

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 12 March 2014

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

**Decision on “Prosecution Request for a Variance of Protective Measures of
Trial Witnesses to Allow Access to Transcripts of Evidence in a Related
Article 70 Proceeding”**

No. ICC-01/05-01/08

1/12

12 March 2014

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

The Office of the Prosecutor

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Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
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Registrar

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Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section Other**

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”), issues the following Decision on “Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding” (“Decision”).

I. Background and Submissions

1. During the course of the presentation of evidence by the defence in the *Bemba* case, the Chamber granted protective measures in relation to 30 witnesses, in order to protect their identity vis-à-vis the general public. For that purpose, pursuant to Rule 87 of the Rules of Procedure and Evidence (“Rules”), 28 witnesses were granted the continued use of pseudonyms, image and voice distortion as well as limited recourse to closed sessions.¹ In relation to two witnesses, the Chamber granted continued use of pseudonyms and additionally ordered that their entire testimony be given in closed session.²

2. On 30 January 2014, the Office of the Prosecutor (“prosecution”) filed its “Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding”³ (“Prosecution Request”), in which, pursuant to Regulation 42 of

¹ The Chamber granted limited in-court protective measures in relation to Witnesses D04-07, D04-50, D04-57, D04-64, D04-51, D04-55, D04-48, D04-49, D04-16, D04-66, D04-45, D04-21, D04-39, D04-56, D04-18, D04-02, D04-09, D04-03, D04-04, D04-06, D04-23, D04-26, D04-25, D04-36, D04-29, D04-30, D04-15 and D04-13.

² The Chamber granted full closed session in relation to Witnesses D04-19, and D04-54.

³ Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, 30 January 2014, ICC-01/05-01/08-2951-Conf and confidential Annex A. The Prosecution Request was initially classified as “confidential ex parte – only available to Prosecution and Registry”. The prosecution subsequently requested the reclassification as confidential of the document and its Annex, which was granted by the Chamber (email from the prosecution to the Chamber of 30 January 2014 at 15.52).

the Regulations of the Court (“Regulations”), it requests a “variance of the protective measures ordered by the Chamber” in relation to the transcripts of hearings of *all* witnesses called by the defence in the *Bemba* case who testified between 14 August 2012 and 14 November 2013.⁴ The request is aimed at allowing the disclosure of relevant confidential portions of transcripts to the defence in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido* (“case ICC-01/05-01/13”).⁵

3. The prosecution submits that the requested variation of protective measures is appropriate and necessary as (1) there is a clear nexus between case ICC-01/05-01/13 and the *Bemba* case;⁶ and (2) the variation is limited to three distinct purposes: (a) meeting the disclosure requirements in case ICC-01/05-01/13, (b) carrying out its obligations under the Statute and the Rules, and (c) providing the defence in case ICC-01/05-01/13 “sufficient access to inarguably relevant material which, to a limited extent, will be relied upon by the Prosecution for confirmation and trial”.⁷

4. On 5 February 2014, pursuant to the Chamber’s instruction,⁸ the legal representative of victims, Maître Marie-Edith Douzima-Lawson (“Me Douzima”),⁹ the defence,¹⁰ and the Victims and Witnesses Unit (“VWU”)¹¹

⁴ ICC-01-05-01/08-2951-Conf, paragraph 4.

⁵ ICC-01/05-01/08-2951-Conf, paragraphs 12 and 13.

⁶ ICC-01/05-01/08-2951-Conf, paragraphs 7 to 9.

⁷ ICC-01/05-01/08-2951-Conf, paragraph 10.

⁸ Order requesting observations on prosecution document ICC-01/05-01/08-2951-Conf, 30 January 2014, ICC-01/05-01/08-2954-Conf.

⁹ Observations de la Représentante légale des victimes à « Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to transcripts of Evidence in a Related Article 70 Proceeding ICC-01/05-01/08-2951 », 5 February 2014, ICC-01/05-01/08-2958-Conf.

