Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/05-01/08**
Date: **19 November 2010**

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

URGENT
Public

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:

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence
Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

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 Jean-Xavier Keïta

States Representatives

Amicus Curiae

REGISTRY

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 ("Court" or "ICC"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, hereby renders the following Decision on the admission into evidence of materials contained in the prosecution's list of evidence:

I. Background and Submissions

1. On 15 January 2010, the Office of the Prosecutor ("prosecution") filed its confidential *ex parte* "Updated list of evidence" ("List of Evidence"), submitting evidence on which it will rely at trial. The List of Evidence is divided into groups as follows: (a) witness statements, (b) documents to be tendered through witnesses, and (c) "other evidence".[1]

2. On 4 October 2010, the Chamber issued an "Order for submissions on the presentation of evidence at trial" ("Order"),[2] in which it recalled its duty to ensure that a trial is fair and expeditious pursuant to Article 64(2) of the Rome Statute ("Statute"). In pursuance of this objective, the parties and participants were ordered to file observations "on the potential submission into evidence of the witness statements of those witnesses to be called to give evidence at trial."[3]

3. On 11 October 2010, the prosecution filed its observations,[4] in which it submits that the Chamber has authority under the Statute and the Rules of Procedure and Evidence ("Rules") to admit prior statements of witnesses who appear at trial and who are available for "cross-examination".[5] The prosecution bases its observations on Article 69(2) of the Statute and Rule

[1] Confidential *Ex Parte* Prosecution and Defence only Annex B to the Prosecution's submission of its 'Updated Summary of Presentation of Evidence", 15 January 2010, ICC-01/05-01/08-669-Conf-AnxB.
[2] Order for submissions on the presentation of evidence at trial, 4 October 2010, ICC-01/05-01/08-921.
[3] ICC-01/05-01/08-921, paragraph 3.
[4] Prosecution's Position on Potential Submission of Witness Statements at Trial pursuant to Trial Chamber III's Order, 11 October 2010, ICC-01/05-01/08-941.
[5] ICC-01/05-01/08-941, paragraph 6.

68(b) of the Rules.[6] The prosecution submits that if the Chamber agrees in principle to consider the admission of prior statements, the prosecution will make applications pursuant to Rule 68(b) of the Rules for the admission of particular witness statements, whether in whole or in part, at appropriate stages in the trial.[7]

4. On 11 October 2010, the Office of the Public Counsel for Victims ("OPCV")[8] filed its observations,[9] in which it argues that the admission into evidence of the prior recorded witness statements of each prosecution witness called to testify at trial, in addition to their oral testimonies, would not facilitate the expeditious conduct of the proceedings.[10] The OPCV submits that Article 69(2) of the Statute stipulates that the core evidence from a witness must come from his or her "live" testimony, which is thereby subjected to questioning and scrutiny by the parties, the participants and the Chamber.[11] Finally, the OPCV observes that, should the Chamber deem it appropriate to have written statements of witnesses admitted into evidence in addition to their oral testimony at trial, such a scenario should be allowed only in exceptional circumstances when the Chamber considers it necessary in its determination of the truth.[12]

5. On 18 October 2010, defence counsel for Mr. Jean Pierre Bemba Gombo ("defence") filed its observations,[13] concurring with the OPCV.[14] The defence

[6] ICC-01/05-01/08-941, paragraph 2.
ICC-01/05-01/08-941, paragraph 4.
[8] Acting as the legal representative at the time of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09.
[9] Legal Representative's Observations on the potential submission into evidence of the prior recorded statements of Prosecution witnesses testifying at trial, 11 October 2010, ICC-01/05-01/08-943.
[10] ICC-01/05-01/08-943, paragraph 3.
[11] ICC-01/05-01/08-943, paragraph 3.
[12] ICC-01/05-01/08-943, paragraph 6.
[13] Defence Observations on the Potential Submission into Evidence of the Prior Recorded Statements of Prosecution Witnesses Testifying at Trial, 18 October 2010, ICC-01/05-01/08-960.

stresses that, as a general rule, testimony should be heard live in court, and exceptions should be narrowly construed and never in a manner which could prejudice the rights of the accused.[15] The defence argues that the envisaged procedure should not be adopted in those situations where the subject matter of the testimony in question is either materially in dispute or central to the core issues in the case.[16] The defence further suggests that the "guiding principle" should be the generally accepted rule that "nothing is admitted into evidence when its prejudicial value could outweigh its probative effect".[17] Finally, the defence recalls the decision of Trial Chamber I which stated that there are "material advantages" to be gained from hearing *viva voce* testimony delivered in full before the Court, "especially when the evidence concerned requires comprehensive investigation and credibility issues demand observation of a witness's demeanour".[18]

6. On 26 October 2010, the prosecution filed a confidential "Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning" ("Revised Order of Witnesses"),[19] in which it submits that it has implemented the Chamber's instructions with regard to grouping some of the witnesses and the general order in which witnesses are to be called.

7. In accordance with Article 21(1) of the Statute, the Trial Chamber, in making its decision has considered Article 54(1)(a), Article 64(2), Article 64(3)(a) and (c), Article 64(6)(b) and (6)(f), Article 64(8)(b), Article 64(9)(a), Article 67(1)(c) and (e), Article 69(2) to Article 69(4), Article 69(7) and Article 74(2) of the

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[14] ICC-01/05-01/08-960, paragraph 4.
[15] ICC-01/05-01/08-960, paragraph 5.
[16] ICC-01/05-01/08-960, paragraph 6.
[17] ICC-01/05-01/08-960, paragraph 7.
[18] ICC-01/05-01/08-960, paragraph 8.
[19] Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning, 26 October 2010, ICC-01/05-01/08-975-Conf with public redacted version filed on 5 November 2010, ICC-01/05-01/08-975-Red. The order of witnesses was approved by the Chamber by the Order on the "Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning", 4 November 2010, ICC-01/05-01/08-996.

Statute, Rule 63(2), (3) and (9), Rule 64, Rule 68(b), Rule 88(5), Rule 130, Rule 131(1), Rule 134(1), Rule 140(1) and Rule 140(2)(c) of the Rules of Procedure and Evidence ("Rules") and Regulations 43 and 54(g) and (i) of the Regulations of the Court.

