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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 D04-13", ICC-01/05-01/08-2873 of 11 November 2013**

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-Édith 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

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 D04-13.

I. Background and submissions

1. On 13 July 2012, the defence filed its “Defence Request for Protective Measures”¹ (“First Request”), in which it seeks the Chamber’s authorisation for in-court protective measures for a number of witnesses, including Witness D04-13.² In relation to Witness D04-13, 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
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 [REDACTED], and submits that these warrant a finding on the part of the Chamber that the requested protective measures are necessary, reasonable and proportionate.⁴ More specifically, the defence makes a general assertion that the [REDACTED] Witnesses have expressed fears “that they [REDACTED] will be the subject of harassment, subjected to pressure, or that they will be [REDACTED]”.⁵ Moreover, the defence submits that these witnesses would be viewed [REDACTED].⁶ On the basis of these fears, the defence requests that the Chamber grant in-court protective

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

² ICC-01/05-01/08-2244-Conf, paragraph 45.

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

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

⁵ ICC-01/05-01/08-2244-Conf, paragraph 21.

⁶ ICC-01/05-01/08-2244-Conf, paragraphs 23 and 24.

measures for the [REDACTED] Witnesses, including Witness D04-13.⁷

3. On 6 August 2012, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Response to ‘Defence Request for Protective Measures’” (“Response”).⁸ 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 needs such information in order to “assess whether *each* witness is facing an objective and precisely identified risk on the basis of his specific situation”.⁹ 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.”¹⁰ On this basis, the prosecution argues that 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.¹¹ 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.¹²
4. On 15 May 2013, Witness D04-13 was scheduled to testify as of 21 May 2013.¹³
5. On 17 May 2013, the defence filed its “Defence Request for full protective

⁷ ICC-01/05-01/08-2244-Conf, paragraph 25.

⁸ Prosecution’s Response to “Defence Request for Protective Measures”, 6 August 2012, ICC-01/05-01/08-2253-Conf.

⁹ ICC-01/05-01/08-2253-Conf, paragraph 7.

¹⁰ ICC-01/05-01/08-2253-Conf, paragraph 8.

¹¹ ICC-01/05-01/08-2253-Conf, paragraph 8.

¹² ICC-01/05-01/08-2253-Conf, paragraph 9.

¹³ Decision on the order of appearance of witnesses to be called by the defence following Witness D04-56, 15 ICC-01/05-01/08-2630, paragraph 7.

measures for Witness D04-13” (“Second Request”),¹⁴ in which it provided further details on the witness’s situation and security concerns and requested that the Chamber authorise the witness to give his testimony entirely in closed session.¹⁵ The defence submitted that, given the witness’s unique role [REDACTED] during the time period under examination, it would be impossible to conduct his testimony in open session without revealing his status and role within the events in question.¹⁶ The defence further specified that, [REDACTED], the witness was “exposed to increased risk [REDACTED].”¹⁷ The defence also submitted that Witness D04-13 had informed the defence of fears he held [REDACTED] in case his identity as a defence witness became known.¹⁸ The defence submitted that the provision of full in-court protective measures would allow the witness to be able to continue to work [REDACTED] “without fearing for his safety [REDACTED] as a result of the content of his testimony”.¹⁹ The defence finally stated that the witness consented to testifying under full protective measures.²⁰

6. On 19 May 2013 at 22.45, the defence informed the Chamber that Witness D04-13 had allegedly been [REDACTED].²¹
7. On 21 and 22 May 2013, the Victims and Witnesses Unit (“VWU”) provided the Chamber with further details on the alleged [REDACTED] Witness D04-13.²² [REDACTED].²³
8. On 31 May 2013, the Chamber issued its “Decision on the ‘Second Further Revised Defence Submissions on the Order of Witnesses’ (ICC-01/05-01/08-

¹⁴ Defence request for full protective measures for Witness D04-13, 17 May 2013, ICC-01/05-01/08-2634-Conf.

¹⁵ ICC-01/05-01/08-2634-Conf, paragraph 15.

¹⁶ ICC-01/05-01/08-2634-Conf, paragraph 11.

¹⁷ ICC-01/05-01/08-2634-Conf, paragraph 12.

¹⁸ ICC-01/05-01/08-2634-Conf, paragraph 13.

¹⁹ ICC-01/05-01/08-2634-Conf, paragraph 13.

²⁰ ICC-01/05-01/08-2634-Conf, paragraph 13.

²¹ Email from the defence to the Chamber, 19 May 2013, at 22.45.

