



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 D04-19”, ICC-01/05-01/08-2514 of 22 February 2013**

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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Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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The Office of Public Counsel for the Defence

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States Representatives

Amicus Curiae

REGISTRY

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Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

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 D04-19.

I. Background and submissions

1. On 13 July 2012, the defence filed its “Defence Request for Protective Measures”¹ (“Request”), in which it seeks the Chamber’s authorisation for in-court protective measures for a number of witnesses including Witness D04-19.² In relation to Witness D04-19, the defence makes the following requests: (i) as part of a group of witnesses [REDACTED] (together “[REDACTED] Witnesses”), the defence requests in-court protective measures, in particular, the continued use of a pseudonym, image and voice distortion, and the use of private or closed session as necessary to avoid the identity of the witness becoming known by those outside the courtroom;³ and (ii) in addition, in relation to the particular situation of Witness D04-19, the defence requests full in-court protective measures, namely that he give his testimony entirely in closed session.⁴
2. In relation to its request for in-court protective measures for the “[REDACTED] Witnesses”, the defence outlines fears held by that group of witnesses relating to both their own security and that of [REDACTED], and submits that these warrant a finding on the part of the Chamber that the requested protective measures are necessary, reasonable and proportionate.⁵ More specifically, the defence makes a general assertion that the [REDACTED] Witnesses have expressed fears “that they [REDACTED] will

¹ Defence Request for Protective Measures, 13 July 2012, ICC-01/05-01/08-2244-Conf.

² ICC-01/05-01/08-2244-Conf, paragraphs 25 and 40 to 45.

³ ICC-01/05-01/08-2244-Conf, paragraphs 11, 25, and 45.

⁴ ICC-01/05-01/08-2244-Conf, paragraphs 40 and 45.

⁵ ICC-01/05-01/08-2244-Conf, paragraphs 4, 20 to 25.

be the subject of harassment, subjected to pressure, or that they will be [REDACTED]”.⁶ Moreover, the defence submits that these witnesses [REDACTED].⁷ On the basis of these fears, the defence requests that the Chamber grant in-court protective measures for the [REDACTED] Witnesses, including Witness D04-19.

3. In addition, the defence submits that in relation to Witness D04-19 and one other witness, due to “the positions they occupied during the events, and the detailed testimony which the Defence will seek to elicit [...] it will be impossible for these witnesses to give any testimony in open session without immediately revealing their status and roles within the events in question”.⁸ The defence states that these witnesses [REDACTED] and have expressed “fears [REDACTED]”.⁹ Moreover, the defence submits that Witness D04-19 has expressed fears for the safety [REDACTED]. According to the defence, these fears would be exacerbated by [REDACTED].¹⁰ The defence further submits that, given the circumstances outlined above, the hearing of the testimony of Witness D04-19 entirely in closed session is necessary, reasonable, and proportionate.¹¹
4. On 6 August 2012, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Response to ‘Defence Request for Protective Measures’” (“Response”).¹² In its Response, the prosecution asserts that the defence “does not provide sufficiently specific and individualized information in relation to the witnesses concerned to justify the Chamber granting the requested [in-court protective measures]”, and that the Chamber requires such information in order to “assess whether *each* witness is facing an objective and precisely

⁶ ICC-01/05-01/08-2244-Conf, paragraph 21.

⁷ ICC-01/05-01/08-2244-Conf, paragraphs 23 and 24.

⁸ ICC-01/05-01/08-2244-Conf, paragraph 41.

⁹ ICC-01/05-01/08-2244-Conf, paragraph 42.

¹⁰ ICC-01/05-01/08-2244-Conf, paragraph 43.

¹¹ ICC-01/05-01/08-2244-Conf, paragraphs 44.

