

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 13 August 2014

**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**

**Decision on "Defence Request for leave to appeal  
decision ICC-01/05-01/08-3101"**

No. ICC-01/05-01/08

1/18

13 August 2014

**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

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Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

**Legal Representatives of the Victims**

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Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
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**States Representatives**

**Amicus Curiae**

**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

No. ICC-01/05-01/08

2/18

13 August 2014

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) issues the following “Decision on ‘Defence Request for leave to appeal decision ICC-01/05-01/08-3101’” (“Decision”).

## I. Background and Submissions

1. On 9 April 2014, the defence filed its “Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications” (“Original Defence Request”),<sup>1</sup> in which it requested that the Chamber, *inter alia*:

ORDER the Prosecution immediately to deliver to the Defence the email accounts [“Email Accounts”] of Me. Aimé Kilolo, Mr. Jean-Jacques Mangenda and Mr. Narcisso Arido; or, in the alternative

ORDER the Prosecution and the Registry to refrain from accessing the contents of the email accounts until further order; and

ORDER the Prosecution to disclose copies of the email accounts to the Defence so that the Defence can conduct an initial review, and identify materials which are:

- a. privileged;
- b. subject to ex parte classifications; or
- c. constitute internal work product[.]

2. On 2 May 2014, the defence filed a “Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications” (“Addendum”),<sup>2</sup> in order to “update the Trial

<sup>1</sup> Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications, 9 April 2014, ICC-01/05-01/08-3036.

<sup>2</sup> Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications, 2 May 2014, ICC-01/05-01/08-3062-Conf-Exp and Public Redacted Version of

Chamber in relation to developments in the Article 70 case which will compromise the enforceability of protective measures emanating from the Main Case, and, secondly, reiterate the urgent necessity of obtaining relief on this issue".<sup>3</sup>

3. On 3 July 2014, the Chamber issued its "Decision on 'Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications' and Addendum" ("Impugned Decision"),<sup>4</sup> in which it rejected the Original Defence Request.<sup>5</sup>
4. On 9 July 2014, the defence filed its "Defence Request for leave to appeal decision ICC-01/05-01/08-3101" ("Request for Leave to Appeal"),<sup>6</sup> in which it seeks leave to appeal the Impugned Decision in relation to two issues ("Issues").<sup>7</sup>

#### *First Issue*

5. The defence seeks leave to appeal the issue of:<sup>8</sup>

Whether the Trial Chamber erred by finding that it had no competence either to order the Prosecution to disclose information, which was the property of the Defence in this case, or to refrain from accessing

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Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications, 2 May 2014, ICC-01/05-01/08-3062-Red.

<sup>3</sup> ICC-01/05-01/08-3062-Red, paragraph 6.

<sup>4</sup> Decision on "Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications" and Addendum, 3 July 2014, ICC-01/05-01/08-3101.

<sup>5</sup> ICC-01/05-01/08-3101, paragraph 45.

<sup>6</sup> Defence Request for leave to appeal decision ICC-01/05-01/08-3101, 9 July 2014, ICC-01/05-01/08-3103-Conf-Exp. The defence filed a confidential redacted version and a public redacted version on the same date: ICC-01/05-01/08-3103-Conf-Red and ICC-01/05-01/08-3103-Red2.

<sup>7</sup> ICC-01/05-01/08-3103-Red2, paragraphs 1 and 65.

