

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **25 July 2016**

TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
Judge Geoffrey Henderson
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*V. JEAN-PIERRE BEMBA GOMBO***

Public Redacted Document

Public redacted version of "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

Source: Office of the Prosecutor

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

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Introduction

1. On 22 September 2011, Trial Chamber III (“Chamber”) issued a decision granting a request by the Office of the Prosecutor (“Prosecution”) for protective measures for Witness 32, in which it authorized the use of a pseudonym, face and voice distortion, and the partial use of closed or private session during the witness’ testimony (“Decision”).¹

2. On 23 September 2011, the Defence filed an application for leave to appeal the Decision based on four grounds, alleging that the Decision forms an important precedent for subsequent “insider” witnesses warranting appellate scrutiny, and that intervention by the Appeals Chamber could lead to reclassification of Witness 32’s present testimony, and would facilitate the Defence questioning of subsequent “insider” witnesses (“Defence Application”).²

3. The Prosecution submits that the Defence Application should be rejected as none of the issues for which leave to appeal is sought fulfils the applicable statutory requirements enshrined in Article 82(1)(d) of the Rome Statute. The Defence Application either fails to substantiate how the grounds identified amount to appealable issues, and/or fails to adequately demonstrate how the issues affect the fair and expeditious conduct of proceedings or the outcome of trial, and that the intervention of the Appeals Chamber would materially advance the proceedings. Rather, the Defence side-steps the criteria required for an application for leave to appeal and inappropriately delves into the merits of the Decision.

¹ ICC-01/05-01/08-1774-Conf, para. 16.

² ICC-01/05-01/08-1782-Conf, para. 4.

Procedural Background

4. On 13 September 2011, the Prosecution filed an *ex parte* request for protective measures for five witnesses, including Witness 32.³ Thereafter, on 16 September 2011, the Prosecution filed a confidential redacted version of its request available to the Defence.⁴ Specifically, the Prosecution requested the Chamber to authorize the use of a pseudonym, face and voice distortion and partial use of closed or private session during the testimony of Witness 32 (“Prosecution Request”).⁵

5. On 19 September 2011, pursuant to an oral decision of the Chamber,⁶ the Defence filed its response opposing the Prosecution Request.⁷ The Defence deemed the requested measures as a contravention of the Accused’s right to a public trial arguing, *inter alia*, that considering Witness 32’s current occupation and taking into account [REDACTED] that will be the subject of his testimony, the sincerity of his security fears is doubtful and protecting his identity is unnecessary.⁸ The Defence further stated that the Prosecution had provided no basis for its “hypothetical” assertions regarding the security environment in the Democratic Republic of Congo (“DRC”).⁹

³ ICC-01/05-01/08-1743-Conf-Exp, Prosecution’s Request for Protective Measures for Witnesses CAR-OTP-PPPP-0015, CAR-OTP-PPPP-0032, CAR-OTP-PPPP-0036, CAR-OTP-PPPP-0044, CAR-OTP-PPPP-0045 at Trial”.

⁴ ICC-01/05-01/08-1743-Conf-Red.

⁵ ICC-01/05-01/08-1743-Conf-Red, para. 2.

⁶ ICC-01/05-01/08-T-163-CONF-ENG ET 16 September 2011, page 65, line 23 to page 66, line 3.

⁷ ICC-01/05-01/08-1766-Conf, Defence Response to Prosecution Request for Protective Measures for Witness CAR-OTP-WWWW-0032.

⁸ ICC-01/05-01/08-1766-Conf, paras. 10 to 11.

⁹ ICC-01/05-01/08-1766-Conf, paras. 13 to 14.

6. On 22 September 2011, the Victims and Witnesses Unit (“VWU”) provided its assessment regarding Witness 32 to the Chamber wherein it supported the Prosecution Request as a necessary precautionary measure due to Witness 32’s current occupation and the heightened tension in the DRC (“VWU Assessment”).¹⁰
7. On 22 September 2011, the Chamber issued the Decision¹¹ ruling that protective measures for Witness 32 were necessary, reasonable and proportionate due to the particular circumstances of the witness, including his occupation, his subjective security fears, and the current security situation in the DRC as a result of the upcoming presidential elections.¹²
8. On 27 September 2011 the witness completed his testimony.

