

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **29 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 32”, ICC-01/05-01/08-
1774 of 22 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

Ms 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*, (“Bemba case”) issues the following Decision on in-court protective measures for Witness 32.

I. Background and Submissions

1. On 13 September 2011, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Request for Protective Measures for Witnesses CAR-OTP-PPPP-0015, CAR-OTP-PPPP-0032, CAR-OTP-PPPP-0036, CAR-OTP-PPPP-0044, CAR-OTP-PPPP-0045 at Trial”¹ (“Request”). The prosecution filed a confidential redacted version of its Request on 16 September 2011.²
2. Relying on Articles 68(1) and 64(2) of the Rome Statute (“Statute”) and on Rules 87 and 88 of the Rules of Procedure and Evidence (“Rules”), the prosecution requests that the Chamber grant protective measures to, among others, Witness 32.³ Specifically, the prosecution requests the Chamber to authorise the use of a pseudonym, face and voice distortion and partial use of closed or private session during the testimony of Witness 32.⁴ According to the prosecution, these protective measures are necessary, reasonable and proportionate.⁵
3. The prosecution generally argues that the unstable security environment caused by [REDACTED], is contributing to “both objective and subjective perceptions of risk” by the Witness.⁶ The prosecution further argues that [REDACTED] creates a risk of retaliation against the witness and poses a significant general threat to

¹Prosecution’s Request for Protective Measures for Witnesses CAR-OTP-PPPP-0015, CAR-OTP-PPPP-0032, CAR-OTP-PPPP-0036, CAR-OTP-PPPP-0044, CAR-OTP-PPPP-0045 at Trial, 13 September 2011, ICC-01/05-01/08-1743-Conf-Exp.

² ICC-01/05-01/08-1743-Conf-Red.

³ ICC-01/05-01/08-1743-Conf-Red, paragraph 1.

⁴ ICC-01/05-01/08-1743-Conf-Red, paragraph 2

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

⁶ ICC-01/05-01/08-1743-Conf-Red, paragraph 7.

anyone who would appear as a prosecution witness before the Court.⁷ The prosecution also submits that Witness 32 is in a similar situation as [REDACTED] and that it is therefore reasonable to predict that he may face the same types of threats as those reported by [REDACTED], or even attacks if he is required to testify without protective measures.⁸

4. The prosecution asserts that Witness 32 has himself requested protective measures [REDACTED] and his perceived risk due to his cooperation with the Court [...].⁹ The prosecution finally argues that testifying without protective measures would raise Witness 32's [REDACTED] and subject him to potential threats and intimidation, although the prosecution acknowledges that Witness 32 has yet not reported any threats as a result of his cooperation with the Court.¹⁰
5. On 19 September 2011, pursuant to an oral decision of the Chamber issued on 16 September 2011,¹¹ the defence filed its "Defence Response to Prosecution Request for Protective Measures for Witness CAR-OTP-WWWW-0032" ("defence Response").¹² In objecting to the prosecution Request, the defence relies on the right of the accused to a public trial¹³ and argues that "protective measures must be proportionate and discrete, and only implemented when the Chamber is convinced that failure to do so will give rise to a serious likelihood that actual harm will be caused to a witness".¹⁴

⁷ ICC-01/05-01/08-1743-Conf-Red, paragraph 8.

⁸ ICC-01/05-01/08-1743-Conf-Red, paragraphs 10 and 12.

⁹ ICC-01/05-01/08-1743-Conf-Red, paragraph 12.

¹⁰ ICC-01/05-01/08-1743-Conf-Red, paragraph 12.

¹¹ Transcript of hearing on 16 September 2011, ICC-01/05-01/08-T-163-CONF-ENG ET, page 65, line 23 to page 66, line 3.

¹² Defence Response to Prosecution Request for Protective Measures for Witness CAR-OTP-WWWW-0032, 19 September 2011, ICC-01/05-01/08-1766-Conf.

¹³ ICC-01/05-01/08-1766-Conf, paragraph 5.

¹⁴ ICC-01/05-01/08-1766-Conf, paragraph 8.

