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**International
Criminal
Court**

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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

**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"**

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

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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 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".

I. Background

1. On 19 November 2010, the Chamber, by majority, ("Majority") rendered its "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" ("Majority Decision").¹ In its decision the Majority decided that any materials, including witnesses' written statements and related documents previously disclosed to the defence and which will form part of the prosecution's Revised List of Evidence are *prima facie* admitted as evidence for the purposes of the trial.² Judge Ozaki issued a dissenting opinion on 23 November 2010 ("Dissenting Opinion").³
2. In summary, the Majority Decision admits into evidence all of the materials included by the prosecution in its Revised List of Evidence on the basis of a *prima facie* finding on the admissibility of this evidence.⁴ This finding stems from a *prima facie* assessment of the relevance of material contained on the prosecution's Revised List of Evidence, on the basis that it appears to be *a priori* relevant to the case.⁵ The Majority considered that there is nothing in the ICC legal framework to prevent the Chamber from *prima facie* admitting non-oral evidence⁶ and that this is consistent with the Chamber's role to direct and ensure the proper conduct of the proceedings pursuant to Article

¹ Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 19 November 2010, ICC-01/05-01/08-1022.

² ICC-01/05-01/08-1022, paragraph 35.

³ See 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.

⁴ ICC-01/05-01/08-1022, paragraph 9.

⁵ ICC-01/05-01/08-1022, paragraph 10.

⁶ ICC-01/05-01/08-1022, paragraph 13.

64(8)(b) of the Rome Statute ("Statute") and Rule 140 of the Rules of Procedure and Evidence ("Rules") as well as the Chamber's discretion to issue any order in the interests of justice for the purposes of the proceedings including, on the number of documents or exhibits to be introduced and on the extent to which a participant can rely on recorded evidence, pursuant to Regulation 54(g) and (i) of the Regulations of the Court.⁷ The Majority Decision further stated that the *prima facie* admission into evidence of the witnesses' written statements and related documents included in the prosecution's Revised List of Evidence does not prevent the parties from challenging the admissibility of such evidence, or the Chamber from ruling, *proprio motu*, on the admissibility, pursuant to Article 69(7) of the Statute.

3. In addition, the Majority Decision states that it does not intend to replace oral testimony,⁸ but rather to facilitate the fair, expeditious and proper conduct of the proceedings with full respect for the rights of the defence and due regard for the protection of victims and witnesses, pursuant to Articles 64(2) and 64(3)(a) of the Statute.⁹ The Majority considered that the *prima facie* admission of evidence would contribute to the expeditiousness and proper conduct of the proceedings as it would shorten the length of questioning by the parties in court, contributing to the accused being tried without undue delay,¹⁰ and would allow for more coherence between the pre-trial and trial stages of the proceedings.¹¹
4. Finally, the Majority considered that the admission of all the materials included in the prosecution's Revised List of Evidence is in line with the Chamber's statutory obligation under Article 69(3) of the Statute, to search for the truth since the Chamber would have at its disposal all the evidence

⁷ ICC-01/05-01/08-1022, paragraph 11.

⁸ ICC-01/05-01/08-1022, paragraph 20.

⁹ ICC-01/05-01/08-1022, paragraph 22.

¹⁰ ICC-01/05-01/08-1022, paragraph 23.

¹¹ ICC-01/05-01/08-1022, paragraph 27.

upon which the prosecution seeks to rely and it could then exercise its function in determining which evidence it considers probative, based on its own evaluation as well as any challenges raised by the parties and participants.¹²

