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TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
Judge Geoffrey Henderson
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

*IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO*

**Public Redacted Document
with
Confidential Annex A**

Public redacted version of "Prosecution's response to Defence application for leave to appeal the decision on in-court protective measures for Witness CAR-OTP-PPPP-0045", 31 January 2012, ICC-01/05-01/08-2089-Conf

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I. Introduction

1. On 24 January 2012, Trial Chamber III (“Chamber”) issued a decision granting a request by the Office of the Prosecutor (“Prosecution”) for protective measures for Witness CAR-OTP-PPPP-0045 (“Witness 45”), in which it authorized the use of a pseudonym, face and voice distortion, and the partial use of closed or private session during the witness’ testimony (“Decision”).¹

2. On 30 January 2012, the Defence filed an application for leave to appeal the Decision based on its allegations that the Chamber used *ex parte* proceedings to withhold material from the Defence, that the Chamber prevented the Defence from responding to a request for protective measures, and that the Chamber improperly granted protective measures to encourage the attendance of witnesses (“Defence Application”).²

3. The Prosecution submits that the Defence Application should be rejected. First, the Application does not even identify, with at least some degree of precision, the issues for which leave to appeal is sought. Second, none of the matters mentioned in the Application fulfils the applicable statutory requirements enshrined in Article 82(1)(d) of the Rome Statute (“Statute”): the Defence Application fails to substantiate how the matters raised amount to appealable issues and to demonstrate how they affect the fair and expeditious conduct of proceedings or the outcome of trial, and that the intervention of the Appeals Chamber would materially advance the proceedings. Rather, the Defence side-steps the criteria required for an application for leave to appeal and inappropriately makes baseless allegations and suppositions on the merits of the Decision.

¹ ICC-01/05-01/08-2063-Conf, Decision on in-court protective measures for Witness 45, 24 January 2012, para. 22.

² ICC-01/05-01/08-2082-Conf, Request for leave to appeal the decision on in-court protective measures for Witness 45, 30 January 2012, para. 23.

II. Procedural Background

4. On 13 September 2011, the Prosecution filed an *ex parte* request for protective measures for five witnesses, including Witness 45.³ Thereafter, on 16 September 2011, the Prosecution filed a confidential redacted version of its request available to the Defence.⁴ Specifically, the Prosecution requested the Chamber to authorize the use of a pseudonym, face and voice distortion and partial use of closed or private session during the testimony of Witness 45 (“Prosecution Request”).⁵

5. On 7 October 2011, the Defence filed its response opposing the Prosecution Request.⁶ The Defence deemed the requested measures as a contravention of the Accused’s right to a public trial.⁷

6. On 20 January 2012, the Prosecution provided the Chamber with its Prosecution Report on Its Joint Mission (“Prosecution Report”) with the Victims and Witnesses Unit (“VWU”).⁸ The Prosecution reiterated the Prosecution Request in light of newly available information. On the same day, the VWU provided its assessment regarding Witness 45 to the Chamber wherein it supported the Prosecution Request due to Witness 45’s [REDACTED].⁹

³ ICC-01/05-01/08-1743-Conf-Exp, 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, 13 September 2011.

⁴ ICC-01/05-01/08-1743-Conf-Red, Confidential Redacted Version of “Prosecution’s Request for Protective and Special 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.

⁵ ICC-01/05-01/08-1743-Conf-Red, para. 2.

⁶ ICC-01/05-01/08-1835-Conf, 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.

⁷ ICC-01/05-01/08-1835-Conf, para. 10.

⁸ ICC-01/05-01/08-2051-Conf-Red, 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.

⁹ ICC-01/05-01/08-2052-Conf-Red, 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 measure for the benefit of this witness, 20 January 2012, para 6.

7. On 23 January 2012, 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”.¹⁰

8. On 24 January 2012, the Chamber issued the Decision¹¹ ruling that protective measures for Witness 45 were necessary, reasonable and proportionate.¹²

9. On 30 January 2012, just minutes before Witness 45 initiated his testimony, the Defence filed the Defence Application to appeal the Decision in which the Defence refers to the following grounds of appeal:

- i. The Chamber’s reliance upon information that was not available to the Defence for its submissions;
- ii. The Chamber’s failure to provide the Defence with an opportunity to respond to an alleged new request for protective measures;
- iii. The Chamber’s improper grant of protective measures to encourage the attendance of witnesses.¹³

III. Prosecution submissions

10. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d) of the Statute. The sole question is whether the issue meets the criteria set out in the provision.¹⁴

¹⁰ ICC-01/05-01/08-2057-Conf-Exp, 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.

¹¹ ICC-01/05-01/08-2063-Conf.

¹² ICC-01/05-01/08-2063-Conf, para. 21.

¹³ ICC-01/05-01/08-2082-Conf, paras. 27-29.

