

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: 14/09/2012

**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***

***Confidential***

**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**

**Source:** Defence for Mr. Jean-Pierre Bemba Gombo

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

***Court to:***

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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## A. BACKGROUND

1. On 6 September 2011, Trial Chamber III ('the Chamber') rendered its *Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute*. ('Impugned Decision').<sup>1</sup> Judge Kuniko Ozaki filed a partially dissenting opinion the same day.<sup>2</sup>

2. This decision was rendered six months after the initial Prosecution request on 28 February 2012.<sup>3</sup> It was therefore rendered after the time limit set by the Chamber for the filing of Defence lists of witnesses and documents,<sup>4</sup> and after the start of the Defence case.

3. In the Impugned Decision, the Majority of the Chamber admitted the following categories of documents, over Defence objection:<sup>5</sup>

(a) 18 Press Reports<sup>6</sup> and nine recordings of radio programs from Radio France International;<sup>7</sup>

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<sup>1</sup> ICC-01/05-01/08-2299-Conf

<sup>2</sup> ICC-01/05-01/08-2300-Conf

<sup>3</sup> Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 28 February 2012, ICC-01/05-01/08-2147, with two confidential Annexes ICC-01/05-01/08-2147-Conf-AnxA and ICC-01/05-01/08-2147-AnxB.

<sup>4</sup> ICC-01/05-01/08-2221.

<sup>5</sup> Defence Response to the Prosecution's Application for Admission of Evidence from the Bar Table, 19 March 2012, ICC-01/05-01/08-2168, with two confidential Annexes ICC-01/05-01/08-2168-Conf-AnxA and ICC-01/05-01/08-2168-Conf-AnxB.

<sup>6</sup> CAR-OTP-0004-0343; CAR-OTP-0004-0345; CAR-OTP-0004-0667; CAR-OTP-0008-0413; CAR-OTP-0005-0133; CAR-OTP-0005-0141; CAR-OTP-0005-0147; CAR-OTP-0005-0194; CAR-OTP-0005-0135; CAR-OTP-0005-0333; CAR-OTP-0011-0293; CAR-OTP-0013-0065; CAR-OTP-0013-0161; CAR-OTP-0013-0005; CAR-OTP-0013-0053; CAR-OTP-0013-0151; CAR-OTP-0032-0167; CAR-OTP-0004-0336.

<sup>7</sup> CAR-OTP-0031-0099; CAR-OTP-0031-0104; CAR-OTP-0031-0093; CAR-OTP-0031-0106; CAR-OTP-0031-0116; CAR-OTP-0031-0120; CAR-OTP-0031-0122; CAR-OTP-0031-0124; CAR-OTP-0031-0136.

(b) Reports from Non-Governmental Organisations ('NGOs');<sup>8</sup>

(c) Reports from States, including a list compiled by the government of the Central African Republic ('CAR') purporting to contain a number of victims statements from anonymous victims during the period relevant to the events;<sup>9</sup>

(d) A purported 'Telephone Record' allegedly related to the phone number of Mr. Bemba during the relevant events;<sup>10</sup>

(e) Three Forensic Reports related to the alleged murder of Witness 87's brother, the authors of which were not called to give evidence.<sup>11</sup> (together, 'Impugned Materials').

4. The Defence submits that the admission of the Impugned Materials by the Majority of the Chamber gives rise to identifiable issues that would significantly affect both the fair and expeditious conduct of the proceedings, and that an immediate resolution of which would material advance the proceedings.

## **B. REQUEST FOR LEAVE TO APPEAL**

### **(a) *Conditions for Leave to Appeal***

5. Leave to appeal pursuant to Article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative

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<sup>8</sup> CAR-OTP-0001-0034, CAR-OTP-0004-1096, CAR-OTP-0004-0409, CAR-OTP-0004-0881, CAR-OTP-0011-0503.

<sup>9</sup> CAR-OTP-0004-0977.

<sup>10</sup> CAR-OTP-0055-0893.

