

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 17 June 2015

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 Relief for Abuse of Process”

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"), issues the following Decision on "Defence Request for Relief for Abuse of Process" ("Decision").

I. Background and submissions

1. On 15 December 2014, the Defence of Jean-Pierre Bemba Gombo ("Defence") filed its "Defence Request for Relief for Abuse of Process" ("Abuse of Process Motion"),¹ in which it submits that, "[t]hrough a combination of different actions [...] the constituent elements of Mr. Jean Pierre Bemba Gombo's right to a fair, impartial and independent trial have been ruptured, irreparably" and requests that the Chamber stay the proceedings in the *Bemba* case and order the immediate release of Mr Bemba to Portugal or the Kingdom of Belgium.² Although not included in the "Relief sought",³ the Defence submits that "[e]ven if the threshold for issuing a permanent stay of proceedings has not been met [...] [g]iven that the violations have prolonged Mr. Bemba's detention, prejudiced the effectiveness of the Defence, and occasioned undue mental harm, then it would be appropriate as an alternative remedy for the Trial Chamber to grant interim release".⁴

¹ Defence Request for Relief for Abuse of Process, 15 December 2014, ICC-01/05-01/08-3217-Conf-Exp With Confidential *ex parte* Annexes I, II, III, X And Confidential Annexes IV, V, VI, VII, VIII, and IX. The defence filed on the same day a confidential redacted version, Confidential Redacted Version of Defence Request for Relief for Abuse of Process, ICC-01/05-01/08-3217-Conf-Red with Confidential *ex parte* Annexes I, II, III, X And Confidential Annexes IV, V, VI, VII, VIII, and IX. A public redacted version of the Defence Request was filed on 30 January 2015, Public Redacted Version of Defence Request for Relief for Abuse of Process, ICC-01/05-01/08-3217-Red2 With Confidential *ex parte* Annexes I, II, III, X and Public Redacted Annexes IV, V, VI, VII, VIII and Confidential Annex IX. The defence originally filed, on 11 November 2014, its Defence Request for Relief for Abuse of Process, ICC-01/05-01/08-3203-Conf-Exp with Confidential *ex parte* Annexes I to III and Confidential Annexes IV to IX. This was an 87-page filing with nine annexes. On 18 November 2014, the defence also filed its Addendum to Defence Request for Relief for Abuse of Process, ICC-01/05-01/08-3203, ICC-01/05-01/08-3207-Conf-Exp. In response, on 21 November 2014, the prosecution filed the Prosecution's Response to the Defence Request for an Extension of Page Limit, ICC-01/05-01/08-3209-Conf. On the 26 November 2014, the Chamber, in its Decision on defence request for an extension of the page limit, ICC-01/05-01/08-3210, *inter alia*, (i) rejected Documents 3203 and 3207 as non-compliant with Regulation 37(1) of the Regulations; and (ii) granted the defence an extension of the page limit up to 40 pages and instructed the defence to refile documents 3203 and 3207 in one consolidated filing.

² ICC-01/05-01/08-3217-Red2, paras 1 and 143.

³ ICC-01/05-01/08-3217-Red2, para 143.

⁴ ICC-01/05-01/08-3217-Red2, para. 142.

2. On 7 January 2015, the Office of the Prosecutor ("Prosecution") filed its "Prosecution Response to Refiled Defence Request for Relief for Abuse of Process (ICC-01/05-01/08-3217-Conf-Exp)" ("Prosecution Response" or "Response"),⁵ in which it requests that the Chamber dismiss the Abuse of Process Motion for failing to meet the threshold required to stay the proceedings.⁶
3. On 7 January 2015, the Legal Representative of the Victims ("Legal Representative") filed her "Réponse de la Représentante légale des victimes à la requête de la Défense 'Confidential Redacted Version of Defence Request for Relief for Abuse of Process – ICC-01/05-01/08-3217-Conf-Red'",⁷ in which she requests that the Chamber reject the Abuse of Process Motion in its entirety.⁸ As to the request for a stay of proceedings, Me Douzima argues that it is based on a disagreement with the Chamber's previous decisions and that granting it would be prejudicial to the right of the victims for the trial to take place within a reasonable time.⁹ As to the request for provisional release, the Legal Representative argues that it is devoid of legal basis and should not be considered by the Chamber.¹⁰
4. On 26 January 2015, the Defence filed its "Defence Reply for the Abuse of Process Motion" ("Defence Reply" or "Reply"),¹¹ in which it submits that the Prosecution

⁵ Prosecution Response to Refiled Defence Request for Relief for Abuse of Process (ICC-01/05-01/08-3217-Conf-Exp), 7 January 2015, ICC-01/05-01/08-3229-Conf-Exp with Confidential, *ex parte*, only available to Prosecution and Defence Annex A. A confidential redacted version was filed on 16 January 2015, Confidential Redacted version of "Prosecution Response to Refiled Defence Request for Relief for Abuse of Process", 07 January 2015, (ICC-01/05-01/08-3229-Conf-Exp), ICC-01/05-01/08-3229-Conf-Red, with Confidential *ex parte*, only available to Prosecution and Defence Annex A. A public redacted version was filed on 30 January 2015, Public Redacted version of "Prosecution Response to Refiled Defence Request for Relief for Abuse of Process", 07 January 2015, (ICC-01/05-01/08-3229-Conf-Exp), ICC-01/05-01/08-3229-Red2, with Confidential *ex parte*, only available to Prosecution and Defence Annex A. Pursuant to Trial Chamber III's instructions from 3 February 2015, the Annex A Document was reclassified as Public: ICC-01/05-01/08-3229.

⁶ ICC-01/05-01/08-3229-Red2, paras 9 and 73.

⁷ Réponse de la Représentante légale des victimes à la requête de la Défense "Confidential Redacted Version of Defence Request for Relief for Abuse of Process – ICC-01/05-01/08-3217-Conf-Red", 7 January 2015, ICC-01/05-01/08-3228-Conf.

⁸ ICC-01/05-01/08-3228-Conf, page 11.

⁹ ICC-01/05-01/08-3228-Conf, paras 22 and 23.

¹⁰ ICC-01/05-01/08-3228-Conf, para. 26.

¹¹ Defence Reply for Abuse of Process Motion, 26 January 2015, ICC-01/05-01/08-3239-Conf-Exp with Confidential *Ex parte* Prosecution and Defence Annexes A, B and Confidential Annex C. A confidential redacted version was filed on 26 January 2015, Confidential Redacted Version of Defence Reply for the Abuse

Response merely confirms that there has been an “egregious abuse of process” and that, unless the case is stayed, there will remain an appearance that justice was not served and that there was not an adversarial trial.¹² Consequently, it reiterates its request for the proceedings to be stayed and Mr Bemba released to Belgium or Portugal.¹³

II. Analysis

5. For the purpose of ruling on the Abuse of Process Motion and in accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered Articles 21(3), 54(1), 55, 57, 64, 67, 68, and 70 of the Statute, Rules 73, 77, 81(1) and (2), and 87 of the Rules and Regulation 42 of the Regulations of the Court.

1. Threshold for a stay of proceedings

Submissions

6. The Defence submits that a stay of proceedings is mandated “if the constituent elements of a fair trial have disappeared, and there is insufficient indication that this will be resolved during the trial process”.¹⁴ In addition, the Defence argues that a request for a stay of proceedings is a measure of “last resort” which inherently requires the Defence to first request alternative measures.¹⁵ However, the Defence stresses that, “if the cumulative impact of the Chamber’s rejection of

of Process Motion, ICC-01/05-01/08-3239-Conf-Red, with Confidential *Ex parte* Prosecution and Defence Annexes A and B, Confidential Annex C. A public redacted version of the Defence Reply was issued on 30 January 2015: Public Redacted Version of Defence Reply for the Abuse of Process Motion, ICC-01/05-01/08-3239-Red2, with Confidential *Ex parte* Prosecution and Defence Annexes A and B, Confidential Annex C. *See also* Defence Request for a Hearing and for Leave to Reply to the Prosecution Response to Defence Request for Relief for Abuse of Process, 14 January 2015, ICC-01/05-01/08-3231-Conf-Exp (A public redacted version was filed on 9 February 2015, Public Redacted Version of Defence Request for a Hearing and for Leave to Reply to the Prosecution Response to Defence Request for Relief for Abuse of Process, ICC_01/05-01/08-3231-Red); and Decision on “Defence Request for Hearing and Leave to Reply to the Prosecution Response to Defence Request for Relief for Abuse of Process”, 19 January 2015, ICC-01/05-01/08-3233.

¹² ICC-01/05-01/08-3239-Red2, paras 1 to 4.

¹³ ICC-01/05-01/08-3239-Red2, para. 49.

¹⁴ ICC-01/05-01/08-3217-Red2, para. 138.

¹⁵ ICC-01/05-01/08-3217-Red2, para. 138.

such individual requests is that ‘no fair trial can be held, the object of the judicial process is frustrated and the process **must** be stopped’”.¹⁶

7. In its response, the Prosecution argues that the Abuse of Process Motion does not meet the “high threshold” for a stay of the proceedings.¹⁷ In particular, the Prosecution submits that it fails to establish that a continuation of the proceedings “would be repugnant to the administration of justice”, or that “it is impossible for the trial to be fair”.¹⁸ The Prosecution states that a permanent stay of proceedings is a “drastic” and “exceptional” measure, “which may potentially frustrate the delivery of justice [...] and affect the broader purposes expressed in the preamble to the Rome Statute”.¹⁹ Therefore, the Prosecution submits that prejudice must at least be shown to the good conscience or integrity of the trial process.²⁰

Analysis

8. While the Statute does not expressly provide for a stay of proceedings as a remedy for an abuse of process, the jurisprudence of the Court has confirmed the availability of a stay of proceedings in certain circumstances.
9. The Appeals Chamber held that Article 21(3) “makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights”,²¹ and stated that:²²

Where [a] fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done.

¹⁶ ICC-01/05-01/08-3217-Red2, para. 138 (emphasis in original and citations omitted).

¹⁷ ICC-01/05-01/08-3229-Red2, paras 9 and 15.

¹⁸ ICC-01/05-01/08-3229-Red2, paras 9 and 15.

¹⁹ ICC-01/05-01/08-3229-Red2, para. 15.

²⁰ ICC-01/05-01/08-3229-Red2, para. 15.

²¹ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paras 36 and 37.

²² ICC-01/04-01/06-772, paras 37 and 39.

A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.

[...]

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.

This approach has been followed by a number of Chambers of the Court.²³

10. Not every infraction of the law or breach of the rights of the Accused will justify a stay of proceedings.²⁴ A stay of the proceedings is an “exceptional” and “drastic” remedy, as halting the proceedings “potentially frustrate[s] the objective of the trial of delivering justice [...] as well as affecting the broader purposes expressed in the preamble to the Rome Statute”.²⁵ Consequently, a stay of proceedings is only justified where the situation is such that it is “impossible to piece together

²³ Public redacted “Decision on the ‘Defence Request for Termination of Proceedings’”, 30 January 2014, ICC-02/05-03/09-410, para. 27; Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013, ICC-01/09-02/11-868-Red, para. 14; Decision on Defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, paras 74 and 75; Decision on the Defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paras 78, 81, 82, and 83; Decision on the “Defence request for a permanent stay of proceedings”, 1 July 2011, ICC-01/04-01/10-264, page 4; Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 March 2011, ICC-01/04-01/06-2690-Red2, paras 160, 164, and 166; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010, ICC-01/04-01/06-2582, para. 55; Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paras 252 and 253; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the Prosecution of the Accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, paras 77 and 78; and Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the Prosecution of the Accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 90.

²⁴ ICC-01/04-01/06-772, para. 30. *See also*, ICC-01/09-02/11-868-Red, para. 14; ICC-01/09-02/11-728, para. 77; ICC-01/04-01/10-264, page 4; and ICC-01/04-01/06-2690-Red2, paras 162 and 195.

²⁵ ICC-01/04-01/06-2582, para. 55. *See also*, ICC-01/09-02/11-868-Red, para. 14; ICC-01/09-02/11-728, para. 77; ICC-02/05-03/09-410, paras 78 and 80; ICC-01/04-01/10-264, page 5; ICC-01/04-01/06-2690-Red2, paras 162, 165, and 168; and ICC-01/04-01/06-772, para. 31. *See also*, ICC-01/04-01/06-2582, para. 60; ICC-01/09-02/11-728, paras 77 and 78; ICC-02/05-03/09-410, para. 79; and ICC-01/09-02/11-868-Red, para. 14.

the constituent elements of a fair trial”,²⁶ and “it would be ‘repugnant’ or ‘odious’ to the administration of justice to allow the case to continue”.²⁷

11. In determining whether this standard is met, it is not necessary that the Prosecution be found to have acted in bad faith.²⁸ Furthermore, in deciding whether the requisite threshold is satisfied, trial chambers enjoy “a margin of appreciation” based on their “intimate understanding of the process”.²⁹

2. Defence Allegations

Submissions

12. According to the Defence, in exercising its powers under Article 70, the Prosecution did not comply with its duty under Article 54(1)(c) to ensure that its investigations and prosecutorial actions were consistent with Mr Bemba’s right to a fair trial.³⁰ The Defence groups its submissions into four main allegations, stating that the Prosecution:

- (i) requested States to perform actions which violated the privileges and immunities of the Defence (“First Allegation”);³¹
- (ii) received privileged information concerning Defence strategy and instructions from Mr Bemba, internal work product and *ex parte* information (“Second Allegation”);³²

²⁶ ICC-01/04-01/06-772, para. 39. *See also*, ICC-01/09-02/11-728, para. 76; ICC-02/05-03/09-410, paras 79 and 80; ICC-01/04-01/06-2582, para. 55; ICC-01/04-01/06-1486, para. 78; and ICC-01/04-01/06-1401, paras 90 and 91.

²⁷ ICC-01/04-01/06-2690-Red2, para. 195; ICC-01/09-02/11-868-Red, para. 14; and ICC-01/09-02/11-728, para. 77.

²⁸ ICC-01/04-01/06-1401, para. 90. *See also*, ICC-01/09-02/11-868-Red, para. 14; and ICC-01/09-02/11-728, para. 76.

²⁹ ICC-01/04-01/06-1486, para. 84; ICC-02/05-03/09-410, para. 86; ICC-01/04-01/06-2690-Red2, para. 167; and ICC-01/04-01/06-2582, para. 56.

³⁰ ICC-01/05-01/08-3217-Red2, paras 4 and 6.

³¹ ICC-01/05-01/08-3217-Red2, paras 7 and 22 to 39.

³² ICC-01/05-01/08-3217-Red2, paras 7 and 40 to 90.

