

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 6 November 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***

Confidential

**Partly Dissenting Opinion of Judge Ozaki on the Third Decision on the
prosecution and defence requests for the admission of evidence**

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

I. Introduction

1. This Partly Dissenting Opinion is in response to the "Third Decision on the prosecution and defence requests for the admission of evidence" (ICC-01/05-01/08-2864-Conf) ("Decision") and will address the reasons underlying my disagreement with the Majority on some of the issues therein.
2. Although I agree with the Decision with regard to a majority of the documents submitted by the parties, I disagree with the reasoning offered by the Majority when admitting into evidence the prior recorded interviews of Witness D04-19,¹ seven media reports,² and a book written by Witness D04-65.³ I also disagree with the Majority with regard to the admission of a report from the International Crisis Group ("ICG").⁴

II. Prior recorded interviews of Witness D04-19

3. The prosecution seeks the admission of 29 video recordings of Witness D04-19's interviews as well as the corresponding transcripts ("prior recorded interviews");⁵ the defence does not object to the admission of

¹ See Third Decision on the prosecution and defence requests for the admission of evidence, 06 November 2013, ICC-01/05-01/08-2864-Conf, paragraphs 41 to 51.

² CAR-OTP-0013-0118; CAR-OTP-0013-0114; CAR-OTP-0030-0274; CAR-OTP-0005-0129; CAR-OTP-0005-0131; CAR-OTP-0010-0471 and CAR-V20-0001-0165, see ICC-01/05-01/08-2864-Conf, paragraphs 64 to 91 and 95 to 106.

³ CAR-DEF-0002-0108, see ICC-01/05-01/08-2864-Conf, paragraphs 136 to 140.

⁴ CAR-OTP-0069-0148, see ICC-01/05-01/08-2864-Conf, paragraphs 160 to 166.

⁵ Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 22 April 2013, ICC-01/05-01/08-2596-Conf, paragraphs 7 to 8, and Confidential Annex A, ICC-01/05-01/08-2596-Conf-AnxA, pages 3 to 8.

the entirety of the prior recorded interviews.⁶ The Chamber has previously held that the absence of a challenge to an item's admissibility weighs heavily in favour of its admission and that the Chamber will exclude the item only if one or more elements of the three-part test are clearly not met.⁷ The Majority admits the prior recorded interviews into evidence;⁸ I concur with the items' admission insofar as their admission is uncontested and thus not likely to cause prejudice to the defence, but disagree with the Majority's reasoning for admitting these materials.

4. In allowing the admission of these prior recorded interviews, the Majority states that "the prior recorded interviews of witnesses who have testified at trial are relevant because they may assist the Chamber in assessing, contextualizing, and weighing the witnesses' testimony".⁹ The Majority further asserts that prior recorded interviews should be used to "enable the Chamber to compare the witnesses' testimony against their prior interviews to determine the extent of inconsistencies, if any".¹⁰ The Majority also states its intention to consider prior recorded interviews as "complementary" to the witness's in-court testimony".¹¹

⁶ Defence Response to the Prosecution's Second Application for Admission of Evidence from the Bar Table, 6 May 2013, ICC-01/05-01/08-2617-Conf, paragraphs 15 to 20.

⁷ Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red, paragraph 17.

⁸ ICC-01/05-01/08-2864-Conf, paragraphs 41 to 51.

⁹ ICC-01/05-01/08-2864-Conf, paragraph 49.

¹⁰ ICC-01/05-01/08-2864-Conf, paragraph 51.