<sup>11</sup> CAR-OTP-0048-0492\_R01; CAR-OTP-0051-0263\_R02 and CAR-OTP-0048-0431.

criteria as set out in that provision:<sup>12</sup>

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. The Defence notes that the Appeals Chamber has held that '[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.'<sup>13</sup>

7. The standard for the granting of 'certification' of interlocutory decisions at the *ad hoc* Tribunals and the SCSL is not identical as the procedure in place at the ICC. However, requests for leave to appeal decisions admitting documents 'from the bar table' have regularly been granted in these courts, on the basis that such decisions concern issues which affect the fair and expeditious conduct of the proceedings, and issues for which a decision by the Appeals Chamber may materially advance the proceedings.<sup>14</sup>

**(b) Identification of Appealable Issues**

8. The Defence submits that the Impugned Decision gives rise to the following

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<sup>12</sup> ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4

<sup>13</sup> Situation in the Democratic Republic of the Congo, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber Ts 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 9.

<sup>14</sup> See, for example, *Prosecutor v Taylor*, SCSL-03-01-T, *Decision on Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents*, 10 December 2008; *Prosecutor v Prlic et al.*, IT-04-74-T, *Decision on Requests for Certification to Appeal Two Decisions Filed by the Prlic Defence Dated 6 and 9 October 2008 Respectively*, 6 November 2008; *Prosecutor v Prlic et al.*, IT-04-74-T, *Decision on Certification to Appeal Decision on Prlic Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, 16 July 2009.

identifiable subjects or topics requiring a decision for their resolution, which meet the criteria set out under Article 82(1)(d), and warrant consideration by the Appeals Chamber. These appealable issues are not merely 'disagreements' or 'conflicts of opinion' between the Defence and the Majority as to the general approach to admissibility of evidence,<sup>15</sup> but rather consist of discrete legal questions which arise directly out of the Impugned Decision and which meet the above criteria for appeal.

9. The appealable issues identified are as follows:

- (a) The Majority set an erroneous standard for the admissibility of press articles and reports in the absence of testimony from the author,<sup>16</sup> namely that they 'may' serve to corroborate other pieces of evidence, and in failing to identify the 'envisioned limited usage' which apparently limited their prejudicial effect.<sup>17</sup>
- (b) The Majority erred in admitting press articles and reports under Article 64(9) in the absence of an individual assessment as to their reliability and credibility.
- (c) The Majority of the Chamber erred in its assessment of the probative value of the admitted NGOs reports,<sup>18</sup> when it was unable to assess the reliability of the accounts contained therein given that the authors

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<sup>15</sup> 10-02-2009, PTCII Single judge, Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, ICC-02/04-177, para. 13.

<sup>16</sup> CAR-OTP-0004-0343; CAR-OTP-0004-0345; CAR-OTP-0004-0667; CAR-OTP-0008-0413; CAR-OTP-0005-0133; CAR-OTP-0005-0141; CAR-OTP-0005-0147; CAR-OTP-0005-0194; CAR-OTP-0005-0135; CAR-OTP-0005-0333; CAR-OTP-0011-0293; CAR-OTP-0013-0065; CAR-OTP-0013-0161; CAR-OTP-0013-0005; CAR-OTP-0013-0053; CAR-OTP-0013-0151; CAR-OTP-0032-0167; CAR-OTP-0004-0336; CAR-OTP-0031-0099; CAR-OTP-0031-0104; CAR-OTP-0031-0093; CAR-OTP-0031-0106; CAR-OTP-0031-0116; CAR-OTP-0031-0120; CAR-OTP-0031-0122; CAR-OTP-0031-0124; CAR-OTP-0031-0136.

<sup>17</sup> ICC-01/05-01/08-2299-Conf, paras. 95 – 128.

<sup>18</sup> CAR-OTP-0001-0034, CAR-OTP-0004-1096, CAR-OTP-0004-0409, CAR-OTP-0004-0881, CAR-OTP-0011-0503.

and sources are not sufficiently identified.

- (d) The admission of a Report containing out-of-court statements from anonymous victims of sexual violence, in the absence of any information as to the methodology of their compilation, is contradictory to the practice for the admission of evidence followed so far in this case, at the ICC, and in international criminal trials generally;<sup>19</sup>
- (e) The Majority of the Chamber erred in its assessment of probative value and prejudice of the 'Telephone Record' allegedly related to the phone number of Mr. Bemba during the relevant events,<sup>20</sup> when the document contains no indication of its sources, other indicia of reliability, and given the Prosecution's positive decision not to call the document's authenticating witness.
- (f) The Majority of the Chamber erred in its assessment of the admissibility of Forensic Reports,<sup>21</sup> when the Prosecution actively refrained from seeking to authenticate these reports through Witness 87 who was in a position to identify the images or information contained therein, and actively chose not to call their authors.
- (g) Because of the timing of admission, the Majority failed to ensure that the Impugned Material was tendered at a time and a in way that would have allowed the Defence to exercise its right of confrontation effectively.