- (iii) employed “sharp trial tactics” by failing to disclose information concerning the credibility of Defence witnesses and evidence, and failing to put its case to these witnesses (“Third Allegation”);³³ and
- (iv) repeatedly attempted to contaminate the ability of the Trial Chamber to adjudicate the case impartially (“Fourth Allegation”) (together “Allegations”).³⁴

13. The Defence argues that the requirements for a stay of proceedings have been met, because: (i) the constituent elements of a fair trial have been destroyed;³⁵ and (ii) the Chamber’s prior rulings have in themselves satisfied the second criterion that this will not be resolved during the trial process, as the Defence has attempted to utilise the trial process to minimise or remedy the violations but has been unable to do so.³⁶ The Defence further alleges that “there is no basis upon which an outsider could reasonably comprehend that Mr. Bemba would receive a fair trial before the present Trial Chamber, and no prospect that the deficiencies will or could be corrected”.³⁷ The Defence argues that, the cumulative and protracted nature of the violations have irreparably eliminated the notion of equality of arms, Mr Bemba’s right to silence and privilege against self-incrimination, and Mr Bemba’s right to be judged in an impartial manner.³⁸ In addition, the Defence submits that it would be contrary to Mr Bemba’s right to expeditious proceedings to order a retrial.³⁹

14. The Defence further argues that the Prosecution aggravated its conduct by withholding relevant information and providing the Chamber with misleading information, which had a significant influence on the Chamber’s decisions and

³³ ICC-01/05-01/08-3217-Red2, paras 7 and 91 to 95.

³⁴ ICC-01/05-01/08-3217-Red2, paras 7 and 96 to 112.

³⁵ ICC-01/05-01/08-3217-Red2, paras 1 and 8.

³⁶ ICC-01/05-01/08-3217-Red2, para. 138.

³⁷ ICC-01/05-01/08-3217-Red2, para. 139.

³⁸ ICC-01/05-01/08-3217-Red2, para. 140.

³⁹ ICC-01/05-01/08-3217-Red2, para. 141.

prevented the Defence from assessing the extent of prejudice or from seeking timely relief.⁴⁰ The Defence argues that Mr Bemba has been denied any effective remedy for these violations.⁴¹

15. The Prosecution submits that Mr Bemba has had a fair trial.⁴² In particular, it argues that the Defence has failed to substantiate its claim that Mr Bemba has suffered or is suffering prejudice in the *Bemba* case.⁴³ It contends that “[t]he attempt by the Defence to recast a collection of individual incidents and complaints, each adjudicated or debunked during the course of trial, as a narrative of misconduct, bias, or impropriety is false and unpersuasive”.⁴⁴ The Prosecution argues that the Abuse of Process Motion is manifestly ill-founded and based on complaints which: (i) are incorrect, distortive, or speculative;⁴⁵ and (ii) seek reconsideration of arguments addressed in previous decisions of the Chamber or ignore those decisions entirely, including those designed to protect Mr Bemba’s right to a fair trial.⁴⁶

16. The Prosecution argues that whether individually or cumulatively, the Abuse of Process Motion fails to show any prejudice to the integrity of this trial, or indeed to Mr Bemba’s rights to equality of arms, to the protection against self-incrimination, and to a fair and impartial hearing.⁴⁷ The Prosecution also argues that certain Defence arguments are immaterial to the proceedings before the Chamber.⁴⁸

⁴⁰ ICC-01/05-01/08-3217-Red2, para. 113 to 127.

⁴¹ ICC-01/05-01/08-3217-Red2, paras 128 to 142.

⁴² ICC-01/05-01/08-3229-Red2, paras 2 and 9.

⁴³ ICC-01/05-01/08-3229-Red2, paras 14 and 15.

⁴⁴ ICC-01/05-01/08-3229-Red2, para. 3.

⁴⁵ ICC-01/05-01/08-3229-Red2, paras 10, 13, and 17.

⁴⁶ ICC-01/05-01/08-3229-Red2, paras 4, 10, 11, 16, and 18.

⁴⁷ ICC-01/05-01/08-3229-Red2, para. 16.

⁴⁸ ICC-01/05-01/08-3229-Red2, para. 17.

Analysis

17. At the outset, the Chamber notes that throughout its Abuse of Process Motion the Defence raises a number of arguments related to the legality or propriety of measures conducted in the Prosecution's investigation related to offences under Article 70 of the Statute ("Article 70 Investigation") and in case ICC-01/05-01/13. In this regard, the Chamber recalls its prior decisions and reiterates that it is not competent to make any determinations as to the legality or propriety of such measures and that it would be inappropriate for this Chamber to intervene in order to review measures conducted with the authorisation and under the supervision of the Single Judge of Pre-Trial Chamber II.⁴⁹ Accordingly, submissions as to the legality or propriety of such measures do not, *in themselves*, fall within this Chamber's competence and the Chamber will not analyse them or review the legality or propriety of the relevant measures.

18. However, while it will not review the legality or propriety of measures conducted in the Article 70 Investigation or in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ("case ICC-01/05-01/13"), the Chamber reiterates that it is bound by the duty to ensure full respect for the fundamental rights of the Accused, including his right to a fair trial in the *Bemba* case.⁵⁰ In the present context, the Chamber is presented with a request to stay the proceedings as a result of measures, taken at least partly within the context of a separate case before the Court, which the Defence alleges constitute an abuse of process. In this situation, the Chamber must assess, irrespective of the legality or propriety of the measures themselves, whether the Defence has demonstrated that the Accused's right to a fair trial in the Bemba case has been violated, prejudiced, or infringed

⁴⁹ ICC-01/05-01/08-3059, paras 15 and 16; ICC-01/05-01/08-3080, paras 35 and 41; and ICC-01/05-01/08-3101, paras 21, 22, and 26. *See also*, ICC-01/05-01/08-2606-Red, para. 21.

⁵⁰ *See* ICC-01/05-01/08-3059, para. 18; and ICC-01/05-01/08-3101, para. 23.

such that it is “impossible to piece together the constituent elements of a fair trial” and would be “‘repugnant’ or ‘odious’ to the administration of justice to allow the case to continue”.⁵¹ The Chamber will follow this approach throughout its analysis of the Defence’s Allegations.

a) First Allegation

Submissions

19. In its First Allegation, the Defence argues that the Prosecution requested States to perform actions which violated Defence privileges and immunities. It submits that such privileges and immunities “go to the heart” of the ability of the Defence to “perform its functions in an independent manner, which is also consistent with Defence confidentiality, as set out in Article 67(1)(b) and (g) and Rule 73(1)”.⁵² The Chamber understands the First Allegation to be restricted to addressing alleged prejudice caused by violations of the Defence’s privileges and immunities vis-à-vis *States*, as opposed to alleged violations of the Accused’s right to privileged communication vis-à-vis, *inter alia*, the Prosecution, which is dealt with under the Second Allegation.

20. The Defence argues that the principle of “[i]nviolability of Defence information” ensures the protection of Defence witnesses and investigations from arbitrary interference from national authorities.⁵³ If this principle is not respected, the Defence submits, the confidence of potential witnesses concerning the confidentiality of their interactions with the Defence will be eroded and witnesses and sources will be exposed to risk.⁵⁴

⁵¹ See para. 10 above.

⁵² ICC-01/05-01/08-3217-Red2, para. 22.

⁵³ ICC-01/05-01/08-3217-Red2, para. 25.

⁵⁴ ICC-01/05-01/08-3217-Red2, para. 25.

21. The Defence makes a large number of submissions as to the legality or propriety of measures taken in Article 70 Investigation relating to privilege and immunities.⁵⁵
22. The Defence also notes that, from 2012 onwards, the Prosecution was aware of unlawful violations of Defence immunities committed by certain national authorities;⁵⁶ however, no inquiries were carried out into these matters despite Defence requests.⁵⁷ The Defence submits that instead of condemning these acts and investigating the perpetrators, the Prosecution requested the very same “implicated” States to undertake illegal activities as part of the Article 70 investigation.⁵⁸ Additionally, the Defence submits that the Prosecution “widened the net” to other States through requests for the transmission of (i) financial records and information, (ii) the content of email accounts, and (iii) records of telephone communications, all concerning Defence team members, protected witnesses, or persons related to them.⁵⁹ While, the Defence submits, this violated the Chamber’s protective measures and compromised the confidentiality and security of the Defence, the Prosecution did not “seek a judicial variation of the protective measures or consult with the VWU in order to ensure that the execution of such requests would not endanger or prejudice the witnesses’ security”.⁶⁰
23. The Defence submits that “[i]n the absence of an explicit waiver of Defence immunity, the principle of inviolability of the information fully stands, and the information must be returned to the Defence”.⁶¹ However, the Defence argues

⁵⁵ ICC-01/05-01/08-3217-Red2, paras 23 and 31 to 36; ICC-01/05-01/08-3217-Conf-Exp, para. 114; and ICC-01/05-01/08-3229-Conf-Exp, para. 63.

⁵⁶ ICC-01/05-01/08-3217-Red2, paras 26 to 29. Including incidents involving Cameroonian, French, Belgian and Congolese authorities.

⁵⁷ ICC-01/05-01/08-3217-Conf-Exp, paras 27 and 28.

⁵⁸ ICC-01/05-01/08-3217-Red2, para. 30.

⁵⁹ ICC-01/05-01/08-3217-Conf-Exp, para. 30.

⁶⁰ ICC-01/05-01/08-3217-Red2, para. 37.

⁶¹ ICC-01/05-01/08-3217-Red2, para. 38.

that the Prosecution placed “the fruits of its illegal investigation” before the Chamber and used the same information as the basis for subsequent requests to obtain access to confidential Defence information.⁶²

24. Lastly, the Defence submits that the Chamber has a positive obligation to take measures to ensure the confidentiality of Defence information, and that the principle of equality of arms requires that the same level of concern be applied to Defence witnesses as Prosecution witnesses.⁶³ However, the Defence submits that the Prosecution’s abusive conduct has shielded such matters from adversarial scrutiny and judicial oversight, ensuring that this would not be the case.⁶⁴

25. In response to these allegations, the Prosecution submits that neither the functional immunity of the Defence nor legal professional privilege have been violated, that the Defence misapprehends the scope of both, and that the Defence “consistently overlooks the extensive body of decisions by which the Trial Chamber, the Single Judge, and other judicial organs have supervised the conduct of the investigation”.⁶⁵

26. Similarly to the Defence, the Prosecution makes detailed submissions as to the propriety and legality of measures taken in the Article 70 Investigation or in case ICC-01/05-01/13 relating to privilege and immunities.⁶⁶

27. In its Reply, the Defence again makes a number of submissions as to the propriety and legality of measures taken in the Article 70 Investigation relating to privilege and immunities.⁶⁷ In addition, with respect to the disclosure of confidential information concerning witnesses, the Defence submits that “it

⁶² ICC-01/05-01/08-3217-Red2, para. 38.

⁶³ ICC-01/05-01/08-3217-Red2, para. 39.

⁶⁴ ICC-01/05-01/08-3217-Red2, para. 39.

⁶⁵ ICC-01/05-01/08-3229-Red2, para. 19.

⁶⁶ ICC-01/05-01/08-3229-Red2, paras 20 to 26.

⁶⁷ ICC-01/05-01/08-3239-Red2, paras 17 to 27.

would be completely unfair and discriminatory to apply a higher threshold as concerns the Chamber's assessment of the risk which has resulted to the Defence", than it applied to the Prosecution.⁶⁸

Analysis

28. At the outset, the Chamber notes that in its First Allegation, the Defence contends that the Prosecution infringed Mr Bemba's right to a fair trial by requesting States to perform actions which violated Defence privileges and immunities. With respect to the question of whether the activities of which it complains satisfy the requirements for ordering a stay of proceedings, the Defence asserts, relying on jurisprudence from the ICJ,⁶⁹ that it is unnecessary for it to demonstrate the impact of a breach of privileges or immunities, and that it has "a right to a remedy *whenever* privileges and immunities are breached".⁷⁰

29. The Chamber questions whether principles set out in a case concerning responsibility and reparations *between States* can be directly transposed to the very different question of whether alleged breaches of Defence counsel immunities justify a stay of proceedings before this Court. This notwithstanding, the Chamber is not persuaded that the case the Defence cites supports the proposition that no "impact" need be demonstrated when seeking a remedy for alleged breaches of privileges or immunities. In the cited case, the ICJ held that Iran had breached its obligations under international law and that the consequence of this was an obligation to "make reparation *for the injury thereby caused* to the United States".⁷¹ It did not state that a right to a remedy arises

⁶⁸ ICC-01/05-01/08-3239-Red2, para. 24.

⁶⁹ ICJ, *Case concerning United States diplomatic and consular staff in Tehran (United States of America v. Iran)*, Judgement of 24 May 1980.

⁷⁰ ICC-01/05-01/08-3239-Conf-Red2, para. 24.

⁷¹ ICJ, *Case concerning United States diplomatic and consular staff in Tehran (United States of America v. Iran)*, Judgement of 24 May 1980, para. 90 (emphasis added).

whenever privileges and immunities are breached irrespective whether any impact or injury is shown.

30. Indeed, the Chamber finds the contrary to be true: a motion alleging abuse of process and requesting a stay of proceedings must be properly substantiated.⁷² This is made particularly clear by the fact that even when it is demonstrated that there has been an infraction of the law or a violation of the Accused's rights, this alone does not necessarily justify the imposition of a stay of proceedings.⁷³ What must be demonstrated, irrespective of whether there is shown to be a violation of the Accused's rights, is that it is "impossible to piece together the constituent elements of a fair trial" and that it would be "'repugnant' or 'odious' to the administration of justice to allow the case to continue".⁷⁴ The Chamber considers that making this demonstration in the absence of substantiation as to the impact of the alleged violations on the Accused's right to a fair trial is manifestly implausible.

31. In addition, the Defence argues that the Chamber "order[ed]" an investigation into the disclosure of confidential information concerning Prosecution witnesses on the basis of *ex parte* and unverified information.⁷⁵ It argues that it "would be completely unfair and discriminatory to apply a higher evidential threshold as concerns the Chamber's assessment of the risk which has resulted to the Defence".⁷⁶ The Defence apparently relies on these submissions as further support for its assertion that the Chamber should grant a stay of proceedings even if the Defence demonstrates no impact of the alleged violations. However, the Chamber does not consider that any meaningful comparison can be made between (i) a statement made in a status conference related to protected witness

⁷² See ICC-01/04-01/06-2690-Red2, para. 169; and ICC-02/05-03/09-410, para. 90.

⁷³ See para. 10 above.

⁷⁴ See para. 10 above.

⁷⁵ ICC-01/05-01/08-3239-Conf-Red, para. 24.

⁷⁶ ICC-01/05-01/08-3239-Red2, para. 24.

information having potentially been made public and (ii) a decision on a request for a stay of proceedings for abuse of process related to the transfer of information by States to the Prosecution. As such, the Chamber finds these submissions to provide no support to the proposition that no impact of alleged violations need be shown in a request for a stay of proceedings.

