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THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

**SITUATION IN CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. Jean-Pierre Bemba Gombo***

Public Document

**Defence appeal against the "Decision on the admission into evidence of material
contained in the Prosecution's list of evidence" of 19 November 2010**

Source: Defence Team of Mr Jean-Pierre Bemba Gombo

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

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A. BACKGROUND

1. On 19 November 2010, Trial Chamber III rendered its “*Decision on the admission of evidence of materials contained in the prosecution’s list of evidence*” (“the Impugned Decision”)¹. In the Impugned Decision, the majority of Trial Chamber III (“the Majority”) held that “*any materials, including witnesses’ written statements and related documents previously disclosed to the defence and which will form part of the prosecution’s Revised List of Evidence are prima facie admitted as evidence for the purposes of the trial.*”²

2. The practical effect of the Impugned Decision was that hundreds of pages of statements of Prosecution witnesses were admitted “as evidence” in the case against the accused, three days before the opening of the proceedings, and before any assessment had been made by the Chamber of their probative value or prejudice to the accused.

3. On 23 November 2010, Her Honour Judge Ozaki issued her Dissenting Opinion,³ in which she disagreed with the Impugned Decision in its entirety. Judge Ozaki reasoned that no concept of “*prima facie* admissibility” exists in the legal framework of the ICC,⁴ and that the Impugned Decision violates the principle of the primacy of orality in proceedings before the Court.⁵ Judge Ozaki also noted that the Majority’s decision would prolong the proceedings as the parties could dispute each contentious fact included in the statements of the other parties’ witnesses statements, whereas normally these would not be raised in court,⁶ and that the Chamber itself would not be obviating the need to make rulings on the admissibility of these documents but merely postponing such a task.⁷

4. Judge Ozaki also noted the prejudice which an accused would suffer as a result of the Impugned Decision in that: (a) it precludes the accused from knowing with certainty the evidence against him since an assessment of the evidence will be left until the end of the trial proceedings;⁸ (b) it shifts the burden to the Defence to challenge the admissibility of documents,⁹ and (c) since the Defence is not obliged to take statements from its witnesses, the admission into evidence of all Prosecution witness statements may create an imbalance

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

² ICC-01/05-01/08-1022, para. 35.

³ Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, ICC-01/08-01/05-1028 (“Dissenting Opinion”).

⁴ ICC-01/08-01/05-1028, para. 4.

⁵ ICC-01/08-01/05-1028, paras 6 and 8.

⁶ ICC-01/08-01/05-1028, para. 24.

⁷ ICC-01/08-01/05-1028, para. 26.

⁸ ICC-01/08-01/05-1028, paras. 15 and 16. Both Defence and Prosecution sought leave to appeal under Rule 82(1)(d).

⁹ ICC-01/08-01/05-1028, para. 18.

between the parties as the Defence may not be able to rely on written statements to cover any potential lacunae in their questioning.¹⁰

5. On 29 November 2010, both the Defence and Prosecution sought leave to appeal the Impugned Decision.¹¹ On 26 January 2011, the Trial Chamber rendered its “*Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”*”,¹² granting leave to the parties to appeal the following question:

whether the legal framework of the ICC allows for *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Majority Decision, including witnesses’ written statement [sic] and related documents previously disclosed to the defence and which form part of the Prosecution’s Revised List of Evidence.

6. The Defence files this appeal pursuant to that decision, and sets out the following grounds of appeal:

- a. The legal framework of the Court does not allow for the *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Impugned Decision;
- b. The Majority’s regime of *prima facie* admission into evidence of documents contravenes the rights of the accused as set out in the legal framework of the Court;
- c. The Majority’s regime of *prima facie* admission cannot be reconciled with the principle of the primacy of orality imposed by the legal framework of the Court.

7. The Defence notes that neither the Statute nor the Rules of Procedure and Evidence set out the grounds which can be raised on appeal pursuant to Article 82(1)(d) of the Statute. As previously held by the Appeals Chamber, in the absence of the specification of any grounds the parties are at liberty to raise any relevant ground of appeal including the grounds as specified under Article 81(a) and (b).¹³

B. SUBMISSIONS

- a. **The legal framework of the Court does not allow for the *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Impugned Decision, in the context of how *prima facie* admissibility has been set out in the Impugned Decision**

¹⁰ ICC-01/08-01/05-1028, para. 20.

