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Original: **English**

No.: **ICC-01/05-01/08 OA5**
Date: **18 February 2011**

THE APPEALS CHAMBER

Before: **Judge Akua Kuenyehia, Presiding Judge**
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

***IN THE CASE OF THE PROSECUTOR v.* JEAN-PIERRE BEMBA GOMBO**

Public document

Prosecution's Response to the "Defence appeal against the 'Decision on the admission into evidence of material contained in the Prosecution's list of evidence' of 19 November 2010"

Source: **Office of the Prosecutor**

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

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Introduction

1. In its "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" ("Decision"),[1] the Majority of Trial Chamber III ("Majority") *prima facie* admitted into evidence "any materials, including witnesses' written statements and related documents previously disclosed to the defence and which will form part of the prosecution's Revised List of Evidence".[2] Judge Ozaki dissented.[3] On 26 January 2011, the Prosecution and the Accused were granted leave to appeal the following issue: "whether the legal framework of the ICC allows for prima facie admission into evidence of materials, as defined in paragraphs 9 and 10 of the Majority Decision, including witnesses' written statements and related documents previously disclosed to the defence and which form part of the prosecution's Revised List of Evidence".[4]

2. Both the Prosecution and the Accused filed documents in support of appeal on 7 February 2011.[5] The Prosecution argued that the Trial Chamber committed two reversible errors which materially affected the impugned Decision: it wrongly admitted all items of evidence in the Prosecution's List of Evidence without assessing their admissibility pursuant to Article 69(4) or providing the Accused an opportunity to raise issues relating to admissibility and relevance pursuant to Rule 64, and it violated the primacy of oral evidence by admitting all of the written witness statements.

3. The Accused presents three grounds of appeal: "(a) The Legal framework of the Court does not allow for the *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Impugned Decision; (b) The Majority's

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[1] ICC-01/05-01/08-1022.
[2] Decision, para.35.
[3] ICC-01/05-01/08-1028("Dissenting Opinion").
[4] ICC-01/05-01/08-1169, para.37.
[5] ICC-01/05-01/08-1194 ("Prosecution Document in Support of Appeal"); ICC-01/05-01/08-1191 ("Defence Document in Support of Appeal").

regime of *prima facie* admission into evidence of documents contravenes the rights of the accused as set out in the legal framework of the Court; (c) The Majority's regime of *prima facie* admission cannot be reconciled with the principle of the primacy of orality imposed by the legal framework of the Court."[6]

4. The arguments advanced by the Accused in his First and Third Grounds of Appeal largely coincide with the Prosecution's position. Accordingly, the Prosecution relies on its Document in Support of Appeal and supports most of the arguments presented by the Accused.[7] The Prosecution however disagrees with the position of the Accused in his Second ground of Appeal that the Chamber's failure to make particularized admissibility rulings before the start of trial causes prejudice to his right to a fair trial.[8] This will be addressed below.

Prosecution's Submission in Response to the Defence Appeal

5. Under his Second Ground of Appeal, the Accused alleges certain prejudicial effects that supposedly result from the impugned Decision,[9] but appears not to articulate an identifiable error.[10] Nonetheless, he appears to argue that the Decision does not include any ruling on the admissibility of the evidence, that the Chamber instead will make such rulings at a later stage of the trial,[11] and that such delayed evidentiary rulings violate the following Accused's rights: to

[6] Defence Document in Support of Appeal, para.6.
[7] The Prosecution does not agree with the manner in which the arguments in paragraphs 19, 24, 61 and 62 are presented. Also, with respect to the admission of written evidence, the positions are not identical: the Accused fails to acknowledge that other relevant statutory provisions allow for this possibility, such as Article 68(2) and 69(4). The Prosecution further considers that the introduction of written statements in lieu of or in addition to oral testimony can expedite the proceedings, a statutory requirement and fundamental right of the accused. In this vein, Trial Chamber I admitted under Article 69(4) written interviews of witnesses falling outside the purview of Rule 68(b) and Article 68(2). See ICC-01/04-01/06-2595-Red, paras.42-52. See also para. 43. Therefore, as long as decisions of this nature are made in light of the specific circumstances of each case and are consistent with the rights of the accused and the fairness of the proceedings the Chamber may admit prior recorded statements of witnesses.
[8] Defence Document in Support of Appeal, paras.33-35.
[9] Defence Document in Support of Appeal, paras.33-52.
[10] The Appeals Chamber has ruled that "[g]rounds of appeal for appeals brought under article 82(1)(d) can include those grounds that are listed at article 81(1)(a)": ICC-01/04-01/06-568 OA3, para.19.
[11] Defence Document in Support of Appeal, para.33.

prompt and detailed notice of the charges against him;[12] to adequate time to prepare a defence;[13] and to a trial without undue delay.[14] According to the Accused, the Chamber must rule on the admissibility of all the Prosecution's intended evidence *before* the start of the trial.[15]

6. Contrary to the Accused's position, the timing of evidentiary rulings has no bearing on an accused person's right to proper notice of the charges – i.e., the factual and legal allegations -- under Article 67(1)(a). The Accused's right to be informed of the charges against him is fully protected by the filing of the document containing the charges and the confirmation decision, which is based on the charges and evidence admitted at the confirmation hearing. Nothing in the Statute or Rules requires, as a fundamental component of notice, that the Trial Chamber also make pre-trial item-by-item admissibility rulings on all anticipated evidence. Indeed, if that were so, every instance when late-discovered evidence was admitted would violate the right to notice of the charges themselves.[16]