<sup>8</sup> ICC-01/05-01/08-3103-Red2, paragraphs 1, 2, and 65.

information which was the property of the Defence in the Main Case;  
["First Issue"]

6. The defence asserts that the Chamber's findings relating to competence resulted in it "fail[ing] to address or grapple with the fact that the materials in question are protected by a specific form of confidentiality, which adheres in the Main Case".<sup>9</sup>
  
7. The defence draws a parallel between measures relating to the protection of witnesses, and "the protect[ion] afforded by Rule 73(1) in the Main Case", and argues that the Chamber has the competence and duty to ensure that the disclosure of the Email Accounts in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido* ("case ICC-01/05-01/13") does not undermine the protection afforded by Rule 73(1) of the Rules of Procedure and Evidence ("Rules") in the *Bemba* case.<sup>10</sup>
  
8. The defence argues that the "Chamber's belief that it was precluded from [assessing the introduction of the Email Accounts in case ICC-01/05-01/13] by virtue of the Single Judge's decisions is misconceived", since the Single Judge could not and did not address the question of whether disclosure of the Email Accounts would be "overly prejudicial" to the accused's rights in the *Bemba* case.<sup>11</sup> Similarly, the defence argues that the Single Judge, in rejecting a request that the defence in case ICC-01/05-01/13, together with the defence in the *Bemba* case, be permitted to review the Email Accounts

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<sup>9</sup> ICC-01/05-01/08-3103-Red2, paragraphs 2 and 3, citing ICC-01/05-01/08-3101, paragraph 22.

<sup>10</sup> ICC-01/05-01/08-3103-Red2, paragraphs 4 and 17.

<sup>11</sup> ICC-01/05-01/08-3103-Red2, paragraphs 5 to 7, 9, and 10.

to filter out any privileged material, did not consider whether the proposal would be more consistent with the accused's rights in the *Bemba* case, basing his decision instead upon delays to case ICC-01/05-01/13.<sup>12</sup> The defence further contends that since the Single Judge did not place the prosecution under a "positive duty" to access the Email Accounts, the Trial Chamber was not prevented from injuncting the prosecution from accessing them.<sup>13</sup> The defence adds that "the fact that one particular CD rom had been sealed by order of the Single Judge did not prevent either the Chamber or the Prosecution from obtaining further copies, which could have been disclosed to the Defence, as required by the Prosecution's disclosure obligations".<sup>14</sup>

9. The defence also (i) submits that the Email Accounts were disclosable in the *Bemba* case;<sup>15</sup> (ii) submits that the defence should have been granted the right to review the Email Accounts prior to their transmission to the prosecution;<sup>16</sup> and (iii) sets out alleged benefits of the Chamber granting the requested relief.<sup>17</sup>

10. Lastly, the defence submits that the Chamber had complementary jurisdiction to rule on the defence request relating to the Email Accounts and its failure to do so has "created an unacceptable lacuna as concerns the effective enforcement and protection of Mr. Bemba's rights".<sup>18</sup>

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<sup>12</sup> ICC-01/05-01/08-3103-Red2, paragraphs 22 to 23.

<sup>13</sup> ICC-01/05-01/08-3103-Red2, paragraph 8.

<sup>14</sup> ICC-01/05-01/08-3103-Red2, paragraph 9 (emphasis in original).

<sup>15</sup> ICC-01/05-01/08-3103-Red2, paragraphs 10 to 12, 14, and 43.

<sup>16</sup> ICC-01/05-01/08-3103-Red2, paragraphs 18 to 21.

<sup>17</sup> ICC-01/05-01/08-3103-Red2, paragraphs 15 and 16.

<sup>18</sup> ICC-01/05-01/08-3103-Red2, paragraphs 14, 25, 43, and 44.

*Second Issue*

11. The defence seeks leave to appeal the issue of:<sup>19</sup>
- i. Whether the Trial Chamber erred by imposing too high an evidential threshold in a request for provisional measures/injunctive relief. [“Second Issue”]
12. The defence submits that the Chamber erred by rejecting the defence’s requests for relief on the grounds that the defence had failed to adduce specific examples “from the very materials to which the Defence was seeking access”.<sup>20</sup> The defence submits that it could not have established that privileged information had failed to be filtered out, either because the information has not yet been transferred to the prosecution – as in the case of the Email Accounts, or without providing specific examples and aggravating the prejudice it was seeking relief from by expanding the radius of persons who have had access to the information.<sup>21</sup>
13. The defence argues that apart from providing such examples, all it could do was describe the information that had been transmitted in the past, which it argues it did do.<sup>22</sup> The defence submits that it is not speculative to assert that there was a risk that the prosecution had received privileged defence communications or information relating to defence strategy or the defence’s closing brief.<sup>23</sup>

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<sup>19</sup> ICC-01/05-01/08-3103-Red2, paragraphs 1 and 65.

