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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

Public Redacted Version of the Partly Dissenting Opinion of Judge Kuniko Ozaki on the First decision on the prosecution and defence requests for the admission of evidence of 15 December 2011

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

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I. Introduction

1. This Partly Dissenting Opinion is in response to the "First decision on the prosecution and defence requests for the admission of evidence ("Decision"),[1] and will address the reasons underlying my disagreement with the Majority over some of the issues therein.

2. Although I agree with the Decision with regard to a majority of the documents submitted by the parties, I cannot concur with the outcome of the Majority Decision with regard to two categories of documents. In addition, in one case, I would like to clarify my understanding of the reasoning. Finally, I will address an additional procedural issue for a number of documents.

3. Before going into the specific documents, however, I would like to address briefly the general test applicable to the determination of admissibility of evidence.

4. Article 69(4) of the Rome Statute ("Statute") provides that "[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence" ("Rules"). This means that, in order to admit an item into

[1] Decision on the prosecution and defence requests for the admission of evidence, 15 December 2011, ICC-01/05-01/08-2012-Conf.

evidence, this item has to (1) relate, or be logically connected, to the issues to be considered by the Chamber,[2] (2) have *prima facie* probative value, and (3) have such probative value as to outweigh any potential prejudicial effect. The first element, though not specifically mentioned in Article 69(4), is a prerequisite of any admissibility or relevance assessment.[3] As for elements other than those listed above, Article 69(4) does not elaborate on them; they must be determined on a case-by-case basis, in accordance with Articles 69(3), 64(2) and any other relevant provisions of the Court's legal framework. This interpretation corresponds to the three-stage test which has been adopted by Trial Chamber I and II, and which is now adopted, quite correctly, by the Chamber in the Decision.

5. I have to point out, however, that the use of the term "relevance" in the three-stage test, which is also used in Article 69(4) of the Statute, may, in some cases, create confusion. "Relevance" in Article 69(4) refers to the well-known and widely accepted concept of relevancy, meaning "[l]ogically connected and tending to prove or disprove a matter in issue; having appreciable probative value – that is, rationally tending to persuade people of the probability or possibility of some alleged fact."[4] This is clear from the wording of Article 69(4), which provides that one condition of "relevance or admissibility" is, among others, probative

[2] This element is also called "materiality" in some jurisdictions.
[3] See, for example, U.S. Federal Rules of Evidence (2010), Rule 401 provides that: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The notes of the Advisory Committee on the Rules add that: "The rule uses the phrase 'fact that is of consequence to the determination of the action' to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word 'material.'" See also, Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd Ed. (2008), at page 1323.
[4] Black's Law Dictionary, 9th Ed. (2009), page 1404.

value.[5] On the other hand, "relevance" in the three-stage test means relevant to the trial, in that "it relates to matters that are properly to be considered by the Chamber in its investigation of the charges against the accused",[6] and is distinct from probative value, which is the second criterion. I would like to clarify, therefore, that whenever I refer to the term "relevance" in the context of the three-stage test, which I fully support, I use the term as defined in that test.

6. This having been addressed, I now turn to the specific instances where I either disagree with the Majority on the outcome, or want to clarify the reasons.

II. Disagreement in relation to the outcome

a. Victims' Application Forms

7. The Majority of the Chamber declined to admit into evidence four victims' application forms, arguing that they are not relevant and that the probative value of the forms is diminished by the circumstances in which they were created, and that their admission into evidence may be perceived as unfair and thus be prejudicial to the proceedings.[7]

[5] See also the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, which provide, at Rule 89(C): "A Chamber may admit any relevant evidence which it deems to have probative value."
[6] Corrigendum to Decision on the admissibility of four documents, 20 January 2011, ICC-01/04-01/06-1399-Corr, paragraph 27 and Corrigendum to Redacted Decision on the defence request for the admission of 422 documents, 8 March 2011, ICC-01/04-01/06-2595-Red-Corr, paragraph 39, as quoted in the Decision, paragraph 14.
[7] Decision, paragraphs 99-100 and 102.