¹¹ Prosecution’s Application for Leave to Appeal the “*Decision on Admission into evidence of materials contained in the prosecution’s list of evidence*” 29 November 2010, ICC-01/05-01/08-1059; Application for Leave to Appeal Trial Chamber III’s decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 29 November 2010, ICC-01/05-01/08-1061.

¹² Decision on the prosecution and defence applications for leave to appeal the “*Decision on the admission into evidence of materials contained in the prosecution’s list of evidence*”, 26 January 2011, ICC-01/05-01/08-1169.

¹³ The Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s appeal against the decision of the Pre-Trial Chamber I entitled “*Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58*”, 13 July 2006 (reclassified as a public document on 23 September 2008), ICC-01/04-169, paras. 33-35.

i. *Prima facie* admissibility, as set out in the Impugned Decision

8. Before turning to an exploration of the legal framework of the ICC, the Defence will first examine how the concept of *prima facie* admissibility was approached in the Impugned Decision. It is the submission of the Defence that the Impugned Decision's approach conflicts with that of other Trial Chambers where the adopted approach has a firm legal basis in the ICC framework.

9. In the Impugned Decision, the Majority held that "*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*" and for the same reasons, admitted *prima facie* "*all the documents submitted to the Chamber by the prosecution in its List of Evidence*".¹⁴

10. In reaching its decision, the Majority distinguished between the admission of materials into evidence and Trial Chamber III's future determination of the probative value to be placed on this evidence. Probative value, it was held, refers "*to the reliability and weight to be attached to the evidence concerned*".¹⁵ The Impugned Decision's approach to *prima facie* admissibility envisages the wholesale admission into evidence of the material outlined above based on their *a priori* relevance to the proceedings. An individual assessment of individual pieces of evidence according to their probative value and weight will be left until the end of the proceedings.

11. This conflicts with the approach of Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* in its "*Decision on the admissibility of four documents*" where the Chamber set out the test for admissibility as follows:

27. **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...

28. **Second**, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value. In this regard there are innumerable factors which may be **relevant** to this evaluation, some of which, as set out above, have been identified by the ICTY....

31. **Third**, the Chamber must, where relevant, weigh **the probative value of the evidence against its prejudicial effect**. Whilst it is trite to observe that all evidence that tends to incriminate the accused is also "prejudicial" to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case.

32. It follows, that this will always be a fact-sensitive decision, and the court is free to assess any evidence that is relevant to, and probative of, the issues in the case, so long as it is fair for the evidence to be introduced.¹⁶

¹⁴ ICC-01/05-01/08/1022, para. 8

¹⁵ ICC-01/05-01/08/1022, para. 9

¹⁶ 13 June 2008, ICC-01/04-01/06-1399, paras. 26-32, para. 33

12. Trial Chamber I has since continued to apply this approach to *prima facie* admissibility in its later Decisions, holding, for example, that:¹⁷

the Statute and the Rules set out the principles to be applied to the admissibility of evidence, other than witness evidence, in various provisions. These provided the basis for the Chamber's general approach to the admissibility of documents, as described in its "Decision on the admissibility of four documents" on 13 June 2008.

13. Trial Chamber II in *The Prosecutor v. Katanga & Ngudjolo* has followed the approach to *prima facie* admissibility set out by Trial Chamber I. In its "*Decision on the Prosecutor's Bar Table Motions*" of 17 December 2010, Trial Chamber II stated "*the Chamber will first assess the relevance of the material, then determine whether it has probative value and finally weigh its probative value against its potentially prejudicial effect.*"¹⁸ Trial Chamber II emphasised the distinction between probative value and evidentiary weight; the former being a requirement for admissibility and the latter, a determination of relative importance to be considered only after all evidence has been admitted at the end of trial.¹⁹ Trial Chamber II also noted that before admitting any item of evidence, the Chamber must be satisfied that all the admissibility criteria have been met.

