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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 36", ICC-01/05-01/08-2160 of 9 March 2012**

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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Legal Representatives of the Applicants

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Participation/Reparation**

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Section**

Other

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 36.

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”). A confidential redacted version of the Request was filed on 16 September 2011.² In its Request, the prosecution urges the Chamber to authorise in-court protective measures for, *inter alia*, Witness 36.³
2. Specifically, the prosecution requests that the Chamber authorise image and voice distortion, use of a pseudonym and limited use of private or closed sessions for the portions of testimony where the witness provides information that would tend to disclose his identity.⁴
3. The prosecution argues that the protective measures requested are necessary, reasonable and proportionate.⁵ For that purpose, the prosecution asserts that Witness 36 himself has requested protective measures “as a result of [REDACTED], past threats, and his perceived risk due to his cooperation with

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 Confidential Redacted Version of “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, 16 September 2011, ICC-01/05-01/08-1743-Conf-Red.

³ ICC-01/05-01/08-1743-Conf-Red, paragraph 2.

⁴ ICC-01/05-01/08-1743-Conf-Red, paragraph 2 and 9 -10.

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

the Court”.⁶ In addition, the prosecution argues that testifying without protective measures would raise Witness 36’s [REDACTED] and subject him to continued threats or an actual attack.⁷ Finally, it is submitted that Witness 36 is similarly situated to [REDACTED] and would therefore likely face similar types of threats and intimidation.⁸

4. 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”).⁹ The defence urges the Chamber to reject the requested protective measures, submitting that Witness 36 does not require protection. To that end, the defence argues that Witness 36 has not formulated any request for protection when he was interviewed in 2008,¹⁰ that [REDACTED],¹¹ [REDACTED] is “completely irrelevant to the question of whether he should be granted protective measures.”¹² With regard to the prosecution’s claim that Witness 36 is in a similar situation as [REDACTED] and would therefore likely face similar types of threats and intimidation, the defence considers that this argument “calls for such blatant speculation on behalf of the Chamber that it cannot be sustained.”¹³ Finally, the defence submits that since it has not been given any opportunity to provide observations on these allegations, the Chamber should refrain from relying on arguments based on the allegations of [REDACTED].¹⁴

5. On 21 February 2012, in the context of the familiarisation procedure, the

⁶ ICC-01/05-01/08-1743-Conf-Red, paragraph 13.

⁷ ICC-01/05-01/08-1743-Conf-Red, paragraph 13.

⁸ ICC-01/05-01/08-1743-Conf-Red, paragraph 13.

⁹ 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.

¹⁰ ICC-01/05-01/08-1835-Conf. paragraph 43.

¹¹ ICC-01/05-01/08-1835-Conf. paragraph 44.

¹² ICC-01/05-01/08-1835-Conf. paragraph 45.

¹³ ICC-01/05-01/08-1835-Conf. paragraph 45.

¹⁴ ICC-01/05-01/08-1835-Conf. paragraph 45.

Victims and Witnesses Unit (“VWU”) met with the witness and provided the Chamber with a security assessment in relation to Witness 36. It recommends that the Chamber authorise the witness’s entire testimony to be heard in closed session.¹⁵ In the view of the VWU, such a measure is necessary to ensure the safety of the witness [REDACTED]. To that end, the VWU explains that the witness has himself expressed the wish to testify in closed session since, according to the witness, such a measure would be necessary to avoid [REDACTED] and to minimise the risk to his personal safety as well as the security of [REDACTED]. The VWU further reports that the witness has mentioned that he was recently contacted [REDACTED], asking him to [REDACTED]. According to the VWU, the witness did not perceive this request as an act of intimidation or harassment and he responded that he would only tell the truth.

6. On 24 February 2012, upon the Chamber’s request,¹⁶ the prosecution¹⁷ and the defence¹⁸ provided their observations on the VWU’s recommendation to hear the entire testimony of Witness 36 in closed session. The prosecution supports the VWU’s recommendation, and alternatively, requests the Chamber to authorise image and voice distortions, assignment of pseudonyms and limited use of private or closed session.¹⁹
7. The defence criticises at the outset that no decision in relation to the protective measures has been taken “notwithstanding the passage of almost 5 months

¹⁵ Email by the Associate Legal Officer of the VWU to the Assistant Legal Officer of the Chamber, 21 February 2012, at 13.14. This email was followed by a formal filing: Victims and Witnesses Unit’s updated report on the in-court protective measures for Witness CAR-OTP-PPPP-0036, 23 February 2012 (filing ICC-01/01/08-2139-Conf-Exp).

¹⁶ Email by the Assistant Legal Officer of the Chamber to the prosecution and the defence, 21 February 2012, at 18.06.

¹⁷ Prosecution’s Observations on the Victims and Witnesses Unit’s Recommendations for Protective and Special Measures for Witness CAR-OTP-PPPP-0036 at Trial, 24 February 2012, ICC-01/05-01/08-2142-Conf.

¹⁸ Defence Observations on the Request for Full Protective Measures for Witness 0036, 24 February 2012, ICC-01/05-01/08-2144-Conf.

