

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **28 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 Witness 65”, ICC-01/05-01/08-
1809 of 30 September 2011**

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

Counsel for the Defence

Mr Peter Haynes
Ms Melinda Taylor
Ms Kate Gibson

Legal Representatives of the Victims

Ms Marie-Édith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

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*, issues the following Decision on in-court protective measures for Witness 65.

I. Background and submissions

1. On 6 July 2010, the Office of the Prosecutor (“prosecution”) filed, on a confidential, *ex parte* basis, its Corrigendum to “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial” (“Application”).¹ Simultaneously, the prosecution filed confidential redacted versions of the Application, which were notified to the defence,² the legal representatives of victims,³ and the OPCV.⁴
2. Among other matters, the Application requests that the Chamber grant protective measures to Witness 65, namely the use of a pseudonym, face and voice distortion and partial use of closed or private session.⁵ The prosecution asserts that Witness 65 faces threats from the accused’s supporters [REDACTED].⁶ To this end, the prosecution argues that the proposed measures are necessary to protect Witness 65’s identity and his safety [REDACTED].⁷

¹ Corrigendum to “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial”, ICC-01/05-01/08-800-Conf-Exp-Corr, 6 July 2010, and two confidential, *ex parte* annexes.

² Corrigendum to “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial”, ICC-01/05-01/08-800-Conf-Exp-Corr-Red, 6 July 2010, and one confidential, *ex parte* annex.

³ Corrigendum to “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial”, ICC-01/05-01/08-800-Conf-Exp-Corr-Red3, 6 July 2010, and one confidential, *ex parte* annex.

⁴ Corrigendum to “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial”, ICC-01/05-01/08-800-Conf-Exp-Corr-Red2, 6 July 2010, and one confidential, *ex parte* annex. A public redacted version was also filed on 6 July 2010: Corrigendum to “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial”, ICC-01/05-01/08-800-Conf-Exp-Corr-Red4, 6 July 2010, and one annex.

⁵ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraphs 34 and 41.

⁶ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraphs 34, 36 and 41.

⁷ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraph 34, ICC-01/05-01/08-800-Conf-Exp-AnxA-Corr, pages 11-12.

3. On 15 July 2010, the defence filed its response to the Application.⁸ The defence argues that the Chamber should conduct “a short preliminary examination” in closed session to determine whether the proposed measures are warranted.⁹ The defence asserts that such an examination is necessary to determine whether the perceived threat arising out of the witness’ testimony is “objective, genuine and proximate and whether the measures are proportionate to this threat”.¹⁰ In relation to Witness 65 specifically, the defence argues that there is “no indication [. . .] that a future and proximate threat may be posed to [him] on account of his cooperation with the Court”.¹¹

4. On 15 September 2010, the Victims and Witness Unit (“VWU”) filed its observations on the Application.¹² The VWU supports the prosecution’s request for protective measures for Witness 65, asserting that they are “necessary to maintain and complement the protective measures put in place for him” by the VWU.¹³

5. At 16:38 on 30 September 2011, the VWU provided the Chamber with its updated assessment regarding Witness 65.¹⁴ The VWU explains that Witness 65 has expressed fears for his security [REDACTED] if his identity and cooperation with the Court are disclosed, particularly in light of the [REDACTED]. The VWU also recommends that the protective measures requested by the prosecution be granted as a precautionary measure.¹⁵

⁸ 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.

⁹ ICC-01/05-01/08-830-Conf-Exp, paragraph 10.

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

¹¹ ICC-01/05-01/08-830-Conf-Exp, paragraph 16.

¹² Victims and Witnesses Unit’s observations on the “Corrigendum to “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial”, 15 September 2011, ICC-01/05-01/08-884-Conf-Exp.

¹³ ICC-01/05-01/08-884-Conf-Exp, paragraph 4.

¹⁴ Email to the Chamber’s Legal Officer, sent by VWU’s Associate Legal Officer, 30 September 2011 at 16:38.

¹⁵ Email to the Chamber’s Legal Officer, sent by VWU’s Associate Legal Officer, 30 September 2011 at 16:38.

II. Relevant provisions

6. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered the following provisions: Articles 64(7), 67(1), and 68 of the Statute, Rule 87 of the Rules of Procedure and Evidence (“Rules”), Regulation 20 of the Regulations of the Court, and Regulation 94 of the Regulations of the Registry.

