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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 Reconsideration of the
'Decision on 'Defence request for recall of Witness P-178'", ICC-01/05-01/08-3186-
Conf"**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section Other**

Trial Chamber III ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, ("Bemba case") hereby issues the following Decision on "Defence Request for Reconsideration of the 'Decision on 'Defence request for recall of Witness P-178'', ICC-01/05-01/08-3186-Conf" ("Decision").

I. Background¹

1. On 4 November 2014, the Chamber issued its "Decision on 'Defence request for recall of Witness P-178" ("Decision 3186"),² in which it rejected the "Defence request for recall of Witness P-178" ("Recall Request").³ The Chamber found that "the defence has demonstrated no substantial change of circumstances warranting reconsideration of the Chamber's Decision 2924, or the existence of compelling and exceptional circumstances warranting an additional reopening of the presentation of evidence and the recall of Witness P-178".⁴ The Chamber held that "good cause" had not been shown and that it was "not convinced that the defence has demonstrated that recalling Witness P-178 would provide the Chamber with "fresh" evidence necessary for the determination of the truth".⁵

2. On 4 November 2014, the Victims and Witnesses Unit ("VWU") filed its "Victims

¹ In view of the number of submissions and findings related to the contacts of Witnesses P-169 and P-178 with other witnesses, the Chamber will confine its summary of the procedural background to documents directly relevant to the present Decision and refers back to the background detailed in its previous decisions on the matter, particularly that included in: "Decision on 'Prosecution's Information to Trial Chamber III on issues involving witnesses CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter' (ICC-01/05-01/08-3139-Conf)", 2 October 2014, ICC-01/05-01/08-3154-Conf (a public redacted version of that decision was filed on 10 October 2014, ICC-01/05-01/08-3154-Red); "Decision on 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure' (ICC-01/05-01/08-3159-Conf)", 21 October 2014, ICC-01/05-01/08-3167-Conf; and "Decision on 'Defence request for recall of Witness P-178'", 11 November 2014, ICC-01/05-01/08-3186-Conf.

² Decision on "Defence request for recall of Witness P-178", 4 November 2014, ICC-01/05-01/08-3186-Conf.

³ ICC-01/05-01/08-3186-Conf, paragraph 25 (i). See Defence request for recall of Witness P-178, 29 October 2014, ICC-01/05-01/08-3177-Conf.

⁴ ICC-01/05-01/08-3186-Conf, paragraph 20. See 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. ("Decision 2924").

⁵ ICC-01/05-01/08-3186-Conf, paragraphs 21 and 24.

and Witnesses Unit's Updated Report pursuant to Decisions ICC-01/05-01/08-3077-Conf and ICC-01/05-01/08-3154-Conf", in which it transmitted to the Chamber⁶ information it had received during [REDACTED].

3. On 5 November 2014, the defence filed its "Defence Request for Reconsideration of the 'Decision on 'Defence request for recall of Witness P-178'", ICC-01/05-01/08-3186-Conf" ("Reconsideration Request"),⁷ in which it asks that the Chamber reconsider its Decision 3186 and recall Witness P-178, on the grounds that:⁸

- i. New circumstances have arisen since the issuance of the Decision, which undermine the bases of the Chamber's conclusion; and
- ii. The Trial Chamber committed manifest errors of law by
 - a. Imposing an unduly high evidential threshold for the recall of P-178;
 - b. Issuing final findings on the issue of collusion before the Defence had submitted its observations on P-169, and outside the scope of the final judgment in this case; and
 - c. Relying on untested, unsworn information from VWU on matters concerning witness testimony.

4. The defence submits that Trial Chamber I has confirmed that decisions can be reconsidered if they are "manifestly unsound and their consequences are manifestly unsatisfactory",⁹ and that this Chamber has indicated that it can reconsider a decision upon the provision of new information.¹⁰

5. The defence contends that the filing of a VWU report subsequent to the issuance of Decision 3186 gives rise to new circumstances that undermine the bases of the

⁶ Victims and Witnesses Unit's Updated Report pursuant to Decisions ICC-01/05-01/08-3077-Conf and ICC-01/05-01/08-3154-Conf, 4 November 2014, ICC-01/05-01/08-3190-Conf and ICC-01/05-01/08-3190-Conf-Anx1.

