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**International
Criminal
Court**

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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

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

Public

**Decision on “Defence Request for Leave to Appeal the ‘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

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Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

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**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 Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'" ("Decision").

I. Background and Submissions

1. On 17 June 2015, the Chamber issued its "Decision on 'Defence Request for Relief for Abuse of Process'" ("Impugned Decision"),¹ in which it rejected the Defence's requests for a stay of proceedings and for Mr Bemba to be released to Portugal or the Kingdom of Belgium.²
2. On 23 June 2015, the Defence for Mr Jean-Pierre Bemba Gombo ("Defence") filed its "Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'" ("Request for Leave to Appeal" or "Request"),³ in which it requests the Chamber to grant it leave to appeal the Impugned Decision.⁴ The Defence argues that "the Trial Chamber made a number of significant errors of fact and law, including in its articulation of the legal standard for a stay of proceedings", which it submits "give rise to distinct appealable issues that warrant review on the part of the Appeals Chamber".⁵ The Defence raises 11 "appealable issues" ("Issues"), which it submits meet the criteria set

¹ Decision on "Defence Request for Relief for Abuse of Process", 17 June 2015, ICC-01/05-01/08-3255.

² ICC-01/05-01/08-3255, para. 129.

³ Defence Request for Leave to Appeal the "Decision on Defence Request for Relief for Abuse of Process" 23 June 2015, ICC-01/05-01/08-3260. On 24 June 2015, the defence files its Corrigendum to Defence Request for Leave to Appeal the "Decision on Defence Request for Relief for Abuse of Process", 24 June 2015, ICC-01/05-01/08-3260-Corr.

⁴ ICC-01/05-01/08-3260-Corr, para. 15.

⁵ ICC-01/05-01/08-3260-Corr, para. 4.

out under Article 82(1)(d) of the Rome Statute (“Statute”) and are “discrete legal questions which arise directly out of the Impugned Decision”, not “merely ‘disagreements’ or ‘conflicts of opinion’ between the Defence and the Chamber”.⁶

3. On 26 June 2015, the Office of the Prosecutor (“Prosecution”) submitted its “Prosecution’s Response to the Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’” (“Response”),⁷ in which it opposes the Request.⁸ The Prosecution submits that “[t]he 11 issues referred to in the [Request] neither arise from the Decision nor are they appealable issues within the meaning of article 82(1)(d)” and that “[t]he Application fails to show that the Issues would significantly affect the fair and expeditious conduct of the proceedings, *and* that the Appeals Chamber’s immediate resolution may materially advance the proceedings”.⁹ The Prosecution makes specific submissions in relation to each Issue raised by the Defence and submits that the Issues fail to meet the criteria for leave to appeal under Article 82(1)(d).¹⁰

⁶ ICC-01/05-01/08-3260-Corr, paras 7 to 14.

⁷ Prosecution’s Response to the Defence Request for Leave to Appeal the “Decision on Defence Request for Relief for Abuse of Process”, 26 June 2015, ICC-01/05-01/08-3261.

⁸ ICC-01/05-01/08-3261, paras 1 and 19.

⁹ ICC-01/05-01/08-3261, para. 1 (emphasis in original).

¹⁰ ICC-01/05-01/08-3261, paras 2 to 18.

II. Applicable law

4. In the present Decision the Chamber has considered Articles 67 and 82(1)(d) of the Statute.
5. In deciding on the Request for Leave to Appeal, the Chamber is guided by the established jurisprudence of this Chamber and of the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, for a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific “issues” which were dealt with in the relevant decision and which constitute the appealable subject.¹¹
6. The Appeals Chamber has held that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”¹² In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.¹³

¹¹ Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9. *See also*, Decision on the “Defence Request for Leave to Appeal the Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”, 30 October 2012, ICC-01/05-01/08-2399, paragraph 9.

¹² ICC-01/04-168, paragraph 9. *See also*, ICC-01/05-01/08-2399, paragraph 10.

¹³ Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paragraph 17; Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, paragraph 11;

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

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand would significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁴

8. The three criteria mentioned above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.¹⁵

9. It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.¹⁶ Further, it is insufficient

Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)’”, 29 August 2011, ICC-01/09-01/11-301, paragraphs 32 to 34; Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paragraphs 50 and 61.

¹⁴ Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169, paragraph 23. *See also*, ICC-01/05-01/08-2399, paragraph 11.

¹⁵ ICC-01/05-01/08-1169, paragraph 24. *See also*, ICC-01/05-01/08-2399, paragraph 12.