32. Turning to the substance of the First Allegation, despite submitting that demonstrating the impact of the alleged violations on the trial process is not required and predominantly focusing on the legality of measures taken in the Article 70 Investigation,⁷⁷ a number of the Defence's submissions do address issues which relate to allegedly prejudicial impacts on the fairness of the trial in the *Bemba* case and which are relevant to the Chamber's analysis. The Defence submits that:⁷⁸ (i) privileges and immunities "go to the heart of the ability of the Defence to perform its work";⁷⁹ (ii) eroding the principle of the inviolability of Defence information would "erode the confidence of potential witnesses and sources that their cooperation with the Defence will remain strictly confidential, and expose actual witnesses and sources to risk";⁸⁰ (iii) "breaches of Defence immunities could create a risk for Defence witnesses, and deter persons from cooperating with the Defence" and refers to a number of alleged violations of Defence immunities and intimidation of Defence witnesses;⁸¹ (iv) the involvement of certain authorities in the accessing of Defence information "compromised the confidentiality and security of the Defence" and its witnesses;⁸² and (v) the Chamber should have applied the same concern to the

⁷⁷ See para. 21 above.

⁷⁸ The Chamber also notes that the Defence refers to the Prosecution having "put the fruits of its illegal investigation squarely before the Trial Chamber", ICC-01/05-01/08-3217-Red2, para. 38. The Chamber will assess whether such actions caused prejudice in the *Bemba* case in its analysis of the Fourth Allegation.

⁷⁹ ICC-01/05-01/08-3217-Red2, para. 22.

⁸⁰ ICC-01/05-01/08-3217-Red2, para. 25.

⁸¹ ICC-01/05-01/08-3217-Conf-Exp, para. 28.

⁸² ICC-01/05-01/08-3217-Red2, para. 37.

protection of Defence witnesses and those of the Prosecution, but was precluded from so doing by the Prosecution's conduct.⁸³

33. However, the Defence at no point substantiates how the above factors entail the conclusion that it is "impossible to piece together the constituent elements of a fair trial" or that it would be "'repugnant' or 'odious' to the administration of justice to allow the case to continue".⁸⁴ The Defence fails to substantiate or explain how the Prosecution's actions vis-à-vis States, or the actions of States themselves, would entail the conclusion that the Chamber is incapable of fairly rendering its final judgement. This could have been done, for example, by setting out and explaining irreparable deficiencies in the presentation of the Defence's evidence in the *Bemba* case caused by violations of immunity resulting from requests made by the Prosecution to States or witnesses' loss of confidence that their cooperation with the Defence would remain confidential. The Defence fails to provide any such substantiation, instead providing general submissions as to the relationship between (i) privileges and immunities and (ii) the ability of the Defence to carry out its work confidentially and securely. This falls far short of demonstrating or substantiating the existence or risk of prejudice to the fairness of the *Bemba* case or justifying a request for the "exceptional" and "drastic" remedy of a stay of proceedings.

34. In addition to the above, with respect to the Defence's allegation that the Chamber had a "positive obligation to take measures" to ensure the confidentiality of Defence information but was precluded from doing so by the Prosecution's "abusive conduct", the Chamber considers this to be an assertion that the Chamber should have reviewed measures ordered or authorised by the Single Judge in the Article 70 Investigation.⁸⁵ The Chamber reiterates that it is not

⁸³ ICC-01/05-01/08-3217-Red2, para. 39.

⁸⁴ See para. 10 above.

⁸⁵ ICC-01/05-01/08-3217-Red2, para. 39.

competent to do so and finds that this submission provides no further information relevant to its analysis of whether the threshold for a stay of proceedings is satisfied.

b) Second Allegation

Submissions

35. In its Second Allegation, the Defence submits that Mr Bemba's right to maintain privileged communications with his Defence team has been rendered meaningless and that the Prosecution team in this case has enjoyed virtually unfettered access to communications between Mr Bemba and his former lead counsel and case manager.⁸⁶ In the argument of the Defence, the Prosecution has received and is continuing to receive, at a minimum: (i) "[p]rivileged internal work product, which had been communicated to potential witnesses under conditions of confidentiality"; and (ii) "[p]rivileged communications between Mr. Bemba and members of his Defence team, and between such Defence team members" transmitted to it by both the Independent Counsel⁸⁷ and the detention unit.⁸⁸ In addition, the Defence submits that this was aggravated by the Prosecution (i) "misinform[ing] the Appeals Chamber by claiming that 'staff members working on the Main Case do not access the Mangenda's conversations audio recorded by the Registry'";⁸⁹ and (ii) repeatedly claim[ing] that it did not have access to privileged information, an assertion that was relied upon by the Chamber when rejecting the Defence request for interim relief, but which the

⁸⁶ ICC-01/05-01/08-3217-Red2, para. 40.

⁸⁷ Pre-Trial Chamber II had appointed an Independent Counsel and tasked him with reviewing telephone logs and listening to recordings of telephone calls placed and received by Me Kilolo and Mr Mangenda, with a view to transmitting to the Prosecution only portions relevant for the Prosecution's investigation. *See* ICC-01/05-01/13-749, para. 2.

⁸⁸ ICC-01/05-01/08-3217-Red2, paras 40 and 41.

⁸⁹ ICC-01/05-01/08-3217-Red2, paras 119 and 120.

Defence argues, relying on its submissions in a prior request for leave to appeal, was not true.⁹⁰

36. In its Response, the Prosecution argues that, “[i]n stark contrast to the Defence’s general characterisation of the Prosecution conduct, both the Single Judge and the Appeals Chamber have noted the cautious and responsible approach taken by the Prosecution to potentially privileged material”.⁹¹ After referring to a series of decisions of the Chamber that dealt with the issue of the Prosecution’s alleged access to privileged communications,⁹² the Prosecution argues that the Defence ignores the fact that two Chambers of the Court actively sought to ensure that the Prosecution’s approach to potentially privileged material neither prejudiced this trial nor the Article 70 proceedings.⁹³ In addition, the Prosecution draws attention to a decision of the Appeals Chamber where it was found that “no reasonable doubts as to the Prosecutor’s impartiality” arose out of the involvement of members of the Prosecution team in the *Bemba* case initially being involved in the Article 70 Investigation and proceedings.⁹⁴

37. As to the allegations of breaches of legal professional privilege, the Prosecution argues that the Defence’s claim is based on a misinterpretation of the scope of that privilege, as provided in Rules 73(1) and 81(1), and an inaccurate account of the proceedings in the *Bemba* case and in case ICC-01/05-01/13.⁹⁵ The Prosecution argues that legal professional privilege has been carefully preserved and there has been no conceivable prejudice to Mr Bemba.⁹⁶ Furthermore, the Prosecution submits that the Defence fails to address the fact that the Chamber and the Single Judge of Pre-Trial Chamber II have ruled multiple times with regard to

⁹⁰ ICC-01/05-01/08-3217-Red2, para. 118, citing ICC-01/05-01/08-3103-Red2, paras 28 to 32.

⁹¹ ICC-01/05-01/08-3229-Red2, para. 30.

⁹² ICC-01/05-01/08-3229-Red2, paras 30 to 35, referring to decisions ICC-01/05-01/08-3059, ICC-01/05-01/08-3080, ICC-01/05-01/08-3114, and ICC-01/05-01/08-3101.

⁹³ ICC-01/05-01/08-3229-Red2, para. 39.

⁹⁴ ICC-01/05-01/08-3229-Red2, paras 49 to 51.

⁹⁵ ICC-01/05-01/08-3229-Red2, paras 27 to 29.

⁹⁶ ICC-01/05-01/08-3229-Red2, para. 27.

potentially privileged material, and summarises the content of a number of such decisions taken by this Chamber.⁹⁷ The Prosecution submits that “the Defence fails to identify any specific privileged material supposedly accessed by the Prosecution, much less substantiate that such access occurred”.⁹⁸

38. In its Reply, the Defence argues that “privilege pertains to the [*Bemba*] case” and that Rule 73(1) requires that measures be taken to protect Mr Bemba’s rights in the *Bemba* case.⁹⁹ Similarly, it argues that legal professional privilege is intrinsically tied to Mr Bemba’s rights in the *Bemba* case, as it derives from Article 67(1)(b) and (g) and serves to protect the right to effective representation and Mr Bemba’s privilege against self-incrimination.¹⁰⁰

39. The Defence argues that the Article 70 Investigation has had a direct impact on the *Bemba* case and that the Chamber has a duty to consider the impact of the Article 70 Investigation on the overall fairness of proceedings.¹⁰¹ It cites an ICTR Appeals Chamber decision as support for the proposition that the assessment of whether decisions of another Chamber have caused prejudice does not entail sitting in appeal of those decisions.¹⁰² The Defence asserts that, through the Article 70 case, the Prosecution accessed information related to the *Bemba* case that it would not have otherwise been entitled to, which it then used to its advantage in the *Bemba* case, giving rise to a conflict of interest.¹⁰³

40. According to the Defence, Article 21(3) requires the Chamber to respect internationally recognised human rights, which demand that every violation of a right must be justiciable and remedied and which also require a judicial remedy

⁹⁷ ICC-01/05-01/08-3229-Red2, paras 30 to 35.

⁹⁸ ICC-01/05-01/08-3229-Red2, para. 30

⁹⁹ ICC-01/05-01/08-3239-Red2, para. 8.

¹⁰⁰ ICC-01/05-01/08-3239-Red2, para. 6.

¹⁰¹ ICC-01/05-01/08-3239-Red2, paras 14 to 16.

¹⁰² ICC-01/05-01/08-3239-Conf-Red2, para. 16.

¹⁰³ ICC-01/05-01/08-3239-Conf-Red2, para. 34.

as concerns all monitoring of communications, which the Defence submits Mr Bemba has been denied.¹⁰⁴

41. Lastly, the Defence submits that Rule 73(1) vests privilege in the client and only the client can waive it.¹⁰⁵ However, it argues that Mr Bemba has been denied standing to assert privilege and has not been sufficiently involved in identifying privileged material.¹⁰⁶

Analysis

42. The Chamber will examine each of the specific allegations contained within the Second Allegation in line with its approach outlined above.¹⁰⁷

- i. **The allegation that the Prosecution has received and continues to receive “[p]rivileged internal work product, which had been communicated to potential witnesses and potential experts under conditions of strict confidentiality”**

Submissions

43. The Defence submits that the Prosecution received and commenced reviewing the contents of Mr Arido’s email account, “without any prior vetting by the Independent Counsel, the Single Judge or the Registry”, despite the fact that the Prosecution had previously conceded that the contents might be privileged.¹⁰⁸ The Defence further states that Mr Arido was a Defence witness who, although he did not testify due to security concerns, was also instructed as a potential expert witness.¹⁰⁹ In this capacity, the Defence argues, Mr Arido received

¹⁰⁴ ICC-01/05-01/08-3239-Red2, para. 7.

¹⁰⁵ ICC-01/05-01/08-3239-Red2, para. 9.

¹⁰⁶ ICC-01/05-01/08-3239-Red2, paras 7, 9, and 10.

¹⁰⁷ See paras 17 and 18 above.

¹⁰⁸ ICC-01/05-01/08-3217-Conf-Exp, paras 42 and 43.

¹⁰⁹ ICC-01/05-01/08-3217-Red2, para. 44.

information concerning Defence lines of inquiry and potential Defence exhibits which, unless tendered in Court, remain protected by “Defence privilege”.¹¹⁰

44. The Defence avers that the Prosecution’s disclosure in the Article 70 case reveals that Mr Arido’s email account contained “correspondence with the VWU and Counsel detailing *ex parte* security concerns, and correspondence with Ms Gibson”, which the Defence argues is privileged.¹¹¹ In the argument of the Defence, the Defence materials and lines of inquiry shared with Mr Arido should have remained privileged unless incorporated in his testimony or a finalised expert report and, since this never occurred, the privilege should have remained intact.¹¹² Alternatively, the Defence submits that even if the contents of Mr Arido’s email account included correspondence that was not privileged, the absence of a vetting mechanism violated Mr Bemba’s rights and allowed the Prosecution access to information concerning Defence strategy and future arguments.¹¹³

45. In its Response, the Prosecution notes that it has accessed Mr Arido’s email account, but stresses that the Chamber “has previously rejected as ‘speculative’ the argument that the account may contain privileged work product shared with Mr Arido as a ‘potential expert witness’”.¹¹⁴ The Prosecution argues that the Defence “fails to address the reasonableness of treating Mr Arido as a ‘potential *fact* witness’”, “in respect of whom any work product disclosed would be unprivileged and, indeed, an appropriate subject for cross-examination”, and that, given the “vague nature” of the Defence submission, the Defence cannot “assert that the approach to Mr Arido’s email account was improper”.¹¹⁵

¹¹⁰ ICC-01/05-01/08-3217-Red2, para. 44.

¹¹¹ ICC-01/05-01/08-3217-Red2, para.45.

¹¹² ICC-01/05-01/08-3217-Red2, para. 46.

¹¹³ ICC-01/05-01/08-3217-Red2, para. 47.

¹¹⁴ ICC-01/05-01/08-3229-Red2, para. 37.

¹¹⁵ ICC-01/05-01/08-3229-Red2, para. 37.

Analysis

46. The Chamber notes that the Defence proposed to call Mr Arido as a former USP soldier; i.e. as a fact witness.¹¹⁶ At no point during the discussions related to the Defence's presentation of evidence did the Defence indicate that it was considering calling Mr Arido as a potential expert witness, making this indication only after Mr Arido's arrest.¹¹⁷ Moreover, the Defence provided little substantiation, asserting that it "*contemplated* calling him as an expert witness" and that "[i]t is *probable* that his email account *may* have contained draft expert submissions".¹¹⁸ In its previous decision in relation to allegedly privileged defence communications, the Chamber found the Defence's assertions that material related to Mr Arido may be protected by privilege to be speculative, noted the Prosecution's submission that materials related to Mr Arido did not contain privileged information, and also noted that Mr Bemba was authorised by the Single Judge of Pre-Trial Chamber II to share his access to the record of case ICC-01/05-01/13 with his Defence team in the *Bemba* case.¹¹⁹ The Chamber also recalls its findings as to whom privileged communication is afforded under the Court's legal framework.¹²⁰

47. With the above in mind, the Chamber finds that the Defence has provided little substantiation of its allegations or any explanation as to how, if proven, they would render it "impossible to piece together the constituent elements of a fair trial" or "'repugnant' or 'odious' to the administration of justice to allow the case

¹¹⁶ See Submissions on Defence Evidence, Annex A, 28 May 2012, ICC-01/05-01/08-2222-Conf-AnxA, pages 26 to 27. Pursuant to Trial Chamber III's instructions from 19 September 2012 Annex A was reclassified as Confidential: ICC-01/05-01/08-2222-Conf-AnxA. See also, Decision on the "Submissions of Defence Evidence", 7 June 2012, ICC-01/05-01/08-2225, with *ex parte* Annex-A Defence and VWU only. A Public Redacted Version of Annex A was filed on 28 August 2012: ICC-01/05-01/08-2225-AnxA-Red.

