

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 10 August 2012

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 Document
With
Confidential Annexes A to O**

**Prosecution Motion on Procedure for Contacting Defence Witnesses and to
Compel Disclosure**

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

Counsel for the Defence of Jean-Pierre Bemba Gombo

Mr. Aimé Kilolo Musamba

Mr. Peter Haynes

Legal Representatives of Victims

Ms. Marie-Edith Douzima Lawson

Mr. Zarambaud Assingambi

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Office of the Prosecutor ("Prosecution") requests Trial Chamber III ("Chamber") to compel the Defence to seek, in good faith, the consent of its witnesses to meet with the Prosecution and to facilitate the necessary arrangements for such witness meetings.

2. Since 20 July 2012 the Prosecution has made several reasonable requests to the Defence, in keeping with the protocol decided by the Chamber,¹ seeking the consent of Defence witnesses to meet with the Prosecution. In the view of the Prosecution, the Defence has not acted in good faith to facilitate such meetings. In its communications with the Prosecution, the Defence has plainly pre-determined that most if not all of its witnesses will refuse to meet with the Prosecution. In addition, the Defence has indicated that it will block meetings if they cannot arrange their schedules to be present (while at the same time indicating that they anticipate having virtually no time for such meetings during the Defence case) or if the Prosecution fails to pay their expenses; with respect to the first expert witness these matters were identified as being among the reasons he would not meet with the Prosecution. Finally, the Defence has indicated that it will "terminate" any meetings that are not conducted to its liking.

3. The message that has been communicated by the Defence in its communications, all of which are attached to this filing, is that the Defence owns its witnesses and will not permit the Prosecution to meet with them before their testimony. By obstructing these contacts, the Defence is prejudicing the Prosecution's ability to investigate the Defence's case. The Prosecution considers it appropriate and necessary to bring these matters to attention of the Chamber now so that they can be resolved without further prejudice to the Prosecution.

¹ ICC-01/05-01/08-813-Conf, Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, paras. 66-68.

4. The Prosecution requests the Chamber to enforce the established rules regulating the contacts between the Prosecution and the Defence witnesses² and to order the Defence: (i) to prepare a neutral script, which it will disclose to the Chamber and the Prosecution, to be read to the Defence witnesses when seeking their consent; (ii) to comply with its obligation to facilitate contacts between the Prosecution and Defence witnesses; (iii) to not obstruct these meetings by declaring that they are unavailable to attend; (iv) to bear any costs incurred by them in relation to their insistence that they personally be present during these meetings; and (v) to not interfere in meetings that occur between the Prosecution and Defence witnesses, including exercising their purported prerogative to terminate them.

5. The Prosecution also requests that the Chamber direct the Defence to provide certain discrete information concerning the expert witnesses – i.e., the documents on which the expert witnesses relied, and the names of the persons interviewed by the expert witnesses, whose information also shaped the witnesses' expert conclusions.

II. Background

6. On 20 July 2012 the Prosecution contacted the Defence via e-mail to request the Defence to seek the consent of Witness CAR-D04-PPPP-0053, General Seara, the Defence's military expert witness, to meet with representatives of the Prosecution.³

7. On 23 July 2012 the Defence responded that General Seara was unwell and thus unavailable for a meeting. General Seara proposed written questions and answers *in lieu* of meeting. The Prosecution responded on the same day that it would

² ICC-01/05-01/08-813-Conf, paras. 66-68; see also ICC-01/04-01/06-1372, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, para. 11; ICC-01/04-01/06-2192-Conf, Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009, paras. 47-52.

prefer to meet with General Seara once he was feeling better.⁴ Also on 23 July 2012 the Prosecution sent a second request⁵ asking the Defence to seek consent of Defence Witnesses 4 to 11⁶ to meet with the Prosecution. The Defence was requested to respond by 3 August 2012.⁷

8. On 25 July 2012 the Defence replied.⁸ The Defence stated that that “we all know at the outset that very few of them [defence witnesses] are likely to be enthusiastic about meeting members of your office.” The Defence then set forth a number of “pre-conditions to any meeting.” First, the Defence stated that it would have to be present at all meetings. At the same time, the Defence made it clear that it would be essentially unavailable during the presentation of the Defence case: “The possibilities for counsel (since it would have to be counsel) to travel outside The Hague to be present at a series of witness interviews will be, to be frank, almost non-existent.” In addition, the Defence insisted that all costs for the Defence to participate in the meetings would have to be borne by the Prosecution. Finally, the Defence sought to prescribe the form of the meetings, even asserting that they would be “restrained to the point of termination” if the Defence concluded in its own judgment that the Prosecution was using them as a “rehearsal” for cross-examination.

