

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 30 October 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***

**Public**

**Decision on the "Defence Request 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"**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Ms Petra Kneuer

**Counsels 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 Applicants for**

**Participation/Reparation**

**Unrepresented Victims**

**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**

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“ICC” or “Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* hereby issues the following Decision on the “Defence Request 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”.

## I. Background and Submissions

1. On 28 February 2012, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”,<sup>1</sup> in which it requested the admission into evidence of 85 documents and 12 audio/video recordings, pursuant to Articles 64(9) of the Rome Statute (“Statute”).<sup>2</sup>
2. On 19 March 2012, the defence for Mr Jean-Pierre Bemba Gombo (“defence”) filed its “Defence Response to the Prosecution’s Application for Admission of Evidence from the Bar Table” (“Defence Response”),<sup>3</sup> in which it requested the Chamber to reject the admission into evidence of 67 items and admit into evidence the remaining 30 items included in the prosecution’s application.<sup>4</sup>
3. On 30 March 2012, the prosecution filed its reply to the Defence Response,<sup>5</sup> as authorised by the Chamber.<sup>6</sup>

<sup>1</sup> Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 28 February 2012, ICC-01/05-01/08-2147, with two Annexes ICC-01/05-01/08-2147-AnxA-Red and ICC-01/05-01/08-2147-AnxB.

<sup>2</sup> ICC-01/05-01/08-2147, paragraph 1.

<sup>3</sup> Defence Response to the Prosecution’s Application for Admission of Evidence from the Bar Table, 19 March 2012, ICC-01/05-01/08-2168, with two Annexes ICC-01/05-01/08-2168-AnxA-Red and ICC-01/05-01/08-2168-AnxB-Red.

<sup>4</sup> ICC-01/05-01/08-2168, paragraph 50.

<sup>5</sup> Prosecution’s Reply to “Defence Response to the Prosecution’s Application for Admission of Evidence from the Bar Table”, 30 March 2012, ICC-01/05-01/08-2184 with Public Annex A ICC-01/05-01/08-2184-AnxA.

<sup>6</sup> See Decision on the “Prosecution’s request for leave to reply to ‘Defence Response to the Prosecution’s Application for Admission of Evidence from the Bar Table’”, 23 March 2012, ICC-01/05-01/08-2173 and

4. On 6 September 2012, the Chamber rendered its “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” (“Decision”).<sup>7</sup> In defining its general approach to the admissibility of documents, the Chamber stressed that there is no strict requirement that every document be authenticated officially or by a witness in court.<sup>8</sup> The Chamber further underlined that the admissibility determination did not predetermine the Chamber’s final assessment of the evidence or the weight to be afforded to it, which would only be decided by the Chamber at the end of the case when assessing the entirety of the evidence admitted for the purpose of the trial.<sup>9</sup> After an individual assessment of each submitted item according to the three-part test of relevance, probative value and potential prejudice, the Chamber admitted into evidence 32 items, rejected the admission of 24 items, postponed the decision on the admission of six items and considered moot the request to admit one item. In addition, the Majority of the Chamber (“Majority”) – Judge Kuniko Ozaki partly dissenting– admitted into evidence 36 further items.
5. On the same date, Judge Kuniko Ozaki filed her “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”,<sup>10</sup> in which she

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Prosecution’s Request for leave to reply to “Defence Response to the Prosecution’s Application for Admission of Evidence from the Bar Table”, 22 March 2012, ICC-01/05-01/08-2171.

<sup>7</sup> Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012, ICC-01/05-01/08-2299-Red.

<sup>8</sup> ICC-01/05-01/08-2299-Red, paragraph 9. The Chamber specifically indicated that, in its view, “items can also be (i) self-authenticating, if they are official documents publicly available from official sources; (ii) agreed upon by the parties as authentic; (iii) *prima facie* reliable if they bear sufficient indicia of reliability such as a logo, letter head, signature, date or stamp, and appear to have been produced in the ordinary course of the activities of the persons or organisations who created them; or (iv) in case the item itself does not bear sufficient indicia of reliability, shown to be authentic and reliable by the tendering party through provision of sufficient information to enable the Chamber to verify that the documents are what they purport to be.”

<sup>9</sup> ICC-01/05-01/08-2299-Red, paragraph 11.

<sup>10</sup> 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, ICC-01/05-01/08-2300.

addressed the reasons underlying her disagreement with the Majority as regards the admission of 36 items.

