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

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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

Defence Motion on Prosecution contact with its witnesses

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

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for the Victims

Paolina Massida

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

A. BACKGROUND

1. Consistent with the practice at the International Criminal Court,¹ a party to the present proceedings is not entitled to contact directly the witnesses of the opposing party.

2. In September 2012, Trial Chamber III ("the Trial Chamber") set out the obligations incumbent on the Prosecution should it wish to be in contact with Defence witnesses, in its *Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure"* ("Protocol").²

3. Notably, the Prosecution was not entitled to contact Defence witnesses directly, and the Defence was entitled to "be present" or to "attend" any interviews to which the Defence witnesses consented.³

4. On a rolling basis throughout the trial, the Prosecution contacted the Defence with requests to meet each of the Defence witness prior to their testimony. The Defence, or VWU, then contacted the witnesses in order to determine whether they consented to such interviews. Each of the Defence witnesses, apart from CAR-D04-PPPP-0060, declined to be interviewed. The Prosecution was informed accordingly.⁴

¹ See for example, ICC-01/05-01/08-813-Conf, para. 68, and ICC-01/09-02/11-469.

² ICC-01/05-01/08-2293.

³ ICC-01/05-01/08-2293, para. 32.

⁴ See, email Eric Iverson to the Defence 03 August 2012 16:02: "Meeting with Defence Military Expert."; Email Defence to Eric Iverson 05 August 2012 23:19: "RE: Meeting with Defence Military Expert"; Email Eric Iverson to the Defence 06 August 2012 18:15: "RE: Meeting with Defence Military Expert"; Email Defence to Eric Iverson 07 August 2012 12:41: "RE: Meeting with Defence Military Expert"; Email Horejah Bala-Gaye to the Defence 05 September 2012 10:54: "Request for meeting with D-60 prior to his testimony"; Email Defence to Horejah Bala-Gaye, September 05, 2012 12:08: "RE: Request for meeting with D-60 prior to his testimony"; Email Horejah Bala-Gaye to Defence, September 04, 2012 12:59: "Request to meet witnesses"; Email Horejah Bala-Gaye to Defence, 12 September 2012 15:49: "Request to meet witnesses"; Email Defence to Horejah Bala-Gaye, September 14, 2012 11:40: "Re: Request to meet witnesses."; Email Horejah Bala-Gaye to the Defence, 14 September 2012 17:01: "RE: Request to meet witnesses"; Email Defence to Horeja Bala-Gaye, September 19, 2012 9:31: "RE: Request to meet witnesses"; Email Horejah Bala-Gaye to the Defence, September 19, 2012 4:54: "RE: Request to meet witnesses"; Email Horejah Bala-Gaye to the Defence, 27 September 2012 16:25: "RE: Request to meet witnesses"; Email Defence to Horejah Bala-Gaye,

5. On 3 February 2014, the Defence in the present case received disclosure of a number of decisions from Case ICC-01/05-01/13 ("Article 70 Case"). This disclosure included a number of revelations concerning the Prosecution's right to contact with Defence witnesses in the present proceedings, namely:

(a) on 8 May 2013, the Single Judge in the Article 70 Case "authorised the Prosecutor to contact and interview Defence witnesses for the limited purposes of the investigation".⁵

(b) At some point after 8 May 2013,⁶ the Registry filed submissions before the Single Judge in the Article 70 Case noting that VWU:

"because of its neutrality requirement... should not be requested to facilitate or otherwise assist the Prosecution in contacting defence witnesses **without informing the Defence** of VWU's operations pertaining to those witnesses" as required by the Protocol governing contact with witnesses established by Trial Chamber III".