¹⁴ ICC-02/04-01/05-20, Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58, 19 August 2005, para. 22.

Reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of Article 82(1)(d) of the Statute. In certain circumstances, a decision which authorises or rejects protective measures may give rise to an appealable issue. However, in the present case, the Defence has failed to demonstrate the existence of any issue fulfilling the criteria set out in Article 82(1)(d) of the Statute.

11. The Decision granted protective measures to Witness 45 after a renewed application of the Prosecution and after having considered the Defence opposition. The fact that the Chamber did not agree with the Defence arguments does not indicate that the Decision involves appealable issues.

12. The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.”¹⁵ In this case, the Defence Application raises three grounds of appeal which allegedly arise from the Decision. But it has failed to satisfy the applicable test under Article 82(1)(d) of the Statute: it has not demonstrated how any of the three grounds raised constitutes an appealable issue arising from the Decision, that any of them significantly affect the fair and expeditious conduct of proceedings or the outcome of trial, and that intervention by the Appeals Chamber may materially advance the proceedings.¹⁶

¹⁵ ICC-01/04-168 OA3, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, Dissenting Opinion of Judge Song, para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

¹⁶ ICC-01/05-01/08-2082-Conf, paras. 27-29.

IV. The issues do not satisfy the test under Article 82(1)(d) of the Statute

A. The First Ground: The Chamber's alleged reliance upon information that was not available to the Defence for its submission

13. At the outset, the Prosecution emphasises that the Defence does not have an absolute right to access to information within the context of the proceedings before Chambers of this Court. Consistent with the jurisprudence of the Court and the obligation to ensure full respect for the rights of the Accused and due regard for the protection of victims and witnesses pursuant to Article 64(2) of the Statute, a Chamber may withhold relevant information regarding the safety and well-being of witnesses.¹⁷

14. More importantly, nothing in the Decision supports the proposition that the Chamber relied on information that had not been provided to the Defence. On the contrary, the Chamber's reasoning shows that the Chamber at all times relied on *inter partes* information for the purposes of its determination. Thus, the Application mischaracterizes this aspect of the Decision.

B. The Second Ground: The Chamber's alleged failure to provide the Defence with an opportunity to respond to an alleged new request for protective measures

15. The Defence contends that the Chamber prevented it from responding to the Prosecution's reiterated request for protective measures. The Defence misrepresents the procedural history and overstates the Prosecution's submissions in its

¹⁷ ICC-01/04-01/07-475 OA, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, para. 62: "the relevant jurisprudence of the European Court of Human Rights, [...] demonstrates that the right to disclosure is not absolute, that the withholding of disclosure of information from the Defence is permissible so as to preserve the fundamental rights of another individual and that not every incident of non-disclosure automatically results in an unfair trial. It would be, in every case, for the Pre-Trial Chamber to assess whether the rights of the defendant to a fair hearing were prejudiced on the facts." [Emphasis added]

Prosecution Report.¹⁸ The Prosecution did not make a substantive new request for in-court protective measures in the Prosecution Report. The Prosecution simply reiterated what it had previously stated in its earlier Prosecution Request with the addition of new information recently brought to its attention. The Defence had ample opportunity to respond to those requests *and did so* in its filing on 23 January 2012.¹⁹ Thus, the allegation that the Defence was prevented from responding to the information contained in the report is unsubstantiated and factually wrong.

C. The Third Ground: That the Chamber improperly granted protective measures to encourage the attendance of witnesses

16. The Defence's contention that the Chamber improperly granted protective measures to wrongfully encourage the attendance of the witness is baseless. The Defence's contention simply ignores the Chamber's stated rationale for its Decision - to balance the need for a public trial with its obligation to protect victims and witnesses.²⁰ In so ignoring the Chamber's explanation, it insinuates that the Chamber engaged in deception and conspired with the Prosecution to reassure Witness 45 that he would benefit from in-court protective measures, suggesting that the timing of the Decision meant that the Chamber intended to encourage Witness 45 to testify.

17. It is hard to fathom the nature of the Defence issue. Decisions to authorize in-court protective measures, and what measures to provide, are generally within the discretion of the Chamber. In-court protective measures are designed to encourage persons to testify - regardless which party calls them - by minimizing the security consequences that would otherwise deter their voluntary appearance or manifest themselves afterward in harm to the witnesses as a result of their testimony. It is entirely serves the Chamber's mission to discover the truth that the appearance of

¹⁸ ICC-01/05-01/08-2051-Conf-Red.

¹⁹ ICC-01/05-01/08-2057-Conf-Exp.