14. The need for a discrete assessment of an item of evidence before determining its *prima facie* admissibility was emphasised by Trial Chamber II in its "*Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol*", where it held:

With regard to challenges pertaining to new items of evidence that were submitted by the Prosecution since the confirmation of charges, the Chamber wishes to emphasise that the evidentiary regime under the Statute and the Rules is neither one of complete freedom of proof, nor does it create any pre-defined categories of information that are systematically inadmissible as evidence. Rather, rule 63(2) of the Rules grants the Chamber full discretion to "assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69". This means that the Chamber must evaluate each challenge on its individual merits, taking into account the specific characteristics and provenance of the item of evidence that is being challenged.²⁰

15. The Defence submits that the Appeals Chamber, when examining whether the legal framework of the ICC allows for the *prima facie* admission into evidence of materials²¹,

¹⁷ 25 October 2010 ICC-01/04-01/06-2589-Corr. Similarly in its Redacted Decision on the «Seconde requête de la Défense documents aux fins de dépôt de documents», the Trial Chamber I admitted duplicate election cards introduced by the Defence, stating, "[i]n all the circumstances, on a *prima facie* basis, the four cards are relevant and they have probative value, and their probative value is not outweighed by their potential prejudicial effect. Accordingly, they are admissible." ICC-01/04-01/06-2596-Red ; 17 November 2010, para. 30. See also the oral decision of Trial Chamber III in response to a partly opposed Defence requested to admit into evidence 15 documents that used during witness examination; *Prosecutor v. Lubanga*, Transcript, pages 30-34 ICC-01/04-01/06-T-222-ENG ETWT]

¹⁸ ICC-01/04-01/07-2635, para. 14

¹⁹ ICC-01/04-01/07-2635, para. 13

²⁰ 13 March 2009, ICC-01/04-01/07-956, para. 35

²¹ as defined in paragraphs 9 and 10 of the Majority Decision, including witnesses' written statement [sic] and related documents previously disclosed to the defence and which form part of the Prosecution's Revised List of Evidence.

should have regard to the approach adopted by Trial Chambers I and II, and find that this particular has approach is most suited to the ICC's statutory framework.

ii. Absence of legal basis in the ICC framework for the concept of *prima facie* admissibility, as set out in the Impugned Decision

16. Whereas the Impugned Decision argues that there is a “*sufficient legal basis*”²² for its concept of *prima facie* admissibility, it fails to point to any provision in the ICC's framework in support of this assertion. The Defence submits that there is no legal basis for the concept of *prima facie* admissibility within the ICC's legal framework. As held by Justice Ozaki in her dissenting opinion, “*the concept of prima facie admissibility simply does not exist in the Rome Statute or in the Rules of Procedure and Evidence*”.²³

The Statute

17. In the Impugned Decision, the Majority held that “[a]part 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”.²⁴ The Defence submits that while no evidence is *per se* inadmissible²⁵ it does not follow that all evidence is therefore admissible. Article 69(7)(a) and (b) (and Rule 71) must be read in the context of Article 69 as whole.²⁶ Article 69(4) reads as follows:

[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 to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

18. According to the academic Donald Piragoff, “*article 69 para. 4 is an amalgam of both common law and civil law concepts [...] The basic principle in both common law and*

²² ICC-01/05-01/08/1022, para. 8

²³ ICC-01/05-01/08/1028, para. 4

²⁴ ICC-01/05-01/08/1022, para. 10. Article 69(7)

²⁵ Bearing in mind the stated exceptions.

²⁶ The interpretation of the Statute is governed by the general principle of interpretation of treaties as set out in article 31(1) of the Vienna Convention on the Law of Treaties, according to which “*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*” The same principle of interpretation applies to the Rules. See also, Appeals Chamber Decision on “Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, in which reference is made to article 31(1) of the Vienna Convention on the Law of Treaties as follows: “The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.”

*civil law systems is that "relevant evidence which has probative value is admissible if such evidence is not affected by an exclusionary virus".*²⁷

19. Notwithstanding the fact that article 69(4) states that the Court may rule on the relevance or admissibility of evidence, Piragoff elaborates that this should be interpreted as offering the Chamber only two options: *"The Court can either 1) rule first whether evidence possesses sufficient relevance to justify its admissibility, taking into account a number of factors mentioned in article 69, para 4, and evaluate subsequently the weight of any admitted evidence as part of the evaluation process or, instead 2) admit evidence and consider relevance, admissibility and weight together as part of the evaluation of the admitted evidence, taking into account the same factors"*.²⁸ In both approaches, the Chamber take into consideration the factors listed in article 69(4) (i.e. probative value and prejudicial impact) as part of its initial decision on admissibility; the only difference is the question as to whether the Chamber will make a preliminary determination of admissibility or, subsequently, in the context of its final judgment.