¹⁶ ICC-01/05-01/08-1169, paragraph 25. *See also*, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 21; Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 11. *See also*, ICC-01/05-01/08-2399, paragraph 13.

that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.¹⁷

III. Analysis

Whether the Issues constitute appealable issues arising from the Impugned Decision

First Issue

10. The first Issue identified by the Defence is “[w]hether the Trial Chamber’s error in enunciating the test for a stay of proceedings warrants a remand of the issues in the Defence Request to be decided in line with the correct standard”.¹⁸ The Defence, in a footnote, highlights that the Chamber stated that “a stay of proceedings is only justified where the situation is such that it is ‘impossible to piece together the constituent elements of a fair trial’, and ‘it would be “repugnant” or “odious” to the administration of justice to allow the case to continue”’, i.e. the Defence alleges that the Chamber erroneously applied the above formulations conjunctively rather than disjunctively.¹⁹

11. The Prosecution submits that the first Issue does not arise from the Impugned Decision, contending that the Chamber did not require that the

¹⁷ ICC-01/05-01/08-1169, paragraph 25. *See also*, ICC-01/05-01/08-2399, paragraph 13.

¹⁸ ICC-01/05-01/08-3260-Corr, para. 8(i) (internal citations omitted).

¹⁹ ICC-01/05-01/08-3260-Corr, footnote 11 (emphasis in original).

Defence establish both situations cumulatively, but merely listed two situations which would justify a stay of proceedings.²⁰

12. As a preliminary matter, while noting that in setting out the threshold for a stay of proceedings in the Impugned Decision it found that “a stay of proceedings is only justified where the situation is such that it is ‘impossible to piece together the constituent elements of a fair trial’, and ‘it would be “repugnant” or “odious” to the administration of justice to allow the case to continue’”,²¹ the Chamber considers that the two formulations clearly reflect one other. As such, the Chamber is unpersuaded that there is any meaningful distinction to be drawn between applying them cumulatively or alternatively. Moreover, the Chamber notes that in numerous instances throughout the Impugned Decision the Chamber did not require cumulative satisfaction of the two formulations, linking them with the word “or”.²²

13. The above notwithstanding, the Chamber at no point found either formulation to be satisfied. As such, the question of whether the two formulations were cumulatively or alternatively applicable had no bearing on the Chamber’s conclusions in the Impugned Decision. Consequently, the first Issue is not a “subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.²³

²⁰ ICC-01/05-01/08-3261, para. 2.

²¹ ICC-01/05-01/08-3255, para. 10 (internal citations omitted and emphasis added).

²² See ICC-01/05-01/08-3255, paras 33, 47, 64, 72, and 74.

²³ ICC-01/04-168, para. 9.

14. In light of the above, the Chamber finds that the first Issue is not an appealable issue.

Second Issue

15. The second Issue identified by the Defence is “[w]hether the Trial Chamber erred in finding that it had no ‘positive obligation to take measures to ensure the confidentiality of Defence information’ on the basis that this would have required the Chamber to review measures ordered by the Single Judge in the Article 70 Case, when the acts in question took place in 2012 before the matter was referred to the Single Judge and concerned Prosecution investigations into Defence witnesses for the purposes of the present case”.²⁴

16. In its Response, the Prosecution submits that the second Issue does not arise from the Impugned Decision, arguing that the Chamber did not enter findings to the effect alleged by the Defence.²⁵

17. The Chamber notes that the Defence’s submission that the Chamber had “a positive obligation to take measures to ensure the confidentiality of Defence information” was made in the context of allegations regarding the impact of violations of Defence immunities and privilege, which the Defence asserted satisfied the threshold for a stay of proceedings.²⁶ In the Impugned Decision, after addressing the Defence’s submissions in

²⁴ ICC-01/05-01/08-3260-Corr, para. 8(ii).

²⁵ ICC-01/05-01/08-3261, para. 3.

²⁶ ICC-01/05-01/08-3217-Red2, paras 22 to 39.

support of its request for a stay of proceedings, the Chamber concluded that:²⁷

[...] 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”.

[...]

The Defence fails to provide any [...] 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.

18. After reaching its conclusion as to whether the threshold for a stay of proceedings had been met, the Chamber, as an additional issue, addressed the Defence’s submissions as to its “‘positive obligation to take measures’ to ensure the confidentiality of Defence information”.²⁸ It reiterated that it was not competent to review measures ordered or authorised by the Single Judge in the Prosecution’s investigation related to offences under Article 70 of the Statute and found that “this submission provides no further information relevant to its analysis of whether the threshold for a stay of proceedings is satisfied”.²⁹

19. As this issue was not relevant to the Chamber’s determination of whether the threshold for a stay of proceedings had been met and therefore not essential to the Chamber’s determination in the Impugned Decision, the Chamber finds it not to be a “subject the resolution of which is essential

²⁷ ICC-01/05-01/08-3255, para. 33.