III. Analysis and conclusions

7. Under the Court’s legal framework, and in particular Article 68 of the Statute, the Court has an obligation “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. The Chamber also has a duty to observe the principle of publicity of proceedings, as enshrined in Articles 64(7) and 67(1) of the Statute and Rule 20 of the Rules. While this principle is not absolute,¹⁶ due regard must be given to it when protective measures are sought that would limit the public nature of the proceedings.
8. Requests for protective measures pursuant to Article 68(1) and (2) of the Statute and Rules 87 and 88 of the Rules are to be assessed a case-by-case basis, and may be granted where the Chamber is satisfied that they are not prejudicial to, or inconsistent with, the accused’s right to a fair and impartial trial.
9. As the Chamber has previously explained, 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.¹⁷ Such in-court protective measures impede the

¹⁶ Decision on in-court protective measures for Witnesses 38, 22 and 87, 19 November 2010, ICC-01/05-01/08-1021-Conf, paragraph 24; Trial Chamber II, Transcript of hearing on 20 September 2010, ICC-01/04-01/07-T-189-ENG, page 10, lines 17-22.

¹⁷ ICC-01/05-01/08-1021-Conf, paragraph 28; Decision on in-court protective measures for Witness 32, 22 September 2011, ICC-01/05-01/08-1774-Conf, paragraph 12.

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.¹⁸ While these measures sometimes need to be combined with limited private session testimony to avoid defeating their purpose, private sessions are to be used sparingly and only when necessary.

10. Turning to the particular circumstances of Witness 65, the Chamber considers that the following factors support a grant of the protective measures sought. *First*, the witness [REDACTED] by virtue of his cooperation with the Court, which may create a heightened risk of retaliation if his identity and cooperation with the Court were to be disclosed. This risk is concrete, as demonstrated by the recent threats directed at prosecution witnesses who [REDACTED] appear to have been targeted as a result of their cooperation with the Court.¹⁹ *Second*, the witness [REDACTED] live in a community where he could readily be targeted by those who consider his cooperation with the Court to be [REDACTED] particularly in light of [REDACTED]. *Third*, the witness has expressed subjective fears for his safety and that [REDACTED] if his identity is disclosed and has indicated that those concerns would be mitigated if he were permitted to testify under the protective measures sought.²⁰ *Fourth*, granting the measures sought will increase the chances that Witness 65 will be able to continue to live in his community without the fear of being threatened or harassed as a result of his cooperation with the Court.

11. Against these considerations, the Chamber has balanced the imperative of the publicity of proceedings and the accused's right to a fair trial. In this regard, the

¹⁸ ICC-01/05-01/08-1021-Conf, paragraph 28; ICC-01/05-01/08-1774-Conf, paragraph 12.

¹⁹ See Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011, 26 September 2011, ICC-01/05-01/08-1789-Conf, paragraph 29-31.

²⁰ Email to the Chamber's Legal Officer, sent by VWU's Associate Legal Officer, 30 September 2011 at 16:38.

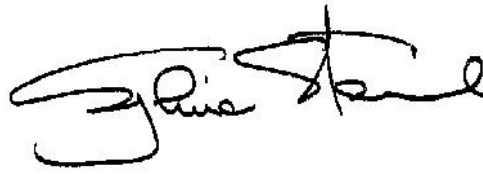
Chamber notes that the protective measures sought in the Application do not curtail the defence's knowledge of Witness 65's identity. On the contrary, his identity has been disclosed to the defence and the defence will be able to listen to and see the witness in court without any distortions. The defence's ability to question the witness will not be affected by the proposed measures. Moreover, the public will still be able to listen to most parts of Witness 65's testimony and will therefore not be deprived of the substance of his evidence. For these reasons, the Chamber concludes that the measures sought would cause minimal prejudice to the defence and are consistent with the accused's fundamental right to a fair, public trial, as enshrined in Article 67 of the Statute.

12. In these circumstances, the Chamber is satisfied that the protective measures sought are necessary, reasonable and proportionate.

IV. Conclusions

13. The Chamber therefore grants the prosecution's application for protective measures for Witness 65 and authorises the use of a pseudonym, face and voice distortion and partial use of closed or private session.

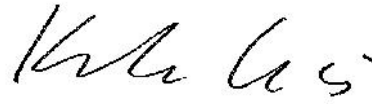
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 28 June 2016

At The Hague, The Netherlands