

**Cour
Pénale
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**International
Criminal
Court**

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Date: 23/09/2011

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

**Defence Request for Leave to Appeal the Decision on in-court 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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A. INTRODUCTION

1. 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.¹

2. The Defence is concerned that the granting of protective measures for Witness 0032, in a situation where the witness has demonstrated a willingness to discuss the content of his testimony publicly, and where he has significant [REDACTED] [REDACTED] sets a troubling precedent for the remainder of the “insider” witnesses; will lead to the very core of these proceedings being kept from the public; and will unduly restrict the Defence ability to conduct investigations and to test the witness’ evidence.

3. As such, the Defence for Mr. Jean-Pierre Bemba respectfully seeks leave of the Chamber to appeal the “Decision on in-court protective measures for Witness 32” of 23 November 2011,² (“Impugned Decision”) pursuant to article 81(2)(d) and rule 155.

4. The Defence notes that the testimony of Witness 0032 commenced today, 23 September 2011. However, the Defence submits that this does not render the present request for leave to appeal moot. Should the Appeals Chamber find that the Trial Chamber III (“the Chamber”) erred in granting protective measures to Witness 0032, this will form an important precedent for subsequent “insider” witnesses; it may form the basis for requests for the re-classification of this witness’s testimony; which would itself facilitate Defence questioning of the “insider” witnesses who are still to come.

¹ See, for example, ICC-01/05-01/08-830-Conf-Exp, para. 3.

² ICC-01/05-01/08-1774-Conf

B. PROCEDURAL BACKGROUND

5. 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"³ ("Prosecution Request"). This request had been filed *ex parte* with the Chamber three days earlier, on 13 September 2011.⁴

6. By way of an oral decision of the same day, the Defence was ordered to respond to the Prosecution's Request for protective measures for Witness 0032, by 4pm on Monday, 19 September 2011.⁵

7. On 19 September 2011, the Defence filed its "Defence Response to Prosecution Request for Protective Measures for Witness CAR-OTP-WWWW-0032"⁶ ("Defence Response").

8. On 22 September 2011, the Chamber rendered the Impugned Decision, granting in-court protective measures for Witness 0032.

C. GROUNDS OF APPEAL

First Ground of Appeal

9. The Defence respectfully submits that the Chamber erred in the Impugned Decision by relying on information which was not provided to the Defence, and upon which the Defence had no opportunity to make submissions.

10. In the Impugned Decision, the Chamber refers to a witness security

³ ICC-01/05-01/08-1743-Conf-Red

⁴ ICC-01/05-01/08-T-163-CONF-ENG ET 16-09-2011 65/66

⁵ ICC-01/05-01/08-T-163-CONF-ENG ET 16-09-2011 66/66

⁶ ICC-01/05-01/08-1766-Conf

assessment provided by VWU on 22 September 2011 at 12.58.⁷ The Chamber went on to rely on this “security assessment” in rejecting Defence arguments,⁸ without any opportunity having been given to the Defence to review the assessment, or submit on the information contained therein. This cannot be reconciled with the jurisprudence of Trial Chamber I and Trial Chamber II of the ICC, which have both granted access to the Defence to redacted versions of VWU observations concerning protective measures, and afforded the Defence an opportunity to comment on these observations.⁹

11. The Defence submits that the fact that VWU’s assessment was only provided at 12.58 on the day before the proposed commencement of Witness 0032’s testimony does not justify its non-provision to the Defence. The Prosecution has been in contact with these “insider” witnesses for over three years. The fact that the Prosecution is filing requests for protective measures at a time that these witnesses should be boarding aeroplanes is extremely unfortunate, but does not mean that the urgency of this situation necessitates circumventing the procedure of the Defence reviewing VWU submissions concerning protective measures. As such, the Defence submits that the Chamber was in error, warranting the intervention of the Appeals Chamber.

Second Ground of Appeal

12. The Defence respectfully submits that the Chamber erred in departing from established precedent as regards the impact of the public knowledge of the identity of the witness on requests for protective measures.

13. In response to the Prosecution request for protective measures, the Defence

⁷ ICC-01/05-01/08-1774-Conf, paras 8 and 14.

⁸ ICC-01/05-01/08-1774-Conf, para. 14.

