

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 11 December 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

Public redacted version of "Decision on 'Defence Request for Leave to Appeal the Decision on the Defence Motion concerning contact between Witnesses 169 and 178' and other witnesses"

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

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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 the Decision on the Defence Motion concerning contacts between Witnesses 169 and 178 and other witnesses” (“Decision”).

I. Background and Submissions

1. On 3 October 2013, the Office of the Prosecutor (“prosecution”) filed its confidential *ex parte*, prosecution and Victims and Witnesses Unit (“VWU”) only, “Information on contacts of Witnesses 169 and 178 with other witnesses” together with confidential *ex parte* Annexes A and B (“Prosecution Submission”).¹ In its filing, the prosecution informed the Chamber that the Registrar’s denial of Witness CAR-OTP-PPPP-0169 (“Witness 169”) and Witness CAR-OTP-PPPP-0178’s (“Witness 178”) loss of income claims caused frustration and complaints from both witnesses.² As a result, Witness 169 sent communications to, amongst others, the prosecution and the VWU,³ in which he, *inter alia*, (i) listed alleged outstanding claims, including loss of income and “money promised by the Prosecutor for witnesses”;⁴ (ii) provided a list [REDACTED] of 22 individuals (“Individuals”) including 21 witnesses called by the prosecution;⁵ and (iii) alleged that many of the Individuals had been contacted and gathered by Witness 178 to “look at loss of income claims and

¹ Information on contacts of Witnesses 169 and 178 with other witnesses [...], 3 October 2013, ICC-01/05-01/08-2827-Conf-Exp and confidential *ex parte* Annexes A and B. Confidential lesser redacted versions was filed on 9 January 2014. Confidential lesser redacted version of information on contacts of Witnesses 169 and 178 with other witnesses, 3 October 2013, (ICC-01/05-01/08-2827-Conf-Exp), ICC-01/05-01/08-2827-Conf-Red2 and confidential redacted Annexes A and B.

² ICC-01/05-01/08-2827-Conf-Red2, paragraph 6.

³ The communications are appended in Annexes A and B to the Prosecution Submission and appear addressed to several Court officials and [REDACTED]. Annex A includes a letter sent by Witness 169 to the prosecution and an email sent by Witness 169 on 7 June 2013. Annex B includes the letter sent by Witness 169 to the prosecution, a letter sent by Witness 169 to the VWU as well as an email sent by Witness 169 on 10 June 2013. One of the addressees of the letters is the Presiding Judge of the *Bemba* case, who has never in fact received this letter.

⁴ ICC-01/05-01/08-2827-Conf-Red2, paragraph 9.

⁵ ICC-01/05-01/08-2827-Conf-Red2, paragraphs 7 and 10. [REDACTED]

other [issues]”.⁶ On the basis of this information, the prosecution sought the Chamber’s guidance as to the possible need, appropriateness, and legal basis of any disclosure requirements resulting from the information contained in the Prosecution Submission.⁷

2. On 25 October 2013, the Chamber issued its "Decision on the prosecution's 'Information on contact with Witnesses 169 and 178 with other witnesses'" ("Decision 2845");⁸ in which it, *inter alia*, ordered the VWU to submit a report on issues addressed in the Prosecution Submission, including [REDACTED].⁹

3. On 11 November 2013, the defence filed its "Defence Motion concerning 'Information on contacts with witnesses 169 and 178 with other witnesses'" ("Defence Motion"),¹⁰ in which it requested that the Chamber orders: (i) the provision of public redacted versions of all filings associated with the conduct of Witnesses 169 and 178; (ii) the prosecution to provide the defence with a lesser redacted version of the Prosecution Submission and to formally disclose and attribute an Evidence Reference Number ("ERN") to Annexes A and B; (iii) "the disclosure of any requests for payments or other benefits made by Witness 169, Witness 178, or any of the 22 [Individuals] and all details and dates of the payments or benefits provided to Witness 169, Witness 178, or any of the 22 [Individuals] by the Prosecution, the VWU, or the Registry, including those made in the period between 25 June 2013 and 3 October 2013"; (iv) "the disclosure of any recordings, statements or notes of interviews generated by the Prosecution during the contact with both Witness 169 and Witness 178, as well as Witness 119, Witness 42, Witness 38, Witness

⁶ ICC-01/05-01/08-2827-Conf-Red2, paragraph 9.

