



Original: English

No.: ICC-01/05-01/08
Date: 29 November 2010

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

Prosecution's Application for Leave to Appeal the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"

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

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

Legal Representatives of Victims

Ms Marie-Edith Douzima Lawson

Mr Assingambi Zarambaud

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

Mr Jean-Xavier Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 19 November 2010, the majority of Trial Chamber III ("Majority") issued its "Decision on the admission into evidence of materials contained in the Prosecution's list of evidence" ("Decision"),¹ in which it ruled, among other matters, that prior statements of witnesses included in the Prosecutor's List of Evidence were *prima facie* admitted into evidence. Judge Ozaki dissented.²
2. The Majority's approach, which diverts from the practice followed by Trial Chambers I and II in the Court's first two trials, is not based in Rule 68 of the Court's Rules of Procedure and Evidence which allows for the admission of prior recorded testimony of a witness under specific circumstances and on a case-by-case basis. Rather, the Majority considers that the Court's legal framework allows for the *prima facie* admission of all statements of the witnesses that the Prosecution intends to call at trial.
3. The Prosecution seeks leave to appeal this particular aspect of the Majority's decision, namely: whether the legal framework of the ICC allows for the *prima facie* admission into evidence of prior statements of all witnesses as defined by the Decision with the clarification provided during the hearing of 23 of November 2010 ("Issue"). This Issue meets the criteria for leave to appeal pursuant to Article 82(1)(d). As stated by Judge Ozaki in her dissenting opinion,³ the Decision, including this Issue, has profound implications for the current proceedings with respect to fairness and protection of the rights of the accused⁴ and expeditious conduct of the proceedings.⁵ Accordingly, as concluded in the Dissenting Opinion, the Decision has the potential to cause irreparable prejudice to both parties.⁶
4. The Prosecution will support any effort by the Chamber to streamline and abbreviate the trial process. However, without some adjustments the mechanism adopted by the Majority has no legal basis. If the mechanism is later deemed to

¹ ICC-01/05-01/08-1022.

² ICC-01/05-01/08-1028 ("Dissenting Opinion").

³ *Ibid.*

⁴ Dissenting Opinion, paras. 13-21.

⁵ Dissenting Opinion, paras. 22-28.

⁶ Dissenting Opinion, para. 31.

be erroneous, the final judgment could be reversed on that ground. Accordingly, early intervention by the Appeals Chamber is critical in order to ensure that the trial against Bemba proceeds on a sound basis.

The Decision

5. In the Decision, the Majority found that “there is sufficient legal basis provided in the ICC legal framework to consider *prima facie* admitting into evidence, before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial”.⁷ As a result, it concluded that “written statements [...] which will form part of the prosecution’s Revised List of Evidence are *prima facie* admitted as evidence for the purpose of the trial”.⁸
6. In support of its ruling, the Majority found that “[a]part from what is provided for in Article 69(7)(a) and (b) of the Statute and Rule 71 of the Rules, no evidence is *per se* inadmissible”;⁹ “nothing in the ICC legal framework prevents the Chamber from *prima facie* admitting non-oral evidence, whether written, audio, visual”.¹⁰
7. During the hearing of 23 November 2010, the Prosecution proposed a solution based on Rule 68(b): Before commencing the questioning of Witness 38, the Deputy Prosecutor asked the witness whether he consented to the admission into evidence of his prior recorded testimony. The witness provided his consent.¹¹ The Deputy Prosecutor then explained her approach to the Chamber:¹²

I just meant to clarify that I requested for the statement to be put into evidence - to be admitted and put into evidence - in the context of Rule 68(b) of the Rules of Procedure and Evidence [...] [i]t was in fact in the light of this rule that I requested for the statement to be - for his consent first and the statement to be admitted and given an 11 EVD number.

8. As a result, the Presiding Judge provided the following clarification:¹³

[The Decision] has not as a legal basis Rule 68(b). This is not considered the filing of the statements as evidence is being proceeded upon as it is in Pre-Trial phase. It is the

⁷ Decision, para. 8

⁸ Decision, para. 35.