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<sup>19</sup> CAR-OTP-0004-0977.

<sup>20</sup> CAR-OTP-0055-0893.

<sup>21</sup> CAR-OTP-0048-0492\_R01; CAR-OTP-0051-0263\_R02 and CAR-OTP-0048-0431.

(c) *Satisfaction of the Conditions for Leave to Appeal*

10. Each of these identified appealable issues significantly affects the **fair conduct of the proceedings**.

11. The appealable issues identified above all relate to whether it was legally permissible or reasonable for the Chamber to admit the Impugned Materials into the record of the case in the absence of authentication by a witness. The Impugned Materials are predominantly inculpatory, namely that if accepted as credible or reliable, or attributed any weight, they would support the Prosecution's allegations against the Accused.

12. In the Impugned Decision, the Chamber 'stressed' that 'that there is no strict requirement that every document be authenticated officially or by a witness in court.'<sup>22</sup> However, the principle of the 'primacy of orality', which is enshrined in Article 69(2) of the Rome Statute is 'one of the cornerstones of the proceedings under the Rome Statute.'<sup>23</sup> It is accordingly an exception to the principle of the primacy of orality to introduce a significant volume of un-tested documentary material, in lieu of calling witnesses whose evidence can be tested through questioning by the parties and the Chamber.

13. Authentication through witnesses gives rise to important safeguards to ensure the credibility of the evidentiary record. As has been held, the '[t]endering evidence from the bar table rarely allows for proper contextualization.'<sup>24</sup> The evidence of witnesses who are the authors of materials, or have knowledge of particular documents or materials, can be tested by the parties. These witnesses can

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<sup>22</sup> ICC-01/05-01/08-2299-Conf, para. 9.

<sup>23</sup> ICC-01/05-01/08-1028, para. 8.

<sup>24</sup> *Prosecutor v. Popović et al*, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table, Motion to Amend the Bar Table Motion, and Oral Motion for Admission of Additional Exhibit", 14 March 2008, para. 15; *Prosecutor v. Haradinaj et al*, Decision on Prosecution's Motion to Tender Documents on its Rule 65ter Exhibit List, 30 November 2007, para. 4;

give sworn testimony about indicia of reliability, and relevant information concerning sources, provenance, methodology and even chain of custody. For this reason, the ICTY has recently clarified that for the purposes of that Court, a bar table motion is only a supplementary method of introducing evidence and is to be used only exceptionally.<sup>25</sup>

14. When documents are admitted through Article 64(9), these safeguards fall away. In these circumstances, the admission of documents through Article 64(9) should obviously be done with caution because of the direct impact on the fairness of the proceedings. If the wrong standard or threshold is set for the admissibility of documents under Article 64(9), the direct result is that an accused will be judged as against evidence which should simply not be in front of the Chamber. Any suggestion, therefore, that the appealable issues identified above are not ones which affect the fair conduct of the proceedings, is in error.

15. There is a second way in which the appealable issues impact on the fair conduct of the proceedings. One of Mr. Bemba's fair trial rights is to be tried without undue delay, pursuant to Article 67(1)(c). The Impugned Materials include numerous newspaper and radio reports and articles; lengthy, dense and un-sourced allegations of NGO reports; numerous out-of-court statements from anonymous alleged victims; alleged phone records; and complex forensic reports. As will be expanded immediately below, it is difficult to see how a significant injection of inculpatory material will not increase the length and scope of the Defence case, thereby impacting on Mr. Bemba's right to be tried without undue delay, particularly when he has already been incarcerated for 4 years of pre-Judgement

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<sup>25</sup> *Prosecutor v. Karadžić*, Decision on Prosecution First Bar Table Motion, para 7; *Prosecutor v. Karadžić*, Order on Procedure for Conduct of Trial, Appendix A, Part VII, para. R, 8 October 2009; see also *Prosecutor v. Prlić et al*, Decision on Admission of Evidence, 13 July 2006, p. 6: "the admission of several thousand documents without prior discussions over them in court may unduly delay the proceedings, to the extent that the Chamber would not have the benefit of explanations from a witness who could help to put these documents in their context and establish their relevance and probative value; WHEREAS the Chamber would therefore be required to spend much of its resources examining and assessing thousands of documents, which could take several months and would delay the pronouncement of the Judgement;

incarceration.