⁷ Defence Request for Reconsideration of the "Decision on 'Defence request for recall of Witness P-178'", ICC-01/05-01/08-3186-Conf, 5 November 2014, ICC-01/05-01/08-3192-Conf.

⁸ ICC-01/05-01/08-3192-Conf, paragraphs 1 and 33.

⁹ ICC-01/05-01/08-3192-Conf, paragraph 2, citing Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, paragraph 18.

¹⁰ ICC-01/05-01/08-3192-Conf, paragraph 2, citing: ICC-01/05-01/08-T-42-Red2-ENG ET, pages 1 to 4.

Chamber's conclusion.¹¹ In particular, the defence notes that:¹²

- a. The Prosecution disclosed to them an additional [REDACTED];
- b. P-178 appears to attribute the letters to [REDACTED]
- c. At least [REDACTED] were involved, including [REDACTED] ; and
- d. He allegedly [REDACTED] , whom he will only name in Court.

The defence submits that (i) "there is thus indicia that [REDACTED] was more directly involved than he had conceded to VWU staff"; (ii) Witness P-178's account of how he obtained the [REDACTED] ("List") is relevant to his credibility as a witness of truth generally; (iii) "whether [REDACTED] is Intermediary 2 or not, there is a clear need to obtain further information concerning his interaction with witnesses"; and (iv) Witness P-178 is the best source of this information.¹³

6. The defence argues that regardless of whether there was "'collusion' between the 22 witnesses, the fact that P-169 and P-178 have been engaged in the activity of attempting to extort the ICC is an issue that goes to credibility".¹⁴ It contends that it should have had the right to put these issues to Witness P-178 during his testimony, but that it was prevented from doing so by the Chamber.¹⁵
7. In addition, the defence argues that, in denying the defence the opportunity to contact prosecution witnesses, the Chamber has deprived the defence of the ability to collect the "very evidence ... the Chamber appears to consider necessary to warrant a reopening" of the trial.¹⁶

8. The defence alleges that it is impossible to assess the veracity of Witness P-169's

¹¹ ICC-01/05-01/08-3192-Conf, paragraph 3.

¹² ICC-01/05-01/08-3192-Conf, paragraph 3 (citations omitted).

¹³ ICC-01/05-01/08-3192-Conf, paragraphs 4 to 8.

¹⁴ ICC-01/05-01/08-3192-Conf, paragraph 10.

¹⁵ ICC-01/05-01/08-3192-Conf, paragraphs 10 to 13.

¹⁶ ICC-01/05-01/08-3192-Conf, paragraph 14.

testimony regarding the letters he sent without hearing Witness P-178, in light of the fact that Witness P-169 attributed “all wrongdoing to P-178”.¹⁷

9. The defence further submits that in stating that “[i]t is satisfied that the testimony of Witness P-169, and the reports submitted by the prosecution and the VWU in relation to the alleged contacts between witnesses, is in line with the Chamber’s assessment that the defence’s allegations of collusion among witnesses called by the prosecution is unsubstantiated”,¹⁸ the Chamber predetermined a finding of fact before the defence was provided with the opportunity to make its submissions on the matter, bringing into question the Chamber’s impartiality.¹⁹
10. Lastly, the defence argues that the Chamber committed a manifest error of law in relying on untested, unsworn information from the VWU on matters concerning witness testimony.²⁰
11. On 6 November 2011, the legal representative filed her “Réponse de la Représentante légale des victimes à la ‘Defen[c]e Request for Reconsideration of the Decision on ‘Defen[c]e request for recall of Witness P-178’, ICC-01/05-01/08-3192-Conf’”, in which she requests that the Chamber reject the Reconsideration Request in its entirety.²¹ Maître Douzima submits that the VWU Report does not provide new circumstances allowing for a reconsideration of the Chamber’s decision not to recall Witness P-178.²² She further asserts that the Chamber has

¹⁷ ICC-01/05-01/08-3192-Conf, paragraphs 15 to 18.

¹⁸ ICC-01/05-01/08-3186-Conf, paragraph 22.