5. On 19 November 2010, the Chamber also issued its "Decision on the Directions for the Conduct of the Proceedings",¹³ in which *inter alia* it gave directions for the implementation of the procedure for the *prima facie* admission into evidence of the documents contained in the prosecution's list of evidence.¹⁴ In that decision the Chamber ordered *inter alia* that: (i) at the time of their testimony, prosecution witnesses will be asked to confirm that written statements and related documents included in the prosecution's list of evidence reflect their voluntary declaration;¹⁵ (ii) in its questioning the prosecution may also choose to refer to paragraphs in a witness's statement(s) that are clear and do not need further presentation, to avoid repetition of evidence;¹⁶ and (iii) during the presentation of the evidence by the prosecution, the defence shall be authorized to question witnesses on the full content of their respective statements.¹⁷

6. On 23 November 2010, Judge Ozaki issued her Dissenting Opinion disagreeing with the Majority Decision's admission of written witness statements and other materials into evidence.¹⁸ In outline, Judge Ozaki opines that the concept of *prima facie* admissibility simply does not exist in the Statute or in the Rules and that the Majority, whilst asserting that

¹² ICC-01/05-01/08-1022, paragraph 28.

¹³ Decision on the Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023.

¹⁴ See ICC-01/05-01/08-1023, footnotes 5, 6, and 7 referencing Judge Ozaki's Dissenting Opinion.

¹⁵ ICC-01/05-01/08-1023, paragraph 10.

¹⁶ ICC-01/05-01/08-1023, paragraph 12.

¹⁷ ICC-01/05-01/08-1023, paragraph 13.

¹⁸ ICC-01/05-01/08-1028, paragraph 2.

sufficient legal basis exists, fails to point to an actual provision in the ICC legal framework which confirms the concept of “*prima facie* admissibility”.¹⁹

7. Further Judge Ozaki opines that, contrary to the Majority’s argument, Article 69(2) of the Statute clearly imposes the principle of primacy of orality in proceedings before the Court and this principle is thereby infringed in creating an obligation on the prosecution to submit wholesale all witness statements as evidence and without prior determination of the merits of the admission of each of these statements.²⁰ Even though the Majority Decision indicates that the statements and other documents in the prosecution’s Revised List of Evidence are to be submitted in addition to, and not *in lieu* of, the oral testimony of witnesses, Judge Ozaki opines that the Majority indicates the purpose of this is to limit witness questioning which results in curtailing the principle of primacy of orality.²¹
8. Additionally, Judge Ozaki does not agree with the conclusion of the Majority that the defence will arguably be better able to prepare its case, as she cannot agree with the Majority that the “material is *prima facie* admitted as evidence, which may provide the basis for the questioning of the witness called by the prosecution”.²² Judge Ozaki opines that the rights of the accused may in fact be negatively affected because the defence will not have certainty in knowing what the evidence against the accused actually is since the assessment of the evidence will be left to the end of the trial proceedings according to the Majority Decision.²³
9. In relation to the expeditiousness of proceedings, Judge Ozaki opines that rather than shortening the proceedings, the wholesale admission into

¹⁹ ICC-01/05-01/08-1028, paragraph 4.

²⁰ ICC-01/05-01/08-1028, paragraphs 6 and 8.

²¹ ICC-01/05-01/08-1028, paragraph 9.

²² ICC-01/05-01/08-1028, paragraph 13, quoting the Majority Decision, paragraph 21.

²³ ICC-01/05-01/08-1028, paragraph 15 and 16.

evidence of witness statements could in fact prolong them as the parties may dispute every single potentially contentious fact included in the statements of the other party's witnesses where normally such facts would not be raised in court.²⁴ In addition, Judge Ozaki considers that the Majority argument that admitting the material on a *prima facie* basis will save time as the Chamber will not have to rule on the admissibility of each and every document submitted is misconceived. Judge Ozaki opines that the Chamber will merely be postponing its ruling on admissibility rather than eliminating the need to make such a ruling.²⁵

10. Lastly, Judge Ozaki in her Dissenting Opinion considers that the timing of the Majority Decision is inappropriate as it has serious consequences for the course of the proceedings and so should have been rendered well in advance of the commencement of trial to enable parties and participants to adapt their preparations accordingly.²⁶