²⁸ ICC-01/05-01/08-3255, para. 34.

²⁹ ICC-01/05-01/08-3255, para. 34.

for the determination of matters arising in the judicial cause under examination". As a result, the Chamber finds that the second Issue does not constitute an appealable issue.

Third Issue

20. The third Issue identified by the Defence is "[w]hether the Trial Chamber erred in rejecting Defence arguments concerning the privilege which inheres in Defence work product with reference to a prior decision which is: (a) limited to privilege for the purpose of communications with a detained accused; and (b) inconsistent with more recent jurisprudence of Trial Chamber III [*sic*] in the Article 70 Case".³⁰
21. In its Response, the Prosecution submits that the third Issue is not an appealable issue as "[i]t is a mere disagreement with the manner in which the Chamber disposed of the Defence's repetitious submissions".³¹
22. The Chamber notes that the reference in the Impugned Decision with which the Defence takes issue was made in the context of a preliminary paragraph wherein the Chamber recalled its position as to professional privilege and stated that "[i]nsofar 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".³²

³⁰ ICC-01/05-01/08-3260-Corr, para. 8(iii).

³¹ ICC-01/05-01/08-3261, para. 4.

³² ICC-01/05-01/08-3255, para. 61.

23. The Chamber then turned to address and decide upon the Defence's submissions regarding "the allegation that Mr Mangenda's communications, whether privileged or not, contained 'internal work product'".³³ In reaching its conclusions on these submissions the Chamber did not take into account the "reference" referred to above.

24. In light of the above, the Chamber finds that the third Issue misrepresents the Impugned Decision and consequently does not arise from it.

25. The Chamber also notes the Defence's allegation that the Chamber's prior decision is "inconsistent with more recent jurisprudence of Trial Chamber III [*sic*] in the Article 70 Case".³⁴ As this submission is unexplained and because the Defence identifies no alleged legal error in the Impugned Decision the Chamber has considered it no further.

Fourth Issue

26. The fourth Issue identified by the Defence is "[w]hether the Trial Chamber erred in applying a different standard to Prosecution and Defence submissions on whether the Prosecution accessed privileged material".³⁵ It submits that the Chamber "accept[ed] unsubstantiated Prosecution submissions that it had not [accessed privileged material], while dismissing Defence submissions that [the Prosecution had accessed privileged material] on the basis that they were unsubstantiated".³⁶

³³ ICC-01/05-01/08-3255, paras 62 to 64.

³⁴ ICC-01/05-01/08-3260-Corr, para. 8(iii).

³⁵ ICC-01/05-01/08-3260-Corr, para. 8(iv).

³⁶ ICC-01/05-01/08-3260-Corr, para. 8(iv) (internal citations omitted).

27. In its Response, the Prosecution submits that the Defence does not correctly represent the Impugned Decision, stating that the Chamber's decision was "squarely based on the Single Judge's assurance that he had put in place sufficient safeguards to prevent the Prosecution from accessing privileged material and that as a result, 'no privileged documents came in the possession of the Prosecution'".³⁷

28. In its Request for Relief for Abuse of Process ("Original Request"),³⁸ the Defence sought a stay of proceedings on the basis that the "constituent elements of Mr. Jean Pierre Bemba Gombo's right to a fair, impartial and independent trial have been ruptured, irreparably".³⁹ In the Impugned Decision, the Chamber held that, in order to succeed in its request, the Defence was required to satisfy the applicable threshold for a stay of proceedings.⁴⁰ The Chamber held 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".⁴¹ Thereafter, the Chamber indeed "dismiss[ed] Defence submissions [...] on the basis that they were unsubstantiated".⁴²

³⁷ ICC-01/05-01/08-3261, para. 5.

³⁸ Defence Request for Relief for Abuse of Process, 15 December 2014, ICC-01/05-01/08-3217-Conf-Exp. A confidential redacted version was filed on the same day: ICC-01/05-01/08-3217-Conf-Red. A public redacted version was filed on 30 January 2015: ICC-01/05-01/08-3217-Conf-Red2.

³⁹ ICC-01/05-01/08-3217-Red2, para. 1.

⁴⁰ See ICC-01/05-01/08-3255, paras 6 to 11, 33, 47, 64, 72, and 74.