¹⁹ ICC-01/05-01/08-3192-Conf, paragraphs 19 to 23.

²⁰ ICC-01/05-01/08-3192-Conf, paragraphs 24 to 32.

²¹ Réponse de la Représentante légale des victimes à la ‘Defen[c]e Request for Reconsideration of the Decision on ‘Defen[c]e request for recall of Witness P-178’, ICC-01/05-01/08-3192-Conf”, 6 November 2014, ICC-01/05-01/08-3193-Conf.

²² ICC-01/05-01/08-3193-Conf, paragraphs 10 and 11.

not committed manifest errors of law and that the defence has not provided any new justification that the recall of Witness P-178 is necessary for the determination of the truth.²³ Finally, she asserts that the Reconsideration Request resembles another attempt to extend the present proceedings while the issues raised have already been addressed by the Chamber and have no legal basis.²⁴

12. On 7 November 2014, the prosecution filed its “Prosecution’s Response to Defence Request for Reconsideration of the ‘Decision on ‘Defence request for recall of Witness P-178’”, ICC-01/05-01/08-3186-Conf”,²⁵ in which it opposes the Reconsideration Request.²⁶ The prosecution submits that the Chamber committed no error of law, nor has any new circumstance arisen that would justify reconsideration.²⁷

II. Analysis and Conclusions

13. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered Articles 64(2) and (9)(a), 67, and 68(1), of the Statute and Rules 16 to 18 of the Rules of Procedure and Evidence (“Rules”).

Reconsideration

²³ ICC-01/05-01/08-3193-Conf, paragraph 12.

²⁴ ICC-01/05-01/08-3193-Conf, paragraph 13.

²⁵ Prosecution’s Response to Defence Request for Reconsideration of the “Decision on ‘Defence request for recall of Witness P-178’”, ICC-01/05-01/08-3186-Conf, 7 November 2014, ICC-01/05-01/08-3197-Conf. The Chamber notes that although the deadline for the prosecution to file its response was 16.00 on 6 November 2014 (Email sent by the Chamber at 15.32), the prosecution filed its response at 17.54 with no explanation as to the delay. While the Chamber will address the prosecution response in this specific case, it cautions the prosecution to ensure that it complies with all deadlines set by the Chamber in future, or inform the Chamber of the specific reasons justifying such delay. In addition, noting that there was an evacuation exercise shortly before the expiry of the deadline, considers that the delay was, in this case, plainly justifiable,

²⁶ ICC-01/05-01/08-3197-Conf, paragraph 2.

²⁷ ICC-01/05-01/08-3197-Conf, paragraph 2.

14. In the present decision, the Chamber is called upon to decide whether it can or should reconsider the conclusions reached in a previous decision. At the outset, the Chamber notes that reconsideration of decisions of Chambers of the Court finds no express basis in the Court's legal framework. However, as the Chamber has previously noted,²⁸ "a significant change in circumstances, or new and compelling reasons, may justify reconsideration of a decision".²⁹ Accordingly, the Chamber will analyse the defence's submission that new circumstances have arisen which undermine the Chamber's conclusion in Decision 3186.

New circumstances have arisen since the issuance of Decision 3186, which allegedly undermine the bases of the Chamber's conclusion

15. In Decision 3186, the Chamber held in key part that "the defence has demonstrated no substantial change of circumstances warranting reconsideration of the Chamber's Decision 2924, or the existence of compelling and exceptional circumstances warranting an additional reopening of the presentation of evidence and the recall of Witness P-178".³⁰ In its Reconsideration Request, the defence alleges that the following facts constitute "new circumstances" which undermine the bases of the Chamber's Decision 3186:

- (i) the prosecution disclosed a [REDACTED],
- (ii) Witness P-178 attributes the letters to [REDACTED],

²⁸ See, Decision on Defence Request for Notice, 12 June 2014, ICC-01/05-01/08-3089, 12 June 2014, paragraph 17.

²⁹ Decision on Defence Request for Notice, 12 June 2014, ICC-01/05-01/08-3089, 12 June 2014, paragraph 17. See also, ICC-01/05-01/08-T-42-CONF-ENG ET, page 4, lines 1 to 5; Decision on the defence request for leave to appeal the "Decision on disclosure by the defence", 8 May 2008, ICC-01/04-01/06-1313, paragraphs 23 to 24; Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, paragraphs 11 to 18; Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 13 December 2012, ICC-01/09-01/11-511, para 6; and Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863, paragraph 11.