6. On 14 September 2012, the defence filed its "Defence Request 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" ("Request for Leave to Appeal"),<sup>11</sup> in which it contested the admission of items belonging to the following categories: (a) eighteen press reports and nine radio recordings; (b) reports from non-governmental organisations; (c) reports from States, including a list compiled by the government of the Central African Republic ("CAR") purporting to contain a number of victims' statements from anonymous victims during the period relevant to the events; (d) a telephone record; and (e) three forensic reports related to the alleged murder of witness 87's brother ("impugned materials").<sup>12</sup> The defence argues that the admission of the impugned materials "gives rise to identifiable issues that would significantly affect both the fair and expeditious conduct of the proceedings, and that an immediate resolution of which would material[ly] advance the proceedings."<sup>13</sup>
  
7. On 20 September 2012, the prosecution filed its "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" ("prosecution's Response"), in which it requests the Chamber to reject the Request for Leave to Appeal.<sup>14</sup> The prosecution alleges that the defence mischaracterises the Decision and, as a consequence, four out of the seven "appealable issues" identified by the defence do not

<sup>11</sup> Defence Request 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, 14 September 2012, ICC-01/05-01/08-2313-Conf.

<sup>12</sup> ICC-01/05-01/08-2313-Conf, paragraph 3.

<sup>13</sup> ICC-01/05-01/08-2313-Conf, paragraph 4.

<sup>14</sup> 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, 20 September 2012, ICC-01/05-01/08-2321-Conf.

actually arise from the decision.<sup>15</sup> The prosecution further alleges that the remaining matters fail to satisfy the requirements under Article 82(1)(d) of the Statute and that the defence (i) fails to substantiate how the matters raised amount to appealable issues and (ii) fails to demonstrate how they affect the fair and expeditious conduct of the proceedings or the outcome of the trial or how the intervention of the Appeals Chamber would materially advance the proceedings.<sup>16</sup>

8. In accordance with Article 21(1) of the Statute, in making its decision the Trial Chamber has considered Articles 64(7), 67(1) and 82 of the Statute, Rule 155 of the Rules of Procedure and Evidence (“Rules”) and Regulations 23bis(3) and 65 of the Regulations of the Court.

## II. Analysis and Conclusions

9. In deciding on the Request for Leave to Appeal the Chamber is guided by the established jurisprudence of this Chamber and of the Court in the interpretation of Article 82(1)(d) of the Statute and the specific requirements that a request for leave to appeal under this article should comply with. Accordingly, for a request for leave to appeal to be granted, the party seeking leave to appeal should identify a specific “issue” which has been dealt with in the relevant decision and which constitutes the appealable subject.<sup>17</sup>
10. The Appeals Chamber has held that “[o]nly 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

<sup>15</sup> ICC-01/05-01/08-2321-Conf, paragraph 3.

<sup>16</sup> *Ibid.*

<sup>17</sup> Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9.

there is a disagreement or 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. The issue may be legal or factual or a mixed one".<sup>18</sup>

11. Accordingly, the Chamber has examined the Request for Leave to Appeal according to the following criteria:

- a) Whether the matter is an "appealable issue";
- b) Whether the issue at hand could significantly affect:
  - i. the fair and expeditious conduct of the proceedings; or
  - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>19</sup>

12. The criteria mentioned in a), b) and c) above, are cumulative and therefore, failure to fulfil one or more of them is fatal to an application for leave to appeal.<sup>20</sup> The cumulative nature of these requirements means that, if at least one of them is not satisfied, it is unnecessary for the Chamber to continue to consider whether the remaining criteria are met.<sup>21</sup>

13. It is not relevant for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.<sup>22</sup> Further, it is insufficient that an

<sup>18</sup> ICC-01/04-168, paragraph 9.

<sup>19</sup> Decision on the prosecution and defence applications for leave to appeal the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 26 January 2011, ICC-01/05-01/08-1169, paragraph 23.

<sup>20</sup> ICC-01/05-01/08-1169, paragraph 24.

<sup>21</sup> *Ibid.*

<sup>22</sup> ICC-01/05-01/08-1169, at paragraph 25. See also Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 20 February 2007, ICC-02/04-01/05-20-US-Kp (unsealed pursuant to Decision ICC-02/04-01/05-52),

appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.<sup>23</sup>

### **Whether the defence has identified “appealable issues”**

14. The defence alleges that the admission of the impugned materials gives rise to a number of appealable issues.<sup>24</sup> Accordingly, the Chamber will first analyse whether the issues identified by the defence arise from the Decision given the manner in which the Chamber decided on the admissibility of the impugned materials.

