

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **27 June 2016**

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 Version of

“Decision on in-court protective measures for Witnesses 38, 22 and 87”, ICC-01/05-01/08-1021 of 19 November 2010

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Legal Representatives of the Victims

Mr Marie-Edith Douzima Lawson

Unrepresented Victims

The Office of Public Counsel for Victims

Ms Paolina Massidda

States Representatives

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Applicants

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for the Defence

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Victims and Witnesses Unit

Mr Nigel Verrill

Victims Participation and Reparations Section

Defence Support Section

Detention Section

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, (“Bemba case”) issues the following Decision on in-court protective measures for Witnesses 38, 22 and 87.

I. Background and Submissions

1. Although some of the submissions referred to in this Decision are set out in *ex parte* submissions, the Chamber is satisfied that the Decision can be issued confidentially.
2. On 24 June 2010, the Office of the Prosecutor (“prosecution”) filed its confidential *ex parte* “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial”¹ and on 6 July 2010, it filed a corrigendum public redacted version of its initial request (“prosecution Request” or “Request”).² The prosecution also appended to its Request a public redacted Annex A in which it proposed various types of protective measures.³
3. Pursuant to Articles 68(1) and 64(2) of the Rome Statute (“Statute”) and Rule 87(3)(a), (c), (d) and (e) as well as Rule 88 of the Rules of Procedure and

¹ Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial only available to the prosecution and the Victims and Witnesses Unit, 24 June 2010, ICC-01/05-01/08-800-Conf-Exp.

² Corrigendum to the Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial, 6 July 2010, ICC-01/05-01/08-800-Corr-Red4; the prosecution also filed on 6 July 2010, a confidential redacted *ex parte* version of its corrigendum request available to the defence, ICC-01/05-01/08-800-Conf-Exp-Corr-Red; a confidential redacted *ex parte* version of its corrigendum request available to the OPCV, ICC-01/05-01/08-800-Conf-Exp-Corr-Red2; a confidential redacted *ex parte* version of its corrigendum request available to the legal representative, Ms. Douzima, ICC-01/05-01/08-800-Conf-Exp-Corr-Red3.

³ Public Redacted Annex A to the Corrigendum to the Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial, 6 July 2010, ICC-01/05-01/08-800-AnxA-Corr-Red4; the prosecution also filed on 6 July 2010, a confidential corrigendum to Annex A redacted *ex parte* available to the prosecution and the VWU, ICC-01/05-01/08-800-Conf-Exp-AnxA-Corr; a confidential corrigendum to Annex A redacted *ex parte* available to the defence, ICC-01/05-01/08-800-Conf-Exp-AnxA-Corr-Red; a confidential corrigendum Annex A redacted *ex parte* available to the OPCV, ICC-01/05-01/08-Conf-Exp-Corr-AnxA-Red2; a confidential corrigendum Annex A redacted *ex parte* available to the legal representative, Ms. Douzima, ICC-01/05-01/08-Conf-Exp-Corr-AnxA-Red3.

Evidence (“Rules”),⁴ the prosecution requests in-court protective and special measures for 21 out of the 40 witnesses.⁵ The witnesses concerned are CAR-OTP-WWWW-0022 (“Witness 22”), CAR-OTP-WWWW-0023 (“Witness 23”), CAR-OTP-WWWW-0029 (“Witness 29”), CAR-OTP-WWWW-0033 (“Witness 33”), CAR-OTP-WWWW-0038 (“Witness 38”), CAR-OTP-WWWW-0042 (“Witness 42”), CAR-OTP-WWWW-0047 (“Witness 47”), CAR-OTP-WWWW-0065 (“Witness 65”), CAR-OTP-WWWW-0068 (“Witness 68”), CAR-OTP-WWWW-0069 (“Witness 69”), CAR-OTP-WWWW-0075 (“Witness 75”), CAR-OTP-WWWW-0079 (“Witness 79”), CAR-OTP-WWWW-0080 (“Witness 80”), CAR-OTP-WWWW-0081 (“Witness 81”), CAR-OTP-WWWW-0082 (“Witness 82”), CAR-OTP-WWWW-0087 (“Witness 87”), CAR-OTP-WWWW-0169 (“Witness 169”), CAR-OTP-WWWW-0173 (“Witness 173”), CAR-OTP-WWWW-0178 (“Witness 178”), CAR-OTP-WWWW-0209 (“Witness 209”) and CAR-OTP-WWWW-0213 (“Witness 213”).⁶