³⁰ ICC-01/05-01/08-3186-Conf, paragraph 20.

(iii) [REDACTED] were involved including [REDACTED], and

(iv) Witness P-178 allegedly [REDACTED]³¹

16. For the basis of Decision 3186 to be undermined, the above information would need to be new information giving rise to “compelling and exceptional circumstances warranting an additional reopening of the presentation of evidence and the recall of Witness P-178”.³²

17. After having rejected the recall of both Witness P-169 and Witness P-178 in December 2013,³³ in October 2014 the Chamber found that there were “exceptional circumstances which warrant the reopening of the evidence and the recall of Witness P-169” based on allegations made by Witness P-169 in the 5 August 2014 Letter relating to the “subordination” of witnesses and “money transferred by the ICC prosecution”.³⁴ It was specifically in light of these allegations that the Chamber found there to be “exceptional circumstances” warranting the reopening of the evidence and the recall of Witness P-169.³⁵

18. However, in contrast to the above, the Chamber does not find the “new circumstances” identified in the Reconsideration Request to constitute “exceptional circumstances” or to demonstrate “good cause” to recall Witness P-178 to permit the presentation of “fresh” evidence.³⁶ The alleged “new circumstances” highlighted by the defence either minimally engage issues connected to the merits of the *Bemba* case or do not do so at all:

³¹ ICC-01/05-01/08-3192-Conf, paragraph 3.

³² ICC-01/05-01/08-3186-Conf, paragraph 20.

³³ ICC-01/05-01/08-2924-Conf, paragraphs 35 to 37, and 38 (vi).

³⁴ ICC-01/05-01/08-3154-Red, paragraphs 28 and 29.

³⁵ ICC-01/05-01/08-3154-Red, paragraph 29.

³⁶ See ICC-01/05-01/08-3154-Red, paragraphs 25 to 27 and ICC-01/05-01/08-3186-Conf, paragraph 18.

- a. On the information before the Chamber, the provision of a new telephone number of Witness P-178 does not appear to bear relevance to the substantive merits of the *Bemba* case or the question of whether good cause for his recall exists.
- b. That Witness P-178 appears to attribute the letters to [REDACTED] and indicated that "at least [REDACTED] were involved, including [REDACTED] and [REDACTED]", is not new information. This information was first mentioned in Filing 2827, which was provided to the defence on 7 November 2013.³⁷ The Chamber considers that on the information before it, the information included in Filing 3190 is not substantially different from the information referred to in Filing 2827, which was known by the Chamber at the time it rendered its Decisions 2924 and 3186 and decided against recalling Witness P-178.
- c. The defence also submits that there is a need to recall Witness P-178 due to an alleged link between "[REDACTED]" and witness testimony.³⁸ On this issue, the Chamber simply recalls its "Decision on 'Defence Request for Disclosure of Information concerning Intermediary 2' (ICC-01/05-01/08-3185-Conf)".³⁹ Moreover, the involvement of an "[REDACTED]" in post-testimony meetings is not new information; it has been known to the

³⁷ ICC-01/05-01/08-2827-Conf-Red, paragraph 15.

³⁸ ICC-01/05-01/08-3192-Conf, paragraph 7.

³⁹ Decision on "Defence Request for Disclosure of Information concerning Intermediary 2" (ICC-01/05-01/08-3185-Conf), 6 November 2014, ICC-01/05-01/08-3196-Conf, paragraph 25: "The defence submits that the Requested Information is relevant as there is "a clear nexus between P-73's initial testimony concerning [REDACTED], and P-169's complaints regarding the existence of witness subordination linked to the payment of financial expenses". However, Witness P-169 is not a so-called "dual status" individual. In addition, in his recent testimony Witness P-169 asserted that he met a person called "[REDACTED]" only once at a meeting held after his testimony at the seat of the Court for the purpose of discussing "loss of income". Furthermore, the Chamber clarifies that with the exception of Witness P-73, none of the dual status individuals called to testify in the proceedings was assisted by Intermediary 2 in the completion of their applications for participation."

defence since 7 November 2013⁴⁰ and was known by the Chamber at the time both Decisions 2924 and 3186 were taken.