II. Analysis and Conclusions

8. Having considered the observations submitted by the parties and participants pursuant to Article 64(3)(a) of the Statute, the Majority of the Chamber ("Majority")[20] is convinced that there is a sufficient legal basis provided in the ICC legal framework to consider *prima facie* admitting into evidence, before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial. For the same reasons, the Majority is of the view that it shall admit, *prima facie,* all the documents submitted to the Chamber by the prosecution in its List of Evidence.[21]

9. The Majority decision to admit into evidence all of the materials included by the prosecution in its List of Evidence, is based on making a *prima facie* finding of the admissibility of this evidence. It is important to distinguish this from the Chamber's future determination of the probative value to be given to the evidence since the Chamber will evaluate, in accordance with Rule 63(2) of the Rules, the probative value and appropriate weight to be given to the evidence as a whole, at the end of the case when making its final judgement. The Chamber would then make the appropriate determinations on whether the probative value of the evidence is out-weighed by its prejudicial effect. By probative value, the Majority refers,

[20] Judge Kuniko Ozaki dissenting.
[21] See the 3 disclosed types of documents in ICC-01/05-01/08-669-Conf-AnxB.

inter alia, to the reliability and weight to be attached to the evidence concerned.[22]

10. The Majority considers that a ruling on admissibility is not a pre-condition for the admission of any evidence, as it only implies a *prima facie* assessment of the relevance of any material, on the basis that it appears to be *a priori* relevant to the case.[23] Apart from what is provided for in Article 69(7)(a) and (b) of the Statute and Rule 71 of the Rules, no evidence is *per se* inadmissible, and the uncontested jurisprudence of the Court determines that any evidence may be "admitted [...] unless [it] is expressly ruled inadmissible [...] by the Chamber upon a challenge by any of the participants at the hearing".[24]

11. The Majority considers that the *prima facie* admission of witnesses' written statements and related documents included in the prosecution's List of Evidence, as evidence to be used at trial, is consistent with the Chamber's role to direct and ensure the proper conduct of the proceedings pursuant to Article 64(8)(b) of the Statute and Rule 140 of the Rules. Furthermore, pursuant to Regulation 54(g) and (i) of the Regulations of the Court, the Trial Chamber has the 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.

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[22] Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Mr Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paragraphs 58-60.

[23] See for a similar approach, Trial Chamber I, 13 June 2008, ICC-01/04-01/06-1399, paragraphs 26-27: "Bearing in mind those key considerations, when the admissibility of evidence other than direct oral testimony is challenged the approach should be as follows. First, the Chamber must ensure that the evidence is prima facie relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. "

[24] Pre-Trial Chamber I, Decision on the schedule and conduct of the confirmation hearing, 28 January 2010, ICC-01/04-01/06-678, page 9.

12. In addition, the Trial Chamber may, as necessary prior to, or during, the course of the trial, rule on any relevant matter or on any issue concerning the conduct of the proceedings, as provided for in Article 64(6)(f) of the Statute and Rule 134(1) of the Rules.

13. Furthermore, the Majority is of the view that nothing in the ICC legal framework prevents the Chamber from *prima facie* admitting non-oral evidence, whether written, audio, visual. According to the Statute and the Rules, a Chamber can rely on all types of evidence, as several legal provisions facilitate evidence being given in writing,[25] orally or by means of video or audio technology.

14. In the view of the Majority, the Statute only envisages a presumption in favour of oral testimony, but no prevalence of *orality* of the procedures as a whole. Although it might be argued that such a prevalence of *orality* could be inferred from the first sentence of Article 69(2) of the Statute, the Majority stresses that the rule has several exceptions,[26] and the same Article gives the Court the discretion ("may also") to permit the giving of recorded testimony or the introduction of documents or written transcripts.[27]

15. The Majority also interprets Article 74(2) of the Statute as requiring the Chamber to consider all the evidence "submitted" before it and "discussed" at trial in making its final determination regardless of the type of evidence presented, whether written, audio, visual or oral.

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[25] See *inter alia*, Article 64(6)(b) of the Statute "documents and other evidence"; Article 68(2) of the Statute "evidence by electronic or other special means"; Article 69(2) of the Statute "introduction of documents or written transcripts"; Rule 68 of the Rules "transcripts or other documented evidence"; Rule 84 of the Rules "documents or other information".
[26] See for instance Article 56 of the Statute and Rules 47, 68, 112 and 114 of the Rules.
[27] See Rule 68 of the Rules.

16. Moreover, the Majority considers that, under the Court's legal framework, the Chamber has discretion to rule on the admissibility of evidence at any time during the course of the proceedings, pursuant to Articles 64(9) and 69(4) of the Statute.

17. The Majority recalls the drafting history and the compromise reached at the Rome Conference as to the governing principles for assessing relevance or admissibility of evidence.[28] The compromise was to eschew generally the technical formalities of the *common law* system of admissibility of evidence in favour of the flexibility of the *civil law* system, provided that the Court has discretion to rule on the relevance or admissibility of any piece of evidence.[29]

18. This subtle compromise is illustrated by the wording used in Article 69(4) and (7) of the Statute. Whilst in accordance with Article 69(4) the Chamber "may" rule on relevance or admissibility of evidence, Article 69(7) of the Statute, combined with Rule 63(3) of the Rules, orders the Chamber ("shall") to rule on relevance or admissibility on an application of a party or on its own motion, in case the evidence has been obtained by means of a violation of the Statute or internationally recognised human rights standards pursuant to Article 69(7)(a) and (b) of the Statute. This latter provision,

[28] Donal K. Piragoff (2001) Evidence in *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee (ed.) (New York, Transnational Publishers), page 351, who stresses that "while the basic principle of both systems – [common law and civil law] – is that all relevant evidence that has probative value is admissible unless affected by an exclusionary rule, common law systems contain more prohibitory or exclusionary rules. Common law systems generally tend to exclude or weed out irrelevant evidence, and inherently unreliable types of evidence, as a question of admissibility, while in civil law systems, all evidence is generally admitted and its relevancy and probative value are considered freely together with the weight of the evidence."

[29] Donal K. Piragoff (2001) Evidence in *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee (ed.) (New York, Transnational Publishers), pages 349-401; and Donald K. Piragoff (2008) Evidence in Commentary on the Rome Statute of the International Criminal Court, Otto Triffterer (ed.) (München, C.H.Beck Hart Nomos), page 1317.

drafted in a restrictive manner, is the only situation in which the Chamber has a duty to make a ruling on admissibility.[30]

19. The Majority reiterates that the *prima facie* admission into evidence of the witnesses' written statements and related documents included in the prosecution's List of Evidence does not prevent the parties from challenging the admissibility of such evidence, or the Chamber from ruling, *propio motu,* on its admissibility, pursuant to Article 69(7) of the Statute. The defence is therefore at liberty to challenge the admissibility of the evidence in accordance with Rules 63(3) and 64(1) of the Rules.

