC-01/04-01/06-T-144-ENG.

<sup>9</sup> ICC-01/05-01/08-815-Red2, para. 27.

11. However, the disclosed statements of CAR-OTP-WWWW-0213 contain phrases such as the following:



12. Having repeatedly outlined these demands, without which he would not testify, the witness was then included as CAR-OTP-WWWW-0213 on the Prosecution's list of witnesses.<sup>15</sup>

13. The Defence is aware that it has been informed by the Chamber that the redactions relate to "(i) the location of Witness 0213; (ii) the location of Witness 0213's family; and (iii) Witness 0213's request, for security reasons, [REDACTED]"

[REDACTED] "The Defence concern

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<sup>10</sup>CAR-OTP-0058-0210

<sup>11</sup>CAR-OTP-0058-0210

<sup>12</sup>CAR-OTP-0058-0239

<sup>13</sup>CAR-OTP-0058-0240

<sup>14</sup>CAR-OTP-0058-0300

<sup>15</sup> Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning, ICC-01/05-01/08-975-Conf 26-10-2010

is the following. It appears from the statements quoted above that the witness is classifying his demands a pre-requisite for his testimony. He is saying that unless he is provided with (a redacted demand), he will refuse to testify. As such, the Defence can only conclude that this witness has an interest in receiving a benefit from the court which goes beyond the ordinary costs involved in testifying.

14. Whether this is a legitimate interest or otherwise, jurisprudence of the Court dictates that if a witness demonstrates an interest in receiving a benefit from the court which goes beyond ordinary subsistence, that information should be disclosed to the Defence. This disclosure is essential in allowing the Defence to explore whether this additional benefit affects the credibility of the witness, or his testimony. In the *Lubanga* case, for example, it was revealed that a witness was hoping for assistance as regards his dowry. The Chamber held that:<sup>16</sup>

Our observation is really a very contained one, and it is the expression of interest on 22 April 2009 that the witness, certainly at that point in time, was hoping for assistance as regards his dowry. It seems to us that that could be interpreted as expressing a somewhat unusual financial interest in giving evidence before this court. One wouldn't ordinarily associate the fact that he was going to be giving evidence with the expectation that a dowry would be paid. And therefore, on material reflection, and looking at what you've provided us with, we consider that that indication by him was always disclosable to the Defence.

15. This finding is instructive, as it demonstrates that even the mere expression of interest in receiving assistance over and above that which is necessary to facilitate giving evidence is disclosable to the Defence.

16. This approach is wholly consistent with the practice of the *ad hoc* Tribunals. In the *Martić* case, for example, two Prosecution witnesses had sought, and had received, assistance from the Prosecution with pending asylum applications.<sup>17</sup> The Trial Chamber concluded in its Judgement that "[t]he Trial Chamber notes that both

<sup>16</sup> ICC-01/04-01/06-T-294-ENG CT WT 25-05-3010 28/30

<sup>17</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 July 2007, paras 37, 38

Witness MM-003 and Witness MM-079 sought assistance from the Prosecution, which also provided such assistance to both witnesses. The Trial Chamber therefore considers that there is significant doubt as to the credibility of both witnesses...".<sup>18</sup> The Judgement notes that "the Prosecution sent a letter to the Defence disclosing details of its assistance provided to Witness MM-003 in his asylum case,"<sup>19</sup> reflecting the practice that such benefits are disclosable to the Defence.

17. At the ICTR, Prosecution witnesses and their families were also re-located as result of their testimony. It was held that payments made by the Prosecution to witnesses "are relevant and probative for assessing that witness's credibility because '[m]aterial or information within the Prosecutor's knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably required... may affect the credibility of witnesses...'"<sup>20</sup> As such, this information was disclosed routinely disclosed to the Defence.<sup>21</sup>

18. While the impugned redactions remain in place, the Defence is not in a position to explore this point during CAR-OTP-WWWW-0213's testimony, or to submit on any effect it may have on his credibility. The Defence reiterates that it is not seeking to know additional identifying details or the location of the witness or his family, but simply to be informed of the demands made by the witness as a pre-requisite to his testimony, and whether these demands were met.

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<sup>18</sup> *Ibid.*, para. 38.

<sup>19</sup> *Ibid.*, para. 38, citing Letter from Alex Whiting to Predrag Milovančević, dated 9 April 2007.

<sup>20</sup> *The Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses (TC), 23 August 2005, para. 7.

<sup>21</sup> *The Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Records of all Payments made Directly or Indirectly to Witness D, 28 September 2006; and the ultimate disclosure demonstrated by *The Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Reconsideration of the Oral Decision for Reconsideration of Oral Decision on the 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.

**D. RELIEF REQUESTED**

19. In light of all of the aforementioned, the Defence respectfully requests that the Chamber remove the redactions which relate to the demands made by CAR-OTP-WWWW-0213 in his statements CAR-OTP-0058-0201; CAR-OTP-0058-0234; CAR-OTP-0058-0296, and order that the Defence be informed as to whether these demands were met. The Defence also respectfully submits that given the unsettled question of the re-scheduling of witnesses, that this Defence Motion be decided as soon as practicable and that the requested information be disclosed within the shortest possible delay.

20. The whole respectfully submitted.



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Aimé Kilolo Musamba  
Associate Counsel

Done at The Hague, the Netherlands

23 September 2011