*The first, second, third, fifth and sixth appealable issues identified by the defence and the admission of press reports, audio-video recordings, Non-Governmental Organisation (“NGO”) reports, a Telephone Record and Forensic Reports*

15. The first two issues of appeal identified by the defence are:

(a) The Majority set an erroneous standard for the admissibility of press articles and reports in the absence of testimony from the author, namely that they ‘may’ serve to corroborate other pieces of evidence, and in failing to identify the ‘envisioned limited usage’ which apparently limited their prejudicial effect;

(b) The Majority erred in admitting press articles and reports under Article 64(9) in the absence of an individual assessment as to their reliability and credibility.<sup>25</sup>

16. The issues mentioned above refer to the admission of the first category of impugned materials, which includes eighteen press reports and nine audio recordings. In particular, the defence refers to items (i) Press Reports: CAR-

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paragraph 21; and Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 11.

<sup>23</sup> ICC-01/05-01/08-1169, paragraph 25.

<sup>24</sup> ICC-01/05-01/08-2313-Conf, paragraph 4.

<sup>25</sup> ICC-01/05-01/08-2313-Conf, paragraph 9(a) and (b).



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 and CAR-OTP-0004-0336; and (ii) Audio-Video 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.<sup>26</sup>

17. At the outset, the Chamber underscores that, contrary to the defence's allegation, after a detailed analysis of the three-part test,<sup>27</sup> items CAR-OTP-0032-0167 and CAR-OTP-0004-0336 were admitted into evidence by the Chamber and not by the Majority.<sup>28</sup>

18. The first issue identified by the defence concerns the legal reasoning relied on by the Majority in explaining why the admission of press reports would not prejudice the defence. The Majority explained that the admission of these items would not be prejudicial "in light of the envisioned limited usage of the information contained" therein, with the limited usage identified as: "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>29</sup> The defence suggests that the Majority failed to identify the limited usage which apparently limited the items' prejudicial effect.

<sup>26</sup> See ICC-01/05-01/08-2313-Conf, footnotes number 6, 7, 16 and 17.

<sup>27</sup> ICC-01/05-01/08-2299-Conf, paragraphs 93, 94, 95 and 111.

<sup>28</sup> ICC-01/05-01/08-2299-Red, paragraphs 97 and 111.

<sup>29</sup> See ICC-01/05-01/08-2299-Red, paragraphs 95 – 128.

19. However, the defence contention that the Majority set an erroneous standard for the admissibility of these materials is misconceived. The standard applied by the Majority was the three-part admissibility test in which relevance and probative value are weighed against potential prejudicial effect.<sup>30</sup> The fact that the defence disagrees with one aspect of the Majority's reasoning as to why admission of the material would not be prejudicial does not constitute the issue as defined by the defence as an "erroneous standard". On this basis, the Chamber finds that the defence has failed to appropriately identify an appealable issue. Moreover, even assuming that the defence had properly identified an appealable issue, the fair and expeditious conduct of the proceedings would not be significantly affected by the admission of this limited amount of press reports and audio recordings, namely 27 items. In addition to the limited number of items involved, the Chamber has not yet made a final determination of the weight that it will give to this evidence. The defence will be able to make submissions at the close of the case as to the weight, if any, to be attributed to these items. Furthermore, the Chamber is not persuaded by the defence's argument that the need to investigate the information contained in the admitted materials will have a significant effect on the expeditious conduct of the trial.

20. As regards the second appealable issue identified by the defence, that the Majority did not conduct an individual assessment as to the reliability and credibility of the impugned materials in the first category, the Chamber

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<sup>30</sup> ICC-01/05-01/08-2299-Red, paragraph 8. See also the individual assessment made by the Chamber and the Majority at paragraph 101, in relation to items CAR-OTP-0004-0343 and CAR-OTP-0004-0345; paragraphs 103 and 104, in relation to items CAR-OTP-0004-0667 and CAR-OTP-0008-0413; paragraphs 106 and 107, in relation to items CAR-OTP-0005-0133, CAR-OTP-0005-0135, CAR-OTP-0005-0141, CAR-OTP-0005-0147 and CAR-OTP-0005-0194; paragraphs 109 and 110, in relation to items CAR-OTP-0005-0333, CAR-OTP-0011-0293, CAR-OTP-0013-0005, CAR-OTP-0013-0053, CAR-OTP-0013-0065, CAR-OTP-0013-0151 and CAR-OTP-0013-0161; paragraphs 123 and 124, in relation to item CAR-OTP-0031-0099; paragraphs 125 and 126, in relation to item CAR-OTP-0031-0104; and paragraphs 127 and 128, in relation to items CAR-OTP-0031-0093, CAR-OTP-0031-0106, CAR-OTP-0031-0116, CAR-OTP-0031-0120, CAR-OTP-0031-0122, CAR-OTP-0031-0124 and CAR-OTP-0031-0136.