⁷ ICC-01/05-01/08-2827-Conf-Red2, paragraph 20.

⁸ Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located [...] (ICC-01/05-01/08-2827-Conf-Exp)", 25 October 2013, ICC-01/05-01/08-2845-Conf-Exp. A confidential redacted version was filed on 5 November 2013: Confidential redacted version of "Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located [REDACTED]' (ICC-01/05-01/08-2827-Conf-Exp)" of 25 October 2013, 5 November 2013, ICC-01/05-01/08-2845-Conf-Red.

⁹ ICC-01/05-01/08-2845-Conf-Red, paragraphs 11, 12 and 13(i).

¹⁰ Defence Motion concerning "Information on contacts with witnesses 169 and 178 with other witnesses", 11 November 2013, ICC-01/05-01/08-2872-Conf.

68 and any of the other [Individuals], as well as [REDACTED] or any other intermediary with whom it has been in contact”; and (v) the recall of Witness 169 and Witness 178.¹¹

4. On 15 November 2013, pursuant to the Chamber’s instruction,¹² the prosecution and one legal representative of victims, the late Maître Assingambi Zarambaud, filed their observations on the Defence Motion.¹³ The prosecution requested that the Chamber reject the Defence Motion in its entirety.¹⁴ Maître Zarambaud requested that the Chamber reject the defence request for provision of public redacted versions of the documents related to the conduct of Witnesses 169 and 178, or, in the alternative, that he be consulted on the redactions to be applied to the relevant filings.¹⁵
5. On 18 December 2013, the Chamber issued its “Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’” (“Impugned Decision”),¹⁶ in which it: (i) rejected the defence’s request for reclassification as public of all filings related to the conduct of Witnesses 169 and 178; (ii) granted the defence’s request for disclosure of a lesser redacted version of the Prosecution Submission; (iii) ordered the prosecution to file by 13 January 2014 the lesser redacted version of the Prosecution Submission in accordance with the Chamber’s directions; (iv) ordered the prosecution to formally disclose by 13 January 2014 the lesser redacted versions of the 7 and 8 June 2013 letters in accordance with eCourt protocol; (v) ordered the Registry to reclassify its confidential ex parte, VWU

¹¹ ICC-01/05-01/08-2872-Conf, paragraph 50.

¹² Email from the Chamber to the parties, participants and the Registry on 12 November 2013 at 10.19.

¹³ Prosecution’s Response to Defence Motion concerning “Information on contacts of Witnesses 169 and 178 with other witnesses”, 15 November 2013, ICC-01/05-01/08-2897-Conf; Réponse du Représentant légal de victimes, Me. Zarambaud Assingambi, à la « Defence Motion concerning “Information on contacts with Witnesses 169 and 178 with other witnesses”», ICC-01/05-01/08-2872-Conf, 15 November 2013, ICC-01/05-01/08-2894-Conf.

¹⁴ ICC-01/05-01/08-2897-Conf, paragraph 21.

¹⁵ ICC-01/05-01/08-2894-Conf, page 8.

¹⁶ Decision on “Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 18 December 2013, ICC-01/05-01/08-2924-Conf.

only, “Victims and Witnesses Unit’s Report in relation to the Defence Motion ICC-01/05-01/08-2872-Conf pursuant to the Status Conference held on 26 November 2013” (“VWU Report 2912”), together with three confidential *ex parte*, VWU only Annexes A, C, and D as confidential; (vi) rejected the defence’s request to recall Witnesses 169 and 178; and (vii) decided that any applications by the parties and participants for the admission into evidence of documents referred to in the Impugned Decision were to be submitted by 20 January 2014.¹⁷

6. In the Impugned Decision, the Chamber cited its obligation to “balance its duty to observe the principle of publicity of proceedings, pursuant to Articles 64(7) and 67(1) of the [Rome Statute (“Statute”)] and Regulation 20 of the Regulations of the Court [(“Regulation”)], against its obligations under Article 68 of the Statute ‘to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’”.¹⁸ The Chamber noted Maître Zarambaud’s contention that communication of the allegation contained in the relevant filings to the public would negatively affect the victims participating in the *Bemba* case,¹⁹ as well as the pending VWU report ordered by Decision 2845 (“VWU [REDACTED]”) and concluded that public communication of the information contained in the relevant filings prior to receipt of the complete report might prejudice the Registry’s assessment and have a negative impact on the well-being of the individuals involved.²⁰
7. Further, the Chamber noted the VWU’s submission that the Individuals did not receive any financial assistance beyond the requirements of ordinary subsistence.²¹ After analysing the record before it, the Chamber found that the

¹⁷ ICC-01/05-01/08-2924-Conf, paragraph 38.