<sup>20</sup> ICC-01/05-01/08-3103-Red2, paragraphs 26 to 27, and 36 to 38.

<sup>21</sup> ICC-01/05-01/08-3103-Red2, paragraphs 34 and 35.

<sup>22</sup> ICC-01/05-01/08-3103-Red2, paragraph 34.

<sup>23</sup> ICC-01/05-01/08-3103-Red2, paragraphs 28 to 33.

14. The defence also submits that the evidentiary threshold applied by the Chamber would have required the defence to “ignore its duty of diligence” by waiting until it could adduce “sufficiently concrete examples”, rather than seeking interim relief as soon as it became aware of the risk of prejudice.<sup>24</sup>
15. The defence argues that it is not necessary to establish that the Chamber’s evidential threshold was incorrect, but only that the question as to whether it was correct arises from the Impugned Decision.<sup>25</sup>

*Remaining requirements of Article 82(1)(d)*

16. The defence argues that the First and Second Issues significantly impact the fairness of the proceedings by leaving the defence with no mechanism for contesting the Single Judge’s application of the law to matters concerning the *Bemba* case, and by imposing an impossible threshold on the defence for seeking relief from prejudice resulting from the same.<sup>26</sup> In particular, the defence argues that the accused’s right to privileged communication attaches to the *Bemba* case, and the Trial Chamber has the duty to ensure effective protection thereof, while the Single Judge had no competence to grant access to such materials.<sup>27</sup> The defence also argues that resolution of the two issues significantly impacts the expeditiousness

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<sup>24</sup> ICC-01/05-01/08-3103-Red2, paragraph 51 and 52.

<sup>25</sup> ICC-01/05-01/08-3103-Red2, paragraph 39.

<sup>26</sup> ICC-01/05-01/08-3103-Red2, paragraphs 42, 43, 45, and 47.

<sup>27</sup> ICC-01/05-01/08-3103-Red2, paragraph 46.



of the proceedings by deferring the ability of the defence to litigate alleged violations in a timely and proactive manner.<sup>28</sup>

17. The defence submits that the First and Second Issues significantly affect the outcome of the trial because, if the Chamber were wrong to reject the Original Defence Request, the proceedings in the *Bemba* case will be irretrievably tainted due to the unfair and improper advantage the prosecution will have enjoyed through gaining access to internal defence information.<sup>29</sup> The defence also submits that since the Chamber has not granted interim relief, the defence is not in a position to know what will or will not be transmitted to the prosecution, meaning that the defence will not be in a position to make informed decisions as to the best interests of the accused in drafting its closing brief and final submissions.<sup>30</sup>

18. Lastly, the defence submits that immediate resolution by the Appeals Chamber would materially advance the proceedings because the prosecution, to the knowledge of the defence, have not yet gained access to the content of the Email Accounts.<sup>31</sup> The defence argues that if leave to appeal were granted it could request suspensive effect and thereby protect the integrity of the *Bemba* case.<sup>32</sup> It adds that the gravity of an unlawful or unwarranted violation of privilege is such that it cannot be left for final judgement or appeal.<sup>33</sup>

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<sup>28</sup> ICC-01/05-01/08-3103-Red2, paragraph 48.

<sup>29</sup> ICC-01/05-01/08-3103-Red2, paragraphs 53 to 59 and 61.

<sup>30</sup> ICC-01/05-01/08-3103-Red2, paragraph 60.

<sup>31</sup> ICC-01/05-01/08-3103-Red2, paragraph 62.