considers that this claim is without merit, since probative value may be determined by taking into account a number of different factors.<sup>31</sup>

21. The Chamber recalls that, as stressed by the Appeals Chamber, pursuant to Articles 64(9)(a) and 69(4) of the Statute and Rule 63(2) of the Rules, the Chamber has discretion to rule on the relevance or admissibility of any evidence.<sup>32</sup> In the exercise of its discretion the Chamber is nevertheless obliged to make an item-by-item analysis and apply the three-part test, giving clear reasons for its findings.<sup>33</sup> However, as pointed out by the Appeals Chamber “whether evidence is relevant, has probative value, or would be prejudicial to the accused will depend on the specific characteristics of each item of evidence; the factors that will require consideration will not be the same for all items of evidence.”<sup>34</sup>

22. As regards the admission of the press articles and audio recordings at issue, the Majority undertook an item-by-item analysis and concluded that the impugned materials in this category had sufficient probative value to outweigh any potential prejudice caused by admitting them.<sup>35</sup> On this basis, the defence has failed to identify an appealable issue as it merely expresses a disagreement with the Chamber’s conclusion which, as said above, does not constitute, *per se*, an appealable issue.

<sup>31</sup> ICC-01/05-01/08-2299-Red, paragraphs 8 and 9.

<sup>32</sup> Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, paragraph 37.

<sup>33</sup> ICC-01/05-01/08-1386, paragraph 59.

<sup>34</sup> ICC-01/05-01/08-1386, paragraph 53.

<sup>35</sup> ICC-01/05-01/08-2299-Red, paragraph 101, in relation to items CAR-OTP-0004-0343 and CAR-OTP-0004-0345; paragraphs 103 and 104, in relation to items CAR-OTP-0004-0667 and CAR-OTP-0008-0413; paragraphs 106 and 107, in relation to items CAR-OTP-0005-0133, CAR-OTP-0005-0135, CAR-OTP-0005-0141, CAR-OTP-0005-0147 and CAR-OTP-0005-0194; paragraphs 109 and 110, in relation to items CAR-OTP-0005-0333, CAR-OTP-0011-0293, CAR-OTP-0013-0005, CAR-OTP-0013-0053, CAR-OTP-0013-0065, CAR-OTP-0013-0151 and CAR-OTP-0013-0161; paragraph 123, in relation to item CAR-OTP-0031-0099; paragraphs 125 and 126, in relation to item CAR-OTP-0031-0104; and paragraphs 127 and 128, in relation to items CAR-OTP-0031-0093, CAR-OTP-0031-0106, CAR-OTP-0031-0116, CAR-OTP-0031-0120, CAR-OTP-0031-0122, CAR-OTP-0031-0124 and CAR-OTP-0031-0136.

23. The third appealable issue identified by the defence is:

(c) The Majority of the Chamber erred in its assessment of the probative value of the admitted NGOs reports, when it was unable to assess the reliability of the accounts contained therein given that the authors and sources are not sufficiently identified;<sup>36</sup>

24. The issue mentioned above refers to the admission of the second category of impugned materials, which includes four NGO reports. In particular, the defence refers to items CAR-OTP-0001-0034, CAR-OTP-0004-1096, CAR-OTP-0004-0409, CAR-OTP-0004-0881 and CAR-OTP-0011-0503.

