



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  
Urgent**

**Application for leave to appeal Trial Chamber III's decision on the admission into  
evidence of materials contained in the prosecution's list of evidence**

**Source:** Defence team of Mr Jean-Pierre Bemba Gomba

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 & Deputy Registrar**

Silvana Arbia & Didier Preira

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Urgent Nature of the Filing

1. The members of the Defence of Mr. Jean-Pierre Bemba Gombo were in the courtroom between 14.00 and 16.00 today, 29 November 2010 and experienced technical difficulties in sending the current filing from the courtroom. As such, the Defence seeks the leave of the Chamber to accept this filing as urgent, and filed today on 29 November 2010, which was filed as soon as the members of the Defence team were able to transfer it to the Registry.

## II. Introduction

2. On 15 January 2010, the Office of the Prosecutor (the 'Prosecution') filed its confidential *ex parte* 'Updated List of Evidence' ('List of Evidence'), submitting evidence on which it seeks to rely at trial.<sup>1</sup> The List of Evidence is grouped in three: (i) witness statements; (ii) documents to be tendered through witnesses; and (iii) 'other evidence'.

3. On 4 October 2010, the Chamber issued an "Order for Submissions on the Presentation of Evidence at Trial" (the 'Order').<sup>2</sup> Under this Order, the parties were required to file observations "on the potential submission into evidence of the witness statements of those witnesses to be called to give evidence at trial".

4. Observations of the Prosecution and the Office of the Public Counsel for Victims (the 'OPCV') filed their observations on 11 October 2010.<sup>3</sup> Defence Counsel

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<sup>1</sup> Confidential *Ex Parte* Prosecution and Defence only Annex B to the Prosecution's submission of its 'Updated Summary of Presentation of Evidence', 15 January 2010, ICC-01/05-01/08-669-Conf-AncB

<sup>2</sup> Order for Submissions on the Presentation of Evidence at Trial, 4 October 2010, ICC-01/05-01/08-921

<sup>3</sup> Prosecution's Position on Potential Submissions of Witness Statements at Trial Pursuant to Trial Chamber III's Order, 11 October 2010, ICC-01/05-01/08-941 and Legal Representative's Observations on the Potential Submission into evidence of the Prior Recorded Statements of Prosecution's Witnesses Testifying at Trial, 11 October 2010, ICC-01/05-01/08-943. A summary of the observations submitted by the Prosecution and OPCV are set out in impugned Decision, at paragraphs 3 and 4 respectively.

for Bemba (the 'Defence') filed its observations on 18 October 2010.<sup>4</sup> On 26 October 2010, the Prosecution filed a confidential 'Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning'.<sup>5</sup>

5. On 23 November 2010, the Majority of the Trial Chamber, in its 'Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence' (the 'impugned Decision'), held that there was "a sufficient legal basis provided in the ICC legal framework to consider *prime facie* admitting into evidence, before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial" and for the same reasons, admitted *prima facie* "all the documents submitted to the Chamber by the prosecution in its List of Evidence".<sup>6</sup> The Majority further held that "the Statute only envisages <sup>7</sup>a presumption in favour of oral testimony, but no prevalence of *orality* of the procedures as a whole".

6. On the same date, Her Honour Justice Ozaki attached a Dissenting Opinion to the Majority's impugned Decision, in which Justice Ozaki disagreed with the reasoning underlying the impugned Decision and held that the Chamber should follow the established practice, that is, undertake a case-by-case analysis as to whether the statements and other documents are admissible as evidence.<sup>8</sup>

7. The Defence hereby applies for leave to appeal against the impugned Decision in accordance with Rule 155 of the Rules of Procedure and Evidence.

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<sup>4</sup> Defence Observations on the Potential Submission into evidence of the Prior Recorded Statements of Prosecution's Witnesses Testifying at Trial, 18 October 2010, ICC-01/05-01/08-960. A summary of the observations submitted by the Prosecution and OPCV are set out in impugned Decision, at paragraph 5.

<sup>5</sup> Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning', 26 October 2010, ICC-01/05-01/08-996

<sup>6</sup> Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence, 23 November 2010, ICC-01/05-01/08-1022

<sup>7</sup> ICC-01/05-01/08-1022, para. 14

<sup>8</sup> Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence, (the 'Dissenting Opinion') 23 November 2010, ICC-01/05-01/08-1028, paragraph 32

### III. The Law

8. Article 82(1)(d) of the Statute of the International Criminal Court (the ‘Statute’) sets out the requirements to be satisfied when bringing an application for leave to appeal an interlocutory decision. It reads

Either Party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

.....

