

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 6 September 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***

**URGENT  
Confidential**

**Partly Dissenting Opinion of Judge Ozaki on the Prosecution's Application for  
Admission of Materials into Evidence Pursuant to Article 69(4) of the Rome  
Statute**

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

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## I. Introduction

1. This partly dissenting opinion is in response to the "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" ("Decision"), and will address the reasons underlying my disagreement with the Majority as to some of the issues therein.
2. Although I agree with the Decision with regard to a majority of the documents at issue, I am unable to accept the reasoning of the Majority concerning the admission into evidence of media reports, disagree with the reasoning and conclusion of the Majority with regard to reports from non-governmental organisations ("NGOs") and States, and also in regard to the admission of a telephone log and two forensic reports, as discussed in greater detail below.

## II. Press and Audio Media Reports

3. The Majority of the Chamber has admitted into evidence seventeen press reports in full and one in part,<sup>1</sup> and nine recordings of radio news programmes from *Radio France Internationale* ("RFI").<sup>2</sup> I am in agreement with the admission of two of these newspaper reports, one

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<sup>1</sup> Admitted media reports: 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. Partially admitted media report: CAR-OTP-0004-0336.

<sup>2</sup> Admitted audio media recordings: 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.

containing a transcribed speech<sup>3</sup> and the other which was used during the questioning of Witness 15,<sup>4</sup> for the reasons set out in the Decision.<sup>5</sup> With regard to the remaining sixteen press reports and all nine audio media reports, the Majority describes the basis for admission as follows: "the Majority of the Chamber is of the view that these materials can be considered for a limited purpose; in particular, the information contained therein may serve to corroborate other pieces of evidence and might be examined when assessing the prosecution's allegation that the conduct described in the charges was widely broadcast".<sup>6</sup>

4. I am of the view that the admission into evidence of newspaper articles and other media reports when their authors are not called to testify at trial must be approached with great caution, particularly when the prosecution seeks to rely on them to prove critical elements of its case. Even when media reports appear to describe contemporary events objectively, the authors of these reports often rely on hearsay, and there are no guarantees that the sources have been selected impartially. In most cases, therefore, media reports lack the minimum probative value necessary for admission into evidence.
5. In this regard, Trial Chamber I has held that "generally, newspaper articles cannot usually be relied on to report with sufficient reliability the events they purport to address" and declined to admit into evidence a newspaper article when the author was not called to testify at trial.<sup>7</sup> Trial Chamber II similarly held that "[m]edia reports often

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<sup>3</sup> CAR-OTP-0004-0336.

<sup>4</sup> CAR-OTP-0032-0167.

<sup>5</sup> Decision, paras 95 – 96 and 111.

<sup>6</sup> Decision, para. 104. See also the reasoning in paras 101, 107, 110, 124, 126 and 128.

<sup>7</sup> Decision on the "Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)", 21 October 2010, ICC-01/04-01/06-2589-Anx, pages 14 – 15.

contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources.”<sup>8</sup> That Chamber highlighted that opinion evidence is only admissible when provided by an expert, and refused to admit into evidence several media reports where the prosecution had failed to satisfy the Chamber as to the objectivity of the reports.<sup>9</sup> I would, in principle, adopt this approach in considering the press and other media reports currently at issue.

6. Throughout the Decision, the Majority in admitting material into evidence, including press and audio media reports, relies on the rationale that admission is not prejudicial “in light of the envisioned limited usage of the information contained in the documents”<sup>10</sup> with the “envisioned limited usage” apparently referring to the possibility that the information “may serve to corroborate other pieces of evidence and might be examined [in relation to whether the events were widely reported]”.<sup>11</sup>
7. I cannot agree with the reasoning of the Majority that these reports are admissible because they “may serve to corroborate other pieces of evidence”.<sup>12</sup> In my view, the fact that a given item corroborates other evidence can be a factor in assessing its reliability and probative value. However, the mere *possibility* that certain items may corroborate other, as-yet unidentified evidence at a later stage has no impact on the item’s present limited probative value. The prosecution has not identified with any particularity the evidence which the press reports could be used to corroborate. Although the Majority suggests that the admission of these reports is not prejudicial “in light of the envisioned limited

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<sup>8</sup> Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, paras 31.

<sup>9</sup> ICC-01/04-01/07-2635, paras 31 and 36.

<sup>10</sup> Decision, paras 36, 41, 104, 107, 110, 124, 126 and 128.

<sup>11</sup> See, e.g., Decision, paras 41, 104, 107, 110, 124, 126 and 128.

<sup>12</sup> See, e.g., Decision, paras 41, 104, 107, 110, 124, 126 and 128

usage of the information contained in these documents",<sup>13</sup> it neglects to specify how this usage is to be limited, and at no stage does the Majority analyse the probative value of each item in light of the evidence it would be used to corroborate.