4. The prosecution distinguishes four categories of witnesses to be protected, grouping them as follows: 10 “victims of sexual violence”; 3 “witnesses whose evidence will identify victims of sexual violence”; 5 [REDACTED]; and 3 “witnesses identifiable by their evidence”.⁷

5. In particular, the prosecution requests the following protective measures:

(i) image and voice distortion as well as the use of pseudonyms for witnesses 22, 23, 29, 33, 38, 42, 65, 68, 69, 79, 80, 81, 82, 87, 173, 178, 209 and 213 during their testimony;

(ii) witnesses 75, 79 and 87 to be accompanied, if requested, by a psychologist, trustworthy person, or family member at trial in accordance with Rule 88 of the Rules;

(iii) closed session for parts Witnesses 38, 42, and 209’s testimony, as well as the witnesses

⁴ ICC-01/05-01/08-800-Corr-Red4, paragraph 1; ICC-01/05-01/08-800-AnxA-Corr-Red4, third column.

⁵ ICC-01/05-01/08-800-Corr-Red4, paragraph 1; The Prosecution’s Updated Order of Witnesses, 21 September 2010, ICC-01/05-01/08-891-AnxA.

⁶ Annex A to the Corrigendum to the Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial, 6 July 2010, ICC-01/05-01/08-800-AnxA-Corr-Red4, first column.

⁷ ICC-01/05-01/08-800-Corr-Red4, paragraphs 10 to 56.

referred to above, whenever the testimony would tend to identify victims of sexual violence;

(iv) closed session for all witnesses giving evidence about the identity of protected witnesses or other information that could identify protected witnesses;

(v) closed session testimony for Witnesses 47, 75 and 169.⁸

6. In addition, the prosecution submits that, should the Chamber grant these protective measures for these witnesses, the discrete parts of all evidence referring to the identity of the protected witnesses or revealing identifying information about the protected witnesses should be given in closed session to maintain the effectiveness of the protection of these witnesses throughout the trial.⁹
7. The prosecution argues that the proposed protective measures are justified as they are necessary, reasonable and the least intrusive measures available.¹⁰ If put in place, these measures would prevent, *inter alia*, any re-traumatisation or stigmatisation of the witnesses who are also alleged victims of the crimes charged, in particular the charge of rape. The prosecution submits it would also assist the witnesses in giving evidence without fear, enabling them to provide an account of what they observed and ultimately assisting the Chamber in its determination of the truth.¹¹ The prosecution bases its submissions on the Court's duty to protect the safety of vulnerable and at-risk witnesses and submits that its witnesses are at potential risk from supporters of Mr Jean-Pierre Bemba Gombo ("Mr Bemba") if they follow the public proceedings.¹²

⁸ ICC-01/05-01/08-800-Corr-Red4, paragraphs 2 and 57; ICC-01/05-01/08-800-AnxA-Corr-Red4, second column.

⁹ ICC-01/05-01/08-800-Corr-Red4, paragraph 2.

¹⁰ ICC-01/05-01/08-800-Corr-Red4, paragraph 4.

¹¹ ICC-01/05-01/08-800-Corr-Red4, paragraph 6; ICC-01/05-01/08-800-AnxA-Corr-Red4, fourth column.

¹² ICC-01/05-01/08-800-Corr-Red4, paragraph 7.

8. In addition, the prosecution submits that the proposed measures are proportionate to the identified risk and are the least intrusive to the lives of the witnesses and to the rights of the accused.¹³ The defence's rights would not be infringed as the defence already received the full identifying details of the witnesses concerned and will have complete access to them and the evidence they present in court.¹⁴ The prosecution submits that the defence will be able to present its case at trial without restrictions.¹⁵ To support its Request for in-court protective measures as regards vulnerable and at risk witnesses, the prosecution refers to the jurisprudence of the Court in the *Lubanga* and *Katanga* cases¹⁶ and of the international criminal tribunals as well as national courts.¹⁷
9. On 15 July 2010, the defence filed its response to the prosecution Request ("defence Response").¹⁸ In objecting to the prosecution Request, the defence relies on the principle of publicity of proceedings¹⁹ and argues that any derogation from this should respect the principles of necessity and proportionality and be consistent with internationally recognised human rights standards.²⁰ The defence opposes the granting of protective measures in advance without a prior case-by-case factual analysis of the witnesses fears for those witnesses for whom the proposed measures are intended and submits that the use of closed session testimony and "other protective relief" would be disproportionate.²¹ Although the defence would be sympathetic to requests for discrete and proportionate specific protective measures for vulnerable

¹³ ICC-01/05-01/08-800-Corr-Red4, paragraph 7.