¹⁰ Defence Observations on the “Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding”, 5 February 2014, ICC-01/05-01/08-2959-Conf.

submitted their respective observations on the Prosecution Request.

5. Me Douzima supports the Prosecution Request.¹² In this regard, she reaffirms the existence of a clear link between case ICC-01/05-01/13 and the *Bemba* case, justifying access to the transcripts of the testimony of defence witnesses being granted to the defence in case ICC-01/05-01/13.¹³ She further submits that the Prosecution Request does not affect the personal interests of the victims she represents, as it only concerns transcripts of witnesses called by the defence.¹⁴
6. The VWU considers that as long as the protective measures granted in the *Bemba* case continue to have full force in relation to case ICC-01/05-01/13, granting the Prosecution Request would not negatively impact the security of witnesses.¹⁵
7. The defence urges the Chamber to reject the Prosecution Request.¹⁶ Specifically, the defence stresses that any variation of protective measures is subject to the requirement under Regulation 42(4) of the Regulations that the consent of the witnesses be sought.¹⁷ According to the defence, this is further complicated by the “wholesale nature” of the Prosecution Request, “which is in no way tailored to minimize the required variation of protective measures.”¹⁸ The defence asserts that, although three of the accused in case ICC-01/05-01/13 have previously had access to the transcripts, two have not. In addition, the defence states that “[n]o consideration has been given to the stress or confusion that may arise if defence witnesses are informed of the

¹¹ Victims and Witnesses Unit’s Observations on document ICC-01/05-01/08-2951-Conf, 5 February 2014, ICC-01/05-01/08-2960-Conf.

¹² ICC-01/05-01/08-2958-Conf, page 5.

¹³ ICC-01/05-01/08-2958-Conf, paragraphs 6 to 8.

¹⁴ ICC-01/05-01/08-2958-Conf, paragraph 9.

¹⁵ ICC-01/05-01/08-2960-Conf, paragraph 1.

¹⁶ ICC-01/05-01/08-2959-Conf, paragraph 14.

¹⁷ ICC-01/05-01/08-2959-Conf, paragraph 7.

¹⁸ ICC-01/05-01/08-2959-Conf, paragraph 8.

prosecution's intention to disclose their entire testimony to the two other accused persons and their lawyers, for its potential use in other proceedings."¹⁹

8. The defence further argues that the parties cannot "adduce testimony without the consent of the person concerned" and that "it must be presumed that the prosecution has not obtained the consent of these persons to use their transcripts as evidence" in case ICC-01/05-01/13.²⁰ Moreover, the defence highlights a number of practical difficulties that might be encountered when seeking the witnesses' consent.²¹

9. On 17 February 2014, following the Chamber's authorisation,²² the prosecution filed its reply to the Defence Response ("Reply").²³ In its Reply, the prosecution argues that (i) consent under Regulation 42(4) of the Regulations "is not a dispositive prerequisite for the determination of a variance application", (ii) "[c]onsent does not apply to the Prosecution's discharge of disclosure obligations in subsequent proceedings"; (iii) "[t]he Defence mischaracterises the scope of the variance sought"; (iv) "[c]onsent cannot reasonably be required where the testimony sought is itself part of the crime"; (v) "[t]he Court should preclude the Defence's contact with the witnesses concerning the obtaining of consent"; and (vi) [t]he possible *viva voce* testimony of the protected witnesses is irrelevant to the disposition of the Request".²⁴

¹⁹ ICC-01/05-01/08-2959-Conf, paragraph 8.

²⁰ ICC-01/05-01/08-2959-Conf, paragraphs 9 to 11.

²¹ ICC-01/05-01/08-2959-Conf, paragraph 12.

²² Decision on "Prosecution Request for leave to reply to Defence Observations on the Prosecution Request for a Variance of Protective Measures", 11 February 2014, ICC-01/05-01/08-2968-Conf, paragraph 5.

²³ Reply to defence Observations on the Prosecution Request for a Variance of Protective Measures, 17 February 2014, ICC-01/05-01/08-2979-Conf, paragraph 2.

