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Pénale
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**International
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Court**

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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**

Strictly Confidential

Defence Request for Protective Measures

Source: Defence for Mr. Jean-Pierre Bemba Gombo

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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A. BACKGROUND

1. On 24 February 2012, Trial Chamber III (“the Chamber”) rendered its *Decision on defence disclosure and related issues*, which ordered the Defence to file “if applicable, any request for in-court protective measures stating the legal and factual basis for such a request.” It was ordered to file this request “not less than two weeks prior to the commencement of the defence presentation of evidence.”¹

2. On 24 May 2012, the Chamber rendered its *Decision on the starting date for the presentation of defence evidence and related issues*, in which it ordered the Defence to “provide the Prosecution, legal representatives and the Chamber with the complete identity of its prospective witnesses, their anticipated order of appearance, the estimated length of questioning for each witness **as well as any requests for in – court protective measures as soon as practicable, and in any event no later than 16h00 on 13 July 2012**”²

3. On 13 June 2012, the Defence filed its *Defence Request for Delayed Disclosure of Witness Identifying Particulars and Other Related Requests*,³ in which it requested particular measures stemming from fears expressed by Defence witnesses residing in the Democratic Republic of Congo (“DRC”). In denying the Defence request in full, the Chamber held that a potential risk could “be deemed real only after a proper assessment to be made by the Victims and Witnesses Unit (“VWU”)...”⁴

4. A number of the witnesses who the Defence intends to call to give evidence in the present case have expressed fears of potential harm to themselves (and often also to their families) which are both genuine and well founded. The Defence submits that these fears warrant a finding by the Chamber that the granting of

¹ICC-01/05-01/08-2141, para 36(c).

²ICC-01/05-01/08-2221, pp.8-9 (emphasis added).

³ICC-01/05-01/08-2226-Conf

⁴ICC-01/05-01/08-2236-Conf, para.18.

protective measures on behalf of these witnesses is necessary, reasonable and proportionate. On this basis, the Defence makes the current request.

B. APPLICABLE LAW

5. Article 67(1)(e) of the Rome Statute ("the Statute") safeguards the right of the accused "to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

6. As regards protective measures for witnesses, Article 68(1) provides as follows:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

7. Together with Article 64(2) of the Statute, and Rules 87 and 88 of the Rules of Procedure and Evidence ("the Rules"), the Chamber is authorised to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, particular including victims of sexual violence, and to facilitate the testimony of vulnerable witnesses and those who are particularly at risk, while at the same time preserving the Accused's right to a fair and public trial.

8. In the present case, the Chamber has adopted the following approach to the granting of requests for protective measures:⁵

...protective measures pursuant to Article 68(1) and (2) of the Statute and Rules 87 and 88 of the Rules may be granted by the 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 fair and impartial 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 fair and public trial.

Balancing its duty to respect the principle of publicity and its obligation to protect victims and witnesses, **the Chamber considers 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.** These measures are also intended as well to protect the physical and psychological well-being of witnesses at risk, and avoiding unnecessary public exposure of witnesses. **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. These measures will sometimes need to be combined with limited private session testimony, in order not to defeat their purpose and to ensure effective protection of the identities of the witnesses concerned.

9. In relation to victims of alleged sexual violence, the Chamber has also regularly recalled Rules 70 and 71 of the Rules, and has ruled that it will prevent any attempt by the parties to ask questions directed at (i) inferring consent of the victims of sexual violence suffered by any words or conduct, silence or lack of resistance; (ii) questioning the credibility, character or predisposition to sexual availability of the witness by reason of the sexual nature of the prior or subsequent conduct of the witness; and (iii) demonstrating the prior or subsequent sexual conduct of the witness.⁶

⁵See, for example, ICC-01/05-01/08-1774-Conf, paras.11-12.

⁶See, for example, ICC-01/05-01/08-T-42-Red-ENG WT 02-12-2010 6/50

C. SUBMISSIONS

(1) In-Court Protective Measures

10. On the basis of the fears and risks associated with their testimony that have been expressed by its witnesses, the Defence seeks in-court protective measures for the following categories of witnesses: (a) Victim Witnesses; (b) DRC Witnesses; (c) Former Central African Soldiers; (d) Other Witnesses. The necessity of protective measures categories for each of these categories will be examined below.

11. By “in-court protective measures”, the Defence is requesting the following: (a) the continued use of a pseudonym; (b) the use of image and voice distortion; and (c) the use of private or closed sessions as necessary to avoid the identity of the witness being known by those outside the courtroom.