¹⁴ ICC-01/05-01/08-800-Corr-Red4, paragraph 3; ICC-01/05-01/08-800-AnxA-Corr-Red4, fourth column.

¹⁵ *Ibid.*

¹⁶ ICC-01/05-01/08-800-Corr-Red4, paragraphs 8 and 20.

¹⁷ ICC-01/05-01/08-800-Corr-Red4, paragraphs 9 and 11 to 15.

¹⁸ Defence Response to the Prosecution's Request for Protective and Special Measures for Prosecution Witnesses at Trial, 15 July 2010, ICC-01/05-01/08-830-Conf-Exp.

¹⁹ Article 67(1) of the Rome Statute.

²⁰ ICC-01/05-01/08-830-Conf-Exp, paragraph 2.

²¹ ICC-01/05-01/08-830-Conf-Exp, paragraph 4 and footnote 7.

witnesses, it submits that this must be under the condition that the Court is convinced that failure to protect these witnesses will likely cause a genuine and well-founded harm to them.²² In support of this argument, the defence refers to the jurisprudence of the international criminal tribunals and the requirement that the perceived risk must have an objective basis and be sufficiently proximate to the witness.²³

10. The defence submits that Rules 87 and 88 of the Rules do not permit the Chamber to consider a potential refusal of a witness to testify *per se* as a relevant factor in deciding whether the rights of the accused to a public trial would be infringed.²⁴ It further argues that the protective measures requested by the prosecution should be considered only after the defence has had the opportunity to test the veracity of the prosecution's assertions concerning the risk run by the witnesses on account of their testimony and whether they effectively consent to the protective measures since their consent is mandatory.²⁵ The defence therefore suggests that before granting such protective measures, the Chamber should facilitate a short preliminary examination of the witness in order to ascertain that the witness consents to the in-court protective measures, to assess that the perceived threat is objective, genuine and proximate to the witness and finally, to establish that the proposed measures are proportionate to this threat.²⁶

11. In reviewing the categories established by the prosecution, the defence submits that it would not oppose the protective measures proposed for the *prima facie* rape victims/witnesses (first category of witnesses) under the condition that the preliminary examination is conducted by the Chamber in

²² ICC-01/05-01/08-830-Conf-Exp, paragraphs 3 and 5.

²³ ICC-01/05-01/08-830-Conf-Exp, paragraphs 5 to 8.

²⁴ ICC-01/05-01/08-830-Conf-Exp, paragraph 9.

²⁵ ICC-01/05-01/08-830-Conf-Exp, paragraph 10.

²⁶ ICC-01/05-01/08-830-Conf-Exp, paragraph 10.

closed session. The defence maintains that at present, no such assessment of the nature of the fears of these vulnerable witnesses has been made by the prosecution.²⁷ With regard to the second category of witnesses, namely those whose evidence will identify and refer to other witnesses/victims of alleged rape (crime base witnesses): the defence argues that these witnesses could only testify after the crime base witnesses to whom they refer have testified. As regards the witnesses [REDACTED] and those identifiable by their evidence, the defence maintains that no or insufficient information has been provided as to the risk run by these witnesses on account of their testimony in court.²⁸ This risk should therefore be assessed during a preliminary examination of each witness concerned. Finally, the defence strongly opposes any protective measures for Witness 213, arguing that this particular witness should not be given the opportunity to give evidence “under a cloak of secrecy” since he contacted the prosecution of his own accord and the defence submits that his testimony is, *inter alia*, motivated by “a desire to take revenge” on Mr Bemba.²⁹

12. In conclusion, save for Witness 213 as set out above, the defence objects to the application of any protective measures “until such time as a preliminary closed session examination of the witnesses (including allowing the defence the right to ask questions) is held, on a case by case basis, prior to their testimony in the courtroom”.³⁰

13. On 15 September 2010, following the Chamber’s order of 25 August 2010,³¹ the Victims and Witnesses Unit (“VWU”) also filed confidential *ex parte*

²⁷ ICC-01/05-01/08-830-Conf-Exp, paragraph 12.

