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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 213”, ICC-01/05-01/08-1902
of 11 November 2011**

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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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

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Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

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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*, issues the following Decision on in-court protective measures for Witness 213.

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 the “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 Office of Public Counsel for Victims.⁴
2. In its Application, the prosecution requests that the Chamber grant protective measures to, *inter alia*, Witness 213, namely the use of a pseudonym, image and voice distortion⁵ and partial use of closed session for evidence regarding the identity or other identifying information of the witness.⁶ In support of its request, the prosecution asserts that Witness 213 is vulnerable to [REDACTED] who have already committed acts of intimidation and violence [REDACTED]. It is submitted that this risk is increased with regard to Witness 213, [REDACTED].⁷ For these reasons, the prosecution argues that the proposed measures are necessary to ensure that Witness 213 provides his evidence without fear of reprisal [REDACTED] and to

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

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

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

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

⁵ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraph 57 (i).

⁶ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraphs 34 and 57(i).

⁷ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraph 39.

protect the safety of the witness [REDACTED].⁸

3. On 15 July 2010, in accordance with the Chamber's instruction,⁹ the prosecution filed its first "Mémoire de l'Accusation relatif à la situation du Témoin CAR-OTP-WWWW-0213 [REDACTED]" ("First Security Report"),¹⁰ in which it informed the Chamber that Witness 213 has reported several security incidents and expressed concerns about his safety and security.¹¹
4. On 15 July 2010, the defence filed its response to the Application ("Defence Response").¹² The defence "strenuously object[s]" to Witness 213 being granted protective measures, arguing that he should not be given the opportunity to give evidence "under the cloak of secrecy" since he contacted the prosecution of his own accord, is motivated by "a desire to take revenge" [REDACTED] "in circumstances which have yet to be disclosed to the defence."¹³
5. On 15 September 2010, the Victims and Witness Unit ("VWU") filed its observations on the Application¹⁴ and on the First Security Report.¹⁵ The VWU supports the prosecution's request for protective measures for Witness 213 on the basis that Witness 213 has previously been exposed to alleged threats and that protecting the identities of the witness [REDACTED] and his association with the Court would

⁸ ICC-01/05-01/08-800-Conf-Exp-Corr, paragraph 34, ICC-01/05-01/08-800-Conf-Exp-AnxA-Corr, pages 28 to 29.

⁹ Transcript of *ex parte*, prosecution and VWU only status conference of 27 May 2010, ICC-01/05-01/08-T-23-Conf-Exp-ENG ET, page 15, lines 18 to 20. At the status conference, the Chamber asked the prosecution to keep the Chamber informed as regards the situation of Witness 213 [REDACTED].

¹⁰ Mémoire de l'Accusation relatif à la situation du Témoin CAR-OTP-WWWW-0213 [REDACTED], 15 July 2010, ICC-01/05-01/08-826-Conf-Exp. This filing was followed by the Mémoire de l'Accusation relatif à la situation du Témoin CAR-OTP-WWWW-0213 [REDACTED], 2 November 2010, ICC-01/05-01/08-990-Conf-Exp and the Mémoire de l'Accusation relatif à la situation du Témoin CAR-OTP-WWWW-0213 [REDACTED], 20 September 2011, ICC-01/05-01/08-1771-Conf-Exp.

¹¹ ICC-01/05-01/08-826-Conf-Exp, paragraphs 5 to 12.

¹² 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.

¹³ ICC-01/05-01/08-830-Conf-Exp, paragraph 17.

¹⁴ 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.

¹⁵ Victims and Witnesses Unit's observations on the "Mémoire de l'Accusation relatif à la situation du Témoin CAR-OTP-WWWW-0213 [REDACTED]", 15 September 2010, ICC-01/05-01/08-883-Conf-Exp.

minimise his exposure to security threats in the future.¹⁶

6. In three subsequent filings relating to the security situation of Witness 213 –the most recent being dated 26 October 2011-,¹⁷ the prosecution informed the Chamber about further security incidents reported by Witness 213, [REDACTED] that are apparently linked to his cooperation with the Court.
7. At 12:31 on 11 November 2011, the VWU provided the Chamber with its updated assessment regarding Witness 213.¹⁸ The VWU explains that the witness expressed serious concerns for his security [REDACTED] if his identity and cooperation with the Court were disclosed. Accordingly, the VWU recommends that the requested protective measures be granted to minimise the risk to Witness 213 [REDACTED] to maintain the participation of the witness before the Court.

II. Relevant provisions

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.

III. Analysis and conclusions

9. When ruling upon a request for protective measures pursuant to Article 68(1) and (2) of the Statute and Rule 87 of the Rules, the Chamber needs to comply with the obligation established in Article 68 of the Statute “to protect the safety, physical and

¹⁶ ICC-01/05-01/08-884-Conf-Exp, paragraph 7; ICC-01/05-01/08-883-Conf-Exp, paragraph 4.