⁹ Decision, para. 10.

¹⁰ Decision, para. 13.

¹¹ ICC-01/05-01/08-T-33-Conf-ENG, p.8, lns.3-17.

¹² ICC-01/05-01/08-T-33-Conf-ENG, p.32, lns.2-11.

¹³ ICC-01/05-01/08-T-33-Conf-ENG, p.32, ln.12-p.33, ln.12.

simple filing of statements as part of the case file, therefore evidence of the case. And that's why the Chamber ordered the filing of all statements and that all of them and related documents should be given EVD numbers. So they are already evidence admitted *prima facie* as evidence, unless any of the parties decide to challenge admissibility in accordance with the Statute and the rules. It's not exactly Rule 68(b), since we are not considering the written statements as prior recorded testimony. We understand that the - what the drafters meant by prior-recorded testimony to be filed as evidence in lieu of or testimony is a completely different situation. So we are trying to adopt in Trial Chamber III the same system of admitting into evidence all documents of the prosecution's list of evidence and of the Defence list of evidence *prima facie* admissible unless the Chamber *prop mote* [sic] or any of the parties challenge the admissibility of the document.

The issue for which leave to appeal is sought fulfils the criteria in Article 82(1)(d)

9. The issue that the Prosecution requests be certified for appeal is whether the legal framework of the ICC allows for the *prima facie* admission into evidence of prior statements of all witnesses as defined by the Decision with the clarification provided during the hearing of 23 of November 2010 ("Issue"). The Issue is thus of a systemic nature and concerns the question whether, as a general matter of law, out-of-court statements of witnesses without their consent or the opportunity for cross-examination are presumptively admissible as evidence.
10. This Issue clearly arises from the Decision, especially as clarified by the Presiding Judge during the hearing of 23 November 2010.¹⁴ As established by the jurisprudence of the Court, the correctness of the Decision is irrelevant to an application for leave to appeal. The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.¹⁵ Reference to any alleged errors in the Decision is only made when necessary to demonstrate the appellability of the Issue.

¹⁴ The Appeals Chamber has held that "only 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 disagreement of a 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. It may be legal or factual or a mixed one." ICC-01/04-168 OA03, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

¹⁵ ICC-02/04-01/05-20-US-Exp, para. 22.

(a) The Issue affects the fair conduct of the proceedings

11. "Fairness" within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires, *inter alia*, that the procedural and substantive rights and obligations of all participants be respected.¹⁶
12. The Prosecution considers that the issue impacts on the fairness of the proceedings and has, at a minimum, the potential to cause irreparable prejudice. The Prosecution refers to the Dissenting Opinion by Judge Ozaki, explaining that the Decision has a significant impact on the rights of the accused¹⁷ and "causes irreparable prejudice to both parties".¹⁸ In addition, the Prosecution submits that the Issue also affects the fair conduct of the proceedings in other ways.
13. Rule 68 regulates the admission into evidence of prior recorded witness statements and includes specific safeguards to ensure that the admission of prior recorded evidence does not prejudice the parties. Rule 68 requires that the opposing party has an opportunity to examine a witness either at the moment of the recording of the prior testimony (where the witness is not present before the Chamber), or during the proceedings (where the witness is present before the Chamber). In the latter circumstance, when the witness is present before the Chamber, Rule 68(b) provides for an additional requirement, namely the consent of the witness to its admission. It follows that, precisely because of these conditions, the *prima facie* admission should be, in accordance with Rule 68, with its requirements verified in each case in order to determine the admissibility of the prior recorded testimony.¹⁹
14. An unfettered *prima facie* admission into evidence of all prior statements affects the fairness of the proceedings. The Decision provides that the admission of prior statement "is not intended to replace oral testimony [as] [t]he accused will not in any way be deprived of his right to examine or have examined the witnesses

¹⁶ ICC-01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11; ICC-01/04-135-tEN, para. 38: "Fairness" includes respect for the principles of equality and adversarial proceedings.