¹⁸ ICC-01/05-01/08-2924-Conf, paragraph 16.

¹⁹ ICC-01/05-01/08-2924-Conf, paragraph 17.

²⁰ ICC-01/05-01/08-2924-Conf, paragraph 17.

²¹ ICC-01/05-01/08-2924-Conf, paragraph 33.

defence's assertion regarding collusion of witnesses was unsubstantiated.²²

8. The Chamber found that "the requesting party needs to demonstrate good cause to recall a witness"²³ and that "judicial economy demands that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature".²⁴ The Chamber also noted the defence's submission that "disclosure of the requested information put into admissible form for reception into evidence, may well obviate the need for the recall of any witnesses".²⁵ The Chamber extended the deadline for the submission of applications for the admission of the relevant materials into evidence and found that the defence had not demonstrated good cause to recall Witnesses 169 and 178.

9. On 10 January 2014, the defence filed its "Defence Request for Leave to Appeal the Decision on the Defence Motion concerning contact between Witness 169 and 178 and other witnesses" ("Request for Leave to Appeal");²⁶ in which it submits that the Impugned Decision gives rise to appealable issues that meet the criteria set forth under Article 82(1)(d) of the Rome Statute ("Statute") and warrant consideration by the Appeals Chamber.²⁷ The defence identifies two issues: (i) "[w]hether the Trial Chamber erred in law in failing to meet its obligations under Articles 64(7) and 67(1) of the Statute and Regulation 20 of the Regulations of the Court by declining to order the provision of public redact versions of the relevant filings, in the absence of any identified or concrete risk to the safety or well-being of any witness or victim" ("First Issue") and (ii) "[w]hether the Trial Chamber erred in failing to consider the Defence arguments concerning the breach of witness protective measures in place, and preventing further investigation and exploration of

²² ICC-01/05-01/08-2924-Conf, paragraph 34.

²³ ICC-01/05-01/08-2924-Conf, paragraph 35.

²⁴ ICC-01/05-01/08-2924-Conf, paragraph 35.

²⁵ ICC-01/05-01/08-2924-Conf, paragraph 36 (internal citation omitted).

²⁶ Defence Request for Leave to Appeal the Decision on the Defence Motion concerning contact between Witness 169 and 178 and other witnesses, 10 January 2014, ICC-01/05-01/08-2932-Conf.

²⁷ ICC-01-5-01/08-2932-Conf, paragraphs 12 to 13.

issues central to the credibility of the Prosecution evidence in this case” (“Second Issue”).²⁸

10. The defence submits that the “appealable issues are not merely ‘disagreements’ or ‘conflicts of opinion’ between the Defence and the Chamber but rather consist of discrete legal questions that arise directly out of the Impugned Decision”.²⁹ The defence argues generally that each of the identifiable issues significantly affects the fair and expeditious nature of the proceedings.³⁰ The defence makes specific arguments in relation to each issue it identifies for appeal.
11. In addition to the specific arguments it offers in support of the identified issues, the defence submits that “an immediate resolution of [the] issues would materially advance the proceedings”.³¹ It argues that although the trial “is in its final phase, the Impugned Decision contains issues which impact on the credibility of such a significant proportion of the Prosecution’s evidence that they cannot be safely left for any potential appeal from a Judgement at first instance”.³²
12. On 16 January 2014, the prosecution filed its “Prosecution’s Response to the Defence Request for Leave to Appeal the Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’” (“Prosecution Response”),³³ in which it asks that the Chamber

²⁸ ICC-01/5-01/08-2932-Conf, paragraph 13.

²⁹ ICC-01/05-01/08-2932-Conf, paragraph 12.

³⁰ ICC-01/05-01/08-2932-Conf, paragraph 14.

³¹ ICC-01/05-01/08-2932-Conf, paragraph 18.

