

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 23 November 2012

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

Duty Counsel, Defence, Office of the Prosecutor and Registry only

**Decision on the duty counsel's "Demande de mesures de protection en faveur
du témoin D04-49 (Règle 87-1 du Règlement de procédure et de preuve)"**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Petra Kneuer

Counsel for the Defence

Mr Aimé Kilolo Musamba

Mr Peter Haynes

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria-Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Mr Ghislain M. Mabanga

Trial Chamber III ("Chamber") of the International Criminal Court ("ICC") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on the duty counsel's "Demande de mesures de protection en faveur du témoin D04-49 (Règle 87-1 du Règlement de procédure et de preuve)".

1. On 16 November 2012, Maître Ghislain M. Mabanga, the duty counsel appointed by the Registry in order to ensure that witness CAR-D04-PPPP-0049 ("Witness D04-49") was notified and informed of the provisions of Rule 74 of the Rules of Procedure and Evidence ("Rules"),¹ filed the "Demande de mesures de protection en faveur du témoin D04-49 (Règle 87-1 du Règlement de procédure et de preuve)" ("Request"),² in which he requested the Chamber to order the relocation of the witness and his family once his testimony before the Chamber has been provided; or, in the alternative, to invite the Victims and Witnesses Unit ("VWU") to report to the Chamber on the potential risks that might be encountered by the witness upon his return to his country of origin and on the protective measures that could be adapted to the particular situation of the witness.³
2. On 19 November 2012, the Chamber rendered its "Decision requesting the VWU's observations on the 'Demande de mesures de protection en faveur du témoin D04-49 (Règle 87-1 du Règlement de procédure et de preuve)'" ,⁴ in which it ordered the VWU to file its observations on the Request, no later than 16.00 on 21 November 2012.⁵

¹ Enregistrement de la désignation de Maître Ghislain Mabanga en qualité de conseil de permanence, 11 October 2012, ICC-01/05-01/08-2338-Conf and Annex ICC-01/05-01/08-2338-Conf-Anx.

² Demande de mesures de protection en faveur du témoin D04-49 (Règle 87-1 du Règlement de procédure et de preuve), 16 November 2012, ICC-01/05-01/08-2415-Conf-Exp and three confidential *ex parte* annexes.

³ ICC-01/05-01/08-2415-Conf-Exp, paragraph 13.

⁴ Decision requesting the VWU's observations on the « Demande de mesures de protection en faveur du témoin D04-49 (Règle 87-1 du Règlement de procédure et de preuve) », 19 November 2012, ICC-01/05-01/08-2420-Conf-Exp.

⁵ ICC-01/05-01/08-2420-Conf-Exp, paragraph 2.

3. On 21 November 2012, the VWU filed its "Victims and Witnesses Unit's Observations Pursuant to 'Decision requesting the VWU's observations on the 'Demande de mesures de protection en faveur du témoin D04-49 (Règle 87-1 du Règlement de procédure et de preuve) ''".⁶ The VWU submits that, in line with the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial ("Unified Protocol"),⁷ after the conclusion of his testimony, while at the seat of the Court, the witness would receive a "de-briefing" and go through a security questionnaire with VWU staff.⁸ The VWU further explains that, since it has also received a referral for protection of Witness D04-49 from the defence, it would conduct a threat and risk assessment, as well as a psycho-social assessment of the witness.⁹ This assessment would also be conducted upon completion of the witness's testimony since the provision or content of his testimony may have an impact on his security situation.¹⁰
4. In deciding on the duty counsel's Request, the Chamber has considered, in accordance with Article 21 of the Rome Statute ("Statute"), Articles 64(6)(e) and 68(1) of the Statute and Rules 86 and 87 of the Rules.
5. At the outset, the Chamber underscores that the Unified Protocol frames the scope of the duty counsel's mandate so as to ensure that witnesses are fully aware and informed of the consequences of potential self-incrimination and the content of Rule 74 of the Rules. Indeed, the Unified Protocol clearly specifies that the duty counsel's appointment is limited to providing "legal

⁶ Victims and Witnesses Unit's Observations Pursuant to "Decision requesting the VWU's observations on the 'Demande de mesures de protection en faveur du témoin D04-49 (Règle 87-1 du Règlement de procédure et de preuve)'" (ICC-01/05-01/08-2420-Conf-Exp), 21 November 2012, ICC-01/05-01/08-2428-Conf.