- d. On the information before the Chamber, the fact that Witness P-178 “allegedly obtained the [REDACTED], whom he will only name in Court”,⁴¹ while being new information, does not have a bearing on the merits of the *Bemba* case, but is rather an issue of witness security to be addressed by the Registry and the VWU in light of their responsibilities in accordance with Rules 16 to 18 of the Rules. The defence’s assertion that “P-178’s account as to how he obtained the witness list is also an issue that goes to his credibility as a witness of truth”⁴² is not substantiated. In this regard, the Chamber notes that the defence’s allegation that information on post-testimony contact between witnesses was sufficient to demonstrate “good cause” justifying the recall of Witness P-178 has already been decided on by the Chamber in Decision 2924.⁴³ Noting that the existence of the List and the information that Witness P-178 was [REDACTED] was already known and taken into account in that decision, the Chamber does not consider, in view of the information before it, that more detailed information regarding the circumstances in which Witness P-178 obtained the List invalidates the Chamber’s decision that there exist no “exceptional circumstances” justifying the recall of Witness P-178.

19. For the above reasons, the Chamber considers that the “new circumstances” identified by the defence are not in fact “new”, or in any case do not undermine the conclusion reached in Decision 3186 that there are no exceptional

⁴⁰ ICC-01/05-01/08-2827-Conf-Red, paragraph 15.

⁴¹ ICC-01/05-01/08-3192-Conf, paragraph 3.

⁴² ICC-01/05-01/08-3192-Conf, paragraph 4.

⁴³ ICC-01/05-01/08-2924-Conf, paragraph 34 *et seq.*

circumstances warranting the recall of Witness P-178. Consequently, the defence has not demonstrated that there is new information justifying reconsideration of the Chamber's previous decision.

Reconsideration based on alleged errors of law

20. With respect to reconsideration based on errors of law, the Chamber again recalls that such reconsideration finds no express basis in the Court's legal framework. The Chamber notes the broader position adopted by Trial Chambers I and V,⁴⁴ and cited with apparent approval by Trial Chamber V(B),⁴⁵ that past decisions may be reconsidered when they are "manifestly unsound and their consequences are manifestly unsatisfactory". However, in the present circumstances the Chamber does not consider that the defence has demonstrated that interpreting into the Court's legal framework a procedure whereby decisions of a Chamber may be reconsidered on the basis of alleged errors of law, is justified or necessary.⁴⁶ The above notwithstanding, given the urgency of the matters at issue and the potential that prejudice may be caused to the proceedings if the Chamber does not clarify certain misconstructions of Decision 3186 by the defence, the Chamber will exceptionally address the defence's arguments as to *errors of law* which it argues warrant reconsideration of Decision 3186.

The Chamber allegedly applied an "unduly high evidential threshold for the recall of P178"

⁴⁴ ICC-01/04-01/06-2705, paragraph 18 and ICC-01/09-01/11-511, paragraph 6.

⁴⁵ See ICC-01/09-02/11-863, paragraph 11.

⁴⁶ While in agreement with the conclusion of the Chamber, Judge Ozaki considers that reconsideration is not dependent merely on the existence of new information, but rather chambers may reconsider their decisions in light of various circumstances, which all together render a decision manifestly unsound and its consequences manifestly unsatisfactory. In the present circumstances, however, Judge Ozaki finds, based on the analysis below, that the defence has not demonstrated that such other circumstances exist.