8. With regard, I cannot agree with the reasoning of, or the conclusion reached by, my Colleagues. A proper application of the three-stage test in the case of these four application forms shows that these documents are admissible as evidence. But before applying the three-stage test to these application forms, I would like to address three preliminary issues.

9. First, I agree with the Majority's rejection of the prosecution's argument that the forms are inadmissible as they constitute prior-recorded testimony, without fulfilling the conditions of Rule 68 of the Rules. Trial Chamber II has addressed the meaning of the term "testimony" in these words:

> Clearly, statements made out of court can equally qualify as testimony. [...]
>
> At the same time, the Chamber considers that not every communication of information by an individual outside of the courtroom is testimony in this sense. [...]
>
> a statement given to representatives of an intergovernmental organisation with a specific fact-finding mandate may be considered as testimony if the manner in which the statement was obtained left no doubt that the information might be used in future legal proceedings. [...]
>
> The second key factor in determining whether an out-of-court statement qualifies as testimony in the sense of article 67(l)(e) and rule 68 is that the person making the statement understands, when making the statement, that he or she is providing information which may be relied upon in the context of legal proceedings. It is not necessary for the witness to know against whom his or her testimony may be used, or even for the witness to know which particular crime is being investigated or prosecuted. It is important, however, that the statement is formalised in some manner and that the person making the statement asserts that it is truthful and based on personal knowledge. A unilaterally prepared affidavit may thus also qualify as testimony if the person making it clearly had the intention of making factual assertions for the purpose of future or ongoing legal proceedings.[8]

[8] Decision on the Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, paragraphs 44-45 and 48-49.

10. This being said, to be a prior-recorded testimony under Rule 68 of the Rules, a document must bear minimum qualities which enable it to become a suitable "substitute for oral evidence in court",[9] for example, qualities such as those provided for in Rule 111 of the Rules. These minimum qualities allow prior-recorded testimonies under Rule 68 to be admitted for the truth of their content. However, victims' application forms do not have such minimum requirements. As pointed out by the Majority,[10] when filling out their forms, the victim applicants only aimed at being recognised as participating victims in the proceedings. The forms are mere questionnaires, created with a view to allowing potential victims to demonstrate that they fulfil the criteria of Rule 85 of the Rules – their content is not meant to be proven beyond reasonable doubt. Therefore, the application forms fall outside the scope of Rule 68 of the Rules and should simply be assessed, like any other non-testimonial materials, through the three-stage test.

11. Second, as I already explained in my Partly Dissenting Opinion on the Order on the procedure relating to the submission of evidence ("Dissent 1471"), "parties to criminal proceedings generally tender materials into evidence either: (1) to prove the truth of their content; or (2) to assess or test the credibility of a witness".[11] In this regard, Trial Chamber I ruled that "not all information relating to the credibility [of a witness] is necessarily admissible" and that the general requirements of the three-

[9] ICC-01/04-01/06-2595-Red-Corr, paragraph 55.
[10] Decision, paragraph 100.
[11] Partly Dissenting Opinion of Judge Kuniko Ozaki on the Order on the procedure relating to the submission of evidence, ICC-01/05-01/08-1471, paragraph 9. The Majority seems to adopt a similar point of view, in paragraph 144 of the Decision, although I dissent from its application in that part of the Decision, as I will explain below.

stage test should be applied before a determination on the admission into evidence.[12] While I agree with this ruling, I would add that this distinction in the purpose of the admission into evidence inevitably leads to a distinction in the threshold of the three-stage admissibility test, depending on the nature of the materials considered, especially with regard to the evaluation of the probative value. Hence, the probative value of material merely admitted to test the credibility of a witness needs not be as high as that of materials admitted to prove the truth of their contents.[13]

12. Finally, I cannot concur with the Majority's argument that rejecting the application forms will not cause prejudice to the defence because "its questioning on potential inconsistencies is already reflected in the transcripts."[14]

