

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **29 June 2016**

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

Public Redacted Version of

“Decision on the ‘Defence Request for Leave to Appeal the Decision on in-court Protective Measures for Witness CAR-OTP-WWWW-0032’”, ICC-01/05-01/08-1850 of 20 October 2011

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes
Ms Melinda Taylor
Ms Kate Gibson

Legal Representatives of the Victims

Ms Marie-Édith Douzima-Lawson

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

REGISTRY

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Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* delivers the following Decision on the “Defence Request for Leave to Appeal the Decision on in-court Protective Measures for Witness CAR-OTP-WWWW-0032” (“Request”).¹

I. Background and submissions

1. On 22 September 2011, the Chamber issued its “Decision on in-court Protective Measures for Witness 32” (“Decision”) in which it granted the prosecution’s request for in-court protective measures for Witness 32 —namely, voice and face distortion, use of a pseudonym and partial use of closed or private session.²
2. On 23 September 2011, defence counsel for Mr Bemba (“defence”) filed the Request, in which it applied for leave to appeal the Decision on the following four grounds:
 - i. the Chamber’s reliance “on information which was not provided to the Defence, and upon which the defence had no opportunity to make submissions”;³
 - ii. the Chamber’s alleged departure “from established precedent as regards the impact of the public knowledge of the identity of the witness on requests for protective measures”;⁴
 - iii. the Chamber’s alleged failure “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”;⁵ and

¹ Defence Request for Leave to Appeal the Decision on in-court Protective Measures for Witness CAR-OTP-WWWW-0032, 23 September 2011, ICC-01/05-01/08-1782-Conf.

² Decision on in-court Protective Measures for Witness 32, 22 September 2011, ICC-01/05-01/08-1774-Conf, paragraph 16.

³ ICC-01/05-01/08-1782-Conf, paragraph 9.

⁴ ICC-01/05-01/08-1782-Conf, paragraph 12.

⁵ ICC-01/05-01/08-1782-Conf, paragraph 16.

iv. the Chamber's alleged failure to give sufficient consideration to the [REDACTED] of Witness 32 in [REDACTED].⁶

3. The defence argues that the four issues identified above satisfy the conditions of Article 82(1)(d) of the Rome Statute ("Statute"). Specifically, the defence submits that the first condition under Article 82(1)(d) is satisfied because "the protection of witnesses is inextricably linked to the fairness of the proceedings", in that it "impacts on the public nature of the trial".⁷ The defence submits that the second condition of Article 82(1)(d) is satisfied because (i) members of the public are more likely to come forward to dispute incorrect testimony "when a witness testifies in public under his own name";⁸ (ii) the "drafting of procedural motions and decisions" and the testimony of witnesses will be expedited if protective measures are not granted;⁹ and (iii) "continuing on an incorrect footing" with regards to protective measures "would have serious consequences for the advancement of the proceedings".¹⁰
4. On 29 September 2011, the Office of the Prosecutor ("prosecution") filed its response, in which it argues that leave to appeal should not be granted because the four grounds raised in the Request do not satisfy the conditions of Article 82(1)(d) of the Statute.¹¹
5. *First*, the prosecution submits that none of the issues raised by the defence constitute appealable issues arising from the Decision and that the requirements of Article 82(1)(d) cannot be satisfied as a result.¹² To this end, the prosecution argues that: (i) the first issue "does not arise from the Decision" because the Chamber's

⁶ ICC-01/05-01/08-1782-Conf, paragraph 19.

⁷ ICC-01/05-01/08-1782-Conf, paragraph 23.

⁸ ICC-01/05-01/08-1782-Conf, paragraph 27.

⁹ ICC-01/05-01/08-1782-Conf, paragraphs 28-29.

¹⁰ ICC-01/05-01/08-1782-Conf, paragraph 30.

¹¹ Prosecution's Response to Defence Application for Leave to Appeal the Decision on in-court Protective Measures for Witness CAR-OTP-WWWW-0032, 29 September 2011, ICC-01/05-01/08-1805-Conf, paragraph 10.