(a) Victim Witnesses

12. The Defence intends to bring 11 witnesses to testify about the crimes committed in the Central African Republic during the relevant events.

13. Six of these witnesses are direct victims of sexual violence; namely Witness 27, Witness 37, Witness 30, Witness 32, Witness 34, and Witness 35. These women have expressed their desire to testify in circumstances which will not expose their identities.

14. The Defence notes “the need for special consideration to victims of sexual violence... has been widely recognized in both domestic laws of states and in international courts.”⁷ It is submitted that the use of protective measures will assist in avoiding re-traumatisation, and may also help to alleviate psychological

⁷*Prosecutor v. Sesay et al.* SCSL-04-150, 5 July 2005, para.32.

suffering, which “may be exacerbated by social and cultural conditions”,⁸ which is an issue where the public disclosure of rape results “in rejection by the victim’s family and community.”⁹

15. The Chamber in the present case has, without exception, authorized protective measures for alleged victims of sexual violence, finding that such measures are warranted to avoid the witnesses “being re-traumatized, threatened, or harassed.”¹⁰

16. In addition to exhibiting the concerns consistently shown by victims of sexual violence as to their identity being known, these six women have also expressed particular concern given that their testimony will accuse soldiers under the command of the current Head of State in the Central African Republic. In such circumstances both the risk, and their legitimate fear of reprisals against themselves and their families is heightened.

17. Witnesses 38 and 29 are the husbands of two of the victims of sexual violence referred to above, as well as direct victims of pillage and violence themselves. In addition to their own re-traumatization which may be heightened by recounting the acts perpetrated against them in public, their evidence may reveal, directly or indirectly, the identities of victims of sexual violence. The Prosecution in the present case has requested and was granted in-court protective measures for witnesses whose evidence may identify the victims of sexual violence.¹¹ In addition, Witnesses 38 and 29 will also accuse soldiers under the command of the current Head of State of the Central African Republic, and as such face similar risks concerning reprisals from their testimony.

⁸*Prosecutor v. Delalić et al.*, Judgement, Case No.IT-96-31-T, 16 November 1998, para. 495.

⁹*Prosecutor v. Tadić*, IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 50.

¹⁰See, for example, ICC-01/05-01/08-T-79-CONF-ENG ET 03-03-2011 44/46.

¹¹See, for example, ICC-01/05-01/08-800-Corr-Red4, para. 32, and ICC-01/05-01/08-T-63-Red-ENG WT 10-02-2001 51/67

18. Witnesses 33 and 36 are direct victims of pillage, with Witness 36 also being an eyewitness to the rape of [REDACTED]. Both have expressed concerns about their identities being made public, particularly given that they are also accusing troops under the command of the current Head of State of the Central African Republic. Finally, Witness 28, while not a direct victim himself, is a leader in the community who can testify about the crimes which occurred during the relevant events. He has also expressed fears for his safety should his identity and association with the Defence be made public, and is also accusing the troops under the command of the current Head of State.

19. For these reasons, the Defence requests that the Chamber authorize in-court protected measures for Witness 27, Witness 37, Witness 30, Witness 32, Witness 34, Witness 35, Witness 33, Witness 36, Witness 38, Witness 29 and Witness 28.

(b) DRC Witnesses

20. A number of the Defence witnesses are currently working as part of the Forces Armées de la République Démocratique du Congo ("FARDC"), or within - or in positions associated with - the present Government (together "DRC witnesses").¹²

21. The Defence has received consistent, corroborated and grave concerns from the DRC witnesses arising out of their testimony before the Court. These DRC witnesses have expressed fears that they or their families will be the subject of harassment, subjected to pressure, or that they will be removed from their posts, transferred to areas of ongoing military conflict, or detained in order to prevent their testimony on behalf of the Defence.

¹²Witness 46, Witness 61, Witness 13, Witness 44, Witness 17, Witness 12, Witness 14, Witness 41, Witness 21, Witness 62, Witness 45, Witness 19, Witness 49, Witness 39, Witness 15, Witness 20, Witness 18, Witness 48, Witness 54, Witness 40, Witness 16, Witness 43, Witness 42, and Witness 47.

22. The Defence submits that these fears expressed consistently by the DRC witnesses are not mere feelings of insecurity, but are expressions of objective and precisely identified risks, being made by people who have full knowledge of the inner workings, prior conduct and political motivations of both the FADRC and the present regime in the DRC.