²² Email from the VWU to the Chamber, 22 May 2013, at 18.42

²³ Email from the VWU to the Chamber, 22 May 2013, at 18.42

2644) and on the appearance of Witnesses D04-02, D04-09, D04-03, D04-04 and D04-06 via video-link”²⁴, in which it, *inter alia*, approved an amended order of appearance. Witness D04-13 was not included in this amended order on the basis that he [REDACTED] before the Court.²⁵

9. At a status conference convened on 27 June 2013, the defence informed the Chamber that, as a result of the alleged [REDACTED] Witness D04-13, it was no longer in a position to call him as a witness.²⁶
10. On 4 November 2013, the defence filed its “Motion to replace a witness”,²⁷ in which it requested that the Chamber authorise the defence “to present the testimony of Witness D04-13, in lieu of that of Witness D04-41”.²⁸
11. On 7 November 2013, the Chamber granted the defence’s request to present the testimony of Witness D04-13, provided that he completed his testimony no later than 15 November 2013.²⁹ The Chamber ordered the Registry to make the necessary arrangements for Witness D04-13’s testimony to start on 12 November 2013.³⁰
12. On 11 November 2013, the VWU provided the Chamber with its “VWU assessment for in-court protective measures for Witness CAR-D-0013” (“VWU Assessment”).³¹ [REDACTED] the witness has reported experiencing criticism and discrimination [REDACTED] and fears this would worsen

²⁴ Decision on the ‘Second Further Revised Defence Submissions on the Order of Witnesses’ (ICC-01/05-01/08-2644) and on the appearance of Witnesses D04-02, D04-09, D04-03, D04-04 and D04-06 via video-link, 31 May 2013, ICC-01/05-01/08-2646.

²⁵ ICC-01/05-01/08-2646, paragraphs 2, 3 and 13(i).

²⁶ ICC-01/05-01/08-T-331-CONF-ENG ET, page 24, line 11 to page 25, line 18.

²⁷ Motion to replace a witness, 4 November 2013, ICC-01/05-01/08-2862-Conf.

²⁸ ICC-01/05-01/08-2862-Conf, paragraph 10.

²⁹ Decision on the defence’s “Motion to replace a witness”, 7 November 2013, ICC-01/05-01/08-2865-Conf, paragraph 19.

³⁰ ICC-01/05-01/08-2865-Conf, paragraph 19.

³¹ Email from the VWU to the Chamber, 11 November 2013, at 11.29.

[REDACTED].³²

II. Analysis

13. 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.

14. 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,³³ it must be paid due regard when protective measures that would limit the publicity of the proceedings are sought.³⁴

15. 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 First Request the defence did not provide individualised and specific information in relation to each witness for which it has requested

³² Email from the VWU to the Chamber, 11 November 2013, at 11.29.

³³ Decision on in-court protective measures for Witnesses 38, 22 and 87, 19 November 2010, ICC-01/05-01/08-1021-Conf, paragraph 24; Decision on in-court protective measures for Witness 36, 9 March 2012, ICC-01/05-01/08-2160-Conf, paragraph 9; and Decision on in-court protective measures for Witness 45, 24 January 2012, ICC-01/05-01/08-2063-Conf, paragraph 16.

³⁴ 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.

protective measures. In relation to Witness D04-13, this deficiency was subsequently alleviated by the more specific information provided in support of the defence's Second Request to hear Witness D04-13's testimony in full closed session.³⁵ In the present circumstances, the Chamber considers that it has sufficient information to rule on the defence's requests, drawn from the information provided by the defence in its First and Second Requests, the witness himself, and the VWU Assessment.

16. Turning to the particular circumstances of Witness D04-13, and the question of whether the requested protective measures are justified, the Chamber is of the view that [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 reported criticism and discrimination from other [REDACTED] based upon his being identified as a potential defence witness, and his fears that this may worsen, should it become known that he is testifying before the Court.³⁶ The Chamber also notes the incident which occurred [REDACTED], and the witness's fear that due to his forthcoming testimony this may happen again.³⁷

17. The Chamber has also taken into account [REDACTED].³⁸

18. For the above reasons, the Chamber considers that Witness D04-13 might face objectively justifiable risks as a result of giving testimony on behalf of the defence.

³⁵ ICC-01/05-01/08-2634-Conf.

³⁶ Email from the VWU to the Chamber, 11 November 2013, at 11.29.

³⁷ [REDACTED].

³⁸ [REDACTED].

19. The Chamber notes that, according to the defence, Witness D04-13 consented to testifying in full closed session, whereas in the VWU Assessment, the VWU informs the Chamber [REDACTED].³⁹ The Chamber notes that the defence's request was filed over five months prior to the VWU Assessment. Based upon the VWU assessment, and noting [REDACTED], the Chamber considers that limited in-court protective measures, including limited use of private session for testimony which may tend to reveal the identity of the witness, would be sufficient to avoid the risks the witness may face.

20. 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 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.⁴⁰ As such, the use of limited in-court protective measures will not be prejudicial to the fairness of the trial.

21. 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. Limited in-court protective measures are therefore both necessary and proportionate.

III. Conclusion

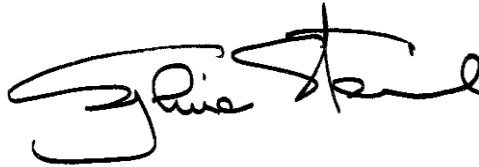
22. For the reasons set out above, the Chamber DECIDES that the testimony of Witness D04-13 will be heard with limited in-court protective measures, namely the use of image and voice distortion, the continued use of a

³⁹ [REDACTED].

⁴⁰ On 7 November 2013, the Chamber decided to hear Witness D04-13's testimony by means of video technology: ICC-01/05-01/08-2865-Conf, paragraph 19.

pseudonym, as well as the use of private session to protect the witness's identity when necessary, provided that this is indicated in advance to the parties, the participants, and the Chamber.

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