9. On 26 July 2012 the Prosecution replied to the Defence, objecting to its overall approach to its requests to meet with witnesses and its specific “pre-conditions.” Because it was already clear from the Defence’s e-mail that it was not seeking, in good faith, to assist the Prosecution to meet Defence witnesses, the Prosecution

⁴ E-mail from Mr. Iverson to Mr. Mangenda on 20 July 2012 at 13:28 hours (Annex A); E-mail on 23 July 2012 at 13:31 hours from Ms. Gibson to Mr. Iverson (Annex B); E-mail on the same day at 18:18 hours from Mr. Iverson to Ms. Gibson (Annex C).

⁵ E-mail from Mr. Iverson to Ms. Gibson on 23 July 2012 at 18:21 hours (Annex D).

⁶ ICC-01/05-01/08-2243-Conf-AnxA, Defence Disclosure of its List of Witnesses and Factual and Legal Elements of its Case, 13 July 2012, listing the Defence witnesses per their proposed order of appearance.

⁷ Due to an oversight, the e-mail from Mr. Iverson on 23 July 2012 at 18:21 hours had requested that the Defence respond to the Prosecution no later than 27 August 2012. Therefore, a subsequent e-mail from Mr. Iverson to Ms. Gibson on 30 July 2012 at 14:47 hours (Annex E) clarified that the Prosecution requested a response from the Defence by 3 August 2012.

⁸ E-mail from Mr. Haynes to Mr. Iverson on 25 July at 16:58 hours (Annex F).

requested that the Defence prepare a script that it would read to its witnesses when seeking consent.⁹ Further, the Prosecution stated that it was up to the Defence to organize its resources to be available for Prosecution meetings with witnesses and that the Defence would have to bear the costs itself if it chose to attend the Prosecution meetings. Finally, the Prosecution stated that it was aware of its responsibilities with regard to the conduct of such meetings and that it was not the role of the Defence to regulate them.

10. On 30 July 2012 the Defence replied generally that the Prosecution requests to meet with the Defence witnesses would be communicated by the Defence with “propriety and professionalism,” but that the Defence would not prepare a script for this purpose.¹⁰ The Defence did not address the remaining issues raised in the previous e-mails, saying only that “[t]here is nothing further we can usefully add at this stage.”

11. On 2 August 2012 the Prosecution requested the Defence to seek the consent of Witnesses CAR-D04-PPPP-0059 and CAR-D04-PPPP-0060, Defence expert witnesses, to meet with the Prosecution.¹¹ On the same day the Prosecution submitted a disclosure request to the Defence seeking a number of expert witness-related documents¹² and information on the identities of persons purportedly interviewed for the expert’s report.

12. On 3 August 2012 the Prosecution again asked the Defence to seek General Seara’s consent to meet, proposing to meet at a location convenient for him on 9 or 10 August 2012.¹³ The Defence responded and explained that the General would not meet with the Prosecution, in part because the Prosecution failed to produce an

⁹ E-mail from Mr. Iverson to Mr. Haynes on 26 July 2012 at 12:48 hours (Annex G).

¹⁰ E-mail from Mr. Haynes to Mr. Iverson on 30 July 2012 at 9:42 hours (Annex H).

¹¹ E-mail from Ms. Bala-Gaye to Ms. Gibson on 2 August 2012 at 9:46 hours (Annex I).

¹² E-mail from Ms. Bala-Gaye to Ms. Gibson on 2 August 2012 at 9:23 hours (Annex J).

¹³ E-mail from Mr. Iverson to Ms. Gibson on 3 August 2012 at 16:03 hours (Annex K).

“agenda” or list of questions in advance, the length of the meeting was unspecified, and no member of the Defence could be present because the team was unavailable and the Prosecution had refused to pay for its presence.¹⁴

13. The Prosecution has not received any substantive information from the Defence regarding the consent of Defence Witnesses 2-11.¹⁵ Further, the Defence has failed to provide the Prosecution with any of the information requested on 2 August 2012.¹⁶

III. Request for confidentiality

14. The Prosecution requests that this Application and its Annexes A to O (e-mails between the Prosecution and the Defence) be received by the Chamber as “Confidential” pursuant to Regulation 23 *bis* of the Regulations of the Court, as they contain information that should not be revealed to the public.

