

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/05-01/13
Date: **10 September 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO***

Public Document

**Prosecution's Response to the Defence Request for Leave to Appeal the
"Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from
the Witness List"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell
Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Mr Philippe Larochelle

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

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

I. Introduction

1. The joint Defence application for leave to appeal¹ the Trial Chamber's decision declining to strike two Prosecution witnesses, P-198 and P-201,² should be dismissed.³ The Motion must fail because it does not identify any appealable issue arising from the Decision, nor does it demonstrate that the necessary criteria under article 82(1)(d) of the Rome Statute ("Statute") are satisfied. To the contrary, the Motion seeks merely to reargue the merits of the Decision, which it appears to misunderstand at least in part, and to raise speculative concerns which are not grounded in the law or facts of this case.

II. Submissions

2. None of the three issues identified by the Joint Defence ("Three Issues") constitutes an appealable issue arising from the Decision.⁴ None of them significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. Their immediate resolution by the Appeals Chamber would not materially advance the proceedings.

A. None of the Three Issues arises from the Decision

3. Each of the Three Issues sought to be certified demonstrates misunderstanding or confusion about the Decision and its implications in the conduct of these proceedings. For this reason, they are not "appealable" issues. Interlocutory appeals

¹ ICC-01/05-01/13-1222 ("Motion"). The Motion is brought by the Defence teams for Messrs Bemba, Kilolo, Babala, and Arido ("Joint Defence"). The Prosecution notes that the various Defence teams have evidently, and quite properly, consulted and elected to present the Motion jointly. It is understood that the Defence for Mr Mangenda did not wish to join this application, nor to contribute substantive arguments to it. The Prosecution welcomes this constructive approach, and anticipates no further submission regarding the Motion that will undermine it. *See further* ICC-01/05-01/13-1210-Conf, para.5.

² ICC-01/05-01/13-1202 ("Decision").

³ *Contra* Motion, para.61.

⁴ *Contra* Motion, para.1.

are neither for addressing hypothetical arguments not grounded in the decision at issue, nor to remedy any party's speculation or uncertainty about a decision's reasoning.

4. To the contrary, only an issue which is "an identifiable subject or topic requiring a decision for its resolution"—and "not merely a question over which there is disagreement or conflicting opinion"—may be appealed.⁵ Moreover, the issue must be of such significance in the relevant context that its resolution is "essential for the determination of matters arising in the judicial cause under examination."⁶

i. The First Issue misunderstands the Decision

5. The First Issue—whether a Prosecution witness may be called to testify "in circumstances in which the Prosecution has failed to make good faith efforts to obtain the witness' consent"⁷—may not be appealed because it is based on a misunderstanding of the Decision. Although the Decision made passing reference to the matter of consent, the question upon which it turned—its *ratio decidendi*—was whether article 54(1)(a) of the Statute and rule 76 of the Rules of Procedure and Evidence ("Rules") required the Prosecution to obtain statements from witnesses P-198 and P-201. Accordingly, the First Issue does not arise genuinely from the Decision, nor was essential for its determination.⁸

6. The focus of the Decision's *ratio* upon the meaning of article 54(1)(a) and rule 76 is evident from its plain wording.

⁵ ICC-01/04-168 OA3 ("DRC Appeal Decision"), para.9.

⁶ DRC Appeal Decision, para.9.

⁷ See Motion, para.1.

⁸ Contra Motion, para.22.

- As the Trial Chamber recalled, the Decision addressed applications from all five Defence teams in this case for the exclusion of the two witnesses “based primarily on the non-disclosure of any statement, or even summary, of their anticipated testimony.”⁹
- The Trial Chamber expressly directed itself that, “[i]n evaluating the Request, the Chamber will consider whether the Prosecution’s conduct with respect to P-198 and P-201 has breached its disclosure or investigative obligations” and, if so, whether exclusion is the appropriate remedy.¹⁰
- The cardinal stages of the Trial Chamber’s reasoning were that i.) rule 76(1) may be satisfied if “there are no prior statements to provide”;¹¹ ii.) rule 76 applies to material which the Prosecution has “already collected”;¹² iii.) it is reversible error to require the Prosecution to ensure all statements are in the form prescribed by rule 111;¹³ iv.) the Prosecution must make “sufficient efforts” to question witnesses “about their knowledge” in its investigation;¹⁴ and v.) to any extent the Prosecution failed to question witnesses P-198 and P-201 sufficiently, this occasioned only “minimal” prejudice.¹⁵
- Although the Trial Chamber briefly referred to the issue of consent, it did so in recalling the Court’s ability to compel uncooperative witnesses to appear to testify.¹⁶ The practical implication of this power for any general obligation to take statements is obvious, especially absent any power to compel cooperation *prior* to testimony. Furthermore, the relevant submissions of the Parties referred only to the issue of consent as a further consideration in

⁹ Decision, para.1. *See also* para.6.

