

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 16/05/2013

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 full protective measures for Witness D04-13

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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A. BACKGROUND

1. On 24 February 2012, Trial Chamber III ("the Chamber") rendered its *Decision on defence disclosure and related issues*, which ordered the Defence to file "if applicable, any request for in-court protective measures stating the legal and factual basis for such a request."

2. On 24 May 2012, the Chamber rendered its *Decision on the starting date for the presentation of defence evidence and related issues*, in which it ordered the Defence to "provide the Prosecution, legal representatives and the Chamber with the complete identity of its prospective witnesses, their anticipated order of appearance, the estimated length of questioning for each witness as well as any requests for in – court protective measures as soon as practicable".¹

3. On 13 July 2012, the Defence filed its *Defence Request for Protective Measures*,² ("First Defence Request") in which it asked for in-court protective measures for a number of its witnesses, including Witness D04-13.³ The Defence argued that the "DRC Witnesses", including Witness D04-13, have expressed fears "that they or their families will be the subject of harassment, subjected to pressure, or that they will be removed from their posts, transferred to areas of ongoing military conflict, or detained in order to prevent their testimony on behalf of the Defence".⁴ It was submitted that these witnesses would be viewed by the present regime and army in the DRC as "traitors", due to the regime's "interest in the continued detention and ultimate conviction of the accused".⁵ On the basis of these fears, the Defence requested that the Chamber grant in-court protective measures for the DRC Witnesses, including Witness D04-13.

¹ICC-01/05-01/08-2221, pp.8-9 (emphasis added).

² ICC-01/05-01/08-2244-Conf

³ ICC-01/05-01/08-2244-Conf, para. 45.

⁴ ICC-01/05-01/08-2244-Conf, para. 21.

⁵ ICC-01/05-01/08-2244-Conf, paras. 23-24.

4. On 15 May 2013, the Chamber rendered its *Decision on the order of appearance of witnesses to be called by the Defence following Witness D04-56*,⁶ in which it approved an estimated schedule listing Witness D04-13 as the next witness to testify in the present proceedings.

B. APPLICABLE LAW

5. Article 67(1)(e) of the Rome Statute ("the Statute") safeguards the right of the accused "to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

6. As regards protective measures for witnesses, Article 68(1) provides as follows:

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 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.

7. Together with Article 64(2) of the Statute, and Rules 87 and 88 of the Rules of Procedure and Evidence ("the Rules"), the Chamber is authorised to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, particular including victims of sexual violence, and to facilitate the testimony of vulnerable witnesses and those who are particularly at risk, while at the same time preserving the Accused's right to a fair and public trial.

⁶ ICC-01/05-01/08-2630.

8. In the present case, the Chamber has adopted the following approach to the granting of requests for protective measures:⁷

...protective measures pursuant to Article 68(1) and (2) of the Statute and Rules 87 and 88 of the Rules may be granted by the Chamber on a case-by-case basis, where the Chamber is satisfied that they are not prejudicial to, or inconsistent with, the accused's right to a fair and impartial trial. It can therefore not be said that protective measures granted for witnesses who are called to testify are, in principle, contrary to the fundamental right of the accused to a fair and public trial.

Balancing its duty to respect the principle of publicity and its obligation to protect victims and witnesses, **the Chamber considers that protective measures such as image and voice distortion and the assignment of pseudonyms are generally non-intrusive measures in cases where a witness could be at risk on the account of their testimony at the Court.** These measures are also intended as well to protect the physical and psychological well-being of witnesses at risk, and avoiding unnecessary public exposure of witnesses. **Such in-court protective measures impede the public's understanding of the case to a very limited extent** because the public is still able to follow the proceedings and the substance of the testimony of witnesses to whom protective measures are granted. These measures will sometimes need to be combined with limited private session testimony, in order not to defeat their purpose and to ensure effective protection of the identities of the witnesses concerned.

C. SUBMISSIONS

9. The Defence notes the Chamber's previous ruling, that "the measure of concealing the witness's identity should, under normal circumstances, be sufficient protection to avoid security risks".⁸ However, in certain circumstances, the Chamber has previously granted full in-court protective measures in these proceedings when warranted.⁹

⁷See, for example, ICC-01/05-01/08-1774-Conf, paras.11-12.