¹² Prosecution’s Response to “Defence Request for Protective Measures”, ICC-01/05-01/08-2253-Conf.

identified risk on the basis of his specific situation”.¹³ The prosecution further submits that the defence “failed to submit individual fact-based requests, choosing instead to describe generic risks for entire categories of witnesses.”¹⁴ On this basis, the Chamber should require the defence to provide all relevant information in support of the individual request for each witness so as to enable the Chamber to strike a proper balance between the obligation to protect witnesses and the duty to ensure the publicity of the proceedings.¹⁵ The prosecution finally observes that the defence's request did not specify whether it had obtained the consent of each witness for whom protective measures are sought, which the prosecution submits is necessary, since the Chamber has consistently sought witnesses' consent before deciding on requests for protective measures.¹⁶

5. On 21 February 2013, the Victims and Witnesses Unit (“VWU”) provided the Chamber with its “VWU Report on the need to implement in-court protective measures for the benefit of witness D-19” (“VWU Assessment”).¹⁷ The witness declared to the VWU that if he were to be exposed as a witness for the defence this could negatively impact upon his security situation [REDACTED]. The VWU also informed the Chamber that the witness had expressed concerns for his security and stated that his security situation would worsen if he were to be seen by the public as a defence witness. [REDACTED]. Witness D04-19 further reported to the VWU that [REDACTED] he wanted to benefit from in-court protective measures.
6. [REDACTED]. As such, the VWU submits that keeping Witness D04-19's identity and collaboration with the defence known to a limited number of persons “would only benefit the overall security strategy of the witness.”

¹³ ICC-01/05-01/08-2253-Conf, paragraph 7.

¹⁴ ICC-01/05-01/08-2253-Conf, paragraph 8.

¹⁵ ICC-01/05-01/08-2253-Conf, paragraph 8.

¹⁶ ICC-01/05-01/08-2253-Conf, paragraph 9.

¹⁷ Email by the Registry's Associate Legal Officer to the Chamber's Legal Officer, 21 February 2013, at 17.21.

7. As a result, the VWU recommended the granting of in-court protective measures.

II. Analysis and conclusions

8. 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"), Regulations 20, 41 and 42 of the Regulations of the Court, and Regulation 94 of the Regulations of the Registry.
9. At the outset, the Chamber notes that the prosecution did not make any submissions with respect to the defence's specific request that the Chamber hear the testimony of Witness D04-19 entirely in closed session. That notwithstanding, in deciding upon this request, the Chamber will consider the prosecution's Response to the defence's request for in-court protective measures for Witness D04-19 as part of the group of witnesses identified as [REDACTED] Witnesses insofar as it is also relevant to the defence's request for Witness D04-19's testimony to be heard entirely in closed session.
10. When ruling upon a request for protective measures, pursuant to Article 68(1) and (2) of the Statute and Rule 87(1) of the Rules, the Chamber must take into account its obligation under Article 68 of the Statute "to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". This obligation must be balanced against the Chamber's duty to observe the principle of publicity of proceedings, as enshrined in Articles 64(7) and 67(1) of the Statute and Regulation 20 of the Regulations of the Court. The Chamber notes that while the principle of publicity of proceedings

is not absolute,¹⁸ it must be paid due regard when protective measures that would limit the publicity of the proceedings are sought.¹⁹

11. The Chamber reiterates its consistent approach that in-court protective measures are to be granted on a case-by-case basis, based upon precise information on the objective risk the witness is exposed to. The Chamber notes that in its Request the defence has not generally provided individualised and specific information in relation to each witness for which it has requested protective measures. In relation to Witness D04-19, this deficiency is only partly alleviated by the more specific information provided in support of hearing his testimony in full closed session.²⁰ Nevertheless, the Chamber considers that it has sufficient information to rule on the request, drawn from the information provided by the defence, the witness himself and the VWU Assessment.