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcomes of the trial, and for which, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

### IV. Submissions

(a) *An “issue” exists that was dealt with in the impugned Decision*

9. For an application for leave to appeal to be granted under Article 82(1)(d), the Chamber must find that an “issue” exists that was dealt with in the impugned Decision.<sup>9</sup>

10. The impugned Decision of the Majority in favour of the wholesale admission of the evidence contained in the Prosecution’s List of Evidence, prior to any assessment of its relevance or probative value, was based on the finding that there exists a sufficient legal basis provided in the ICC legal framework to consider *prime facie* admitting into evidence, before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial.

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<sup>9</sup> E.g., Prosecutor v. Lubanga, Pre-Trial Chamber I, Decision on Leave to Appeal Confirmation Decision, ICC-01/04-01/06-915 at paragraphs 56-59

11. The Defence submits that, as this formed the basis for the impugned Decision, the following issue can be considered an appealable ‘issue’ within the meaning of Article 82(1)(d): namely: whether the such a concept of “*prima facie* admissibility”, as set out in the impugned Decision, exists in the Rules of the Procedure of the International Criminal Court, in the Rome Statute or in the wider legal framework of the ICC.

(b) *An issue that significantly affects the fair conduct of the proceedings*

12. Both the Majority and Her Honour Judge Ozaki have acknowledged that the issue of the *prima facie* admissibility of documents is one which affects the fairness of the proceedings. While taking different views on the whether the new regime for the admission of documents would have a positive or negative affect the fair conduct of the proceedings, both asserted that it would indeed have this effect. The Majority in the Decision asserted that “[t]he *prima facie* admission into evidence of witnesses’ statements and related documents included in the prosecution’s List of Evidence would thereby facilitate the fair, expeditious and proper conduct of the proceedings...’.<sup>10</sup> In the same manner, Her Honour Judge Ozaki stated that “...it is not sufficient for evidence to have *prima facie* authenticity, relevance and probative value, as the introduction of such evidence also need to be balanced against the fairness of the trial<sup>11</sup>...” and “ [t]his waste of defence resources may negatively affect the right of the accused to a fair trial...” and described the regime as putting “an additional immense burden on the defence.”

13. The Defence agrees with both the Majority and Her Honour Judge Ozaki that the Decision to implement a new regime for the admissibility of evidence involves an issue that would affect the fair conduct of the proceedings. In fact, this Decision will significantly affect the fair conduct of the proceedings for the following reasons.

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<sup>10</sup> ICC-01/05-01/08-1022, para. 22.

<sup>11</sup> ICC-01/05-01/08-1022.

Firstly, the course taken by the Majority in its impugned Decision constitutes a de facto reversal of the burden of proof. It would no longer fall to the Prosecution to persuade the Trial Chamber of every piece of evidence's relevance to the proceedings; rather the evidence will be *prima facie* admitted without regard to its relevance and it will be then for the Defence (or the Chamber, *proprio motu*) to challenge the *prima facie* admissions, either at the close of trial proceedings or upon its presentation by the Prosecution. It is for the Prosecution to prove relevance as a gateway to admissibility. It is the respectful submission of the Defence that to place this burden on the Defence contravenes the rights of Accused, as set out in Article 67(1)(i) and therefore necessarily impacts on the fair conduct of the proceedings.

14. Secondly, the issue in these the Accused (and the Defence as a whole) has the right to know with certainty what the evidence against the accused actually is.<sup>12</sup> As held in the Dissenting Opinion, "the principle of judicial certainty militates in favour of providing the defence with focussed, clearly delineated evidence so that it can exercise its rights from the commencement of the trial, rather than only at the end of it".<sup>13</sup> The wholesale *prima facie* admission of evidence, without regard to its relevance, directly contravenes this fair trial right of the Accused.

15. Thirdly, under the new regime of *prima facie* admission of documents the trial, the Chamber is necessarily admitting documents into evidence before an assessment has been made of whether the prejudicial affect of the document could outweigh its probative value. As such, this means that there will be, or at least a real risk exists, of documents being admitted into the evidence against the Accused, and being relied upon by the Prosecution and put to witnesses during the trial phase, which may ultimately be determined to be inadmissible because of their prejudicial nature. The Defence therefore respectfully submits that it cannot be reasonably be asserted that the Decision does not involve an issue which will have a significant affect on the fair

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<sup>12</sup> Article 76(1)(a)

<sup>13</sup> ICC-01/05-01/08/1028, para. 16

conduct of the proceedings, as acknowledged by both the Majority and Her Honour Judge Ozaki.