¹¹⁷ See Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications, 9 April 2014, ICC-01/05-01/08-3036, para. 84.

¹¹⁸ ICC-01/05-01/08-3036, para. 84 (emphasis added).

¹¹⁹ ICC-01/05-01/08-3101, paras 33 and 34.

¹²⁰ See ICC-01/05-01/08-3080, para. 19

to continue”.¹²¹ While it alleges that the Prosecution received “Defence strategy and future arguments”, “Defence materials and lines of inquiry”, and information which it used to its advantage in the *Bemba* case giving rise to a conflict of interest,¹²² these allegations rest on the Defence’s assertions as to the information, allegedly privileged, Mr Arido may have received as a potential expert witness, which the Chamber has already found – and continues to find – speculative.

48. As to the allegation that the Prosecution received “*ex parte* security concerns”,¹²³ the Defence fails to tie this argument to any allegation of prejudice relevant to the question of whether the threshold for a stay of proceedings is met. Nevertheless, the Chamber reiterates that under Articles 54(1)(b) and 68(1) the Prosecution is obliged to respect the interests and personal circumstances and protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses when conducting its investigations. The Chamber has no reason to doubt that the Prosecution complied with these duties.

ii. The allegation that the Prosecution has received “[p]rivileged communications between Mr. Bemba and members of his Defence, and between such Defence team members”

49. The Defence submits that “[n]otwithstanding its repeated protestations to the contrary”, the Prosecution has received “legitimate” privileged Defence information through at least three different avenues: (i) requests for assistance directed to State authorities; (ii) information disclosed directly from the detention unit; and (iii) information disclosed via the Independent Counsel.¹²⁴

¹²¹ See para. 10 above.

¹²² ICC-01/05-01/08-3217-Red2, paras 46 and 47; and ICC-01/05-01/08-3239-Red2, para. 34.

¹²³ ICC-01/05-01/08-3217-Red2, para. 45.

¹²⁴ ICC-01/05-01/08-3217-Red2, para. 48.

(i) *“Requests for assistance directed to State authorities”*

Submissions

50. The Defence argues that it can be deduced from discussions at a status conference conducted within the context of the Article 70 Investigation that the Prosecution requested from States, and obtained access to, privileged communications for periods prior to “the Single Judge’s decision to lift privilege for specific communications”.¹²⁵ The Defence submits that from discussions at the relevant status conference it is clear that before the Independent Counsel finished vetting the recordings, the Prosecution had already accessed communications related to Me Kilolo and other information including “call data logs”.¹²⁶ Consequently, the Defence argues that it was prejudiced as the Prosecution obtained information useful in “understand[ing] the approach and exactly what happened” and gained access to confidential Defence sources, the contact details and locations of protected Defence witnesses, and the details of all persons contacted by the Defence.¹²⁷

51. The Defence further submits that the Prosecution being “able to use its Article 70 powers in order to obtain such information”, while the Defence was denied “information and investigative assistance in relation to P-169 and P-178, in order to enable the Defence to explore the possibility of witness collusion and the provision of financial incentives in exchange for testimony”, demonstrates a fundamental inequality of arms.¹²⁸

52. The Prosecution refutes the allegation that it improperly listened to communications, stating that it only used legitimate investigative means in order

¹²⁵ ICC-01/05-01/08-3217-Conf-Exp, paras 50 to 52.

¹²⁶ ICC-01/05-01/08-3217-Conf-Exp, paras 53 to 56.

¹²⁷ ICC-01/05-01/08-3217-Conf-Exp, paras. 56 and 57.

¹²⁸ ICC-01/05-01/08-3217-Red2, paras 57 and 58.

to identify Me Kilolo's telephone numbers and that the Defence wrongly attributes a remark to the Prosecution which was, in fact, made by the Independent Counsel in case ICC-01/05-01/13.¹²⁹

53. In the Defence Reply, the Defence argues that it is insufficient for the Prosecution to submit that it employed "legitimate investigate means" without explaining what those means were.¹³⁰

Analysis

54. At the outset, the Chamber finds that the allegation that there existed an inequality of arms regarding the Prosecution's ability to use Article 70 powers to obtain information, which the Defence relies upon as evidence that the Prosecution gained an advantage not enjoyed by the Defence with respect to, for example issues concerning P169 and P178, to be unsupported. The Chamber assisted the Defence in investigating allegations concerning P169 and P178, as demonstrated by the recall of P169 to allow the Defence the opportunity to question the witness regarding its allegations and the admission of a large volume of documentary evidence including, *inter alia*, material detailing payments made to all prosecution witnesses including P169 and P178, to further allow the Defence to address these issues.¹³¹ Moreover, the Chamber's decision

¹²⁹ ICC-01/05-01/08-3229-Conf-Exp, para. 38.

¹³⁰ ICC-01/05-01/08-3239-Conf-Exp, para. 32.

¹³¹ See Decision on "Prosecution's Information to Trial Chamber III on issues involving witness 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 redacted version was filed on 10 October 2014, Redacted version of "Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness 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)" of 2 October 2014, ICC-01/05-01/08-3154-Red. A second redacted version was filed on 11 December 2014, Second Redacted version of "Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness 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)" of 2 October 2014, ICC-01/05-01/08-3154-Red2. See also ICC-01/05-01/08-T-361-CONF-ENG-ET; ICC-01/05-01/08-T-362-CONF-ENG-ET; ICC-01/05-01/08-T-363-CONF-ENG-ET; Decision on "Defence Motion for the Admission of Documents related to Witness 169 and Witness 178", 13 March 2014, ICC-01/05-01/08-3015-Conf, para. 33(A public redacted version of this document was filed on the 11 December 2014, Public redacted version of "Decision on 'Defence Motion for the Admission of Documents related to Witness

not to recall P178 was taken only after thorough assessment of the Defence's submissions on the basis of which the Chamber found recall unnecessary.¹³² As such, the Chamber finds that the Defence was in no way impeded in its ability to investigate issues concerning P169 and P178.

55. Turning to the allegation that the Prosecution obtained access to confidential Defence information, the Chamber finds, firstly, that the question of whether or not the Prosecution used "legitimate investigative means",¹³³ in line with the approach set out above,¹³⁴ falls outside this Chamber's competence.

56. As to whether, irrespective of legality or "legitimacy", the fairness of the *Bemba* case has been prejudiced, while stating that the Prosecution obtained (i) information useful in "understand[ing] the approach and exactly what happened"; (ii) access to confidential Defence sources, (iii) the contact details and locations of protected Defence witnesses, and (iv) the details of all persons contacted by the Defence, the Defence provides no substantiation or explanation as to how the Prosecution allegedly gaining access to this information did or could have impacted on the fairness of the *Bemba* case, for example, by illustrating any resulting actual or potential impediment to the Defence's presentation of its evidence, advantage gained by the Prosecution, or impact upon the Chamber's ability to fairly assess the evidence presented to it at trial.

169 and Witness 178", ICC-01/05-01/08-3015-Red); Decision on the admission of two documents, 24 October 2014, ICC-01/05-01/08-3176, para. 5; and ICC-01/05-01/08-T-363-CONF-ENG-ET, page 29, line 5 to page 33, line 15.

¹³² Decision on "Defence request for recall of Witness P-178", 4 November 2014, ICC-01/05-01/08-3186-Conf. A public redacted version was filed on 11 December 2014, Public redacted version of "Decision on 'Defence request for recall of Witness P-178'", ICC-01/05-01/08-3186-Red; and 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", 11 November 2014, ICC-01/05-01/08-3204-Conf. A public redacted version was filed on the same day, 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", ICC-01/05-01/08-3204-Red.

¹³³ See ICC-01/05-01/08-3229-Conf-Exp, para. 38; and ICC-01/05-01/08-3239-Conf-Exp, para. 32.

¹³⁴ See paras 17 and 18 above.

57. In addition, the Chamber also finds that the above further undermines the allegation that the Prosecution gained an unfair advantage and the Defence's submissions as to an inequality of arms.

(ii) *"Information transmitted via the Detention Unit"*

Submissions

58. The Defence argues that, although Mr Mangenda's communications had been previously treated by the Prosecution as privileged, they were transmitted directly from the Detention Unit to the Prosecution, giving the Prosecution access to all communications between Mr Bemba and Mr Mangenda, including communications concerning potential strategy for witnesses and the formulation of legal arguments intended for the Closing Brief of Mr. Jean-Pierre Bemba Gombo¹³⁵ ("Defence Closing Brief").¹³⁶ The Defence submits that the recordings should have been notified to the Defence prior to their transmission in accordance with Regulation 175(10) of the Regulations of the Registry to give the Defence the "opportunity to assert privilege over specific communications that might have been intimately tied to strategy devised by Counsel" and that their direct transmission revealed privileged communications between Mr Bemba and his Defence "'depriving rule 73(1) of the Rules of any practical effect'".¹³⁷

59. In addition, the Defence argues that the information should have been protected from disclosure as it constituted internal work product and was thus covered by Rule 81(1).¹³⁸ The Defence argues that there is no obligation on the Defence to lift "internal work product privilege" and that even if this were so the Chamber was obliged to ensure disclosure respected Mr Bemba's rights, including the right to

¹³⁵ Closing Brief of Mr. Jean-Pierre Bemba Gombo, 25 August 2014, ICC-01/05-01/08-3121-Conf, paras 13 to 16.

¹³⁶ ICC-01/05-01/08-3217-Red2, paras 59 to 61.

¹³⁷ ICC-01/05-01/08-3217-Red2, para. 62.

¹³⁸ ICC-01/05-01/08-3217-Red2, para. 63.

silence and not to be compelled to testify or to confess guilt, an obligation the Defence claims the Chamber failed to discharge thereby allowing a “fundamental breach of such rights”.¹³⁹

60. In its Response, the Prosecution argues that, while it was originally cautious and treated these communications as privileged, the Chamber has already held that Mr Mangenda’s communications are not privileged.¹⁴⁰ The Prosecution also notes that this is consistent with a decision of the Single Judge.¹⁴¹ Therefore, the Prosecution states that there has been no breach of privilege and notes that the Chamber denied leave to appeal the decision on this matter on the grounds that the Defence simply disagreed with the Chamber’s finding.¹⁴²

Analysis

61. As to whether the transmission of communications between Mr Bemba and Mr Mangenda may have prejudiced the Accused’s right to a fair trial, the Chamber firstly reiterates its prior finding that the Court’s legal framework only affords privilege to (i) counsel, whether lead counsel or co-counsel, and (ii) assistants to counsel, as referred to in Regulation 68.¹⁴³ As the Chamber has previously held specifically in relation to the communications between Mr Bemba and Mr Mangenda “[w]ith respect to communications between the Accused and any other person, no expectation of privilege or privacy arises, nor does the Chamber consider it necessary in order to fully uphold the rights of the Accused under

¹³⁹ ICC-01/05-01/08-3217-Red2, paras 64 to 66.

¹⁴⁰ ICC-01/05-01/08-3229-Red2, para. 32, citing ICC-01/05-01/08-3080, paras 17 to 22, 24, 28, and 38.

¹⁴¹ ICC-01/05-01/08-3229-Red2, para. 32, citing Decision on the “Prosecution’s request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel”, 17 December 2013, ICC-01/05-01/13-48, paras 4 to 6. Pursuant to Pre-Trial Chamber II’s decision ICC-01/05-01/13-147 of 3 February 2014 this document was reclassified as public: ICC-01/05-01/13-48.

¹⁴² ICC-01/05-01/08-3229-Red2, paras 32 and 33, citing Decision on “Defence Request for Leave to Appeal ‘Decision on Defence Motion on Privileged Communications’”, 14 August 2014, ICC-01/05-01/08-3114, para. 21.

¹⁴³ ICC-01/05-01/08-3080, para. 19.

Article 67(1)(b) of the Statute”.¹⁴⁴ Insofar as the Defence submissions challenge this conclusion, the Chamber finds the Defence’s submission to be an attempt to re-litigate issues previously decided upon by the Chamber.

62. Concerning the allegation that Mr Mangenda’s communications, whether privileged or not, contained “internal work product” protected by Rule 81(1) the transmission of which to the Prosecution has caused prejudice to the Accused’s right to a fair trial, the Chamber firstly recalls that the Defence has previously made similar submissions. The Defence argued that such communications’ transmission revealed “the innermost strategies and internal communications concerning the Defence case” to the Prosecution which may have “informed [the Prosecution’s] strategy”.¹⁴⁵ However, the Chamber determined that the Defence had “failed to substantiate its claim that the Accused had suffered or was suffering prejudice in the *Bemba* case” as a result of its allegations.¹⁴⁶ The Chamber considers that the Defence’s present request to a large extent effectively seeks to re-litigate this issue; insofar as this is the case, the Chamber considers the Defence’s submissions to be inappropriate and sees no reason to deviate from its prior conclusions.

63. The above notwithstanding, the Chamber notes the Defence’s allegation that the Prosecution gained access to “internal work product”, including “communications concerning potential strategy for any Defence witnesses called [from 3 June 2013 onwards], and the formulation of legal arguments intended for the Defence Closing Brief”.¹⁴⁷ The Defence argues that this transmission constituted a fundamental breach of Mr Bemba’s “fair trial rights, including the

¹⁴⁴ ICC-01/05-01/08-3080, para. 22.

¹⁴⁵ Defence Request for Interim Relief, 24 January 2014, ICC-01/05-01/08-2945-Conf, with Confidential Annex A, paras 2, 50, and 56. A public redacted version was filed on 23 January 2014, Public Redacted Version of Defence Request for Interim Relief, ICC-01/05-01/08-2945-Red, with public Annex A.

¹⁴⁶ ICC-01/05-01/08-3059, para. 24.

¹⁴⁷ ICC-01/05-01/08-3217-Red2, paras 61 to 63 and 66.

right to silence and the defendant's privilege against self-incrimination".¹⁴⁸ Firstly, given that none of the relevant material transmitted via the Detention Unit has been admitted in this case or put before this Chamber, the Chamber finds the Defence's argument that Mr Bemba's rights to silence and against self-incrimination with respect to the *Bemba* case have been breached ill-founded.

64. In relation to the Defence's more general claim that the Accused's "fair trial rights" have been breached,¹⁴⁹ including assertions that the transmission of information informed the Prosecution's strategy, the Defence provides no further substantiation or explanation as to how the transmission of the communications to the Prosecution means that it is "impossible to piece together the constituent elements of a fair trial" or that it would be "'repugnant' or 'odious' to the administration of justice to allow the case to continue".¹⁵⁰ By way of example, the Defence could have demonstrated or explained how the Prosecution's access to the relevant communications did or could entail irreparable prejudice to the Defence's presentation of its evidence or closing submissions.