¹⁰ Decision, para.8.

¹¹ Decision, para.9.

¹² Decision, para.9.

¹³ Decision, para.10. This argument was relevant to rejecting the relevance of authority proposed by the Defence.

¹⁴ Decision, para.12.

¹⁵ Decision, paras.13-14.

¹⁶ *See* Decision, paras.9 (“witnesses can be compelled to testify before the Court, meaning that the Prosecution can seek the testimony of witnesses who have never cooperated with the Prosecution or consented to testify”), 11 (“The Chamber therefore considers that the Prosecution is permitted to call witnesses when it has not obtained their consent to testify or collected any prior statements from them. *Failing to take statements or obtain consent from P-198 or P-201 does not constitute a Rule 76 violation*”, emphasis added).

assessing the adequacy of disclosure.¹⁷ The Trial Chamber excluded other arguments.¹⁸

- Finally, the *ratio* of the Decision is further confirmed by the terms of the Trial Chamber’s conclusion, which stated simply: “the Prosecution’s conduct with respect to P-198 and P-201 does not breach its disclosure obligations” and that, “even if the Prosecution’s conduct could be understood as falling short of its investigative obligations, the minimal prejudice caused” did not justify excluding the witnesses.¹⁹

7. The *ratio* of the Decision must also be seen in the light of the Trial Chamber’s procedural decision—which has not been challenged, nor even acknowledged by the Joint Defence—to disregard additional submissions on the matter of consent which were improperly filed by Counsel for Mr Kilolo and for Mr Babala.²⁰ When the Trial Chamber has already rebuked Parties for circumventing the procedures of this Court by supplementing their original motion with additional arguments, particular caution must be observed when similar arguments are then presented in an application for leave to appeal.

¹⁷ See ICC-01/05-01/13-1132, para.17 (asserting that the “failure” to have obtained the witnesses’ consent to testify, “in conjunction with the absence of any effort to take statements from these witnesses, undermines the purpose of a Pre-Trial Brief—which is to provide notice of the Prosecution case. The inclusion of evidence without a minimal basis to believe that the evidence will be adduced does not assist in streamlining the trial or Defence preparations”). See also ICC-01/05-01/13-1168, para.16 (responding, “[t]he Joint Request further incorrectly argues that the absent of the witnesses’ consent [...] undermines the purpose of the pre-trial brief to provide adequate notice of the Prosecution’s case”); Decision, para.6 (noting the Defence argument that “the Prosecution has not obtained the consent of P-198 or P-201 to testify, arguing that ‘[t]he inclusion of evidence without a minimal basis to believe that the evidence will be adduced does not assist in streamlining the trial or Defence preparations’”).

¹⁸ See below para.7.

¹⁹ Decision, para.15.

²⁰ See ICC-01/05-01/13-1134-Conf-Red; ICC-01/05-01/13-1163-Conf; Decision, para.4 (citing regulation 23(1)(d) of the Regulations of the Court, and considering “that a party breaches the terms of Regulation 23(1)(d) by filing a request and then attempting to supplement their submission with additional legal and factual arguments which were available when the request was first filed. Such is the case with both of these additional submissions. The Chamber will therefore disregard them”).

8. The gulf between the First Issue and the *ratio* of the Decision is further demonstrated by the Joint Defence's own arguments. After an essentially irrelevant exposition on the merits of the question whether the Court's power to compel witnesses should be a "last resort"²¹—arguments on the merits are largely out of place in an application for leave to appeal²²—the Motion frames the justification for the First Issue in the following terms:

the fact that [the] ICC can, in principle, compel a witness to testify does not[,] in itself, answer the question as to whether the Prosecution can move the Court to exercise such a power in circumstances in which it has not adduced evidence that it made good faith efforts to first obtain the voluntary testimony of the witness.²³

9. This assertion, raising the question whether a summons to appear may be granted by the Court without showing the exhaustion of other measures, is speculative. It has nothing to do with the matters presented in the original motion, and considered by the Trial Chamber, which primarily concerned the request to strike witnesses in the absence of disclosure of any statement. It confirms that the Joint Defence, through the First Issue, seek to raise matters with the Appeals Chamber that are (at the very least) tangential to the Decision if not entirely inapposite.

