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Pénale
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**International
Criminal
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**

*Confidential
With a Confidential Annex A*

**Defence Response to Prosecution Request for Protective Measures for Witness
CAR-OTP-WWWW-0032**

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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**Victims Participation and Reparations Other
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A. BACKGROUND

1. By way of an email on 9 September 2011 entitled “Witness Schedule”, the Defence was informed that given the unavailability of Prosecution Witness 0045, the next Prosecution witness to be called would be Witness CAR-OTP-WWWW-0032 (“Witness 0032”).¹

2. Seven (7) days later, on 16 September 2011, the Defence received a Confidential Redacted Version of “Prosecution’s Request for Protective and Special Measures for Witnesses CAROTP-PPPP-0015, CAR-OTP-PPPP-0032, CAR-OTP-PPPP-0036, CAR-OTP-PPPP-0044, and CAR-OTP-PPPP-0045 at Trial”² (“Prosecution Request”). The Prosecution Request is significantly redacted. As an example, the justification for protective measures is set out in paragraphs 7 to 10, but all of paragraph 9 is redacted.

3. By way of an oral decision of the same day, 16 September 2011, the Defence was ordered to respond to the Prosecution’s Request for protective measures for Witness 32, by 4pm on Monday, 19 September 2011. Pursuant to that order, the Defence files the following response.

B. APPLICABLE LAW

4. Article 64 of the Rome Statute of the International Criminal Court (“Statute”), provides that:

The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

5. One of the rights with which the Chamber must ensure “full respect” is the

¹ Email [REDACTED] to the parties and participants entitled “Witness Schedule”, dated 9 September 2011.

² ICC-01/05-01/08-1743-Conf-Red

right to a public trial. Article 67(1) of the Statute states that: “[i]n the determination of any charge, the accused shall be entitled to a **public hearing**...”

6. The European Court of Human Rights has been unequivocal that the public nature of trials³

‘protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.’

7. The importance of preserving the public nature of trials has been recognised by Trial Chamber II. In *Katanga & Ngudjolo*, the Trial Chamber was explicit that ‘the public nature of proceedings... constitutes for the Defence a safeguard, an essential safeguard. It contributes to preserving the trust that all those subject to the law have to have in justice, and it is one of the best means of controlling the way in which such justice is rendered.’⁴

C. SUBMISSIONS

8. Throughout these proceedings, the Defence has been consistent in its position that protective measures must be proportionate and discrete, and only implemented when the Chamber is convinced that failure to do so will give rise to a serious likelihood that actual harm will be caused to a witness.⁵ The Defence reiterates its previous arguments that protective measures should only be granted where the potential harm to a vulnerable witness is both genuine and well-founded.⁶

³Judgement, *Werner v. Austria*, 24 November 1997, § 45.

⁴ Transcript, *Katanga & Ngudjolo Chui* (ICC-01/04-01/07-T-189-ENG ET WT 20-09-2010), at 10.

⁵ See, for example, ICC-01/05-01/08-830-Conf-Exp, para. 3.

⁶ ICC-01/05-01/08-830-Conf-Exp, para. 5.

9. In relation to Witness 0032, the Prosecution has requested:⁷

- (i) image and voice distortion;
- (ii) continued in-court use of a witness number and pseudonym in lieu of his name; and
- (iii) private or closed sessions for the portions of testimony where the witnesses provide information that would tend to disclose their respective identities (together, “protective measures”).

10. Witness 0032’s current employment is listed in his witness statement as

[REDACTED]

[REDACTED]»⁸ It is difficult to

accept that the [REDACTED]

[REDACTED]

[REDACTED] would be able to establish any objective or well-founded fear arising out of testifying before the Chamber. By contrast, the Defence draws the attention of the Chamber to an Human Rights Watch report known to the parties, which documents systematic violence against a political opponents of the current regime in Bas-Congo.⁹ According to this report, [REDACTED] security and police forces [REDACTED] [REDACTED] have used “unnecessary or excessive” force¹⁰ against a particular political group opposed to the current regime, and have carried out attacks in which up to 200 supporters were killed and meeting places systematically destroyed, in what MONUC investigators said appeared to be “a deliberate effort to wipe out the movement.”¹¹ This publicly-available information casts doubt on the sincerity of Witness 0032’s alleged fears arising out of his testimony.

⁷ ICC-01/05-01/08-1743-Conf-Red, para. 2.

⁸ CAR-OTP-0011-0298

⁹ ICC-01/05-01/08-721-Anx8 pages 73 - 91. An English version of this report is available at : <http://www.hrw.org/sites/default/files/reports/drc1108web.pdf>, at pages 66 – 82.

¹⁰ *Ibid.*, page 73.

¹¹ *Ibid.*, page 74.

11. The Prosecution's request for protective measures for Witness 0032 becomes even more difficult to accept given that the witness has [REDACTED] [REDACTED] the events discussed in the witness' statements, and which he will presumably discuss during his testimony.¹² As such, the hiding of his identity at this stage is without object, given that he has already demonstrated a willingness to discuss these events in public, and put his name publicly to his knowledge of these events.

12. For its part, the Prosecution bases this request on an alleged "unstable security environment due to upcoming DRC presidential elections and evidence of threats to other similarly situated prosecution witnesses."¹³ The Prosecution provides no basis for its hypothetical assertions, nor has it given the Chamber any actual or tangible information upon which an order for protective measures could be justified. The Defence respectfully submits that in the absence of actual information providing a concrete basis for protective measures for Witness 0032, the Prosecution has failed to justify any limitation on Mr. Bemba's right to a public trial.

