

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 February 2012

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 the defence's "Request for leave to appeal the decision on in-court protective measures for Witness 45"

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 Petra Kneuer

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo-Musamba

Legal Representatives of the Victims

Ms Marie-Édith Douzima-Lawson

Mr Assingambi Zarambaud

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

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") renders the following Decision on the defence's "Request for leave to appeal the decision on in-court protective measures for Witness 45".

I. Background and submissions

1. On 24 January 2012, the Chamber issued its "Decision on in-court protective measures for Witness 45" ("Decision"), in which it granted the Office of the Prosecutor's ("prosecution") request for in-court protective measures for Witness 45 — namely the use of a pseudonym, image and voice distortion and partial use of closed or private session.¹
2. On 30 January 2012, the defence filed a "Request for leave to appeal the decision on in-court protective measures for Witness 45" ("Request").² The defence urges the Chamber to (i) grant the request for leave to appeal; (ii) postpone the hearing of Witness 45's evidence until resolution of the Request; and (iii) order the disclosure of the transcripts of *ex parte* hearings said to have been held on 11 and 23 January 2012.³
3. On a preliminary basis, the Chamber denied the defence's request for the postponement of Witness 45's testimony, on the basis that the Chamber's

¹ Decision on in-court protective measures for Witness 45, 24 January 2012, ICC-01/05-01/08-2063-Conf, paragraph 22.

² Request for leave to appeal the decision on in-court protective measures for Witness 45, 30 January 2012, ICC-01/05-01/08-2082-Conf.

³ ICC-01/05-01/08-2082-Conf, paragraph 30.

Decision which *inter alia* granted the partial use of private or closed sessions will not prejudice the defence as the relevant transcripts may be reclassified as public.⁴

4. The defence identifies three grounds in support of its Request. The defence submits that the Chamber (i) based its decision on discredited or ancient material or information that was not disclosed to the defence ("First Ground");⁵ (ii) erred in not rendering the decision in a timely manner, thus making the decision an effective tool of inducement for the prosecution ("Second Ground");⁶ and (iii) failed to adequately identify the actual risk to the witness's security in light of the defence's arguments on the position held by the witness and the prior publicity of his involvement as a witness ("Third Ground").⁷ Further, and as a preliminary matter, the defence requests the Chamber to (i) suspend the testimony of Witness 45 until a decision on the request is issued; and (ii) asks the Chamber to disclose the transcripts of two *ex parte* hearings that allegedly took place on 11 and 23 January 2012.⁸
5. On 31 January 2012, pursuant to the Chamber's instructions,⁹ the prosecution filed the "Prosecution's response to Defence application for leave to appeal the decision on in-court protective measures for Witness

⁴ Transcript of hearing of 30 January 2012, ICC-01/05-01/08-T-201-CONF-ENG-ET, page 2, lines 4 to 11.

⁵ ICC-01/05-01/08-2082-Conf, paragraph 27.

⁶ ICC-01/05-01/08-2082-Conf, paragraph 28.

⁷ ICC-01/05-01/08-2082-Conf, paragraph 29.

⁸ ICC-01/05-01/08-2082-Conf, paragraph 30.

⁹ Oral decision of 30 January 2012, see transcript of hearing of 30 January 2012, ICC-01/05-01/08-T-201-CONF-ENG-ET, page 2, lines 12 to 15.

CAR-OTO-PPPP-0045" ("Response"),¹⁰ submitting that the Request should be rejected.

6. To this end, the prosecution argues that the defence failed to demonstrate how any of the three grounds raised (i) constitute an appealable issue arising from the decision; (ii) significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) that the Request fails to establish that an intervention by the Appeals Chamber may materially advance the proceedings.¹¹
7. In light of the defence's request that a decision be issued on an urgent basis before the conclusion of the testimony of Witness 45,¹² the Chamber issued an oral summary of the Decision during the hearing of 3 February 2012.¹³ In this summary, the Chamber dismissed the defence's Request and explained that a written decision containing the Chamber's reasoning would follow in due course.