²⁴ ICC-01/05-01/08-2979-Conf, paragraphs 5 to 25.

II. Analysis and Conclusion

10. In accordance with Article 21(1) of the Rome Statute ("Statute"), in making its determination, the Chamber has considered Articles 64(2), 64 (6)(c) and (e), 64(7), 67(1) and 68 of the Statute, Rules 81(4) and 87 of the Rules, Regulations 20, 23*bis*, 28 and 42 of the Regulations and Article 8 of the Code of Professional Conduct for counsel ("Code of Conduct").
11. At the outset, the Chamber notes that the Prosecution Request and the other underlying filings are currently classified as confidential. However, considering that the present Decision does not contain any information warranting confidential treatment and pursuant to the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute and Regulation 20 of the Regulations, the present Decision is classified as public.
12. Pursuant to Regulation 42(1) of the Regulations, "[p]rotective measures ordered in any proceedings in respect of a victim or a witness shall continue to have full force and effect in relation to any other proceedings before the Court [...]". Regulation 42(2) of the Regulations provides that the prosecution, when discharging its disclosure obligations in subsequent proceedings, "shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures."
13. Considering that the Prosecution Request would imply disclosing the identity of protected witnesses to the accused and defence teams in case ICC-

01/05-01/13 that are different from the defence in the *Bemba* case, the Chamber finds that the Prosecution Request amounts to a request for a variation of protective measures under Regulation 42(3) of the Regulations. The Chamber notes that, while the prosecution seeks to disclose some *Bemba* case transcripts in case ICC-01/05-01/13, currently before Pre-Trial Chamber II, the relevant protective measures were granted by this Chamber in the context of the *Bemba* case. Therefore, in line with Regulation 42(3) of the Regulations, the present request for a variation of protective measures is correctly brought before the Chamber, which ordered the protective measures.²⁵

14. Before considering the present request for a variation of protective measures, the Chamber notes that currently not all transcripts of the testimony of defence witnesses are available in a public redacted version. In addition, the Chamber acknowledges that the currently available public redacted versions of the transcripts include a significant number of redactions, some of which may not be necessary to protect the identities of protected witnesses, victims or other persons at risk on account of the activities of the Court. In this regard, the Chamber has ordered, *inter alia*, the defence to review the confidential versions of the transcripts of hearing of its witnesses with a view to identifying redactions that could be lifted and to provide the Chamber with proposals for limited redactions. In compliance with this order, the defence, which as the calling party is best placed to know the security situation faced by its witnesses, transmitted its proposals for limited redactions to the English version of the corrected transcripts of defence witnesses to the Chamber in a series of emails between 7 June 2013 and 17

²⁵ Pursuant to the first sentence of Regulation 42(3) “[a]ny application to vary a protective measure shall *first* be made to the Chamber which issued the order” (emphasis added).

January 2014. These proposals for redactions are currently under review by the Chamber.

15. As these proposals are ultimately intended for release to the public in application of the general principle of publicity of the proceedings enshrined in Article 64(7) and 67(1) of the Statute, the Chamber is of the view that they may be disclosed to the defence teams in case ICC-01/05-01/13, provided that these documents remain confidential until this Chamber has authorised the proposed redacted versions for release to the public. Since, pending their review by the Chamber, the proposed redacted versions of the transcripts will only be provided to a limited number of individuals who are bound by confidentiality obligations pursuant to Article 8 of the Code of Conduct, the Chamber finds that this approach is consistent with its duty under Article 68(1) to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.²⁶ As the protective measures ordered by the Chamber in the *Bemba* case will continue to have full force and effect in relation to case ICC-01/05-01/13, the Chamber’s approach does not amount to a variation of protective measures. In these circumstances, the requirement under Regulation 42(4) of the Regulations to seek the witnesses’ consent is therefore not applicable.