Arguments

9. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.¹³ Reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of article 82(1)(d).

¹⁰ Email sent to the Legal Officer of the Chamber by the VWU’s Associate Legal Office on 22 September 2011 at 12.58.

¹¹ ICC-01/05-01/08-1774-Conf.

¹² ICC-01/05-01/08-1774-Conf, paras. 14 and 16.

¹³ ICC-02/04-01/05-20-US-Exp, para. 22.

10. Although the Defence Application identifies four purportedly appealable issues, which allegedly arise from the Decision, it has failed to satisfy the applicable test under Article 82(1)(d): it has not demonstrated how each of the four grounds raised constitutes an issue arising from the Decision or that any of them would significantly affect the fair and expeditious conduct of proceedings or the outcome of trial, and that intervention by the Appeals Chamber may materially advance the proceedings.

11. The four grounds contained in the Defence Application are:

- A. The Chamber's alleged reliance upon information that was not available to the Defence for its submissions;
- B. The Chamber's alleged departure from established precedent on the impact of public knowledge of the identity of the witness on requests for protective measures;
- C. 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; and
- D. The Chamber's alleged failure to give sufficient consideration to the present occupation of Witness 32 and therefore the conclusion that his [REDACTED] supports a request for protective measures contrary to the Court's precedent.

Whether the Issues satisfy the test under Article 82(1)(d)

(a) The issues identified in the Grounds do not arise from the Decision

12. The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.”¹⁴

13. The Prosecution submits that the issues discussed in the four grounds do not arise from the Decision or do not constitute “issues” within the terms of Article 82(1)(d). Even if the Chamber considers that any of them constitute issues arising from the Decision, they do not fulfil the requirements for leave to appeal.

A. The First Ground: The Chamber’s alleged reliance upon information that was not available to the Defence for its submissions

14. The first ground as framed by the Defence does not arise from the Decision: the Chamber’s reliance on the VWU Assessment was marginal at best; for the same reasons, and as it will be explained further below, there is no impact on the fairness of proceedings to the detriment of the Defence.

¹⁴ ICC-01/04-01/06-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

15. At the outset, the Prosecution emphasises that the Defence does not have an absolute right to access to information within the context of the proceedings before Chambers of this Court. Consistent with the jurisprudence of the Court and the obligation to ensure full respect for the rights of the Accused and due regard for the protection of victims and witnesses pursuant to Article 64(2), a Chamber may withhold relevant information regarding the safety and well-being of witnesses.¹⁵ Mindful of its obligation to provide for the protection of witnesses pursuant to Article 64(6)(e), the Chamber sought the observations of VWU, a neutral organ of the Court. The VWU Assessment of Witness 32 was not provided to the Prosecution or to the Defence.¹⁶

16. In any event, the fact that the Defence was not provided with relevant information contained in VWU Assessment for its review or comment does not automatically result in the existence of an appealable issue. Rather, this must be determined in the broader context of the Chamber's decision, taking into account the extent of its reliance on the VWU Assessment and any prejudice suffered by the Defence. The Prosecution submits that although the Chamber rightly sought an assessment from VWU following the Prosecution Request, the Chamber's reasoning in its Decision reveals that it based its ruling almost exclusively on its analysis of the submissions advanced by the Prosecution and the Defence. In fact, the Chamber refers to the VWU Assessment only once in its analysis, when it observes that

¹⁵ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-475 OA, 13 May 2008, para. 62: "the relevant jurisprudence of the European Court of Human Rights, [...] demonstrates that the right to disclosure is not absolute, that the withholding of disclosure of information from the Defence is permissible so as to preserve the fundamental rights of another individual and that not every incident of non-disclosure automatically results in an unfair trial. It would be, in every case, for the Pre-Trial Chamber to assess whether the rights of the defendant to a fair hearing were prejudiced on the facts." [Emphasis added]

¹⁶ To the extent that the Defence suggests that the error was in accepting the VWU submissions at a time when the Defence could not respond, the Defence is misconstruing the Decision: it was the confidential and sensitive nature of the content of the VWU Assessment rather than its timing, which led to its non-disclosure to the Defence.

Witness 32 reported several threats following [REDACTED].¹⁷ This sole reference to the VWU Assessment within the Chamber's analysis comes after the Chamber's conclusion that protective measures were necessary, reasonable and appropriate. Thus it is evident that the Chamber's reliance on the VWU Assessment, if at all, was at best minimal and only corroborative of the Prosecution's submissions.