⁴¹ ICC-01/05-01/08-3255, para. 30.

⁴² ICC-01/05-01/08-3260-Corr, para. 8(iv).

29. However, in the part of the Impugned Decision in which the Defence now alleges that the Chamber “accept[ed] unsubstantiated Prosecution submissions”, the Chamber in fact stated that:⁴³

[...] 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 [...] the Chamber (i) notes the Single Judge’s statement that “no privileged document came in the possession of the Prosecution”, 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”.

30. As is clear from the wording of the Impugned Decision, the Chamber did not *accept* “unsubstantiated Prosecution submissions”. Rather, it *reiterated its previous finding* that it has no reason to doubt an assertion made by the Prosecution that it “is not privy to any information that is protected by legitimate professional privilege”.⁴⁴

31. Furthermore, the reiterated finding itself, made in a decision issued on 2 May 2014, was based upon the “procedure for the monitoring of communications and seizure of materials in case ICC-01/05-01/13” and a statement of the Single Judge.⁴⁵ Therefore, rather than accepting the Prosecution’s statement, the Chamber reached a finding – based on factors *other than* the Prosecution’s statement – that it had no reason to doubt said statement.

32. For the above reasons, the Chamber finds that the fourth Issue misrepresents the Impugned Decision. As the Chamber did not

⁴³ ICC-01/05-01/08-3255, para. 73 (internal citations omitted).

⁴⁴ ICC-01/05-01/08-3255, para. 73.

⁴⁵ ICC-01/05-01/08-3059, para. 19.

“accept[...] unsubstantiated Prosecution submissions”,⁴⁶ the question of whether the Chamber “erred in applying a different standard to Prosecution and Defence submissions”⁴⁷ does not arise from the Impugned Decision.

Fifth Issue

33. The fifth Issue identified by the Defence is “[w]hether the Trial Chamber erred in finding that no prejudice arose from the two-year delay in the disclosure of Rule 77 material, by failing to address the inability of the accused to contemporaneously confront his witnesses with information arising from the disclosure in 2012”.⁴⁸

34. In its Response, the Prosecution submits that the fifth Issue is a disagreement with the manner in which the Chamber disposed of the Defence arguments.⁴⁹ In addition, it contends that the fifth Issue does not arise from the Impugned Decision as, contrary to the Defence’s allegation, the Chamber did address the Defence’s submissions as to the alleged prejudice suffered by it.⁵⁰

35. The Chamber notes that in the Impugned Decision, the Chamber expressly addressed the “Defence argu[ment] 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

⁴⁶ ICC-01/05-01/08-3260-Corr, para. 8(iv).

⁴⁷ ICC-01/05-01/08-3260-Corr, para. 8(iv).

⁴⁸ ICC-01/05-01/08-3260-Corr, para. 8(v).

⁴⁹ ICC-01/05-01/08-3261, para. 6.

⁵⁰ ICC-01/05-01/08-3261, para. 7.

witnesses during their testimony”, concluding that the Defence “fails to demonstrate any prejudice to the fairness of the trial and consequently also fails to satisfy the threshold for a stay of proceedings”.⁵¹ In light of the above, the Defence’s allegation that the Chamber “fail[ed] to address” this issue is without basis.

36. Accordingly, the Chamber finds that the fifth Issue misrepresents the Impugned Decision and does not arise from it.

Sixth Issue

37. The sixth Issue identified by the Defence is “Whether the Trial Chamber erred in finding that the relevant Rule 77 material was disclosed on 22 July 2014, when it was made aware prior to the rendering of the Impugned Decision on 15 June 2015 that the Prosecution’s disclosure violations were in fact ongoing in the present proceedings”.⁵²

38. In its Response the Prosecution submits that the sixth Issue does not arise from the Impugned Decision, as the Defence “wrongly assumes that the Trial Chamber was made aware prior to the rendering of the [Impugned] Decision that the Prosecution’s disclosure violations were ongoing in [the *Bemba* case]”.⁵³ In addition, the Prosecution argues that even if the Chamber had been aware of the Defence’s allegations that the violations were ongoing, the Defence’s submission that the allegations made by Mr Bemba’s Defence counsel in case ICC-01/05-01/13 show that the

⁵¹ ICC-01/05-01/08-3255, paras 86 to 88 and 90.

⁵² ICC-01/05-01/08-3260-Corr, para. 8(vi).

⁵³ ICC-01/05-01/08-3261, para. 8.