11. During a hearing on 23 November 2010, in response to a request by the prosecution for a witness statement to be admitted into evidence pursuant to Rule 68(b) of the Rules of Procedure and Evidence ("Rules"), the Presiding Judge stated that:

[The Decision] has not as a legal basis Rule 68(b). This is not considered the filing of the statements as evidence is being proceeded upon as it is in Pre-Trial Phase. It is the simple filing of statements as part of the case file, therefore evidence of the case. And that's why the Chamber ordered the filing of all statements and that all of them and related documents should be given EVD numbers. So they are already evidence admitted *prima facie* as evidence, unless any of the parties decide to challenge admissibility in accordance with the Statute and the Rules. It is not exactly Rule 68(b) since we are not considering the written statements as prior-recorded testimony. We understand that the – what the drafters meant by prior-recorded testimony to be filed as evidence *in lieu* of oral testimony is a completely different situation. So we are trying to adopt in Trial Chamber III, the same system of admitting into evidence all documents of the prosecution's list of evidence and of the

²⁴ ICC-01/05-01/08-1028, paragraph 24.

²⁵ ICC-01/05-01/08-1028, paragraph 26.

²⁶ ICC-01/05-01/08-1028, paragraph 31.

Defence list of evidence *prima facie* admissible unless the Chamber *proprio motu* or any of the parties challenge the admissibility of the document.²⁷

II. Submissions of the parties

A. Prosecution

12. On 29 November 2010, the Office of the Prosecutor ("prosecution") filed an application for leave to appeal the Majority Decision, ("prosecution application").²⁸ The prosecution seeks leave to appeal on one issue, namely: whether the legal framework of the ICC allows for the *prima facie* admission into evidence of prior statements of all witnesses as defined by the Decision with the clarification provided during the hearing of 23 November 2010.²⁹

13. In summary, the prosecution submits that the issue is of a systemic nature and concerns "the question whether, as a general matter of law, out-of court statements of witnesses without their consent or the opportunity for cross-examination are presumptively admissible as evidence."³⁰ The prosecution submits that the issue impacts on the fairness of the proceedings and has, at a minimum, the potential to cause irreparable prejudice.³¹ The prosecution argues that the *prima facie* admission should be in accordance with Rule 68, with its requirements verified in each case in order to determine the admissibility of the prior-recorded testimony.³² The prosecution further argues that the Majority Decision places the parties in a position of uncertainty as to the status and value of an entire category of evidence and therefore warrants the Appeals Chamber's corrective intervention at the beginning of the trial rather than the end.³³ The prosecution submits that the

²⁷ Transcript of Hearing on 23 November 2010, ICC-01/05-01/08-T-33-Conf-ENG-ET, page 32, line 12 to page 33, line 12.

²⁸ Prosecution's Application for Leave to Appeal the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 29 November 2010, ICC-01/05-01/08-1059.

²⁹ ICC-01/05-01/08-1059, paragraph 3.

³⁰ ICC-01/05-01/08-1059, paragraph 9.

³¹ ICC-01/05-01/08-1059, paragraph 12.

³² ICC-01/05-01/08-1059, paragraph 13.

³³ ICC-01/05-01/08-1059, paragraph 16.

Majority Decision may also affect the expeditious conduct of the proceedings and rather than shortening them, it could in fact lengthen the proceedings.³⁴

14. Finally, the prosecution submits that the issue for which leave to appeal is sought undoubtedly affects the outcome of the trial, as the Majority expressed its intention to rely on this evidence for the purposes of its judgment under Article 74(2) of the Statute.³⁵ The prosecution submits that an immediate determination by the Appeals Chamber will assist the Chamber, parties and participants in the smooth continuation of the proceedings, and “will avoid the risk of a fundamental flaw that materially affects the sustainability of the Trial Chamber’s decision under article 74.”³⁶

