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**International
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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 Redacted Document

**Public Redacted Version of “Prosecution’s Response to “Defence Motion on
Prosecution contact with its witnesses”, 20 February 2014, ICC-01/05-01/08-2990-
Conf”**

Source: Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the "Defence Motion on Prosecution contact with its witnesses", which requests two orders from the Trial Chamber III ("Chamber") for: (i) the "[p]rosecution to refrain from contacting any Defence witnesses outside the procedure set by the Trial Chamber"; and (ii) "if such contact has occurred, the Prosecution immediately disclose all interview notes, statements, or transcripts of interview" ("Defence Motion").¹

2. If granted, the requested orders will impede the Prosecution's ability to further investigate crimes against the administration of justice under Article 70 of the Rome Statute ("Statute") in accordance with its statutory duty. The Prosecution's role, distinct from that of the Defence, requires that it engages adequate measures and resources to protect persons - including Defence witnesses - in the course of its investigations. The Defence Motion misstates the purpose behind the Chamber's "Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure"" ("Witness Contact Protocol")² and mistakenly asserts a fact-specific link to witness protection information that was unavailable to the Pre-Trial Chamber II ("PTC II").³ Thus, the Defence wrongly contends that the order of PTC II's Single Judge, which grants an exception to the Witness Contact Protocol and authorises the Prosecution to contact Defence witnesses solely for the limited purpose of its Article 70 investigation,⁴ "has effectively quashed a standing order from this Trial Chamber."⁵

¹ ICC-01/05-01/08-2971-Conf, Defence Motion on Prosecution contact with its witnesses, 12 February 2014, para. 17.

² ICC-01/05-01/08-2293-Conf, Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", 4 September 2012.

³ ICC-01/05-01/08-2971-Conf, para. 13.

⁴ ICC-01/05-01/08-2971-Conf, para. 5 citing ICC-01/05-50, page 3 and para. 11.

⁵ ICC-01/05-01/08-2971-Conf, para. 13.

3. The Prosecution chose not to contact Defence witnesses throughout the Defence case at trial despite having authorisation to question some Defence witnesses for a limited purpose.⁶ Therefore, the Defence request for disclosure of material under Rule 77 of the Rules of Procedure and Evidence (“Rules”) for its preparation relates to post-testimony documents of any interviews with Defence witnesses within the narrow confines of the Article 70 investigation.⁷ The disclosure of any witness related Article 70 material is intrinsically linked to the Chamber’s decision on the relevance of any such evidence for the current trial proceedings. This information requested is either incriminating or evidence intended to be used by the Prosecution, should it seek to do so.⁸ Nevertheless, the Prosecution is ready to disclose this material, should the Chamber decide otherwise.⁹ The Defence request for disclosure of Article 70 material conflicts with its allegations that the Prosecution is attempting to “contaminate” this Chamber with Article 70 evidence¹⁰ as it is fully aware that the E-Court Protocol requires communication of all disclosed materials to the Chamber, which can thereafter access this information.¹¹ The Defence has similarly rejected introduction of any Article 70 evidence in the present proceedings.¹²

II. Request for Confidentiality

4. Pursuant to Regulation 23(2)*bis* of the Regulations of the Court, the Prosecution files this response as “Confidential”, as it refers to the Defence Motion and other decisions of the same classification.

⁶ ICC-01/05-44-Red, para. 38. [Emphasis added]

⁷ ICC-01/05-01/08-2971-Conf, paras. 11 and 16.

⁸ The Prosecution has sought to introduce some of this material: ICC-01/05-01/08-2910, Prosecution’s Application to Submit Additional Evidence, 29 November 2013.

⁹ See, ICC-01/05-01/08-2910, Prosecution’s Application to Submit Additional Evidence, 29 November 2013.

¹⁰ ICC-01/05-01/08-2945-Conf, Defence Request for Interim Relief, 24 January 2014.

¹¹ ICC-01/05-01/08-55-AnxA, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008.

¹² ICC-01/05-01/08-2937-Conf, Response to the Prosecution’s application to submit additional evidence, 15 January 2014; and ICC-01/05-01/08-2945-Conf, Defence Request for Interim Relief, 24 January 2014.