23. The Chamber has previously considered the occupation of witnesses residing in the DRC as a factor relevant to the granting of protective measures.¹³ The Chamber has also granted protective measures in the present case having considered, *inter alia*, as follows:¹⁴

The Chamber is concerned that the witness may be perceived by MLC supporters as a traitor by virtue of his cooperation with the Court, which might put his safety at risk

24. The Defence submits that the same concerns *a fortiori* must also apply to Defence witnesses, who will certainly be viewed as “traitors” within a regime and an army which has an obvious and public interest in the continued detention and ultimate conviction of the accused.

25. On this basis, the Defence requests that in-court protective measures are granted for the following DRC Witnesses: Witness 46, Witness 61, Witness 13, Witness 44, Witness 17, Witness 12, Witness 14, Witness 41, Witness 21, Witness 62, Witness 45, Witness 19, Witness 49, Witness 39, Witness 15, Witness 20, Witness 18, Witness 48, Witness 54, Witness 40, Witness 16, Witness 43, Witness 42, Witness 47, and Witness 67.

¹³See, for example, ICC-01/05-01/08-1774-Conf, para.14.

¹⁴ICC-01/05-01/08-2160-Conf, para.11.

(b) Former Central African Soldiers

26. The Defence also intends to call former Central African soldiers who were involved in the relevant conflict, and who fought as part of Bozize's troops, the FACA, for Abdoulaye Miskine, and as part of the Karako militia.

(i) Bozize's Troops

27. The first category of former Central African soldiers are those who fought as part of **General Bozize's troops** during the 2002-2003 conflict, namely Witness 10, [REDACTED] Witness 26, Witness 56, and Witness 22. Each of them has fled the Central African Republic, and are now all considered "deserters" from the army of the present regime. They have therefore expressed genuine and legitimate concerns for their own safety, and that of their families residing in the Central African Republic, should their identities as witnesses for the Defence become known.

28. In addition, the present regime in the Central African Republic has an obvious interest in the conviction of the accused for crimes which are alleged to have occurred in areas in which the current Head of State's troops were also present. As such, the same fears arise that these witnesses will be considered as "traitors" if they are seen to be associated with the "Defence" case, or testify during the "Defence" presentation of evidence, the timing of which is publicly known. As the Chamber has previously acknowledged, this may put their safety at risk.¹⁵

29. Moreover, these witnesses will testify about crimes committed by troops under the control of the current Head of State during the 2002-2003 conflict. In such circumstances both the risk, and their legitimate fear of reprisals against themselves and their families is heightened.

¹⁵ICC-01/05-01/08-2160-Conf, para.11.

(ii) *FACA Soldiers*

30. The second group of former Central African soldiers are **ex-FACA soldiers** who were part of the so-called “Loyalist Forces” during the 2002-2003 regime, namely Witness 11, Witness 4, Witness 6, Witness 7, Witness 8, Witness 9, Witness 57, Witness 50, Witness 51, Witness 52 and Witness 64.

31. These former soldiers fled the Central African Republic following the conflict, and are consequently liable to be considered as “deserters”. Moreover, they were the military adversaries of the Head of State of the present regime during the 2002-2003 conflict. As such, they have expressed genuine fears for their own safety and that of their families who remain in the Central African Republic, should their identities or whereabouts, or association with the Defence be made public.

32. These witnesses will also be called to testify about the crimes committed by the troops under the command of the current Head of State during the relevant conflict which again heightens the risk, and their legitimate fear of reprisals against themselves and their families should their identity be made public.

(iii) *Miskine and Karako militia*

33. The last category of former Central African soldiers also fought as part of the “Loyalist Forces” during the 2002-2003 conflict. Witness 2 fought as part of the Karako militia, while Witness 3 was part of the troops who were under the direction of Abdoulaye Miskine. Both have since fled the Central African Republic.

34. They have both expressed concerns for their safety should their identities become known on the basis that they were the adversaries of the present regime in the Central African Republic during the 2002-2003 conflict, and also because they will give testimony as to crimes committed by troops under the control of the

present Head of State (and other soldiers under the command of Miskine himself, who remain within the Central African Republic).

35. For the reasons outlined above, the Defence submits that the granting of in-court protective measures for the former Central African soldiers is necessary, reasonable and proportionate. The Defence recalls that the Chamber has previously considered that protective measures are generally non-intrusive measures in cases where a witness could be at risk on the account of their testimony at the Court.¹⁶ The Defence submits that for each of the categories of former Central African soldiers outlined above, this threshold has been met, warranting the granting of in-court protective measures for the hearing of their testimony.