II. Analysis and conclusions

8. In ruling upon the Request, the Chamber has, in accordance with Article 21(1) of the Rome Statute ("Statute"), considered Article 82(1)(d) of the Statute and Rule 155 of the Rules of Procedure and Evidence ("Rules").

¹⁰ Prosecution's response to Defence application for leave to appeal the decision on in-court protective measures for Witness CAR-OTO-PPPP-0045, 31 January 2012, ICC-01/05-01/08-2089-Conf.

¹¹ ICC-01/05-01/08-2089-Conf, paragraphs 13 to 24.

¹² Transcript of hearing of 2 February 2012, ICC-01/05-01/08-T-204-CONF-ENG-RT, page 2, line 3 to page 4, line 8.

¹³ Transcript of hearing on 2 February 2012, ICC-01/05-01/08-T-204-CONF-ENG-ET, page 44 line 24 to page 46 line 6.

Request for leave to appeal

9. The Chamber has followed the established jurisprudence of the Court with regard to the requirements that must be met under Article 82(1)(d) of the Statute in order for leave to appeal to be granted.¹⁴ To this end, the Chamber has examined the Request against the following criteria:

- i. whether the matters raised in the Request constitute appealable issues arising from the impugned decision;
- ii. whether the issues at hand would significantly affect:
 - a. the fair and expeditious conduct of the proceedings, or
 - b. the outcome of the trial; and

¹⁴ Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210-Corr-Anx; Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191; Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168; Decision on the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la décision orale du 4 mars 2010 autorisant l'utilisation et le dépôt en preuve de trois photographies", 2 April 2010, ICC-01/04-01/06-2404; Decision on the "Prosecution's request for Leave to Appeal the Trial Chamber's Oral Ruling Denying Authorisation to Add and Disclose Additional Evidence after 30 November 2009", 28 January 2010, ICC-01/05-01/08-680; Decision on the defence request for leave to appeal the "Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges", 28 October 2010, ICC-01/05-01/08-980; Decision on the Prosecution's Request for Leave to Appeal the Trial Chamber's Decision on Directions for the Conduct of the Proceedings, 15 December 2010, ICC-01/05-01/08-1086; Decision on the "Defence Request for Leave to Appeal the Decision on in-court Protective measures for Witness CAR-OTP-WWW-0032", 20 October 2011, ICC-01/05-01/08-1850-Conf.

iii. whether the immediate resolution of the issues by the Appeals Chamber would, in the opinion of the Trial Chamber, materially advance the proceedings.

10. The requirements set out above in (i), (ii) and (iii) are cumulative. The failure to fulfil one or more of them is therefore fatal to an application for leave to appeal.¹⁵

11. In relation to the first criterion, the Chamber recalls that an appealable issue is an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”¹⁶ In analysing whether the matters in the Request constitute appealable issues, the Chamber must first ascertain whether the issues identified actually *arise* from the Decision.¹⁷ If they do not, leave to appeal cannot be granted.¹⁸

12. Against this standard, the Chamber will therefore consider each of the three grounds raised by the defence in order to determine whether they may be considered appealable issues.

13. In support of the First Ground, the defence submits that the Chamber “made unsustainable findings which were either based on discredited or

¹⁵ ICC-01/04-01/06-2404, paragraph 18; *see also* Decision on the “Prosecution’s application for leave to appeal Trial Chamber II’s ‘Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1401, 1412, and 1456)’ of 7 October 2009”, 18 December 2009, ICC-01/04-01/07-1732, paragraph 12.

¹⁶ ICC-01/04-168, paragraph 9; *see also*, ICC-01/04-01/07-1732, paragraph 13; ICC-01/04-01/06-2404, paragraph 20; ICC-01/05-01/08-980, paragraph 12.

¹⁷ ICC-01/04-01/07-1732, paragraph 14.

¹⁸ ICC-01/04-01/07-1732, paragraph 14.

ancient material, or information which was not disclosed to the defence.”¹⁹

In this context, the defence further contends that it was prevented from exercising its right to respond to a request for protective measures.²⁰ The Chamber is of the view that the defence’s arguments cannot be sustained.