²⁸ ICC-01/05-01/08-830-Conf-Exp, paragraphs 15 and 16.

²⁹ ICC-01/05-01/08-830-Conf-Exp, paragraph 17.

³⁰ ICC-01/05-01/08-830-Conf-Exp, paragraph 20.

³¹ Email sent by a Legal Officer of the Chamber to the VWU on 25 August 2010.

observations on the prosecution Request (“VWU’s Observations”).³² The VWU differentiates between witnesses [REDACTED]. The VWU recommends that protective measures are granted as proposed in the prosecution Request for Witnesses 33 and 173. It maintains that in-court protective measures such as face and voice distortion, the use of a pseudonym and closed session for any identifying information, would [REDACTED]. The VWU further submits that this approach is consistent with the one taken so far before the Court’s Trial Chambers.³³ The VWU makes a similar submission concerning Witness 65 [REDACTED].³⁴ Subsequently, in an email sent on 5 November 2010, the Chamber was informed by the VWU that [REDACTED].³⁵

14. The VWU supports the protective measures proposed by the prosecution for the 10 vulnerable witnesses [REDACTED] and who are alleged rape victims. These measures would ensure their continued safety and integrity and would enable them to remain in their current communities.³⁶ The VWU makes similar submissions as to Witnesses 38, 42 and 209 whose evidence would identify three vulnerable witnesses, namely Witnesses [REDACTED].³⁷

15. The VWU further submits that, pursuant to Rule 88 of the Rules, the proposed special measure for Witnesses 75, 79 and 87 to be accompanied at trial by a psychologist, a trustworthy person or a family member, needs further assessment and additional field-based information. It is argued that the suitability of such measures and the eligibility of the persons who would

³² Victims and Witnesses Unit’s observations on the ‘Corrigendum to the “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at trial”’, 15 September 2010, ICC-01/05-01/08-884-Conf-Exp.

³³ ICC-01/05-01/08-884-Conf-Exp, paragraph 3.

³⁴ [REDACTED].

³⁵ Email from the VWU to the Legal Adviser to the Trial Division on 5 November 2010.

³⁶ ICC-01/05-01/08-884-Conf-Exp, paragraphs 5 and 6.

³⁷ ICC-01/05-01/08-884-Conf-Exp, paragraphs 8, 13 and 14.

effectively accompany these witnesses can only be assessed at a later stage in accordance with Regulation 91 of the Regulation of the Registry.³⁸

16. Following an instruction from the Chamber to the VWU on 12 October 2010,³⁹ the VWU filed on 25 October 2010, its Victims and Witnesses Unit's additional observations on protective measures for vulnerable witnesses concerning vulnerable witnesses 22, 23, 29, 68, 69, 79, 80, 81, 82, and 87.⁴⁰ The VWU informs it met with all but one of these witnesses, namely Witness 29 as the witness was unavailable at the time of the mission but the VWU plans to meet with the witness during its next mission.⁴¹ The VWU provides the Chamber with an overview of its observations regarding the current psychosocial situation of the vulnerable witnesses and their capacity to testify at the seat of the Court. These observations will be followed by a final assessment of the witnesses by the VWU psychologist once the witnesses are at the seat of the Court, during which the necessary special measures will be identified and recommended to the Chamber.⁴²

17. In general terms, the VWU informs that procedural protective measures requested by the prosecution were discussed with each witness and all interviewed witnesses provided their consent to the implementation of procedural protective measures if granted.⁴³ The VWU also clarifies that an "accompanying support person" is a person who accompanies the witness to the location of testimony as opposed to an "in-court assistant" who is a person provided by the Registry who accompanies the witness in the courtroom and

³⁸ ICC-01/05-01/08-884-Conf-Exp, paragraphs 9 to 12.

³⁹ Email sent to the VWU from the Legal Adviser to the Trial Division on 12 October 2010 and response thereto sent by the VWU on 14 October 2010.

⁴⁰ Victims and Witnesses Unit's additional observations on protective measures for vulnerable witnesses, 25 October 2010, ICC-01/05-01/08-974-Conf-Exp and Conf-Exp-Anx1 and public Annex 2.

⁴¹ ICC-01/05-01/08-974-Conf-Exp, paragraph 2.