³² ICC-01/05-01/08-2932-Conf, paragraph 18.

³³ Prosecution’s Response to the Defence Request for Leave to Appeal the Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 16 January 2014, ICC-01/05-01/08-2938-Conf. On 20 January 2014, the prosecution filed a corrigendum to the Prosecution Response. Corrected Version of Prosecution’s Response to the Defence Request for Leave to Appeal the Decision on “Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 20 January 2014, ICC-01/05-01/08-2938-Conf-Corr.

reject the Request.³⁴ The prosecution submits that the issues identified by the defence do not arise from the Impugned Decision, nor do they constitute appealable issues.³⁵ The prosecution further submits that the defence fails to demonstrate that the identified issues meet the criteria for leave to appeal.³⁶ The prosecution also makes specific arguments in relation to each issue identified by the defence.

II. Analysis and Conclusions

13. For the purpose of the present Decision and in accordance with Article 21(1) of the Statute, the Chamber has considered Articles 67 and 82(1)(d) of the Statute and Rule 155 of the Rules of Procedure and Evidence.
14. 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.³⁷
15. 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

³⁴ ICC-01/05-01/08-2938-Conf-Corr, paragraph 2.

³⁵ ICC-01/05-01/08-2938-Conf-Corr, page 5.

³⁶ ICC-01/05-01/08-2938-Conf-Corr, paragraph 2.

³⁷ 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, 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.

factual or a mixed one.”³⁸ In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.³⁹

16. 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.⁴⁰

17. 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.⁴¹

18. It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.⁴² Further, it is insufficient that an appeal

³⁸ ICC-01/04-168, paragraph 9; *see also* ICC-01/05-01/08-2399, paragraph 10.

³⁹ 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 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, paragraphs 32 to 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.

⁴⁰ 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.

⁴¹ ICC-01/05-01/08-1169, paragraph 24; *see also* ICC-01/05-01/08-2399, paragraph 12.

⁴² ICC-01/05-01/08-1169, paragraph 25. *See also* Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 21; Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’

may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.⁴³

19. In addition, a party seeking leave to appeal should take into account that the Appeals Chamber's 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 decision only under limited conditions",⁴⁴ namely: "(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion".⁴⁵

First Issue

20. In regard to the First Issue, the defence states that the accused has a right to a public trial under the Statute and proceedings against an accused at international courts and tribunals can only be hidden from the public in exceptional circumstances.⁴⁶ The defence submits that the "significance" of the Witnesses 169 and 178-related filings to the credibility of the prosecution's case provide further justification for the public to be informed.⁴⁷

21. The defence argues that the Chamber's ruling in the Impugned Decision affects the expeditious conduct of the proceedings. It argues that "[f]urther litigation as to the publicity of these filings and documents, coupled with the Chamber's decision to wait for the [REDACTED] and submission of a report

Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 11; *see also* ICC-01/05-01/08-2399, paragraph 13.

⁴³ ICC-01/05-01/08-1169, paragraph 25; *see also* ICC-01/05-01/08-2399, paragraph 13.

⁴⁴ 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.

⁴⁵ ICC-02/04-01/05-408, paragraph 80.

⁴⁶ ICC-01/05-01/08-2932-Conf, paragraph 14.

⁴⁷ ICC-01/05-01/08-2932-Conf, paragraph 14.

by VWU inevitably leads to delays” giving “rise to another issue which must ultimately be resolved before a decision can be rendered declaring the presentation of evidence closed pursuant to Rule 141”.⁴⁸

22. The defence further avers that appropriate redactions to the relevant filings could inform the public of “very important issues” which have arisen in the *Bemba* case without identifying the witnesses involved.⁴⁹ It posits that as such, there is no risk that the VWU’s work would be prejudiced in any way or that [REDACTED] of the Individuals would be compromised.⁵⁰ The defence submits that “in the absence of any concrete information that appropriately redacted filings would have any negative impact on any witnesses or victims, the balance should favour publicity of the proceedings over hypothetical and unspecified assertions as to confusion”.⁵¹

23. The prosecution submits that the First Issue does not arise from the Impugned Decision because it is based on a mischaracterisation of the Chamber’s decision. The prosecution submits that the Chamber identified concrete security concerns, such as Maître Zarambaud’s contention that the provision of public redacted versions of the relevant documents would risk compromising the security and the physical and psychological well-being of the victims he represents.⁵² The prosecution also noted the Chamber’s request for the VWU to prepare the VWU [REDACTED] on the issues addressed in the Prosecution Submission—including [REDACTED].⁵³

24. Further, the prosecution asserts that the Chamber only refused reclassification as an interim measure, pending the VWU [REDACTED]; as such the First

⁴⁸ ICC-01/05-01/08-2932-Conf, paragraph 14.

