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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

Confidential

**Request for leave to appeal the decision on in-court protective measures for
Witness 45**

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

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

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Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. INTRODUCTION

1. On 24 January 2012, the Trial Chamber issued its *Decision on in-court protective measures for Witness 45* ("Decision").¹ In its Decision the Trial Chamber granted the Prosecution's request for in court protective measures, authorised the use of a pseudonym, image and voice distortion and the partial use of closed or private session.²

2. By this Motion the Defence seeks the leave of the Trial Chamber to appeal the Decision under Article 82(1)(d) of the Statute of Rome, and Rule 155 of the Rules of Procedure and Evidence.

3. The Defence seeks the postponement of the witness' evidence until the matter is determined by the Trial Chamber and/or the Appeals Chamber.

B. RELEVANT PROCEDURAL BACKGROUND

4. On 13 September 2011, the Prosecution filed its Request for Protective Measures.³ It was provided to the Defence in redacted form on 16 September 2011. The arguments therein are mischaracterised in the Chamber's Decision at paragraph 3 of its Decision.

5. On 7 October 2011, the Defence filed its Response.

6. Significantly, the Prosecution sought no leave to reply, and did not do so. Accordingly, the filings in this regard were closed, and the arguments crystallised by the end of October 2011.

¹ ICC-01/05-01/08-2063-Conf

² *Supra* paragraph 22

³ ICC-01/05-01/08-1743-Conf-Red

7. On 29 October 2011, the Prosecution sent an email regarding scheduling, seeking leave to call several witnesses after the winter recess on the basis of the presidential elections in the Democratic Republic of Congo. As regards Witness 45, the Prosecution stated: “[s]imilarly the Prosecution is still trying to obtain information concerning the most suitable time for W 45 to testify and will inform the Chamber in this respect as soon as possible”.⁴

8. The DRC elections duly took place on 28 November 2011.

9. On 9 December 2011, the evidence finished prior to the judicial winter recess. On 16 December 2011, the winter recess commenced.

10. On 9 January 2012, the winter recess ended.

11. On 10 January 2012, the VWU reported that it could not make telephone contact with the witness.

12. On 11 January 2012, there was an *ex parte* hearing before the Chamber in which the Chamber authorised [REDACTED] by the OTP/VWU to make contact with Witness 45. There is no evidence available to the defence to suggest that any contact had been made with Witness 45 between 9 September 2011 and that hearing. It is difficult to know how the Chamber came to characterise the loss of contact as “temporary”⁵ on the disclosed materials, and difficult to reason why a mission was necessary by 11 January, if the VWU had only been trying to contact the witness for 24 hours. Neither make sense, unless the Decision was informed by rather different information to that made available to the Defence.

13. On 14 January 2012, the mission arrived [REDACTED]

⁴Email Prosecution to the Chamber, “Prosecution updated witness schedule”, 29 October 2011

⁵ICC-01/05-01/08-1743-Conf-Red, para. 7.

14. On 15 January 2012, the OTP/VWU met the witness.

15. On 20 January 2012, the Chamber ordered disclosure of the reports of the mission to the Defence. The date upon which this document was originally provided to the Chamber is not clear. The reason for the disclosure of the document to the Defence bears careful analysis. What in fact was disclosed to the defence is not merely a report, but rather a renewed application for protective measures based on apparently fresh concerns of the witness.

16. The Defence was given effectively 7 hours of the working week to respond to allegations against its acting principal counsel.

17. On 21 January 2012, despite assertions as to his willingness to attend, Witness 45 failed to confirm [REDACTED] or contact the VWU Security Officer [REDACTED]

18. On 23 January 2012, Witness 45 failed to arrive in The Hague. The Defence filed its response to the Report of the Prosecution (In fact the report of the VWU was never served as ordered). There was a further *ex parte* hearing at which the court directed a second mission to take place between 24 and 26 January.

19. On 24 January 2012, the Trial Chamber rendered the Decision on in-court protective measures for Witness 45. It was an event almost contemporaneous with the departure of Prosecution Counsel Ms Petra Kneuer [REDACTED] She was of course, one day later able to tell the witness that he had full in court protective measures, and remain with him until they could board a flight to Amsterdam together on 26 January.