⁴² ICC-01/05-01/08-974-Conf-Exp, paragraph 5.

⁴³ ICC-01/05-01/08-974-Conf-Exp, paragraph 6.

provides support during testimony as needed; this is typically a Support Assistant, a VWU Psychologist, or an outside expert.⁴⁴

18. The VWU reiterates its support of the prosecution Request for protective measures for vulnerable Witnesses 22, 23, 68, 69, 79, 80, 81, 82 and 87, who are all alleged victims of sexual violence, stating that face and voice distortion and allocation of a pseudonym as well as partial closed session are necessary protective measures to reduce the risk of threats, social stigma and/or rejection. Simultaneously these measures can facilitate the testimony of vulnerable witnesses and protect them against psychological harm as a result of testifying by minimising exposure to the public.⁴⁵ The VWU also agrees with the prosecution Request for an accompanying support person for Witnesses 79 and 87; the VWU has assessed the proposed accompanying support person and finds them suitable, pursuant to Regulation 91 of the Regulations of the Registry.⁴⁶

19. Specific observations on each of the abovementioned witnesses are set out in detail in Annex 1 to the VWU filing but will not be rehearsed here.⁴⁷

II. Relevant provisions

20. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 64 of the Statute Functions and powers of the Chamber

7. The trial shall be held in public. The Trial Chamber may, however, determine that

⁴⁴ ICC-01/05-01/08-974-Conf-Exp, paragraph 8.

⁴⁵ ICC-01/05-01/08-974-Conf-Exp, paragraph 9.

⁴⁶ ICC-01/05-01/08-974-Conf-Exp, paragraph 10.

⁴⁷ ICC-01/05-01/08-974-Conf-Exp-Anx1.

special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially [...]

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the proceedings

1. 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.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

[...]

Rule 87 of the Rules

Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted ex parte;

(b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of who shall have the opportunity to respond;

(c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;

[...]

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

Rule 88 of the Rules

Special measures

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.

2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if

necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.

3. For *inter partes* motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply mutatis mutandis.

4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to *inter partes* motions or requests filed under seal shall also be filed under seal.

5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

Regulation 20 of the Regulations of the Court

Public hearings

1. All hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

2. When a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.

3. A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.

Regulation 91 of the Regulations of the Registry

Accompanying support persons

1. Witnesses, victims who appear before the Court and persons at risk may be permitted to bring an accompanying support person with them to the Court. The Registry shall cover the costs of the accompanying support person, in accordance with regulations 81, 82 and 84.

2. In order to determine the eligibility of a witness, a victim who appears before the Court or a person at risk to bring an accompanying support person with him or her to the Court, the following criteria, shall be, *inter alia*, taken into account:

- (a) The fact that the person has no surviving close family members;
- (b) The presence of severe trauma-related symptoms;
- (c) The existence of possible suicidal tendencies;
- (d) The potential for violence;
- (e) The fear or anxiety of the person to the extent that it would prevent him or her from attending the Court;
- (f) The age;
- (g) The fact that the person is a victim of sexual or gender violence;

- (h) The fact that the person suffers from a pre-existing disease of a physical and/or psychological nature; and
- (i) The severity of physical or psychological symptoms.

3. The Registry shall assess the suitability of the accompanying person to provide support.

Regulation 94 of the Regulations of the Registry
Protective measures

Measures taken pursuant to an order of a Chamber under rule 87 to protect the identity of witnesses, victims who appear before the Court and persons at risk may include, *inter alia*:

- (a) Pseudonyms, where the person is assigned a pseudonym that is used during the proceeding instead of his or her real name;
- (b) Facial distortion, where the image of the person is rendered unrecognisable by an electronic mosaic in the audiovisual feed;
- (c) Voice distortion, where the voice of the person is rendered unrecognisable by electronic means in the audiovisual feed;
- (d) Private sessions, where the hearing is not open to the public and there is no audiovisual stream broadcast outside the Court;
- (e) Closed sessions, where the hearing is held *in camera*;
- (f) Videoconferences, where the person takes part in the proceeding via a direct video link;
- (g) Expunctions from the public record of the proceeding of any information which might lead to the identification of the victim, witness or person at risk; or
- (h) Any combination of the protective measures listed above or any modification of a measure ordered by the Chamber which is technically feasible.