20. The Majority recalls once again that the admission of the documents contained in the prosecution's List of Evidence is not intended to replace oral testimony. The accused will not in any way be deprived of his right to examine or have examined the witnesses against him, in accordance with Article 67(1)(e) of the Statute.[31]

21. In addition, as the material included in the prosecution's List of Evidence has already been disclosed *inter partes,* the *prima facie* admission into evidence of this material does not infringe the rights of the accused to have adequate time and facilities for the preparation of his defence, in accordance with Article 67(1)(a) of the Statute. Arguably, the defence may be in a better position to prepare its case as this material is *prima facie* admitted as

[30] The Chamber also notes that Rule 71 is the other exclusionary rule for evidence pertaining to the prior or subsequent sexual conduct of victim or witness.

[31] This approach is consistent with the human rights case-law: ECtHR, Caka v. Albania, (Application no. 44023/02), Judgment, Strasbourg, 8 December 2009, paragraph 102; ECtHR, *Lüdi v. Switzerland*, Judgment of 15 June 1992, Series A no. 238, page 21, paragraph 49; ECtHR, Saïdi v. France, judgment of 20 September 1993, Series A no. 261-C, page 56, paragraph 43; ECtHR, Vozhigov v. Russia, no. 5953/02, paragraph 51, 26 April 2007; ECtHR, Solakov v. The Former Yugoslav Republic Of Macedonia, (Application no. 47023/99), Judgment, Strasbourg, 31 October 2001, page 14, paragraph 57; ECtHR, Kostovski v. The Netherlands, Application No. 11454/85, Judgment. 20 November 1989, paragraph 41 and *mutatis mutandis,* ECtHR, Unterpertinger v. Austria, Application No. 9120/80, Judgment, 24 November 1986, paragraph 41, in which it was stressed that the rights of the defence require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement *or at some later stage of the proceedings, at trial.*

evidence, which may provide the basis for the questioning of the witnesses called by the prosecution.

22. The *prima facie* admission into evidence of witnesses' statements and related documents included in the prosecution's List of Evidence would thereby 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.

23. Expeditiousness is one of the factors that secures the fairness of the proceedings, as justice within a reasonable time respects the rights of the accused and best serves the interests of the victims.[32] The Majority considers this *prima facie* admission of evidence will shorten the length of questioning by the parties in court and contribute to the accused being tried without undue delay, pursuant to Article 67(1)(c) of the Statute.

24. As previously stated, the Chamber is under no obligation to make rulings on admissibility for each item of evidence presented before it. The Majority considers that the *prima facie* admission of evidence, without the need to rule on each piece of evidence as it is presented, will save significant time during the proceedings thereby expediting matters.

25. The Majority also recalls that the *prima facie* admission of evidence, including witnesses' written statements is in keeping with the current developments of the procedural models adopted by the international criminal tribunals. In particular that of the International Criminal Tribunal

[32] Ekaterina Trendafilova (2009) Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings in *The Emerging Practice of the International Criminal Court*, C Stahn and G Sluiter (eds.) (Leiden, Martinus Nijhoff Publishers), page 441. Judge Trendafilova stresses: "Fairness and expeditiousness are the pillars of criminal justice. Though distinct principles, they are closely related and mutually dependent. Expeditiousness secures the fairness of the proceedings. Justice within reasonable time respects the rights of the accused, is crucial to the case of the Prosecutor, best serves the interests of the victims and observes the public interests in a timely prosecution of crimes within the jurisdiction of the International Criminal Court (...)".

for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") in which, after years of lengthy proceedings and to "enhance the efficiency of trial proceedings",[33] on 13 September 2006 the Statutes of both ICTY and ICTR incorporated Rule 92 *ter*.[34] In the same line with the use of witness statements as evidence by the Chamber, ICTY-ICTR's Rule 92 *ter* provides for written statements and transcripts of interviews to be admitted into evidence in trial proceedings provided that the witness is present in Court, available for cross-examination and questioning by the Judges, and attests that the document reflects his/her declaration.

26. The Majority is aware that the application of Rule 92 *ter* before the ICTY and the ICTR is different, to a certain extent, than the procedure to be followed by the Chamber. Indeed, the admission of witness statements in the ICTY-ICTR is applied on a case-by-case basis and after the Chamber's assessment of its admissibility.[35] However, the statutory evolution before the ICTY and ICTR and the adoption of such a procedure with regard to witness statements, even if governed by different modalities than at the ICC, addressed similar concerns to those raised by the Majority, namely the need for expediting procedures. The application of Rule 92 *ter* has been further recognized as the reason for substantial savings of court time within the

[33] See ICTY, The Prosecutor v. Milan Lukic and Sredoje Lukic, Decision on Confidential Prosecution Motion for the admission of prior testimony with associated exhibits and written statements of witnesses pursuant to Rule 92 *ter*, 9 July 2008, IT-98-32/1-T D3474-D3466, paragraph 13.

[34] Rule 92 ter of the Statute of the ICTY states: Rule 92 *ter* Other Admission of Written Statements and Transcripts (Adopted 13 Sept 2006) (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined. (B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

[35] See ICTY, The Prosecutor v. Milan Lukic and Sredoje Lukic, Decision on Confidential Prosecution Motion for the admission of prior testimony with associated exhibits and written statements of witnesses pursuant to Rule 92 *ter*, 9 July 2008, IT-98-32/1-T D3474-D3466, paragraph 13.

ICTY proceedings.[36] Finally, it is worth noting that a similar legal provision, and arguably for the same reasons, was also incorporated in the Statute of the Special Tribunal for Lebanon ("STL"), as Rule 156.[37] Such a rule before the STL is also slightly different from the application to be given by the Chamber, as the STL rule is framed in a way so as to avoid questioning by the prosecution as Rule 156 is entitled "Written Statements and transcripts *in lieu of* Examination in Chief".

