



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 45”, ICC-01/05-01/08-2063 of 24 January 2012**

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 Kate Gibson
Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel 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 45.

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 45.³ 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 45.⁴ According to the prosecution, these protective measures are necessary, reasonable and proportionate.⁵
3. The prosecution generally argues that the unstable security environment [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

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.

threat to anyone who would appear as a prosecution witness before the Court.⁷ The prosecution also submits that witness 45 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 45, who is [REDACTED], has himself requested protective measures “as a result of [REDACTED] and his perceived risk due to his cooperation with the Court”.⁹ The prosecution further argues that testifying without protective measures would raise Witness 45’s [REDACTED] and subject him to potential threats and intimidation. Finally, it is submitted that Witness 45’s “anticipated testimony creates a substantial risk that he could be a continued target of such threats or actual attack” and that the imposition of in-court protective measures would mitigate this risk.¹⁰

5. On 7 October 2011, the defence filed its “Defence Response to Prosecution Request for Protective Measures for Witness CAR-OTP-WWWW-0015, CAR-OTP-WWWW-0036, CAR-OTP-WWWW-0044, CAR-OTP-WWWW-0045” (“defence Response”).¹¹ In objecting to the prosecution Request, the defence relies on the right of the accused to a public trial¹² 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”.¹³

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

⁸ ICC-01/05-01/08-1743-Conf-Red, paragraphs 10 and 15.

⁹ ICC-01/05-01/08-1743-Conf-Red, paragraph 15.

¹⁰ ICC-01/05-01/08-1743-Conf-Red, paragraph 15.

¹¹ Defence Response to Prosecution Request for Protective Measures for Witness CAR-OTP-WWWW-0015, CAR-OTP-WWWW-0036, CAR-OTP-WWWW-0044, CAR-OTP-WWWW-0045, 7 October 2011, ICC-01/05-01/08-1835-Conf.

¹² ICC-01/05-01/08-1835-Conf, paragraph 6 to 11.

¹³ ICC-01/05-01/08-1835-Conf, paragraph 10.

6. The defence expresses concerns that, for most of the witnesses for whom the prosecution requested in-court protective measures, when granted, their implementation “inevitably leads [...] to the witness evidence being heard in private or closed session, as it is seldom possible adequately to describe events without referring to persons, places or incidents which tend to reveal the witness’ identity”.¹⁴
7. The defence, *inter alia*, questions the prosecution’s assertion that Witness 45 himself requested for in-court protective measures as a result of [REDACTED] and argues that Witness 45 does not genuinely require protection. To support its argument, the defence recalls [REDACTED] at the time the prosecution filed its Request for protective measures and states that, instead of [REDACTED] a witness who genuinely requires protection would not [REDACTED].¹⁵
8. The defence further argues that the prosecution’s submission that, in view of [REDACTED], the witness’ public testimony would raise his [REDACTED] is an insufficient basis for imposing protective measures and does not justify derogating from the accused’s right to a public and fair trial.¹⁶
9. The defence submits that Witness 45 was interviewed [REDACTED], rendering the in-court protective measures unnecessary.¹⁷ The defence finds the comparison between Witness 45’s security situation and the alleged threats to [REDACTED] irrelevant, considering the lack of information known to the defence on these threats.¹⁸ Referring to a [REDACTED], the defence

¹⁴ ICC-01/05-01/08-1835-Conf, paragraph 10.

¹⁵ ICC-01/05-01/08-1835-Conf, paragraphs 20 (ii) to (v) and 21.

¹⁶ ICC-01/05-01/08-1835-Conf, paragraphs 23, 25, 26 and 52.

¹⁷ ICC-01/05-01/08-1835-Conf, paragraphs 27(c), 28, 29, 50 and 51.