September 28, 2012 12:56: "RE: Request to meet witnesses"; Email Horejah Bala-Gaye to the Defence, September 28, 2012 6:18: "RE: Request to meet witnesses"; Email Horejah Bala-Gaye to the Defence, 04 October 2012 10:29: "RE: Request to meet witnesses"; Email Defence to Horejah Bala-Gaye, 05 October 2012 06:45: "RE: Request to meet witnesses"; Email Eric Iverson to the Defence, 23 July 2012 18:21: "Prosecution Request to Contact Defence Witnesses"; Email Defence to Eric Iverson, 03 August 2012 16:35: "RE: Prosecution Request to Contact Defence Witnesses"; Email Defence to Eric Iverson, 14 August 2012 16:09: "RE: Prosecution Request to Contact Defence Witnesses"; Email Horejah Bala-Gaye to the Defence, 08 February 2013 17:16: "Request to meet Defence witnesses"; "; Email Horejah Bala-Gaye to the Defence, 19 February 2013 10:13: "RE: Request to meet Defence witnesses"; Email Defence to Horejah Bala-Gaye, 19 February 2013 16:39: "RE: Request to meet Defence witnesses"; Email Horejah Bala-Gaye to the Defence, 20 March 2013 10:37: "Request to meet upcoming Defence witnesses"; Email Defence to Horejah Bala-Gaye, 25 March 2013 11:35: "RE: Request to meet upcoming Defence witnesses"; Email Horejah Bala-Gaye to the Defence, 30 May 2013 12:18: "Request to meet upcoming Defence witnesses"; Email Lejla Komarica to the Defence, Jun 4, 2013 at 5:21: "RE: FW: Request to meet upcoming Defence witnesses"; Email Horejah Bala-Gaye to the Defence, 20 September 2013 11:22: "Request to meet remaining Defence witnesses"; Email Defence to Horejah Bala-Gaye, 25 September 2013 15:55: "RE: Request to meet remaining Defence witnesses".

⁵ ICC-01/05-50, page 3.

⁶ ICC-01/05-50, page 4.

(c) On 27 May 2013, the Single Judge in the Article 70 Case ruled that he had made an “exception” to this Trial Chamber’s Protocol, finding that:⁷

As it should have been clear, having found good reasons supporting the Prosecutor’s request **to contact defence witnesses without prior notice to the Defence**, authorisation to such direct contact for the limited purposes of the investigation evoked in the Prosecutor’s Request has been granted by the Single Judge and thereby an exception to the operation of the Protocol has been created. Accordingly, the Registry, as service provider of the Court, should duly take note of such exception and provide the Prosecutor with all the assistance which is necessary and appropriate for that exception to be applied and to function smoothly.

(d) on 10 October 2013, the Single Judge in the Article 70 Case ordered VWU to give the Prosecution “all available telephone contact information for all 62 Defence witnesses listed on [the Defence list of witnesses]”.⁸

6. As such, the Defence for Mr. Bemba now finds itself in a position where the phone numbers of each of its witnesses; be they victims of crimes; former rebels; expert witnesses; or soldiers and commanders actively serving in extremely sensitive operations; are in the possession of the Prosecution, who believes itself to have an unfettered right to contact each of them and “investigate” whether they are complicit in an alleged bribery scheme. Accordingly, the Defence files the following submissions.

B. APPLICABLE LAW

7. Article 64(1) of the Statute of the International Criminal Court (“Statute”) tasks the Trial Chamber with ensuring that a trial is fair and expeditious and conducted with “due regard for the protection of victims and witnesses.”

⁷ ICC-01/05-50, para. 11.

⁸ ICC-01/05-62-Red, page 5.

8. Concerning the Prosecution contacting Defence witnesses, Trial Chamber I has previously held that:⁹

[T]he prosecution must exercise great caution in its investigations; it must ensure that by its actions it does not deter or destabilise any of the defence witnesses, and that it does not impair the opportunity for the Chamber to consider all the relevant and available evidence. Therefore, it is critical that it demonstrates circumspection and caution in taking [...] investigative steps as regards the defence witnesses.

9. In addition, the Prosecution must disclose any and all statements of Defence witnesses in its possession. The jurisprudence of the Court is consistent that statements given by Defence witnesses to the Prosecution are properly disclosable under Rule 77. In the *Lubanga* case, Trial Chamber I held generally that information that undermines or supports the evidence or the credibility of proposed defence witnesses falls within the scope of Rule 77 of the Rules.¹⁰ Most recently, Trial Chamber in the *Ruto and Sang* case held that:¹¹

the Chamber considers that the previous statements and any other material related to the two Defence witnesses are material to the preparation of the Defence. Accordingly, the material is subject to disclosure under Rule 77 of the Rules.

10. This position mirrors that at the international criminal tribunals, where Chambers have consistently required the Prosecution to disclose any statements of Defence witnesses in their possession. The Trial Chambers in *Karemera et al*, *Kamuhanda*, *Zigiranyirazo* and the *Ngirabatware* cases, for example, were explicit that where the prosecution interviewed defence witnesses, their statements were material to the defence and inspection should be allowed.¹²

⁹ ICC-01/04-01/06-2192-Red, para. 60.

¹⁰ *Lubanga* case, Trial Chamber: *Decision on the Scope of the Prosecution's Disclosure Obligations as Regards Defence Witnesses* (12 November 2010) at para. 18.