27. The Majority finally considers that the *prima facie* admission of evidence will contribute to the expeditiousness and proper conduct of the proceedings as it will allow for more coherence between the pre-trial and trial stages of the proceedings. As it has been recognised by the jurisprudence of the Court, the role of Pre-Trial Chambers is to prepare the case for trial.[38] Most of the witnesses' written statements and related documents to be relied upon by the prosecution at trial were collected, disclosed and used as evidence forming the basis for confirming the charges at pre-trial stage. The Majority recalls the Chamber's recent decision in which it stressed the importance of

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[36] See paragraph 8 "General Assembly Sixty-second session Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991", 1 August 2007, A/62/172–S/2007/469, that stresses: "The addition of rule 92 *ter*, which authorizes a Trial Chamber to consider written statements and transcripts of witnesses in lieu of oral testimony that go to proof of the acts and conduct of the accused, resulted in substantial savings of court time in both the Milutinović et al. and Popović et al. multi-accused trials. Additionally, in the multi-accused Prlić et al. trial, the Trial Chamber revised and reduced the time allocated to the parties for their cases."

[37] See Special Tribunal for Lebanon, Rules of Procedure and Evidence (as of 10 June 2009), Explanatory Memorandum by the Tribunal's President. [online] Available at: http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/Explanatory_memorandum_En.pdf. last visited 7 November 2010, page 1-2 stresses : « ICTY, ICTR and SCSL procedural system – although initially based almost exclusively on the adversarial model – has evolved to include several significant elements that are closer to the inquisitorial model (for instance: the Pre-Trial Judge; the admission of written evidence (...)). (...). No one doubts that there is an increasing need for international criminal proceedings to be less lengthy, less cumbersome, and less costly. Finally, the right to an expeditious trial is part and parcel of fundamental human rights standards." See also page 13, that stresses: "Generally speaking, judges should be trusted in their assessment of the evidence; they are expected to be competent, experienced and therefore capable of attaching to the evidence the value it deserves, on a case-by-case basis."

[38] For a similar approach on the role of Pre-Trial Chambers as to preparation of trial and contribution to judicial economy and efficiency, although on a different matter, see the Appeals Chamber Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 12 July 2010, ICC-01/04-01/07-2259, paragraph 40.

the Decision Confirming the Charges as the main authoritative document.[39] Therefore, the Majority does not see any compelling reason for the statements and related documents, that were the basis for the charges to be confirmed by the Pre-Trial Chamber, not to be used at trial by the Trial Chamber.

28. Moreover, in the view of the Majority, the admission into evidence of all the materials included in the prosecution's List of Evidence would be in line with the Chamber's statutory obligation under Article 69(3) of the Statute, to search for the truth, and with the discretionary power of the judges to decide on additional elements as they deem necessary for the Chamber's determination of the truth. In this regard, the Chamber would have at its disposal all the evidence upon which the prosecution seeks to rely and 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. This is further supported by the fact that the Chamber may order the production of documents or other evidence, in addition to that already collected by the parties or presented during trial, pursuant to Article 64(6)(b) and (d) of the Statute and Rule 84 of the Rules.

III – Orders by Majority

29. For the proper implementation of the procedure described above, the Majority notes that the "Updated List of Evidence" of 15 January 2010 does not correspond exactly with the Revised Order of Witnesses to be called at trial, filed on 5 November 2010.[40]

[39] Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges, 8 October 2010, ICC-01/05-01/08-935, paragraph 12 .
[40] In fact, the current List of Evidence still contains statements of certain witnesses whom the prosecution decided not to rely on any more. In addition, this list does not include reports of expert witnesses on whom the prosecution will rely at trial.

30. In order to ensure the proper conduct of the proceedings and in view of the imminent commencement of the trial, the Majority orders the prosecution to file a revised and updated List of Evidence ("Revised List of Evidence" or "Revised List") in line with the order of appearance of witnesses as approved so far by the Chamber,[41] by 16.00 on Monday 22 November 2010.

31. The Majority considers that this Revised List should state, for each witness and in order of their appearance at trial (starting with Witness 38), the related items of evidence to be tendered through each witness.[42]

32. As the Revised Updated List will follow the order of appearance of prosecution witnesses to be called at trial, this list shall include expert witnesses and their respective reports, disclosed *inter partes*.

33. As to the last category so far included in the prosecution's List of Evidence, namely "other evidence", which includes documentary and audiovisual evidence, the Majority understands that this evidence will not be tendered through any witness. Therefore, the prosecution is ordered to specify, when filing its Revised Updated List of Evidence, whether and how items contained in this category "other evidence" will be tendered at trial.

34. Once this Revised List of Evidence is filed in the record of the case, the Registry is ordered to assign an EVD-T number to each item.

[41] ICC-01/05-01/08-975-Red.
[42] As an example, for Witness 38, who will come to testify first, the prosecution will file its Revised List of Evidence starting by Witness 38 and the three documents to be used for the purpose of questioning as communicated to the opposing party, the legal representative and the Chamber on 15 November 2010 (Email communication from the Prosecution Case Manager to the Legal Adviser to the Trial Division, 15 November 2010 at 15:15, mentioning three documents with ERN and EVD numbers).

IV - Decision

35. In view of the above reasons, the Majority therefore decides 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 purpose of the trial.

The dissenting Opinion of Judge Kuniko Ozaki will follow in due course.

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

Judge Sylvia Steiner

Judge Joyce Aluoch

Judge Kuniko Ozaki

Dated this 19 November 2010

At The Hague, The Netherlands

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/05-01/08**
Date: **23 November 2010**

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Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence
Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

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

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I. Introduction

1. This Dissenting Opinion is in response to the Majority's "Decision on the admission into evidence of materials contained in the prosecution's list of evidence",[1] which is itself partly based on the submissions filed by the parties and participants on the issue of the admission of witness statements into evidence.[2]

2. The dissent will address the reasons underlying my disagreement with the Majority over the issue of the wholesale admission of written witness statements and other materials into evidence.