12. Turning to the particular circumstances of Witness D04-19, and the question whether the requested protective measures are justified, the Chamber is of the view that given his previous role [REDACTED], and taking into account the VWU Assessment in this regard, the witness may indeed be perceived as a [REDACTED] should the fact that he has been called to testify by the defence become more widely known. The Chamber notes that the witness has expressed his fear [REDACTED].²¹

¹⁸ Decision on in-court protective measures for Witnesses 38, 22 and 87, 19 November 2010, ICC-01/05-01/08-1021-Conf, paragraph 24, see also Decision on in-court protective measures for Witness 36, 9 March 2012, ICC-01/05-01/08-2160-Conf, paragraph 9; Decision on in-court protective measures for Witness 45, 24 January 2012, ICC-01/05-01/08-2063-Conf, paragraph 16.

¹⁹ Decision on in-court protective measures for Witness 65, 30 September 2011 (notified on 3 October 2011), ICC-01/05-01/08-1809-Conf, paragraph 7; see also ICC-01/05-01/08-2160-Conf, paragraph 9.

²⁰ ICC-01/05-01/08-2244-Conf, paragraphs 40 to 44.

²¹ ICC-01/05-01/08-2244-Conf, paragraph 42.

13. The Chamber is also amenable to Witness D04-19's concerns for the safety of [REDACTED] as a result of his testimony.²² Such risks are particularly significant since [REDACTED].²³
14. The Chamber further notes the witness' consent to benefit from in-court protective measures.
15. For the above reasons, the Chamber considers that Witness D04-19 would face objectively justifiable risks as a result of giving testimony on behalf of the defence.
16. The Chamber notes that the VWU Assessment did not address the defence's request for the testimony of Witness D04-19 to be heard entirely in closed session. However, with regard to the specific security situation of Witness D04-19, the Chamber concurs with the defence's arguments that full closed session is necessary due to "the [position occupied by the witness] during the events, and the detailed testimony which the Defence will seek to elicit [...] it will be impossible for [this witness] to give any testimony in open session without immediately revealing [his status and role] within the events in question".²⁴ Thus, the Chamber is of the view that limited in-court protective measures would be insufficient to avoid the risks the witness may face. Under these specific circumstances, the Chamber considers that more extensive protective measures, namely full closed session, are necessary to avoid the witness's identity becoming known to those outside the courtroom.
17. In terms of the fairness of proceedings, the Chamber stresses that the protective measures sought protect the witness's identity solely with regard to the general public and do not deny the prosecution or the legal

²² ICC-01/05-01/08-2244-Conf, paragraphs 43 and 44.

²³ ICC-01/05-01/08-2244-Conf, paragraph 43; and ICC-01/05-01/08-2160-Conf, paragraph 12.

²⁴ ICC-01/05-01/08-2244-Conf, paragraph 41.

representatives' knowledge of the witness's identity. Furthermore, the prosecution and the legal representatives of victims will be able to listen to, see and question the witness *via* video-link.²⁵ As such, the use of full closed session will not be prejudicial to a fair trial.

18. Balancing its duties to protect the witness and to respect the publicity of the proceedings, the Chamber considers that the measures requested are strictly necessary to avoid the risks posed to the witness; no less intrusive measures would suffice. Full closed session is therefore both necessary and proportionate. Having said this and in light of the principle of publicity of proceedings, the Chamber underlines that after the completion of the witness's testimony, the defence may be required to prepare a public redacted version of the transcripts of the hearings held in closed session, for their possible release to the public once reviewed and authorised by the Chamber.

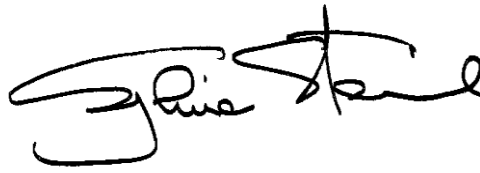
III. Conclusions

19. For the reasons set out above, the Chamber

- a. DECIDES to authorise the continued use of the pseudonym D04-19 during the witness testimony and trial proceedings; and
- b. DECIDES that the testimony of Witness D04-19 will be heard in closed session.

²⁵ On 6 February 2013, the Chamber decided to hear Witness D04-19's testimony by means of video technology: Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, 6 February 2013, ICC-01/05-01/08-2500, paragraph 30.

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