B. The Second Ground: The Chamber's alleged departure from established precedent on the impact of public knowledge of the identity of the witness on requests for protective measures;

17. The issue identified in the second ground advanced by the Defence does not arise from the Decision and therefore cannot constitute an appealable issue. The Defence submissions regarding both the relevant facts and the jurisprudence of the Court regarding the impact of public knowledge of the identity of the witness on requests for protective measures are misguided. First, the Chamber referred to the [REDACTED] of Witness 32's [REDACTED] in relation to the likelihood that [REDACTED].¹⁸ The Prosecution submits that as [REDACTED] the Accused and the MLC, the extent to which [REDACTED] the events at issue in this case does not alter the Chamber's conclusion.¹⁹ The Chamber's reference to that information is limited and only corroborative of its conclusion that protective measures are necessary, reasonable and proportionate due to other factors affecting Witness 32's particular circumstances.

¹⁷ ICC-01/05-01/08-1774-Conf, para. 14 and footnote 24. The Prosecution notes that the only other mention of the VWU assessment is contained in the 'Background and Submissions' section at the beginning of the Decision.

¹⁸ ICC-01/05-01/08-1774-Conf, para. 14.

¹⁹ The Prosecution notes that in the Defence Response to the Prosecution Request for protective measures, the Defence stated that 'the witness [REDACTED] the events discussed in the witness' statements, and which he will presumably discuss during his testimony': ICC-01/05-01/08-1766-Conf, para. 11. Further, [REDACTED] was relied upon many times by the Defence during their examination of the witness, see, for example, ICC-01/05-01/08-T-166-CONF-ENG ET 26-09-2011, page 5, line 25 to page 6, line 10.

18. The jurisprudence of the Court, particularly the relevant *Lubanga* decision cited by the Defence, support the fact that decisions regarding protective measures are made on a case-by-case basis²⁰, and that the “extent of the reasoning will depend on the circumstances of the case”.²¹ Therefore it is inaccurate to characterize previous decisions of other Chambers based on fact-specific determinations as “consistent jurisprudence” rejecting requests for protective measures on the grounds that the identity of the witness is already in the public domain as asserted by the Defence.²²
19. In fact, in stark contradiction to the Defence submission that the Decision is inconsistent with existing precedent, the reasoning in the Decision is actually consistent with a previous ruling from this Chamber on a similar issue,²³ where the Chamber made the following finding:

“[it] finds the Defence argument that [REDACTED] already publicly exposed his story irrelevant for the issue of protection to be afforded by the Chamber to a witness pursuant to Article 68 of the Statute. The fact that a person has given an interview to the press does not mean that the public is aware that the person is cooperating with the Court. The interview did not mention the link between [REDACTED] and the Court. Therefore, the father’s status as a witness remains confidential. [REDACTED]’s identity should not therefore be disclosed to the public.”²⁴ [Emphasis added]

²⁰ The Prosecutor v Thomas Lubanga Dyilo, Judgment on Disclosure Restriction pursuant to Rule 81 (2) and (4), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 36: “In evaluating an application for non-disclosure of the identity of witnesses or of portions of witness statements, a Pre-Trial Chamber must take into account all relevant factors, and carefully appraise the Prosecutor’s request on a case-by-case basis.” [Emphasis added]

²¹ ICC-01/04-04/06-773 OA 5, para. 20.

²² ICC-01/05-01/08-1766-Conf, para. 15.

²³ ICC-01/05-01/08-T-50-CONF-ENG CT 20-01-2011, page 41, line 22 to page 42, line 3.

²⁴ ICC-01/05-01/08-T-50-CONF-ENG CT 20-01-2011, page 41, line 22 to page 42, line 3.

20. This ruling is in line with the Chamber's decision to afford protective measures to Witness 32 in order to shield the public from the knowledge that he is cooperating with the Court.²⁵

C. The Third Ground: 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.

21. The issue identified in the third ground is based on an assumption that the Chamber ignored the Defence submissions. There is no evidence that this was the case, or that the Chamber otherwise failed to consider the Defence interests. On the contrary, and as conceded by the Defence, in paragraph 13 of the Decision, the Chamber addressed why the protective measures would not interfere with the rights of the Accused.²⁶ The Chamber provided sufficient basis for its reasoning including, *inter alia*, the fact that the witness' identity had been disclosed to the Defence, Defence questioning will not be affected by the proposed measures, and the public will be able to follow the substance of Witness 32's testimony.²⁷ The fact that the Chamber did not refer to the Defence arguments does not automatically lead to the conclusion that they were ignored.

