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**International
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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 Redacted Version

**Prosecution's Response to Defence Application 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: Office of the Prosecutor

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The Office of the Prosecutor

Counsel for the Defence of Jean-Pierre Bemba

Mr Aimé Kilolo-Musamba

Mr Peter Haynes, QC

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

The Office of Public Counsel for the Defence

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 6 September 2012, Trial Chamber III ("Chamber") issued its *Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute* ("Decision").¹ Judge Ozaki issued a partially dissenting opinion on the same day.²
2. On 14 September 2012, the Defence filed an application for leave to appeal the Decision based on its allegations that the Chamber set erroneous standards for the admissibility of several categories of documentary evidence ("Defence Application").³
3. The Defence Application should be rejected. First, the Application misstates and mischaracterizes the Decision, and as a consequence four out of the seven "appealable issues"⁴ identified by the Defence do not actually arise from the Decision. Second, the remaining matters mentioned in the Application fail to satisfy the applicable statutory requirements of Article 82(1)(d) of the Rome Statute. The Defence Application fails to substantiate how the matters raised amount to appealable issues, and to demonstrate how they affect the fair and expeditious conduct of proceedings or the outcome of trial, or how intervention of the Appeals Chamber would materially advance the proceedings.
4. Pursuant to Regulation 23bis(2) of the Regulations of the Court, the Prosecution files this document confidentially as it is responding to a document with same level of confidentiality

¹ ICC-01/05-01/08-2299-Conf, Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012.

² ICC-01/05-01/08-2300-Conf, 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, 6 September 2012.

³ ICC-01/05-01/08-2313-Conf, Defence Request for Leave to Appeal the Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 69(4) of the Rome Statute, 14 September 2012.

⁴ ICC-01/05-01/08-2313-Conf, para 9.

Arguments

5. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.⁵ Reference to the merits of the Decision will only be made when necessary to demonstrate that the issue does not meet the criteria of Article 82(1)(d). In the present case, the Defence has failed to demonstrate the existence of any issue fulfilling the criteria set out in Article 82(1)(d) of the Statute.
6. The Decision admitted 68 out of 97 documents, videos, and audio recordings proffered by the Prosecution, over Defence objections. The fact that the Defence disagrees with the Chamber's rejection of its arguments does not indicate that the Decision involves appealable issues.
7. 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."⁶
8. In this case, the Defence Application identifies seven "appealable issues" which allegedly arise from the Decision. The seven issues can broadly be grouped in two main complaints: (1) that the Chamber erred in admitting proffered evidence (para. 9(a)-(f)); and (2) that the timing of the admission prejudiced the Accused's right to confrontation (para 9 (g)).⁷

⁵ ICC-02/04-01/05-20-US-Exp, para. 22.

⁶ ICC-01/04-01/06-168 OA3, 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."

⁷ ICC-01/05-01/08-2313-Conf, para. 9(a-g).

9. Four issues within the first group of issues (para. 9(a)-(c), (e)) are based on a flawed reading of the Decision and a strained reading of the admissibility standards applied by the Chamber. The Defence's mischaracterizations of the Majority Decision fail to satisfy the applicable test under Article 82(1)(d): it has not demonstrated how the stated issues, read fairly together with the Majority's reasoning in the Decision, constitute appealable issues arising from the Decision. The first group of issues also contains two additional issues that are not based on a mischaracterization of the Decision (para. 9(d), (f)). However these two issues do not significantly affect the fair and expeditious conduct of proceedings or the outcome of trial. Moreover, intervention by the Appeals Chamber in relation to these two issues would not materially advance the proceedings.⁸
10. The second complaint (para. 9(g)) is that the Chamber allegedly failed to ensure that the Prosecution submitted the materials into evidence at a time and in a way that would have allowed the Defence to exercise the Accused's right of confrontation.⁹ The Defence fails to demonstrate how intervention by the Appeals Chamber would materially advance the proceedings.