20. The Defence notes Article 64(9), which reads *"[t]he Trial Chamber shall have, inter alia, the power on an application of a party or on its own motion to (i) rule on the admissibility or relevance of any evidence..."* According to the drafting history Article 64(9)(a) was not intended to detract from the Chamber's obligations under article 69(4). According to the academic Gilbert Bitti, the drafters of the Rome Statute recognised that it was duplicative of article 69(4) but did not have sufficient time to address this issue in the final draft.²⁹

21. Additionally, Article 69(3) of the Statute reads *"[t]he parties may submit evidence relevant to the case, in accordance with article 64"*.³⁰ Article 64 deals with the functions and powers of the Trial Chamber. Subsection (2) of Article 64 reads *"[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of witnesses and victims"*.

22. The Defence argues that a proper interpretation of Article 69(3), read in conjunction with Article 64, demands that a Trial Chamber only admit evidence which is relevant and consistent with full respect for the rights of the accused. Article 69(7)(a) and (b) and Rule

²⁷ Donald K. Piragoff, 'Article 69: Evidence', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) at page 1322, citing Prosecutor v. Delalic et al, 'Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample' 19 January 1998, para 30.

²⁸ Donald K. Piragoff, 'Article 69: Evidence', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) at page 1322.

²⁹ G Bitti 'Functions and Powers of the Trial Chamber, article 64' *Commentary on the Rome Statute of the International Criminal Court* (Triffterer ed., 2008), page 1217 para. 31

³⁰ Emphasis added.

71, in this context, merely set out limited situations in which evidence cannot ever be admitted but do not (and cannot) provide the basis for the much wider conclusion that all evidence is admissible save for those delineated situations.

The Rules of Procedure and Evidence

23. Rules 63(1) and (2) are to be read in conjunction with Article 69 of the Statute.³¹

24. According to Rule 64(3), “[e]vidence ruled irrelevant or inadmissible shall not be considered by the Chamber”. Trial Chamber III has indicated that it intends to address issues of probative value and prejudicial effect at the end of the proceedings which could entail that several items of evidence, which might subsequently be ruled to be inadmissible, will have been put to witnesses and commented upon by them. Although the learned Trial Chamber is composed of professional judges, in many instances, it will be impossible for the judges to determine the extent to which the witness’s testimony may have been prompted or influenced by the inadmissible evidence. An inevitable consequence of Trial Chamber III’s approach is, thus, that the Chamber will take into consideration inadmissible evidence, in violation of Rule 64(3).

ICC Jurisprudence

25. In addition to finding no basis in the statutory instruments of the Court, the Defence respectfully notes that the jurisprudence cited by the Majority in paragraphs 9 and 10 of the Impugned Decision does not support the Majority’s approach. Firstly, the Majority asserts 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 the material, on the basis that it appears to be *a priori* relevant to the case.”³²

26. In support, the Majority relies on what it calls a “*similar approach*” of Trial Chamber I in its “*Decision on the admissibility of four documents*”. However, this is the decision in which Trial Chamber I set out the 3-part test for admission discussed above. As such, it does not provide support for the Majority’s finding that the admission of evidence only requires a *prima facie* assessment of whether the material is *a priori* relevant to the case.

³¹ 63(1) and (2) read,

1. The rules of evidence set forth in this chapter, together with article 69, shall apply in the proceedings before all Chambers.
2. A Chamber shall have the authority, in accordance with the discretion described in Article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

³² ICC-01/05-01/08-1022, para. 10.

27. The other decision relied upon by the Majority is similarly unhelpful. The Majority claims that the “*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’*”.³³

28. In fact, this “*uncontested jurisprudence*” is a 2006 Decision of Pre-Trial Chamber I, which relates solely to the conduct of a confirmation hearing, where different evidentiary standards are applied. The Majority points to no decisions from the trial phase in support of the “*uncontested jurisprudence*” of the Court, and has, it is argued, selectively relied on aspects of Decisions which do not, upon closer scrutiny, support its position.