¹² ICC-01/05-01/08-1805-Conf, paragraph 13.

reliance on information not provided to the defence was marginal and because the defence does not have an absolute right to access to information regarding the safety and well-being of witnesses;¹³ (ii) the second issue, regarding the Chamber's alleged departure from the Court's jurisprudence on requests for protective measures, is without merit because the Decision is consistent with that body of law;¹⁴ (iii) the third issue, regarding the Chamber's alleged failure to properly consider the potential prejudice to the accused and the fairness of proceedings, is based upon an unsupported assumption that the Chamber ignored the defence's submissions;¹⁵ and (iv) the fourth issue is merely a "disagree[ment] with the Chamber's assessment", which does not amount to an appealable issue arising from the Decision.¹⁶

6. *Second*, the prosecution argues that even if the four issues identified by the defence could be viewed as appealable issues arising from the Decision, leave to appeal should nevertheless be denied because the defence fails to demonstrate that the matters raised would affect the fair or expeditious conduct of the proceedings or that their resolution would materially advance the proceedings.¹⁷
7. In relation to the fair and expeditious conduct of proceedings, the prosecution asserts that (i) protective measures do not prevent the public from following the witness's evidence or "coming forward with relevant evidence for the Defence";¹⁸ (ii) the defence "has access to all the relevant information related to" Witness 32;¹⁹ and (iii) the "unsubstantiated assertion that the efficacy of judgment-drafting will be affected as a result of the Decision" does not fulfil the threshold of the second condition of Article 82(1)(d).²⁰ In relation to the material advancement of

¹³ ICC-01/05-01/08-1805-Conf, paragraphs 14-15.

¹⁴ ICC-01/05-01/08-1805-Conf, paragraphs 17-18 (footnotes omitted).

¹⁵ ICC-01/05-01/08-1805-Conf, paragraph 21.

¹⁶ ICC-01/05-01/08-1805-Conf, paragraphs 23-24.

¹⁷ ICC-01/05-01/08-1805-Conf, paragraphs 25-33.

¹⁸ ICC-01/05-01/08-1805-Conf, paragraphs 26-27.

¹⁹ ICC-01/05-01/08-1805-Conf, paragraph 28.

²⁰ ICC-01/05-01/08-1805-Conf, paragraph 31.

proceedings, the prosecution argues that the Decision was confined to granting protective measures to a particular witness and that as far as witness 32's testimony is concerned, the issue would be moot by the time the Appeals Chamber issues a decision.²¹

II. Analysis and conclusions

8. In ruling upon the Request, the Chamber has, in accordance with Article 21(1) of the Statute, considered Article 82(1)(d) of the Statute and Rule 155 of the Rules of Procedure and Evidence.
9. The Chamber has also followed the approach established by the jurisprudence of the Court with regard to the requirements that must be met under Article 82(1)(d) in order for leave to appeal to be granted.²² To this end, the Chamber has examined the Request against the following criteria:
 - i. whether the matters raised in the Request constitute appealable issues arising from the impugned decision;
 - ii. whether the issues at hand would significantly affect:
 - a. the fair and expeditious conduct of the proceedings, or
 - b. the outcome of the trial; and

²¹ ICC-01/05-01/08-1805-Conf, paragraph 32-33.

²² Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210; Decision on the defence and prosecution requests for leave to appeal the Decision on victims participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191; Judgment 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, ICC-01/04-168; 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", 24 April 2010, ICC-01/04-01/06-2404; Decision on the "Prosecution's request for Leave to Appeal the Trial Chamber's Oral Ruling Denying Authorisation to Add and Disclose Additional Evidence after 30 November 2009", 28 January 2010, ICC-01/05-01/08-680; Decision on the defence request for leave to appeal the "Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges", 28 October 2010, ICC-01/05-01/08-980; Decision on the Prosecution's Request for Leave to Appeal the Trial Chamber's Decision on Directions for the Conduct of the Proceedings, 15 December 2010, ICC-01/05-01/08-1086.

- iii. whether the immediate resolution of the issues by the Appeals Chamber would, in the opinion of the Trial Chamber, materially advance the proceedings.

10. The requirements set out above in (i), (ii) and (iii) are cumulative. The failure to fulfil one or more of them is therefore fatal to an application for leave to appeal.²³

Of the four grounds of appeal raised by the defence, only ground one is appealable

11. As stated in previous decisions of the Court, an appealable issue is an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”²⁴ In analysing whether the matters in the Request constitute appealable issues, the Chamber must first ascertain whether the issues identified actually *arise* from the Decision.²⁵ If they do not, leave to appeal cannot be granted.²⁶ The Chamber will consider each of the four issues raised by the defence to determine whether they satisfy this threshold requirement.

Issue one: whether the Chamber erred by relying on information that was not provided to the Defence.

12. At issue is an assessment provided by the VWU at 12:58 on 22 September 2011, the day the Decision was issued and the day before Witness 32 was scheduled to begin his testimony.²⁷ While the prosecution correctly observes that the Chamber’s reliance on the VWU’s assessment was limited,²⁸ the assessment was nevertheless

²³ ICC-01/04-01/06-2404, paragraph 18; *see also* ICC-01/04-01/07-1732, paragraph 12.