⁷ Annex to Victims and Witnesses Unit's amended version of the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" submitted on 22 October 2010, 7 December 2010, ICC-01/05-01/08-1081-Anx, filed as instructed by the Chamber's Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016.

⁸ ICC-01/05-01/08-2428-Conf, paragraph 2; ICC-01/05-01/08-1081-Anx, paragraph 106.

⁹ ICC-01/05-01/08-2428-Conf, paragraph 1.

¹⁰ ICC-01/05-01/08-2428-Conf, paragraph 3.

advice' to the witness(es) so concerned in accordance with Rule 74.10 of the Rules".¹¹ It further provides that the duty counsel should be "available to provide notification on the provisions of rule 74 of the Rules"¹² and that he or she "needs not be at any time physically present in The Hague or during the proceedings, but, rather, [should be able to] provide advice and assistance remotely."¹³ Further, the duty counsel should only have access "to the relevant material to be in the position to advise the witness on the issue of self-incrimination."¹⁴ And lastly, "it is the responsibility of the duty counsel to explain to the witness his/her *mandate* and to advise the witness that the *meeting is restricted to issues relating to self-incrimination* and that no other aspects of the testimony must be discussed."¹⁵

6. Consequently, the mandate of the duty counsel appointed by the Registry to provide notification of the provisions of Rule 74 of the Rules to Witness D04-49 and other witnesses is strictly limited to the issue of self-incrimination. The duty counsel does not represent the witness, is not a party¹⁶ or participant¹⁷ in the proceedings and has no *locus standi* to appear before the Court. Accordingly, the duty counsel is not entitled to request protective measures on behalf of the witness and his request should be rejected *in limine*.
7. Furthermore, the Chamber stresses that the Unified Protocol establishes a detailed procedure for the assessment of a witness's security situation during the period following the conclusion of the witness's testimony. In line with this procedure, after the conclusion of a witness's testimony but while the witness is still at the location of the testimony, the VWU should conduct a risk

¹¹ ICC-01/05-01/08-1081-Anx, paragraph 57.

¹² Ibid.

¹³ Ibid.

¹⁴ ICC-01/05-01/08-1081-Anx, paragraph 59.

¹⁵ ICC-01/05-01/08-1081-Anx, paragraph 63 [emphasis added].

¹⁶ Parties in the proceedings are exclusively the prosecution and defence, *see* Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paragraph 93.

¹⁷ Participants are only those specifically granted the right to participate in the proceedings by the relevant Chamber, e.g. legal representatives of victims or States.

assessment to determine whether the witness can return to his or her location of residence and whether any further support measures are required.¹⁸ In this context and in consultation with the "entity that called the witness", the VWU may also need to determine whether the witness should be included in the ICC protection programme.¹⁹ It follows from these provisions that the assessment of the threats or risks that a witness might face upon return to his or her country of residence falls under the responsibility of the VWU and the "entity that called the witness". In addition, in relation to the specific situation of Witness D04-49, a referral for protection was submitted by the defence to the VWU on 16 November 2012.²⁰

8. For these reasons, the Chamber

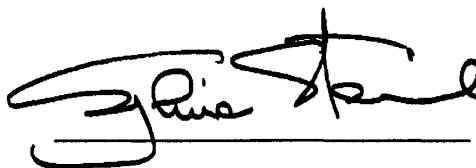
- (a) REJECTS the duty counsel's Request *in limine*;
- (b) INSTRUCTS the VWU to follow the procedure as set out in the Unified Protocol and conduct a risk assessment to determine whether the witness can return to his location of residence and/or whether any further measures are required.

¹⁸ ICC-01/05-01/08-1081-Anx, paragraph 108.

¹⁹ ICC-01/05-01/08-1081-Anx, paragraph 110.

²⁰ ICC-01/05-01/08-2428-Conf, paragraph 1. In relation to the timing of the submission of the referrals, the Chamber stresses that it has already reminded the defence that any requests for referral to the ICC Protection Programme need to be made in a timely manner in order to enable the VWU to conduct the necessary assessment. *See* Decision on defence disclosure and related issues, 24 February 2012, ICC-01/05-01/08-2141, paragraph 24; Decision on the "Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests", 27 June 2012, ICC-01/05-01/08-2236-Conf, paragraph 18.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 23 November 2012

At The Hague, The Netherlands