21. Firstly, the defence alleges that it suffered harm “as a result of the unjust and unfair confiscation of the August 2011 letter” by the Chamber, as this “deprived” the defence of the opportunity to put the contents of the letter⁴⁷ to Witness P-178 and all witnesses who testified after him.⁴⁸ However, the Chamber wishes to clarify that the defence was not “deprived” of the opportunity to put the contents of the August 2011 Letter to Witness P-178 or subsequent witnesses.
22. The August 2011 Letter was first filed on 29 August 2011, as a confidential annex to a confidential document.⁴⁹ On 9 September 2011, the Chamber reclassified the August 2011 Letter as confidential, *ex parte* prosecution and VWU only,⁵⁰ and ordered the VWU and the prosecution to prepare a confidential redacted version of the August 2011 Letter “that removes all sensitive information related to the security of witnesses and to VWU proceedings [i]n the field, which can be provided to the legal representatives and defence”.⁵¹ The legal representatives and defence were notified of the redacted version of the August 2011 Letter on 15 September 2011.⁵² The only period during which the defence did not have access to the August 2011 Letter was between 9 and 15 September 2011. Consequently, the defence had access to the August 2011 Letter between 29 August 2011 and 9 September 2011, i.e. throughout Witness P-178’s testimony,⁵³ and had access to a redacted version from 15 September 2011 onwards. The defence was thus in a

⁴⁷ ICC-01/05-01/08-1660-Conf-Exp-Anx1 (“August 2011 Letter”). Two lesser redacted versions were filed subsequently: ICC-01/05-01/08-1660-Conf-Anx1-Red and ICC-01/05-01/08-1660-Conf-Anx1-Red2.

⁴⁸ ICC-01/05-01/08-3192-Conf, paragraphs 11 to 13.

⁴⁹ Observations de Maître Zarambaud Assingambi, Représentant légal de[] victimes, sur la demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République démocratique du Congo, en date du 24 août 2011, 29 August 2011, ICC-01/05-01/08-1660-Conf. An unredacted version of the August 2011 letter was appended as confidential Annex 1.

⁵⁰ Decision on the prosecution’s application regarding a letter dated 6 August 2011, 9 September 2011, ICC-01/05-01/08-1727-Conf, paragraph 14(a).

⁵¹ ICC-01/05-01/08-1727-Conf, paragraph 14.

⁵² Prosecution’s Submission of the Redacted Version of ICC-01/05-01/08-1660-Conf-Anx1, 14 September 2011 (notified on 15 September 2011), ICC-01/05-01/08-1748-Conf and ICC-01/05-01/08-1660-Conf-Anx1.

⁵³ Witness P-178 testified between 30 August and 8 September 2011.

position to use the document during the questioning of Witness P-178 – and did in fact do so⁵⁴ – and of all witnesses who testified thereafter.⁵⁵

23. In light of the above, the defence allegation that “the burden should not be on the Defence to justify why recall is warranted, the burden should be on the Chamber to justify why they are not allowing recall to remedy the harm suffered by the Defence as a result of the unjustified and unfair confiscation of the August 2011 letter”⁵⁶ is wholly inappropriate, inaccurate, and devoid of merit.

24. Secondly, the defence argues that the Chamber set too high an “evidential threshold” as it “denied [the defence] the right to contact this limited pool of persons” and thereby “collect the very evidence, which the Chamber appears to consider necessary to warrant a reopening of the trial”.⁵⁷

25. The Chamber ordered the recall of Witness P-169 to hear his testimony relating to allegations relating to “subordination” of witnesses and “money transferred by the ICC prosecution”.⁵⁸ In Decision 3186, the Chamber rejected the recall of Witness P-178 on the basis that (i) the defence had identified no new substantive information showing “good cause” to recall Witness P-178, (ii) Witness P-178’s recall was not necessary to “check the credibility of Witness P-169, which the Chamber will assess against the entire record of the case”, and (iii) it remained unconvinced that *post-testimony contact between prosecution witnesses* showed “collusion” constituting “good cause” for recall.⁵⁹ The Chamber held that “good

⁵⁴ ICC-01/05-01/08-T-157-CONF-ENG-ET, page 52, line 8 to page 53, line 9.

⁵⁵ The Chamber notes that as Witness P-33 testified from 8 to 19 September 2011, the unavailability of any version of the August 2011 Letter between 9 and 15 September 2011 did not prevent the defence from using this document during its questioning of Witness P-33.

⁵⁶ ICC-01/05-01/08-3192-Conf, paragraph 13.

⁵⁷ ICC-01/05-01/08-3192-Conf, paragraph 14.

⁵⁸ ICC-01/05-01/08-3154-Red, paragraphs 28 and 29.