13. In typical proceedings, if either party, during its questioning, refers to questionable materials, the Chamber, either *proprio motu* or following an objection of the opposing party, rules on the use of the materials and thereby decides on whether to admit such materials. In controversial cases, the Chamber may postpone its determination to a later stage, and such postponement will be reflected in the transcript. That is the procedure which I envisaged in my Dissent 1471, in which I said that the parties, while questioning witnesses, can refer to, or quote a limited part or parts of materials, in order to have the relevant information in evidence through the transcript, or may, in some circumstances, request the admission into

[12] ICC-01/04-01/07-2595-Red-Corr, paragraph 54.
[13] See ICC-01/05-01/08-1471, paragraph 9.
[14] Decision, paragraph 102.

evidence of the relevant part(s) of the relevant materials.[15] One possibility does not necessarily exclude the other.

14. In the present case, however, following the Appeals Chamber's "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'" ("Appeal Judgment"),[16] this Chamber repeatedly stated that admissibility issues would be ruled upon later.[17] Therefore, the mere fact that materials were discussed in Court and that this information is on the record of the case does not necessarily mean that it will be deemed admissible by the Chamber when making its final determination on the case.

15. In properly applying the three-stage test to the application forms, it appears that the forms are relevant, as they all refer to the events charged and relate to the credibility of witnesses, which is also an issue to be determined by the Chamber.

16. The victims' application forms also bear minimum probative value warranting their use in testing the credibility of witnesses. Even though their inherent defects as discussed in paragraph 10 above undermine their probative value, the latter remains sufficient for credibility purposes.

[15] ICC-01/05-01/08-1471, paragraph 12.
[16] Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386.
[17] For example, see Transcript of hearing on 14 June 2011, ICC-01/05-01/08-T-128-CONF-ENG CT2, page 25, lines 3-4; Transcript of hearing on 30 June 2011, ICC-01/05-01/08-T-135-CONF-ENG ET, page 10, lines 17-20; [REDACTED]; Transcript of hearing on 1 September 2011, ICC-01/05-01/08-T-151-CONF-ENG CT, page 71, lines 19-20.

Indeed, the forms were authenticated by the witnesses, discussed at length through pointed questions, and sometimes even corrected by the witnesses in Court.

17. In this regard, I cannot agree with the Majority's argument that the probative value of the forms is invalidated by the fact that they were not "collected to support or challenge the substantive criminal charges in the case" and that "no formal requirements govern their creation, such as those applicable to the collection of "formal statements" under Rules 111 and 112 of the Rules."[18] With this finding, and by using the examples of Rules 111 and 112 of the Rules, the Majority seems to deal with the victims' application forms under the prism of Rule 68 of the Rules and dismisses the forms for failing to constitute proper statements or testimonies. This approach is inconsistent with the Majority's subsequent rejection of the prosecution argument relating to Rule 68 of the Rules.[19] Indeed, if the forms do not constitute prior-recorded statements, the Majority should not reject them for their lack of statement qualities.

18. In addition, if, to be admitted, materials needed to have been collected with a view to provide evidence in the case, the Chamber would be forced to reject the admission of a large number of materials which are admitted in the present Decision.[20] The same goes for the "administrative" nature of the forms, their "limited purpose" and for the "relationship of confidence between a potential victim and the Registry of the Court", which

[18] Decision, paragraph 100.
[19] Decision, paragraph 101.
[20] For example, none of the medical reports and certificates, academic articles and reports, *procès-verbaux*, domestic court documents or official CAR documents, or [REDACTED] materials were originally created with a view to provide evidence in the present case.

characterises the creation of the forms.[21] As explained above, I do not contest that the forms' probative value can be lessened by the circumstances under which they are made; however, this is not as significant as to deprive the forms of any probative value. Again, it will be the case of an overwhelming majority of materials that the circumstances of their creation will be uncertain or blurry – it is for the Chamber to decide on the weight of these materials accordingly.