The Issues do not satisfy the test under Article 82(1)(d)

A. The First Category (para. 9(a-f)): the Majority erred in admitting proffered evidence

The identified Issues do not arise from the Decision (para. 9(a-c, e))

11. The Defence contends that the Chamber set an erroneous standard for the admissibility of press article and reports.¹⁰ The Defence fails to explain what standard the Chamber allegedly violated and fails to explain how the

⁸ ICC-01/05-01/08-2313-Conf, para. 9(a-g).

⁹ ICC-01/05-01/08-2313-Conf, para. 9(g).

¹⁰ ICC-01/05-01/08-2313-Conf, para. 9(a).

Decision to admit certain press articles and reports affects the fairness or expeditiousness of the proceedings. The Defence misrepresents the Majority's carefully explained reasoning for the admissibility of press articles, taking one of the many considerations offered by the Chamber out of context. The Chamber did not only state that press articles "'may' serve to corroborate other pieces of evidence" as the Defence implies.¹¹ Rather the Chamber provided a detailed rationale taking into account, *inter alia*, relevance, reliability, authenticity, probative value, and prejudice.¹² Thus, the allegation that the Chamber set an erroneous standard is unsubstantiated and factually wrong.

12. The Defence also raises, as an issue, the Majority's purported error in admitting press articles and reports without an individual assessment as to each item's reliability and credibility.¹³ The Decision, however, does not substantiate that claim. The Chamber in fact undertook a careful analysis of reliability and credibility of the press articles and reports.¹⁴ Indeed, the Defence side-steps the fact that the Chamber also refused to admit a number of press articles after determining that the reliability of the articles could not be verified.¹⁵

13. The Defence contends that the Majority erred in assessing the probative value of five NGO reports as it was unable to assess the reliability of the accounts contained in the reports.¹⁶ The Defence ignores the Majority's stated reasoning in the decision that "the Chamber's determination of admissibility does not predetermine the Chamber's final assessment of the evidence of the weight to be afforded to it."¹⁷ The Defence also fails to state

¹¹ ICC-01/05-01/08-2313-Conf, para. 9(a).

¹² ICC-01/05-01/08-2299-Conf, paras. 95-116.

¹³ ICC-01/05-01/08-2313-Conf, para. 9(b).

¹⁴ See e.g. ICC-01/05-01/08-2299-Conf, paras. 109-110.

¹⁵ ICC-01/05-01/08-2299-Conf, para. 113.

¹⁶ ICC-01/05-01/08-2313-Conf, para. 9(c).

¹⁷ ICC-01/05-01/08-2299-Conf, para. 36.

that the Majority considered the reliability of the NGO reports in arriving at its Decision to admit the documents.¹⁸

14. The Defence raises as an issue the Majority's purported error in admitting telephone records of the Accused without a requisite factual basis.¹⁹ [REDACTED].²⁰

15. In short, contrary to what the Defence claims, the preceding identified issues do not arise from the Decision. The Defence's contention that the Chamber improperly admitted materials without an adequate factual or legal basis or without assessing their reliability is thus incorrect.

The remaining issues do not affect the fair conduct of the proceedings (para. 9(d),(f))

16. The Defence raises an issue of the admission of purportedly improper hearsay evidence recounted in a US State Department Report dealing with human rights in the Central African Republic during the 2002-2003 conflict.²¹

17. The Defence also raises the issue of the admission of three purportedly unauthenticated forensic reports about a single murder. It contends that the reports should not be admitted because the Prosecution did not authenticate these reports through their authors or through witness 87, a lay witness without training in forensic sciences or knowledge of the contents of the reports.²²

18. While these two issues can be said to arise from the Decision, the Defence fails to demonstrate that they affect the fair conduct of the proceedings.²³ The

¹⁸ ICC-01/05-01/08-2299-Conf, para. 35.

¹⁹ ICC-01/05-01/08-2313-Conf, para. 9(e).

²⁰ [REDACTED]

²¹ ICC-01/05-01/08-2313-Conf, para. 9(d).