29. As such, the Defence respectfully submits that the provisions of the Statute and Rules which govern the admissibility of documents do not support the existence of an intermediate step of *prima facie* admission of materials into evidence, nor does the jurisprudence cited by the Majority support its approach.

Jurisprudence of other International Criminal Tribunals

30. There is no concept of *prima facie* admissibility based solely on an assessment of *a priori* relevance in the jurisprudence or practice of other international criminal tribunals. At the ICTY and ICTR, according to Rule 89 of the Rules,³⁴ a Chamber may admit any evidence provided it is relevant and has probative value, with the discretion to determine the weight to be accorded to such evidence in the context of all evidence at the end of the case.³⁵

31. The ICTY has adopted a dossier system, whereby the Prosecution is required to file all materials and statements which it intends to use as evidence at trial before the Pre-Trial Judge (who can also be a member of the Trial Chamber) during the pre-trial phase.

³³ ICC-01/05-01/08-1022, para. 10, citing to Decision on the schedule and conduct of the confirmation hearing, 28 January 2010, ICC-01/04-01/06-678, page 9.

³⁴ ICTY Rule 89 of the Rules of Procedure and Evidence relates to the admission of evidences and provides as follows:

- (C) A Chamber may admit any relevant evidence which it deems to have probative value;
- (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial;
- (E) A Chamber may request verification of the authenticity of evidence obtained out of court.

ICTR Rule 89: General Provisions

- (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may request verification of the authenticity of evidence obtained out of court.

³⁵ *Prosecutor v. Blaskic*, Judgment, Trial Chamber, March 3 2000, para. 34; *Prosecutor v. Popovic et al*; IT-05-88-T, Decision on Prosecutor’s Motion for Admission of Exhibits from the Bar Table, Motion to Amend the Bar Table Motion, and Oral Motion for Admission of Additional Exhibit, para. 17; *Prosecutor v. Musema*, Trial Chamber Judgment, 27 January 2000, para. 41;

Nonetheless, the ICTY has strongly emphasised that mere inclusion of such material in a dossier filed during the pre-trial phase does not automatically give this material the quality of evidence: the Prosecution is still obliged to tender it during the trial proceedings, and to establish that the relevant requirements for admissibility have been met.³⁶

32. While it is not a formal rule at the ICTY that exhibits should be tendered through a witness, “*an exhibit that has been put to a witness and commented upon cannot be treated the same as one which has not been presented to any witness or on which there is no evidence*”.³⁷ In the case of exhibits which have not been tendered through a witness, there is a greater burden on the Prosecutor to prove both their reliability and probative value.³⁸ Moreover, in the event that it is not possible to test the reliability or provenance of the evidence or statement, the Chamber will, as a rule, reject it.³⁹

b. The Majority’s regime of *prima facie* admission into evidence of documents contravenes the rights of the accused as set out in the legal framework of the Court

(i) The right to be informed promptly and in detail of the nature, cause and content of the charge

33. An accused before the Court has a right to be informed promptly and in detail of the nature, cause and content of the charge against him.⁴⁰ The Majority’s new regime of ruling on the admissibility of documents at the end of the proceedings means that it is only at this stage - and significantly after the close of the Defence case - that the Defence will know for the first time the precise nature of the Prosecution evidence against him.

34. As held in the Dissenting Opinion, “*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*”.⁴¹

35. The Defence subscribes to this reasoning, and notes that a procedure whereby an accused is only given notice of the evidence against him at the close of the proceedings cannot be reconciled with his right to be informed promptly and in detail of the cause and content of the charges against him. This is particularly so in international criminal proceedings (as opposed to domestic cases), where the scope and gravity of the charges, the

³⁶ Prosecutor v. Blagojevic, Decision of Appeals Chamber dated 3 April 2003, at para 28; Prosecutor v. Blagojevic, Decision on Joint Defence Motion for Reconsideration of Trial Chamber’s Decision to Review all Discovery Material Provided to the Accused by the Prosecution, 21 January 2003

³⁷ Prosecutor v. Oric, IT-03-68-T, Judgement 30 June 2006 para. 29.

³⁸ Prosecutor v. Oric, IT-03-68-T, Judgement 30 June 2006 para. 29.