²¹ See Motion, paras.10-20.

²² See e.g. ICC-02/04-01/05-20-US-Exp (made public by ICC-02/04-01/05-52), para.22 ("arguments on the merits or the substance of the appeal are more appropriate[] for consideration and examination before the Appeals Chamber if and when leave to appeal has been granted"). See also STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.2, Decision on Appeal against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/1963-f0008ar1262> (accessed 8 September 2015), para.13; ICTY, *Prosecutor v. Haradinaj et al*, IT-04-84bis-T, Decision on Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65ter Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92ter, 15 March 2012, available at <http://www.icty.org/x/cases/haradinaj/tdec/en/120315.pdf> (accessed 8 September 2015), para.9.

²³ Motion, para.21. See also para.22 (asserting that the First Issue "therefore arises from the [D]ecision").

- ii. *The Second and Third Issues are improperly formulated and speculative, and represent no more than disagreements with the Decision*

10. The Second Issue and Third Issue vary in their subject matter yet share a common formal defect. Rather than presenting a concrete and “identifiable” issue for certification, they instead invite the Appeals Chamber to determine whether the pertinent issue actually arises in the Decision at all. This is impermissibly speculative. Although the Prosecution is unaware of a previous Chamber specifically identifying concern with such a formulation, this Trial Chamber is invited to do so now, consistent with the established requirements set by the Appeals Chamber. Thus, the Second Issue is formulated:

*Whether the Trial Chamber failed to consider/give sufficient weight to the individual rights of each Defence team under Article 67(1) in finding that the prejudice arising from the lack of a statement was ‘minimal’, and did not, therefore, bar the calling of the witnesses.*²⁴

11. The Third Issue is likewise formulated:

*Whether the Trial Chamber failed to give sufficient consideration to the rights of witnesses under Article 55, and Article 68(1) of the Statute and Rule 74 of the Rules of Procedure and Evidence, which militate against compelling witnesses to testify, without being informed of the prospective subject matter of their testimony.*²⁵

12. Both formulations are overly vague, and cannot meet the requirements for certification. They invite the Appeals Chamber to determine for itself not only whether the proposed issue is meritorious, but whether it is even an issue arising from the Decision. Simply asking whether a particular point of reasoning adequately

²⁴ Decision, para.1 (emphasis added).

²⁵ Decision, para.1 (emphasis added).

conforms to the law (*i.e.*, whether it gives “sufficient consideration” to one or more rights in the Statute) does not sufficiently identify a specific “subject or topic which requires a decision for its resolution”.²⁶ Without such framing, the Trial Chamber cannot be satisfied that the proposed issues *actually* arise from the Decision.²⁷ Furthermore, in practice (as the following paragraphs demonstrate), such vaguely defined issues merely open the door to impermissible re-litigation of the substance of the Decision on the merits.

13. Neither the Second Issue nor the Third Issue amounts to anything more than a disagreement with the outcome of the Decision.

14. The Second Issue—which is concerned with the Trial Chamber’s assessment of the extent of any prejudice *even if* the Prosecution had not properly discharged its duty under article 54(1)(a)²⁸—depends on taking one part of the Decision out of context. By implication, the Second Issue is premised on the notion that the Decision did not adequately consider whether any prejudice sustained by some Defence teams may be greater than the “minimal” prejudice it generally identified.²⁹ Yet, of

²⁶ See DRC Appeal Decision, para.9.

²⁷ In purely formal terms, the formulation of the First Issue is more appropriate. Although it should nonetheless be rejected because it does not in fact arise from the Decision, it does identify a topic with sufficient precision. In this context, the practice of the STL may be instructive. The STL applies a rule on interlocutory appeals which in relevant part duplicates article 82(1)(d): see STL, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.7, rule 90(B)(ii), available at http://www.stl-tsl.org/images/RPE/RPE_EN_February_2015.pdf (accessed 8 September 2015). However, in its jurisprudence, at the urging of its Appeals Chamber, the STL has emphasised that an appealable issue must be a “specific” issue: see *e.g.* STL *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals against Trial Chamber’s ‘Decision on Alleged Defects in the Form of the Amended Indictment’, 5 August 2013, available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/2433-f0007ar902> (accessed 8 September 2015), para.10; STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/TC, Decision on Defence Motions for Certification for Appeal of the Trial Chamber’s 13 September 2013 ‘Decision on Alleged Defects in the Form of the Amended Indictment’, 9 October 2013, available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/2543-f1140> (accessed 8 September 2015), para.2.