III. Procedural History

5. On 10 August 2012, the Prosecution submitted its “Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure” requesting the Chamber to, *inter alia*, order the Defence to comply with its obligation to facilitate contact between the Prosecution and Defence witnesses.¹³

6. On 4 September 2012, the Chamber issued its Witness Contact Protocol wherein it ruled that “the Chamber considers it sufficient to stress the obligation incumbent on the calling party not to try to influence the witness's decision in any way when seeking consent. More specifically, the information to be provided by the calling party to the witness should be limited to explaining: (i) the nature of the interview; (ii) the fact that such interviews are accepted common practice; and (iii) the requirement of the witness's consent. The calling party should raise no other issues with the witness that could affect his or her decision to consent or not to participate in such a meeting.”¹⁴

7. [REDACTED],¹⁵ [REDACTED].¹⁶

8. [REDACTED].¹⁷

9. On 3 May 2013, the Prosecution submitted its “Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70” to PTC II wherein it repeated its request to, *inter alia*, contact and interview Defence witnesses for the limited purposes of the investigation of offenses against the administration of justice

¹³ ICC-01/05-01/08-2260-Conf, Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure, 10 August 2012, paras. 1 and 25.

¹⁴ ICC-01/05-01/08-2293-Conf, Decision on the “Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure”, 4 September 2012, paras. 16 and 37.

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

without prejudice to the limitations set in the Witness Contact Protocol.¹⁸ The Prosecution noted that as “the Chamber instructed the Prosecution to bring the matter to the Pre-Trial Chamber. Implicitly, therefore, the Chamber has given the Pre-Trial Chamber the authority to decide on this matter. Further, the Pre-Trial Chamber has the authority ...” to rule on the Prosecution’s requests.¹⁹

10. On 8 May 2013, the Single Judge of PTC II issued the “Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70"", granting authorisation for “the Prosecutor to contact and interview Defence witnesses for the limited purposes of the investigation evoked in the Prosecutor's Request, *without prejudice to all the limitations set forth in the protocol for contact with witnesses established by Trial Chamber III, which remain otherwise applicable and in force.*”²⁰

IV. Submissions

11. Pursuant to Articles 54 and 68 of the Statute, the Prosecution has a duty to take necessary measures to protect any persons, including Defence witnesses, in the course of its investigations and prosecutions.²¹ Indeed this Chamber has recognised that witnesses “are the property neither of the Prosecution nor of the Defence and [...] should therefore not be considered as witnesses of either party, but as witnesses of the Court.”²² The Prosecution’s obligations and responsibilities are distinct from

¹⁸ ICC- 01/05-44-Conf-Exp, Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70, 3 May 2013, paras. 38, 39 and 41(d), reclassified as public in ICC-01/05-44-Red, Public Redacted version of “Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70”, 12 February 2014.

¹⁹ *Ibid.*, para. 39.

²⁰ ICC-01/05-46-Conf-Exp, Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70", 8 May 2013, page 8, reclassified as “public” on 4 February 2014. [Emphasis added]

²¹ See, also, Regulation 36(1) of the Regulations of the Office of the Prosecutor which reaffirms that the Office “... shall give due consideration to his or her safety and well-being, including all aspects relevant to the risks of re-traumatisation.”

²² See, ICC-01/05-01/08-2293-Conf, Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure”, 4 September 2012, para. 23 citing Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 26.

that of the Defence. As Trial Chamber I noted, “[t]he overall positions of the prosecution and defence are not the same – there are self-evident differences in their roles, in the length of their respective investigative involvement in the case and in the resources available to each of them”.²³ The Defence Motion fails to demonstrate how the mere pursuit of an investigation by the Prosecution in accordance with its statutory obligations under Articles 54, 68, and 70 of the Statute would result in “destabilisation” or 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.”²⁴ If the Defence made representations to witnesses that their association with the Court was over without explaining their obligation to tell the truth and the possible consequences flowing from false testimony, then it wrongly informed these witnesses.