⁴⁹ ICC-01/05-01/08-2932-Conf, paragraph 6.

⁵⁰ ICC-01/05-01/08-2932-Conf, paragraph 6.

⁵¹ ICC-01/05-01/08-2932-Conf, paragraph 6.

⁵² ICC-01/05-01/08-2938-Conf-Corr, paragraph 11.

⁵³ ICC-01/05-01/08-2938-Conf-Corr, paragraph 11 (internal citation omitted).

Issue was raised prematurely.⁵⁴ The prosecution submits that currently, the final classification of the relevant documents “is an abstract question or hypothetical concern”.⁵⁵

25. Regarding the First Issue, the Chamber underlines that in the Impugned Decision it struck a balance between its obligations relating to the principle of publicity of proceedings and its duty to protect victims and witnesses—supported by the concerns raised by Maître Zarambaud and the need to consider the pending VWU [REDACTED]. Accordingly, the Chamber ruled that “*at this stage*, [the defence’s] request for reclassification should be rejected”.⁵⁶ Given that the Chamber has yet to issue a final decision on the reclassification of the relevant documents as public, the Chamber finds that the First Issue represents a hypothetical concern at this stage and, as such, does not arise from the Impugned Decision.

26. Therefore, in relation to the First Issue, the Chamber considers that the defence has failed to identify an appealable issue for the purpose of Article 82(1)(d) of the Statute.

Second Issue

27. The Chamber finds that the defence’s phrasing of the Second Issue compounds two separate issues. As such, the Chamber will consider this question as comprising the following two potential issues for appeal: (i) whether the Chamber erred in “failing to consider the Defence arguments concerning the breach of witness protective measures in place” (“First Sub-Issue”) and (ii) whether the Chamber erred in “preventing further investigation and exploration of issues central to the credibility of the prosecution evidence in this case” (“Second Sub-Issue”).

⁵⁴ ICC-01/05-01/08-2938-Conf-Corr, paragraph 12.

⁵⁵ ICC-01/05-01/08-2938-Conf-Corr, paragraph 12.

⁵⁶ ICC-01/05-01/08-2924-Conf, paragraph 17 (emphasis added).

First Sub-Issue

28. The defence alleges that the Chamber did not address the defence's concern as to how the [REDACTED] in the *Bemba* case.⁵⁷ It submits that the parties and participants "remain utterly in the dark as to how such a manifest breach of witness protective measures could have occurred".⁵⁸ The defence argues that "there is an irresistible inference that there had been contact between witnesses prior to [REDACTED] , and the possibility of contact prior to or during their testimonies is a proper topic for exploration in any legitimate search for the truth".⁵⁹ The defence submits that "any analysis of the credibility of the Prosecution case in general, and of the testimony of these particular witnesses, warrant further investigation as to how [the breach of witness protective measures] occurred, and the timing and extent of contact between the Prosecution witnesses".⁶⁰
29. The defence further argues that "[t]he Prosecution Submissions indicate, at a minimum, that Prosecution witnesses were in contact with each other following their testimony, to discuss (further) payments" from the ICC,⁶¹ and that this contact raises questions regarding the timing and extent of the contact, "particularly since it falls foul of the Chamber's own orders on protective measures".⁶²
30. The prosecution submits that the First Sub-Issue does not arise from the Decision. Particularly, the prosecution asserts that in the Defence Motion, the defence: (i) made no arguments focused "*solely*" on the breach of protective

⁵⁷ ICC-01/05-01/08-2932-Conf, paragraph 8.

⁵⁸ ICC-01/05-01/08-2932-Conf, paragraph 8.

⁵⁹ ICC-01/05-01/08-2932-Conf, paragraph 8.

⁶⁰ ICC-01/05-01/08-2932-Conf, paragraph 8.

⁶¹ ICC-01/05-01/08-2932-Conf, paragraph 15.