7. By the same token, the List of Evidence (with or without a judicial ruling on admissibility) is also not related to the provision of notice of the charges. It is instead a trial management tool devised by the Chambers, not expressly required in the Statute or Rules,[17] which enables the Chamber and the Accused to anticipate the incriminatory evidence that the Prosecution may proffer to prove

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[12] Article 67(1)(a). See Defence Document in Support of Appeal, paras.33-35.
[13] Article 67(1)(b). See Defence Document in Support of Appeal, paras.36-39.
[14] Article 67(1)(c). See Defence Document in Support of Appeal, paras.40-47. The Prosecution understands that the prejudices listed by the Accused in his Second Ground are the result of the admission (albeit called *prima facie* in the Decision) of the materials referred in the List of Evidence without a ruling on its admissibility within the terms of Article 69(4).
[15] Defence Document in Support of Appeal, paras. 33-35.
[16] Clearly, courts have permitted late-discovered evidence without holding that the admission of the evidence violated the accuseds' right to adequate pre-trial notice of the charges. E.g., *Prosecutor v. Bagasora et al.*, ICTR-98-41-T, "Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP AND DA," 5 December 2003, see in particular par.10; *Prosecutor v. Nahimana et al.*, ICTR-99-52-I, "Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures," 14 September 2001, para.17.
[17] The Prosecution notes that while a list of the evidence is required in advance of the confirmation hearing (Rule 121(3)), no provision requires a list of evidence in advance of trial.

its case.[18] The List facilitates the process, but does not and is not intended to provide notice of the underlying charges themselves.

8. The Accused further submits that if the Chamber does not rule on admissibility of evidence until the end of the trial he will have to prepare his defence to counter all the factual allegations contained in the evidence referred to in the List of Evidence. This, he contends, violates his right to adequate time and facilities to prepare a defence.[19]

9. This argument, however, wrongly conflates factual allegations with evidence. As the Appeals Chamber has made clear, these are two different and distinguishable concepts.[20] As noted above, the document containing the charges and the confirmation decision provide notice of the allegations against him, and the list of evidence supplements the notice of the evidentiary foundation that the Prosecution intends to elicit to prove the charges.

10. Nor is the Accused correct in pegging the adequacy of pretrial preparation time to the timing of trial decisions regarding the admissibility of individual items of evidence. The requirement is that the Accused have adequate time to prepare for what the Prosecution will attempt to prove, not that he have adequate advance notice of how the Trial Chamber will rule on evidentiary issues. The Prosecution disclosed its incriminatory evidence many months in advance – in this case, for example, the Accused received essentially most of the intended evidence more than 15 months ago,[21] and with few exceptions has had the entirety of the

[18] ICC-01/05-01/08-682, paras.21,23,26 largely quoting ICC-01/04-01/07-956, paras.5,6,12; and ICC-01/04-01/07-1088, para.24.
[19] Defence Document in Support of Appeal, paras. 36-37.
[20] "In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67(I) (a) of the Statute." ICC-01/04-01/06 2205 OA15 OA16, fn.163. Although the distinction was made in the context of the confirmation hearing, it would equally apply at trial.
[21] As the Chamber acknowledged in its Decision setting a date for trial, a significant portion of the trial material was served on the Accused prior to the confirmation hearing (ICC-01/05-01/08-598, para.5). Thereafter, the Prosecution disclosed to the Accused on 10 November 2009 the overwhelming majority of the incriminatory

Prosecution's incriminatory evidence at least one year before the first day of trial. He has had ample time to investigate and prepare a defence against the anticipated Prosecution evidence. Indeed, it would be irresponsible for an accused to delay his trial preparations until after the Chamber rules that the evidence will be admitted. Part of the preparation, in fact, may be to develop arguments against the reliability or admissibility of the intended evidence, as well as to prepare to address or counter it.

11. Finally, there is no reason to believe that the proceedings will be unduly delayed because the Accused must cross-examine witnesses on all matters contained in their written statements, whereas if the statements were not admitted the cross-examination would be reduced.[22] Instead, the Prosecution anticipates that the critical facts will be elicited in direct testimony, and the Accused should reasonably be expected to address and put to the testifying witness the essential factual and credibility issues that may arise from the direct testimony and all other relevant evidence.

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evidence in its possession, on which it intended to rely at trial (ICC-01/05-01/08-605 and ICC-01/05-01/08-606). The Prosecution also disclosed all the material under Article 67(2) and Rule 77 in accordance with the deadline of 30 November 2009 set by the Chamber (ICC-01/05-01/08-T-14-ENG, p.16, lines 5-6; ICC-01/05-01/08-590, para.7).

[22] Defence Document in Support of Appeal, para.42.

Conclusion

12. The Prosecution requests the Chamber to entertain the submissions enclosed herein and, for the reasons set out above and in its Document in Support of Appeal, to reverse the impugned Decision.

Luis Moreno-Ocampo, Prosecutor

Dated this 18th day of February 2011

At The Hague, The Netherlands