¹⁷ Dissenting Opinion, paras. 13-21.

¹⁸ Dissenting Opinion, para. 31.

¹⁹ In the Decision no such determination has been made. The statements of all witnesses were admitted without their presence in court and without them giving their consent. Moreover, the statements could also not have been admitted under Rule 68(a), as the defence did not have an opportunity to question them at the time when the statements that have now been admitted into evidence were taken.

against him”.²⁰ This would appear to limit the scope of the Decision to those witnesses who appear before the Court, thereby observing one of the safeguards included in Rule 68 (the opportunity of the opposing party to question the witness). However, this has not been expressly stated by the Majority and remains a matter of interpretation.

15. In addition, the Majority does not explain fully how the admission of prior statements is reconcilable with the principle of live testimony enshrined in Article 69(2) and Rule 68. In particular, since the language of the decision does not make any distinction, the admitted statements appear to be on an equal footing in terms of relevance and probative value with the live testimony of a witness or the prior recorded statement obtained via Rule 68. These questions require an authoritative determination.
16. As acknowledged by the Presiding Judge, the Decision adopts a new procedure that “may raise some concerns or difficulties in implementation”.²¹ The Prosecution considers that the Decision places the parties in a position of uncertainty as to the status and value of an entire category of evidence. In this sense as well, the fairness of the proceedings – which, the Prosecution submits, depends in substantial part on the ability of the Parties to understand the essential rules under which the trial will be governed before the trial begins – is adversely affected. This warrants corrective intervention by the Appeals Chamber at the beginning of the trial, and not at the end.
17. Finally, the Decision unfairly requires the parties to significantly adjust their questioning of witnesses and their planning for the case virtually at the start of the trial. As found by Judge Ozaki, such a decision “should have been rendered well ahead of the commencement of the trial, so as to allow parties and participants to adapt their preparation in consequence”.²²

²⁰ Decision, para. 20.

²¹ ICC-01/05-01/08-T-33-Conf-ENG, p.32, lns.12-14.

²² Dissenting Opinion, para. 31.

(b) The Issue affects the expeditious conduct of the proceedings

18. "Expeditious conduct" means timely and efficient conduct of the proceedings.²³

This principle requires that decisions do not unnecessarily delay the overall determination of responsibility.²⁴ Pre-Trial Chamber II considered that the expeditious conduct of the proceedings is affected where an issue "would entail the risk that lengthy and costly trial activities are nullified at a later stage."²⁵ Trial Chamber I found in this context that "[t]he introduction of evidence touching on the issue of the guilt or innocence of the accused may materially affect the content and the substance of the evidence introduced during the trial and its length, since this is likely to affect the nature and extent of the evidence called and the issues to be raised. Indeed, this decision may result in the Chamber considering evidence that otherwise would not be available."²⁶

19. As found by Judge Ozaki, the Decision has a significant impact on the expeditious conduct of the proceedings.²⁷ The Prosecution agrees in particular that the approach taken by the Majority may not shorten the proceedings and in fact could lengthen them.²⁸ The Prosecution also notes the Chamber's decision of 16 September 2010, and in particular its finding that "avoiding questioning by the prosecution in court will [not] have the effect of expediting the proceedings".²⁹

20. As the Majority has stated, the admission of prior recorded statements "is not intended to replace oral testimony". Hence, a party proposing a witness is still entitled to examine that witness in chief. In addition, during cross-examination, the opposing party will be free to challenge not only what the witness stated in

²³ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003 ("Norman Decision on Application for Stay"): "the Court's obligation to do justice expeditiously and effectively, as well as fairly." (para. 6); "we can only do justice that is expeditious, fair and efficient" (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue "will significantly affect the efficient and expeditious conduct of the proceedings".

²⁴ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

²⁵ ICC-02/04-01/05-20 (unsealed pursuant to ICC-02/04-01/05-52), para. 36. The Prosecution notes that this can also be properly viewed as an element relevant to whether the immediate resolution of the issue will materially advance the proceedings – see e.g. ICC-01/04-168 OA03, para. 16.