B. Defence

15. On 29 November 2010, the defence filed its “Application for leave to appeal Trial Chamber III’s decision on the admission into evidence of materials contained in the prosecution’s list of evidence” (“defence application”).³⁷ The defence seeks leave to appeal on one issue, namely: “whether the [sic] such a concept of “*prima facie* admissibility”, as set out in the impugned Decision, exists in the Rules of the Procedure of the International Criminal Court, in the Rome Statute or in the wider legal framework of the ICC.”³⁸

16. Due to technical difficulties experienced by the defence in sending the defence application, the defence also seeks the Chamber’s leave to accept the

³⁴ ICC-01/05-01/08-1059, paragraph 19 in relation to paragraphs 20 and 21.

³⁵ ICC-01/05-01/08-1059, paragraph 23.

³⁶ ICC-01/05-01/08-1059, paragraph 25.

³⁷ Application for leave to appeal Trial Chamber III’s decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 29 November 2010, ICC-01/05-01/08-1061.

³⁸ ICC-01/05-01/08-1061, paragraph 11.

filing as having been filed as urgent on 29 November 2010, even though it was only notified on 30 November 2010.³⁹

17. The defence submits that the Majority Decision involves an issue that significantly affects the fair conduct of the proceedings, for the following reasons: (i) it constitutes a *de facto* reversal of the burden of proof, since the evidence will be *prima facie* admitted without regard to its relevance and it will be for the defence (or the Chamber, *proprio motu*) to challenge the *prima facie* admission, which will contravene the rights of the accused as set out in Article 67(1)(i) of the Statute;⁴⁰ (ii) the accused has the right to know with certainty what the evidence against him actually is and “the wholesale *prima facie* admission of evidence, without regard to its relevance, directly contravenes this fair trial right of the Accused”;⁴¹ and (iii) under the new regime of *prima facie* admission of documents “the Chamber is necessarily admitting documents into evidence before an assessment has been made of whether the prejudicial affect [sic] of the document could outweigh its probative value.”⁴²

18. The defence also submits that the Majority Decision significantly affects the expeditious conduct of the proceedings as it will significantly prolong and complicate them.⁴³ Lastly, the defence argues that “[t]he standard set for the admission of evidence permeates the entirety of the trial, and has the ability to dramatically alter the evidence in the case against the Accused.”⁴⁴

³⁹ ICC-01/05-01/08-1061, paragraph 1.

⁴⁰ ICC-01/05-01/08-1061, paragraph 13.

⁴¹ ICC-01/05-01/08-1061, paragraph 14.

⁴² ICC-01/05-01/08-1061, paragraph 15.

⁴³ ICC-01/05-01/08-1061, paragraph 17.

⁴⁴ ICC-01/05-01/08-1061, paragraph 19.

19. On 6 December 2010, the prosecution filed a response to the defence application,⁴⁵ in which it submits that it does not oppose the late filing of the defence application. The prosecution also acknowledges that the issue on which the defence seeks leave to appeal is similar to that on which the prosecution is seeking leave to appeal although the prosecution's issue is more narrowly construed. The prosecution therefore respectfully suggests that the Chamber grants both applications jointly.⁴⁶

III. Relevant Provisions

20. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 82 of the Statute

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

[...]

Rule 155 of the Rules of Procedure and Evidence

Appeals that require leave of the Court

1. When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.
2. The Chamber shall render a decision and shall notify all parties who participated in the proceedings that gave rise to the decision referred to in sub-rule 1.

Regulation 65 of the Regulations of the Court

Appeals under rule 155

⁴⁵ Prosecution's Response to Defence "Application for leave to appeal Trial Chamber III's decision on the admission into evidence of materials contained in the prosecution's list of evidence", 6 December 2010, ICC-01/05-01/08-1079.

⁴⁶ ICC-01/05-01/08-1079, paragraphs 4 and 5.

1. An application for leave to appeal under rule 155 shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof [...]
2. An application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.
3. Participants may file a response within three days of notification of the application described in sub-regulation 1, unless the Pre-Trial or Trial Chamber concerned orders an immediate hearing of the application. [...]