(iii) *"Information transmitted via the Independent Counsel"*

Submissions

65. While the Defence acknowledges that the Chamber is not legally responsible for the appointment of the Independent Counsel, it argues that the Independent Counsel's failure "to act as an effective mechanism for vetting legal privilege" caused prejudice in the *Bemba* case, which it submits is justiciable before this Chamber.¹⁵¹ In this regard, the Chamber notes that both parties make extensive

¹⁴⁸ ICC-01/05-01/08-3217-Red2, para. 66.

¹⁴⁹ ICC-01/05-01/08-3217-Red2, para. 66.

¹⁵⁰ See para. 10 above.

¹⁵¹ ICC-01/05-01/08-3217-Red2, paras 67 and 68.

submissions as to whether the Independent Counsel “failed to act as an effective mechanism for vetting legal privilege”.¹⁵²

66. The Defence submits that the appointment of an Independent Counsel “resulted in a complete absence of effective scrutiny as concerns the impact of the transmission of certain information on the rights of Mr. Bemba”.¹⁵³ In terms of substantiating and explaining this impact, the Defence claims that the Prosecution received (i) privileged communications with Defence team members not accused in case ICC-01/05-01/13, (ii) a “plethora of information concerning Defence strategy”, (iii) “internal views of the Defence on the conduct of the proceedings and weight of evidence”, (iv) “the contact details of potential witnesses and sources”, and (v) information “concerning the finances of Defence investigations”.¹⁵⁴ It further substantiates the alleged impact on Mr Bemba’s rights by reference to the alleged partiality of the Independent Counsel, as well as his method and mandate, which it alleges resulted in him adopting a broad approach, transmitting all “possib[ly]” “relevant” material to the Prosecution.¹⁵⁵ In addition, the Defence submits that the Single Judge of Pre-Trial Chamber II “failed to instruct the Independent Counsel to take measures to safeguard the rights of the Defence”.¹⁵⁶

67. In its response, the Prosecution submits that “[t]he appointment of Independent Counsel was not unlawful, nor is the [Abuse of Process Motion] an appropriate forum for challenging that decision (which, in any event, has been exhaustively litigated in [case ICC-01/05-01/13])”.¹⁵⁷

¹⁵² ICC-01/05-01/08-3217-Red2, paras 67 to 90; ICC-01/05-01/08-3229-Red2, paras 40 to 45; and ICC-01/05-01/08-3239-Red2, paras 1, 11 to 13, and 28.

¹⁵³ ICC-01/05-01/08-3217-Red2, para. 69.

¹⁵⁴ ICC-01/05-01/08-3217-Red2, paras 72 and 81.

¹⁵⁵ ICC-01/05-01/08-3217-Conf-Exp, paras 70 to 71, 75 to 76, 79, 80, and 82 to 90.

¹⁵⁶ ICC-01/05-01/08-3217-Red2, para. 75.

¹⁵⁷ ICC-01/05-01/08-3229-Red2, para. 40.

68. In its Reply, the Defence argues that, since at least some of the material to which the Independent Counsel had access was subject to “protective measures” in the *Bemba* case, his actions fall under the jurisdiction of this Chamber.¹⁵⁸ The Defence also submits that the Chamber has an overarching duty to assess the implications of the Independent Counsel’s actions on this case and take any measures to counteract prejudice.¹⁵⁹ Lastly, it reiterates its allegation that the Independent Counsel’s mandate to transmit all “relevant” information resulted in the Prosecution receiving “huge swathes of information concerning Defence strategy and legal advice”.¹⁶⁰

Analysis

69. Turning firstly to the allegation that the Independent Counsel provided the Prosecution with access to material that was subject to “protective measures” in the *Bemba* case, the Chamber notes that it has previously ruled on this issue, stating that:¹⁶¹

Turning to its duties under Articles 64(2) and 68(1) of the Statute to provide for the protection of witnesses, victims and “[other] persons at risk on account of the activities of the Court”, the Chamber notes the defence’s concern that the information transmitted to the prosecution through the Independent Counsel could include information subject to *ex parte* protective measures or orders. In this regard, the Chamber observes that before being transmitted to the prosecution, the material extracted by the Independent Counsel needs to be released by the Single Judge, a judicial authority who is bound by the general obligation under Article 68(1) of the Statute to provide for the protection of victims, witnesses and other individuals at risk on [ac]count of the activities of the Court. The Chamber further recalls that pursuant to Regulation 42(1) of the Regulations, protective measures granted in the *Bemba* case continue to have full force and effect in case ICC-01/05-01/13.

The Chamber considers the Defence’s submissions on this issue effectively seek to re-litigate this issue and sees no reason to deviate from its prior conclusions.

¹⁵⁸ ICC-01/05-01/08-3239-Red2, paras 11 and 12.

¹⁵⁹ ICC-01/05-01/08-3239-Red2, para. 13.

¹⁶⁰ ICC-01/05-01/08-3239-Red2, para. 28.

¹⁶¹ ICC-01/05-01/08-3101, para. 27.

70. In respect of the Defence's allegations as to the lack of impartiality of the Independent Counsel, the Chamber recalls its prior finding, when faced previously with submissions related to "measures taken in case ICC-01/05-01/13, in particular concerning the appointment and work of the Independent Counsel", that "such measures fall under the competence of the Single Judge of Pre-Trial Chamber II and that the Trial Chamber lacks competence in relation to matters arising from that case".¹⁶²

71. In terms of prejudice to the Accused's right to a fair trial in the *Bemba* case, the Defence alleges that the Prosecution gained access to information containing views and strategy of the Defence resulting from the Independent Counsel's failure to act as an effective mechanism for vetting legal privilege when transmitting Defence communications to the Prosecution. Firstly, the Chamber notes that it has previously dealt with almost identical submissions from the Defence in relation to the transmission of communications from the email accounts of Me Kilolo and Mr Mangenda,¹⁶³ in relation to which it found that the "the defence's submissions are impermissibly speculative and that the relief sought [...] is not warranted".¹⁶⁴ Insofar as the Defence seeks to re-litigate these issues, the Chamber again finds its submissions inappropriate and sees no reason to deviate from its prior conclusions.

72. This notwithstanding, the Defence at no point explains how the alleged failure of the Independent Counsel renders it "impossible to piece together the constituent elements of a fair trial" or "'repugnant' or 'odious' to the administration of justice to allow the case to continue".¹⁶⁵ It fails to substantiate, for example, how, based

¹⁶² See ICC-01/05-01/08-3101, para. 21; ICC-01/05-01/08-3080, para. 35; ICC-01/05-01/08-2606-Red, para. 21; and ICC-01/05-01/08-3059, paras 15 to 18.

¹⁶³ ICC-01/05-01/08-3036, paras 51 to 82 and 92 to 107; and 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, paras 9 to 20.

¹⁶⁴ ICC-01/05-01/08-3101, para. 26.

¹⁶⁵ See para. 10 above.

upon the timing of the transmission of any communications together with a description of their likely content, the actions of the Independent Counsel could have caused prejudice to the fairness of the *Bemba* case or afforded the Prosecution an unfair advantage such that the fairness of the trial would be irreparably tainted. In the absence of such substantiation, irrespective of alleged deficiencies in the regime mandated by the Single Judge, including the Independent Counsel, no prejudice to the Accused's right to a fair trial in the *Bemba* case has been shown.

iii. Conclusion

73. In addition to the above analysis, insofar as the classification of the material referred to throughout the Second Allegation as privileged might indicate that its content includes information advantageous to the Prosecution, and recalling its competence and approach to matters arising out of case ICC-01/05-01/13,¹⁶⁶ the Chamber (i) notes the Single Judge's statement that "no privileged document came in the possession of the Prosecution",¹⁶⁷ and (ii) reiterates its previous finding that there is no reason to doubt the Prosecution's assertion that it "is not privy to any information that is protected by legitimate professional privilege".¹⁶⁸

74. With the above in mind, the Chamber finds that none of the submissions in the Second Allegation demonstrate prejudice to the fairness of the *Bemba* case or establish that it is "impossible to piece together the constituent elements of a fair trial" or that it would be "'repugnant' or 'odious' to the administration of justice to allow the case to continue".¹⁶⁹ The Chamber finds that consideration of the Defence's submissions cumulatively does not lead to a different conclusion. As such, the threshold required to justify a stay of proceedings has not been met.

¹⁶⁶ See paras 17 and 18.

¹⁶⁷ ICC-01/05-01/08-3059, para. 19.

¹⁶⁸ ICC-01/05-01/08-3059, para. 19; citing ICC-01/05-01/08-2965-Red, para. 2.

¹⁶⁹ See para. 10 above.

c) Third Allegation

Submissions

75. Under its Third Allegation, the Defence notes that, “[a]lthough the Prosecution is vested with a parallel mandate to investigate allegations of contempt, this mandate aims to ensure the integrity of the main proceedings, not to frustrate or impede them”.¹⁷⁰ Accordingly, the Defence argues that the Prosecution should have disclosed, pursuant to Rule 77, information concerning alleged improprieties that impacted on the credibility of Defence witnesses as soon as this information was received.¹⁷¹ The Defence notes that this did not occur and submits that the Prosecution “waited until after the Defence case had closed, and then ambushed the Defence by the revelation of an Article 70 case”.¹⁷² The Defence argues that if the material had been disclosed contemporaneously, the Defence could have put the allegations to the witnesses and tested their veracity.¹⁷³ However, the Defence states that it was not in a position to do so and given that the Prosecution had “contaminated the Trial Chamber’s appreciation of such testimony”, it was “compelled to abandon its reliance on a raft of exculpatory testimony”.¹⁷⁴ These “sharp trial tactics”, the Defence submits, were unfair and prejudicial.¹⁷⁵

76. Lastly, the Defence contends that if the Prosecution suspected wrongdoing on the part of the Defence, it ought to have requested that the proceedings be suspended until the matter could be addressed, and submits that by not doing so the integrity of the proceedings was compromised.¹⁷⁶

¹⁷⁰ ICC-01/05-01/08-3217-Red2, para. 91 (citations omitted).

¹⁷¹ ICC-01/05-01/08-3217-Red2, para. 92.

¹⁷² ICC-01/05-01/08-3217-Red2, para. 93 (emphasis in original).

¹⁷³ ICC-01/05-01/08-3217-Red2, para. 94.

¹⁷⁴ ICC-01/05-01/08-3217-Red2, para. 94.

¹⁷⁵ ICC-01/05-01/08-3217-Red2, para. 94.

¹⁷⁶ ICC-01/05-01/08-3217-Red2, para. 95.

77. The Prosecution submits that the allegations of bad faith, in the sense of a “sharp” trial tactic in order to obtain partisan advantage, are unsubstantiated and should be rejected.¹⁷⁷ The Prosecution argues that the Article 70 Investigation was not a “trial tactic”, but rather a “careful and deliberate investigation into suspected offences against the administration of justice, consistent with the requirements of the Statute”.¹⁷⁸

78. As to the allegations concerning Rule 77, the Prosecution argues that it did not violate its obligation to disclose information concerning the credibility of Defence witnesses and did not seek to “ambush” the Defence with the Article 70 case.¹⁷⁹ To the contrary, the Prosecution submits that, under Rule 81(2), the information did not need to be disclosed as it may have prejudiced further or ongoing investigations.¹⁸⁰ It argues that the Defence’s view of the proper implementation of Rule 77 would frustrate any investigation pursuant to Article 70 when connected to the conduct of a Defence team or an Accused.¹⁸¹ The Prosecution notes that it alerted the Trial Chamber to the Article 70 investigation promptly, on an *ex parte* basis, but did not seek assistance concerning disclosure at this point as the investigation was at a preliminary stage.¹⁸² It highlights the Defence’s subsequent and repeated disclosure requests and the Chamber’s decisions dealing with these issues, which it states the Defence fails to address.¹⁸³ The Prosecution further notes that Mr Bemba has access to all disclosure made in both cases and that it is for him to determine the extent to which this material is shared with counsel.¹⁸⁴

¹⁷⁷ ICC-01/05-01/08-3229-Red2, para. 48.

¹⁷⁸ ICC-01/05-01/08-3229-Red2, para. 48.

¹⁷⁹ ICC-01/05-01/08-3229-Red2, para. 54.

¹⁸⁰ ICC-01/05-01/08-3229-Red2, paras 54 and 55.

¹⁸¹ ICC-01/05-01/08-3229-Red2, para. 54.

¹⁸² ICC-01/05-01/08-3229-Red2, para. 56.

¹⁸³ ICC-01/05-01/08-3229-Red2, para. 57.

¹⁸⁴ ICC-01/05-01/08-3229-Red2, paras 58 and 59.

79. Further, the Prosecution submits that the Defence argument that contemporaneous disclosure would have allowed it to question witnesses on these issues is unrealistic and shows no prejudice.¹⁸⁵ The Prosecution states that it consistently put appropriate questions to witnesses to assess their credibility and the Defence could have addressed the same matters in re-examination if they wished.¹⁸⁶ Further, the Prosecution argues that the Defence's allegations of prejudice as a result of having to "abandon its reliance on a raft of exculpatory testimony" are ill-founded as there "could be no compulsion, nor indeed any genuinely exculpatory testimony, if the facts ultimately prove that the evidence so provided was false".¹⁸⁷

80. In its Reply, the Defence submits that the "spirit" of Rule 77 is "clearly violated in circumstances where the Defence is ambushed with material, which could have had an impact on its trial strategy, after the close of the Defence case".¹⁸⁸ The Defence also argues that it is "erroneous to claim that the defendant's alleged knowledge of matters allegedly affecting the credibility of Defence witnesses absolved the Prosecution from its disclosure obligations" and contends that the Prosecution should have put the matter to the Chamber to decide.¹⁸⁹ If disclosure was not possible, the Defence submits that "the appropriate response might have been to stay the proceedings, rather than compromising the fairness of the trial".¹⁹⁰

81. In addition, the Defence notes that Mr Bemba is presumed innocent and that his alleged role in such matters has not been established.¹⁹¹ It argues that the Prosecution is not absolved from disclosure because Mr Bemba may have known

¹⁸⁵ ICC-01/05-01/08-3229-Red2, para. 59.

¹⁸⁶ ICC-01/05-01/08-3229-Red2, para. 59.

¹⁸⁷ ICC-01/05-01/08-3229-Red2, para. 59.

¹⁸⁸ ICC-01/05-01/08-3239-Red2, para. 35 (emphasis in original).

¹⁸⁹ ICC-01/05-01/08-3239-Red2, para. 36.

¹⁹⁰ ICC-01/05-01/08-3239-Red2, para. 36.