¹⁸ ICC-01/05-01/08-1835-Conf, paragraph 53.

further argues that the prosecution's Request is without object given that [REDACTED].¹⁹

10. Witness 45's testimony was postponed [REDACTED] and was then scheduled to testify on 16 January 2012.²⁰ On 11 January 2012, due to practical difficulties encountered by the VWU to contact the witness in order to prepare his travel to The Hague, the Chamber authorised the prosecution and the VWU to carry out a joint mission with a view to establishing contact with Witness 45 and confirming his willingness to testify.²¹

11. On 20 January 2012, upon an order by the Chamber,²² the prosecution filed the confidential redacted "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,"²³ renewing its Request for protective measures. The prosecution submits that Witness 45, [REDACTED], raised serious security concerns [REDACTED].²⁴ The prosecution further relies on allegations made by Witness 45 to the effect that a member of the defence counsel has been sharing information on the trial proceedings and that, after disclosure of the witness' statements to the defence, his cooperation with the Court became known [REDACTED]. Witness 45 reported, *inter alia*, that he was contacted by and received information from [REDACTED], advising him "not to testify [REDACTED]".²⁵ As a result of the allegation of leakage of confidential information, the witness believes that the defence counsel in question would disclose the day of

¹⁹ ICC-01/05-01/08-1835-Conf, paragraph 54.

²⁰ Email from the prosecution Case Manager to the Legal Adviser of the Trial Division, 3 January 2012 at 17:19.

²¹ Email from the Assistant Legal Officer to the Chamber to the prosecution and the VWU, 11 January 2012, at 15:44.

²² Email from the Assistant Legal Officer to the Chamber to the prosecution and the VWU, 20 January 2012, at 08:47.

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, 20 January 2012, ICC-01/05-01/08-2051-Conf-Red.

²⁴ ICC-01/05-01/08-2051-Conf-Red, paragraph 8.

²⁵ ICC-01/05-01/08-2051-Conf-Red, paragraph 9.

commencement of his testimony, which, according to the witness, renders his travel to the Court “very risky”.²⁶

12. On 20 January 2012, upon an order by the Chamber,²⁷ the Victims and Witnesses Unit (“VWU”) provided the Chamber with its confidential redacted mission report, *inter alia*, assessing Witness 45’s security and the similar abovementioned information the witness received from individuals [REDACTED].²⁸ The VWU takes the position that the protective measures requested by the prosecution should be granted, *inter alia*, due to Witness 45’s [REDACTED].²⁹ The VWU evaluates that the witness’ perception of risk is genuine and advises that in-court protective measures would safeguard his well-being and ensure that the witness “does not suffer reprisals as a result of his testimony”.³⁰ The VWU does not recommend granting any additional protective measures during the witness’ travel to or stay in The Hague.³¹

13. On 23 January 2012, upon an order by the Chamber,³² the defence filed the “Defence consolidated response to the Prosecution and Registry report on a joint mission to re-establish contact with Witness CAR-OTP-PPPP-0045 and response to an application for specific protective measures”,³³ in which it requests to deny the Request for in-court protective measures, stating that it will file a separate filing on this matter. The defence rejects the witness’ allegation concerning a possible leakage by a member of the defence counsel, mainly arguing that such allegation was already made in a prosecution’s

²⁶ ICC-01/05-01/08-2051-Conf-Red, paragraph 9.

²⁷ Email from the Assistant Legal Officer to the Chamber to the prosecution and the VWU, 20 January 2012, at 08:47.

²⁸ 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, paragraph 6.

²⁹ ICC-01/05-01/08-2052-Conf-Red, paragraph 9.

³⁰ ICC-01/05-01/08-2052-Conf-Red, paragraph 9.

³¹ ICC-01/05-01/08-2052-Conf-Red, paragraph 9.

³² Email from the Assistant Legal Officer to the Chamber to the prosecution and the VWU, 20 January 2012, at 08:47.