12. The Witness Contact Protocol, and other jurisprudence referred to by the Defence on witness contact,²⁵ regulates “prior contact between a party or a participant and the *witnesses to be called* by the other party or a participant.”²⁶ In regulating witness contact with the opposing party *prior* to testimony, Chambers were concerned with the effective management of trial proceedings and the determination of the truth.²⁷ For instance, Trial Chamber I noted that “irrelevant lines of questioning may be identified and discarded [and] lines of further enquiry may become clear, enabling their timely investigation prior to the witness giving evidence”;²⁸ whilst this Chamber recognised the “particular benefit such meetings may have for the interviewing party in cases where the disclosed summaries of the issues on which the witnesses called by the other party will testify provide insufficient detail for the interviewing party to effectively and efficiently carry out

²³ ICC-01/04-01/06-2192-Red, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, para. 54.

²⁴ ICC-01/05-01/08-2971-Conf, para. 15.

²⁵ ICC-01/05-01/08-2971-Conf, paras. 1 and 8.

²⁶ ICC-01/05-01/08-2293-Conf, para. 7. [Emphasis added]

²⁷ ICC-01/05-01/08-2293-Conf, para. 8.

²⁸ See, ICC-01/05-01/08-2293-Conf, para. 8; and ICC-01/04-01/06-2192-Red, para. 49.

any investigations”,²⁹ the focus was to ensure an efficient trial presentation and the effective examination of the truthfulness of trial testimony.

13. Contrary to the Defence assertion, the Witness Contact Protocol was not based on specific concerns about “the vulnerability and protective measures necessary for particular witnesses.”³⁰ Further, it is not incidental to any protective measures put in place for Defence witnesses. In fact, the protocol was issued during the testimony of the second Defence witness and before the Chamber had made *any* decision on protective measures for specific Defence witnesses with the benefit of recommendations from the Victims and Witnesses Unit.³¹ Therefore, contrary to the factual premise underpinning the Defence argument,³² the Single Judge of PTC II was not deprived of material information guiding this Chamber’s Witness Contact Protocol.

14. [REDACTED].³³ [REDACTED].³⁴

15. Contrary to the Defence’s claim that, “[i]n effect, however, the Single Judge has effectively quashed a standing order from this Trial Chamber”,³⁵ the Single Judge expressly observed that there was “...no need for the Chamber to “vary” the order issued by Trial Chamber III concerning contact with witnesses, nor, consequently, to determine whether such variation may or may not be in the purview of the Chamber’s powers.”³⁶ The Single Judge exercised his separate authority to grant an exception to the Witness Contact Protocol, thereby authorising the Prosecution to

²⁹ ICC-01/05-01/08-2293-Conf, para. 9.

³⁰ ICC-01/05-01/08-2971-Conf, para. 13.

³¹ The first decision on protective measures for Defence witnesses was issued on 19 September 2012 in ICC-01/05-01/08-T-248-CONF-ENG ET, page 2, line 1 to page 4, line 20.

³² See, ICC-01/05-01/08-2971-Conf, para. 13.

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ ICC-01/05-01/08-2971-Conf, para. 13. [Emphasis added]

³⁶ ICC-01/05-46-Conf-Exp, Decision on the Prosecutor’s “Request for judicial assistance to obtain evidence for investigation under Article 70”, 8 May 2013, reclassified as “public” on 4 February 2014 (ICC-01/05-46), para. 12.

contact some Defence witnesses for the limited purpose of conducting Article 70 investigations without prior notification to the Defence. By requesting that the Prosecution be ordered to refrain from contacting any Defence witnesses outside the Witness Contact Protocol,³⁷ the Defence Motion, in effect, seeks to impede the Prosecution's investigation into alleged offences under the administration of justice involving Defence witnesses. Furthermore, the charges against the suspects in the Article 70 case involve Defence witnesses in this case and former members of the Defence. By requiring that contact with these witnesses should be made following the Witness Contact Protocol, the Defence is putting the witnesses in a very difficult position and creating likely confusion in their minds as some of the witnesses that were allegedly corrupted met with former lead counsel and former case manager together with current members of the Defence team.³⁸

16. The Defence Motion states that, "[e]ach of the Defence witnesses, apart from CAR-D04-PPPP-0060, declined to be interviewed" by the Prosecution.³⁹ In the Witness Contact Protocol, this Chamber agreed with Trial Chamber II that "the [witness's] consent must be given voluntarily. The party calling the witness is prohibited from trying to influence the witness's decision as to whether or not to agree to be interviewed by Counsel of another party."⁴⁰ In response to the Prosecution's submissions on the manner in which the Defence should seek consent of its witnesses to meet with the Prosecution,⁴¹ the Defence asserted that "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

³⁷ ICC-01/05-01/08-2971-Conf, para. 17.