19. Finally, the Majority's assessment of a potential prejudicial effect is misguided. First, the Majority argues that "admitting application forms as evidence may be perceived by victim applicants as an unfair use of documentation that was provided to the Court for a discrete purpose."[22] The Majority then rules that rejecting the application forms will not cause prejudice to the defence because "its questioning on potential inconsistencies is already reflected in the transcripts."[23]

20. With regard, this is not a correct application of this part of the three-stage test, which stipulates that the Chamber must "weigh the probative value of the item in question against the prejudicial effect that its admission as evidence 'may cause *to a fair trial or to a fair evaluation of the testimony of a witness*'"[24] (emphasis added). In its reasoning, the Majority does not in fact argue that the admission of the victims' application forms would cause prejudice to the fair evaluation of the testimony of the dual-status victim-witnesses individuals. The Majority merely argues that the victim

[21] Decision, paragraph 100.
[22] Decision, paragraph 102.
[23] Decision, paragraph 102.
[24] Decision, paragraph 16.

applicants may *perceive* the admission of the forms as unfair. With regard, this is not sufficient to constitute a prejudicial effect under the three-stage test.

21. To the contrary, I would argue that the victims' application forms do not cause any prejudice to the fairness of the proceedings or the fair evaluation of the testimonies, as the witnesses had ample opportunity to discuss and explain the content of their application forms to the court. Also, as discussed in my Dissent 1471, considering the nature and content of victims' application forms, I believe that they should be admitted in full.[25]

22. Lastly, the Majority's mention in paragraph 99 of the Decision, of the possibility that some victims' application forms be admitted into evidence in some circumstances is contradictory to its finding that the mere nature of the forms makes them inadmissible. The Majority gives an example, which, in my view, is applicable in this case, but does not explain how it reached the opposite conclusion.

23. Therefore, I would admit the victims' application forms, for the purpose for which admission was sought, namely to test the credibility of the related witnesses.

b. Witness' written statements

[25] ICC-01/05-01/08-1471, paragraph 18.

24. I have expressed my opinion on the admission of written statements at length in my Dissenting Opinion on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence,[26] which I don't intend to repeat here. However, the present situation warrants some additional analysis.

25. The Majority applies the three-stage test to the written statements of Witnesses 42, 73 and 209. The Majority finds that "the statements are primarily relevant because they assist the Chamber in assessing, contextualising and weighing the witnesses' testimony",[27] and adds that their admission into evidence "enables the Chamber to undertake a fuller evaluation of the witness' testimony".[28] The Majority further argues that in order for the Chamber "to properly discharge its statutory truth-finding prerogative, it should be able to compare a witness' testimony against the entirety of his or her written statement, as opposed to merely those excerpts that the parties decide to refer to in court in the limited time available to them to conduct their questioning."[29]

26. With regard to the statements' probative value, the Majority argues that it stems from the circumstances in which they were created as well as from the fact that the witnesses concerned "testified in court as to the accuracy of their written statements."[30]

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[26] 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.
[27] Decision, paragraph 142.
[28] Decision, paragraph 142.
[29] Decision, paragraph 143.
[30] Decision, paragraph 144. In this regard, I note that while this assertion is correct in relation to Witnesses 42 and 73, it does not reflect the words of Witness 209, who told the Court that he had nothing to add or to

27. Finally, addressing the issue of prejudice, the Majority rules that the statements of Witnesses 42 and 73, if admitted for the purpose of assisting the Chamber's evaluation of their in-court testimony, thereby not constituting a substitute for oral testimony, would not cause prejudice and do not need to fulfil the requirements listed in the Appeal Judgment.[31] Regarding the statement of Witness 209, the Majority argues that the purpose for which the admission is requested is a cause for concern, as "written statements should not be used to fill in the gaps in a witness' testimony."[32] However, the Majority concludes that the statement may nonetheless be admitted, "for the same limited purpose as those of Witnesses 42 and 73 – namely, to complement Witness 209's testimony and to enable the Chamber to better assess its veracity and determine the weight it should be afforded."[33]

28. With regard, I cannot agree with the Majority's reasoning, and would reject the admission into evidence of the three witness statements admitted by the Majority. In my analysis below, I will first address the purpose and interpretation of Rule 68 of the Rules, and the findings of the Appeals Judgment in this regard. Then, I will explain my disagreement with the manner in which the Majority applies the three-stage test.