³⁹ Thus, in the Prosecutor v. Halilovic, the OTP sought to tender the interview with the accused Halilovic from the bar table (i.e. not through a witness). The Chamber rejected this request – since – in line with Halilovic’s protection against self-incrimination, it was not possible to subpoena him as a witness to test the reliability and probative value of the statement. Decision on Motion for Exclusion of Statement of the Accused 8 July 2005 - affirmed on appeal: Appeals Judgment of 16 October 2007

⁴⁰ Article 67(1)(a).

⁴¹ ICC-01/05-01/08/1028, para. 16

sheer volume of evidence and the difficulties of conducting investigations *in situ* give heightened importance to the right to be informed promptly and in full of the case against an accused.

(ii) The right to have adequate time and facilities for the preparation of his defence

36. An additional problem arises out of the Majority's decision to prevent the accused from having a clear picture the evidence against him until the end of the trial proceedings.⁴² Namely, the Defence is forced to perform investigations with a view to countering all the factual allegations contained in all of the "evidence" admitted wholesale at the start of the proceedings, regardless of whether this "evidence" will ultimately be excluded at the end of the proceedings for being inauthentic or lacking in probative value.

37. This places a huge burden on the Defence team and has the potential to greatly increase the scope of its investigations.⁴³ As such, the Majority's *prima facie* admission of documents necessarily impacts on the right of the accused to have adequate time and facilities for the preparation of his defence, as he is required to investigate and seek to defend against large swathes of "evidence" which may ultimately disregarded by the Chamber.

38. On this point, it is worth noting the Majority's statement that "*the prima facie admission into evidence of this material does not infringe on the rights of the accused to have adequate time and facilities for the preparation of his defence.... Arguably, the defence may be in a better position to prepare its case as this material is prima facie admitted as evidence which may provide the basis for the questioning of the witness called by the Prosecution.*"⁴⁴ This reasoning is, with respect, flawed since it is not necessary for documents to be admitted as evidence in order for witnesses to be examined on their contents.⁴⁵

⁴² ICC-01/05-01/08-1022, paras 9 and 19

⁴³ Trial Chamber II has underscored that the whole sale admission of evidential items detracts from the focus and clarity of the proceedings, and thereby burdens the defence. The Chamber concluded that it "would unduly burden the case record for such lengthy video excerpt to be admitted into evidence in its entirety, as this would impose a burden upon the Defence to address all the issues potentially raised by the video excerpt, given that the Prosecution has not indicated with sufficient clarity which exact inferences it proposes should be drawn from which specific passages in the excerpt". Prosecutor v. Katanga and Ngudjolo, Decision on Request to admit prior recorded testimony of P-30 as well as related video excerpts, 15 July 2010, ICC-01/04-01/07-2233-Corr, at para 14.

⁴⁴ ICC-01/05-01/08-1022, para 21.

⁴⁵ See, for example, the reasoning of Judge Ozaki, that "[t]he 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", at ICC-01/05-01/08-1028, para. 12.

39. As such, the Majority's statement that the Defence will be in a better position to examine witnesses because of the admission of all documents on the Prosecution's List is mistaken.

(iii) The right to be tried without undue delay

40. An accused before the Court has a right to be tried without undue delay.⁴⁶ The Majority asserts that its regime of wholesale *prima facie* admissibility "*will shorten the length of questioning by the parties in court and contribute to the accused being tried without undue delay.*"⁴⁷ The Majority gives no reason, however, for why this will indeed be the case.

41. In dissenting from the Majority's opinion on this matter, Judge Ozaki stated that "*admitting the statements into evidence may lead the parties to contest every single potentially contentious fact included in the statements of the other parties' witnesses*".

42. After hearing several weeks of testimony, the Defence can now assert that it is indeed compelled to question witnesses on "evidence" which has not come from the witness during his or her testimony, but is contained within the sometimes hundreds of pages of written statements, leading to lengthier cross-examinations, and protracted proceedings. As such, it is submitted that the Majority erred in reasoning that admitting the Prosecution's list of documents would not impact on the right of the accused to be tried without undue delay.

43. On this point, the Defence recalls the finding of this same Trial Chamber III in a decision of 16 September 2010 concerning the admission of particular witness statements into evidence:⁴⁸

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.

44. No reasons were given for the departure of the majority from this position, to which Judge Ozaki and the Defence subscribe, and which is illustrated by the practice of the present proceedings.