⁸ICC-01/05-01/08-2160-Conf, para. 11.

⁹ See, for example, ICC-01/05-01/08-2160-Conf. See also ICC-01/05-01/08-2514-Conf

10. The Defence submits that given the particular circumstances of Witness D04-13, the granting of full protective measures is necessary and proportionate, and will not impact on the fairness of the proceedings.

11. Witness D04-13 is a witness of significant importance to the present proceedings, [REDACTED] the *Mouvement de Liberation du Congo* ("MLC") during the intervention in the Central African Republic ("CAR") during 2002-2003.¹⁰ He is in a unique position to inform the Chamber of the ability of the MLC troops in the CAR [REDACTED] for which Mr. Bemba has been charged. As a result of this unique position, however, and the detailed testimony which the Defence will seek to elicit, it will be impossible for the witness to give testimony in open session without immediately revealing his status and role within the events in question. The people along whom he worked, and the tasks he was performing are essential to his testimony, but will also immediately betray his identity to the wider public.

12. Secondly, as indicated in the First Defence Request, Witness D04-13 is currently serving as part of the *Forces Armées de la République Démocratique du Congo* ("FARDC"). The Defence has been informed that the witness is [REDACTED]
[REDACTED] In this context, the Defence submits that due to the extremely sensitive and precarious nature of this work, Witness D04-13 is exposed to increased risk should it be known within the military intelligence hierarchy that he is testifying in a manner which exonerates the accused, given Mr. Bemba's designation as a prominent political adversary of the current regime. This risk should be viewed against a background of it being publicly known that the case of *The Prosecutor v. Jean-Pierre Bemba* before the ICC has now entered the phase of the presentation of Defence evidence. Witnesses currently residing in the DRC have consistently informed the Defence of their belief

¹⁰ See updated summary of the testimony of Witness D04-13, CAR-D04-0004-0043, disclosed to the parties on 14 May 2013.

that they are cooperating with the Defence at great personal risk to themselves and their families on the basis that Mr. Bemba is a political adversary of the current regime in place in the DRC, and the Chamber has heard evidence of direct threats made against other witnesses from the DRC by the same military hierarchy.¹¹

13. Witness D04-13 has similarly informed the Defence of his fears [REDACTED] should his identity as a Defence witness become known. As such, the provision of full in-court protective measures will allow Witness D04-13 to be able to continue to work [REDACTED] without fearing for his safety and worrying about acts of retaliation [REDACTED] as a result of the content of his testimony. While not wishing to pre-empt any report or conclusions from VWU, the Defence notes that in similar circumstances VWU has recommended that keeping a Defence witness' identity and collaboration with the Defence known to a limited number of persons "would only benefit the overall security strategy of the witness."¹² The Defence finally notes that Witness D04-13 consents to testifying under protective measures in the present case.

14. For the above reasons, the Defence submits that Witness D04-13 would face objectively justifiable risks as a result of giving testimony on behalf of the Defence, and as such the Defence request for full protective measures in the particular circumstances is necessary and proportionate. Moreover, in terms of fairness of the proceedings, the Chamber has previously held:¹³

In terms of the fairness of proceedings, the Chamber stresses that the protective measures sought protect the witness's identity solely with regard to the general public and do not deny the prosecution or the legal representatives' knowledge of the witness's identity. Furthermore, the prosecution and the legal representatives of victims will be able to listen to, see and question the witness... As

¹¹ See, for example, ICC-01/05-01/08-T-271-CONF-ENG ET 20-11-2012, p. 26-38.

¹² ICC-01/05-01/08-2514-Conf, para. 6.

¹³ ICC-01/05-01/08-2514-Conf, para. 17.

such, the use of full closed session will not be prejudicial to a fair trial.

D. RELIEF REQUESTED

15. Given the reasons set out above, the Defence respectfully requests that the Chamber:

ORDER the provision of full protective measures for Witness D04-13 and authorise this witness to give his testimony entirely in closed session.

The whole respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 16th of May 2013
At The Hague, The Netherlands