29. First, I believe that the purpose of Rule 68 of the Rules is to create an exception to the principle of orality, by which the admission of a prior-

take away from his statements, but that he "noticed a few nuances in terms of form". See Transcript of hearing on 25 May 2011, ICC-01/05-01/08-T-117-CONF-ENG ET, page 6, lines 16-17 and 23.
[31] Decision, paragraphs 145-150.
[32] Decision, paragraph 153.
[33] Decision, paragraph 154.

recorded testimony in fact *replaces* oral evidence. This is how this Rule was understood and applied by Trial Chambers I and II,[34] and this is also how the Appeals Chamber seems to view it in the Appeal Judgment.[35] Because Rule 68 is an exception which must be narrowly applied, the Appeals Chamber notably ruled that:

> In deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In the view of the Appeals Chamber, this requires a cautious assessment. The Trial Chamber may, for example, take into account, a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.[36] (footnotes omitted)

30. In the present Decision, the Majority chose to admit written statements to "complement" oral evidence and use them as a "basis for assessing that testimony and determining the weight it should be afforded."[37] For this reason, while applying Rule 68 of the Rules, the Majority decided not to apply the requirements listed in the Appeal Judgment. In my opinion, this is not a correct application of Rule 68 of the Rules or of the Appeal Judgment. As previously said, any deviation from the principle of orality should be kept to a minimum, and the Chamber should ensure that such

[34] See, for example, Trial Chamber I: 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; and ICC-01/04-01/07-2595-Red-Corr. Trial Chamber II: Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr; 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-01/04-01/07-2289-Corr-Red; Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010, ICC-01/04-01/07-2362; and Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, ICC-01/04-01/07-2954.
[35] ICC-01/05-01/08-1386, paragraphs 74-81.
[36] ICC-01/05-01/08-1386, paragraph 78.
[37] Decision, paragraph 150.

deviation "is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally."[38] While such deviation can be allowed and written statements admitted into evidence for the purpose of assessing a witness' credibility, it remains that such admission should be as narrow and pointed as possible.[39] I have addressed this issue previously, and stated that admission of part(s) of a written statement may be warranted "after a contradiction appears between the witness's written statement and his in-court testimony" and that in such cases, parties can "request the admission into evidence of the relevant part(s) of the statement [...]."[40] While the Majority argues that they will use the witness statements to assess or test the accuracy of the oral testimony of the witnesses, if no inconsistency exists between the statement and the oral evidence, there should be no need to request the admission into evidence of the written statement just for credibility assessment purposes.

31. Moreover, while the Majority also argues that the admission of the statements will come as a "complement" to oral testimony, in fact, if parts of the statements not used by the parties in their questioning are admitted into evidence, these parts will "fill the gaps" in the witnesses' evidence, which is what the Majority states is an impermissible practice. Or, if the Majority, by "complement" means to admit witness statements in order for them to provide, for example, "relevant background information"[41], or for any other similar purposes, the Chamber must make a proper item-by-

[38] ICC-01/05-01/08-1386, paragraph 78.
[39] ICC-01/05-01/08-1471, paragraphs 11-13.
[40] ICC-01/05-01/08-1471, paragraph 12.
[41] ICC-01/05-01/08-1386, paragraph 78.

item assessment, in accordance with the guidelines set out by the Appeals Chamber.