8. Moreover, as discussed above, the press reports and RFI broadcasts<sup>14</sup> at issue in this Decision have very little probative value to begin with. On this basis, I do not consider the possibility of corroboration sufficient to justify their admission, particularly when balanced against the very real potential for prejudice if these media reports are admitted for the truth of their contents.

9. I do not, however, object to the admission of media reports for the purpose of the Chamber's determination of whether crimes committed by MLC troops in the CAR in 2002 and 2003 were widely reported, which may be of relevance to the accused's knowledge of the alleged crimes.

10. On this basis I concur with the Majority's admission of twenty-five press and audio media reports<sup>15</sup> but only insofar as they are admitted for the purpose of demonstrating that the events described therein were widely reported. For the reasons just discussed, I would not admit them for the truth of their contents.

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<sup>13</sup> Decision, paras 104 and 107.

<sup>14</sup> Two of the newspaper articles contain interviews with President Patassé (CAR-OTP-0013-0005 and CAR-OTP-0013-0161) and a number of the RFI recordings contain interviews which were apparently broadcast as part of the news programmes and which may be of relevance to the case against the accused. However, the prosecution has not provided any information as to the circumstances in which these interviews were conducted, nor has it called any witnesses to authenticate the recordings, or to confirm the contents of the interviews. On this basis I am unable to conclude that the interviews are sufficiently reliable and probative to outweigh the potential prejudice to the defence if they were admitted.

<sup>15</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-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.

### III. Reports from Non-Governmental Organizations ("NGOs")

11. The Majority of the Chamber has admitted into evidence four NGO reports (three prepared by the *Fédération Internationale des Ligues des Droits de l'Homme* ("FIDH")<sup>16</sup> and one by Amnesty International ("AI").<sup>17</sup> The Majority holds that these reports "contain sufficient details of their sources of information and methodology"<sup>18</sup> and therefore bear sufficient indicia of authenticity and reliability. The reports contain information relevant to the crimes with which the accused is charged. However, the identities of the authors and the sources of the information relied on in the reports are not revealed with sufficient detail, and as a result it is not possible to fully investigate their reliability. The three FIDH reports and the AI report admitted into evidence by the Majority are based almost entirely on information obtained from other NGOs, journalists, or unidentified eyewitnesses, thus rendering it very difficult to adequately assess the reliability of the accounts contained therein.

12. Due to the lack of guarantees concerning the reliability of these reports' sources and without hearing the testimony of the authors of these reports, in my judgment their probative value is low. Considering in turn the high potential for prejudice to the defence if the reports are admitted, it is my view that these reports do not satisfy the test for admission. Although the Majority suggests that these reports are only admitted "for the limited purpose that the information contained therein may serve to corroborate other pieces of evidence"<sup>19</sup>, given the

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<sup>16</sup> CAR-OTP-0001-0034, CAR-OTP-0004-1096 and the English and French versions of the "Second FIDH Report" - CAR-OTP-0004-0409 and CAR-OTP-0004-0881.

<sup>17</sup> CAR-OTP-0011-0503.

<sup>18</sup> Decision, para. 35; *see also* para. 41.

<sup>19</sup> Decision, paras 36 and 41.

low probative value of the reports and the potential for prejudice, I do not believe that the intention to use these reports to corroborate other (unidentified) evidence justifies their admission.

13. Only one of the NGO reports at issue was published during the period of the charges.<sup>20</sup> This report was published in February 2003, in the same month that the accused corresponded with the president of the FIDH concerning the investigation of crimes allegedly committed by ALC soldiers.<sup>21</sup> For this reason I do not object to the admission of this report for the purpose of the Chamber's determination of whether crimes committed by MLC troops in the CAR in 2002 and 2003 were widely reported, which may be of relevance to the accused's knowledge of the alleged crimes.

#### **IV. Reports from States**

14. The Majority has also admitted into evidence a report from the United States Department of State,<sup>22</sup> published on 31 March 2003, specifying in its reasoning that "the information contained therein may serve to corroborate other pieces of evidence. In light of the envisioned limited usage of the information contained in this report, the Majority is of the view that there is no reason to believe that its admission will have a prejudicial effect on a fair trial."<sup>23</sup>

15. This report contains no information about its sources, nor does it explain the methodology relied on to compile and analyse the evidence that forms the basis of its factual assertions. If the author of the report

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<sup>20</sup> The First FIDH Report, CAR-OTP-0001-0034.

<sup>21</sup> CAR-DEF-0001-0152 and CAR-DEF-0001-0154.

<sup>22</sup> CAR-OTP-0004-0977.

<sup>23</sup> Decision, para. 137.

is not called to testify, and in the absence of any other means for the Chamber and the defence to inquire into the information relied on in the report, I am of the view that its probative value is insufficient to outweigh its potentially prejudicial effect, and I would not admit this document, regardless of whether or not it may, in theory, be capable of corroborating other evidence.