Prosecution continues to violate its disclosure obligations in the *Bemba* case are speculative.⁵⁴

39. The sixth Issue turns on the Defence's allegation that the Chamber was "made aware" of disclosure violations on the part of the Prosecution prior to rendering the Impugned Decision, in which it found that the relevant Rule 77 material was disclosed on 22 July 2014.⁵⁵ The Defence's basis for this assertion is the fact that the Chamber was included on the notification page of a response filed in a separate case before the Court, two days prior to the Chamber's rendering of the Impugned Decision, in which said allegedly ongoing disclosure violations were mentioned.⁵⁶

40. The Chamber considers that an allegation that the Chamber failed to take into account information contained in a filing in a separate case before the Court, but which was not mentioned in the parties' submissions, is not an appealable issue. The Chamber considers that in a request for leave to appeal a party may not rely on – or complain of a Chamber's failure to take into account – information or facts not referred to by the parties in the original submissions underlying the decision impugned.

41. Further, the Chamber notes that alleged ongoing disclosure violations on the part of the Prosecution are raised in a pending request for a stay of proceedings filed by the Defence in the present case;⁵⁷ the Chamber will

⁵⁴ ICC-01/05-01/08-3261, para. 8.

⁵⁵ ICC-01/05-01/08-3260-Corr, para. 8(vii).

⁵⁶ ICC-01/05-01/08-3260-Corr, para. 8(vii), citing: ICC-01/05-01/13-1005-Conf-Exp, paras 52 to 55.

⁵⁷ See Defence request for a stay of proceedings and request for further disclosure, 19 June 2015, ICC-01/05-01/08-3257-Conf. A public redacted version was filed the same day: ICC-01/05-01/08-3257-Red.

decide on this request in due course. As such, and in addition to the considerations set out above, the Chamber considers that immediate resolution of the sixth Issue by the Appeals Chamber would not have the potential to materially advance the proceedings.

42. For the reasons above, the Chamber finds that the sixth Issue is not an appealable issue.

Seventh Issue

43. The seventh Issue identified by the Defence is “[w]hether the Trial Chamber erred in excusing the Prosecution’s non-disclosure of Rule 77 material on the basis that the undisclosed material ‘was neither submitted nor admitted into evidence in the Bemba case’, when the prejudice inheres in the Prosecution having failed to put its case to the witnesses, and substantiating its case with a solid evidential foundation”.⁵⁸

44. In its Response, the Prosecution submits that the seventh Issue does not arise from the Impugned Decision, arguing that the Chamber “extensively addressed and rejected the Defence’s allegations that the Accused suffered prejudice from the delayed disclosure of Rule 77 material” and “merely noted the fact that the Rule 77 material was not admitted into evidence to illustrate its irrelevance to the Defence’s ability to effectively question its witness”.⁵⁹

⁵⁸ ICC-01/05-01/08-3260-Corr, para. 8(vii).

⁵⁹ ICC-01/05-01/08-3261, para. 9.

45. In the Impugned Decision, the Chamber assessed whether the Prosecution had met its disclosure obligations, finding 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 applying to the Chamber for authorisation, it failed to satisfy the requirements of Rule 81(2)”.⁶⁰

46. Thereafter, the Chamber assessed whether the Prosecution’s actions had caused prejudice to the Accused’s right to a fair trial such as to satisfy the threshold for a stay of proceedings.⁶¹ Within this analysis, the Chamber considered whether the Defence had been prejudiced in its ability to question its witnesses, noting that:⁶²

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. Indeed the material referred to by the Defence was neither submitted nor admitted into evidence in the *Bemba* case.

47. It then concluded that the Defence had “fail[ed] to demonstrate any prejudice to the fairness of the trial and consequently also fail[ed] to satisfy the threshold for a stay of proceedings”.⁶³ The Chamber based this conclusion upon analysis of a number of factors. The Defence’s ability to question its witnesses was one such factor; however, the Chamber also took into account, *inter alia*, “its orders clarifying the Prosecution’s disclosure obligations, the fact that the relevant material was disclosed on

⁶⁰ ICC-01/05-01/08-3255, para. 83.

⁶¹ ICC-01/05-01/08-3255, paras 84 to 90.

⁶² ICC-01/05-01/08-3255, para. 87 (internal citations omitted).

⁶³ ICC-01/05-01/08-3255, para. 90.

22 July 2014, and the Defence's failure to make timely submissions on the basis of the material once disclosed".⁶⁴

48. In light of the above, it is clear that the Chamber did not "excuse" the Prosecution's alleged non-disclosure of Rule 77 material, whether solely on the basis that it "was neither submitted nor admitted" in the *Bemba* case, or otherwise. Rather, the Chamber (i) found that the Prosecution had failed to comply with Rule 81(2) and (ii) based on a range of factors, determined that the threshold for a stay of proceedings had not been met.