²⁴ ICC-01/04-168, paragraph 9. *See also*, Decision in the “Prosecution’s application for leave to appeal Trial Chamber II’s ‘Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1401, 1412, and 1456)’ of 7 October 2009”, 18 December 2009, ICC-01/04-01/07-1732, paragraph 13; ICC-01/04-01/06-2404, paragraph 20; ICC-01/05-01/08-980, paragraph 12.

²⁵ ICC-01/04-01/07-1732, paragraph 14.

²⁶ ICC-01/04-01/07-1732, paragraph 14.

²⁷ ICC-01/05-01/08-1774-Conf, paragraph 8.

²⁸ ICC-01/05-01/08-1805-Conf, paragraphs 14-16.

part of the total mix of information provided to, and considered by, the Chamber in rendering the Decision. Thus, the defence is correct that the Chamber “rel[ie]d upon information which was not provided to the Defence” in rendering the Decision, albeit to a limited extent. The Chamber is therefore satisfied that the first matter raised by the defence is an issue that arises from the Decision.

*Issue two: whether the Chamber erred by “departing from established precedent as regards the impact of the public knowledge of the identity of the witness on requests for protective measures”.*²⁹

14. As the Chamber understands the defence’s position, it is (i) arguing for a blanket rule that protective measures should be denied whenever “the identity of the witness is already in the public domain”;³⁰ and (ii) asserting that the jurisprudence of the Court and the International Criminal Tribunal for the former Yugoslavia (“ICTY”) support such a rule.³¹ The defence argues that this rule cannot be reconciled with the Chamber’s determination that [REDACTED] thereby supporting the request for protective measures.³² This argument fails for two reasons.

15. *First*, the Decision did not purport to establish a blanket rule on whether or not protective measures should be granted when a witness’ identity is in the public domain. Instead, it focused on the specific circumstances of Witness 32 and treated [REDACTED] as one factor among several in determining whether the application for protective measures should be granted. The Decision leaves open the question of whether, in a given case, a witness’ [REDACTED] will militate for or against a grant of protective measures. The Decision leaves this question to be resolved on a case-by-case basis, taking into account all other relevant factors. In no way, it established the broad rule now alleged and challenged by the defence.

²⁹ ICC-01/05-01/08-1782-Conf, paragraph 12.

³⁰ ICC-01/05-01/08-1782-Conf, paragraph 15.

³¹ ICC-01/05-01/08-1782-Conf, paragraph 15 & n. 11.

³² ICC-01/05-01/08-1782-Conf, paragraphs 13-14.

16. *Second*, the “consistent jurisprudence from both the ICC and the ICTY” relied upon by the defence does not establish a rule that protective measures can never be granted if the witness’ identity is in the public domain.³³ The ICTY decision relied upon by the defence does not lay down such a rule and is distinguishable because it concerned a situation where the individual’s *status as a witness* in the case was already public knowledge, which is not the case here.³⁴ The sole ICC decision cited by the defence stands for the proposition that requests for protective measures are to be assessed in light of *all factors* relevant to the witness’ situation and security, not merely the witness’ professional position or public profile.³⁵ Thus, the ICC jurisprudence relied upon by the defence supports a holistic approach of assessing requests for protective measures against the specific circumstances of each witness. This is the approach the Chamber took in relation to Witness 32. The defence has not demonstrated that this approach was inconsistent with the Court’s jurisprudence.

17. For these reasons, the Chamber finds that the second issue does not arise from the Decision and is therefore not appealable under Article 82(1)(d) of the Statute.

Issue three: whether the Chamber failed to properly address the potential prejudice to the rights of the accused and the fairness and impartiality of the trial.

18. The Decision discusses the potential prejudice to the rights of the accused that may have flowed from a grant of protective measures in the following terms:

[t]he protective measures sought in the prosecution Request aim to protect Witness 32 from public identification, as opposed to curtailing the defence’s knowledge of the witnesses’ identity. Indeed, the witness’ identity has been disclosed to the defence and the defence will be able to listen to and see the witness in court without any distortions. The defence’s ability to question the witness will not be affected by the proposed

³³ ICC-01/05-01/08-1782-Conf, paragraph 15 & n. 11.

³⁴ ICTY, *Prosecutor v. Bošoski and Tarčulovski*, Case No. IT-04-82-T, Trial Chamber, transcript of hearing held on 29 August 2007, T-4270-71. It is to be noted that this decision has minimal precedential value because it appears to be a summary of a decision rendered in private session rather than the Trial Chamber’s full decision.