III. Analysis and Conclusions

21. Not only are protective measures for victims and witnesses sought by the parties to protect against risks to their safety, but the Court also has an obligation “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”, in accordance with Article 68 of the Statute.

22. The assessment of the objective risk on the account of the testimony of a witness, and the need to protect their physical and psychological well-being, form the basis for a decision by the Chamber granting or denying the

requested in-court protective measures. The Chamber can make an informed decision and appropriately assess the risk in advance, by, for example, taking into account the nature of the conduct allegedly suffered by the witness, or when the witness comes to testify at the Court and participates in the familiarisation process conducted by the VWU.⁴⁸

23. Subject to any further information that may materialise during the familiarization process, the Chamber addresses herewith only part of the prosecution Request with regard to the security situation of Witnesses 38, 22 and 87 who have recently been assessed by the VWU and are the first three witnesses to be called to testify in the *Bemba* case.

1) Preliminary Remarks

Principle of publicity

24. Following the jurisprudence of the Court with regard to granting protective measures for witnesses, the Chamber considers that, as decided by Trial Chamber I⁴⁹ and Trial Chamber II,⁵⁰ the principle of publicity of proceedings and the “importance of truly open justice”, as enshrined in Articles 64(7) and 67(1) of the Statute and Rule 20 of the Rules, prevails. It is noteworthy that Trial Chamber II recently reiterated that the principle of publicity of the proceedings “contributes to preserving the trust that all those subject to the law have in justice, and it is one of the best means of controlling the way in

⁴⁸ Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016.

⁴⁹ Trial Chamber I, Transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG, page 3, line 16 to page 4, line 3.

⁵⁰ Trial Chamber II, Ordonnance relative aux mesures de protection de certains témoins cités à comparaître par le Procureur et par la Chambre (règles 87 et 88 du Règlement de procédure et de preuve), 9 December 2009, ICC-01/04-01/07-1667-Red, paragraphs 8 and 9.

which such justice is rendered. This principle, however, does not have an absolute nature [...].”⁵¹

25. Protective measures pursuant to Article 68(1) and (2) of the Statute as well as Rules 87 and 88 of the Rules may nonetheless be granted by a Chamber on an exceptional, case-by-case, basis where the Chamber is satisfied that they are not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial, based on an assessment as to the risks to the safety and integrity of witnesses, usually conducted by the VWU, in order to preserve their physical and psychological well-being.

26. It cannot be said therefore that protective measures granted for witnesses who are called to testify are, in principle, contrary to the fundamental right of the accused to a public and fair trial.

Request by the defence to hold in-camera hearings to determine whether to order protective measures pursuant to Rule 87(3) of the Rules

27. Article 68(2) of the Statute and Rule 87(3) of the Rules specifically provide that the “Chambers of the Court” or “a Chamber” may conduct any part of the proceedings *in camera*, in order to protect victims and witnesses, *inter alia*, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim or a witness or other person at risk on the account of testimony to be given by a witness. In dealing with the present Request for protective measures, the Chamber does not consider it is necessary to hold additional closed session

⁵¹ Trial Chamber II, Transcript of hearing on 20 September 2010, ICC-01/04-01/07-T-189-ENG, page 10, lines 17-22.

hearings to determine whether protective measures are appropriate, given the objective assessments already conducted by the VWU, as summarised above.

Image and face distortion as well as allocation of a pseudonym pursuant to Rule 87(3)(c) and (d) of the Rules and Regulation 94(a), (b) and (c) of the Regulations of the Registry

28. 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 vulnerable witnesses, avoiding unnecessary public exposure of vulnerable witnesses and re-traumatisation. Such in-court protective measures only impede the public's understanding of the case as a whole to a very limited extent as the public is still able to follow the proceedings.
29. In addition, the Chamber finds that 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. The Chamber will rule on this course of action as necessary.
30. The protective measures sought aim to protect the witnesses from public identification as opposed to curtailing the defence's knowledge of the witnesses' identity and are not therefore prejudicial to or inconsistent with the rights of the defence. The defence will be able to listen to and see the witnesses without any distortions and all the witnesses' identities have been disclosed to the defence.

2) Case-by-case analysis

Consent of the person in respect of whom the protective measure is sought pursuant to Rules 87(1) and 88(1) of the Rules

31. The Chamber notes that pursuant to Rules 87(1) and 88(1) of the Rules, it “shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure”.