¹¹ ICC-01/09-01/11-840-Red, para. 11.

¹² *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at paras. 14-16; *Prosecutor v Kamuhanda*, No. ICTR-

C. SUBMISSIONS

11. The Defence has no information that the Prosecution has taken advantage of the “exception” to the Trial Chamber’s Protocol and contacted its witnesses directly. The Defence has received no disclosure of any interview notes, statements or transcripts of any interviews between the Prosecution and its witnesses. Given that this material is undoubtedly disclosable under Rule 77, the Defence must assume that no such contact has taken place.

12. [REDACTED]¹³

[REDACTED].

13. In effect, however, the Single Judge has effectively quashed a standing order from this Trial Chamber, and has done so without being privy to the information which was before the Trial Chamber when it devised the Protocol. Throughout the course of these proceedings, the Chamber heard detailed submissions from the parties, and reviewed the assessments and recommendations of VWU as regards the vulnerability and protective measures necessary for particular witnesses. With all of this confidential (and often *ex parte*) information at its disposal, the Trial Chamber determined that in all the circumstances of the case, a party was not permitted to contact another party’s witnesses directly, that the witness must consent to any contact, and that the calling party had the right to be present during any subsequent interviews or exchanges.

99-54A-T, *Decision on Kamuhanda’s Motion for Disclosure of Witness Statements and Sanction of the Prosecutor* (29 August 2002) at para. 27; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007) at para. 11; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence [...] Second Motion for Inspection of Materials in the Prosecution’s Custody* (27 September 2011) at para. 42; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007).

¹³ [REDACTED].

14. Without this information before him, the Single Judge ordered a “variation” to the Protocol, effectively overriding the Trial Chamber’s orders concerning contact with witnesses. No legal or statutory basis was given for the Single Judge of the Pre-Trial Chamber creating an exception to an order rendered by a Trial Chamber, particularly when it is the Trial Chamber which is explicitly tasked under Article 64(1) with ensuring that the trial is conducted with “due regard for the protection of victims and witnesses”. It cannot be the case that the desire of the Prosecution to investigate in an attempt to build a case under Article 70 necessarily and automatically trumps the orders and safeguards put in place by a Trial Chamber, particularly as concerns the safety and dignity of witnesses.

15. To this end, phone calls from the Office of the Prosecutor in The Hague “investigating” whether witnesses lied in their testimony is likely to cause confusion and fear on the part of many of the witnesses who had understood that their association with the Court was over. In accordance with the Protocol, these witnesses have also previously been informed that they had no obligation to meet with or talk to the Prosecution, and that any contact would not occur without their consent. This is precisely the kind of “destabilisation” that Trial Chamber I in *Lubanga* warned against, when advocating great caution by the Prosecution in contacting Defence witnesses.¹⁴ Simply because a proposed step has an investigative purpose cannot mean that the Prosecution should be permitted to take it.

16. Nor can any sensible distinction be drawn on the basis that the Defence witnesses have now concluded their testimony. On this point the Defence notes that on 14 November 2013, the Prosecution refused to provide the Defence with the contact details of two of its own witnesses, noting as follows: “We kindly note that, since the beginning of this case, the practice has been that contact details of witnesses were not provided to the other party, **unless so authorised by the**

¹⁴ ICC-01/04-01/06-2192-Red, para. 60.

Chamber.¹⁵ Moreover, with the greatest of respect to the Single Judge, to suggest that such interviews are or can be limited to the purpose of the Article 70 investigation is to make a wholly false distinction. The sole purpose of the interviews is to establish that witnesses gave false evidence in these proceedings, and the Prosecution has already evinced a clear intention to employ the fruits of the Article 70 investigation herein. The matter, therefore, falls squarely within the purview of this Trial Chamber and the aforementioned protocols.

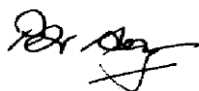
D. RELIEF REQUESTED

17. The Defence requests that the Trial Chamber

ORDER that the Prosecution refrain from contacting any Defence witnesses outside the procedure set by the Trial Chamber in its *Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure"*¹⁶; and

ORDER that if such contact has occurred, the Prosecution immediately disclose all interview notes, statements, or transcripts of interview generated during the course of this contact.

The whole respectfully submitted:



Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

¹⁵ Email Shkelzen Zeneli to the Defence, 14 November 2013 17:00: "RE: Request from the Defence".

¹⁶ ICC-01/05-01/08-2293

The Hague, The Netherlands

12 February 2014