⁹ See for example, Prosecutor v. Lubanga, Trial Chamber, “Redacted Decision on the “Prosecution’s Request for Lifting of Redactions to the Identity of One Individual providing Rule 77 Information and Request for Redactions further to Article 54(3)(f) and Rules 81(2) and 81(4)” and “Prosecution’s application for variation in the protective measures concerning witness 44 and witness 101” of 24 July 2009”; ICC-01/04-01/06-2196-Red2; 15 December 2009, para. 20-23; Prosecutor v. Lubanga, Oral decision 24 November 2010, Transcript ICC-01/04-01/06-T-336-Red-ENG pp2-3 ; Prosecutor v. Katanga and Ngudjolo, “Decision on the Defences’ Urgent Request for the reclassification of document” ICC-04-01/07-482-Conf-Exp ICC-01/04-01/07-532, 30 May 2008.

argued that protective measures were without object, given that Witness 0032 had [REDACTED] the same events about which he is testifying. The Chamber rejected the Defence argument, holding that “the witness’ profile in the DRC is likely to have increased as a result of [REDACTED] [REDACTED] on the events in issue in this case.”¹⁰

14. The Defence firstly respectfully submits that the Chamber is in error in stating that [REDACTED] “events in issue in this case”, noting that it concerns alleged actions of Mr. Bemba that fall outside those charged in the DCC.

15. Secondly, the Defence notes the Chamber’s conclusion that [REDACTED] [REDACTED] supports Witness 0032’s request for protective measures cannot be reconciled with consistent jurisprudence from both the ICC and ICTY, where Chambers have rejected requests for protective measures on the grounds that the identity of the witness is already in the public domain.¹¹ As such, the Chamber was in error in reaching its conclusion, warranting the intervention of the Appeals Chamber.

Third Ground of Appeal

16. The Defence respectfully submits that the Chamber failed to properly address why protective measures would not be prejudicial to, or inconsistent with the rights of the accused and a fair and impartial trial.

17. The Appeals Chamber has been unequivocal that decisions relating to protective measures must be supported by sufficient reasoning.¹² In *Lubanga*, the Appeals Chamber held that the Pre-Trial Chamber failed to give sufficient reasoning in authorising of non-disclosure of the identity of a witness, given that it had, *inter alia*, failed to address “why the Pre-Trial Chamber considered that the measure

¹⁰ ICC-01/05-01/08-1774-Conf, para. 14 (emphasis added).

¹¹ See, for example, *Prosecutor v. Boskoski and Tukulovski*, T. 4270 -4271, 29 August 2007. See also ICC-01/04-01/06-T-153-ENG WT 24-03-2009 1/99 NB T, at 60 – 63.

¹² ICC-01/04-01/06-773, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81*, para. 20.

would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹³

18. In the Impugned Decision, while the Chamber set out in paragraph 13 the reasons why the protective measures would not interfere with the rights of the accused, it completely failed to address the two arguments put forward in this regard by the Defence.¹⁴ As such, the Defence asserts that the Chamber failed to give sufficient reasoning, warranting the intervention of the Appeals Chamber.

Fourth Ground of Appeal

19. The Defence respectfully submits that the Chamber erred in failing to give sufficient consideration to the position of Witness 0032 as [REDACTED]

[REDACTED]»¹⁵ Moreover, the Chamber's conclusion that his position supports the request for protective measures cannot be reconciled with ICC precedent on this question.

20. In the Defence Response, the Defence drew the attention of the Chamber to the fact that Witness 0032 currently occupies the position of [REDACTED]

[REDACTED]¹⁶ arguing that this position made it difficult to accept that he had any objective or well-founded fear arising out of testifying before the Chamber. In its "Analysis and Conclusions", the Chamber makes one reference to the position of the

¹³ *Ibid.*, para. 21.

¹⁴ ICC-01/05-01/08-1766-Conf, para. 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."

¹⁵ CAR-OTP-0011-0298

¹⁶ ICC-01/05-01/08-1766-Conf, para. 10.

witness, being “[a]gainst this backdrop, the Chamber considers that, due to the particular circumstances of the witness, **including his occupation...**”¹⁷ protective measures should be granted. The Chamber failed to provide reasons as to why, in its view, the occupation of the witness (which in effect puts [REDACTED] [REDACTED] supports rather than undermines a request for protective measures.