16. The impact of the appealable issues on the **expeditious conduct of the proceedings** is manifest and blatant. Through the Impugned Decision, the Majority has admitted a significant amount of additional inculpatory material.

17. The Defence does not contend that the sheer volume of this evidence is of any relevance to its admissibility. However, in the exercise of its professional duties, the Defence will be required to analyse, and investigate the claims and information contained in the inculpatory Impugned Materials. The Defence is now required to bring evidence to rebut both (a) the Prosecution case as it stood at the time the Defence assembled its witness and evidence lists during the judicial recess; and (b) the newly-expanded Prosecution case which now includes the facts being alleged in multiple recordings, newspaper reports and articles, NGO reports, State Government reports and telephone records. No argument can be made that the Defence should have expended scarce time and resources investigating the allegations and evidence contained in evidence which was not yet admitted into the evidentiary record, nor would the Defence been able to obtain funding or support from the Registry to do so. Therefore, and in accordance with its duties to represent the client, the Defence may well need to seek leave of the Chamber to amend and expand its lists of witnesses and evidence in order to rebut this wealth of new material which has now been admitted (erroneously, in the view of the Defence) into the evidentiary record of the case. No argument can be made, therefore, that the appealable issues are not relevant to the expeditious conduct of the proceedings.

18. **An immediate resolution by the Appeals Chamber** would materially advance the proceedings. The Impugned Decision contains issues which can not be safely left for any potential appeal from a Judgement in first instance.

19. Firstly, the appealable issues identified will have an impact on the ongoing

trial. It is likely (if not certain) that the Defence will, on the basis of the thresholds for admissibility set in the Impugned Decision, file its own request for admission of documents under Article 64(9) of the Statute. As noted by an ICTY Trial Chamber when granting leave to appeal a decision concerning the admission of documents, 'it is essential to guarantee a clearly identifiable coherent practice in the matter of the admissibility of documents.'<sup>26</sup> Any future request by the Defence would be assisted by such 'essential' clarification, would settle the issue to avoid any future litigation on the admissibility of documents not through witnesses, and would therefore advance the proceedings.

20. A resolution by the Appeals Chamber of the divergences between the Majority and Her Honour Judge Ozaki on crucial questions of admissibility of documents, are not issues which can be safely left for appeal, given the Trial Chamber's responsibilities as to the assessment of evidence at first instance. It is an accepted principle that 'the task of hearing, assessing and weighing the evidence at trial is left to the judges sitting in a Trial Chamber'<sup>27</sup> who have the advantage of 'observing witnesses in person and so [are] better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence'.<sup>28</sup> It is therefore necessarily contrary to this principle for the Appeals Chamber to resolve such significant evidentiary issues on appeal, after the Judgement has been rendered.

21. Nor would any prejudice arise to any parties or participants as a result of appellate intervention and clarification.

## C. CONCLUSION

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<sup>26</sup> *Prosecutor v Prlic et al.*, IT-04-74-T, Decision on Requests for Certification to Appeal Two Decisions Filed by the Prlic Defence Dated 6 and 9 October 2008 Respectively, 6 November 2008, p. 5.

<sup>27</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 232, citing *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 64

<sup>28</sup> *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 32.

22. The Impugned Decision has created a divergence in an approach to admission of documents not only between the Majority and Her Honour Judge Ozaki, but also between Trial Chamber III and the other two Trial Chambers of the International Criminal Court on certain significant points. An important aspect of a fair regime is legal certainty for accused and equality before the law. Appellate clarification in such instances of jurisprudential divergence can assist in achieving this end, particularly when clear appealable issues have been identified, and given the importance of the issues at stake.

**D. RELIEF REQUESTED**

23. In light of the above arguments, the Defence respectfully requests that the Chamber:

**GRANT** 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, in terms of the issues identified herein.

**GRANT** the Defence leave to file the present motion publically.



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Aimé Kilolo Musamba  
Lead Counsel



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Peter Haynes  
Co- Counsel

Done on the 14th of September 2012  
At The Hague, The Netherlands