¹⁹¹ ICC-01/05-01/08-3239-Red2, para. 37.

of the facts to which the allegedly disclosable material relates.¹⁹² The Defence also argues that the Prosecution's obligations were not fulfilled by the Prosecution "putting the existence of its suspicions to the witnesses and not the evidential foundation".¹⁹³

Analysis

82. Regarding material collected during the Prosecution's Article 70 Investigation, Rule 77 requires the Prosecution to permit the Defence to inspect materials in the possession of the Prosecution which are "material to the preparation of the Defence", subject to the restrictions on disclosure as provided for in the Statute and Rules 81 and 82. Rule 81(2) provides that:

Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence [...] However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

83. Therefore, where the Prosecution wishes to withhold disclosure on the basis of Rule 81(2), it must apply to the Chamber to receive authorisation to do so. While the Chamber notes the Prosecution's statement that it *notified* the Chamber of the existence of its Article 70 Investigation,¹⁹⁴ the Prosecution did not *apply* to the Chamber for a ruling as to whether it must disclose relevant Rule 77 information or material or not. As such, the Chamber finds that insofar as the Prosecution was (i) in the possession of and (ii) did not disclose Rule 77 information on the grounds that it could prejudice further or ongoing investigations without

¹⁹² ICC-01/05-01/08-3239-Red2, para. 37.

¹⁹³ ICC-01/05-01/08-3239-Red2, para. 38.

¹⁹⁴ ICC-01/05-01/08-3229-Red2, para. 56.

applying to the Chamber for authorisation, it failed to satisfy the requirements of Rule 81(2).¹⁹⁵

84. However, in terms of prejudice to the Accused's right to a fair trial in the *Bemba* case, the Chamber notes that after charges were publically brought against the Accused in case ICC-01/05-01/13 it twice clarified the Prosecution's disclosure obligations relating to material arising out of the Article 70 Investigation.¹⁹⁶ The Chamber notes that the relevant material was subsequently disclosed on 22 July 2014.¹⁹⁷ As such, the Defence had ample opportunity to make submissions on the basis of this material as to any alleged prejudice caused by the timing of the disclosure, and request any relevant remedy including, for example, in its Defence Closing Brief. However, it did not do so. Rather, it waited almost five months before including submissions on the issue in a request for a stay of proceedings.

85. In addition, while the Defence submits that "[k]ey material" remains undisclosed,¹⁹⁸ in support it cites only a letter sent from Mr Haynes to the Prosecutor on 12 December 2014, asserting that a filing in case ICC-01/05-01/13 "suggests that the *ex parte* annexes are statements of Defence witnesses who testified in the Main Case" and seeking reclassification of the relevant filing to facilitate the Defence's access thereto.¹⁹⁹ While such statements are subject to disclosure pursuant to Rule 77,²⁰⁰ the Chamber does not consider it possible to determine whether any such disclosable material remains undisclosed on the basis of the cited letter and as such finds the Defence's submissions speculative.

¹⁹⁵ Decision on "Defence Motion Regarding Prosecution Disclosure", 3 September 2012, ICC-01/05-01/08-2292, para. 9.

¹⁹⁶ ICC-01/05-01/08-3070, paras 19, 24, and 27; and ICC-01/05-01/08-3100, para. 42.

¹⁹⁷ See ICC-01/05-01/08-3108.

¹⁹⁸ ICC-01/05-01/08-3217-Red2, para. 127.

¹⁹⁹ ICC-01/05-01/08-3217-Conf-Exp-AnxX.

²⁰⁰ ICC-01/05-01/08-3070, paras 19 to 27 and 30.

86. Turning to the Defence's submissions as to the prejudice caused by the delayed disclosure of the material, the Defence argues that the Prosecution's failure to disclose the material prevented it from testing the veracity of the Prosecution's allegations regarding the witnesses by putting them to those witnesses during their testimony, which, together with the fact that the Prosecution had "contaminated the Trial Chamber's appreciation of" the witnesses' testimony, resulted in the Defence being "compelled to abandon its reliance on a raft of exculpatory testimony".²⁰¹

87. Firstly, the Chamber notes that the Prosecution put only open-ended questions to Defence witnesses regarding issues affecting credibility – without particularising allegations or presenting or referring to the undisclosed information – on which the Defence was not precluded from following up by a lack of information.²⁰² Indeed the material referred to by the Defence was neither submitted nor admitted into evidence in the *Bemba* case.

88. Secondly, and for similar reasons, the Chamber finds the Defence's assertion that "the Prosecution had contaminated the Trial Chamber's appreciation of such testimony" unfounded.²⁰³ As the Chamber has previously stated, "its decision pursuant to Article 74 of the Statute will be based solely on evidence submitted and discussed before it at the trial, namely the transcripts of the testimony of 77 witnesses and 700 items of documentary evidence".²⁰⁴ Moreover, the Chamber

²⁰¹ ICC-01/05-01/08-3217-Red2, para. 94.

²⁰² See, *inter alia*, **D2**: T-322-Red2-ENG-WT, page 26, line 6 to page 27, line 9; **D3**: T-330-Red-ENG-WT, page 21, line 23 to page 22, line 4; **D6**: T-329-Red-ENG-WT, page 22, lines 3 to 24; **D13**: T-351-Red-ENG-WT, page 51, line 14 to page 52, line 2; **D15**: T-345-Red-ENG-WT, page 12, line 4 to page 14, line 25; **D23**: T-334-Red-ENG-WT, page 17, line 5 to 25; **D25**: T-337-Red-ENG-WT, page 40, lines 3 to 20; **D26**: T-335-Red-ENG-WT, page 19, lines 8 to 13; **D29**: T-339-Red-ENG-WT, page 41, line 18 to page 44, line 13; **D54**: T-349-CONF-ENG-ET, page 44, line 19 to page 45, line 9; **D55**: T-265-Red2-ENG-WT, page 15, lines 4 to 18; **D57**: T-258-Red-ENG-WT, page 2, line 25 to page 3, line 10; and **D64**: T-260-Red3-ENG-WT, page 6, lines 14 to 23.

²⁰³ ICC-01/05-01/08-3217-Red2, para. 94.

²⁰⁴ Decision on "Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding", 26 June 2014, ICC-01/05-01/08-3098-Conf, para. 18. A public redacted version of the Decision on "Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding" was filed and notified on the same day: ICC-01/05-01/08-3098-Red.

reiterates that “it is composed of professional judges who, unlike a lay jury, will be sufficiently capable of evaluating the value of any allegations brought before it and [disregarding] them as necessary”.²⁰⁵ Consequently, the Chamber finds that nothing in the Prosecution’s failure to disclose material promptly “compelled [the Defence] to abandon its reliance on a raft of exculpatory testimony”.

89. Indeed, this conclusion is illustrated by the Defence’s own submissions in its Defence Closing Brief. There, the Defence explained its decision to rely on only certain witnesses’ testimony by stating that (i) “the mere existence of [case ICC-01/05-01/13] presents the Accused with a conundrum in making his final submissions”, (ii) the outcome of case ICC-01/05-01/13 may impact upon the *Bemba* case “in one way or another at some future date”, and (iii) the Defence’s decision not to rely on certain Defence witnesses “is designed to protect the integrity of these proceedings and Mr. Bemba’s position on appeal”.²⁰⁶ These submissions belie the Defence’s claim to have been “compelled” by disclosure violations on the part of the Prosecution.

90. Accordingly, while recognising the Prosecution’s previous failure to comply with the requirements of Rule 81(2) or promptly disclose relevant material pursuant to Rule 77, the Chamber, taking into account the above considerations,²⁰⁷ its orders clarifying the Prosecution’s disclosure obligations,²⁰⁸ the fact that the relevant material was disclosed on 22 July 2014,²⁰⁹ and the Defence’s failure to make timely submissions on the basis of the material once disclosed,²¹⁰ finds that the Third Allegation fails to demonstrate any prejudice to the fairness of the trial and consequently also fails to satisfy the threshold for a stay of proceedings.

²⁰⁵ See ICC-01/05-01/08-3070, para. 29.

²⁰⁶ ICC-01/05-01/08-3121-Conf, paras 13 to 16.

²⁰⁷ See paras 84 to 89.

²⁰⁸ ICC-01/05-01/08-3070, paras 19, 24, and 27.

²⁰⁹ See ICC-01/05-01/08-3108.

²¹⁰ See para. 84 above.

d) Fourth Allegation

Submissions

91. Under its Fourth Allegation, the Defence submits that the Prosecution repeatedly contaminated the appearance of the impartiality of the proceedings.
92. In particular, the Defence argues that, as it is beyond dispute that the Prosecution was legally incorrect to approach the Chamber with *ex parte* information concerning the Article 70 Investigation, the Trial Chamber should have immediately directed the Prosecution to seise the Pre-Trial Chamber with its request.²¹¹ The Defence alleges that, rather than so doing, the Prosecution and Chamber interacted on multiple occasions and “exchanged viewpoints as to how best to facilitate the Prosecution’s investigation”.²¹² In the course of this interaction, the Defence asserts that the Prosecution provided the Chamber with detailed information about the Article 70 investigation.²¹³ Consequently, it submits that the impartiality of the Chamber was already compromised at the time it decided it had no competence over the Prosecution’s request related to its Article 70 Investigation.²¹⁴ Furthermore, the Defence argues that even after the Chamber’s decision on its competence, the Prosecution continued to contaminate the appearance of the impartiality of the proceedings in a number of ways.²¹⁵
93. The Defence argues that “[t]he presumption of judicial professionalism is rebuttable”,²¹⁶ and submits that “[a] reasonable observer could only conclude that there was a deliberate effort to taint the entirety of the Defence case, and that this

²¹¹ ICC-01/05-01/08-3217-Red2, paras 96 and 97.

²¹² ICC-01/05-01/08-3217-Red2, paras 97 to 99.

²¹³ ICC-01/05-01/08-3217-Red2, paras 97 to 99.

²¹⁴ ICC-01/05-01/08-3217-Red2, para. 100.

²¹⁵ ICC-01/05-01/08-3217-Red2, paras 101 to 109.

²¹⁶ ICC-01/05-01/08-3217-Red2, para. 109.

would inevitably impact on the objective appearance of the Judges' ability to assess the credibility of Defence witnesses in a fair manner".²¹⁷

94. In addition, the Defence relies on a decision of Trial Chamber I in the *Lubanga* case to argue that the Accused has a right that questions concerning "a highly contentious and potentially important matter" be resolved in his presence.²¹⁸ In the same vein, the Defence relies on jurisprudence from the European Court of Human Rights in arguing that a party must have the opportunity to comment on submissions that could influence the Chamber's determination.²¹⁹

95. In response, the Prosecution denies that there was any attempt to compromise the impartiality of the Chamber by alerting it to its suspicions of Article 70 offences.²²⁰ The Prosecution further refutes that it placed privileged material before the Chamber during the recall of P169 and denies that it "peppered its submissions in this case with reference to Article 70 allegations".²²¹ It states that "[n]o reasonable observer would consider that the Trial Chamber no longer has the appearance of being able to render a fair decision on the evidence in this case" and that the Defence "rel[ies] on nothing more than a catalogue of subjective complaints and disagreements".²²²

96. Additionally, the Prosecution submits that any attempt to taint the Chamber would not have been successful.²²³ It recalls the Chamber's statement that it is composed of professional judges capable of evaluating and discarding any allegations brought before it as necessary and argues that it was entitled to rely on the "strong presumption" of judicial fairness and did not err in alerting the

²¹⁷ ICC-01/05-01/08-3217-Red2, para. 112.

²¹⁸ ICC-01/05-01/08-3217-Red2, para. 110, citing Redacted Decision on Intermediaries, 31 May 2010, ICC-01/04-01/06-2434-Red2, para. 137.

²¹⁹ ICC-01/05-01/08-3217-Red2, para. 111, citing *Lanz v. Austria*, 24430/94, 31 January 2002, para. 62; *Brandstetter v. Austria*, 11170/84; 12876/87; 13468/87, 28 August 1991, para. 67.

²²⁰ ICC-01/05-01/08-3229-Red2, para. 49.

²²¹ ICC-01/05-01/08-3229-Red2, para. 68.

²²² ICC-01/05-01/08-3229-Red2, paras 65.

²²³ ICC-01/05-01/08-3229-Red2, para. 49.

Chamber to its investigation on an *ex parte* basis.²²⁴ The Prosecution also recalls that the Chamber directed the Prosecution to the relevant Pre-Trial Chamber, repeatedly reminded the parties that their submissions should be based only on evidence in these proceedings, and stated that the Chamber's judgment would be based solely upon evidence submitted and discussed before it at trial.²²⁵ The Prosecution further argues that the Chamber's impartiality was not affected by the judges participating in the Plenary or having access to public arguments in another case.²²⁶

97. In its Reply, the Defence states that the Chamber received at least 12 *ex parte* submissions which have never been reclassified.²²⁷ It argues that the impact of such submissions on the Chamber's appearance of impartiality is demonstrated by measures taken by the Chamber based on *ex parte* submissions made by the Prosecution in relation to the Defence's questioning of Prosecution witnesses.²²⁸ In contrast, it argues, the Prosecution was given "unfettered license to cross-examine Defence witnesses [...]"²²⁹ In addition, the Defence argues that there is an objective appearance that "Defence witnesses were accorded disparate treatment" as a result of *ex parte* submissions, referring specifically to the way vulnerable Defence witnesses were treated and allegedly different treatment of Prosecution and Defence witnesses regarding access to notes.²³⁰ In addition, it argues that the appearance of an objective lack of impartiality also inheres in the manner in which the Chamber "oversaw, and provided direct guidance to the Prosecution in connection with its *ex parte* investigations into the Defence".²³¹

²²⁴ ICC-01/05-01/08-3229-Red2, paras 66 and 67.

²²⁵ ICC-01/05-01/08-3229-Red2, para. 67.

²²⁶ ICC-01/05-01/08-3229-Red2, para. 69.

²²⁷ ICC-01/05-01/08-3239-Red2, para. 39.

²²⁸ ICC-01/05-01/08-3239-Conf-Exp, paras 40 to 42.

²²⁹ ICC-01/05-01/08-3239-Red2, para. 43.

²³⁰ ICC-01/05-01/08-3239-Red2, paras 44 to 46.

²³¹ ICC-01/05-01/08-3239-Red2, para. 48.

98. Finally, the Defence asserts that prejudice should be presumed whenever the “principle of open justice” is violated and procedural guarantees are not put in place to protect the interests of the Defence.²³² It argues that “there will always be an appearance of reasonable doubt as to what the outcome would have been if the Defence had been accorded a contemporaneous opportunity to address and rebut [the Prosecution’s allegations]”.²³³

Analysis

99. Under the Rome Statute, judges are required to be impartial and, pursuant to Article 41(2)(a), “shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground”.²³⁴ Rule 34 provides that the grounds for disqualification of a judge include, *inter alia*, personal interest, involvement in legal proceedings where the Accused is an opposing party, performance of certain prior functions, and the expression of opinions that could objectively affect their impartiality.