¹¹ *Ibid.*

5. As I explained in previous dissents,¹² the principle of the primacy of orality articulated in Article 69(2) of the Rome Statute demands careful limitation of the circumstances in which prior-recorded statements are admitted. Specifically, although the admission of relevant parts of prior testimony may be permissible for credibility assessment purposes in the event of a contradiction between a witness's prior interview and his or her testimony before the Court, such testimony should not be admitted to make up for substantive deficiencies in the witness's oral testimony.¹³
6. Turning to the prior recorded interviews at issue, the prosecution seeks to admit these materials to allow the Chamber to assess, *inter alia*, the credibility of the witness's evidence.¹⁴ I note that these inconsistencies were extensively addressed during trial and excerpts from the recorded interviews were shown to the witness;¹⁵ as such, the Chamber should be able to rely on the court's records of the witness's testimony to evaluate the witness's credibility. Still, in light of the defence's lack of objection to the wholesale admission of these materials, I concur with its admission for the limited purpose

¹² 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, paragraphs 6 to 12; 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, 13 February 2012, ICC-01/05-01/08-2015-Red, paragraph 29; Partly Dissenting Opinion of Judge Ozaki on the admission of 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), 3 September 2013, ICC-01/05-01/08-2793-Anx, paragraph 4.

¹³ ICC-01/05-01/08-2793, paragraph 4. *See also* 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, paragraph 12; ICC-01/05-01/08-2015-Red, paragraph 31.

¹⁴ ICC-01/05-01/08-2596-Conf, paragraph 7.

¹⁵ The relevant part of the testimony is discussed in detail in ICC-01/05-01/08-2864-Conf, paragraphs 49 to 51.

described above and but not as a supplement to the witness's testimony at trial.

III. Media reports

7. The Majority considered the admission into evidence of eight media articles.¹⁶ I agree with the decision not to admit CAR-OTP-0031-0011, a RFI list entitled "BROADCASTS" of interviews, documentaries, and summaries with their date of publication.¹⁷ I agree to admit media reports CAR-OTP-0013-0118, CAR-OTP-0013-0114, CAR-OTP-0030-0274, CAR-OTP-0005-0129, CAR-OTP-0005-0131, CAR-OTP-0010-0471, and CAR-V20-0001-0165 (the "present media reports") but disagree with the Majority's reasoning for admitting these documents.¹⁸
8. I refer to, and again assert, the views expressed in my previous dissents with regards to the admission of media reports.¹⁹ I reiterate that newspaper articles and media reports where the authors are not called to testify may be admitted for the purpose of demonstrating that the events therein were widely reported, but not to "corroborate" other pieces of evidence, "contextualize" or "assess" a witness's testimony, or prove the truth of their contents.²⁰

¹⁶ CAR-OTP-0013-0118; CAR-OTP-0013-0114; CAR-OTP-0030-0274; CAR-OTP-0005-0129; CAR-OTP-0005-0131; CAR-OTP-0031-0011; CAR-OTP-0010-0471; CAR-V20-0001-0165, *see* ICC-01/05-01/08-2864-Conf, paragraphs 61 to 106.

¹⁷ ICC-01/05-01/08-2864-Conf, paragraphs 92 to 94.

¹⁸ ICC-01/05-01/08-2864-Conf, paragraphs 64 to 91 and 95 to 106.

¹⁹ 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, 8 October 2012, ICC-01/05-01/08-2300-Conf, paragraphs 3 to 10; Partly Dissenting Opinion of Judge Ozaki on the Decision on the admission into evidence of items deferred in the Chamber's "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute", (ICC-01/05-01/08-2299), 27 June 2013, ICC-01/05-01/08-2721-Anx, paragraphs 5 to 6.

²⁰ ICC-01/05-01/08-2300-Conf, paragraphs 4 to 8; ICC-01/05-01/08-2721, paragraph 5.

9. As such, I object to the Majority's admission of the present media reports to corroborate other pieces of evidence, to contextualize and facilitate the assessment of witness's testimony, and/or for the proof of their contents. I do not object to the admission of the present media reports for the purpose of demonstrating that the events described therein were widely reported.

IV. Book

10. I disagree with the Majority's reasoning for admitting a book written by the Witness D04-65 into evidence.²¹ The prosecution submits that the book is relevant to the witness's credibility as well as to issues discussed in the witness's testimony regarding the identification of MLC troops and the role of the MLC brigade commander after the witness's release by General Bozize's rebels.²² The defence does not object to the book's admission on principle but disputes the prosecution's basis for seeking its admission.²³

11. I note that the prosecution extensively questioned Witness D04-65 about the information contained in this book and his testimony concerning occurrences detailed in the book are adequately reflected on the record.²⁴ For the above reason, I hesitate to admit the entirety of the book as the prosecution requests. The prosecution had ample opportunity to question the witness, and did so adequately. The

²¹ CAR-DEF-0002-0108, *see* ICC-01/05-01/08-2864-Conf, paragraphs 136 to 140.