32. The Majority's analysis of Rule 68 leads to a general deviation from the principle of orality of proceedings and of the actual purpose of Rule 68. As I argued above in paragraph 29, Rule 68 of the Rules covers cases whereby prior-recorded statements are admitted *in lieu* of oral evidence. By adopting a reasoning which makes evident that admission of statements for the purpose of "complementing" or "evaluating" a witness' oral evidence will always be considered permissible by the Chamber (provided that the witness gave his consent), the Majority admits the written statements "through the back door" and in fact avoids doing an item-by-item analysis, which is in contradiction with the Appeal Judgment. By doing so, the Majority creates a very broad exception to Rule 68 and to the requirements of the Appeals Judgement, in fact almost putting in place a whole new category of testimonial evidence, falling outside the ambit of Rule 68.

33. In my view, the Majority's reasoning and its consequences are also prejudicial to the rights of the accused. In this context, I note that the first two parts of the three-stage test, *i.e.* relevance and probative value, are a non-issue when it comes to witness statements. Those statements are evidently relevant to the case, and have probative value, by the circumstances in which they were created. However, in the present case, they do not pass the third stage of the test. In my view, multiple prejudicial effects can result from the admission of the tendered

statements and may endanger the fairness of the proceedings, as discussed item-by-item below.

34. I now turn to the individual analysis of the tendered statements, excluding those for which Rule 68 requirements are missing. First, the prosecution tenders the statement of Witness 42, arguing that its admission is warranted to "rebut an expressed or implied charge [...] of recent fabrication, influence, motive or collusion".[42] Implicitly, the prosecution is referring to the alleged fabrication of evidence [REDACTED][43] and to [REDACTED][44] I find unconvincing the prosecution argument in this regard.

35. First, while the allegations of fabrication or collusion came up during [REDACTED]. The prosecution should not be allowed to remedy its own failure by requesting the admission of the witness statement. [REDACTED]. The prosecution cannot only now attempt to address allegations of fabrication, [REDACTED].

36. As regards the written statement of Witness 73, the prosecution also alleges that its admission would serve to rebut an expressed or implied charge of recent fabrication, influence, motive or collusion.[45] Although no further detail is given, we can assume that the prosecution refers to the parts of Witness 73's oral testimony in which he [REDACTED]. Here again, I do not see how this can justify the admission of the statement. The

[42] Prosecution's submission of the list of materials it requests to be admitted into evidence, 14 June 2011, ICC-01/05-01/08-1514-Conf-AnxA , pages 7-8.
[43] [REDACTED]
[44] [REDACTED]
[45] ICC-01/05-01/08-1514-Conf-AnxA , page 9.

prosecution had an opportunity to clarify the matter in re-examination and opted not to do so. Once more, the prosecution should not be allowed to remedy its own failure by requesting the admission of the witness statement.

37. The prosecution finally requests the admission into evidence of Witness 209's written statement, alleging that the oral testimony of the witness does not capture all of the information contained in the statement.[46] The admission of Witness 209's statement with a view to complement deficiencies in his evidence is a violation of the principle of orality and ultimately, it would send the message that parties can simply avoid questioning witnesses on some issues and subsequently tender a favourable statement into evidence. Such approach in my view is incompatible with Rule 68 of the Rules and constitutes a violation of the rights of the accused. As pointed out by the Majority,[47] the prosecution in fact voluntarily took about half an hour less than its original estimate to question the witness. Any alleged incomplete information therefore can only be the prosecution's own fault, and the admission of the written statement cannot be used as an attempt to remedy its own failure, especially considering the ruling of the Appeals Chamber cited above.[48]

38. Admission of the written statements of Witnesses 42, 73 and 209 will also be prejudicial to the rights of the accused and to the fairness of the proceedings. The statements constitute highly incriminating evidence and while large parts have been discussed in Court and were subject to the

[46] ICC-01/05-01/08-1514-Conf-AnxA , pages 38-39.
[47] Decision, paragraph 152.
[48] ICC-01/05-01/08-1386, paragraph 78.