49. For the above reasons, the Chamber considers that the seventh Issue misrepresents the Impugned Decision and consequently does not arise from it. Insofar as the Defence's submissions imply disagreement with the Chamber's conclusion as to whether the threshold for a stay of proceedings had been met, the Chamber finds that such disagreement, without identification of any legal or factual error in the Impugned Decision, does not constitute an appealable issue.

Eighth Issue

50. The eighth Issue identified by the Defence is "[w]hether the Trial Chamber erred in its determination of the 'Fourth Allegation' by not addressing its own critical failure to refer the Prosecution's *ex parte* filings and submissions immediately to the Pre-Trial Chamber as required by the

⁶⁴ ICC-01/05-01/08-3255, para. 90.

Statute, rather than erroneously entertaining these requests for a period of five months”.⁶⁵

51. In its Response, the Prosecution submits that the eighth Issue does not arise from the Impugned Decision, arguing that the Defence fails to substantiate how the Chamber’s alleged error was essential to the Chamber’s determination in the Impugned Decision.⁶⁶ In addition, the Prosecution contends that the Defence’s allegation that the Chamber “entertained” Prosecution filings and submissions for five months is speculative, noting that the Defence “does not indicate any concrete step that the Trial Chamber undertook with respect to those filings and submissions other than referring them to the Pre-Trial Chamber”.⁶⁷

52. In its Original Request, the Defence stated that the Chamber “should immediately have directed the Prosecution to seize the Pre-Trial Chamber”.⁶⁸ It continued, stating that “[i]nstead, the Trial Chamber and Prosecution interacted on multiple occasions, and exchanged viewpoints as to how best to facilitate the Prosecution’s investigations”.⁶⁹ It submitted that the appearance of the impartiality of the proceedings was “contaminated” by prosecutorial actions and events occurring between the time the Prosecution first provided information to the Chamber regarding its Article 70 investigations and the Chamber’s decision as to its competence over “investigative measures requested by the prosecution in

⁶⁵ ICC-01/05-01/08-3260-Corr, para. 8(viii).

⁶⁶ ICC-01/05-01/08-3261, para. 10.

⁶⁷ ICC-01/05-01/08-3261, para. 10.

⁶⁸ ICC-01/05-01/08-3217-Red2, para. 97.

⁶⁹ ICC-01/05-01/08-3217-Red2, para. 97.

relation to an Article 70 investigation”.⁷⁰ After referring to information put before the Chamber by the Prosecution, and the content of a status conference, the Defence concluded that “[b]y the time that the Trial Chamber decided it had ‘no competence’ over the Prosecution’s request [...] the damage had been done”.⁷¹

53. As is clear from the above, the Defence argued that the threshold for a stay of proceedings had been met based upon events occurring after the Chamber’s alleged failure to “immediately [...] direct[...] the Prosecution to seize the Pre-Trial Chamber” which allegedly prejudiced the Accused’s right to a fair trial.⁷² The Chamber expressly addressed these submissions in the Impugned Decision.⁷³ The Defence did not submit that the Chamber’s alleged failure to “immediately [...] direct[...] the Prosecution to seize the Pre-Trial Chamber”,⁷⁴ *itself*, caused prejudice to the Accused’s right to a fair trial.

54. In light of the above, it is clear that the Chamber addressed all Defence submissions essential to the Chamber’s determination of whether the threshold for a stay of proceedings had been met. In addition, the Chamber considers that the question of whether the Chamber erred in

⁷⁰ ICC-01/05-01/08-3217-Red2, paras 96 to 100. *See* Prosecution’s Request for Record of Payments made by the Registry to Witnesses called by the Defence of Mr. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-2412-Conf-Exp. Pursuant to the Chamber’s Decision ICC-01/05-01/08-3057, this filing was reclassified as public: ICC-01/05-01/08-2412. *See also*, Decision on the prosecution’s request relating to Article 70 investigation, 26 April 2013, ICC-01/05-01/08-2606-Conf-Exp. Pursuant to the Chamber’s Decision ICC-01/05-01/08-2920-Conf, this decision was reclassified as confidential: ICC-01/05-01/08-2606-Conf. A public redacted version was filed on 2 May 2014: ICC-01/05-01/08-2606-Red, para. 21.

⁷¹ ICC-01/05-01/08-3217-Red2, paras 96 to 100.