²⁶ ICC-01/04-01/06-1191, para. 42.

²⁷ Dissenting Opinion, paras. 22-28.

²⁸ Dissenting Opinion, paras. 24-27.

²⁹ ICC-01/05-01/08-886, para. 19, referred to in Dissenting Opinion, para. 25.

court, but also every fact that is included in the prior recorded statement. Moreover, actual or perceived inconsistencies between the oral testimony and the prior recorded testimony can be addressed during the examination of the witness.³⁰

21. Finally, given that there is a degree of uncertainty as to whether or to what extent written statements may be admitted into evidence under circumstances other than those referred to in Rule 68, it can further be expected that the parties will make abundant use of their right to challenge the admissibility of each prior statement in accordance with the language of the Majority Decision.³¹ Whereas the Prosecution considers that there may be instances that warrant admissibility of a statement outside the framework of Rule 68, the wholesale admission of all statements by the Trial Chamber makes the ruling extremely controversial and prone to litigation.

(c) The Issue affects the outcome of the trial

22. An issue only needs to impact on the fair and expeditious conduct of the proceedings or the outcome of the trial.³² Nevertheless, the Prosecution stresses that the Issue also does affect the outcome of the trial. According to the Appeals Chamber, under this limb the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.”³³
23. The *prima facie* admission of the out-of-court statements of all 36 fact witnesses (three of them were interviewed more than once), along with their “related documents”, as well as the reports of the four expert witnesses will undoubtedly affect the outcome of the proceedings. This impact is further illustrated by the

³⁰ See also Dissenting Opinion, para. 24.

³¹ Decision, para. 19.

³² ICC-01/05-01/08-75, para. 8; ICC-02/04-112, para. 17; ICC-01/04-01/06-1417, paras. 17-18; ICC-01/04-01/06-1473, paras. 21-22.

³³ ICC-01/04-168 OA03, para.13.

Majority's expressed intention to rely on this evidence for the purposes of its judgement under Article 74(2).³⁴

(d) Immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings

24. Immediate resolution of the Issue will materially advance the proceedings. For the reasons set out above, "prompt reference of the issue to the court of appeal" and its "authoritative determination"³⁵ is particularly important to ensure that the trial, which has just commenced, proceeds on a sound procedural and factual basis. An immediate resolution of the Issue by the Appeals Chamber would "[r]emov[e] doubts about the correctness of a decision [and] map[...] a course of action along the right lines provides a safety net for the integrity of proceedings."³⁶ If the decision is wrong and not remedied now on appeal, the final judgment could be so infected by the error that reversal might result. In the words of the Appeals Chamber, there will be a "setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process".³⁷

25. An immediate determination of the Issue by the Appeals Chamber will assist the Chamber and the parties and participants in the smooth continuation of the proceedings, and will avoid the risk of a fundamental flaw that materially affects the sustainability of the Trial Chamber's decision under Article 74. As already advanced, the Majority has made clear that it intends to consider the written statements as part of the relevant body of evidence for the purposes of its decision on the guilt or innocence of the Accused. If the Majority's admission of prior statements into evidence is error, consideration of and reliance on those statements may invalidate the judgment and require a re-trial. This danger is averted if the Appeals Chamber is afforded an opportunity to examine the

³⁴ Decision, paras. 7 and 15.

³⁵ ICC-01/04-168 OA, paras. 14-15, 18.

³⁶ *Ibid.*

³⁷ ICC-01/04-168 OA03, para. 16. According to the Appeals Chamber, "[i]n those circumstances the proceedings will not be advanced but on the contrary they will be set back" (*ibid.*).

Decision and, if it considers the Majority's approach to be incorrect, to reverse the Decision and prevent damage to the integrity and fairness of the proceedings.

Relief sought

26. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal pursuant to Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 29th day of November 2010

At The Hague, The Netherlands