scrutiny of the parties, other parts were not. The defence thus will have no control over, or knowledge of which parts may be used by the Chamber in its final determination. Moreover, the admission will add uncertainty around the treatment that the Chamber will give to a witness's evidence, if the evidence in the transcript and the statement are the same, but whereas a contradiction appears in cross-examination. This risk is heightened by the ambiguity of the Majority's intentions relating to the use of the statements, exemplified by such broad expressions as "assist the Chamber in assessing, contextualising and weighing", "undertake a fuller evaluation", or "complementing". In any event, the Chamber will have to look at twice the volume of incriminating material, while the defence's means to defeat such material will remain limited to oral evidence. Finally, the credibility assessment of witnesses should as much as possible take place in the courtroom, where the parties, participants and the Chamber are able to observe the demeanour and reactions of the witness.

39. In light of the above, I would have rejected the admission of all three witness' written statements admitted by the Majority.

III. Clarification of the reasoning or of procedural matters

a. Procès-verbaux d'interrogatoire

40. The Chamber decided to admit the 203 *procès-verbaux* submitted by the prosecution, ruling that:

> [...] the *procès-verbaux* are relevant to the Chamber's assessment of the contextual elements of the crimes for which the accused is charged. They memorialise Witness 9's interviews of hundreds of victims of crimes allegedly committed by

> MLC troops, and therefore may assist the Chamber in its assessment of whether the crimes allegedly perpetrated by MLC troops were committed as part of a widespread or systematic attack directed against a civilian population, pursuant to or in furtherance of a State or organizational policy. *Second,* the *procès-verbaux* were the focus of a significant part of Witness 9's testimony and will therefore assist the Chamber in assessing that testimony.[49]

The Chamber further ruled that:

> The prosecution states that the *procès-verbaux* are "relevant to prove *inter alia* that crimes committed by the MLC were widespread". The Chamber is satisfied that the potential prejudice to the accused will be minimal if the *procès-verbaux* are admitted for this limited purpose. The Chamber reaches this conclusion because (i) as is generally the case, if the Chamber finally concludes that the *procès-verbaux* are hearsay evidence, the Chamber will ascribe less probative value to the *procès-verbaux* than testimony or other evidence that is testable in court; (ii) the *procès-verbaux* are being offered to prove the contextual elements of the crimes charged and not the accused's individual criminal responsibility; and (iii) the defence had the opportunity to question Witness 9 regarding the circumstances in which the *procès-verbaux* were created and in which the statements therein were made.[50]

41. Although the Chamber rules that the *procès-verbaux* are only admitted for a limited purpose, in fact, it could be inferred from these passages that they are actually admitted for the truth of their content, as the Chamber refers to the assessment of whether crimes were committed as part of a widespread or systematic attack directed against a civilian population, pursuant to or in furtherance of a State or organisational policy. Such use may go to the substance of the case, indicating that the truth-value of these documents may be considered. I do not take such view, and would like to clarify my understanding.

42. While I agree to admit the *procès-verbaux* as fulfilling the three-stage test, the specific purpose of this admission should be carefully delimited. The

[49] Decision, paragraph 64.
[50] Decision, paragraph 69(footnotes omitted).

procès-verbaux, although tendered through Witness 9, are hearsay evidence, and not his to attest. In nature, these *procès-verbaux* are witness statements from a Central African Republic ("CAR") domestic jurisdiction, which, to be admitted for the truth of their content, would need to conform to the requirements of Rule 68 of the Rules.[51] The information contained in the *procès-verbaux* was collected, in the absence of either party to the *Bemba* case to test the truth of their content, from a very large number of individuals who are not witnesses in this case and who can therefore not confirm the content of their statement. This kind of information, which cannot be tested by the parties in court, cannot constitute valid evidence to prove the truth of their content, and the admission of the *procès-verbaux* for their truth-value is prejudicial to the fairness of the proceedings and to the rights of the accused.