³³ Defence consolidated response to the Prosecution and Registry report on a joint mission to re - establish contact with Witness CAR-OTP-PPPP-0045 and response to an application for specific protective measures, 23 January 2012, ICC-01/05-01/08-2057-Conf-Exp.

application during the pre-trial proceedings, which was rejected. It was consequently ruled that the appropriate path for such an application was to submit a complaint for the defence's alleged misconduct to the Registry in accordance with the provisions under the Code of Professional Conduct for counsel ("Code of Conduct").³⁴

II. Relevant provisions

14. In accordance with Article 21(1) of the Statute, the Chamber has considered the following provisions: Articles 64(2) and (7), 67(1), 68(1) and (2) of the Statute; Rules 87 and 88 of the Rules of Procedure and Evidence ("Rules"); Regulations 20 and 23(1)(d) of the Regulations of the Court; and Regulation 94 of the Regulations of the Registry.

III. Analysis and Conclusions

15. At the outset, the Chamber underlines that the present Decision does not address the defence's arguments to the allegation made by Witness 45 of a possible leakage of confidential information concerning a member of the defence counsel as this matter will be dealt with separately, and in due time. In addition, on the issue of protective measures sought by the prosecution for Witness 45, the Chamber notes the defence Response to the Request and does not deem it necessary to have any additional information for the purpose of the present Decision.

16. 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

³⁴ ICC-01/05-01/08-2057-Conf-Exp, paragraph 2 and Pre-Trial Chamber II, Decision on the Prosecutor's Applications to Open an Inquiry with Respect to Witnesses 0037 and 0045, ICC-01/05-01/08-295-Conf, paragraph 15.

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.³⁵

17. 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 public and fair 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.³⁶

18. Balancing its duty to respect the principle of publicity and its obligation to protect victims and witnesses, the Chamber reiterates its previous analysis 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 his or her testimony at the Court.³⁷ These measures are also intended to protect the physical and psychological well-being of witnesses at risk, and to avoid unnecessary public exposure. 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.³⁸ These measures will sometimes need to be combined with limited private session testimony, in order not to

³⁵ 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.

³⁶ ICC-01/05-01/08-1021-Conf, paragraphs 25-26.

³⁷ Decision on in-court protective measures for Witness 32, 22 September 2009, ICC-01/05-01/08-1774-Conf, paragraph 12.

³⁸ ICC-01/05-01/08-1021-Conf, paragraph 28.

defeat their purpose and to ensure effective protection of the identities of the witnesses concerned.

19. The Chamber notes that, although the possible [REDACTED], the VWU and the prosecution made similar submissions on the Witness 45's reiterated fear about his security. The Chamber notes with concern Witness 45's belief that the day of commencement of his testimony may be known [REDACTED]. The Chamber does not find any compelling reasons for doubting the witness' own account about what was reported to him [REDACTED]. Taking into account the seriousness of the risk Witness 45 runs on account of his cooperation with the Court, [REDACTED], the Chamber finds that the testimony of Witness 45 may have negative repercussions on his safety, if given in public. The Chamber considers that such a risk, although mitigated [REDACTED], remains high.

20. The protective measures sought in the prosecution Request aim at protecting Witness 45 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 45'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 and public trial, as enshrined in Article 67 of the Statute.

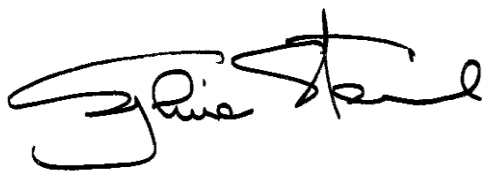
21. Against this backdrop, the Chamber considers that, due to the particular circumstances of the witness, [REDACTED] and the fears he expressed for his security, the protective measures requested for Witness 45 are necessary,

reasonable and proportionate. These measures will enable Witness 45 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. Any request for an amendment to the protective measures ordered in the present Decision shall be the subject of a formal filing setting out the relevant factual and legal issues, in accordance with Rule 87 of the Rules and Regulations 23(1)(d) of the Regulations of the Court.

IV. Conclusions

22. The Chamber therefore grants the prosecution's Request for in-court protective measures for Witness 45 and authorises the use of a pseudonym, image 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