32. The prosecution submits that Witness 38 will testify on events which may reveal the identities of some of the crime-base vulnerable witnesses. The Chamber notes that the prosecution does not make any reference to whether consent has been obtained to the proposed in-court protective measures.

33. The VWU confirms that procedural protective measures requested by the prosecution for Witnesses 22 and 87, were discussed with these witnesses during its last mission and the witnesses provided their consent to the implementation of procedural protective measures if granted.⁵²

Witness 38

34. At paragraph 32 of the prosecution Request, the prosecution requests three types of protective measures concerning vulnerable witnesses whose pseudonyms may be mentioned by Witness 38 during his testimony, namely:

- (i) these victims/witnesses should continue to be referred to by their pseudonyms throughout the proceedings, pursuant to Rule 87(3)(d) of

⁵² ICC-01/05-01/08-974Conf-Exp, paragraph 6.

the Rules, in order to prevent their identities from being disclosed to the public;

(ii) any parts of the testimony of other witnesses that could lead to the positive identification of victims of sexual violence should be heard in private or closed session.

35. The VWU specifies in its analysis of the prosecution Request that the vulnerable witnesses/victims who could be identified are Witnesses [REDACTED].⁵³ Furthermore, the Chamber notes that Witness 38, [REDACTED] on alleged crimes suffered by some vulnerable witnesses.⁵⁴ The Chamber agrees with the use of, and reference to, the respective pseudonyms of vulnerable witnesses. Therefore request (i) above is to be granted for the sake of consistency.

36. With regard to request (ii) for parts of Witness 38's testimony to be held in closed session, the Chamber expresses a preference for private sessions rather than closed sessions. The VWU, after consultation, submits that these measures would effectively avoid rejection, re-traumatisation and stigmatisation of these victims. In order not to defeat any protective measures granted or to be granted to vulnerable witnesses, the Chamber accepts that the relevant parts of Witness 38's testimony referring to, and identifying, Witnesses [REDACTED], who are alleged rape victims, are given by Witness 38 in private session. The parties and participants should make every effort to question Witness 38 on matters concerning other vulnerable witnesses at the beginning of his testimony.

⁵³ ICC-01/05-01/08-884-Conf-Exp, paragraph 13.

⁵⁴ ICC-01/05-01/08-793-Conf-Exp-AnxC10.

37. The Chamber strongly encourages the prosecution to submit in advance a list of sensitive and confidential information contained in Witness 38 statements, and the related questions to be dealt with in private session. This list will be classified as a confidential document and shall be provided to the Chamber, by way of an email to the Legal Adviser to the trial Division before the testimony of Witness 38. The prosecution is also responsible for informing the Chamber about any other vulnerable witnesses to whom Witness 38 may refer.
38. In preparing their questions, parties and participants should endeavour to group together all the identifying questions and to ask these identifying questions at the beginning of their questioning.

Witnesses 22 and 87

39. The Chamber notes that the prosecution in its Request refers several times to the expression “victims of sexual violence” as encompassing “victims of rape, sexual violence, or related crimes”.⁵⁵ Whilst the Chamber understands that this is likely done for ease of reference, it notes that the crime confirmed by the Pre-Trial Chamber is “rape” as a crime against humanity pursuant to Article 7(1)(g) of the Statute and as a war crime pursuant to Article 8(2)(e)(vi) of the Statute rather than “any other form of sexual violence”.⁵⁶
40. As to Witnesses 22 and 87, the Chamber notes that these two witnesses have been considered by the VWU as vulnerable witnesses due to being alleged

⁵⁵ ICC-01/05-01/08-800-Corr-Red4, paragraph 2, footnote 2 and title IV.

⁵⁶ Pre-Trial Chamber III, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, pages 184 and 185, letter d) ii) and iv).

victims of rape. These witnesses also suffer from fragile medical condition as a result of the consequences of sexual violence.

41. Both the prosecution and the VWU submit that image and voice distortion, allocation of a pseudonym as well as proceeding in private session when identifying information is to be mentioned, are necessary measures which will enable the vulnerable witnesses [REDACTED] to continue to live in their respective communities without fear of being identified as victims of rape and thereby being stigmatized.⁵⁷

42. The Chamber is particularly mindful of the provision under Article 68(2) of the Statute regarding the implementation of protective measures in the case of victims of sexual violence. These two witnesses are alleged rape victims and the Chamber takes into account the particular vulnerability of these witnesses as well as the risk of re-victimisation when testifying in court [REDACTED].