II. The Wholesale Admission of Written Witness Statements and Other Materials into Evidence

3. 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."[3] The Majority argued that

[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] Prosecution's Position on Potential Submission of Witness Statements at Trial pursuant to Trial Chamber III's Order, 11 October 2010, ICC-01/05-01/08-941 ("prosecution's Position"); Legal Representative's Observations on the potential submission into evidence of the prior recorded statements of Prosecution witnesses testifying at trial, 11 October 2010, ICC-01/05-01/08-943 ("Legal Representative's Observations"); Defence Observations on the Potential Submission into Evidence of the Prior Recorded Statements of Prosecution Witnesses Testifying at Trial, 18 October 2010, ICC-01/05-01/08-960 ("defence Observations"). These documents were submitted following the Chamber's "Order for submissions on the presentation of evidence at trial", 4 October 2010, ICC-01/05-01/08-921 ("Order").
[3] ICC-01/05-01/08-1022, paragraph 35.

there is "sufficient legal basis provided in the ICC legal framework to consider *prima facie* admitting into evidence, before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial", as well as all documents submitted to the Chamber in the prosecution's List of Evidence.[4] The Majority further argued that "the Statute only envisages a presumption in favour of oral testimony, but no prevalence of *orality* of the procedures as a whole".[5] With due respect, I cannot agree with my Colleagues' reasoning, and after briefly addressing the Majority's use of the expression "*prima facie* admissibility" and after expressing my views on the principle of primacy of orality and the rights of the accused, which are my main concerns, I will address their remaining arguments as appropriate.

a. The concept of prima facie *admissibility*

4. In its Decision, the Majority refers to the concept of "*prima facie* admissibility". The Majority argues that sufficient legal basis exist to apply such a concept, but fails to point to an actual provision in the ICC legal framework which confirms this concept. In my opinion, the concept of *prima facie* admissibility simply does not exist in the Rome Statute ("Statute") or in the Rules of Procedure and Evidence ("Rules").

[4] ICC-01/05-01/08-1022, paragraph 8.
[5] ICC-01/05-01/08-1022, paragraph 14.

5. The Statute rather foresees that the Chamber may make a ruling on the admissibility of the evidence.[6] This ruling will then be final, save in exceptional circumstances which may force the Chamber to revisit its decision at a later stage.[7] The Statute does not, contrary to the Majority's assertion, foresee an "intermediate stage" in the ruling on admissibility. In my view, materials presented to the Court must either be admissible, or not admissible, without the possibility of an interim status such as "*prima facie* admissible".

b. Principle of Primacy of Orality

6. Contrary to the Majority's argument,[8] Article 69(2) of the Statute clearly imposes the principle of primacy of orality in proceedings before the Court. It determines that as a general rule, "[t]he testimony of a witness at trial shall be given in person". The Statute and the Rules also provide for a limited number of exceptions to this general principle.[9] Notably, Rule 68 of the Rules allows for the admission into evidence of prior-recorded testimony, provided that certain conditions are met, and it has been recognised that this Rule indeed "permits the introduction of written statements".[10]

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[6] Article 64(9) of the Statute.
[7] For example, should the Chamber discover at a later stage that materials admitted into evidence were obtained in violation of Article 69(7), the Chamber should then review its prior decision and exclude the material.
[8] ICC-01/05-01/08-1022, paragraph 14.
[9] Article 69(2), Rules 68, 87 (3)(c), and 88(1) of the Rules.
[10] Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603, paragraph 18. This finding was endorsed by this Chamber, see Decision on the "Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108", 16 September 2010, ICC-01/05-01/08-886, paragraphs 5-6.

7. Trials which have so far taken place before international criminal tribunals in principle have relied on oral testimonies of witnesses, with written statements having been exceptionally admitted on a specific case-by-case basis.[11] In fact, in-court, live testimony is arguably the best way for a Chamber to evaluate the credibility of a witness, through his/her demeanour, hesitations, facial expressions, etc and thus to gauge the reliability of his/her testimony. This is especially true in cases before this Court, where most witnesses come from remote areas, have completely different cultural backgrounds and are testifying in a criminal case of extreme complexity. It is therefore unsurprising that the principle of primacy of orality has also been systematically applied by Trial Chambers of the Court, including this Chamber, which has consistently treated the admission into evidence of witness statements and other prior-recorded testimonies as an exception to the rule, and has considered such requests for admission on a case-by-case basis.[12] This Chamber

[11] See, ICTY, *The Prosecutor v. Kupreškic et al.*, *Case No IT-95-16-AR73.3*, Appeals Chamber, Decision on Appeal by Drajan Papic against Ruling to Proceed by Deposition, 15 July 1999, paragraphs 18 and 21; ICTR, *Prosecutor v. Ndindiliyimana et al.*, *Case No ICTR-00-56-T*, Trial Chamber II, Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision dated 11 May 2007 Regarding Admission of Exhibits P.132 and P.135, 25 July 2007, paragraph 6. The Majority refers to Rule 92 *ter* of the Rules of Procedure and Evidence of the ICTY as a basis for justifying its decision. This parallel cannot stand for two main reasons: First, such a provision does not exist in the legal framework of the Court. Second, Rule 92 *ter* refers to circumstances which are completely different from those prevailing before the ICC in general and in the Bemba case in particular. For example, Rule 92 *ter* only allows the admission of statements or transcripts from testimony of witnesses who already testified before the Tribunal, and the admission of the statement or transcript is made on a case-by-case basis. In my opinion, Rule 92 *ter* is in fact, far less radical than the measure adopted by the Majority's decision in the present case.

[12] See ICC-01/05-01/08-886, paragraph 7; ICC-01-04-01/06-2595-Red, paragraphs 39, 42; ICC-01/04-01/06-1603, paragraphs 18-21; Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, paragraphs 22, 26 and 32; Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140, 29 January 2008, paragraph 41; Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 27 August 2010, ICC-01/04-01/07-Corr-Red-2289, paragraph 14; Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219,

recently adopted this approach and found that: "the introduction of such prior-recorded testimony remains an option which should be adopted only in specific and exceptional circumstances."[13]

8. The Majority's decision to oblige 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 constitutes, in my opinion, an infringement of the principle of orality, which is one of the corner-stones of the proceedings under the Rome Statute.

9. The Majority Decision argues that the statements (and the other documents in the prosecution's List of Evidence) are to be submitted in addition to, and not *in lieu* of, the oral testimony of witnesses.[14] However, the Majority concedes that the purpose of this will be to limit the questioning of the witnesses by the prosecution[15] – which in itself, constitutes a substitution of the oral testimony for the written statements, curtailing the principle of primacy of orality. On the other hand, if the general admission of statements into evidence does not result in a shortening of questioning, then it is essentially superfluous as statements are not, at the trial stage, of assistance to assess the witness' credibility.