45. The Majority also considered 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.*"⁴⁹ Judge Ozaki describes this argument as "misconceived", noting that "[i]ndeed the Chamber will only be postponing, not eliminating

⁴⁶ Article 67(1)(c).

⁴⁷ ICC-01/05-01/08-1022, para 23.

⁴⁸ ICC-01/05-01/08-886, para 8.

⁴⁹ ICC-01/05-01/08-1022, para 24.

*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”.*⁵⁰

46. The Defence supports this reasoning, and also notes that it may be the case that the Prosecution will not ultimately seek the admission of all the documents contained on the Revised Prosecution List of Evidence. It may eventually be the case that some documents could be discarded as irrelevant or unnecessary to the proceedings as the evidence unfolds and the Prosecution case is refined. As such, the Majority could potentially be increasing its workload by forcing itself to make a ruling on each of the documents it admitted in a blanket manner prior to the commencement of the proceedings.

47. Perhaps the most significant point, however, is that the Defence team, in the exercise of its duties, will now be required to lead evidence to rebut the factual allegations contained in thousands of pages of “evidence” admitted pursuant to the Impugned Decision, regardless of whether these allegations will ultimately form part of the Prosecution case. This will lead to unnecessarily protracted proceedings, and an opportunity for the clear delineation and streamlining of the Prosecution case is being missed. It increases the burden on the Defence, as well as wasting the time and resources of the court itself.

48. For all of the above reasons, the Defence submits that the Trial Chamber erred in asserting that the *prima facie* admission of evidence will contribute to the accused being tried without undue delay.⁵¹

(iv) The right to have imposed any reversal of the burden of proof or onus of rebuttal

49. Article 67(1)(i) preserves the right of the accused not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal. The course taken by the Majority in the Impugned Decision constitutes a *de facto* reversal of the burden of proof. It would no longer fall to the Prosecution to persuade the Trial Chamber of the relevance, authenticity, or probative value of particular documents; rather the Majority’s new regime places the burden squarely on the Defence to challenge the *prima facie* admissions.⁵² The Defence submits that in so doing, the Majority opinion contradicts the rights of accused, as set out in Article 67(1)(i).⁵³

⁵⁰ ICC-01/08-01/05-1028, para. 26.

⁵¹ IC-01/05-0108-1022, para. 23.

⁵² See also, *Telfner v Austria (Judgment of 20 March 2001) (Application No. 33501/96)* where it held that the shifting of the burden of proof from the prosecution to the defence violated Article 6(2) of the European Convention of Human Rights.

⁵³ In this connection, the ICC Appeals Chamber has held that even if the defence has the right to subsequently challenge a preliminary determination by the Chamber on an issue, the rights of the defence may be violated as the burden of proof will fall on the defence and the defence will inevitably have to combat a degree of judicial predetermination; see DRC situation, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial

(v) The right to question witnesses

50. The Impugned Decision is silent as to what happens if, for example, Prosecution witnesses become unavailable or unwilling to testify, or particular witnesses are not called by the Prosecution - for whatever reason. In any of these eventualities, it appears that the statements of these witnesses would still be admitted as “evidence” in the case, regardless of the fact that the accused has been deprived of his right “*to examine, or have examined, the witnesses against him or her*”.⁵⁴

51. From the Impugned Decision, it appears that in such a situation, the Defence would be required to challenge the admissibility of this “evidence” in order to have it excluded from the case. This process, however, represents an impermissible burden shift to the Defence and will also puts the Defence in breach of Rule 64(1) which requires that “*an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber*”.

52. Moreover, in accordance with the approach delineated in the Impugned Decision, at the time when the evidence is used by the Prosecution in the proceedings, the Defence will not be aware of the purpose for which the evidence has been admitted (i.e. for the truth of its contents or for impeachment purposes only), nor will the Chamber have determined whether it is necessary to implement counterbalancing measures to ensure that the probative value of the evidence is not outweighed by its prejudicial impact on the rights of the defence and the fairness and impartiality of the proceedings. Since the Chamber will only be making these determinations at the end of the proceedings, the Defence will be precluded from obtaining appropriate relief (for example, the recall of certain witnesses or an adjournment to investigate further) in a timely manner, which will further prejudice its right to examine witnesses concerning the Prosecution evidence in an effective manner.⁵⁵

c. The Majority’s regime of prima facie admission cannot be reconciled with the principle of primacy of orality as set out in the legal framework of the Court.