²² ICC-01/05-01/08-2313-Conf, para. 9(f).

²³ ICC-01/04-168 OA3, para. 11. The Appeals Chamber has ruled that "[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights".

Defence speculates in the abstract that the Decision prejudices the rights of the Accused in order to claim that the fairness of the proceedings are affected. However, neither a purely general complaint,²⁴ nor the mere hypothetical impact on the fairness or expeditiousness of proceedings, suffices.²⁵ Instead, the applicant must demonstrate the existence of a tangible impact of the issue in question on the fair and expeditious conduct of the proceedings. Here, the Defence is effectively contending that the admission of one US State Department report and three forensic reports about *one* alleged murder affects the fair conduct of the proceedings.

19. The Prosecution accepts that an issue involving purely the admissibility of evidence, without regard to the weight or probative value that such evidence may be given at the end of the trial, may be sufficiently linked to the fairness of proceedings to justify interlocutory review in a particular instance. Clearly, however, not all discretionary evidentiary rulings meet that requirement. Here, the Defence has failed to demonstrate why fairness is affected simply by the admission of these documents, as is its burden to do. The onus on the Defence is to identify the aspects of the ruling that warrant certification for appeal and that accordingly distinguish this particular decision from other rulings on admissibility of evidence.

The issues do not affect the expeditious conduct of the proceedings

20. The Defence Application fails to demonstrate that the issues significantly affect the expeditious conduct of the proceedings within the meaning of Article 82(1)(d). Again, the only two issues the Defence identifies that actually arise from the Decision concern the admission of the US State Department report and three forensic reports on one murder.

²⁴ ICC-01/04-01/07-2463, para. 31.

²⁵ ICC-01/04-01/07-1958, para. 20.

21. The Prosecution submits that the expeditious conduct of proceedings means the timely and efficient conduct of proceedings.²⁶ This principle requires that decisions at all stages not unnecessarily delay the overall determination of responsibility.²⁷ The Defence has failed to explain why and how the Decision on the admission of these four documents into the record of the case – without any indication that they will be given any significant weight in the Court's ultimate judgment – must be reviewed now, in order to assure the expeditious conduct of the proceedings.

*An immediate resolution of the issues will not materially advance the proceedings*²⁸

22. The Defence fails to show how immediate resolution of any of the issues identified above (including those which actually do not arise from the Decision) by the Appeals Chamber will materially advance the proceedings.

23. None of the arguments advanced demonstrate the need for intervention by the Appeals Chamber at this stage. The Defence is assuming an impact of the admitted material on the final decision in this case, which at this stage is purely hypothetical. Should the Trial Chamber rely on the admitted evidence for the purposes of a conviction, the Defence can raise this claim, if it considers such reliance to be erroneous or inappropriate, as part of a final

²⁶ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2003-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: "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"; Jones and Powles, *International Criminal Practice* at para. 8.5.60.

²⁷ 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.

²⁸ This requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'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 proceedings." See ICC-01/04-168, paras. 14-15, 18.

appeal against conviction under Article 81(1)(b).²⁹ In this sense, the Prosecution stresses that it would be detrimental to the efficient conduct of the proceedings to cause unnecessary delay by allowing an interlocutory appeal at this stage, when an adequate remedy will be available, if needed, as soon as the trial proceedings are completed.³⁰

B. The Second Category (Ground g): the timing of the Decision prejudices the Accused's right to confrontation

Intervention of the Appeals Chamber is unnecessary

24. The Defence contends that "the Majority failed to ensure that [the Prosecution] tendered the material at a time and a in [sic] way that would have allowed [the Accused] to exercise its right to confrontation."³¹ The Prosecution concedes that the issue of timing arguably involves considerations of fairness and expeditiousness of the proceedings. However, the Defence fails to state how intervention by the Appeals Chamber at this stage would materially advance the proceedings. The Defence has also failed to identify any prejudice resulting from the timing of the Decision requiring immediate intervention by the Appeals Chamber.

