

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 November 2011

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

Decision on in-court protective measures for Witness 69

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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Ms Petra Kneuer

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Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Mr Assingambi Zarambaud

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

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod Jacome

Detention Section

**Victims Participation and Other
Reparations Section**

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 69.

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 69 – namely, the use of a pseudonym, image and voice distortion and limited use of closed or private session.⁵ The prosecution asserts that the requested protective measures will permit Witness 69, an alleged rape victim, "to provide [a] full account[] of the events at issue with minimal re-traumatisation, [...] protect [his] privacy and the privacy of family members, and [...] avoid the stigma that is associated with rape".⁶ It further argues that the requested protective measures would "ameliorate [Witness 69's] psychological suffering" and "address [his] physical and psychological fear of 'reprisals'".⁷

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

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

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

⁴ Corrigendum to "Prosecution's Request for Protective and Special Measures for Prosecution Witnesses at Trial", 6 July 2010, ICC-01/05-01/08-800-Conf-Exp-Corr-Red2, 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", 6 July 2010, ICC-01/05-01/08-800-Conf-Exp-Corr-Red4, and one annex.

⁵ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraphs 10, 26 and 57.

⁶ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraph 10.

⁷ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraph 18.

3. On 15 July 2010, the defence filed its response to the Application,⁸ in which it 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 witness consents to the proposed measures and 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 The defence explains that if these criteria are established, it “will not object to [Witness 69] giving evidence with [a] pseudonym[] and voice/facial distortion”.¹¹
4. On 15 September 2010, the Victims and Witnesses Unit (“VWU”) filed its observations on the Application.¹² The VWU supports the prosecution’s request for protective measures for Witness 69, asserting that the proposed measures “will enable the witness[] to continue to live in [his] current communit[y] without the fear of [...] being identified and as a result being threatened or harassed, or becoming [a] victim[] of social stigmas”.¹³ Preventing Witness 69 from being publicly identified as a victim of sexual violence would, in the VWU’s submission, “avoid rejection, re-traumatisation and stigmatisation”.¹⁴
5. On 24 November 2011, the VWU, whose staff met with Witness 69 during the familiarisation process, provided the Chamber with its updated assessment

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 11.

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 6.

¹⁴ ICC-01/05-01/08-884-Conf-Exp, paragraph 14.

regarding the witness.¹⁵ The VWU explains that the witness consents to the proposed protective measures and wishes to benefit from them because he or his family could be subject to reprisals if his cooperation with the Court were made public.¹⁶

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,¹⁷ 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 Rule 87 of the Rules are to be assessed on 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.

¹⁵ Email to the Chamber's Legal Officer, sent by VWU's Associate Legal Officer, 24 November 2011 at 12:35.
¹⁶ Email to the Chamber's Legal Officer, sent by VWU's Associate Legal Officer, 24 November 2011 at 12:35.
¹⁷ 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.

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 his or her testimony at the Court.¹⁸ 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.¹⁹ 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 69, the Chamber considers *first*, that the witness may suffer stigmatization in his community if it is revealed that he is a rape victim. *Second*, the implementation of the proposed protective measures may limit the retraumatization that Witness 69 may experience as a result of his testimony in court. *Third*, the witness has expressed fears for his safety and that of his family if his cooperation with the Court is made public, which the Chamber finds to be well-founded. *Fourth*, the Chamber is persuaded that the measures sought will increase the chances that Witness 69 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 Chamber notes that the protective measures sought in the Application do not curtail the defence's knowledge of Witness 69's identity. On the contrary, his identity has been disclosed to the defence and the defence will be able to

¹⁸ 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.

¹⁹ ICC-01/05-01/08-1021-Conf, paragraph 28; ICC-01/05-01/08-1774-Conf, paragraph 12.

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 69'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.
13. Finally, the Chamber concludes that the preliminary examination proposed by the defence is unnecessary because the Chamber has sufficient information before it to make an informed decision on the Application.
14. For the above reasons, the Chamber grants the prosecution's Application.

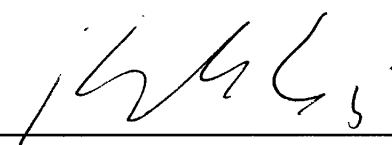
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 24 November 2011

At The Hague, The Netherlands