25. In relation to the NGO reports mentioned, the Chamber was satisfied that they fulfilled the requirement of relevance.<sup>37</sup> However, the Majority and Judge Kuniko Ozaki disagreed on the probative value and potential prejudicial effect of the items. In terms of probative value, the Majority was satisfied that the Reports bore sufficient indicia of authenticity and reliability and was not persuaded by the defence's argument that they lacked impartiality, since it found that they contained sufficient details of their sources of information and methodology.<sup>38</sup> In terms of potential prejudice to a fair trial, the Majority was not persuaded by the defence's argument that the documents' admission would undermine the fact-finding role of the Chamber, since the admissibility determination does not predetermine the Chamber's final assessment of the evidence or the weight to be afforded to it.<sup>39</sup> Notwithstanding these findings, the Majority admitted them for the limited purpose that the information contained therein may be used to corroborate other pieces of evidence.<sup>40</sup>

26. In her partially dissenting opinion, Judge Kuniko Ozaki explained that her disagreement with the Majority stemmed from the fact that the identities of

<sup>36</sup> ICC-01/05-01/08-2313-Conf, paragraph 9(c).

<sup>37</sup> ICC-01/05-01/08-2299-Red, paragraphs 32, 33, 34 and 40.

<sup>38</sup> ICC-01/05-01/08-2299-Red, paragraphs 35 and 41.

<sup>39</sup> ICC-01/05-01/08-2299-Red, paragraphs 36 and 41.

<sup>40</sup> *Ibid.*

the authors and the sources of information relied on in the reports are not revealed with sufficient detail, which, in her view, does not permit the Chamber to fully investigate their reliability.<sup>41</sup> Due to the lack of guarantees concerning the reliability of the reports' sources and without hearing the testimony of the authors, in Judge Ozaki's judgment, their probative value was low.<sup>42</sup> Considering the high potential for prejudice to the defence that the admission of the reports would entail, Judge Ozaki was of the view that the reports did not satisfy the test for admission.<sup>43</sup> However, in relation to one of the reports (document CAR-OTP-0001-0034), which was published during the period of the charges, Judge Ozaki did not object to its admission for the purpose of the Chamber's determination of whether the crimes were widely reported.<sup>44</sup>

27. In the view of the Chamber, the defence's argument that the Majority was "unable to assess the reliability of the accounts contained therein" does not take into account the Majority's application of the three-part test. Indeed, in the Decision the Majority assessed the probative value of each report in turn and held that it was satisfied that the Reports offered sufficient indicia of authenticity and reliability and that it was not persuaded by the defence's argument that they lacked impartiality, since it found that they contained sufficient detail relating to their sources of information and methodology.<sup>45</sup> On this basis, the defence has failed to identify an appealable issue as it merely expresses a disagreement with the Chamber's conclusion which does not constitute, *per se*, an appealable issue.

28. The fifth appealable issue identified by the defence is:

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<sup>41</sup> ICC-01/05-01/08-2300, paragraph 11.

<sup>42</sup> ICC-01/05-01/08-2300, paragraph 12.

<sup>43</sup> *Ibid.*

<sup>44</sup> ICC-01/05-01/08-2300, paragraph 13.

<sup>45</sup> ICC-01/05-01/08-2299-Red, paragraphs 36 and 41.

(e) The Majority of the Chamber erred in its assessment of probative value and prejudice of the 'Telephone Record' allegedly related to the phone number of Mr. Bemba during the relevant events, when the document contains no indication of its sources, other indicia of reliability, and given the Prosecution's positive decision not to call the document's authenticating witness;<sup>46</sup>

29. The issue mentioned above refers to the admission of a telephone record, bearing ERN number CAR-OTP-0055-0893.<sup>47</sup> In relation to this item, the Majority found that it was relevant to the charges against the accused and that the record had probative value in that it may help the Chamber to contextualise and understand the testimony of Witness 178.<sup>48</sup> In addition, the Majority found that its admission would not unfairly prejudice the defence and therefore admitted the item into evidence.<sup>49</sup> In her partly dissenting opinion, Judge Kuniko Ozaki was of the view that the probative value of the document was very low and insufficient to outweigh the prejudice it would cause to the defence if admitted, given that the document did not contain any indication of its source or other indicia of reliability and had not been authenticated by a witness.<sup>50</sup>

30. Again in relation to this matter, the defence's argument that the Majority erred in its assessment because "the document contains no indication of its sources [or] other indicia of reliability, and given the Prosecution's positive decision not to call the document's authenticating witness" is unfounded. Indeed, the Majority found that the telephone records were relevant to matters properly to be considered by the Chamber and that they may help to contextualise and understand the testimony of Witness 178.<sup>51</sup> Against this background, the Majority found that the admission of this document would

<sup>46</sup> ICC-01/05-01/08-2313-Conf, paragraph 9(e).