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3 September 2009, ICC-01/04-01/07-2362, paragraphs 14, 15 and 19; Transcript of hearing on 4 March 2010, ICC-01/04-01/07-T-112-Red-ENG, page 3, lines 20 to 24.
[13] ICC-01/05-01/08-886, paragraph 7.
[14] ICC-01/05-01/08-1022, paragraph 20.
[15] ICC-01/05-01/08-1022, paragraph 23.

10. In my view, the measure adopted by the Majority implies that the oral testimony of witnesses is insufficient in itself for the Chamber to evaluate the probative value and the credibility of witnesses' evidence. However, this is not the case. In proceedings before the ICC, listening to and evaluating witness testimony is at the core of judicial functions, as clearly demonstrated by the wording of Article 69(2) of the Statute. Moreover, the absence, in the Statute, of a prohibition on hearsay evidence should not lead to the conclusion that hearsay has the same probative value as direct, first-hand evidence – it does not. Witness statements are, by their nature, of a lower probative value than oral testimony. While professional judges are, unlike a jury, capable of evaluating the probative value that may be granted to hearsay evidence, this should not serve as a justification for the automatic introduction into evidence of statements which may be, given their nature, prejudicial to the fair conduct of the proceedings or to a fair evaluation of the in-court testimony of a witness.

11. In civil law jurisdictions, where there is no strict rule prohibiting hearsay evidence, judges are also often bound to rely on live evidence given before the Court and cannot replace live testimony with written evidence. [16] Moreover, unlike in certain domestic jurisdictions, witness statements at the ICC are not taken in neutral, impartial circumstances. They are taken by a party (often by an

[16] For example, see the German Principle of Unmittelbarkeit, Strafprozeßordnung, StPO § 250: "If the proof of a fact is based on the observation of a person, such person shall be examined at the main hearing. The examination shall not be replaced by reading out the record of a previous examination or reading out a written statement." Translation provided http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#StPO_000P250.

investigator), mainly in order to gather evidence to mount a case against an accused, and without the supervision of any impartial arbiter. These witness statements are taken with the intention of summarising a witness's oral evidence that will be given at trial and act as a guide or preview of this evidence which is disclosed to the defence. For all of these reasons, I believe that the admission of written statements and other materials must remain the exception and only be allowed in the specific, limited circumstances provided for in the Statute, in particular in the specific, limited cases when such statements bring a clearly specified added value to the testimony.

12. The admission of a witness statement into evidence is not required for the Chamber to be able to ask questions, or direct questioning, or for the parties to impeach a witness whose oral testimony contradicts his/her prior-recorded statement. Should the latter occur, the parties or the Chamber may simply refer to the prior-recorded statement and confront the witness in court, the resulting exchange thereby being included in the record of the case. In appropriate cases, the parties may request the Chamber to admit the prior-recorded statements in order to impeach the witness,[17] or otherwise, the Chamber may request the parties to submit any evidence considered necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. In any event, the impeachment of a witness remains exceptional in most court proceedings, and therefore, in the vast

[17] ICC-01-04-01/06-2595-Red, paragraphs 49 and 52.

majority of cases, the admission into evidence of witness statements will be superfluous and futile.

c. Rights of the Accused

13. The Majority argues that the wholesale admission of documents contained in the prosecution's List of Evidence will not deprive the accused of his rights to examine witnesses,[18] and that arguably, it will in fact allow the defence to better prepare its case, as the "material is *prima facie* admitted as evidence, which may provide the basis for the questioning of the witnesses called by the prosecution".[19] In my opinion, this reasoning does not stand up to in-depth analysis.

14. Articles 64(2), 69(2) and (4) of the Statute expressly require the Trial Chamber to take into consideration the rights of the accused when dealing with evidence. It follows from such provisions, and in particular from Article 69(4), that it is not sufficient for the evidence to have a *prima facie* authenticity, relevance and probative value, as the introduction of such evidence needs also to be balanced against the fairness of the trial and the expeditiousness of the proceedings.[20]

[18] ICC-01/05-01/08-1022, paragraph 20.
[19] ICC-01/05-01/08-1022, paragraph 21.
[20] ICC-01/04-01/06-1603, paragraph 23, when speaking about the decision to introduce written statements *in lieu* of oral testimony: "However, the right of the accused to a fair trial must not be undermined by decisions of this kind, and the Chamber must ensure that the accused's rights are appropriately protected". See also Redacted Decision on the Prosecution third and fourth applications for admissions of documents from the "bar table", 17 November 2010, ICC-01/04-01/06-2600-Red, paragraph 27: when speaking about receiving document or written transcripts "The Court can receive [...] subject to the Statute and Rules of Procedure and Evidence, so long as these measures are not prejudicial to or inconsistent with the rights of the Accused".

In my opinion, the wholesale admission into evidence of witness statements and other materials may negatively affect the rights of the accused in three main areas:

15. Firstly, the Majority decision is based on the assumption that all statements, or in fact, any material, may be tendered and admitted into evidence, without prior assessment of authenticity, relevance or probative value.[21] Such an assessment, according to the Majority, would be left for the end of the trial proceedings, unless the opposing party or the Chamber *proprio motu*, challenges the admissibility upon its presentation by the party.[22]

16. In my opinion, this methodology may put the defence at a disadvantage. The defence has a right to know with certainty what the evidence against the accused actually is. The principle of judicial certainty militates in favour of providing the defence with focussed, clearly delineated evidence so that it can exercise its rights from the commencement of the trial, rather than only at the end of it.

17. Moreover, given that Rule 64(1) provides that "[a]n issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber", the defence will have to examine the issue of admissibility of each and every witness statement and related materials, prior to a witness's testimony, or arguably, even at the very beginning of the trial, since the Majority decision foresees the immediate admission into evidence of all

[21] ICC-01/05-01/08-1022, paragraphs 9-10, 18 and 24.
[22] ICC-01/05-01/08-1022, paragraphs 9 and 19.

documents contained in the prosecution's List of Evidence. This puts an additional immense burden on the defence. Due to the very late filing of the Majority Decision, it is virtually impossible for the defence to comply with the delays prescribed in Rule 64(1) of the Rules. If such a measure was to be put in place, a decision should have been issued well in advance of the trial, so as to avoid imposing on the defence such an impossible task.

18. In addition, the defence may not be aware of the conditions in which the statements have been taken and documents obtained, and may not, for example, be able to make an assessment as to whether the conditions set out in Article 69(7) of the Statute and Rule 111 of the Rules have been respected.[23] This burden is normally absent, since there is no such question of admissibility with regard to the live in-court testimony of a witness.