³⁸ See, for example, Defence submissions on possible confusion regarding the involvement of former and current members of the Defence team in relation to the Article 70 investigation or proceedings: ICC-01/05-01/08-2957, Defence Request for Withdrawal or Clarification of a Filing, 31 January 2014, para. 4: "...the public is not in a position to differentiate between the current and the former composition of the Defence team, *nor to ascertain whether any members of the current team are the subject of the Article 70 proceedings.*" [Emphasis added]

³⁹ ICC-01/05-01/08-2971-Conf, para. 4.

⁴⁰ ICC-01/05-01/08-2293-Conf, para. 15, citing ICC-01/04-01/07-1134, Decision on a number of procedural issues raised by the Registry, 14 May 2009, para. 28.

⁴¹ ICC-01/05-01/08-2260-Conf.

International Criminal Court, and *have and will continue to act accordingly*.”⁴² However, as the Article 70 proceedings show, there is a reasonable basis to believe that these ideals have not always been met. Should the Chamber allow, the Prosecution stands ready to provide evidence showing former lead Counsel dissuaded witnesses from meeting with the Prosecution. This information is contained in a report pending admission as additional evidence.⁴³

17. The Prosecution has discharged its on-going obligation to disclose Rule 77 information throughout the course of the proceedings. For example, it disclosed prior interview documents of Defence witnesses [REDACTED] sufficiently in advance of their testimonies to enable the Defence to prepare.⁴⁴ The decision of PTC II’s Single Judge to grant authorisation was “for the *specific and limited purposes* of the investigation into the scheme alleged in her Request.”⁴⁵ The Prosecution did not contact any Defence witness prior to the close of the Defence case. Therefore, any such contact would not only be *post-testimony*, but would be limited to the Article 70 investigation.

18. Currently, Article 70 material has not been provided to the Chamber for the determination of the charges in this case. The Defence rejects any attempt to put Article 70 evidence before the Chamber arguing possible “contamination”,⁴⁶ yet seeks disclosure of Article 70 evidence that will be notified and available to the Chamber in accordance with the E-Court Protocol.⁴⁷ The disclosure of any witness

⁴² ICC-01/05-01/08-2268-Conf, Defence Response to ‘Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure’, 17 August 2012, para. 2, reclassified as “public” on 15 October 2012. [Emphasis added]

⁴³ ICC-01/05-01/08-2910, Prosecution’s Application to Submit Additional Evidence, 29 November 2013.

⁴⁴ See, for example, ICC-01/05-01/08-2298+Conf-AnxA, Prosecution’s Communication of Rule 77 Evidence Disclosed to the Defence on 6 September 2012, 6 September 2012.

⁴⁵ ICC-01/05-46-Conf-Exp, Decision on the Prosecutor’s “Request for judicial assistance to obtain evidence for investigation under Article 70”, 8 May 2013, reclassified as “public” on 4 February 2014 (ICC-01/05-46), para. 12. [Emphasis added]

⁴⁶ ICC-01/05-01/08-2945-Conf, Defence Request for Interim Relief, 24 January 2014, para. 58.

⁴⁷ ICC-01/05-01/08-55-AnxA, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008.

related Article 70 material is intrinsically linked to the Chamber's decision on the relevance of any such evidence for the current trial proceedings. The Prosecution stands ready to disclose this material, should the Chamber decide otherwise.

V. Relief Sought

19. For the reasons set out above, the Prosecution respectfully requests the Chamber to reject the Defence Motion.



Fatou Bensouda, Prosecutor

Dated this 6th Day of March 2014

At The Hague, The Netherlands