¹⁷ See Mémoire de l’Accusation relatif à la situation du Témoin CAR-OTP-WWWW-0213 [REDACTED], 2 November 2010, ICC-01/05-01/08-990-Conf-Exp ; Mémoire de l’Accusation relatif à la situation du Témoin CAR-OTP-WWWW-0213 [REDACTED]”, 20 September 2011, ICC-01/05-01/08-1771-Conf-Exp and Prosecution’s Submission of Individual Risk Assessments, 26 October 2011, ICC-01/05-01/08-1864-Conf-Exp-AnxE.

¹⁸ Email to the Chamber’s Legal Officer, sent by VWU’s Associate Legal Officer, 11 November 2011 at 12:31.

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 absolute nature”,¹⁹ due regard must be given to it when protective measures are sought that would limit the public nature of the proceedings.²⁰

10. According to the practice established by the Chamber, requests for protective measures 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 rights of the accused and a fair and impartial trial.²¹

11. In this regard, the Chamber has previously held 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 their testimony at the Court.²² 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.²³ The Chamber has further emphasized that “while these measures sometimes need to be combined with limited private session

¹⁹ 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.

²⁰ 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.

²¹ ICC-01/05-01/08-1809-Conf, paragraph 8.

²² Decision on in-court protective measures for Witnesses 38, 22 and 87, 19 November 2010, 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; ICC-01/05-01/08-1809-Conf, paragraph 9.

²³ ICC-01/05-01/08-1021-Conf, paragraph 28; ICC-01/05-01/08-1774-Conf, paragraph 12; ICC-01/05-01/08-1809-Conf, paragraph 9.

testimony to avoid defeating their purpose, private sessions are to be used sparingly and only when necessary.”²⁴

12. Turning to the particular circumstances of Witness 213, the Chamber considers that granting the protective measures sought is warranted. *First*, Witness 213 is [REDACTED]. Therefore, he may be perceived [REDACTED] by virtue of his cooperation with the Court, which may create a heightened risk of retaliation if his identity and cooperation with the Court were to be disclosed. As previously underlined, “this risk is concrete, as demonstrated by the recent threats directed at prosecution witnesses who, while not “insider witnesses”, nevertheless appear to have been targeted as a result of their cooperation with the Court.”²⁵ *Second*, Witness 213 has personally reported incidents, where he [REDACTED] were threatened [REDACTED] on the basis of his cooperation with the Court. *Third*, Witness 213 has himself expressed concerns for his safety during testimony. *Fourth*, granting the measures sought will increase the chances that Witness 213 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.

13. The conclusion that protective measures are necessary to protect the witness’ safety needs to be balanced against the rights of the accused to 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 measures sought in the Application will have a minimal impact on these imperatives.

14. At the outset, the Chamber rejects as inapposite the defence’s allegations regarding the motivations behind the witness’ cooperation with the prosecution, “which will

²⁴ ICC-01/05-01/08-1809-Conf, paragraph 9.

²⁵ ICC-01/05-01/08-1809-Conf, paragraph 10, referring to Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011, 26 September 2011, ICC-01/05-01/08-1789-Conf, paragraph 29-31.

be explored in cross-examination”.²⁶ These considerations relate to the credibility of the witness and the reliability of his testimony, not his security. The protective measures sought will not prevent the defence from freely exploring issues of credibility during its questioning of the witness. In this respect, it is worth noting that in its “Decision on the defence request for modification of redactions”,²⁷ the Chamber granted the defence’s request to be provided with additional information which is necessary to explore this issue.²⁸

15. The Chamber stresses further that the protective measures sought merely purport to protect the witness’ identity with regard to the general public and do not curtail the defence’s knowledge of the witness’ identity. To the contrary, his identity has been disclosed to the defence a long time ago and the defence will be able to listen to and see the witness in the courtroom without any distortions.
16. Regarding the principle of publicity of proceedings, the Chamber underlines that the public will still be able to listen to most parts of Witness 213’s testimony and will therefore not be deprived of the substance of his evidence. However, the Chamber will be attentive and will order, at any time, that parts of the testimony are taken in private session, if the Chamber concludes that the line of questioning can reveal details about the witness’ identity, place of residence, family whereabouts, and other identifying information.
17. 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 trial, as enshrined in Article 67 of the Statute.

²⁶ ICC-01/05-01/08-830-Conf-Exp, paragraph 17.

²⁷ Decision on the "Defence request for modification of redactions", 21 October 2011, ICC-01/05-01/08-1857-Conf.

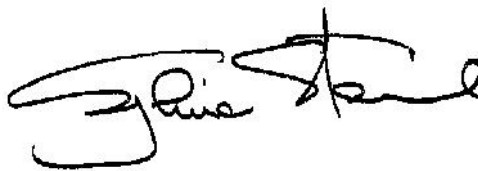
²⁸ ICC-01/05-01/08-1857-Conf, paragraphs 14, 16 and 17.

18. In these circumstances, the Chamber is satisfied that the protective measures sought are necessary, reasonable and proportionate.

IV. Conclusions

19. For the reasons above, the Chamber grants the prosecution's application for protective measures for Witness 213 and authorises the use of a pseudonym, image and voice distortion and partial use of closed or private session.

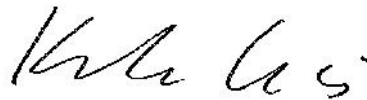
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 29 June 2016

At The Hague, The Netherlands