²⁰ ICC-01/05-01/08-2063-Conf, paras. 18-22.

witnesses with relevant information should be facilitated and that they should be adequately protected. And the timing of the order routinely will be in advance of the witnesses' appearance. If the complaint is that the order was suspiciously close to the testimony, so too were the recent security incidents that had increased Witness 45's anxiety and reluctance to testify. In short, the Defence issue seems predicated upon the underlying assumption that it can be improper for the Chamber to authorize protective measures that might encourage the upcoming appearance of a witness. There is, however, nothing even arguably improper in the Chamber's exercise of discretion in authorizing protection in advance of a witness's testimony, and therefore the issue does not arise from the Decision .

a. The issues identified in the Defence Grounds do not affect the fair conduct of the proceedings

18. The Defence fails to demonstrate that the alleged grounds affect the fair conduct of the proceedings.²¹ The Defence cannot speculate in the abstract that the Decision causes a prejudice to the rights of the Accused in order to invoke that the fairness of the proceedings are affected. Neither a purely general complaint nor the mere hypothetical impact on the fairness or expeditiousness of proceedings suffices.²²

19. The Prosecution accepts that matters of protection - most particularly, the unreasonable denial of protection that in turn leads to a witness's refusal to testify - may be linked to the fairness of proceedings. But the Defence has failed to demonstrate why fairness is affected in this particular instance. Again, it is impossible to discern how enabling a witness to give his evidence through the

²¹ ICC-01/04-168 OA3, para. 11. The Appeals Chamber has ruled that "[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights".

²² ICC-01/04-01/07-1958, Decision on the "Prosecution's Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility", 11 March 2010, para. 20.

provision of protective measures (which are not uncommon and do not deprive the Defence of the ability to know the identity of the witness or to question him fully) renders the proceeding “unfair”.

20. Nor did the timing of the order authorizing protective measures affect the fairness of proceedings arising out of the Decision. The Defence was given and used the opportunity to respond to the Prosecution’s filing, and it was given ample advance notice of the timing of the witness’s testimony and its overall substance.

b. The issues identified in the Defence Grounds do not affect the expeditious conduct of the proceedings

21. The Application fails to demonstrate that the issues significantly affect the expeditious conduct of the proceedings within the meaning of Article 82(1)(d) of the Statute. The Defence argues that the judgment-drafting process will be complicated and prolonged by protective measures afforded to witnesses whose testimony go to the heart of the case, and that testimony of witnesses without protective measures are “remarkably more efficient”.²³

22. The Prosecution submits that the expeditious conduct of proceedings means the timely and efficient conduct of proceedings.²⁴ This principle requires that decisions at all stages not unnecessarily delay the overall determination of responsibility.²⁵ The Defence has failed to explain why and how the Decision can have detrimental

²³ ICC-01/05-01/08-2082-Conf, paras. 28 and 29.

²⁴ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2003-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: “the Court’s obligation to do justice expeditiously and effectively, as well as fairly.” (para. 6); “we can only do justice that is expeditious, fair and efficient” (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue “will significantly affect the efficient and expeditious conduct of the proceedings”; Jones and Powles, *International Criminal Practice* at para. 8.5.60.

²⁵ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

consequences for the expeditious conduct of proceedings. The unsubstantiated and somewhat mystifying assertion that the efficacy of judgment-drafting will be affected as a result of the Decision cannot constitute a proper basis for appeal. Moreover, the use of private or closed session will be the exception, the majority of the witness's testimony will be in open session, whilst use of additional time to explain protective measures to the witness and use of codes is marginal at best.

c. An immediate resolution of the issues will not materially advance the proceedings²⁶

23. The Defence fails to show how immediate resolution of any of the issues by the Appeals Chamber will materially advance the proceedings. The Defence hypothetically argues, apparently for future cases, that if a witness testifies falsely in public, then people who know that the witness is lying will come forward and offer to testify for the Defence. The Defence also argues that the drafting of procedural motions and decisions will be expedited if parties or the Chamber is not constrained by the need to keep certain information confidential. Finally, it is argued that experience of these proceedings indicates that hearing of witnesses with protective measures take longer than those without.

24. None of these arguments demonstrate the need for any involvement of the Appeals Chamber at this stage. The Decision referred to a discrete and confined application for protective measures in relation to a particular witness' testimony. Most of the substance of the witness's evidence will be publicly available, so persons attuned to the case who hear evidence they think is untrue will be able to make themselves known to the Defence even if they do not know Witness 45's identity.

²⁶ This requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "move forward" by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings." See ICC-01/04-168 OA3, paras. 14-15,18.

Furthermore, and more importantly, the witness is testifying at the moment, which means that by the time that the Appeals Chamber hypothetically ruled on the issues, they would effectively be moot, at least as far as the testimony of the instant witness is concerned. In these circumstances therefore, an interlocutory appeal will not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.²⁷

V. Relief sought

25. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence's Application.



Fatou Bensouda, Prosecutor

Dated this 25th Day of July 2016

At The Hague, The Netherlands

²⁷ ICC-01/04-01/06-2404, Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le dépôt en preuve de trois photographies”, 29 April 2010, para. 33.