6. The defence argues that considering Witness 32's [REDACTED] and taking into account the fact that the witness [REDACTED] the sincerity of Witness 32's fears is doubtful and the hiding of his identity is unnecessary.¹⁵ The defence further argues that the prosecution has provided no basis for its "hypothetical" assertions regarding the security environment [REDACTED] and submits that speculation on the alleged threats against witnesses does not justify derogating from the accused's right to a public trial.¹⁶ The defence also argues that the fact that Witness 32 himself requested protective measures should not be a determinative factor, as demonstrated by the majority of the Chamber's decision rejecting such measures for Witness 9.¹⁷

7. The defence submits that granting the requested protective measures would deny the defence the possibility to invite the witness to consider contradictions between his allegations and those of other individuals he knows.¹⁸ Finally, the defence expresses concerns over the fact that a majority of witnesses in the *Bemba* case have been granted protective measures and that "any details of any ultimate findings on command responsibility will be completely beyond public scrutiny [...]".¹⁹

8. On 22 September 2011, the Victims and Witnesses Unit ("VWU"), provided the Chamber with its assessment regarding Witness 32.²⁰ The VWU takes the position that the protective measures requested by the prosecution should be granted as a precautionary measure due to Witness 32's [REDACTED].

¹⁵ ICC-01/05-01/08-1766-Conf, paragraphs 10-11.

¹⁶ ICC-01/05-01/08-1766-Conf, paragraph 13-14.

¹⁷ ICC-01/05-01/08-1766-Conf, paragraph 16.

¹⁸ ICC-01/05-01/08-1766-Conf, paragraph 17.

¹⁹ ICC-01/05-01/08-1766-Conf, paragraph 17.

²⁰ Email to the Chamber's Legal Officer, sent by VWU's Associate Legal Officer, 22 September 2011 at 12.58.

II. Relevant provisions

9. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered the following provisions: Articles 64(7), 67(1), 68(1) and (2) of the Statute; Rules 87 and 88 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

10. At the outset, the Chamber recalls that pursuant to 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 preserve 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. As the Chamber has previously held, however, this principle is not absolute.²¹
11. Therefore, protective measures pursuant to Article 68(1) and (2) of the Statute and Rules 87 and 88 of the Rules may be granted by a 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 public and fair trial.²²

²¹ 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.

²² ICC-01/05-01/08-1021-Conf, paragraphs 25-26.

12. 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 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.²³ 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.

13. The protective measures sought in the prosecution Request aim to protect Witness 32 from public identification, as opposed to curtailing the defence's knowledge of the witnesses' identity. Indeed, the witness' 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 Witness 32'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.

14. Against this backdrop, the Chamber considers that, due to the particular circumstances of the witness, [REDACTED] the fears he expressed for his

²³ ICC-01/05-01/08-1021-Conf, paragraph 28.

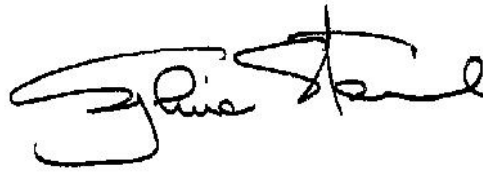
security, [REDACTED] the protective measures requested for Witness 32 are necessary, reasonable and proportionate. These measures will enable Witness 32 to continue to live in his community and carry out his functions without the fear of being identified, and, as a result, being threatened or harassed.

15. In light of the above, the Chamber is satisfied that the proposed measures are needed to ensure that Witness 32 can continue to live in his community without the fear of being identified as cooperating with the Court, and, as a result, being threatened or harassed. They will also ensure that the witness' ability [REDACTED] is not compromised as a result of his testimony in the present case.

IV. Conclusions

16. For the reasons above, the Chamber grants the prosecution's Request for protective measures for Witness 32 and authorises the use of a pseudonym, face and voice distortion and partial use of closed or private session.

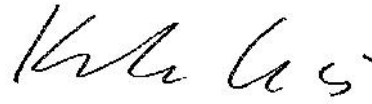
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 29 June 2016

At The Hague, The Netherlands