22. The Prosecution further notes that in the same *Lubanga* decision cited by the Defence in support of this argument, the Appeals Chamber additionally stated that the reasoning underlying a Chamber's decision "will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it

²⁵ See, ICC-01/05-01/08-1774-Conf, para. 15.

²⁶ ICC-01/05-01/08-1766-Conf, para. 18

²⁷ ICC-01/05-01/08-1774-Conf, para. 13.

found to be relevant in coming to its conclusion.”²⁸ [Emphasis added] Consequently, the Chamber was not obligated to specifically refer to the two arguments put forward by the Defence in this regard. The Defence may disagree with the Chamber’s decision and in particular with the fact that its arguments were not accepted. Such disagreement, however, is not relevant for the purposes of the identification of an appealable issue.

D. The Fourth Ground: The Chamber’s alleged failure to give sufficient consideration to the present occupation of Witness 32 and therefore the conclusion that his [REDACTED] supports a request for protective measures contrary to the Court’s precedent.

23. The issue identified in the fourth ground also does not arise from the Decision. The Chamber did not depart from any established jurisprudential principle. First, the Prosecution reiterates that, as reflected by the Court’s practice and jurisprudence thus far, decisions regarding protective measures are based on the specific facts of any given case.²⁹ Second, the *Lubanga* ruling relied upon by the Defence did not purport to establish any general principle and further, can be distinguished from the specific circumstances of Witness 32. In rejecting the request for protective measures in the *Lubanga* case, Trial Chamber I noted that although the witness’s upcoming testimony “principally concerns his own arrest”³⁰ and that he would also deal with other important matters, those matters would not “affect the neutrality of his [REDACTED] in any significant way”.³¹ [Emphasis added]. Thus, and contrary to the Defence contention, the *Lubanga* decision was based not only

²⁸ ICC-01/04-04/06-773 OA 5, para. 20.

²⁹ See para. 18 above.

³⁰ ICC-01/04-01/06-T-153-ENG WT 24-03-2009, page 61, lines 3 to 9.

³¹ ICC-01/04-01/06-T-153-ENG WT 24-03-2009, page 63, lines 3 to 9.

on the [REDACTED] of the witness and the fact that he may be [REDACTED], but also on the type of evidence to be provided at trial.

24. Distinctive from the witness in *Lubanga*, Witness 32's evidence cannot be considered as neutral but rather provides information that is critical of the Accused and the MLC. This fact has to be considered along with the reasons relied upon by the Chamber such as the current security situation in the DRC due to the upcoming elections, the possibility that knowledge of his cooperation with the Court could result in threats or harassment as well as possibly [REDACTED].³² In reality, the Defence merely disagrees with the Chamber's assessment that Witness 32's current occupation is an additional factor that militates in favour of protective measures.

(b) The issues identified in the Defence Grounds do not affect the fair conduct of the proceedings

25. The Defence fails to demonstrate that the issues affect the fair conduct of the proceedings.³³ The Defence Application argues generally that the protection of witnesses is inextricably linked to the fairness of proceedings as it directly impacts on the public nature of the trial.³⁴ It further states that this has a detrimental effect on the efficiency of its investigations as the opportunity is lost for members of the public who know the information provided by the witness to be false from coming forward and offering to testify because of the use in court of a pseudonym instead of his name.³⁵

³² ICC-01/05-01/08-1774-Conf, paras. 14 and 15.

³³ ICC-01/04-168 OA3, para. 11. The Appeals Chamber has ruled that "[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights".

³⁴ ICC-01/05-01/08-1782-Conf, paras 23 to 25.

³⁵ ICC-01/05-01/08-1782-Conf, para. 27.