16. Similarly, the Majority has admitted into evidence a list compiled by the CAR government containing a number of statements of victims of sexual violence alleged to have taken place between 25 and 31 October 2002.<sup>24</sup> Although the Majority states that “any possible prejudicial effect that could result from the admission of this document does not outweigh its relevance and probative value”,<sup>25</sup> I am unable to agree with this reasoning. The report contains identity numbers of victims, but no names; further, no information is provided concerning the methodology relied on to compile these statements. Since neither those involved in creating the report nor the victims themselves have come to testify before the Chamber, I am of the view that its probative value is insufficient to outweigh its prejudicial effect, and I would not admit this document.

17. The Majority has also admitted into evidence a second report from the CAR government containing the results of a humanitarian assistance project focused on victims of sexual violence in the CAR between 2002 and 2003.<sup>26</sup> Although this report contains details on the methodology used to gather and analyse the data, the vast majority of the victims interviewed during the project are not identified, and as a result it is not possible to fully investigate the reliability of their accounts. On this

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<sup>24</sup> CAR-OTP-0019-0588.

<sup>25</sup> Decision, para. 149.

<sup>26</sup> Decision, para. 154, admitting into evidence CAR-OTP-0030-0002.

basis, the probative value of the report is low. Considering in turn the high potential for prejudice to the defence if it is admitted, in my view this document does not satisfy the test for admission.

## V. Other Documents

18. The Majority has admitted into evidence document CAR-OTP-0055-0893,<sup>27</sup> which the prosecution claims is a telephone record of the accused's phone calls from February to July 2003 from a number registered in Witness 161's name.<sup>28</sup> This document contains no indication of its source or other indicia of reliability and has not been authenticated by a witness. As a result, in my view the probative value of this document is very low and in any event is insufficient to outweigh the prejudice to the defence if it is admitted. If the prosecution were to provide the Chamber with additional material that could assist in establishing the authenticity of this document and the circumstances under which it was created, I would be willing to consider its admission into evidence. However, in the absence of such information I am unable to join the Majority in admitting CAR-OTP-0055-0893.

19. Finally, the Majority has admitted into evidence three forensic reports<sup>29</sup> related to the alleged murder of the brother of Witness 87.<sup>30</sup> In my view, the authors of these reports should have been called to give evidence as to their contents. The reports could also have also been shown to Witness 87, who could have identified images or other information contained therein. With regard to reports CAR-OTP-0048-

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<sup>27</sup> Decision, para. 163.

<sup>28</sup> ICC-01/05-01/08-2147-Conf-AnxA, page 15.

<sup>29</sup> CAR-OTP-0048-0492\_R01; CAR-OTP-0051-0263\_R02 and CAR-OTP-0048-0431.

<sup>30</sup> See Decision, para. 161.

0492\_R01 and CAR-OTP-0048-0431, I am of the view that in the absence of any witness testimony to explain or corroborate their contents, their probative value is insufficient to outweigh their prejudicial effect.

20. With regard to report CAR-OTP-0051-0263\_R02, Witness 87 was questioned by the defence on issues related directly to this report, and asked to make marks on "exactly the same type of diagram which appears in [document CAR-OTP-0051-0263\_R02]."<sup>31</sup> Given the explicit reference by the defence to the expert report during its questioning of Witness 87, the report may be of relevance to the Chamber's evaluation of this portion of Witness 87's testimony. Although the probative value of the report might have been higher had the author been called to testify concerning its contents, in all the circumstances and given the defence questioning of Witness 87 on this point, I find that the probative value of the report outweighs any potential prejudice to the defence, and would therefore admit CAR-OTP-0051-0263\_R02 into evidence.

## VI. Conclusion

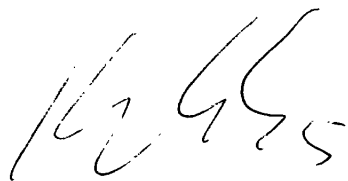
21. For these reasons, I disagree with the Majority's views as expressed in paragraphs 101, 104, 107, 110, 124, 126 and 128 of the Decision, which admit the twenty-six media reports and audio media recordings; paragraphs 36, 41, 137, 149 and 154, which admit into evidence five NGO reports, a report from the U.S. Department of State, a list compiled by the CAR government containing a number of statements of victims of sexual violence and a humanitarian report from the CAR government; paragraph 163, which admits into evidence a document

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<sup>31</sup> ICC-01/05-01/08-T-47-Red-ENG, page 25, line 6 to page 30, line 2.

which is purportedly a telephone record of the accused's phone calls;  
and paragraph 161, which admits two forensic reports into evidence.

Done in both English and French, the English version being authoritative.



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**Judge Kuniko Ozaki**

Dated this 6 September 2012

At The Hague, The Netherlands