IV. Prosecution submissions

15. It is clear from the e-mail exchanges between the Prosecution and Defence that the Defence has no intention of facilitating contact between the Prosecution and its witnesses and in fact will make it impossible for any such contact to occur. Although the Chamber has set the legal framework applicable to contacts between a party and the witnesses to be called by the other party,¹⁷ the Defence is attempting to apply a different set of self-made rules. Moreover, the communications with the Defence cast doubt on the manner in which they seek the consent of the witnesses. The Defence

¹⁴ E-mail from Ms. Gibson to Mr. Iverson on 5 August 2012 at 23:19 hours (Annex L); E-mail from Mr. Iverson to Ms. Gibson on 6 August 2012 at 18:15 hours (Annex M) and e-mail from Ms. Gibson to Mr. Iverson on 7 August 2012 at 12:42 hours (Annex N).

¹⁵ CAR-D04-PPPP-0053, CAR-D04-PPPP-0060, CAR-D04-PPPP-0065, CAR-D04-PPPP-0007, CAR-D04-PPPP-0011, CAR-D04-PPPP-0052, CAR-D04-PPPP-0057, CAR-D04-PPPP-0050, CAR-D04-PPPP-0051, CAR-D04-PPPP-0064.

¹⁶ E-mail from Ms. Bala-Gaye to Ms. Gibson on 2 August 2012 at 9:23 hours (Annex J) and e-mail from Ms. Gibson to Ms. Bala-Gaye on 10 August 2012 at 11:26 hours (Annex O).

¹⁷ ICC-01/05-01/08-813-Conf, paras. 66-68; see also ICC-01/04-01/06-1372, para. 11; ICC-01/04-01/06-2192-Conf, paras. 47-52.

predicted from the start that few if any of its witnesses would give consent, and the e-mail communications recounting General Seara's objections to the requested meeting suggests that they influenced the witness's refusal. In sum, the tone and content of the Defence's e-mails give no confidence that the Defence is genuinely seeking to obtain the consent of its witnesses to speak with the Prosecution.

16. Further, the Defence has invented a series of conditions that will make any meetings with Defence witnesses virtually impossible. It has insisted both that it must be present at all meetings and that it will be unavailable for any such meetings. It has unreasonably insisted that the Prosecution would be required to pay for the Defence's presence at the meetings. And finally it has asserted that it can regulate the way the meetings are conducted.

17. The Prosecution wishes to meet with consenting Defence witnesses for the very reasons previously identified by this Chamber: the "potential benefits of the meetings are the identification and discarding of irrelevant lines of questioning; lines of further enquiry may become clear, enabling the timely investigation prior to the witness' testimony".¹⁸ Should the Prosecution be unable to meet with Defence witnesses, these objectives would be defeated.

18. Without any basis whatsoever, the Defence accuses the Prosecution of wishing to "rehearse" testimony. The Prosecution does not intend on "rehearsing" anything with Defence witnesses. Indeed the Prosecution fails to see how a "rehearsal" would materially benefit any party or witness. A "rehearsal" would allow a dishonest witness an opportunity to cover a fabrication or develop a plausible explanation for an impossible proposition during his testimony.

¹⁸ ICC-01/04-01/06-2192-Conf, para.49.

Script to be read when seeking witnesses' consent and Defence obligation to facilitate the contacts between Prosecution and Defence witnesses

19. Ordinarily the Prosecution would not consider it necessary to ask the Defence to prepare a script that it will read to its witnesses when seeking their consent to speak with the Prosecution. As set forth above, however, it is clear that the Defence has no intention of facilitating contact and it has already revealed that it spoke to one witness about its own inability to be present at any meeting (because of unavailability and the Prosecution's refusal to pay), which was then adopted by the witness as a reason to refuse to meet. In other words, the Defence has demonstrated that its approach to its witnesses negatively influences them to refuse to speak with the Prosecution. Accordingly, the Prosecution requests that the Chamber order the Defence to prepare a neutral script that it will use when asking its witnesses if they will consent to meet with the Prosecution. The Defence has itself, through the tone and content of its communications, provided sufficient justification for this request, and it is hard to see how the Defence could be in any way prejudiced by having to prepare and rely on a script for this purpose. The script should contain information to the effect that the Prosecution is entitled to meet with Defence witnesses and ask them questions prior to their testimony before the Court, subject to their consent. As the party calling the witness is prohibited from trying to influence the witness' decision as to whether or not to agree to meet the other party,¹⁹ no information outside of the script should be conveyed by the Defence representatives to the witnesses.

¹⁹ ICC-01/04-01/07-1134, Decision on a number of procedural issues raised by the Registry, 14 May 2009, para. 28.