<sup>32</sup> ICC-01/05-01/08-3103-Red2, paragraph 63.

<sup>33</sup> ICC-01/05-01/08-3103-Red2, paragraph 64.

19. On 14 July 2014, the prosecution filed its “Prosecution’s Response to the Defence Request for Leave to Appeal Decision ICC-01/05-01/08-3101”, in which it submits that the Request for Leave to Appeal should be rejected.<sup>34</sup>
20. The prosecution submits that the First Issue is not an appealable issue because any determination as to the Trial Chamber’s competence to order the prosecution to disclose information, or to refrain from accessing such information, was not essential to the Chamber’s decision.<sup>35</sup> The prosecution argues that in fact the Chamber based its decision on the finding that the defence’s submissions as to the need to avoid prejudice in the *Bemba* case and protect the accused’s right to a fair trial in that case were speculative and the relief sought not warranted.<sup>36</sup> Therefore, the prosecution submits, the First Issue relates to a finding that was not necessary for the determination of the matter before the Chamber.<sup>37</sup>
21. Regarding the Second Issue, the prosecution submits that the issue does not arise from the Impugned Decision, asserting that the defence fails to point to a specific finding establishing such a threshold.<sup>38</sup> Rather, the prosecution argues, the Request for Leave to Appeal focuses on contesting the Chamber’s finding that the defence’s arguments were “impermissibly speculative”.<sup>39</sup> The prosecution contends that the Chamber did not in fact rule that “it was ‘impermissibly speculative’ to argue that e-mails may include information that should not be transmitted to the prosecution”,

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<sup>34</sup> Prosecution’s Response to the Defence Request for Leave to Appeal Decision ICC-01/05-01/08-3101, 14 July 2014, ICC-01/05-01/08-3104, paragraphs 1 and 2.

<sup>35</sup> ICC-01/05-01/08-3104, paragraphs 2 to 5.

<sup>36</sup> ICC-01/05-01/08-3104, paragraph 6.

<sup>37</sup> ICC-01/05-01/08-3104, paragraph 7.

<sup>38</sup> ICC-01/05-01/08-3104, paragraphs 8 to 10.

<sup>39</sup> ICC-01/05-01/08-3104, paragraph 9.

but rather found that “in the context of this case, and in particular in light of the extensive safeguards put in place by the Single Judge in the case ICC-01/05-01/13, the Defence’s argument that ‘potential prejudice will accrue in the Main Case’ is ‘impermissibly speculative’”.<sup>40</sup>

22. The prosecution submits that the Issues do not impact the fair and expeditious conduct of the proceedings, submitting that the defence fails to substantiate its argument in this regard.<sup>41</sup> Similarly, the prosecution alleges that the defence’s arguments as to why the First and Second Issues would impact the outcome of the trial are “abstract”, “hypothetical”, and insufficient to demonstrate any impact on the outcome of the trial.<sup>42</sup>

23. Lastly, the prosecution submits that immediate resolution by the Appeals Chamber would not materially advance the proceedings.<sup>43</sup> It argues that (i) the defence’s suggestion that the integrity of the proceedings in the *Bemba* case could be preserved if the Appeals Chamber grants suspensive effect is an issue unrelated to the requirements of Article 82(1)(d); and (ii) the defence’s “unsubstantiated assertion that matters pertaining to the ‘violation of privilege should not be deferred to the final judgement or appeal’ is insufficient to meet the threshold for leave to appeal”.<sup>44</sup>

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<sup>40</sup> ICC-01/05-01/08-3104, paragraph 9 (internal citation omitted).

<sup>41</sup> ICC-01/05-01/08-3104, paragraphs 11 to 13.

<sup>42</sup> ICC-01/05-01/08-3104, paragraph 13 and 14.

<sup>43</sup> ICC-01/05-01/08-3104, paragraphs 15 to 17.

<sup>44</sup> ICC-01/05-01/08-3104, paragraphs 15 and 16.