⁷² ICC-01/05-01/08-3217-Red2, para. 97 to 100.

⁷³ ICC-01/05-01/08-3255, paras 103 to 115.

⁷⁴ ICC-01/05-01/08-3217-Red2, para. 97 to 100.

“fail[ing] to refer the Prosecution’s *ex parte* filings and submissions immediately to the Pre-Trial Chamber”,⁷⁵ disconnected from any argument as to how this alleged failure satisfied the threshold for a stay of proceedings, was not a “subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.⁷⁶

55. As the Defence identifies no submission which the Impugned Decision fails to address, and noting that the subject addressed in the eighth Issue was in any event not essential to the Chamber’s determination in the Impugned Decision, the Chamber finds that the eighth Issue does not constitute an appealable issue.

Ninth Issue

56. The ninth Issue identified by the Defence is “[w]hether the Trial Chamber erred in its determination of the ‘Fourth Allegation’ by failing to apply the correct legal standard of ‘whether the circumstances would leave a reasonable observer, properly informed, to reasonably apprehend bias in the judge’, but rather focusing on whether the Chamber itself could see anything giving rise to doubts as to its own impartiality”.⁷⁷

57. In its Response, the Prosecution submits that the ninth Issue does not arise from the Impugned Decision, stating that the Defence fails to “correctly portray the [Impugned] Decision, which correctly sets out the applicable

⁷⁵ ICC-01/05-01/08-3260-Corr, para. 8(viii).

⁷⁶ ICC-01/04-168, para. 9.

⁷⁷ ICC-01/05-01/08-3260-Corr, para. 8(ix).

legal threshold as developed by the jurisprudence from the Plenary and the Presidency” and “appl[ies] this standard to the facts of the case”.⁷⁸ It states that even if the Chamber does not fully repeat this standard in each factual finding, “it cannot reasonably be concluded that the Chamber applied anything other than the objective standard that it articulated just a few paragraphs earlier”.⁷⁹

58. In its submissions on the ninth Issue, the Defence ignores the following findings in the Impugned Decision:⁸⁰

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*”.

[...]

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.

59. After setting out the above, the Chamber proceeded to set out its specific findings as to whether, in its view, the circumstances referred to by the Defence satisfied the test for objective impartiality it had set out immediately prior.⁸¹

60. Taking the above into account, particularly the fact that the Chamber expressly found the relevant standard to be that which the Defence

⁷⁸ ICC-01/05-01/08-3261, para. 11.

⁷⁹ ICC-01/05-01/08-3261, para. 11.

⁸⁰ ICC-01/05-01/08-3255, paras 100 and 102 (emphasis added).

⁸¹ ICC-01/05-01/08-3255, paras 103 to 115.

complains it failed to apply,⁸² the Chamber finds that the ninth Issue misrepresents the Impugned Decision and thus does not arise from it. That the Chamber, in setting out its fuller opinion and specific findings, did not repeat the applicable standard in full is not an appealable issue.

61. In light of the above the Chamber finds that the ninth Issue does not arise from the Impugned Decision.

Tenth Issue

62. The tenth Issue identified by the Defence is “[w]hether the Trial Chamber’s conclusion that it did not ‘provide direct guidance’ to the Prosecution (and in fact that such a suggestion was ‘misleading’), can be reconciled with examples of the Presiding Judge providing direct guidance to the Prosecution”.⁸³

63. In its Response, the Prosecution submits that the tenth Issue is not an appealable issue as it was not essential to the determination of the Impugned Decision.⁸⁴ In addition, the Prosecution argues that the example referred to by the Defence is nothing more than a disagreement with the Chamber’s finding that it “merely ‘facilitated discussion between the Prosecution and Registry’”.⁸⁵

⁸² ICC-01/05-01/08-3255, para. 100.

⁸³ ICC-01/05-01/08-3260-Corr, para. 8(x).

⁸⁴ ICC-01/05-01/08-3261, para. 12.

⁸⁵ ICC-01/05-01/08-3261, para. 12.