²⁹ The Prosecution notes that in relation to the 25 press and media reports, the dissenting Judge concurred with the Majority's admission, although only for the purpose of demonstrating that the events described in those reports were widely reported (see Partly Dissenting Opinion of Judge Ozaki, paras.9-10). This shows that, in the end, the critical issue is the *future* use of those reports by the Chamber for the purposes of the final decision – a matter that is certainly not ripe for consideration now.

³⁰ In the ICTY *Strugar* case, for instance, the Trial Chamber denied certification under Rule 73 (B) to appeal a decision finding the accused fit to stand trial, noting that, should the accused be found guilty at the end of the trial, he was entitled to raise the issue as part of his final appeal (*Prosecutor v. Strugar*, IT-02-54-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6); in *Halilovic*, certification to appeal a decision denying the Prosecution leave to amend charges was rejected due to, inter alia, considerations as to the further delay that an interlocutory appeal could cause to the proceedings; it was simultaneously noted that if the accused were acquitted of the charges, the Prosecution could appeal the judgement (see *Prosecutor v. Halilovic*, IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 12 January 2005, and also *Prosecutor v. Halilovic*, IT-01-48-PT, Separate and Concurring Opinion of Judge O-Gon Kwon Appended to Trial Chamber Decision Dated 12 January 2005 on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 14 January 2005, para. 6.).

³¹ ICC-01/05-01/08-2313-Conf, para. 9(g).

25. The Defence only advances a general and unsubstantiated claim when identifying the issue, and does not even try to explain how its confrontation rights were affected by the timing of admission of the evidence. [REDACTED].³² The fact that the Prosecution did not move them into evidence earlier in the proceedings does not diminish the fact that the Defence was informed from the outset and was able to investigate and prepare to defend against them. The Defence also knew that, once the documents were tendered, the Trial Chamber, under the relevant Appeals Chamber Judgment in the instant case, did not have to rule on the admissibility of the items immediately, but could defer its determination for a later stage, even until the end of the trial.³³
26. It is anticipated that the Defence will take many more months to complete its case. Thus, it has ample time still to attempt to secure evidence, should it choose to do so, to respond to these materials. If the ample time is still not enough, or if the Defence believes it needs additional time to explore the relevant issues with its witnesses, nothing bars it from seeking leave from the Chamber rather than seizing the Appeals Chamber of issues that can be resolved in the course of trial proceedings. The Defence itself in its Application envisions this possibility.³⁴ Thus, the Defence recognizes that there is recourse available to it in order to protect its rights, independent of any Appeals Chamber intervention.

³² [REDACTED].

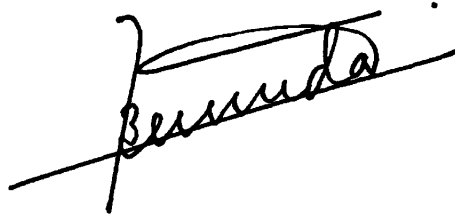
³³ ICC-01/05-01/08-1386 OA5 OA6, Judgment on the appeals against the decision on the admission into evidence of materials contained in the prosecution's list of evidence, 3 May 2011, para. 37. "The above provisions [article 64(9)(a) and 69(4) of the Statute] accord the Trial Chamber discretion when admitting evidence at trial. As borne out by the use of the word 'may' in article 69(4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber [...] and then determine the weight to be attached to the evidence at the end of the trial. In that case, an item will be admitted into evidence only if the Chamber rules that it is relevant and/or admissible in terms of article 69 (4), taking into account 'the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness'. Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person. [...] [I]rrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial."

³⁴ ICC-01/05-01/08-2313-Conf, para. 17.

27. The Prosecution accordingly submits that given that adequate remedies are fully available before the same Trial Chamber, intervention of the Appeals Chamber at this stage is unwarranted, and accordingly would not “materially advance the proceedings”.

Relief sought

28. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence Application.

A handwritten signature in black ink, appearing to read 'Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 7th day of November 2012

At The Hague, The Netherlands