16. In regards to the present request for the variation of protective measures,

²⁶ The Chamber notes that this approach is consistent with the practice of other Chambers of this Court, which, on occasion, in order to expedite the disclosure process, have ordered disclosure of documents in a proposed redacted form, prior to the Chamber’s assessment of the proposed redactions. While it is mindful that these “provisional” authorisations of redactions were granted in relation to prosecution’s proposals for redactions to witness statements to be disclosed to the defence, the Chamber is of the view that this approach may be applied, *mutatis mutandis*, to the situation at stake in the present Decision. See for example Trial Chamber V, *The Prosecutor v Abdallah Banda Abakaer Nourain*, Decision on the Prosecution’s Application for Redactions; the Common Legal Representative Request for Disclosure; the Defence Request for Reclassification; and Decision establishing simplified proceedings related to future applications for non-disclosure, 19 November 2013, ICC-02/05-03/09-524, paragraph 36.

when deciding on a request for such variation, the Chamber considers that it must determine whether the variation sought is appropriate and necessary.

17. In order to determine whether the variation is *appropriate*, the Chamber must comply with its duty under Article 68(1) of the Statute to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. In addition, pursuant to Regulation 42(4) of the Regulations, before making a determination on a request for a variation of protective measures, the Chamber “shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.”

18. In the present case, on the basis of the alleged need to “avoid any suggestiveness to the Chamber”,²⁷ the prosecution requests a variation of protective measures in relation to all witnesses that have been called by the defence. In order to take an informed decision on the Prosecution Request, and in line with its duty under Article 68(1) of the Statute, the Chamber is required to determine whether disclosure of the unredacted testimonies of all protected witnesses called by the defence in the *Bemba* case, including their identities, to the defence in case ICC-01/05-01/13 would entail any risk to these witnesses. In addition, before taking a decision on the Request, the Chamber would have to, at a minimum, attempt to seek the witnesses’ consent to the requested variation. While obtaining consent is not required, as is clear from the wording “shall” and “whenever possible” in Regulation 42(4) of the Regulations, before taking a decision on the Request, the Chamber would have to, at a minimum, attempt to seek the witnesses’

²⁷ ICC-01/05-01/08-2951-Conf, paragraph 4.

consent to the requested variation. This interpretation is necessary in order for Regulation 42(4) of the Regulations not to be rendered meaningless.

19. The Chamber considers that satisfying these requirements would be a time-consuming exercise, as claimed by the defence, and require the Chamber to direct the VWU to contact the 30 witnesses in order to attempt to seek their consent to a potential variation of protective measures. However, the Chamber notes that disclosure of the proposed redacted versions of the transcripts may be sufficient for the purposes sought by the prosecution; as such, the requirement to seek the consent of the witnesses to a potential variation of protective measures would become moot. The Chamber therefore defers its final decision on the variation of protective measures pending a further request, if needed, from the prosecution that such variation is necessary.

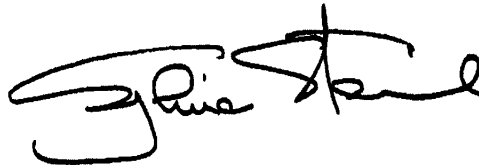
20. In view of the above, the Chamber hereby:

- (a) DEFERS its decision on the Prosecution Request;
- (b) AUTHORISES the defence's proposed redactions to transcripts of the testimony of the witnesses called by the defence in the *Bemba* case on a provisional basis, solely for the purpose of disclosure in case ICC-01/05-01/13;
- (c) AUTHORISES the prosecution to disclose the defence's proposed redacted versions of the transcripts of the testimony of witnesses called by the defence in the *Bemba* case to the defence in case ICC-01/05-01/13;
- (d) ORDERS the prosecution to treat the defence's proposed redacted versions of the transcripts of the testimony of witnesses called by the

defence in the *Bemba* case as confidential, pending their review by the Chamber, and to inform the defence in case ICC-01/05-01/13 accordingly; and

- (e) ORDERS the prosecution, the defence, Me Douzima and the VWU to submit redacted versions of their underlying filings or to request their reclassification as public without redactions by 21 March 2014.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 12 March 2014

At The Hague, the Netherlands

No. ICC-01/05-01/08

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