⁵⁹ ICC-01/05-01/08-3186-Conf, paragraphs 21 and 22.

cause” to recall Witness P-178 had not been shown because it was not convinced that information on the creation of the List and post-testimony contact between witnesses bore relevance to “collusion among witnesses”.⁶⁰ This contrasted with the Chamber’s position with respect to Witness P-169, who made allegations relating to “subordination” of witnesses and “money transferred by the ICC prosecution”.⁶¹ Thus, the Chamber did not reject the Recall Request on the basis of a failure on the part of the defence to meet an evidentiary threshold, but a failure to establish sufficient relevance for the purpose of demonstrating the existence of “exceptional circumstances” justifying the reopening of the presentation of evidence, as well as “good cause” justifying the recall of a witness.⁶² Accordingly, the defence’s contention that it was both required to and prevented from meeting an evidentiary threshold is totally unfounded.

26. Thirdly, the defence argues that “even on the evidence available from P-169’s recall, it is apparent that it is impossible to assess the veracity of P-169’s explanation for the letters without hearing from P-178”.⁶³ At the outset, a need to hear an “explanation for the letters” was not the “exceptional circumstance” which moved the Chamber to order Witness P-169’s recall; it was rather the allegations of “subordination” and “money transferred by the ICC prosecution”, which the Chamber found to warrant recall.⁶⁴ Further testimony as to the “explanation for the letters” would not shed further light on this issue.

27. In addition, the defence identifies no legal error in the Chamber’s reasoning. The defence reasserts that recalling Witness P-178 to testify in relation to the

⁶⁰ ICC-01/05-01/08-3186-Conf, paragraph 22.

⁶¹ ICC-01/05-01/08-3154-Red, paragraphs 28 and 29.

⁶² See ICC-01/05-01/08-3154-Red, paragraphs 25 to 27 and ICC-01/05-01/08-3186-Conf, paragraph 18.

⁶³ ICC-01/05-01/08-3192-Conf, paragraphs 15 to 18.

⁶⁴ ICC-01/05-01/08-3154-Red, paragraphs 28 and 29.

“explanation for the letters” is necessary for the Chamber’s determination of the truth and, after implying that the Chamber “is only interested in hearing evidence that rehabilitates Prosecution witnesses”,⁶⁵ argues that fairness dictates that Witness P-178 needs to be recalled to explore a discrepancy between the content of the letters Witness P-169 has sent and the testimony he gave wherein he seemed unclear as to the date on which he met Witness P-178, [REDACTED] and others.⁶⁶ In his letters, Witness P-169 stated that the meeting occurred in the month of March 2013.⁶⁷ The Chamber does not consider that the discrepancy between Witness P-169’s letters and his testimony identified by the defence is sufficient to constitute “exceptional circumstances” justifying the recall of Witness P-178. Indeed, the defence provides no explanation of its assertion.

28. In these circumstances, the Chamber sees nothing in the defence’s submissions to warrant reconsidering its conclusions in Decision 3186. Further, the Chamber cautions the defence against making such serious allegations regarding the conduct and fairness of the proceedings in such an unconsidered and factually unsubstantiated manner.

“The Trial Chamber committed a manifest error of law by issuing final findings on the issue of collusion before the Defence had submitted its observations on P169, and outside the scope of the final judgement in this case”

29. The defence argues that in stating that it “is satisfied that the testimony of Witness P-169, and the reports submitted by the prosecution and the VWU in relation to the alleged contacts between witnesses, is in line with the Chamber’s

⁶⁵ ICC-01/05-01/08-3192-Conf, paragraph 17.

⁶⁶ ICC-01/05-01/08-3192-Conf, paragraphs 16 and 17. See ICC-01/05-01/08-T-361-CONF-ENG ET, page 68, line 22, to page 69, line 15.