43. The Chamber will permit limited testimony to be given in private session, as opposed to closed session, for these two witnesses. Private session will enable the questioning of these witnesses as to their respective identities and other identifying information which should be indicated in advance to the parties, participants and the Chamber. This will negate any prejudice to or inconsistency with the rights of the defence and arguably may facilitate the questioning of the witnesses by the defence, since it will be able to question them without restriction.

44. With regard to Witness 22,⁵⁸ following the recent assessment by the VWU psychologist, the VWU submits that Witness 22 may need special protective

⁵⁷ ICC-01/05-01/08-884-Conf-Exp, paragraph 6.

⁵⁸ ICC-01/05-01/08-974-Conf-Exp-Anx1, paragraphs 1 to 7.

measures, namely in-court assistance during testimony pursuant to Rule 88(1) of the Rules. The Chamber considers that the VWU psychological assessment is sufficiently recent to provide accurate information as to the need for further protection concerning this vulnerable witness. The Chamber therefore supports the VWU proposal for this special measure provided that the need for in-court assistance is confirmed by the VWU once the familiarisation process has taken place at the seat of the Court.

45. With regard to Witness 87, the prosecution requests authorisation for Witness 87 to be accompanied by either a psychologist, a trustworthy person, or a family member, at her discretion.⁵⁹ The Chamber agrees with the VWU's submission that the requisite prior vulnerability assessment is in practice carried out upon arrival of the witness at the seat of the Court and that it is a matter for the VWU to assess the suitability of an accompanying person to provide support.⁶⁰ In the present case, Witness 87 was recently assessed by the VWU as to her eligibility to be accompanied by a support person.⁶¹ Pursuant to Regulation 91 of the Regulations of the Registry, the VWU has identified a suitable accompanying support person, namely her uncle (who is also Witness 89, a witness not to be called to testify by the prosecution). Therefore, the Chamber will deal with any other request for in-court special measures, as the case may be, once the witness has participated in the familiarisation process at the seat of the Court.

IV. Conclusions

46. Given the conclusions above, the Chamber rejects the defence's request to hold *in camera* hearings to determine whether to order protective measures.

⁵⁹ ICC-01/05-01/08-800-Corr-Red4, paragraph 57(ii).

⁶⁰ ICC-01/05-01/08-884-Conf-Exp, paragraph 11.

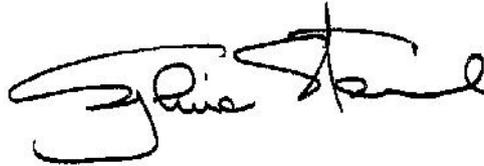
⁶¹ ICC-01/05-01/08-974-Conf-Exp-Anx1, paragraphs 64 to 70.

47. The Chamber authorises, for vulnerable Witnesses 22 and 87, image and voice distortion and the assignment and use of pseudonyms as well as limited private sessions for the parts of their testimony containing identifying information. These sessions are to be held preferably at the beginning of their testimonies. Consequently, the Chamber orders that any references to these vulnerable witnesses by any other witnesses, parties or participants, is made by using their respective pseudonyms.
48. Upon confirmation by the VWU by way of an email to the Legal Adviser to the Trial Division, the Chamber authorises the presence of in-court assistance during the testimony of Witness 22.
49. The Chamber authorizes the parts of Witness 38's testimony, when information on vulnerable witnesses is mentioned, to be heard in private session.
50. The Chamber recalls that the prosecution, the defence or any other participant in the proceedings shall not disclose any identifying information relating to a protected witness.⁶²
51. Finally, the Chamber recalls that, when the Chamber grants any protective measures to individual witnesses, both parties and participants inside and outside the courtroom have a fundamental responsibility to ensure that the

⁶² Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, ICC-01/05-01/08-813-Conf-Exp, and redacted versions issued on 20 July 2010, paragraphs 83-84.

Chamber's relevant decisions on protective measures and in-court precautions are respected and not undermined.⁶³

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 27 June 2016

At The Hague, The Netherlands

⁶³ See for a similar approach: Trial Chamber I, Transcript of public hearing, 22 January 2009, ICC-01/04-01/06-T-105-ENG, page 55, lines 11 to 14.