(d) Other Witnesses

(i) Witnesses 55 and 66

36. Witness 55 is being called to testify on a limited and specific topic. He was alleged [REDACTED]

[REDACTED]

37. Given that Witness 55 is calling into question the credibility and truthfulness of a Prosecution witness who has implicated the accused, he has expressed genuinely held fears in relation to both his own safety and that of his family. He has therefore requested that he be afforded in-court protective measures.

38. Similarly, Witness 66 is also being called to testify as to the credibility and truthfulness of a number of Prosecution witnesses who testified about his actions and movements during the relevant events. Given that he will directly be rebutting

¹⁶See, for example, ICC-01/05-01/08-1774-Conf, paras. 12.

the testimony of Prosecution witnesses, and given that he is still residing in the [REDACTED] he has expressed fears about being seen to be associated with “the Defence”, or to give evidence during the presentation of the Defence case. For these reasons, he has requested in-court protective measures.

(ii) Witness 25

39. Witness 25 was [REDACTED] He is similarly placed as the two witnesses discussed above, given that he is being called to testify, in large part, to rebut the allegations of a particular Prosecution witness. Although [REDACTED]

[REDACTED] Given that he is directly rebutting the testimony of a Prosecution witness, and has expressed fears about testifying, the Defence submits that the granting of in-court protective measures is necessary, reasonable and proportionate.

(2) Full Protective Measures

40. In addition to the protective measures requested above, the Defence also requests full in-court protective measures for Witnesses 19 and 54, namely that they give their testimony entirely in closed session.

41. The Defence notes the Chamber’s previous ruling, that “the measure of concealing the witness's identity should, under normal circumstances, be sufficient protection to avoid security risks”.¹⁷ However, in the case of Witness 19 and Witness 54, given [REDACTED] during the relevant events, and the detailed testimony which the Defence will seek to elicit, the Defence submits that it will be impossible for these witnesses to give any testimony in open session without immediately revealing their status and roles within the events in question.

¹⁷ICC-01/05-01/08-2160-Conf, para. 11.

42. Moreover, both witnesses continue to work as part of the FARDC, [REDACTED]

[REDACTED]

They are enormously concerned that neither the content of their testimony nor their association with the Defence become publicly known, and have expressed genuinely held fears that they risk death if they are suspected of testifying on behalf of the accused, or have any association with the Defence.

43. The witnesses have also expressed fears for the safety of their families,

[REDACTED]

[REDACTED] These concerns are exacerbated by the witness'

[REDACTED]

[REDACTED] On this point, the Defence notes the previous reasoning of the Chamber in granting a Prosecution request for full protective measures for a Prosecution witness:¹⁸

This risk is particularly significant in relation to Witness 36 since, [REDACTED]

44. The Defence submits that under these circumstances, the giving of testimony entirely in closed session would increase the chances that Witness 19 and Witness 54 will be able to continue to work as part of the FARDC without fearing for their safety and worrying about acts of retaliation [REDACTED] as a result of their testimony. Given the particular circumstances of Witnesses 19 and 54 outlined above, the Defence submits that the hearing of his testimony entirely in closed session is necessary, reasonable, and proportionate.

¹⁸ ICC-01/05-01/08-2160-Conf, para. 12.

D. RELIEF REQUESTED

45. Given the reasons cited above, the Defence respectfully requests that the Chamber:

GRANT the Defence request for in-court protective measures for the following witnesses:

- (a) **Victim Witnesses:** Witness 27, Witness 37, Witness 30, Witness 32, Witness 34, Witness 35, Witness 33, Witness 36, Witness 38, Witness 29 and Witness 28;
- (b) **DRC Witnesses:** Witness 46, Witness 61, Witness 13, Witness 44, Witness 17, Witness 12, Witness 14, Witness 41, Witness 21, Witness 62, Witness 45, Witness 19, Witness 49, Witness 39, Witness 15, Witness 20, Witness 18, Witness 48, Witness 54, Witness 40, Witness 16, Witness 43, Witness 42, Witness 47, and Witness 67;
- (c) **Former Central African Soldiers:** Witness 10, Witness 23, Witness 26, Witness 56, Witness 22; Witness 11, Witness 4, Witness 6, Witness 7, Witness 8, Witness 9, Witness 57, Witness 50, Witness 51, Witness 52, Witness 64, Witness 2, and Witness 3.
- (d) **Other Witnesses:** Witness 55, Witness 66, and Witness 25.

GRANT the Defence request for full protective measures for Witnesses 19 and 54, and authorise these witnesses to give their testimony entirely in closed session.

The whole, respectfully submitted.



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Co- Counsel

Done on the 13th of July 2012
At The Hague, The Netherlands