100. Jurisprudence from the Plenary and the Presidency has established that the relevant standard for assessing objective impartiality is “whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge”.²³⁵ In this regard, the question is not whether the reasonable observer *could* have apprehended bias, but whether such apprehension is objectively reasonable.²³⁶ Moreover, it has been held that a strong presumption of impartiality attaches to judges, which is not easily rebutted.²³⁷

²³² ICC-01/05-01/08-3239-Red2, para. 47.

²³³ ICC-01/05-01/08-3239-Red2, para. 47 (emphasis in original).

²³⁴ See Article 36(3)(a).

²³⁵ ICC-02/05-01/09-76-Anx2, page 6; ICC-02/05-03/09-344-Anx, para. 11; ICC-01/04-01/06-3040-Anx, para. 9; ICC-01/05-01/13-511-Anx, para. 17; and ICC-01/04-01/07-3504-Anx, para. 39.

²³⁶ ICC-02/05-03/09-344-Anx, para. 13; ICC-01/04-01/06-3040-Anx, para. 10; ICC-01/05-01/13-511-Anx, para. 17; and ICC-01/04-01/07-3504-Anx, para. 39.

²³⁷ ICC-02/05-01/09-76-Anx2, page 7. See also ICC-02/05-03/09-344-Anx, para. 14; ICC-01/04-01/06-3040-Anx, para. 10; and ICC-01/05-01/13-511-Anx, para. 18.

[I]t is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, are capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case, *whilst excluding any information that was available to them in other capacity*.

101. The European Court of Human Rights ("ECtHR"), which has adopted a similar approach to objective impartiality,²³⁸ has held that a judge having been involved in the pre-trial phase of a case by, for example, taking procedural decisions, does not, in itself, justify fears as to that judge's impartiality.²³⁹ Further, no objective doubts as to judges' impartiality have been found to arise from detailed knowledge of a casefile, the conduct of a preliminary analysis, or the questioning of witnesses.²⁴⁰ The ECtHR has stressed that "what is important is for [the judge's final analysis] to be carried out when judgement is delivered and to be based on the evidence produced and argument heard at the hearing".²⁴¹

102. Taking this jurisprudence into account, the Chamber finds the Defence's allegation that the appearance of the impartiality of the proceedings has been contaminated by the Prosecution having placed information and allegations relevant to the credibility of Defence evidence before the Chamber to be without merit.

²³⁸ See, *inter alia*, ECtHR, *Piersack v. Belgium*, Application no. 8692/79, Court (Chamber), Judgment, 1 October 1982, para. 30; ECtHR, *Kyprianou v. Cyprus*, Application no. 73797/01, Grand Chamber, Judgment, 15 December 2005; ECtHR, *Grievs v. United Kingdom*, Application no. 57067/00, Grand Chamber, Judgment, 16 December 2003, para. 69; ECtHR, *Morel v. France*, Application no. 34130/96, Third Section, Judgment, 6 June 2000, para. 42; ECtHR, *Incal v. Turkey*, Application no. 22678/93, Grand Chamber, Judgment, 9 June 1998, para. 71; ECtHR, *Castillo Algar v. Spain*, Application no. 28194/95, Court (Chamber), Judgment, 28 October 1998, para. 45; ECtHR, *Padovani v. Italy*, Application no. 13396/87, Court (Chamber), Judgment, 26 February 1993, paras 27 and 118; ECtHR, *Fey v. Austria*, Application no. 14396/88, Court (Chamber), Judgment, 24 February 1993, para. 30; ECtHR, *Hauschildt v. Denmark*, Application no. 10486/83, Court (plenary), Judgment, 24 May 1989, para. 48; and ECtHR, *De Cubber v. Belgium*, Application no. 9186/80, Court (Chamber), Judgment, 26 October 1984, para. 26.

²³⁹ See, ECtHR, *Hauschildt v. Denmark*, Application no. 10486/83, Court (plenary), Judgment, 24 May 1989, para. 50; ECtHR, *D.P. v. France*, Application no. 53971/00, Second Section, Judgment, 10 February 2004, para. 35; and ECtHR, *Bulut v. Austria*, Application no. 17358/90, Court (Chamber), Judgment, 22 February 1996, para. 33.

²⁴⁰ See, ECtHR, *Hauschildt v. Denmark*, Application no. 10486/83, Court (plenary), Judgment, 24 May 1989, para. 50; ECtHR, *Bulut v. Austria*, Application no. 17358/90, Court (Chamber), Judgment, 22 February 1996, para. 33; and ECtHR, *D.P. v. France*, Application no. 53971/00, Second Section, Judgment, 10 February 2004, para. 35.

²⁴¹ ECtHR, *D.P. v. France*, Application no. 53971/00, Second Section, Judgment, 10 February 2004, para. 35 (citations omitted).

103. Regarding events prior to the Chamber's decision as to its competence, the Chamber, in the relevant status conference, sought information and clarification from the Prosecution and facilitated discussion between the Prosecution and Registry, including asking questions to clarify the Prosecution's intentions.²⁴² The Chamber took no decisions, made no assessment – even on a preliminary basis – of the merit of any allegations or information put before it, and reached no conclusions as to the Prosecution's allegations or on any other matter. In such circumstances, the Chamber sees nothing giving rise to any doubt as to its impartiality.

104. Similarly, the Chamber does not consider that (i) submissions made by the Prosecution before the Chamber allegedly referring to case ICC-01/05-01/13,²⁴³ (ii) two Judges of the Chamber having received information in plenary or appeal proceedings,²⁴⁴ or (iii) "reminders" given by the Prosecution during the proceedings,²⁴⁵ raise reasonable doubts as to the Chamber's impartiality.

105. In addition, the Chamber recalls that it has previously stressed that its judgment pursuant to Article 74(2) "will be based solely on evidence submitted and discussed before it at trial".²⁴⁶ The Chamber also reiterates that "it is composed of professional judges who, unlike a lay jury, will be sufficiently capable of evaluating the value of any allegations brought before it and [disregarding] them as necessary".²⁴⁷ Consequently, the Chamber considers that it has been made clear that any information, allegations, or submissions made before it not based upon evidence admitted in the *Bemba* case will not be taken into consideration in the Chamber's determination pursuant to Article 74(2).

²⁴² ICC-01/05-01/08-T-303-Red3-ENG-WT.

²⁴³ ICC-01/05-01/08-3217-Red2, paras 101 and 102.

²⁴⁴ ICC-01/05-01/08-3217-Red2, paras 106 to 108.

²⁴⁵ ICC-01/05-01/08-3217-Red2, para. 109.

²⁴⁶ ICC-01/05-01/08-3098-Red, para. 18.

²⁴⁷ ICC-01/05-01/08-3070, para. 29.

106. In addition to the above, the Defence raises a number of other specific submissions relating to objective impartiality which the Chamber deems necessary to address. Regarding the Defence's allegation that the Prosecution "utilised the Single Judge as a mechanism for tainting the Trial Chamber",²⁴⁸ the Chamber considers the Defence's submission to misrepresent the Prosecution's words. The Prosecution stated that there is "space" to make a new request for authorisation to disclose transcripts of witness testimony from the *Bemba* case in case ICC-01/05-01/13;²⁴⁹ the Prosecution at no time stated that there was "'space' to influence the Trial Chamber",²⁵⁰ as alleged by the Defence.

107. Concerning the allegation that the Prosecution placed privileged information related to the case ICC-01/05-01/13 before the Chamber during the recall of P169,²⁵¹ the Chamber notes that the Defence refers to a document listed on the Prosecution's list of documents to be used during a hearing, which was not in fact used.²⁵² The Chamber does not consider this fact to raise any objective doubts as to the Chamber's impartiality.

108. As to the submission that Mr Bemba's fair trial rights were breached by matters being resolved in his absence or him being denied the opportunity to comment on submissions which could influence the Chamber's determination,²⁵³ the Chamber, in light of its discussion above,²⁵⁴ does not consider the Defence to have identified any matters which were "resolved" in the absence of the Accused, or any submissions that could "influence the Chamber's determination".²⁵⁵

²⁴⁸ ICC-01/05-01/08-3217-Red2, para. 103.

²⁴⁹ See ICC-01/05-01/13-T-5-Red2-ENG-WT, page 8, lines 1 to 14.

²⁵⁰ ICC-01/05-01/08-3217-Red2, para. 103.

²⁵¹ ICC-01/05-01/08-3217-Red2, paras 104 and 105.

²⁵² ICC-01/05-01/08-3217-Red2, para. 104.

²⁵³ ICC-01/05-01/08-3217-Red2, paras 110 and 111.

²⁵⁴ See paras 99 to 101 above.

²⁵⁵ ICC-01/05-01/08-3217-Red2, paras 110 and 111. See also ICC-01/05-01/08-3098-Red, para. 18.

109. As to the Defence's argument that there is an "objective appearance" that *ex parte* submissions may have impacted on the Chamber's appearance of impartiality, the Chamber firstly clarifies that none of the 12 *ex parte* filings that the Defence cites,²⁵⁶ and implies represent "key evidential discussions",²⁵⁷ relate to evidential issues or the substance of the *Bemba* case.²⁵⁸

110. In addition, as to the Defence's submission that the record allegedly "demonstrates the impact of such [*ex parte*] submissions on the appearance of the Chamber's impartiality",²⁵⁹ the Chamber finds the examples cited by the Defence to be misleading. The Defence submits that the Chamber took measures to prevent the Defence from questioning Prosecution witnesses on key issues regarding payments and collusion.²⁶⁰ However, during the testimony of P178, the Chamber intervened in relation to the *tone* adopted by the Defence while questioning,²⁶¹ and to prevent the Defence from revealing that certain other individuals had appeared as witnesses before the Court.²⁶² In ruling that the *tone* used by the Defence in questioning P178 was "offensive", the Chamber did not restrict the Defence's questioning or prevent it from pursuing a relevant line of inquiry.²⁶³

²⁵⁶ ICC-01/05-01/08-3239-Red2, para. 39.

²⁵⁷ ICC-01/05-01/08-3239-Red2, para. 39.

²⁵⁸ One of the filings – the Chamber's Decision on "Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines", ICC-01/05-01/08-2487-Conf – is not classified *ex parte*. Three of the filings relate to the work of the duty counsel pursuant to Rule 74: ICC-01/05-01/08-2849-Conf-Exp, ICC-01/05-01/08-2871-Conf-Exp, and ICC-01/05-01/08-2875-Conf-Exp. Four of the filings are currently classified as Under Seal but do not relate to "key evidential discussions" or the merits of the *Bemba* case: ICC-01/05-01/08-2325-US-Exp; ICC-01/05-01/08-2515-US-Exp; ICC-01/05-01/08-2563-US-Exp; and ICC-01/05-01/08-2587-US-Exp. One of the filings is a report on the security situation of witnesses: ICC-01/05-01/08-2826. One of the filings is a report filed by the VWU relating to security measures related to a witness's testimony in accordance with the Chamber's instruction in decision ICC-01/05-01/08-2418, para. 2: ICC-01/05-01/08-2430-Conf-Exp. One of the filings is a report related to a witness familiarisation: ICC-01/05-01/08-2730-Conf-Exp. One of the filings is a Registry filing related to practicalities of witness testimony: ICC-01/05-01/08-2589-Conf-Exp.

²⁵⁹ ICC-01/05-01/08-3239-Red2, para. 40.

²⁶⁰ ICC-01/05-01/08-3239-Red2, para. 40.

²⁶¹ ICC-01/05-01/08-T-154-Red2-ENG-WT, page 3, lines 13 to 14; ICC-01/05-01/08-T-157-Red2-ENG-WT, page 31, lines 22 to 25; and ICC-01/05-01/08-T-157-Red2-ENG-WT, page 53, line 10 to page 54, line 3.

²⁶² ICC-01/05-01/08-T-157-Red2-ENG-WT, page 30, lines 1 to 6.

²⁶³ ICC-01/05-01/08-T-157-Red2-ENG-WT, page 53, line 10 to page 54, line 3.

111. Similarly, while the Defence alleges that the Chamber “grant[ed] the Prosecution request to temporarily injunct the Defence from using P-169’s letter” while citing *ex parte* submissions,²⁶⁴ in the decision cited by the Defence, while ordering that all copies of the letter in the possession of the Defence be returned to protect victims and witnesses pursuant to Article 68 and Rule 87, the Chamber also found that the Defence should be granted access to information in the letter relating to “payments, allegedly received and promised” which “may be relevant to the defence if it intends to challenge the credibility of Witness 169”.²⁶⁵ Indeed, the Chamber recalls a previous decision on a similar Defence submission, wherein it noted that the Defence only lacked access to the letter for less than a week, and was able to use it throughout the questioning of all subsequent witnesses.²⁶⁶

112. In support of its submission that there was “disparate treatment” of vulnerable Prosecution and Defence witnesses resulting from “expos[ure] to *ex parte* submissions”,²⁶⁷ the Defence contrasts two examples. Firstly, the Defence submits that, in relation to a Prosecution witness, the Presiding Judge “opined that it was appropriate to inform a Victim-Witness that the Chamber was confident she was speaking the truth, due to the fact *inter alia*, that she was ‘vulnerable’”.²⁶⁸ The Defence submits that, in contrast, “Judge Aluoch intervened to question the veracity of D-51, notwithstanding the fact that [...] he was also ‘vulnerable’”.²⁶⁹ With respect to the first example, the Chamber notes that the Defence raised its concerns with the Presiding Judge in court, who gave a full response requiring no additional clarification.²⁷⁰ As to the second, the Chamber

²⁶⁴ ICC-01/05-01/08-3239-Conf-Red, para. 41.

²⁶⁵ Decision on the Prosecution’s application regarding a letter dated 6 August 2011, 9 September 2011, ICC-01/05-01/08-1727-Red, para. 12.

²⁶⁶ ICC-01/05-01/08-3204-Red, para. 22.

²⁶⁷ ICC-01/05-01/08-3239-Red2, paras 44 and 45.

²⁶⁸ ICC-01/05-01/08-3239-Red2, para. 45 (citation omitted).

²⁶⁹ ICC-01/05-01/08-3239-Red2, para. 45 (citation omitted).

²⁷⁰ ICC-01/05-01/08-T-222-Red2-ENG-WT, page 3, line 15 to page 4, line 7.

notes that the questioning of D51 referred to by the Defence simply sought *clarification* on a matter relating to the witness's testimony, and evinced no "disparate treatment" of vulnerable Prosecution and Defence witnesses.²⁷¹ In line with the above, the Chamber finds the Defence's allegations as to the impact of *ex parte* submissions on the appearance of the Chamber's impartiality to be entirely without merit.