²⁸ The Joint Defence asserts that the Decision made a positive finding that the Prosecution’s conduct regarding the witnesses actually “falls short of the Article 54(1)(a) standard”, based on its view that “although this finding is preceded by ‘Even if’, the sentence does not employ conditional language”: Motion, para.3, fn.3 (citing only Decision, para.14). However, the Joint Defence’s observation appears not to take into account the language otherwise used in the Decision: see *e.g.* Decision, para.15 (concluding, “*even if* the Prosecution’s conduct *could* be understood as falling short of its investigative obligations”, emphasis added).

²⁹ This follows from the reference in the Second Issue to “the individual rights of *each* Defence team” (emphasis added). It is also consistent with other observations in the Motion: see Motion, paras.25 (“the five Defence teams

the six factors identified by the Trial Chamber as bearing upon the extent of any possible prejudice, five apply in full equality to all the Defence teams. The premise of the Second Issue is incorrect. Thus:

- all the Defence teams have been on notice of P-198's and P-201's "identities, the details of the underlying evidence of the incidents involving them, and their relevance to the charges for some time";³⁰
- "much of the evidence on which the Prosecution intends to rely regarding P-198 and P-201 are allegedly intercepted communications",³¹ which are available to all Defence teams;
- all Defence teams "have been given timely access to the testimony of P-198 and P-201 in the Main Case";³²
- all Defence teams are "free to contact P-198 and P-201 in accordance with the Chamber's protocol for opposing party witnesses";³³
- all Defence teams are equally likely to share in any possible advantage which may result from not being associated with the Prosecution, to which the witnesses are adverse.³⁴

15. The only factor which does not apply equally to the five Defence teams is the Trial Chamber's observation that "[s]ome of the accused are alleged to have personal interactions with [P-198 and P-201] as Main Case defence witnesses".³⁵ Yet the fact that some of the accused may suffer *no* prejudice at all (as a result of their first-hand

have a right to be informed of the Prosecution evidence [against] them", emphasis supplied), 35 ("in a joint trial, the alleged knowledge of one accused is of no assistance to the other co-accused").

³⁰ Decision, para.14.

³¹ Decision, para.14.

³² Decision, para.14. The Joint Defence asserts that this information is "irrelevant" to them on the basis of the Prosecution allegation that this testimony in the Main Case was not truthful: *see* Motion, para.41. But this argument seems to mistake the relevance of the material, which is not for the truth of its contents *per se* but as part of the material conduct which is attributed to the accused. As such, the nature of the witnesses' testimony in the Main Case, and other relevant circumstances, is clearly likely to be relevant to the testimony they may give in this case. This situation is not analogous with the situation which arose in *Lubanga*: *contra* Motion, para.42.

³³ Decision, para.14.

³⁴ Decision, para.14 ("not[ing] the Prosecution's submissions that these witnesses are adverse to it and that the Defence is 'presumptively in a more advantageous position [...]']"). The Prosecution notes, but disputes, the Joint Defence's factual assertion that P-198 is "not 'adverse'" to the Prosecution: *see* Motion, paras.5, 25.

³⁵ Decision, para.14.

knowledge of the relevant events) does not mean that the other accused suffer more than the “minimal” potential prejudice identified in the Decision, given the Trial Chamber’s assurance that the procedural rights to disclosure and opportunity to undertake investigations have been adequately and equally guaranteed to all.

16. Given the five factors enumerated by the Trial Chamber, the rights of each accused person to be informed promptly of the nature and details of the charges, to have adequate time and facilities to prepare, and not to be compelled to incriminate themselves, are fully vindicated.³⁶ It is apparent from these five factors that “alleged knowledge of the charged incidents by the accused”, or the presumption that some accused would inform others of what they know, was not the basis upon which the Trial Chamber determined that any possible prejudice was “minimal”.³⁷ Nor in this context is there any reasonable prospect that the Defence will “only receive[] information concerning a witness’[] account, when the witness i[s] on the stand.”³⁸ To the contrary, the information already disclosed provides adequate notice of the likely contours of the witnesses’ testimony—a degree of notice which is, indeed, no less than that available to the Prosecution in these circumstances.