14. First, for the purpose of its Decision, the Chamber relied on the information and submissions set out in the prosecution’s initial request for protective measures,²¹ the “Defence Response to Prosecution Request for Protective Measures for Witness CAR-OTP-WWWW-0015, CAR-OTP-WWWW-0036, CAR-OTP-WWWW-0044, and CAR-OTP-WWWW-0045”,²² the “Prosecution’s Report on its Joint Mission with the Victims and Witnesses Unit Regarding Contact with Witness CAR-OTP-PPPP-0045 and Application for Specific Protective Measures” (“prosecution Report”),²³ and the “Registry’s report on the Outcome of the Victims and Witnesses Unit and Prosecution joint mission to establish contact with CAR-OTP-PPPP-0045 and on the need for in-court protective measures for the benefit of this witness.”²⁴ The information contained in these filings is known to the defence and the two last documents are dated 20 January 2012. Therefore, the assertion that the Chamber’s findings are based on

¹⁹ ICC-01/05-01/08-2082-Conf, paragraph 27.

²⁰ ICC-01/05-01/08-2082-Conf, paragraph 21.

²¹ Prosecution’s Request for Protective and Special 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.

²² Defence Response to Prosecution Request for Protective Measures for Witness CAR-OTP-WWWW-0015, CAR-OTP-WWWW-0036, CAR-OTP-WWWW-0044, and CAR-OTP-WWWW-0045, 7 October 2011, ICC-01/05-01/08-1835-Conf.

²³ Prosecution’s Report on its Joint Mission with the Victims and Witnesses unit Regarding Contact with Witness CAR-OTP-PPPP-0045 and Application for Specific Protective Measures”, 24 January 2012, ICC-01/05-01/08-2063-Conf.

²⁴ Registry’s report on the outcome of the Victims and Witnesses Unit and Prosecution joint mission to establish contact with CAR-OTP-PPPP-0045 and on the need for in-court protective measures for the benefit of this witness, 20 January 2012, ICC-01/05-01/08-2052-Conf-Red.

discredited or ancient material or information that was not disclosed to the defence is incorrect.

15. Further, in relation to the allegation that the defence was prevented from exercising its right to respond to a request for protective measures, the Chamber notes that the defence indeed responded to the request for protective measures.²⁵ Further, the Chamber notes that the prosecution Report did not make a new request for in-court protective measures as it only updated the Chamber on Witness 45's security situation and reiterated its initial request for protective measures. Finally, contrary to what is submitted by the defence, the defence was granted an opportunity to respond to make submissions on all the issues covered by the prosecution Report.²⁶ Accordingly, in its filing of 23 January 2012, the defence submitted that a more detailed response to the prosecution's request for protective measures in respect of Witness 45 would be provided in due course and in a separate filing.²⁷ However, no such response has been filed to date.

16. As a result, the Chamber finds that the First Ground is based on an inaccurate representation of the relevant facts and can therefore not be considered as an issue arising from the Chamber's Decision. Accordingly, the Chamber concludes that the First Ground is not an appealable issue under Article 82(1)(d) of the Statute.

²⁵ See ICC-01/05-01/08-1835-Conf.

²⁶ E-mail from the Assistant Legal Officer of the Chamber to the parties sent on 20 January at 8.47.

²⁷ Defence consolidated response to the Prosecution and Registry report on a joint mission to re-establish contact with Witness CAR-OTP-0045 and response to an application for specific protective measures, 22 January 2012, ICC-01/05-01/08-2057-Conf-Exp, paragraph 8.

17. The Second Ground relates to the alleged failure by the Chamber to render the decision in a timely manner thus making it “an effective tool of inducement for the Prosecution”. In this respect, it should be emphasised that the timing of decisions on protective measures is determined on a case-by-case basis, in accordance with the specific personal circumstances of each witness for whom protective measures are sought. Updated information on the circumstances of the witnesses, which may be critical to the Chamber’s determination, is often received only a few days prior to testimony. In relation to Witness 45, the decision to grant protective measures was based, *inter alia*, on reported security incidents that allegedly occurred shortly before the witness was scheduled to begin his testimony. The fact that the Chamber’s decision on protected measures was communicated to the witness prior to his travel cannot be considered, by itself, as an inducement to testify one way or another. Considering the Chamber’s duty to take appropriate measures to protect witnesses in accordance with Article 68(1) of the Statute, and given that it is within the Chamber’s discretion to determine the timing of decisions on protective measures, the Chamber finds that the Second Ground does not arise from the Decision and is therefore not appealable under Article 82(1)(d) of the Statute.