13. Turning firstly to the alleged "unstable security environment" in the DRC, the Prosecution refers to 2006 post-electoral violence, and an alleged "angry" reaction to Mr. Bemba's arrest on the part of his supporters.¹⁴ The Prosecution fails, however, to link these events (dating back between 3 and 5 years) to its position that protective measures are necessary for Witness 0032 in 2011. The Prosecution refers to Mr. Bemba historically enjoying considerable levels of popular support (again citing 2006 figures), but again just speculates as to what this might or could possibly lead some undefined group of "MLC militants" to do at some point in the future. On this point, the Defence also notes that by virtue of his position, Witness 0032 is [REDACTED] [REDACTED]

¹² See Confidential Annex A.

¹³ ICC-01/05-01/08-1743-Conf-Red, at 5, 6.

¹⁴ ICC-01/05-01/08-1743-Conf-Red, para. 7.

¹⁵ As such, the Defence submits that the Prosecution has failed to demonstrate how the upcoming elections in the DRC provide a basis for protective measures for Witness 0032.

14. As its second argument, the Prosecution alleges “evidence of threats to other similarly situated prosecution witnesses.”¹⁶ Despite using the plural term “witnesses”, the Prosecution goes on to describe an alleged threat to one witness, being Witness 0169. Again, the Prosecution arguments as regards these threats are based on guesswork, stating that “it is reasonable to conclude that the threats came about due to the perceived willingness of the Witness 169 [REDACTED]...”¹⁷ The Defence has been provided with no details of the alleged threats, and is therefore limited in its ability to argue in response, but submits that such speculation cannot form the basis for any derogation from the right of Mr. Bemba to a public trial.

15. This Prosecution argument is further undermined by its claim that Witness 0169 was an “insider”. The Prosecution asserts that “Witness 32 is similarly situated to Witness 169 [REDACTED], since he is an MLC insider and would likely face similar types of threats and intimidation...”¹⁸ The Defence submits that even taken at its broadest, the term “MLC insider” cannot be applied to Witness 0169. The Prosecution itself in its “Submissions in Preparation for the Commencement of the Trial”, grouped its witnesses into various categories.¹⁹ Witness 0169 was not included in “Group E- CAR and MLC Insiders and the Military expert witness”, but rather was correctly characterised in “Group C – Overview Witnesses”.²⁰ As such, the analogy that the Prosecution attempts to draw between Witness 0169 and 0032 does not stand.

¹⁵ CAR-D04-0002-1786: Loi N°06/2006 du 9 Mars 2006 portant organisation des élections présidentielles, législatives, provinciales, urbaine, municipaleset locales.

¹⁶ ICC-01/05-01/08-1743-Conf-Red, Heading IV.

¹⁷ ICC-01/05-01/08-1743-Conf-Red, para. 11.

¹⁸ ICC-01/05-01/08-1743-Conf-Red, para. 12.

¹⁹ ICC-01/05-01/08-793-AnxA 10-06-2010

²⁰ *Ibid*, at 5.

16. The Prosecution also relies upon the fact that Witness 0032 himself “has requested in-court protective measures.”²¹ It is clear from the practice of this Chamber that a witness’ desire for protective measures is not determinative. Witness 0009, for example, also made an 11th-hour request for protective measures, stating that “knowledge of his identity could lead to some negative impact on his person.”²² On this basis, the Prosecution requested that the Chamber grant protective measures “in order to protect the physical and psychological well-being, dignity and privacy of Witness 9.”²³ A majority of the Chamber rejected this request, finding the requested measures to be “unnecessary”.²⁴

17. The granting of the requested measures has a significant impact not only on the presentation of the testimony of this particular witness, but also has additional implications for the Defence. Perhaps most significantly, the Defence will be denied a valid and powerful examination tool, namely inviting witnesses to consider contradictions between their allegations, and the allegations of other individuals whom they know. Moreover, if Witness 0032 provides incorrect testimony in public session, there is a greater possibility that other persons involved in the same events will be in a position to identify these errors and offer to testify. This safeguard will be eliminated if the public is prevented from knowing who is making these incorrect allegations. The Defence also wishes to put on record its more general concern as to protective measures being ascribed to the majority of witnesses in this case. The Defence is particularly concerned that details of any ultimate findings on command responsibility will be completely beyond public scrutiny, as the Judgement will simply be a series of references to pseudonyms whose functions cannot be made public.

²¹ ICC-01/05-01/08-1743-Conf-Red, para. 12.

²² ICC-01/05-01/08-T-102-CONF-ENG ET 03-05-2011 2/51

²³ *Ibid.*

²⁴ ICC-01/05-01/08-T-102-CONF-ENG ET 03-05-2011 3/51

18. As such, the Defence submits that protective measures should only be granted when a party has demonstrated them to be justified, and necessary. The Prosecution's abstract and speculative arguments fail to do either.

D. RELIEF REQUESTED

19. In light of the above arguments, the Defence respectfully requests that the Chamber:

REJECT the Prosecution request for protective measures for Witness 0032;
and

ORDER the Prosecution to file any further requests for witness protective measures in sufficient time to allow for the Defence to respond within reasonable delays.



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Dated this 19 September 2011
At The Hague, The Netherlands