## II. Analysis

24. For the purpose of the present Decision and in accordance with Article 21(1) of the Rome Statute (“Statute”) the Chamber has considered Articles 67 and 82(1)(d) of the Statute.

25. In deciding on the Request for Leave to Appeal, the Chamber is guided by the established jurisprudence of this Chamber and of the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, for a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific “issues” which were dealt with in the relevant decision and which constitute the appealable subject.<sup>45</sup>

26. The Appeals Chamber has held that “[o]nly 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 a disagreement or 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. The issue may be legal or factual or a mixed one.”<sup>46</sup> In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.<sup>47</sup>

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<sup>45</sup> 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 OA3, paragraph 9; *see also* Decision on the “Defence Request for Leave to Appeal the Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”, 30 October 2012, ICC-01/05-01/08-2399, paragraph 9.

<sup>46</sup> ICC-01/04-168, paragraph 9; *see also* ICC-01/05-01/08-2399, paragraph 10.

<sup>47</sup> Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18

27. Accordingly, the Chamber has examined the Request for Leave to Appeal according to the following criteria:

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand would significantly affect:
  - i. the fair and expeditious conduct of the proceedings; or
  - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>48</sup>

28. The three criteria mentioned above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.<sup>49</sup>

29. The Chamber recalls that the Appeals Chamber has held that its function in relation to the exercise of discretion by a Pre-Trial or Trial Chamber is limited to ensuring that the Chamber properly exercised its discretion. The Appeals Chamber has held that it “will interfere with a discretionary

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September 2009, ICC-01/05-01/08-532, paragraph 17; Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, paragraph 11; Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)””, 29 August 2011, ICC-01/09-01/11-301, paragraph 34; Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paragraphs 50 and 61.

<sup>48</sup> Decision on the prosecution and defence applications for leave to appeal the "Decision on the admission into evidence of materials contained in the prosecution’s list of evidence", 26 January 2011, ICC-01/05-01/08-1169, paragraph 23; *see also* ICC-01/05-01/08-2399, paragraph 11.

<sup>49</sup> ICC-01/05-01/08-1169, paragraph 24; *see also* ICC-01/05-01/08-2399, paragraph 12.

decision only under limited conditions”,<sup>50</sup> namely: “(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on [a] patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion”.<sup>51</sup>

30. The Chamber also notes the position of the Appeals Chamber that “there may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. 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.”<sup>52</sup>

#### *First Issue*

31. In the First Issue, the defence argues that the Chamber “erred by finding that it had no competence either to order the Prosecution to disclose information, which was the property of the Defence in this case, or to refrain from accessing information which was the property of the Defence in the Main Case”.<sup>53</sup> The defence submits that this error resulted in the Chamber failing to assess whether (i) the disclosure of the Email Accounts in case ICC-01/05-01/13 to the prosecution, or (ii) the failure of the prosecution to disclose the materials it has received in case ICC-01/05-

<sup>50</sup> Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19(1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, paragraph 80.

<sup>51</sup> ICC-02/04-01/05-408, paragraph 80.

<sup>52</sup> ICC-01/04-168 OA3, paragraph 9.

<sup>53</sup> ICC-01/05-01/08-3103-Red2, paragraphs 1 and 65.

01/13, would “violate” or “be overly prejudicial” to the accused’s rights in the *Bemba* case,<sup>54</sup> or “undermine the protect[ion] afforded by Rule 73(1)”.<sup>55</sup> According to the defence, the Chamber’s failure to do so creates “an unacceptable lacuna as concerns the effective enforcement and protection of Mr. Bemba’s rights”.<sup>56</sup> The defence alleges that in the Impugned Decision the Chamber “divest[ed] itself of its duty under Article 64(2) to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of Mr. Bemba” and instead relied on the Single Judge who it alleges has had “no regard for the potential prejudice that would accrue to the Defence in the Main Case”.<sup>57</sup>