³⁵ See transcript of hearing held on 24 March 2009, ICC-01/04-01/06-T-153 ENG, page 61, line 23 to page 64, line 4 (considering the witness’ professional function, the nature of his evidence, the lack of specific threats directed at him, the risks to his professional position resulting from his testimony, and his access to support and assistance from his home government).

measures. Moreover, the public will still be able to listen to Witness 32's testimony and will therefore not be deprived of the substance of his evidence. For these reasons, the Chamber concludes that the measures sought would cause minimal prejudice to the defence and are consistent with the accused's fundamental right to a fair, public, trial, as enshrined in Article 67 of the Statute.³⁶

19. As the defence concedes, the passage above sets out the “reasons why the protective measure would not interfere with the rights of the accused”, including the balance struck between the accused’s right to a public trial and the Chamber’s duty to ensure the protection to witnesses.³⁷ The defence’s complaint is that the above passage allegedly ignores two defence arguments, which, in the defence’s submission, shows that the Chamber failed properly to address why protective measures would not be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.³⁸

20. The Chamber is mindful of the importance of giving sufficient reasons in support of its decisions. This duty does not, however, require the Chamber to explain each and every factor underlying its conclusions or to address at length all arguments advanced by the parties. As stated by the Appeals Chamber:

[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the [...] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.³⁹

21. In the present case, the two arguments allegedly ignored by the Chamber were summarised in the first part of the Decision,⁴⁰ thereby demonstrating that the Chamber duly considered them. That the Chamber did not ultimately agree with those arguments simply reflects a disagreement between the defence and the Chamber on the merits.

³⁶ ICC-01/05-01/08-1774-Conf, paragraph 13.

³⁷ ICC-01/05-01/08-1782-Conf, paragraph 18.

³⁸ ICC-01/05-01/08-1782, paragraphs 16-18.

³⁹ 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”, 14 December 2006, ICC-01/04-01/06-773, paragraph 20.

⁴⁰ ICC-01/05-01/08-1774-Conf, paragraph 7.

22. As the Appeals Chamber has held a mere disagreement or difference of opinion, does not constitute an identifiable subject or topic requiring a decision for its resolution.⁴¹ Thus, the Chamber concludes that the third issue identified by the defence is not an appealable issue arising from the Decision.

*Issue four: whether the Chamber failed to give sufficient weight to Witness 32's [REDACTED] and departed from ICC precedent.*⁴²

23. The defence fails to demonstrate that this issue is anything more than a disagreement with the conclusion of the Chamber. Akin to the situation under issue two, above, the question of whether the [REDACTED] of a witness constitutes a factor militating for or against a grant of protective measures is to be determined on a case-by-case basis, in light of all other relevant factors. That is the process the Chamber undertook in relation to the Decision: it balanced the various personal circumstances of Witness 32 and explained those that militated in favour of a grant of protective measures in paragraph 14 of the Decision. That the defence disagrees with the Chamber's assessment does not, in and of itself, create an appealable issue.

24. Finally, the Chamber dismisses the defence's argument regarding the suggested departure from the Court's jurisprudence. The Chamber understands the defence to be arguing for a blanket rule that protective measures should be denied whenever a witness [REDACTED]. As with issue two, the problem for the defence is that the Decision does not lay down a general rule on whether protective measures should or should not be granted to individuals [REDACTED]. Rather, the Decision is grounded in the specific personal circumstances of Witness 32 and leaves future determinations with respect to witnesses [REDACTED] to be determined on a case by case basis. As a result, the Chamber cannot conclude that the fourth issue arises from the Decision. It is therefore not appealable under Article 82(1)(d) of the Statute.

⁴¹ ICC-01/04-168, paragraph 9.

⁴² ICC-01/05-01/08-1782-Conf, paragraphs 19-21.

25. Because the requirements of Article 82(1)(d) are cumulative, the Chamber need not address the subsequent criteria in relation to issues two, three and four, since they do not fulfil the threshold requirement of being appealable issues arising from the Decision.⁴³ Because issue one does arise from the Decision, the Chamber will address the subsequent criteria in relation to that ground below.

Issue one does not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.

26. Once an appealable issue has been identified, leave to appeal may be granted under Article 82(1)(d) of the Statute only if the issue “would *significantly* affect the fair *and* expeditious conduct of the proceedings *or* the outcome of the trial” (emphasis added). For the reasons that follow, the Chamber concludes that these requirements are not met.

Fairness.

