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

Date: 23/01/2013

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

Motion for Full Protective Measures for Witness D-15

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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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

A. BACKGROUND

1. On 9 January 2013, by way of email, the Defence informed the Chamber that Witness D-15 had requested full protective measures for his testimony before the Chamber. Namely, "this witness has requested that his testimony be conducted entirely in closed session."¹

2. On 21 January 2013, the Chamber informed the Defence by way of email that:²

In relation to the defence's request to hear the witness's testimony in closed session, the Chamber instructs the defence to formalise its request through a formal filing in accordance with Regulation 23 of the Regulations of the Court. This filing shall be submitted by 16.00 on Wednesday, 23 January 2013 and the prosecution shall submit its observations pursuant to Rule 87(2) of the Rules, if any, by 16.00 on Thursday, 24 January 2013.

3. Pursuant to that order, the Defence files the current request for protective measures for Witness D-15.

B. APPLICABLE LAW

4. 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."

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

The Court shall take appropriate measures to protect the safety,

¹ Email Defence to the Chamber, 9 January 2012.

² Email Chamber to the Defence, 21 January 2012.

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.

6. 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.

7. In the present case, the Chamber has adopted the following approach to the granting of requests for protective measures:³

...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**

³See, for example, ICC-01/05-01/08-1774-Conf, paras.11-12.

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

8. Witness D-15 is currently a [REDACTED] *Forces Armées de la République Démocratique du Congo* ('FARDC'). He is not willing for authorisation to be requested on his behalf from the Ministry of Defence, because of the risks to which he believes he and his family will be exposed, should he be associated in any way with the defence of Mr. Jean-Pierre Bemba. [REDACTED]

[REDACTED]

[REDACTED]

9. Witness D-15 has recently informed the Defence of his desire to testify in complete closed session, and ask that this be conveyed to the Chamber. According to the witness, by virtue of [REDACTED] he is aware

[REDACTED]

[REDACTED]

10. The risk is particularly heightened for this witness because, as explained to the Chamber by the Defence in its email of 9 January 2012, the vast majority of his testimony (if not the entirety) will betray a level of knowledge of the events in

question which will identify his role, and therefore reveal his identity. In such circumstances, the Defence submits that testimony in complete closed session is necessary and appropriate in order to ensure the safety and security of the witness.

11. The Defence finally notes that the use of full in-court protective measures have previously been ordered in the present case for another currently serving member of the FARDC,⁴ and that the Chamber found that such measures did not amount to an undue restriction on the underlying principle of a fair and public trial, in certain circumstances. The Defence submits that the circumstances exist in the present case.

D. RELIEF REQUESTED

12. On the basis of the above submissions, the Defence:

REQUESTS that the Trial Chamber grant the Defence request for full in-court protective measures for Witness D-15, namely the giving of his testimony entirely in closed session.

The whole, respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 23rd of January 2013
At The Hague, The Netherlands

⁴ ICC-01/05-01/08-2160-Conf.