32. In the Impugned Decision, the Chamber did “note” that the relief sought in the Original Defence Request would “interfere with the competence of the Single Judge”,<sup>58</sup> however, it also expressly stated that “it is nevertheless ‘bound by its duty to ensure that the trial in the *Bemba* case is fair, expeditious, and conducted with full respect for the rights of the accused ... as provided for in Article 64(2) of the Statute””.<sup>59</sup> In keeping with its duty, the Chamber analysed the defence’s allegations of the risk of prejudice to the accused’s rights in the *Bemba* case in light of the information before it and determined that the defence’s submissions were speculative.<sup>60</sup> It is therefore incorrect to state that the position taken by the Chamber regarding its competence resulted in the Chamber “divest[ing]

<sup>54</sup> ICC-01/05-01/08-3103-Red2, paragraphs 4 to 6, 14, 23 to 25, 43, and 44.

<sup>55</sup> ICC-01/05-01/08-3103-Red2, paragraph 4.

<sup>56</sup> ICC-01/05-01/08-3103-Red2, paragraph 25.

<sup>57</sup> ICC-01/05-01/08-3103-Red2, paragraph 43 (emphasis in original).

<sup>58</sup> ICC-01/05-01/08-3101, paragraph 21.

<sup>59</sup> ICC-01/05-01/08-3101, paragraphs 23 to 26.

<sup>60</sup> ICC-01/05-01/08-3101, paragraphs 24 to 26.

itself” of its duties under Article 64(2) or failing to assess whether the accused’s rights had been violated or prejudiced.

33. In light of the above, the Chamber concludes that the First Issue constitutes nothing more than a disagreement with the Chamber’s position as to its competence to analyse and decide upon the request, and therefore does not constitute an appealable issue.

*Second Issue*

34. In the Second Issue, the defence submits that the Chamber imposed “too high an evidential threshold in a request for provisional measures/injunctive relief”.<sup>61</sup> The defence implies that the “evidentiary threshold” applied by the Chamber required the defence to (i) adduce specific examples of privileged information from the materials to which the defence was seeking access;<sup>62</sup> (ii) file examples containing defence strategies;<sup>63</sup> or (iii) “prove” that privileged information had been transmitted to the prosecution.<sup>64</sup>

35. However, in the Impugned Decision the Chamber found, after having taken into account the submissions of the prosecution and decisions of the Single Judge of Pre-Trial Chamber II referred to by the defence, that under the circumstances the defence’s submissions were speculative.<sup>65</sup> Contrary to the defence’s contention, the Chamber merely exercised its discretion to

<sup>61</sup> ICC-01/05-01/08-3103-Red2, paragraphs 1 and 65.

<sup>62</sup> ICC-01/05-01/08-3103-Red2, paragraph 26.

<sup>63</sup> ICC-01/05-01/08-3103-Red2, paragraph 35.

<sup>64</sup> ICC-01/05-01/08-3103-Red2, paragraphs 36 and 37.

<sup>65</sup> ICC-01/05-01/08-3101, paragraphs 25 and 26.



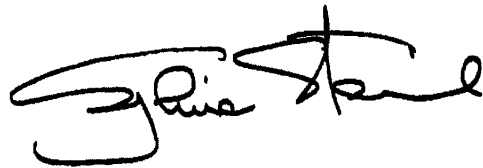
determine, based on the submissions and information before it, whether there was sufficient risk that prejudice might be caused to the accused's rights in the *Bemba* case to justify it ordering the requested relief. That the defence disagrees with the Chamber's conclusion is insufficient to constitute an appealable issue.

36. Accordingly, the Chamber finds that the Second Issue is not an appealable issue.

### III. Conclusion

37. For the foregoing reasons, the Chamber hereby DENIES the Request for Leave to Appeal.

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



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**Judge Sylvia Steiner**



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**Judge Joyce Aluoch**



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**Judge Kuniko Ozaki**

Dated this 13 August 2014

At The Hague, the Netherlands