19. In cases where such challenge to the admissibility could only be made later in the proceedings, or where the Chamber would later reject a statement or a document as inadmissible, the defence would nonetheless have spent time, energy and resources in addressing both the issue of admissibility and the substance of the statement and/or document thereafter excluded from the record. This waste of defence resources may negatively affect the right of the accused to a

[23] Regarding the Rule 111 see, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475, Dissenting Opinion of Judge Pikis, paragraph 24: "As such, it cannot be withheld from the defence given that the manner of conducting the investigation and the presence of the attributes of the statements as laid down in rule 111 is a condition of its acceptability as evidential material."

fair trial. In this sense, I note the defence's argument in their Observations, that: "the guiding principle should be the generally accepted rule that nothing is admitted into evidence when its prejudicial value could outweigh its probative effect."[24]

20. Secondly, the Majority does not mention the issue of defence witness statements. It is generally recognised that the defence does not have to take statements from their own witnesses. Therefore, the admission into evidence of all prosecution witness statements may create an imbalance between the parties, inasmuch as the defence, unlike the prosecution, may not be able to rely on written statements to cover any potential lacunae in their questioning. On the other hand, should the defence choose to take statements from their witnesses to benefit from the admission into evidence of written statements, this would raise the question of prior disclosure of these statements to the prosecution, and potentially create additional obligations for the defence. In both scenarios, I see a potential violation of the rights of the accused.

21. Third and finally, the Majority also fails to take into account another important feature of the ICC trial procedure, namely the principle of publicity of the proceedings. Such principle is well established by various international human rights instruments,[25] and enshrined in

[24] ICC-01/05-01/08-960, paragraph 7; see also ICC-01/04-01/06-2600-Red, paragraph 23; ICC-01-04-01/06-2595-Red, paragraph 39.
[25] Article 10 of the Universal Declaration of Human Rights - 1948; Article 14(1) of the International Covenant on Civil and Political Rights - 1966; Article 6 of the European Convention of Human Rights - 1950; Article 47 of the European Charter of Fundamental Rights - 2000; Article 8 (5) of the American Convention on Human Rights - 1969.

Article 67(1) of the Statute as a right of the accused, as well as in Regulations 20 and 21 of the Regulations of the Court. It has also been reiterated in a recent decision of this Chamber.[26] Pursuant to this principle, the Court is under the obligation to ensure that any document or information used in the proceedings is made publicly available, to the extent possible, except when such document is subject to measures adopted pursuant to Article 68 of the Statute. In my opinion, the wholesale admission of written witness statements into evidence may cause difficulties as regards the principle of publicity. While witness statements are normally not in the public record of a case, this Chamber will now have to determine a procedure by which statements are redacted to ensure that the statements reflect the protective measures granted to witnesses where appropriate, and make them publicly available, creating an additional workload, rather than expediting proceedings.

d. Expeditiousness of the Proceedings

22. The right of the accused to an expeditious trial is an important right of the defence, but one which must be balanced along-side other important defence rights included in Article 67 of the Statute, and along with the principle of primacy of orality. The Majority argues that the admission of written statements will have a positive impact on the fair and expeditious conduct of the proceedings, by shortening the questioning time of the party who called the witness

[26] Order on the "Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning", 4 November 2010, ICC-01/05-01/08-996, paragraph 5.

and avoiding repetitive evidence, hence, reducing the overall length of the trial.[27] The Majority also argues that the *prima facie* admission of documents will "save significant time during the proceedings thereby expediting matters."[28] With due respect for my Colleagues, their arguments are not sustainable, for three main reasons.

23. First, as discussed above, it is only possible to evaluate a witness' credibility during live, oral testimony, which enables the judges to observe a witness and hear what he/she has to say. The reading of a witness statement can never be a substitute to such observations and live evaluations. Should the prosecution cut short its questioning of the witness based on the fact that the content of the testimony may be found in the written statement, the Chamber will lose the benefit of the live oral testimony. Further, avoidance of repetitive evidence can be done through the Chamber giving directions to the parties in court, rather than by the relying on witness statements.

24. Second, I foresee that rather than shortening the proceedings, the admission into evidence of witness statements could in fact prolong them. Considering the very few agreed facts in this case, and the apparent lack of will from the parties in reaching agreements on a number of issues, admitting the statements into evidence may lead the parties to contest every single potentially contentious fact included in the statements of the other party's witnesses. Where normally, certain facts contained in the statements would not be

[27] ICC-01/05-01/08-1022, paragraph 23.
[28] ICC-01/05-01/08-1022, paragraph 24.

raised in court and therefore would not be on the record, the admission into evidence of all statements may cause the party opposing the content of the witness statement to attempt to cover and undermine each and every fact contained in the statements, through a lengthy and protracted questioning of the witness. Such prolonged questioning might then create the need for re-examination by the party who called the witness.

25. Similarly, this Chamber's decision filed on 16 September 2010 on the issue of the admission into evidence of certain witness statements, found that:

> [...] the Chamber is not persuaded that avoiding questioning by the prosecution in court will have the effect of expediting the proceedings. On the contrary, direct questioning by the defence based on written statements given in September 2008, two years ago and around six years after the alleged events suffered, is likely to take a significant amount of time as this evidence is contested by it. In addition, the Chamber is concerned that direct questioning by the defence would not facilitate her testimony in court and may cause distress to the witness. Rather, the Chamber is of the view that if the prosecution's questioning is conducted first, it is likely to assist Witness 80 in giving her evidence and may prepare her to face any questions by the defence which she may find challenging.[29]

I see no reasons to depart from the reasoning adopted by this Chamber in the abovementioned decision.

26. Finally, the argument that admitting this material on a *prima facie* basis will save time during proceedings, as the Chamber will not have to rule on the admissibility of each and every document

[29] ICC-01/05-01/08-886, paragraph 19.

submitted to it is misconceived. Indeed, the Chamber will only be postponing, not eliminating, the need to make a ruling on admissibility, to the end of the case. The time allegedly saved during the proceedings will therefore be "lost" again at the end of the case. Therefore, I cannot agree with the Majority that the measure will have any beneficial effect on the expeditiousness of the proceedings.