IV. Analysis

A. General remarks

21. On applications under Article 82(1)(d), the Chamber's assessment of the merits of the proposed appeal is an irrelevant consideration. Instead, the Chamber must simply focus on whether the Majority Decision as regards admission into evidence of materials contained in the prosecution's list of evidence "[...] involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

22. The Chamber, therefore, has not reviewed the prosecution or defence's submissions on the merits; it has instead focused exclusively on the Article 82(1)(d) test, in accordance with the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006.⁴⁷

⁴⁷ Judgement 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, paragraphs 9-14.

23. Accordingly, it has examined the application for leave to appeal against 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 could materially advance the proceedings.

24. The requirements a), b) and c) above are cumulative and therefore failure to fulfill one or more of them is fatal to an application for leave to appeal. Indeed, the cumulative nature of this test means that if one criterion is not satisfied, it is unnecessary for the Chamber to consider whether the other criteria for granting leave are met.

25. It is irrelevant for these purposes that the issue for which leave is sought is of general interest or that it may arise in future pre-trial or trial proceedings. Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order materially to advance the proceedings. Interlocutory appeals should be regarded as exceptional, not least because they have the capacity significantly to delay the trial. As set out by Pre-Trial Chamber II, "[the] case-law shows that in striking the balance between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid

possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined in the relevant rules of the *ad hoc* Tribunals, and in the Statute, favour as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions."⁴⁸

B. The applications for leave to appeal

26. The issues upon which the prosecution and defence respectively seek leave to appeal are closely related; the prosecution identifies the appealable issue as "whether the legal framework of the ICC allows for the *prima facie* admission into evidence of prior statements of all witnesses as defined by the Decision with the clarification provided during the hearing of 23 November 2010";⁴⁹ whereas the defence seeks leave to appeal on: "whether the [*sic*] such a concept of "*prima facie* admissibility", as set out in the impugned Decision, exists in the Rules of Procedure of the International Criminal Court, in the Rome Statute or in the wider legal framework of the ICC".⁵⁰

27. As the prosecution submits, the issue on which the defence seeks leave to appeal is more broadly construed than that on which the prosecution seeks leave to appeal in that the prosecution confines itself to seeking a determination on whether the legal framework of the ICC allows for the *prima facie* admission into evidence of prior statements of all witnesses as defined by the Majority Decision with the clarification provided during the hearing of 23 November 2010 whereas the defence seeks a broader

⁴⁸ 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, 19 August 2005, ICC-02/04-01/05-20-US-Exp, paragraph 19. This decision was unsealed pursuant to the Appeals Chamber's Decision on the prosecutor's application for unsealing of the warrants of arrest, 13 October 2005, ICC-02/04-01/05-52.

⁴⁹ ICC-01/05-01/08-1059, paragraph 3.

⁵⁰ ICC-01/05-01/08-1061, paragraph 11.

determination as to whether the concept of “*prima facie* admissibility” as set out in the Majority Decision exists in the legal framework of the ICC.

28. In framing the issue upon which leave to appeal is sought, the prosecution has potentially misstated the conclusions reached in the Majority Decision as to the materials that are considered *prima facie* admissible in that the materials do not only concern prior statements of witnesses but also related documents. More significantly these materials are only materials which form part of the prosecution’s Revised List of Evidence, as stipulated in paragraph 35 of the Majority Decision, and so do not include *all* prior statements and related documents.
29. In addition, the prosecution includes the oral “clarification” made by the Presiding Judge on 23 November 2010 in response to a question by the prosecution. This response does not constitute a clarification to the Majority Decision and does not therefore form part of the basis of any application for leave to appeal.
30. Regarding the defence application, the Chamber accepts the reasons given by the defence as to the late filing of the application due to technical reasons and given that there is no objection by the prosecution, the Chamber considers the application as having been filed in time.
31. Further the Chamber considers that any issue upon which leave to appeal is sought should not only be accurately defined but also should not be so broadly defined as to go beyond the scope of the decision concerned. The issue identified by the defence concerns a more abstract question regarding whether *prima facie* admissibility exists conceptually in the legal framework of the ICC. Construing the appealable issue in this manner effectively makes the issue one of general interest or

something which may arise in future pre-trial or trial proceedings and these are not relevant considerations for the Chamber in granting leave to appeal, as stated above.