⁶² ICC-01/05-01/08-2932-Conf, paragraph 15.

measures,⁶³ and (ii) only made reference to protective measures in relation to its allegations of collusion and financial impropriety.⁶⁴

31. The Chamber notes that the defence's arguments as to the breach of witness protective measures are made in support of the defence's claims related to coordination or collusion between witnesses. The Chamber notes that the defence does not submit specific arguments solely on the issue on the breach of witness protective measures in place.

32. Considering the assertions already referred to above in support of the defence's contentions that the Chamber "erred in failing to consider the Defence arguments concerning the breach of witness protective measures", the Chamber observes that, in assessing the defence's assertions of "collusion" and "collective-bargaining", it considered the "attempted contact allegedly initiated by Witness 178" and stated that "on the basis of the material before it, the [...] assertion regarding 'collusion' of witnesses is unsubstantiated".⁶⁵ From this, it is evident that the Chamber considered the evidence before it of contact between witnesses in its determination as to whether good cause existed such as to justify recalling Witnesses 169 and 178.

33. For the above reasons, the Chamber considers that the defence fails to identify any legal or factual error in the Impugned Decision. Thus, any further disagreement on the part of the defence in this regard constitute nothing more than a difference of opinion as to the Chamber's exercise of its discretion.

34. Consequently, the First Sub-Issue does not constitute an appealable issue arising out of the Impugned Decision.

⁶³ ICC-01/05-01/08-2938-Conf-Corr, paragraph 14.

⁶⁴ ICC-01/05-01/08-2938-Conf-Corr, paragraph 14.

⁶⁵ ICC-01/05-01/08-2924-Conf, paragraph 34.

Second Sub-Issue

35. Regarding the Second Sub-Issue, the defence avers that the Chamber "rejected the Defence request for 'the opportunity to investigate and explore the potential collusion between witnesses and the apparent promise of payments to witnesses' and denied the request to recall Witness 169 and Witness 178".⁶⁶ The defence argues that recall of Witnesses 169 and 178 would have allowed the defence to "investigate and explore many unanswered questions which have a direct impact on the credibility of the inculpatory testimony of these witnesses".⁶⁷ Thus, the defence submits that the Chamber's decision rejecting the defence's request to recall Witnesses 169 and 178 impacts Mr Bemba's right to test the credibility of prosecution evidence, as well as the overall fairness of the proceedings.⁶⁸
36. The defence asserts that "in effect, the Chamber has denied the Defence request to recall witnesses in order to establish collusion on the grounds that the Defence has failed to establish collusion".⁶⁹ The defence asserts that "[w]hile the Chamber was entitled to assess whether there **could** have been collusion between witnesses warranting further investigation, a definitive finding on whether collusion in fact occurred, in the absence of Defence submissions, cannot be reconciled with the adversarial nature of the proceedings or the right of [Mr] Bemba to be heard on issues before the Chamber".⁷⁰
37. Further, the defence argues that preventing further investigation will affect the outcome of the trial as widespread collusion between all of the prosecution's [REDACTED] witnesses would affect the credibility of the

⁶⁶ ICC-01/05-01/08-2932-Conf, paragraph 7.

⁶⁷ ICC-01/05-01/08-2932-Conf, paragraph 15.

⁶⁸ ICC-01/05-01/08-2932-Conf, paragraph 15.

⁶⁹ ICC-01/05-01/08-2932-Conf, paragraph 16.

⁷⁰ ICC-01/05-01/08-2932-Conf, paragraph 16 (emphasis in original).

majority of the prosecution's case.⁷¹

38. Regarding the Second Sub-Issue, the prosecution submits that the "Chamber did not prevent further investigation and exploration of the issues central to the credibility of the prosecution evidence".⁷² The prosecution recalls the various steps taken by the Chamber, short of re-calling witnesses, by which the Chamber ensured that the defence received relevant information related to the requests in the Defence Motion.⁷³ The prosecution submits that the defence does not identify a legal, factual, or procedural error in the reasoning of the Chamber in relation to the Second Sub-Issue and that the defence merely disagrees with the Chamber's conclusion.⁷⁴ The prosecution submits that the Chamber did not fail to address the relevant defence submissions.