113. In relation to the Defence submission that the Chamber confiscated D45's notes but did not do the same for P178,²⁷² the Chamber notes that P178 wrote his notes in court,²⁷³ while D45 brought written notes with him from outside the courtroom before commencing his testimony.²⁷⁴ The Chamber thus took differing approaches to differing situations. The Chamber sees nothing in the Defence's submissions demonstrating any impropriety or the appearance of impropriety in the Chamber's approach.

114. Lastly, the Chamber finds that the Defence's allegation that the Chamber "oversaw, and provided direct guidance to the Prosecution in connection with its *ex parte* investigations into the Defence",²⁷⁵ is not linked to the Defence's Allegations or its broader submissions as to the Chamber's objective impartiality. Nevertheless, the Chamber notes that the jurisprudence cited does not speak to the propriety of a Chamber providing guidance to or "overs[eeing]" a Prosecution investigation.²⁷⁶ Moreover, the allegations that the Chamber "oversaw" and "provided direct guidance" are misleading. In the two cited status conferences, the Chamber (i) sought information and clarification from the

²⁷¹ ICC-01/05-01/08-T-263-Red2-ENG-WT, page 20, line 22 to page 23, line 20.

²⁷² ICC-01/05-01/08-3239-Red2, para. 46.

²⁷³ See ICC-01/05-01/08-T-154-Red2-ENG-WT, page 40, line 22 to page 41, line 9.

²⁷⁴ See ICC-01/05-01/08-T-293-Red2-ENG-WT, page 38, line 15 to page 40, line 12; and ICC-01/05-01/08-T-298-CONF-ENG-ET, page 23, lines 10 to 20.

²⁷⁵ ICC-01/05-01/08-3239-Conf-Red2, para. 48.

²⁷⁶ ICTY, *In the case against Florence Hartmann*, Case no. IT-02-54-R77.5 in a specially appointed Chamber, Decision on Defence motion pertaining to the nullification of Trial Chamber's orders and decisions, 19 May 2009.

Prosecution and facilitated discussion between the Prosecution and Registry,²⁷⁷ and (ii) expressed its concerns related to the security of Prosecution witnesses.²⁷⁸ The Chamber sees nothing in the above to undermine the appearance of the Chamber's objective impartiality.

115. In conclusion, the Chamber finds that in its Fourth Allegation the Defence fails to demonstrate any objective lack of impartiality on the part of the Chamber. Consequently, the threshold for a stay of proceedings is not met.

e) Miscellaneous complaints

116. In addition to the above, the Defence makes a number of allegations as to the Prosecution providing misleading information and failing to disclose information, related to the credibility of Prosecution witnesses, in particular P169 and P178, and related to payments made to P169.²⁷⁹ The Defence submits that "[b]oth the Defence and the Trial Chamber depend on the Prosecution to exercise its duties in good faith and honesty" and states that "[i]n many instances, the Trial Chamber relied on undertakings from the Prosecution" to dismiss Defence requests.²⁸⁰

117. In this regard, the Prosecution submits that matters concerning credibility of Prosecution witnesses are unrelated to the Article 70 proceedings.²⁸¹ It recalls that the Chamber has repeatedly issued decisions on matters related to P169 and P178 and submits that it did not mislead the Chamber regarding any matter related to P169.²⁸²

²⁷⁷ ICC-01/05-01/08-T-303-Red3-ENG-WT.

²⁷⁸ ICC-01/05-01/08-T-148-Red2-ENG-WT.

²⁷⁹ ICC-01/05-01/08-3217-Red2, paras 114, 121, 122, 124, and 127.

²⁸⁰ ICC-01/05-01/08-3217-Red2, para. 126.

²⁸¹ ICC-01/05-01/08-3229-Red2, para. 64.

²⁸² ICC-01/05-01/08-3229-Red2, paras 18 and 53.

118. The Chamber notes that it has already expressed regret concerning the Prosecution's failure to meet its disclosure obligations in a timely manner regarding P169 and P178.²⁸³ However, the Chamber has also held that the Defence did not suffer any prejudice from the delayed disclosure.²⁸⁴ It received the relevant material prior to the testimony of P169 and was given the opportunity to make additional submissions in its closing brief and to submit additional material into evidence.²⁸⁵ Moreover, it had the opportunity to address issues concerning Prosecution payments to P169 and allegations of collusion during P169's recall.

119. Regarding documents concerning payments to witnesses other than P169 disclosed after the close of the case,²⁸⁶ while such payment information *was* disclosed, this was done on the Chamber's orders in the specific context of allegations having been made as to witness collusion;²⁸⁷ the Chamber did not depart from – and indeed reiterated – its general position that *only* “payments, benefits or other forms of assistance *that go beyond the ordinary requirements of subsistence* may affect the credibility of witnesses and information related thereto may thus be material to the preparation of the Defence and disclosable pursuant to Rule 77 of the Rules”.²⁸⁸ Moreover, the Defence fails to either link its allegations related to this disclosure to its broader allegations of abuse of process, or to demonstrate how these allegations alone justify a stay of proceedings. In addition, the Chamber recalls that it has previously found that “the defence's allegations of collusion among witnesses called by the prosecution [are]

²⁸³ 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, para. 15. A public redacted version was filed on 11 December 2014, Public redacted version of “Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, ICC-01/05-01/08-2924-Red.

²⁸⁴ 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, para. 49.

²⁸⁵ ICC-01/05-01/08-3167-Conf, para. 49.

²⁸⁶ ICC-01/05-01/08-3217-Red2, para. 127.

²⁸⁷ ICC-01/05-01/08-3167-Conf, para. 53(iii).

²⁸⁸ ICC-01/05-01/08-3167-Conf, para. 33 (emphasis in original).

unsubstantiated”.²⁸⁹ Insofar as the Defence’s submissions seek to challenge or re-litigate this finding, the Chamber considers them inappropriate and sees no reason to deviate from its prior conclusions.

120. The Defence also alleges that the Prosecution made different and incompatible submissions – in both the *Bemba* and the Article 70 cases – concerning whether an anonymous informant relied upon for the purposes of the Article 70 Investigation was privy to confidential information regarding Defence witnesses.²⁹⁰ The Chamber also notes the Prosecution’s submissions in response.²⁹¹ The Chamber recalls that it has previously received submissions from the Defence on this matter,²⁹² and has held that there is nothing to suggest that the Prosecution has not upheld its duties under Articles 54(1)(b) and 68(1) in the present case.²⁹³ The Chamber has no reason to doubt that the Prosecution has complied with its duties in this case.

121. The Chamber does not consider any of the above miscellaneous complaints to demonstrate prejudice to the Accused’s right to a fair trial or to justify a stay of proceedings, whether considered alone or together with the Defence’s other Allegations.

f) “Mr. Bemba has been denied any effective remedy for these violations”

122. The Chamber notes the extensive arguments made by the Defence alleging that it has been denied any effective remedy for the violations it alleges it has suffered.²⁹⁴ It argues that “no judicial forum is willing to hear and consider issues

²⁸⁹ ICC-01/05-01/08-3186-Red, para. 22.

²⁹⁰ ICC-01/05-01/08-3217-Red2, paras 115 to 117.

²⁹¹ ICC-01/05-01/08-3229-Red2, paras 60 to 62.

²⁹² Defence Request for Disclosure, 19 March 2014, ICC-01/05-01/08-3020-Conf, paras 29 to 39, with Confidential Annexes A, B, C, D, E, F, G, and H. A Public Redacted Version was filed on the same day, Public Redacted Version of Defence Request for Disclosure, ICC-01/05-01/08-3020-Red, Public redacted Annex A, B, C, D, E, F, G, and Public Annex H.

²⁹³ ICC-01/05-01/08-3100, para. 25.

²⁹⁴ ICC-01/05-01/08-3217-Red2, paras 128 to 142.

concerning the impact of the Article 70 case on Mr. Bemba's rights in the Main Case".²⁹⁵ In response, the Prosecution argues that the Defence does not, and has not at any point during the proceedings, lacked an adequate remedy.²⁹⁶

123. The Chamber finds that the Defence's submissions mischaracterise the prior decisions of the Chamber. While the Defence alleges that "no judicial forum is willing to hear and consider issues concerning the impact of the Article 70 case on Mr. Bemba's rights in the Main Case",²⁹⁷ the Chamber notes that it has repeatedly considered "whether the Defence claim that the Accused in the *Bemba* case has suffered prejudice as a result of the proceedings in case ICC-01/05-01/13 is substantiated".²⁹⁸ Indeed, the Defence has previously made similar submissions regarding a failure of the Chamber to address prejudice to the Accused's rights in the *Bemba* case caused by measures taken in case ICC-01/05-01/13,²⁹⁹ in adjudication of which the Chamber reiterated and stressed its position.³⁰⁰ The Defence's attempt to re-litigate this issue a third time is inappropriate and the Chamber will afford it no further consideration.

124. The Defence also alleges that the Chamber was "manifestly incorrect" in requiring it to substantiate the existence of prejudice in filings requesting interim relief.³⁰¹ Again, this is an argument which the Defence has previously raised before the Chamber,³⁰² and which the Chamber has rejected in view of the Defence's mischaracterisation of the Chamber's prior decision.³⁰³ More specifically, in the Abuse of Process Motion the Defence argues that there is an "obvious appearance of impropriety" and that other than simply stating this,

²⁹⁵ ICC-01/05-01/08-3217-Red2, para. 135.

²⁹⁶ ICC-01/05-01/08-3229-Red2, para. 70.

²⁹⁷ ICC-01/05-01/08-3217-Red2, para. 135.

²⁹⁸ ICC-01/05-01/08-3059, para. 18. *See also*, ICC-01/05-01/08-3101, paras 23 to 26.

²⁹⁹ ICC-01/05-01/08-3103-Red2, paras 4 to 6, 14, 23 to 25, 43, and 44.

³⁰⁰ ICC-01/05-01/08-3113, para. 32.

³⁰¹ ICC-01/05-01/08-3217-Red2, paras 136 and 137.

³⁰² ICC-01/05-01/08-3064, para. 14.

³⁰³ ICC-01/05-01/08-3122, paras 20 to 23.

“proof of prejudice could only be met by putting privileged information before the Chamber”.³⁰⁴

125. However, the Defence’s submission, again, misrepresents the Chamber’s previous decisions, obfuscates the nature of the Chamber’s analysis, and effectively seeks to re-litigate the Chamber’s prior decisions. Irrespective of any alleged “impropriety” or illegality, the Chamber has repeatedly stressed that it will analyse and determine whether actions taken in case ICC-01/05-01/13 may have caused or be continuing to cause prejudice to the Accused’s right to a fair trial in the *Bemba* case. However, for the Defence’s requests to succeed, it must identify and substantiate the existence of prejudice to the fairness of the trial, whether actual or potential. While the Defence need not *prove* prejudice, it is insufficient to merely state that prejudice to the Accused’s right to a fair trial in the *Bemba* case or a risk thereof exists. This is particularly so where such prejudice, irrespective of any illegality or impropriety, is not self-evident. In the present circumstances, where the Defence is required to demonstrate that the high threshold required to justify a stay of proceedings is met, sufficient substantiation is even more important. Throughout the Abuse of Process Motion, as in its previous similar requests, the Defence has manifestly failed to do this.³⁰⁵

126. In a similar argument, the Defence submits that it has “acted diligently to attempt to minimise the prejudice to Mr. Bemba” but that the “Trial Chamber declined to act” and “refused to authorise an appeal”.³⁰⁶ Further, it argues that “[i]t is also no answer to claim that these issues have been litigated in circumstances where no remedy has been provided” and states that the

³⁰⁴ ICC-01/05-01/08-3217-Red2, para. 137.

³⁰⁵ See paras 33, 56, 64, and 72 above.

³⁰⁶ ICC-01/05-01/08-3217-Red2, paras 129 and 130.

Chamber's prior rulings meant that the Defence was unable to "minimise or remedy these violations".³⁰⁷

127. Again, this mischaracterises the Chamber's decisions. The Chamber did not "decline to act" or "refuse[...] to authorise an appeal" in the face of prejudice to the Accused's right to a fair trial in the *Bemba* case for which justice dictated a remedy be granted. Rather, the Chamber found that no prejudice to the fairness of the trial had been shown and that no remedy was warranted. As such, the fact that the Chamber has rejected previous Defence requests in no way serves to satisfy the prerequisites for a stay of proceedings.

g) Request for Mr Bemba to be released to Portugal or the Kingdom of Belgium

128. The Defence requests, as an alternative to stay of proceedings, that the Chamber grant Mr Bemba interim release.³⁰⁸ The Defence provides no separate or differing arguments to support this request and does not include this request in the "Relief sought".³⁰⁹ The Chamber also notes that it recently rejected a request from the Defence for interim relief,³¹⁰ and that that decision was upheld on appeal.³¹¹ As the Chamber has rejected the Defence's submissions in support of its request for a stay of proceedings, its request for interim release therefore also fails.

III. Conclusions

129. In view of the foregoing, the Chamber finds that the Defence has failed to substantiate prejudice to the Accused's right to a fair trial. The Chamber finds

³⁰⁷ ICC-01/05-01/08-3217-Red2, para. 138.

³⁰⁸ ICC-01/05-01/08-3217-Red2, para. 142.

³⁰⁹ ICC-01/05-01/08-3217-Red2, para. 143.

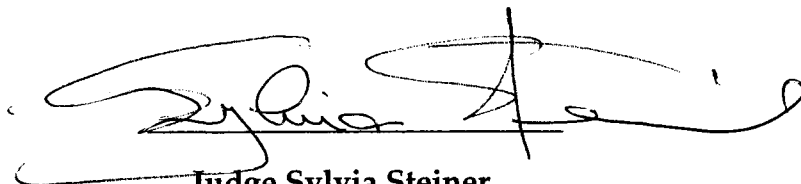
³¹⁰ Decision on "Defence Urgent Motion for Provisional Release", 23 December 2014, ICC-01/05-01/08-3221.

³¹¹ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled "Decision on 'Defence Urgent Motion for Provisional Release'", 20 May 2015, ICC-01/05-01/08-3249-Conf and ICC-01/05-01/08-3249-Red.

that cumulative consideration of the Allegations does not lead to a different conclusion. As such, the threshold for granting a stay of proceedings has not been met. Consequently, the Chamber:

- (i) REJECTS the Defence's request for a stay of the proceedings;
and
- (ii) REJECTS the Defence's request for Mr Bemba to be released to Portugal or the Kingdom of Belgium.

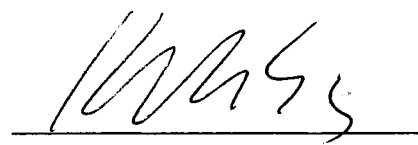
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 17 June 2015

At The Hague, the Netherlands