<sup>47</sup> ICC-01/05-01/08-2313-Conf, footnotes 10 and 20.

<sup>48</sup> ICC-01/05-01/08-2299-Red, paragraph 163.

<sup>49</sup> *Ibid.*

<sup>50</sup> ICC-01/05-01/08-2300, paragraph 18.

<sup>51</sup> ICC-01/05-01/08-2299-Red, paragraph 163.

not unfairly prejudice the defence.<sup>52</sup> As the Chamber has previously stressed, when setting the parameters for each of the requirements, the analysis of the probative value of an item “will always be a fact-specific inquiry and may take into account innumerable factors.”<sup>53</sup> Further, in relation to potential prejudice, the Chamber underlined that “this will always be a fact-sensitive inquiry and the Chamber may consider such factors as whether an item’s admission would encroach on the accused’s rights under Article 67(1) of the Statute or potentially delay proceedings because it is unnecessary or cumulative of other evidence.”<sup>54</sup> Even in the event that the defence has identified an appealable issue, the defence has not demonstrated that the admission of the telephone record into evidence would affect the fair conduct of the proceedings. The Chamber is equally not persuaded by the defence argument that the consequences of the admission of this document into evidence will have a significant effect on the expeditious conduct of the trial.

31. The sixth appealable issue identified by the defence is:

(f) The Majority of the Chamber erred in its assessment of the admissibility of Forensic Reports, when the Prosecution actively refrained from seeking to authenticate these reports through Witness 87 who was in a position to identify the images or information contained therein, and actively chose not to call their authors;<sup>55</sup>

32. The issue mentioned above refers to the admission of the fifth category of impugned materials, which includes three forensic reports. In particular, the defence refers to items CAR-OTP-0048-0492\_R01, CAR-OTP-0051-0263\_R02 and CAR-OTP-0048-0431.

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<sup>52</sup> *Ibid*,

<sup>53</sup> 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 15.

<sup>54</sup> ICC-01/05-01/08-2012-Red, paragraph 16.

<sup>55</sup> ICC-01/05-01/08-2313-Conf, paragraph 9(f).

33. At the outset, the Chamber underscores that, contrary to the defence's allegation, item CAR-OTP-0051-0263\_R02 was admitted into evidence by the Chamber and not by the Majority.<sup>56</sup>
34. In relation to the three reports, the Chamber found that they fulfilled the requirement of relevance and, as to their probative value, it noted that the defence did not question their authenticity.<sup>57</sup> In relation to two of the reports, the Majority found that given that the reports provided relevant information regarding the identities of their authors, the materials used and the methodology employed, and given that they only relate to the specific issue of the alleged murder of Witness 87's brother, there was no reason to believe that their admission would cause unfair prejudice to the accused.<sup>58</sup> However, Judge Ozaki was of the view that, in the absence of any witness testimony to explain or corroborate their contents, their probative value was insufficient to outweigh their prejudicial effect.<sup>59</sup>
35. Once again, the defence's argument that the Majority erred in its assessment of the admissibility of the forensic reports because "the Prosecution actively refrained from seeking to authenticate these reports through Witness 87 who was in a position to identify the images or information contained therein, and actively chose not to call their authors" does not stand up to review of the Majority's decision. Indeed, the Chamber stressed that, since there is no strict requirement for every document to be authenticated officially or by a witness in court, items can also be "agreed upon by the parties as authentic".<sup>60</sup> In the case at hand, as noted by the Chamber, the defence did not question the authenticity of the documents submitted by the prosecution. Against this background, and taking into account the

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<sup>56</sup> ICC-01/05-01/08-2299-Red, paragraph 161.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> ICC-01/05-01/08-2300, paragraph 19.

<sup>60</sup> ICC-01/05-01/08-2299-Red, paragraph 9.



information provided in the reports regarding the identities of their authors, the materials used, and the methodology employed, the Majority was satisfied as to their probative value. On this basis, the defence has failed to identify an appealable issue as it merely expresses a disagreement with the Chamber's conclusion. Moreover, even assuming that the defence has properly identified an appealable issue, because the Chamber has not yet made a final determination of the weight that it will give to these forensic reports, the fair conduct of the proceedings would not be significantly affected by the admission of this evidence. The Chamber may also draw conclusions from the fact that this evidence was not shown to Witness 87. Finally, the defence will be able to make submissions at the close of the case as to the weight, if any, to be attributed to these items.