39. The prosecution argues that the Chamber's decision not to recall Witnesses 169 and 178 "does not, *per se*, affect the fair and expeditious conduct of the proceedings"; it submits that the defence failed to show why the decision not to recall specific witnesses impact fairness and expeditiousness in the concrete circumstances of this case.⁷⁵

40. Further, the prosecution submits that the Chamber has sought to ensure that the defence has access to all the relevant information. The prosecution states that the Chamber allowed for the extension of the deadline for the submission of applications for the admission of materials into evidence and also permitted for the possibility that the defence chooses to utilise such evidence to make any related submissions on witness credibility.⁷⁶ The prosecution asserts that the Chamber could "take into consideration such submissions on credibility as well as any difficulties encountered by the defence in locating

⁷¹ ICC-01/05-01/08-2932-Conf, paragraph 17.

⁷² ICC-01/05-01/08-2938-Conf-Corr, paragraph 17.

⁷³ ICC-01/05-01/08-2938-Conf-Corr, paragraph 17.

⁷⁴ ICC-01/05-01/08-2938-Conf-Corr, paragraph 19.

⁷⁵ ICC-01/05-01/08-2938-Conf-Corr, paragraph 24.

⁷⁶ ICC-01/05-01/08-2938-Conf-Corr, paragraph 30.

and presenting evidence on credibility, when weighing the entirety of the evidence at the end of the trial and it may, at that stage, resolve any unfairness towards the accused".⁷⁷

41. The Chamber finds that in its Request for Leave to Appeal, the defence merely re-litigates its Defence Motion and illustrates the various ways in which it disagrees with the Chamber's conclusions in the Impugned Decision.

42. In actuality, the Chamber, having considered the arguments offered by all parties and participants, allowed further investigation and exploration of issues central to the credibility of the prosecution's evidence on numerous occasions. This is shown by, for example, the Chamber's order to the VWU to provide VWU Report 2912 and the appropriate annexes to the defence. Additionally, the Chamber permitted the parties and participants to submit applications for the admission into evidence of documents referred to in the Impugned Decision; thus giving the defence the opportunity—of which it has availed itself—to submit documents relating to Witnesses 168 and 179 for admission into evidence.

43. When deciding on the parameters of further investigation and exploration of issues raised by the Prosecution Submission, the Chamber considered the defence's arguments and submissions. Indeed, in exercising its discretion as to whether good cause had been shown justifying the recall of Witnesses 169 and 178, the Chamber noted the defence's submission that "disclosure of the requested information put into admissible form for reception into evidence, may well obviate the need for the recall of any witnesses."⁷⁸

44. The Chamber also notes the defence's allegation that the Chamber reached a "definitive" finding on whether collusion in fact occurred.⁷⁹ Contrary to the

⁷⁷ ICC-01/05-01/08-2938-Conf-Corr, paragraph 30.

⁷⁸ ICC-01/05-01/08-2924-Conf, paragraph 36.

⁷⁹ ICC-01/05-01/08-2932-Conf, paragraph 16.

defence's contention, the Chamber did not reach a "definitive" conclusion in the Impugned Decision as to whether or not there had been collusion between witnesses; rather, it merely found that "on the basis of the material before it [...] the defence's assertion regarding 'collusion' of witnesses is unsubstantiated".⁸⁰

45. As the defence has failed to identify any legal or factual error arising from the Impugned Decision, any further disagreement on the part of the defence in regard to the Second Sub-Issue constitute nothing more than a difference of opinion as to the Chamber's exercise of its discretion. As such, the Chamber does not consider the Second Sub-Issue to be an appealable issue arising out of the Impugned Decision.

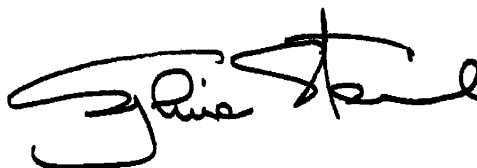
46. As none of the issues raised in the Request for Leave to Appeal constitute appealable issues under Article 82(1)(d) of the Statute and given that the requirements of Article 82(1)(d) are cumulative, the Chamber need not address the subsequent criteria set out in paragraph 16 above.

IV. Disposition

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

⁸⁰ ICC-01/05-01/08-2924-Conf, paragraph 34 (emphasis added).

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 11 December 2014

At The Hague, The Netherlands