¹⁹ ICC-01/05-01/08-2142-Conf, paragraph 10.

since the close of the filings on the matter”.²⁰ Moreover, complaining about the lack of information as to the reasons underpinning the VWU’s recommendation, the defence submits that the VWU report does not constitute “a new basis or ground for the granting of Protective Measures.”²¹ Accordingly, while reiterating “its consistent preference for the proceedings to be held in public” and highlighting “the paucity of information made available to it”, the defence “defers to the Chamber on the present issue.”²²

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”), Regulation 20 of the Regulations of the Court, and Regulation 94 of the Regulations of the Registry.
9. When ruling upon a request for protective measures or when deciding on protective measures on its own motion, pursuant to Article 68(1) and (2) of the Statute and Rule 87(1) of the Rules, the Chamber needs to comply with the obligation established in Article 68 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.” Moreover, the Chamber has a 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. While the principle of publicity of proceedings “does not have an

²⁰ ICC-01/05-01/08-2144-Conf, paragraph 3.

²¹ ICC-01/05-01/08-2144-Conf, paragraph 14.

²² ICC-01/05-01/08-2144-Conf, paragraph 15.

absolute nature”,²³ due regard must be given to it when protective measures are sought that would limit the public nature of the proceedings.²⁴

10. According to the practice established by the Chamber, protective measures are to be considered 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 rights of the accused and a fair and impartial trial.²⁵ In this regard, the Chamber has previously clarified that limited 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.²⁶

11. However, turning to the particular circumstances of Witness 36, and in view of the abovementioned information recently provided by the VWU, the Chamber considers that limited in-court protective measures, concealing the witness’s identity, are not sufficient to negate the risk. In this regard, the Chamber notes the witness’s contention that he was recently [REDACTED]. The Chamber is concerned by such a [REDACTED]. Deploing the fact that confidential information may have leaked, the Chamber is of the view that the express request for [REDACTED] hints at instances of witness interference. As a result, in case the content of his testimony is known to the public, the Chamber is concerned that the witness may be perceived [REDACTED] by virtue of his cooperation with the Court, which might put his safety at risk. The measure of concealing the witness’s identity should, under normal circumstances, be sufficient protection to avoid security risks. However, in

²³ 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.

²⁴ 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.

²⁵ ICC-01/05-01/08-1809-Conf, paragraph 8.

²⁶ Decision on in-court protective measures for Witness 32, 22 September 2009, ICC-01/05-01/08-1774-Conf, paragraph 12.

this particular instance the Chamber is persuaded that more extensive measures are necessary because information about the witness's upcoming testimony has apparently already been made available to others.

12. Moreover, the Chamber notes that the witness has additionally expressed concerns for the security of [REDACTED]. Indeed, the witness emphasised that public knowledge of his testimony might lead to acts of retaliation [REDACTED]. This risk is particularly significant in relation to Witness 36 since, [REDACTED].

13. In these circumstances, the Chamber is of the view that the information provided in the VWU report constitutes a new basis warranting the grant of full protective measures as compared to the limited in-court protective measures that were initially requested by the prosecution on the basis of the information that was previously available to it. Accordingly, the Chamber is of the view that authorising the witness to provide his entire testimony in closed session would increase the chances that Witness 36 will be able to continue to live in his community without fearing for his safety and without worrying about any acts of retaliation against his family as a result of his testimony.

14. The conclusion that protective measures are necessary to protect the witness's safety, physical and psychological well-being, dignity and privacy needs to be balanced against the rights of the accused and a fair and impartial trial and the principle of the publicity of proceedings. For the reasons that follow, the Chamber is of the view that granting the protective measure recommended by the VWU, the neutral organ of the Court that is in charge of protection of witnesses and persons that could be put at risk on account of their cooperation with the Court, will have a limited impact on these imperatives.

15. First, the Chamber stresses that the protective measures sought merely protect the witness's identity with regard to the general public and do not curtail the defence's knowledge of the witness's identity. To the contrary, his identity as well as his written statements have been disclosed to the defence a long time ago and the defence will be able to listen to, see and question the witness *via* video-link.²⁷
16. Second, it is worth noting that in the present Decision, the Chamber informs the parties about the reasons underlying the VWU's recommendation and the Chamber's assessment that hearing the testimony in closed session is warranted. In particular, the parties are informed about the alleged recent incident of witness interference and will have the opportunity to question the witness to that effect. In this respect, it should further be recalled that it is established practice that the Chamber's decisions on protective measures are taken in accordance with the VWU's security assessments that are provided shortly before the commencement of the relevant witness's testimony during the familiarisation process. This practice enables the Chamber to base its decision on updated information relating to the witness's safety and to take into account any developments that might have occurred in the period preceding the testimony. For these reasons, the defence's complaint as to the "passage of almost 5 months" after the filing of the initial request is therefore not justified.
17. Finally, regarding the principle of publicity of proceedings, the Chamber underlines that after the completion of the witness's testimony, the prosecution may be required to prepare a public redacted version of the transcripts of the hearing held in closed session, for its possible release to the public once reviewed and authorised by the Chamber.

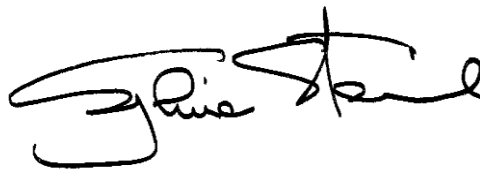
²⁷ On 3 February 2012, the Chamber decided to hear Witness 36's testimony by means of video technology: Public redacted decision on the "Prosecution request to hear Witness CAR-OTP-PPP-0036's testimony via video-link", 3 February 2012, ICC-01/05-01/08-2101-Red2, paragraph 13.

18. 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.

III. Conclusions

19. For the reasons above, the Chamber decides that Witness 36's testimony will be heard in closed 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