

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 17/08/2012

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

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

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

A. RESPONSE TO PROSECUTION REQUEST

1. The Defence responds to the Prosecution Request¹ as follows:

(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*

2. Defense counsel are officers of the Court, and are bound by the ethical guidelines of their national bar associations and the relevant code of conduct in operation at the International Criminal Court, and have and will continue to act accordingly.

3. Practically, reading the content of a “neutral script” over the telephone to often vulnerable witnesses who are ignorant of their rights and the processes of the Chamber would prevent Defence counsel from responding to a multitude of inevitable questions, and would almost certainly end up having the opposite outcome to that sought by the Prosecution.

(ii) *the Defence to comply with its obligation to facilitate contacts between the Prosecution and Defence witnesses*

4. The Defence has no obligation to “facilitate contacts” between the Prosecution and Defence witnesses. The Chamber has ordered:²

if a party or participant intends to contact a witness called by an opposing party or participant, the consent of the witness is to be sought by the party or participant calling the witness which further has the possibility to submit an application objecting to the meeting.

¹ ICC-01/05-01/08-2260-Conf, para. 25.

² ICC-01/05-01/08-2236-Conf, para. 21.

5. The Prosecution asked the Defence to seek the consent of Witnesses 4 to 11 on its list by 27 August 2012.³ This has been done. The Prosecution's subsequent attempt to bring forward the date for the completion of this task, and thereby give the Defence only a few days to complete it, was arbitrary and unreasonable.⁴ The consent of each of those witnesses was sought and notified as soon as practicable.

(iii) that the Defence not obstruct these meetings by making themselves unavailable to attend them

6. As the Prosecution concedes, the Defence is entitled to be present at interviews between Defence witnesses and the Prosecution, absent an order to the contrary.⁵ Given the consistency of fears expressed by its witnesses, the Defence intends to exercise this right.

7. Unlike the Prosecution, the Defence is presenting its case with four team members, and is endeavouring to do so in a period of eight months as proscribed by the Chamber. Thus far, the Prosecution has sought meetings with every one of the first eleven witnesses on the Defence list, notwithstanding the fact that eight of those witnesses seek protective measures, and that the witnesses are spread across five countries in three continents. Any suggestion that Defence unavailability is a deliberate attempt to obstruct Prosecution meetings, rather than a genuine reflection of the current workload of the Defence team and its responsibilities to its client and the Chamber is either disingenuous, or simply incorrect.

(iv) that any costs incurred by the Defence in relation to these meetings shall be borne by the Defence

³ ICC-01/05-01/08-2260-Conf-AnxD

⁴ ICC-01/05-01/08-2260-Conf-AnxE

⁵ See ICC-01/05-01/08-813-Red, paras. 66-68, endorsing the approach taken by Trial Chamber I (as modified by Trial Chamber II with respect to VWU's presence), that: "the party or participant intending to call the witness may also attend the interview, unless the Chamber has, on an application, ruled otherwise."

8. This request is impractical and demonstrably unjust given the current state of the budget for Defence investigations. The cost in travel and accommodation costs alone for the Defence to attend merely the meetings requested to date would run to tens of thousands of euros. It is also inconsistent with the ICC's practice. In *Lubanga*, Trial Chamber I held:⁶

A representative of the VWU shall be present during each interview, and the defence may attend (unless the Chamber has ruled otherwise). Depending on the financial implications of any requests that are made, the Registry may have to consider providing additional funding to enable the defence to attend each of these interviews. It is conceivable that this exercise may involve unexpected and significant additional cost on the part of the defence, which is solely due to a request from the prosecution and which the defence is obliged to meet.

(v) *that the Defence may not interfere in meetings that occur between the Prosecution and Defence witnesses*

9. It is unclear what is meant by 'interfere'. Defence counsel will be unable to comply with their obligations to competently represent the interests of the client should they agree to submit Defence witnesses to unlimited questioning by an adverse party without any ability to raise objection or intervene to protect the witness as and when required.

(vi) *that the Defence disclose the documents and information requested on 2 August 2012.*

10. The Defence has disclosed documents requested by the Prosecution on a rolling basis (including those which are the subject of the August 2 request) as and when they are able, and will continue to do so in good faith.

⁶ ICC-01/04-01/06-2192-Red, para. 51.

B. ALLEGATIONS OF BAD FAITH ON THE PART OF THE DEFENCE TEAM

11. The Prosecution has asserted in a formal filing that “in the view of the Prosecution, the Defence has not acted in good faith to facilitate such meetings.”⁷

12. The Defence takes these allegations extremely seriously. They are not only misplaced, they are personally offensive and unjustified. The Prosecutor of the International Criminal Court has put her signature to a filing which levels these extremely serious allegations at the Defence team, based on nothing more than a subjective interpretation of an email from the Defence, which was sent in the spirit of collegiality and as an explanation of the realities and confines of the situation at hand.

13. As noted by former ICTY President Judge Robinson, “[c]ounsel is an officer of the court, and in judicial proceedings quite often a court must act on counsel's word, which, given as an officer of the court, is accepted as true, unless there is good reason to doubt his *bona fides*.”⁸ The Defence therefore asks, particularly given the absence of any basis for these allegations, that the Prosecution be directed to retract and refrain from making similar accusations in the present proceedings.

C. RELIEF REQUESTED

14. Given the reasons cited above, the Defence respectfully requests that the Chamber:

DISMISS the Prosecution Request in its entirety.

⁷ ICC-01/05-01/08-2260-Conf, para. 2.

⁸ *Prosecutor v. Aleksovski* (Separate Opinion of Judge Patrick Robinson) IT-95-14/1 (30 May 2001), para. 4.

The whole, respectfully submitted.



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Co- Counsel

Done on the 17th of August 2012
At The Hague, The Netherlands