27. The Chamber is not persuaded that its reliance on the VWU’s assessment adversely affects the fair conduct of proceedings, let alone to a significant degree. The assessment was intended to provide the Chamber with up-to-date information regarding the witness’ state of mind, his safety concerns, and any new facts that may bear on the question of his security or the Chamber’s assessment of the application for protective measures. In this specific case, the assessment conducted by the VWU, a neutral unit of the Court, was not shared with either the prosecution or the defence. Thus, both parties were equally situated with regard to the VWU’s assessment and neither was advantaged by the Chamber’s consideration of it. Moreover, the assessment was only one element of the entirety of the information available to the Chamber when it rendered its Decision, which reduces any potential prejudice to the parties resulting from their inability to make observations

⁴³ ICC-01/04-01/06-2404, paragraph 18.

on the assessment. In these circumstances, the Chamber fails to see how its reliance on the VWU's assessment was unfair or could be seen as such.

28. In fact, the VWU's real-time assessments assist the Chamber in ensuring the fairness of proceedings because they provide neutral, up-to-date information regarding witnesses' state of mind and personal situations, which better enables the Chamber to make informed decisions on applications for protective measures.

29. The Chamber finds that the defence's general argument "that the protection of witnesses is inextricably linked to the fairness of the proceedings" is unconvincing, in this specific case.⁴⁴ While the Chamber is mindful that use of protective measures may have an impact on the publicity of proceedings, the defence's arguments on this point do not address the relevant inquiry, which is whether the Chamber's reliance on the VWU's assessment for Witness 32 significantly affects the fair conduct of the proceedings. For the reasons discussed above, the Chamber concludes that it does not.

Expediiousness.

30. The defence's arguments regarding the expeditious conduct of proceedings are irrelevant because they focus on whether the *grant or denial* of protective measures would expedite proceedings,⁴⁵ which is not the relevant inquiry in relation to the first issue identified by the defence. Under Article 82(1)(d) of the Statute, it is the "issue" on appeal that must "significantly affect the fair and expeditious conduct of the proceedings", not the disposition of the impugned decision itself. Thus, the question in relation to the first issue is whether the Chamber's reliance on the VWU's assessment significantly affects the expeditious conduct of the proceedings. The defence has not advanced any arguments on this point and has thus failed to carry its burden.

⁴⁴ ICC-01/05-01/08-1782-Conf, paragraphs 23-25.

⁴⁵ ICC-01/05-01/08-1782-Conf, paragraphs 28-29.

Outcome of the trial.

31. The Chamber is not persuaded that its limited reliance on information not available to either party would “significantly affect [. . .] the outcome of the trial”. The outcome of the trial will be determined by the evidence that is presented, regardless of whether certain witnesses testify under protective measures or not.
32. The Chamber rejects the defence argument that members of the public are more likely to come forward to refute false testimony if the identity of the witness is disclosed.⁴⁶ This argument addresses the *grant or denial* of protective measures rather than the relevant inquiry, which is whether the issue on appeal — the Chamber’s reliance on the VWU’s assessment — would significantly affect the outcome of the proceedings. In any event, the protective measures granted to Witness 32 pursuant to Article 68(1) of the Statute and Rule 87 of the Rules were designed to ensure that the public would be able to follow the substance of his testimony.⁴⁷ For this reason, the Chamber considers that any benefit from disclosing Witness 32’s identity would likely have been incremental, not “significant” as Article 82(1)(d) requires.
33. For these reasons, the Chamber finds that the defence has not demonstrated that issue one significantly affects the fair and expeditious conduct of proceedings or the outcome of the trial. Because the requirements under Article 82(1)(b) of the Statute are cumulative,⁴⁸ it is unnecessary to analyse whether the Appeals Chamber’s immediate resolution of issue one would materially advance the proceedings. In these circumstances, the Chamber concludes that leave to appeal can not be granted.

⁴⁶ ICC-01/05-01/08-1782-Conf, paragraph 27.

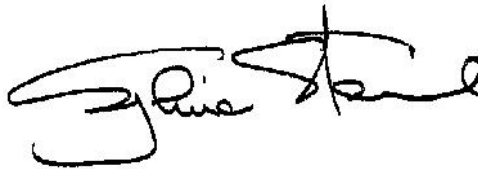
⁴⁷ ICC-01/05-01/08-1774-Conf-paragraphs 12-13.

⁴⁸ ICC-01/04-01/06-2404, paragraph 18; *see also* ICC-01/04-01/07-1732, paragraph 12.

III. Conclusion

34. For the foregoing reasons, the Chamber denies the Request.

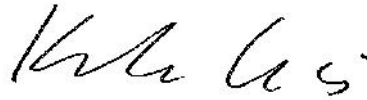
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 29 June 2016

At The Hague, The Netherlands