²² ICC-01/05-01/08-2596-Conf, paragraph 18; ICC-01/05-01/08-2596-Conf-Anx A, page 11.

²³ ICC-01/05-01/08-2617-Conf, paragraph 51.

²⁴ Transcript of hearing of 17 September 2012, ICC-01/05-01/08-T-246-CONF ENG ET, page 12, line 5 to page 14, line 19, page 20, line 23 to page 24, line 12, page 26, line 14 to page 28, line 5, and page 32, line 10 to page 33, line 9; and transcript of hearing of 18 September 2012, ICC-01/05-01/08-T-247-CONF ENG ET, page 19, line 9 to page 26, line 21.

principle of the primacy of orality, as fully elaborated in my previous dissents,²⁵ cautions against admitting unnecessary materials into evidence when the witness's testimony is available. Still, as I noted above, the Chamber has held that the Court should weigh heavily in favour of admission of uncontested items unless one of more elements of the three-part test are clearly not met.²⁶ Thus, given the demonstrated relevance of excerpts of the book and the lack of objection from the defence, I find that the probative value of the evidence outweighs the risk of prejudice that such evidence may cause to a fair trial. I therefore would admit the entirety of the book for the limited purpose of assessing the witness's credibility.

V. ICG Report

12. Lastly, I disagree with the Majority's decision to admit into evidence a report from the non-governmental organisation ("NGO") ICG, dated 13 December 2007.²⁷ I refer to, and incorporate, the views set forth in my previous dissents regarding the probative value of reports issued by NGOs.²⁸ In my view, due to the lack of guarantees concerning the reliability of these reports' sources and the lack of testimony from the authors of these reports, the probative value of such reports is low.

13. In the case of this particular ICG report, the prosecution proposes to use the document to challenge the testimony of Witness D04-57.²⁹

²⁵ ICC-01/05-01/08-1471, paragraphs 7 to 13; Partly Dissenting Opinion of Judge Ozaki on the Second Decision on the admission into evidence of material used during the questioning of witnesses, 14 June 2013, ICC-01/05-01/08-2688-Conf-Anx, paragraph 4.

²⁶ ICC-01/05-01/08-2688-Conf-Anx, paragraph 2.

²⁷ CAR-OTP-0069-0148, *see* ICC-01/05-01/08-2864-Conf, paragraphs 160 to 166.

²⁸ ICC-01/05-01/08-2300-Conf, paragraphs 11 to 13; ICC-01/05-01/08-2721-Conf, paragraphs 2 to 4.

²⁹ ICC-01/05-01/08-2596-Conf, paragraph 19; ICC-01/05-01/08-2596-Conf-Anx A, page 12.

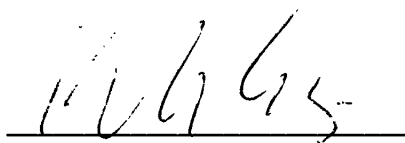
During its questioning of that witness, the prosecution used only one line of the report to challenge the witness' testimony.³⁰ The line, and the witness' response, is reflected in the record. The Chamber can adequately assess the witness's credibility from the testimony on record. For the above reasons, I find that the low probative value of this ICG report does not outweigh the potential for prejudice to the defence if the report is admitted and I would not admit it.

VI. Conclusion

14. For these reasons, I disagree with the reasoning offered by the Majority when admitting into evidence the prior recorded interviews of Witness D04-19, seven media reports, and a book written by Witness D04-65. I also disagree with the Majority with regard to the admission into evidence of a report from the ICG.

³⁰ Transcript of hearing of 18 October 2012, ICC-01/05-01/08-T-257-CONF-ENG ET, page 13, line 13 to page 15, line 19.

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

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

Judge Kuniko Ozaki

Dated this 6 November 2013

At The Hague, The Netherlands