20. There is no procedural logic to the announcement of the Chamber's Decision on 24 January 2012. The witness was neither before the court, nor had he expressed

or exhibited a willingness to be a witness in the trial. The pleadings in the original application had been closed for almost 3 months. The original application had, moreover, been made concurrently in relation to four witnesses. It is impossible to fathom what possible reason there can have been for the decision in relation to Witness 45 to be hived off and delivered separately on that of all days.

21. More to the point, not only had the Defence not in fact replied to the renewed application for protective measures, it hadn't even been invited to. It had only been asked to deal with accusations against counsel. The response, such as it was, made it plain that further submissions would be made on the question of protective measures, and whilst the Chamber asserts that it did not base its decision on the so-called fresh information⁶ (which was in fact just a repetition of 3 year old material the prosecution had abandoned as a sensible allegation), this plainly isn't the case. The critical paragraph in the decision is based almost entirely upon the information the Chamber purports to take no account of.⁷

C. SATISFACTION OF CONDITIONS FOR LEAVE TO APPEAL

22. Leave to appeal pursuant to Article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:⁸

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and

⁶ Supra, paragraph 15

⁷ Para 19

⁸ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4

b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

23. The Defence contends that the matter relevant to the present appeal concern important issues which go to the heart of the fairness of the proceedings, which require immediate resolution by the Appeals Chamber. These include, not least, the use of *ex parte* proceedings and material kept confidential from the Defence by the Chamber in the resolution of contested procedural issues, and the Defence having been prevented from exercising its right to respond to a request for protective measures. The issue for which appeal is being sought also goes directly to the expeditious conduct of the proceedings, namely whether protective measures are being granted as a means of encouraging or ensuring the attendance of witnesses who have thus far held the parties and the Chamber hostage through extensive delays.

24. Moreover, a resolution of the issue would materially advance the proceedings. When a witness testifies in public session under his own name, and claims to have been in a particular place at a particular time, or was in possession of particular knowledge, members of the public who know this information to be false are able to come forward and offer to testify. This greatly assists and expedites Defence investigations, which contributes to the advancement of the proceedings. Moreover, the drafting of procedural motions and decisions is also accelerated when witnesses testify in public session and under their own names, further contributing to the advancement of proceedings. The Defence also submits that the Judgement-drafting process will inevitably be complicated and prolonged if protective measures are afforded to witnesses whose testimony goes to the heart of the case, as this testimony will have to be carefully reviewed to ensure that any information which could lead to their identification is kept out of the Judgement.

25. Moreover, should the Appeals Chamber find that the Chamber erred in granting protective measures, the actual testimony of Witness 45 would also be expedited. The need to spend court-time explaining protective measures, going in and out of public session, [REDACTED] and debating when closed or private session is necessary will be eliminated.

D. PROPOSED GROUNDS OF APPEAL

26. The Decision of the Trial Chamber is in breach of the rules of natural justice and/or the procedures laid down for the determination of procedural matters within a trial.

27. The Trial Chamber made unsustainable factual findings which were either based on discredited or ancient material, or information which was not disclosed to the defence.⁹

28. The Trial Chamber erred both in failing to render the Decision in a timely manner in 2011, and also rendering this decision prior to the arrival of the witness in The Hague, thereby making it an effective tool of inducement for the Prosecution.

29. The Trial Chamber failed adequately or at all to identify the actual risk to the security of this witness of giving evidence, in particular, it failed completely to address the Defence arguments concerning [REDACTED]
[REDACTED] his involvement as a witness.

E. REQUESTED RELIEF

30. For all of the reasons set out above, the Defence requests that the Chamber:

⁹See, for example, paragraph 10 of the Decision and footnotes 20 and 21.

GRANT the Defence request for leave to appeal the *Decision on in-court protective measures for Witness 45*;

POSTPONE the hearing of Witness 45's evidence until a resolution of the present request; and

ORDER the disclosure of the transcripts of the *ex parte* hearings of 11 January 2012 and 23 January 2012, as well as any others conducted in relation to Witnesses 15, 36, 44 and 45, redacted as appropriate.

THE WHOLE respectfully submitted.



Aimé Kilolo Musamba
Associate Counsel

Done on 30th of January 2012

At The Hague, the Netherlands