17. The Joint Defence merely disagrees with the Decision in asserting that “it would [...] be unfair to exempt the Prosecution from collecting and disclosing even the minimum amount of information, which is required”,³⁹ and suggesting that it was unreasonable to take into account the possibility for Defence teams to conduct their own interviews of the witnesses.⁴⁰ In this latter context, the normal application of the protocol established by the Trial Chamber, requiring the recording of such

³⁶ See Motion, paras.26-27, 29, 31, 37-38.

³⁷ *Contra* Motion, paras.28, 35, 38-39.

³⁸ *Contra* Motion, para.30.

³⁹ See Motion, para.32. See also paras.33-34 (arguing that “ICC jurisprudence has uniformly imposed on the Defence the duty to disclose either statements or summaries of its witnesses”).

⁴⁰ See Motion, para.36 (“The possibility that the Defence teams *could* meet the witnesses is not a satisfactory alternative to the Defence right to be informed”, emphasis added).

interviews, is not unfair and does not violate the right against self-incrimination.⁴¹ To the extent that, exceptionally, the Joint Defence has identified a concern in the application of this protocol, then the correct recourse is to seek authorisation from the Trial Chamber to deviate from the protocol based on the specific circumstances,⁴² and not leave to appeal the Decision.

18. Likewise, in the context of the Third Issue, the arguments presented by the Joint Defence merely re-litigate the substance of the Decision by asserting that the absence of a formal interview with the witnesses (leading to the production of a statement) will:

- impede the witnesses alerting the Trial Chamber or the Prosecution “to possible risks associated with their testimony”;⁴³
- impede the witnesses from being “in the best position to assist the Chamber to ascertain the truth”;⁴⁴ and
- impede the witnesses’ ability “to avail themselves of the protections of both Article 55 [...] and Rule 74.”⁴⁵

19. Not only do these assertions impermissibly re-litigate the merits of the Decision, they are also incorrect and do not genuinely arise from it. There is thus no tension between the Decision and article 68 of the Statute.⁴⁶ Reference to the practice of Trial Chamber I in the *Lubanga* case is not of assistance given the differences in the material facts.⁴⁷ First, common sense dictates that P-198 and P-201 are well aware of the general subjects on which they will testify.⁴⁸ Through the ordinary procedures of

⁴¹ *Contra* Motion, para.40. See also ICC-01/05-01/13-1093, para.12 (declining the Defence request to remove this requirement from the protocol); ICC-01/05-01/13-1093-Anx (“Other Party’s Witness Protocol”), para.47 (requiring the recording of such interviews, and prompt disclosure of such records).

⁴² See Other Party’s Witness Protocol, para.48.

⁴³ Motion, para.46.

⁴⁴ Motion, para.47.

⁴⁵ Motion, para.49. See also paras.50-52.

⁴⁶ See Motion, para.45.

⁴⁷ See Motion, paras.47-48.

⁴⁸ *Contra* Motion, para.46 (speculating that the witnesses may be “completely in the dark as to the possible lines of questioning that they might face whilst on the stand”).

the Court, the witnesses will have an opportunity to draw attention to any “possible risks” they may associate with their testimony. Second, the testimony of P-198 and P-201, just like any other witness, will be given under the supervision of the Trial Chamber, as part of its broad responsibility for managing the trial in accordance with the law of this Court. Third, the Trial Chamber has already ordered adequate measures to give effect to the protections afforded to all witnesses under rule 74, and the Prosecution has already “given some indication which of its witnesses might have self-incrimination issues.”⁴⁹

B. None of the Three Issues meets the threshold set by article 82(1)(d)

20. In any event, none of the Three Issues should be certified for appeal because none of them meets the criteria established by article 82(1)(d) of the Statute.

i. None of the Three Issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial

21. Although the Joint Defence contends that “all three issues impact on fundamental rights of the accused, and suspects”⁵⁰—and therefore, it implies, significantly affect the fairness of the proceedings—it is incorrect. Article 67 of the Statute guarantees the rights of *the accused* “[i]n the determination of any charge”; it does not protect the rights of witnesses even if they may potentially be implicated in criminal activity.⁵¹ Yet the Joint Defence makes no argument why the First Issue, which pertains to the legality of compelling *a witness* to appear to testify without exhausting other measures, necessarily engages any right under article 67. Likewise,

⁴⁹ See ICC-01/05-01/13-1209, paras.18-19.