27. Having to evaluate the probative value and to give weight to the written statements in addition to the in-court testimony of witnesses may have serious practical consequences for the Chamber at the end of the case. For example, should the statements and the in-court testimony contain contradictions, the Chamber will have to carefully review these inconsistencies, determine their impact on the credibility of the witnesses, or elect whether to give more importance to the statements or to the testimony. This means analysing and evaluating thousands of additional pages, which adds to the length and the complication of the proceedings, without necessarily adding to the quality of the witness's evidence.

28. Even though the judges of this Court are all highly qualified individuals and are professional judges who operate according to very high standards, in my view, increasing the amount of documentation in the case record may create potential problems caused by the sheer volume and possible incompatibility of the material's content, thereby increasing the risk of confusion in the drafting of the judgment in the case. In my opinion, this risk is not worth taking in the present circumstances of the Bemba case.

e. Other arguments in the Majority Decision

29. The Majority puts forward some additional points which I would like to address here. First, the Majority argues that the *prima facie* admission of statements and other documents "will allow for more coherence between the pre-trial and trial stages of the proceedings".[30] With respect, I do not agree that this alleged need for coherence between the stages of the proceedings can be used as an argument justifying the measure adopted in the Decision. The Pre-Trial and Trial proceedings before the ICC are two completely different stages, to which different rules apply. The purpose of the pre-trial stage is to determine whether the evidence against the accused is sufficient to "establish substantial grounds to believe that the person committed each of the crimes charged"[31] and thereby justify the confirmation of any charges against him. To do so, the Pre-Trial Chamber mainly relies on written evidence. This is not the case at the trial stage, as explained above. Pre-Trial and Trial Chambers apply different evidentiary standards.[32] This, in my opinion, militates for a clear demarcation between the two stages and therefore, the argument of the Majority does not support the Majority Decision.

[30] ICC-01/05-01/08-1022, paragraph 27.
[31] Article 61(7) of the Statute.
[32] For this reason, I am not convinced by the relevance of referring to pre-trial decisions as authority to support the arguments of the Majority. See, for example, paragraph 10 of the Majority Decision.

30. Secondly, the Majority refers to the *travaux préparatoires* of the ICC, and suggests that the system finally put in place "provided that the Court has discretion to rule on the relevance or admissibility of any piece of evidence".[33] While I do not disagree with this assertion, I do, however, note that this does not imply that the Chamber has a right to *prima facie* admit all documents which may be submitted by a party. Moreover, I recall that during the negotiations of the Rome Statute, France made a proposal which intended to give a great discretion to the Chamber in terms of evidence, and which is in essence identical to the conclusions of the Majority Decision.[34] Some delegations expressed concerns about a free admissibility by the Chamber, which led to the rejection of the French proposal.[35] Instead, the actual system of evidence was put in place.

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[33] ICC-01/05-01/08-1022, paragraph 17.

[34] See Projet de Statut de la Cour Criminelle Internationale: Document de travail présenté par la France, Article 105: " *Les crimes peuvent être établis par tout mode de preuve, et la chambre de première instance décide, d'après son intime conviction. Elle ne peut fonder sa décision que sur des preuves qui lui sont apportées au cours des débats et discutées contradictoirement devant elle. Le doute doit profiter à l'accusé.*" See also the Proposal submitted by France concerning the Rules of Procedure and Evidence, PCNICC/1999/DP.10 of 22 February 1999, Rule 37.1, Principle of freedom of evidence "All evidence submitted by the parties shall, in principle, be admissible before the chambers of the Court, which shall assess freely its probative value in accordance with article 69, paragraph 4". See the proposal after the June draft meeting dated of 1st July 1999, PCNICC/1999/WGRPE/RT.5: 'Rule 6.1 General Provision: (a) All evidence submitted by the parties shall, in accordance with the discretion described in articles 64 paragraph 9, be assessed freely by a chamber of the court to determine its relevance and admissibility in accordance with article 69'. The last version of the rule is the one appearing in the Rules of Procedure and evidence.

[35] Text of The Draft Statute for the International Criminal Court, Part VI-The Trial, 1 April 1998, note 15: "A proposal was made, supported by a number of delegations, to add the following paragraph to the Statute:

> "The Court may decide not to admit evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias."

Other delegations supported a proposal that the Statute or Rules of Procedure and Evidence also make reference to the exclusion of evidence of prior sexual conduct of a witness, evidence protected by the lawyer-client privilege, as well as other grounds of exclusion. It was finally proposed that these matters should be addressed in the Rules of Procedure and Evidence, as opposed to in the Statute. Many delegations also felt that the Rules should provide sufficient flexibility to enable the Court to rule on the relevance and admissibility of evidence where no other rule provides guidance on the standards to be applied. See also, Otto Triffeterer, *Commentary on the Rome Statute of the International Criminal Court*, pages 1305-1306: "an initial French draft of rule 63, setting out the general provisions relating to evidence,

31. Finally, as stated above,[36] I believe that the timing of the issuance of the Majority's Decision is inappropriate. The Decision will have serious consequences on the course of the proceedings, including on the investigations and on the preparation for trial of both parties. Such a decision, which constitutes a major departure from the precedents set by Trial Chambers I and II, should have been rendered well ahead of the commencement of the trial, so as to allow parties and participants to adapt their preparation in consequence. In my opinion, the late filing of the Majority's Decision goes against the principle of judicial certainty and therefore causes irreparable prejudice to both parties.

f. Conclusion

32. For the aforementioned reasons, I disagree with the entirety of the Majority decision. I would recommend that this Chamber follows the established practice and undertakes a case-by-case analysis as to whether statements and other documents are admissible as evidence.

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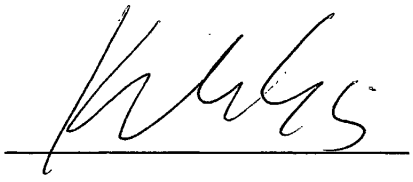
would have established an overarching principle of admissibility for all evidence, effectively undoing the compromise reached in Rome. After a June 1999 drafting meeting the pendulum swung in the other direction, with a proposed version of the rule that would have obligated the Court to assess all evidence for the purpose of admissibility. At the second session of the Preparatory commission, the current form of the rule was developed, which authorizes rather than obligates a chamber to 'assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.' At the fifth session of the Preparatory Commission, an attempt was made to include reliability as a factor to be freely assessed by a chamber in determining relevance or admissibility. No consensus was reached on this proposal, with the result that the Rules are silent in the issue."

[36] See above, paragraph 17.

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



Judge Kuniko Ozaki

Dated this 23 November 2010

At The Hague, The Netherlands