26. There is no apparent reason why the use of a pseudonym or measures to prevent the broadcast of his appearance and voice will prevent the public from coming forward with relevant evidence for the Defence. To the contrary, the public was able to follow the content of Witness 32's testimony and the lack of knowledge of the witness' identity does not prevent an individual who has relevant information that he or she wishes to share from coming forward.
27. The Defence cannot speculate in the abstract that the Decision causes a prejudice to the rights of the Accused in order to invoke that the fairness of the proceedings are affected. Neither a purely general complaint,³⁶ nor the mere hypothetical impact on the fairness or expeditiousness of proceedings suffices.³⁷ The Prosecution accepts that matters of protection may be linked to the fairness of proceedings. But the Defence has failed to demonstrate why fairness is affected in this particular instance.
28. As noted above, the substance of the evidence from this witness will be publicly available in the form of the record of the proceedings. The Defence also has access to all the relevant information related to this witness and is able to robustly examine the witness fully without restriction. The only information that has been withheld from the Defence is the VWU assessment which only deals with matters of protection, and, as demonstrated above, has not even been truly relied upon by the Chamber in its Decision.
29. Consequently, the Defence allegations are either unfounded or speculative and fail to establish any tangible impact on the fairness of proceedings arising out of the Decision.

³⁶ ICC-01/04-01/07-2463, para. 31.

³⁷ ICC-01/04-01/07-1958, para. 20.

(c) The issues identified in the Defence Grounds do not affect the expeditious conduct of the proceedings

30. The Application fails to demonstrate that the Issues significantly affect the expeditious conduct of the proceedings within the meaning of Article 82(1)(d). The Defence argues that the judgment-drafting process will be complicated and prolonged by protective measures afforded to witnesses whose testimony go to the heart of the case, and that testimony of witnesses without protective measures are "remarkably more efficient".³⁸

31. The Prosecution submits that the expeditious conduct of proceedings means the timely and efficient conduct of proceedings.³⁹ This principle requires that decisions at all stages not unnecessarily delay the overall determination of responsibility.⁴⁰ The Defence has failed to explain why and how the Decision can have detrimental consequences for the expeditious conduct of proceedings. The unsubstantiated assertion that the efficacy of judgment-drafting will be affected as a result of the Decision cannot constitute a proper basis for leave to appeal being granted. Moreover, the use of private or closed session will be the exception, the majority of the witnesses' testimony will be in open session, whilst use of additional time to explain protective measures to the witness and use of codes is marginal at best.

³⁸ ICC-01/05-01/08-1782-Conf, paras. 28 and 29.

³⁹ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: "the Court's obligation to do justice expeditiously and effectively, as well as fairly." (para. 6); "we can only do justice that is expeditious, fair and efficient" (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue "will significantly affect the efficient and expeditious conduct of the proceedings"; Jones and Powles, *International Criminal Practice* at para. 8.5.60.

⁴⁰ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

(d) An immediate resolution of the issues will not materially advance the proceedings⁴¹

32. The Defence fails to show how immediate resolution of any of the Issues by the Appeals Chamber will materially advance the proceedings. The Defence hypothetically argues, apparently for future cases, that if a witness testifies in public, then people who know that the witness is giving false testimony will come forward and offer to testify for the Defence. The Defence also argues that the drafting of procedural motions and decisions will be expedited if parties or the Chamber is not constrained by the need to keep certain information confidential. Finally, it is argued that experience of these proceedings indicates that hearing of witnesses with protective measures take longer than those without.

33. None of these arguments demonstrate the need for any involvement of the Appeals Chamber at this stage. The Decision referred to a discrete and confined application for protective measures in relation to a particular witness' testimony. Furthermore, and more importantly, the Witness has already testified. This means that, as recognized by the Defence, by the time that the Appeals Chamber hypothetically ruled on the issues, they would effectively be moot, at least as far as the testimony of the instant witness is concerned. In these circumstances therefore, an interlocutory appeal will not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.⁴² And because the particular characteristics of this witness that, according to the Defence, render it improper to provide protective measures, are unique to this witness, it is not

⁴¹ This requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'move forward' by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings." See ICC-01/04-168, paras. 14-15,18.

⁴² ICC-01/04-01/06-2404, para. 33.

likely that appellate resolution would prevent the same error with respect to a future witness in the case.

Relief sought

34. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence's Application.



Fatou Bensouda, Prosecutor

Dated this 25th Day of July 2016

At The Hague, The Netherlands