⁵⁰ Motion, para.54 (citing article 67(1)(a), (b), (e), and (g)).

⁵¹ The Joint Defence appears, incorrectly, to assume the contrary: see Motion, paras.54 (referring to “suspects”), 68 (referring to “the rights and entitlements of witnesses, who are also suspects”). The Joint Defence is wrong to confuse article 67 with protections for witnesses such as those under article 55 and rule 74. Certainly, a person is not entitled to protection under article 67 at least until such time as they have been charged with a crime under the Statute.

although an argument could potentially be imagined linking the Third Issue to the fair trial rights of the accused, it is nowhere developed in the Motion. Only the Second Issue, on its face, has the potential to engage the fair trial rights of the accused—because it alleges a potential violation of those rights.

22. Furthermore, the facts of this case are entirely different from those in *Ruto and Sang*.⁵² In that case, the Trial Chamber, by majority, recognised a legal “uncertainty” which justified certification⁵³—but that uncertainty arose from the novel assertion of a power to issue witness summonses. In this case, by contrast, the Trial Chamber has simply relied on existing law, including the plain terms of the Statute and Rules, to determine the terms on which two witnesses will testify. Not every point of legal interpretation raises a novel power under the Statute. Furthermore, even if the Trial Chamber had reached a different conclusion in the Decision, it is by no means established that the ultimate course of this case would have been altered.

23. In any event, none of the Three Issues can significantly affect the fair and expeditious conduct of the proceedings because, as already explained, they do not accurately represent either the reasoning in the Decision or the circumstances of this case.⁵⁴ For example, the Joint Defence is incorrect to assert that there is any “absence of concrete *indicia* concerning the prospective testimony of the witness[es]”.⁵⁵ In this context, the potential consequences which the Joint Defence suggests may ensue—including “multiple adjournments during trial”—are no more than speculative.⁵⁶

⁵² *Contra* Motion, para.55.

⁵³ See ICC-01/09-01/11-1313, para.49. See also para.52 (reasoning that, in the event the Appeals Chamber found reversible error on such a point, in a *final* appeal, the “potential consequences flowing therefrom would significantly affect the outcome of the trial”).

⁵⁴ See above paras.5-19.

⁵⁵ *Contra* Motion, para.56. See above paras.14,16.

⁵⁶ *Contra* Motion, para.56.

24. The Joint Defence argues in the alternative that, because “[t]he two witnesses have been described as ‘material’ witnesses”, their “testimony will thus affect the outcome of the trial.”⁵⁷ Yet the materiality of the testimony is not the apposite question.⁵⁸ Rather, the Joint Defence must show that the *Three Issues* significantly affect the outcome of the trial. Yet, beyond the erroneous or speculative arguments in the Motion which have previously been addressed, no effort is made to argue that the Three Issues will have any particular impact on the testimony ultimately provided by either of the witnesses. As such, the Motion cannot show that the outcome of the trial will be significantly affected.

ii. *Immediate resolution by the Appeals Chamber of any of the Three Issues would not materially advance the proceedings*

25. The assertion that immediate resolution of any of the Three Issues by the Appeals Chamber would materially advance the proceedings is also inconsistent with the reasoning of the Decision and speculative.⁵⁹ It is by no means established even that a different view of the legal issues identified would reasonably “have a profound influence on Defence preparation” or “the effective exercise of Defence rights”.⁶⁰ Even immediate resolution by the Appeals Chamber does not necessarily mean that P-198 and P-201 will not testify, or that much greater notice of their anticipated testimony will be obtained.

26. To the contrary, the future trial proceedings in this case—which are imminent—will be relatively short, and the nature of the concerns raised by the Three Issues (even accepting them *arguendo*) are circumscribed. This case is the epitome of the principle that interlocutory appeal is exceptional, governed by the strict application

⁵⁷ Motion, para.57.

⁵⁸ See also ICC-01/05-01/13-1048-Conf-AnxA-Red (Prosecution submission defining a “material” witness).

⁵⁹ *Contra* Motion, paras.58-60.

⁶⁰ *Contra* Motion, para.58.

of the criteria under article 82(1)(d), and that otherwise even reversible error may be better and more justly deferred to any appeal filed under article 81 at the conclusion of the trial.

III. Relief Requested

27. For all the reasons above, the Motion should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 10th day of September 2015
At The Hague, The Netherlands