(c) *An issue that significantly affects the expeditious conduct of the proceedings*

16. In the same way, both the Majority and Her Honour Judge Ozaki have acknowledged that the issue of the *prima facie* admissibility of documents is one which affects the expeditious of the proceedings although again, they take a different position on whether it will have a positive or negative effect. The Majority, in the Decision, held that “[e]xpeditiousness is one of the factors that secures the fairness of the proceedings, as justice within a reasonable time respects the rights of the accused... this *prima facie* admission of evidence will shorten the length of questioning by the parties in court and contribute to the accused being tried without undue delay, pursuant to Article 67(1)(c) of the Statute”.<sup>14</sup> Her Honour Judge Ozaki noted that the new regime would create “an additional workload, rather than expediting proceedings”<sup>15</sup> and after an extensive review of its effect on expeditiousness over seven paragraphs concluded that “I cannot agree with the Majority that the measure will have any beneficial effect on the expeditiousness of the proceedings”<sup>16</sup> and explained at length how the regime would require “analyzing and evaluating thousands of additional pages, which adds to the length and the complication of the proceedings”.<sup>17</sup>

17. The Defence respectfully agrees with and adopts the extensive reasoning of Her Honour Judge Ozaki on the fact that the Decision on admissibility will significantly prolong and complicate the proceedings, affecting their expeditiousness. Her Honour Judge Ozaki also recalled an earlier decision of the current Trial Chamber on the issue of the admission into evidence of witness statements in which

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<sup>14</sup> ICC-01/05-01/08-1022, para. 23.

<sup>15</sup> ICC-01/05-01/08-1028, para. 21.

<sup>16</sup> ICC-01/05-01/08-1028, para. 26.

<sup>17</sup> ICC-01/05-01/08-1028, para. 27.

the Chamber held that: “the Chamber is not persuaded that avoiding questioning by the prosecution in court will have the effect of expediting the proceedings. On the contrary, direct questioning by the defence based on written statements... is likely to take a significant amount of time as this evidence is contested by it.”<sup>18</sup> Whichever position is adopted, it is clear that the issue of the *prima facie* admission of evidence is certainly one which has a significant impact on the expeditious conduct of the proceedings, warranting the granting of leave to appeal.

(d) *Materially Advance the Proceedings*

18. The issue from which the parties seek leave to appeal must be one for which “an immediate resolution by the Appeals Chamber may materially advance the proceedings”. On this point, the Appeals Chamber has held that the meaning of “advance” is:<sup>19</sup>

“move forward by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings. A wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary will be set back.”

As such, the Appeals Chamber concluded that “the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.”<sup>20</sup>

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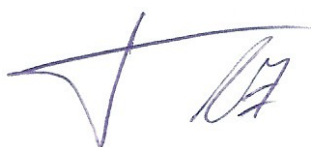
<sup>18</sup> ICC-01/05-01/08-1028, para. 25.

<sup>19</sup> ICC-01/04-168, Appeals Chamber Judgement 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, paras 15, 16.

<sup>20</sup> Ibid., para. 19.

19. The Decision, which puts in place a regime for the admission of evidence which departs from that adopted by other Trial Chambers and, in the opinion of Her Honour Judge Ozaki, also departs from the regime set out in the Statute and Rules of the Court, undoubtedly has an immeasurable impact on the conduct of the entirety of the proceedings. Should it be determined that this new regime for the admission of documents is erroneous and is setting the trial on the wrong course, and the view of the Defence, OPCV and Her Honour Judge Ozaki is correct, this will have significant repercussions for the future conduct of the proceedings. The standard set for the admission of evidence permeates the entirety of the trial, and has the ability to dramatically alter the evidence in the case against the Accused. The Defence respectfully submits that the present Decision is precisely the kind that contains an issue of which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

20. As such, the Defence submits that the criteria for the granting of leave to appeal pursuant to Article 82(1)(d) have been met, and respectfully requests that the Trial Chamber grant the Defence's application for leave to appeal the Decision on the admission into evidence of materials contained in the prosecution's list of evidence pursuant to Article 82(1)(d).



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Aimé Kilolo Musamba  
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Principal Counsel

Dated this 29 November 2010  
At The Hague, The Netherlands