

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 3 September 2013

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***

**Partly Dissenting Opinion of Judge Ozaki on the Decision on the admission
into evidence of items deferred in the Chamber's "First decision on the
prosecution and defence requests for the admission of evidence" (ICC-01/05-
01/08-2012)**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Aimé Kilolo-Musamba

Mr Peter Haynes

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Mr Assingambi Zarambaud

Legal Representatives of the 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 Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. This Partly Dissenting Opinion is in response to paragraphs 15 – 18 and 23 - 25 of the “Decision on the admission into evidence of items deferred in the Chamber’s ‘First decision on the prosecution and defence requests for the admission of evidence’”¹ (“Decision”) and will address the reasons underlying my disagreement with the Majority over those paragraphs.
2. The defence seeks the admission of the written statements of Witnesses 6 and 9¹ but opposes the admission of the written statement of Witness 23.² The prosecution, meanwhile, opposes the admission of the written statements of Witnesses 6 and 9³ whilst requesting the admission of the statement of Witness 23.⁴
3. The Decision allows the admission of the statements of Witnesses 6, 9 and 23 on the basis that the Majority intends to use these statements “to compare the witnesses’ testimony against their prior statements to determine the extent of inconsistencies, if any”.⁵ The Majority states that “witnesses’ prior statements will be treated as complementary to their oral testimony”.⁶

¹ Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l’ordonnance de la Chambre du 31 mai 2011, 14 June 2011, ICC-01/05-01/08-1515.

² Defence Response to the Prosecution’s List of documents to be submitted into evidence pursuant to Trial Chamber III’s order of 31 May 2011, 21 June 2011, ICC-01/05-01/08-1558-Conf.

³ Prosecution’s Response to the Defence’s Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l’ordonnance de la Chambre du 31 mai 2011, 21 June 2011, ICC-01/05-01/08-1557-Conf with Annex A, ICC-01/05-01/08-1557-Conf-AnxA and public redacted versions ICC-01/05-01/08-1557-Red and ICC-01/05-01/08-1557-AnxA-Red2.

⁴ Prosecution’s submission of the list of materials it requests to be admitted into evidence, 14 June 2011, ICC-01/05-01/08-1514 with annex ICC-01/05-01/08-AnxA-Red2-Corr.

⁵ Decision, paras 17 and 25.

⁶ Decision, para. 25.

4. I disagree with the Majority's decision to admit into evidence the prior-recorded statements of Witnesses 6 and 9, and with its reasoning as regards the admission of the statement of Witness 23. In this regard, I refer to my previous dissents⁷ setting out my views on the admission of statements to "complement" oral testimony.⁸ As I have previously set out, although the admission of the relevant parts of a written statement may be warranted in the event that a contradiction appears between the witness's written statement and his testimony before the Court, if there is no inconsistency there should be no need to request the admission of a written statement for credibility assessment purposes.⁹ In my view, the admission of a statement in order to make up for substantive deficiencies in the witness's oral testimony runs contrary to the principle of the primacy of orality enshrined in Article 69(2) of the Statute and would encourage parties to "avoid questioning witnesses on some issues and subsequently tender a favourable statement into evidence".¹⁰ This practice, in my view, runs counter to the aims of Article 69(2) and Rule 68, which are to carefully limit the circumstances in which prior-recorded statements may be admitted.

5. Turning to the statements at issue, the defence has not provided sufficient justification for the admission into evidence of the prior statements of

⁷ Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23 November 2010, ICC-01/05-01/08-1028, Public Redacted Version of the Partly Dissenting Opinion of Judge Kuniko Ozaki on the First decision on the prosecution and defence requests for the admission of evidence of 15 December 2011, ICC-01/05-01/08-2015-Red, 13 February 2012.

⁸ ICC-01/05-01/08-2015-Red, paras 24-39.

⁹ See Partly Dissenting Opinion of Judge Kuniko Ozaki on the Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1471, para. 12 and ICC-01/05-01/08-2015-Red, para. 31.

¹⁰ ICC-01/05-01/08-2015, para. 37.

Witnesses 6 and 9. For this reason, and given the prosecution's objection, I see no reason to make an exception to the principle of the primacy of orality in this instance.

6. As for the statement of Witness 23, the prosecution argues that the admission of these documents is necessary to enable the Chamber to fully assess "Defence express or implied assertion[s] of fabrication, taint, motive or collusion", as it is submitted that the statements are consistent with the witness's in-court testimony.¹¹ Significantly, the prosecution points out that the allegation of fabrication was not raised until Witness 23 had already testified.¹² Although I have previously dissented with regard to the admission of statements tendered following the testimony of a witness in order to rebut allegations of fabrication and collusion,¹³ in this instance the prosecution did not have the opportunity to seek clarification from the witness in re-examination, because the allegations had not yet been made. Although ideally Witness 23 would be recalled in order for the Chamber to hear live testimony on this issue, given the very real logistical difficulties involved in bringing this individual back to the seat of the Court, I would instead admit the statement as requested by the prosecution. The consistency of the statement with the witness's in-court testimony is relevant to allegations of fabrication and the potential prejudice to the defence is relatively low, given that I would only consider these statements for purposes of their consistency with the witness's testimony at trial and not as a supplement to that evidence.

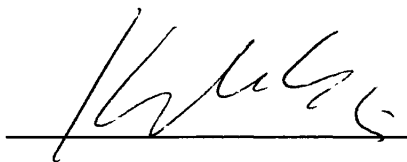
¹¹ Prosecution's Reply to the "Defence Response to the Prosecution's list of documents to be submitted into evidence pursuant to Trial Chamber III's order of 31 May 2011", 27 June 2011, ICC-01/05-01/08-1564-Conf, para. 15.

¹² ICC-01/05-01/08-1564-Conf, para. 16.

¹³ See paragraphs 34 – 36 of ICC-01/05-01/08-2015-Conf.

7. For the above reasons, although I would decline to admit the prior statements of Witnesses 6 and 9 into evidence, I concur in the admission of the statement of Witness 23.

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

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

Dated this 3 September 2013

At The Hague, The Netherlands