21. In any event, the Chamber’s conclusion cannot be reconciled with previous jurisprudence, where a request for protective measures was rejected on the grounds that a witness who held a position appointed by a Ministry of the current government of the Democratic Republic of Congo was able “to be given any support or assistance he needs by the present government.”¹⁸

C. SATISFACTION OF THE CONDITIONS FOR LEAVE TO APPEAL

22. Leave to appeal pursuant to article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:¹⁹

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and

¹⁷ ICC-01/05-01/08-1774-Conf, para. 14 (emphasis added).

¹⁸ He is well-placed to be given any support or assistance that he considers he needs by the present government, and where he is appointed to serve as a judge is of course within the discretion of the Ministry of Justice. The Chamber considers that the principle of open justice is of high importance and requests for anonymity should not be lightly granted. This witness is in a very different category from the previous witnesses in this trial who have enjoyed a high level of protection, and it is important that these applications are not routinely made in the expectation that they will be routinely granted. Instead, they must be founded on a solid basis and reasons must be provided in support of applications of this kind that go beyond the personal preferences or subjective fears of individual witnesses, although those are matters that the Chamber will take into consideration along with all of the objective reasons. ICC-01/04-01/06-T-153-ENG WT 24-03-2009 1/99 NB T, at page 63.

¹⁹ ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4

b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

23. As to the first criterion, the Defence submits that the protection of witnesses is inextricably linked to the fairness of the proceedings. The protection of witnesses directly impacts on the public nature of the trial, one of the fundamental components of a fair trial which is safeguarded by article 67(1) of the Statute.

24. The link between protective measures and the rights of the accused to a fair trial has been recognised at the ICC, the International Tribunals and at the European Court of Human Rights. In *Katanga & Ngudjolo*, for example, 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.'²⁰

25. The European Court of Human Rights judgements are also instructive on the link between the public nature and fairness of the trial, finding that the public nature of trials: ²¹

'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.'

26. As to the second criterion, there are numerous reasons why an immediate resolution by the Appeals Chamber will materially advance the proceedings.

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

²¹ Judgement, *Werner v. Austria*, 24 November 1997, § 45.

27. Firstly, when a witness testifies in public session under his own name, and announces to the general public that he was in a particular place at a particular time, or was in possession of particular knowledge, members of the public who know this information to be false are able to come forward and offer to testify. This greatly assists and expedites Defence investigations, which contributes to the advancement of the proceedings. This opportunity is lost if witnesses testify under pseudonyms, rather than under their own names.

28. The drafting of procedural motions and decisions is also accelerated when the parties and Chamber are not constrained by the need to ensure that certain arguments or information remains confidential. The Defence also submits that the Judgement-drafting process will inevitably be complicated and prolonged if protective measures are afforded to witnesses whose testimony goes to the heart of the case, as this testimony will have to be carefully reviewed to ensure that any information which could lead to their identification is kept out of the Judgement.

29. Should the Appeals Chamber find that the Chamber erred in granting protective measures, the actual testimony of Witness 0032 (and other subsequent similarly-placed witnesses) would also be expedited. The need to spend court-time explaining protective measures, going in and out of public session, [REDACTED] and debating when closed or private session is necessary will be eliminated. The experience of these proceedings indicates that the hearing of witnesses without protective measures is remarkably more efficient when protective measures have not been ascribed to witnesses.²²

30. Perhaps most significantly, the Defence contends that continuing on an incorrect footing as regards the necessity of ascribing witness protective measures to witnesses whose identity is known to the public and who have state mechanisms for protection behind them would have serious consequences for the advancement

²² See, for example, the testimony of witnesses Firmin Findiro and Pamphile Oradimo.

of the proceedings, and warrants the intervention of the Appeals Chamber at this early stage. To this end, the Defence notes that requests for leave to appeal decisions concerning witness protection have previously been granted in international criminal proceedings on the grounds that “resolution of the present controversy by interlocutory appeal will avoid the serious consequences that could result from proceeding throughout the remainder of the Defence case on an incorrect legal footing. On this basis, the Chamber is of the view that immediate resolution of the present controversy may materially advance the proceedings.”²³

D. RELIEF REQUESTED

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

GRANT the Defence request for leave to appeal the Decision on in-court protective measures for Witness 32.



Aimé Kilolo Musamba
Associate Counsel

Done at The Hague, the Netherlands

23 September 2011

²³ *The Prosecutor v. Théoneste Bagosora et al.*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, para. 11.