32. Against that background, the Chamber must assess whether the issues raised by the prosecution and the defence are appealable, and, depending on the answer to that question, whether these could significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial; and whether an immediate resolution by the Appeals Chamber could materially advance the proceedings.

33. The Appeals Chamber has defined an appealable issue as follows: “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 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”.⁵¹ Furthermore, Pre-Trial Chamber III has determined:

An “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. In addition, as has this Chamber held, an appealable issue must emanate from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern.⁵²

34. Despite the inaccuracy of the manner in which the prosecution issue is framed and the broadness of the way in which the defence issue is drafted, the Chamber is persuaded that the issues raised do constitute an identifiable subject requiring a decision for its resolution, as it is essential

⁵¹ ICC-01/04-168, paragraph 9.

⁵² Decision on the Prosecutor's Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paragraph 17.

for the determination of matters arising in the judicial case under examination, and the issue was dealt with in the relevant decision. However, the Chamber considers that the appealable issue needs to be defined in accordance with the conclusion of the Majority Decision as to whether the legal framework of the ICC allows for *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Majority Decision, including witnesses' written statements and related documents previously disclosed to the defence and which form part of the prosecution's Revised List of Evidence.

35. Both the Majority Decision as well as the Dissenting Opinion acknowledge that the issue of *prima facie* admissibility of documents is one which affects the fairness of proceedings although taking divergent views on the matter.⁵³ Clearly these two positions are irreconcilable. The Chamber is persuaded that the issue identified amounts to an issue that may significantly affect the outcome of the trial, as it directly relates with the amount and type of evidence that the Chamber will have to consider when making its final determination in accordance with Article 74 of the Statute.

36. The Chamber is further of the view that an immediate resolution by the Appeals Chamber may materially advance the proceedings, as the issue concerned is likely to have a direct impact on the conduct of the trial proceedings. In particular, the mode of questioning witnesses by parties and participants may be significantly affected by the decision on whether or not the Chamber may make a *prima facie* finding of admissibility of their written statements and related documents, on the basis that it appears to be *a priori* relevant to the case as set out in paragraph 10 of the Majority Decision.

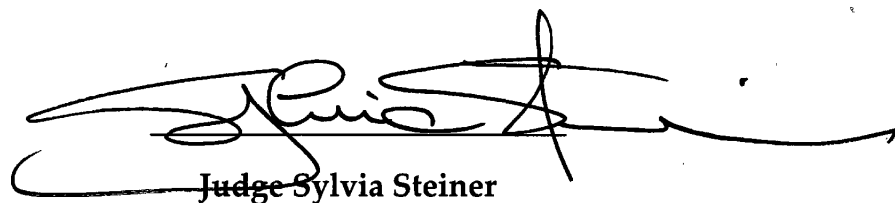
⁵³ ICC-01/05-01/08-1022, paragraphs 22 – 24 and 27; and, ICC-01/05-01/08-1028, paragraphs 22 – 28.

37. Accordingly, leave to appeal should be granted on a conflation of the issues identified by the prosecution and the defence as follows: whether the legal framework of the ICC allows for *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Majority Decision, including witnesses' written statement and related documents previously disclosed to the defence and which form part of the prosecution's Revised List of Evidence.

V. Conclusion

38. For the above reasons the Chamber partly grants the two applications for leave to appeal on the issue as framed in paragraph 37 above.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 26 January 2011

At The Hague, The Netherlands