⁶⁷ See CAR-OTP-0072-0508-R02/EVD-T-D04-00057, at CAR-OTP-0072-0512-R02.

assessment that the defence's allegations of collusion among witnesses called by the prosecution is unsubstantiated",⁶⁸ the Chamber "made a final finding of fact in relation to the existence or not of collusion among witnesses ... before the Defence had been provided with an opportunity to file its submissions in relation to such matters".⁶⁹

30. This argument misconstrues the Chamber's position. The Chamber held that the testimony provided by Witness P-169 during his recall, alongside information from the prosecution and VWU, was in line with its position adopted in Decision 2924.⁷⁰ The Chamber's position in Decision 2924 was that allegations of "collusion" based exclusively upon *post-testimony* contact between prosecution witnesses were unsubstantiated for the purpose of demonstrating "good cause" justifying the recall of Witness P-178.⁷¹ The Chamber later explained that this was not a "'definitive' conclusion ... as to whether or not there had been collusion between witnesses"; rather, it was a finding that "on the basis of the material before it [...] the defence's assertion regarding 'collusion' of witnesses is unsubstantiated".⁷² Stating in Decision 3186 that the information before it did not alter this finding in no way predetermined the Chamber's position (i) on the credibility of any witnesses in this case, (ii) on allegations of "subordination" of witnesses in general, or (iii) on the additional submissions of the parties and the legal representative.⁷³ Indeed, this was made clear by the Chamber's finding that it was "not convinced that the recall of Witness P-178 is justified in order to

⁶⁸ ICC-01/05-01/08-3186-Conf, paragraph 22 (citations omitted).

⁶⁹ ICC-01/05-01/08-3192-Conf, paragraphs 19 to 23.

⁷⁰ ICC-01/05-01/08-3186-Conf, paragraph 22.

⁷¹ ICC-01/05-01/08-3186-Conf, paragraph 22.

⁷² ICC-01/05-01/08-2980-Conf, paragraph 44.

⁷³ Corrected version of "Prosecution's Additional Submissions to the Closing Brief regarding P-169, 31 October 2014, ICC-01/05-01/08-3182-Conf", 4 November 2014, ICC-01/05-01/08-3182-Conf-Corr; Conclusions additionnelles de la Représentante légale des victimes, 31 October 2014, ICC-01/05-01/08-3181-Conf; and Defence Supplemental Submissions arising from the further testimony of P-169, 7 November 2014, ICC-01/05-01/08-3200-Conf.

further check the general credibility of Witness P-169, which the Chamber will assess against the entire record of the case, in its determination pursuant to Article 74(2) of the Statute”.⁷⁴

31. For the above reasons, the Reconsideration Request is premised on a misconception that in taking a position on allegations of “collusion” based on post-testimony contact, the Chamber was also making a final finding of fact on other pending issues related to the testimony provided during Witness P-169’s recall; as this was not the case, the defence’s argument is without merit. In this regard, the Chamber reiterates that it will assess Witness P-169’s testimony and all related evidence against the entire record of the case, in its determination pursuant to Article 74(2) of the Statute.

“The Trial Chamber committed a manifest error of law by relying on untested, unsworn information from VWU on matters concerning witness testimony”

32. From the preceding discussion, it is clear that the Chamber did not take the decision on “matters concerning witness testimony” that the defence alleges it took.⁷⁵ The Chamber found that information provided by the VWU, alongside the testimony of Witness P-169 and information provided by the prosecution, did not alter its prior conclusion that allegations of collusion solely based upon post-testimony contact between witnesses were unsubstantiated for the purposes of demonstrating “good cause” justifying the recall of Witness P-178. For this reason, the allegation that the Chamber inappropriately relied on VWU reports to deny the recall of Witness P-178 is unfounded.

⁷⁴ ICC-01/05-01/08-3186-Conf, paragraph 21.

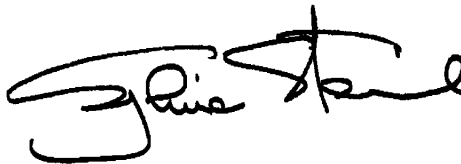
⁷⁵ ICC-01/05-01/08-3192-Conf, page 9 (e).

33. Finally, the Chamber notes that as a neutral organ of the Court, reports of the VWU are to be considered as being made neutrally and in good faith.

34. In view of the above, the Chamber hereby:

- a. REJECTS the defence request that the Chamber reconsider Decision 3186;
and
- b. REJECTS the defence's request that the Chamber order the recall of
Witness P-178.

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