36. Accordingly, the Chamber finds that the first, second, third, fifth and sixth matters for which the defence seeks leave to appeal do not satisfy the requirements of Article 82(1)(d) of the Statute.

*The fourth appealable issue identified by the defence and the admission of a United States ("U.S.") Department of State report*

37. The fourth issue of appeal identified by the defence is:

(d) The admission of a Report containing out-of-court statements from anonymous victims of sexual violence, in the absence of any information as to the methodology of their compilation, is contradictory to the practice for the admission of evidence followed so far in this case, at the ICC, and in international criminal trials generally;<sup>61</sup>

38. The issue mentioned above refers to the admission of the third category of impugned materials, which includes only one State report. In particular, the defence refers to item CAR-OTP-0004-0977.<sup>62</sup>

<sup>61</sup> ICC-01/05-01/08-2313-Conf, paragraph 9(d).

<sup>62</sup> ICC-01/05-01/08-2313-Conf, footnotes 9 and 19.

39. The defence alleges that the impugned report contains “out-of-court statements from anonymous victims of sexual violence”.<sup>63</sup> However, nowhere in the Report – which is a U.S. Department of State country report on Human Rights practices in the Central African Republic during the year 2002 – is there any out-of-court statement of any victim of any crime.<sup>64</sup> As such, the Chamber finds that the fourth issue for which the defence seeks leave to appeal does not arise from the Chamber’s impugned decision and therefore is not an appealable issue for the purposes of Article 82(1)(d) of the Statute. Since the requirements of Article 82(1)(d) are cumulative and the defence’s application does not comply with the first requirement in relation to the fourth issue identified, the Chamber does not deem it necessary to consider any subsequent criteria.

*The seventh appealable issue identified by the defence*

40. The seventh issue of appeal identified by the defence is:

(g) Because of the timing of admission, the Majority failed to ensure that the Impugned Material was tendered at a time and a [sic] in way that would have allowed the Defence to exercise its right of confrontation effectively.”<sup>65</sup>

41. The Chamber underlines that, as noted by the Appeals Chamber, the Trial Chamber is not bound to decide on the admissibility of the evidence submitted by the parties at any specific point during the proceedings. Indeed, the Chamber can rule on the admissibility of evidence at any time “when evidence is submitted, during the trial, or at the end of the trial.”<sup>66</sup> As such, the timing of the admission does not amount to an appealable issue for the purposes of Article 82(1)(d) of the Statute. Since the requirements of Article 82(1)(d) of the Statute are cumulative and the defence’s application

<sup>63</sup> ICC-01/05-01/08-2313-Conf, paragraph 9(d).

<sup>64</sup> See ICC-01/05-01/08-2299-Red, paragraphs 136 and 137.

<sup>65</sup> ICC-01/05-01/08-2313-Conf, paragraph 9(g).

<sup>66</sup> ICC-01/05-01/08-1386, paragraph 37.

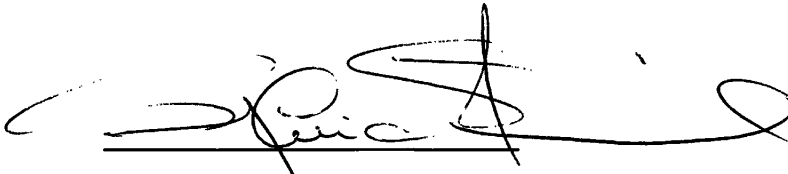
does not comply with the first requirement in relation to the seventh issue identified, the Chamber does not deem it necessary to consider any subsequent criteria.

#### **IV. Orders of the Trial Chamber**


42. For the above reasons the Chamber **REJECTS** the Request for Leave to Appeal.

43. In the Chamber's view the information contained in the parties' underlying submissions does not warrant confidential treatment. Therefore, consistent with the principle of publicity of the proceedings, it **ORDERS** the parties to file public redacted versions of the Request for Leave to Appeal and the prosecution's Response and/or ask for their reclassification if they believe that no redactions are necessary, by no later than 16h00 on 7 November 2012.

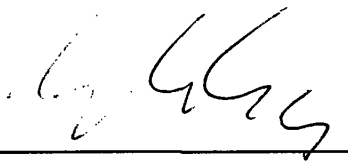
Done in both English and French, the English version being authoritative.



**Judge Sylvia Steiner**



**Judge Joyce Aluoch**



**Judge Kuniko Ozaki**

Dated this 30 October 2012

At The Hague, The Netherlands