64. In the tenth Issue, the Defence expresses its disagreement with the factual determination made by the Chamber that “[i]n the two cited status conferences, the Chamber (i) sought information and clarification from the Prosecution and facilitated discussion between the Prosecution and Registry, and (ii) expressed its concerns related to the security of Prosecution witnesses”.⁸⁶

65. However, the Chamber notes that in the Impugned Decision it found 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’, is not linked to the Defence’s Allegations or its broader submissions as to the Chamber’s objective impartiality”, and that “the jurisprudence cited does not speak to the propriety of a Chamber providing guidance to or ‘overs[eeing]’ a Prosecution investigation”.⁸⁷ Only after reaching these conclusions did the Chamber find that “[m]oreover, the allegations that the Chamber ‘oversaw’ and ‘provided direct guidance’ are misleading”.⁸⁸

66. As the Chamber had already found the Defence’s submissions to be unconnected to its allegations regarding whether the threshold for a stay of proceedings was satisfied or its submissions on impartiality, the Chamber’s finding that said allegations “[we]re misleading” was not a

⁸⁶ ICC-01/05-01/08-3255, para. 114 (internal citations omitted).

⁸⁷ ICC-01/05-01/08-3255, para. 114.

⁸⁸ ICC-01/05-01/08-3255, para. 114 (internal citations omitted).

“subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.⁸⁹

67. In addition, the Chamber notes that the tenth Issue merely repeats the Defence’s original argument that the Presiding Judge’s words in a status conference constituted “overseeing” or “providing direct guidance”.⁹⁰ In the Impugned Decision, the Chamber responded to this argument, addressing the relevant status conferences and finding that the Chamber had “(i) sought information and clarification from the Prosecution and facilitated discussion between the Prosecution and Registry, and (ii) expressed its concerns related to the security of Prosecution witnesses”.⁹¹ That the Defence disagrees with the Chamber’s conclusion on this issue, without identifying any concrete legal or factual error, is not an appealable issue.

68. In light of the above, the Chamber finds that the tenth Issue is not an appealable issue.

Eleventh Issue

69. The eleventh Issue identified by the Defence is “[w]hether the Trial Chamber erred in failing to address Defence submissions concerning the Trial Chamber’s knowledge of *ex parte* submissions about P-178 showing that the witness had solicited and received funds from the Prosecution, at the time that it stopped Defence Counsel from asking questions on

⁸⁹ ICC-01/04-168, para. 9.

⁹⁰ ICC-01/05-01/08-3239- Red2, para. 48.

⁹¹ ICC-01/05-01/08-3255, para. 114 (internal citations omitted).

funding; or in failing to provide any or sufficient reasoning addressing the Defence submissions on this point”.⁹²

70. In its Response, the Prosecution argues that the eleventh Issue is not an appealable issue, submitting that the Chamber did refer to the Defence’s submissions, and that any disagreement on the part of the Defence with the weight the Chamber applied to those submissions “amounts to a mere disagreement”.⁹³ In addition, the Prosecution argues that the Defence does not demonstrate how giving more weight to its submissions would have been essential to the Chamber’s determination of the Impugned Decision.⁹⁴

71. In the Impugned Decision, the Chamber noted the Defence’s submissions on this issue and found that it had “intervened in relation to the *tone* adopted by the Defence while questioning, and to prevent the Defence from revealing that certain other individuals had appeared as witnesses before the Court”.⁹⁵ On this basis, it clarified that it “did not restrict the Defence’s questioning or prevent it from pursuing a relevant line of inquiry”.⁹⁶

72. As the Chamber considered the Defence’s allegation that it “prevented the Defence from questioning witnesses” to be unfounded, the Defence’s submissions as to the Chamber’s knowledge of *ex parte* communications at

⁹² ICC-01/05-01/08-3260-Corr, para. 8(xi).

⁹³ ICC-01/05-01/08-3261, para. 13.

⁹⁴ ICC-01/05-01/08-3261, para. 13.

⁹⁵ ICC-01/05-01/08-3255, paras 97 and 110 (emphasis in original).

⁹⁶ ICC-01/05-01/08-3255, para. 110.

the time it allegedly “prevented the Defence from questioning witnesses” effectively became moot. As such, those submissions bore no relevance to the Chamber’s determination in the Impugned Decision. Consequently, the Chamber’s treatment of the Defence’s submissions was not a “subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.⁹⁷

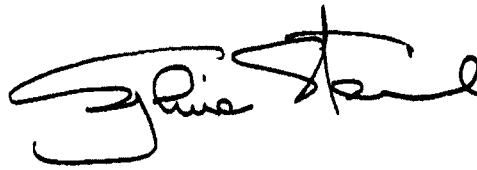
73. For the above reasons, the Chamber finds that the eleventh Issue is not an appealable issue.

IV. Conclusion

74. In light of the foregoing, the Chamber hereby **REJECTS** the Request for Leave to Appeal.

⁹⁷ ICC-01/04-168, para. 9.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 24 July 2015

At The Hague, the Netherlands