Attendance by Defence representatives at meetings between Prosecution and Defence witnesses is not mandatory

20. The Defence's assertion that it will not countenance Defence witnesses' meetings with the Prosecution without Defence representatives' attendance, which entitlement then becomes a reason to exclude the possibility of these meetings, also disregards the Chamber's intention that meetings not be obstructed. The Defence cannot rely upon its inability to be present at *any* time as a reason why the meetings cannot occur.

21. It is not necessary, moreover, that one of the Defence lawyers themselves attend. The purpose of Defence presence is to observe the interview, not to substantively participate in it or represent the interests of the witnesses. Trial Chamber I in the *Lubanga* case explained that the Defence "is entitled to have a representative present during the meeting, unless the Chamber rules otherwise following an application of the party or participant wishing to interview the witness".²⁰ However, if the Defence team *chooses* not to attend or is unable to attend for its *own* reasons, and also chooses not to send another representative who may be available, there is no bar to the meetings occurring in the absence of the Defence.

No indemnity for the costs of the Defence representatives' attendance at the meetings is due

22. The Defence's claim that its representatives should be indemnified for their attendance at the meetings (and its apparent insistence on this as a predicate condition for the occurrence of any such meetings) is without merit. Should the Defence decide to be present, it would be its responsibility to arrange and fund its participation at the meetings. In any event, providing additional funding to the Defence for attending the meetings is not the Prosecution's duty. The Defence

²⁰ ICC-01/04-01/06-2192-Conf, paras. 47-52; ICC-01/05-01/08-813-Conf, para. 66.

enquiry as to “whether the Prosecution is prepared to offer a complete indemnity to the Defence”²¹ is therefore unfounded.

No interference with meetings

23. Further, it is not the role of the Defence to control or regulate meetings between the Prosecution and its witnesses. As observed by the Chambers of this Court, the Defence represents the interests of the Accused and not the witnesses' interests.²² The Defence cannot therefore speak on their behalf. Nevertheless, the Defence in the instant case believes it may “restrain [meetings] to the point of termination.” Should Defence witnesses consent to a meeting with the Prosecution and should the Defence choose to be present, there should not be any interference with the meeting. The Prosecution is well aware of its responsibilities and obligations with regard to any such meetings and if the Defence believes that the Prosecution is engaging in improper conduct it is free to raise the matter with the Chamber.

An order directing the Defence to provide expert-witness information and documents

24. Finally, the Defence has not yet provided the Prosecution with the requested expert witness-related documents²³ and information on the identities of persons purportedly interviewed for the expert's report. This information is necessary to question the Defence expert witnesses. The Defence failure to provide the necessary disclosure is thereby improperly frustrating the ability of the Prosecution to prepare for the examination of these witnesses. Accordingly, the Prosecution asks the Chamber to order the Defence to disclose the necessary information in a timely manner to allow time for the Prosecution to adequately prepare.

²¹ E-mail from Mr. Haynes to Mr. Iverson on 25 July at 16:58 hours (Annex F).

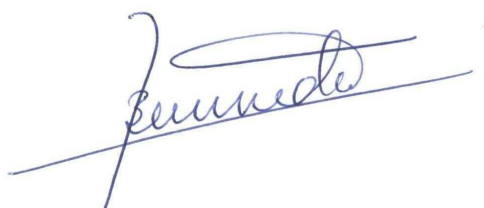
²² ICC-01/04-01/07-2491, Decision on the presence of Defence counsel during Prosecution's interview with two potential Defence witnesses, 25 October 2010, para. 9.

²³ E-mail from Ms. Bala-Gaye to Ms. Gibson on 2 August 2012 at 9:23 hours (Annex J) and e-mail from M. Gibson to Ms. Bala-Gaye on 10 August 2012 at 11:26 (Annex O).

V. Relief sought

25. For the reasons set out above, the Prosecution requests that the Chamber order:

- (i) the Defence to prepare a neutral script, which it will disclose to the Chamber and the Prosecution, to be read to the Defence witnesses when seeking their consent;
- (ii) the Defence to comply with its obligation to facilitate contacts between the Prosecution and Defence witnesses;
- (iii) that the Defence not obstruct these meetings by making themselves unavailable to attend them;
- (iv) that any costs incurred by the Defence in relation to these meetings shall be borne by the Defence;
- (v) that the Defence may not interfere in meetings that occur between the Prosecution and Defence witnesses; and
- (vi) that the Defence disclose the documents and information requested on 2 August 2012.



Fatou Bensouda, Prosecutor

Dated this 10th Day of August 2012

At The Hague, The Netherlands