43. If these *procès-verbaux* can be admitted, it can only be for a limited purpose, that is, to support Witness 9's testimony with regard to the investigation led by him and to the large number of complaints he received in relation to the 2002-2003 events in the CAR, to the exclusion of any hearsay aspect. Any other use of the *procès-verbaux* in my view is improper.

b. Bar Table Materials

44. The Chamber ruled in favour of admitting into evidence: (1) three reports;[52] (2) two *procès-verbaux de constat*;[53] a *note de service*;[54] and a video,[55]

[51] For a similar situation, see ICC-01/04-01/07-2635, paragraphs 52-53.
[52] "La RCA: Une étude de cas sur les armes légères" (CAR-DEF-0002-0713); "Epidemiological Fact Sheet" (CAR-D04-0002-1090); and "Rapport National République Centrafricaine, Objectifs du millénaire pour le dévelopement" (CAR-D04-0002-1095).

all tendered by the defence. The common feature of these documents is that none of them have been authored or authenticated by the witnesses through which they are tendered. In responding to the prosecution's objections to the manner in which these documents were submitted, the Chamber stated that:

> [t]he Court's legal framework contains no requirement that items sought to be admitted into evidence must be submitted via the "bar table" when they cannot be submitted through a witness. While the use of a "bar table" motion is one permissible way to seek the admission of documentary evidence, it is not the only one. In any event, whether an item's admission is sought via the "bar table" is a distinction without a difference because, regardless of the manner in which an item's admission is sought, its admissibility will be determined under the three part test discussed above.[56]

45. It is correct to say that neither the Statute nor the Rules provide for the distinction between bar table evidence and evidence tendered through a witness. I also agree that the admissibility of all evidence, whether it is tendered through a witness or not, should be assessed through the three-stage test.

46. This, however, does not mean there are no distinctions to be made. Evidence submitted through the testimony of a witness, by its nature, can be presumed to possess certain elements of admissibility from very early on. For example, such material's connection to relevant issues in the case and its probative value can already be evaluated at trial, through pointed questions to the witness on the origins and contents of the material. Therefore, in most cases, the admissibility of those materials can be

[53] CAR-OTP-0002-0298; CAR-OTP-0003-0150.
[54] CAR-OTP-0042-0237.
[55] CAR-DEF-0001-0832.
[56] Decision, paragraph 55 (footnotes omitted). See also paragraphs 92-93.

decided on the spot. So-called bar table materials, on the other hand, cannot easily be evaluated through a testimony, and the admissibility determination must be done entirely by the Chamber, based on detailed submissions by both parties. The concept of bar table is therefore reflective of a distinct methodology, and is an efficient tool to duly carry out this scrutiny exercise. This is the reason why it was adopted and used extensively by both Trial Chambers I and II, as well as used by this Chamber.[57]

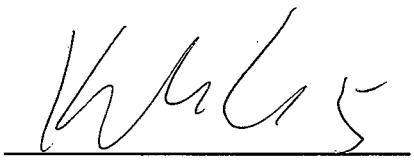
47. In the present case, following the Appeal Judgment, the Chamber issued an Order, requesting the parties to submit all evidence, making no distinction between evidence to be submitted through witnesses, and other types of evidence.[58] Due to the special circumstances surrounding this Order, although the manner in which some of the materials were submitted to the Chamber was inadequate, in the spirit of efficiency and expeditiousness of the proceedings, I would have admitted the documents as if they had been tendered through the "bar table". However, whether this notion is called "bar table" or not, I would not want to ignore this procedural distinction between materials tendered through a witness and those that are not – the bar table may be a useful tool for the Chamber in the future.

IV. Conclusion

[57] Transcript of hearing on 21 October 2010, ICC-01/05-01/08-T-30-ENG ET WT, pages 12-14.
[58] Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1470.

48. For the aforementioned reasons, I disagree with the Majority's views expressed in paragraphs 99-103 of the Decision, which reject the victims' application forms, and to paragraphs 141-154 of the Decision, which grant the admission of three witness statements. I agree with my Colleagues on all other findings, subject to the clarifications above.

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



Judge Kuniko Ozaki

Dated this 14 February 2011

At The Hague, The Netherlands