18. Finally, the Chamber dismisses the defence’s arguments relating to the alleged failure by the Chamber to identify the actual risk to the security of this witness of giving evidence, as formulated in support of the Third Ground. In contrast to what is submitted in the Request, the Chamber has

duly considered the defence's observations on the witness's position and the prior publicity of his involvement as a witness.²⁸ However, in accordance with its obligation under Article 68(1) of the Statute "to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" in a manner that is not "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", the Chamber balanced the defence's observations on the witness's position and the publicity of his involvement with the Court against the circumstances militating in favour of granting protective measures. As a result of this balancing exercise, the Chamber concluded that the requested protective measures were necessary, reasonable and proportionate.

19. Accordingly, the Chamber concludes that the Third Ground merely reflects a disagreement between the defence and the Chamber on the merits and, as such, does not constitute an appealable issue under Article 82(1)(d) of the Statute.²⁹

20. As none of the three grounds raised in the defence's Request constitute appealable issues under Article 82(1)(d) of the Statute and given that the requirements of Article 82(1)(d) are cumulative, the Chamber need not address the subsequent criteria set out in paragraph 9 above and hereby denies the Request.

²⁸ ICC-01/05-01/08-2063-Conf, paragraphs 9 and 19.

²⁹ *See for example*, ICC-01/04-168, paragraph 9; *see also*, ICC-01/04-01/07-1732, paragraph 13; ICC-01/04-01/06-2404, paragraph 20; ICC-01/05-01/08-980, paragraph 12.

Request for postponement of Witness 45's testimony

21. The Chamber recalls that by oral decision of 30 January 2012,³⁰ the defence's request for a postponement of Witness 45's evidence until a resolution of the Request was dismissed on the basis that the rejection of the request would not entail any prejudice for the defence. Considering further that Witness 45 completed his testimony on 2 February 2012, the request for a postponement is rejected as moot.

Request for access to transcripts of ex parte hearings

22. With regard to the defence's request for access to the transcripts of *ex parte* hearings allegedly held on 11 and 23 January 2012, the Chamber informs that no *ex parte* hearings were held in the *Bemba* case since the last hearing before the winter recess in December 2011. As reflected in the Court Management System records, the first hearing held in 2012 corresponds to the first day of hearing of Witness 45.³¹ The relevant email communications between the prosecution, Victims and Witnesses Unit ("VWU") and the Chamber are referenced in the Decision. In addition, the prosecution and the VWU were instructed to file redacted versions of their reports for the defence information.³² The information which was not communicated properly remains confidential and *ex parte* pursuant to Regulation 23bis of the Regulations of the Court. Accordingly, the

³⁰ Transcript of hearing of 30 January 2012, ICC-01/05-01/08-T-201-Conf-ENG-ET, page 2, line 1 to page 2, line 11.

³¹ Transcript of hearing of 30 January 2012, ICC-01/05-01/08-T-201-Conf-ENG-ET.

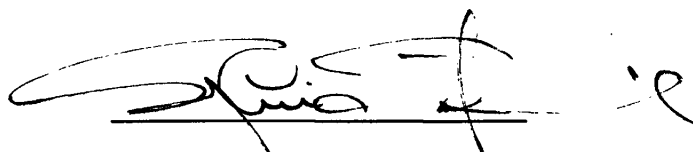
³² See ICC-01/05-01/08-2063-Conf and ICC-01/05-01/08-2052-Conf-Red..

defence's request to be granted access to *ex parte* transcripts is dismissed *in limine*.

23. For the above reasons, the Chamber hereby:

DENIES the Request.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 15 February 2012

At The Hague, The Netherlands