53. Article 69(2) sets out the general rule that “[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence.” Often referred to as “the primacy of orality”, the

Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, ICC-01/04-169, 13 July 2006, at para 50.

⁵⁴ Article 67(1)(e).

⁵⁵ Prosecutor v. Delic, ‘Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decisions on Admission of Exhibits 1316 And 1317’, 15 April 2008, at paras 22 and 23.

principle that witnesses shall be heard orally has been described as “*one of the cornerstones of the proceedings under the Rome Statute*”.⁵⁶

54. While limited and specific exceptions were included in the legislative framework of the Court, a plain reading of Article 69(2) demonstrates that derogation from the principle contained therein is possible only in accordance with Article 68 and the Rules of Procedure and Evidence.

55. Moreover, the jurisprudence of the Court is clear in that the admission into evidence of witness statements and other prior recorded statements is the exception to the general rule. In November 2010, Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* recalled a previous decision where it had discussed the Statute’s preference for oral evidence in detail, and held that there is a presumption in favour of oral testimony.⁵⁷ This principle of the primacy of orality has also been systematically applied by Trial Chamber II in *The Prosecutor v. Katanga & Ngudjolo*.⁵⁸

56. The Defence submits that the Majority’s decision to order the wholesale admission of Prosecution witness statements as “evidence” cannot be reconciled with this important principle. That the Majority envisages that the witness statements would be admitted in addition (rather than as an alternative) to oral testimony of witnesses is irrelevant as the Majority has conceded that the purpose of this will be to limit the questioning of witnesses by the Prosecution.⁵⁹ The effect is therefore the same as it constitutes a substitution of oral testimony for written statements which, as noted by Her Honour Judge Ozaki, curtails the principle of the primacy of orality.⁶⁰

57. In addressing the primacy of orality, the Majority ruled as follows:⁶¹

In the view of the Majority, the Statute only envisages a presumption in favour of oral testimony, but no prevalence of *orality* in 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, 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.

58. The Defence respectfully submits that this reasoning is insufficient to justify the Chamber’s side-stepping of a fundamental principle enshrined in the Court’s Statute. Although the Majority may stress that there are exceptions to the general rule that the testimony of a witness shall be given in person, the existence of exceptions to a rule does not

⁵⁶ ICC-01/05-01/08-1028, para. 8.

⁵⁷ ICC-01/04-01/06-2596-RED, para. 42, citing to ICC-01/04-01/06-1399, para. 22.

⁵⁸ ICC-01/04-01/07-Corr-Red-2289, para. 14; ICC-01/04-01/07-2362, paras 14, 15, 19; Transcript of hearing on 4 March 2010, ICC-01/04-01/07-T-1112-Red-ENG, page 3, lines 20 – 24.

⁵⁹ ICC-01/05-01/08-1022, para. 23.

⁶⁰ ICC-01/05-01/08-1028, para. 9.

⁶¹ ICC-01/05-01/08-1022, para. 14.

authorise the disregarding of the rule in other arbitrary situations. To the contrary, the rule may only be derogated from in the specific exceptions as set out in the Statute and Rules.

59. In fact, Trial Chamber III (of which the Majority formed a part), discussed the principle of the primacy of orality and its statutory exceptions in a decision rendered on 16 September 2010, find that the admission of prior statements should only be done in specific and exceptional circumstances.⁶² The Chamber's reasoning is worth citing in full:

Pursuant to Article 69(2) of the Statute, "[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence." Under Rule 68 of the Rules, the Chamber "may in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence such as testimony." The Chamber may thus depart from the general principle of giving evidence in person and explore the possibility of having evidence submitted in writing, as long as it is not prejudicial to, or inconsistent with, the rights of the accused. However, the introduction of such prior-recorded testimony remains an option which should be adopted only in specific and exceptional circumstances.

60. This decision came two months prior to the rendering of the Impugned Decision, and no reasons were given by the Majority for their departure from this reasoning.

61. The Majority also references rule 92*ter* of the ICTY Rules of Procedure and Evidence in support of its approach. It should be noted, however, that when the ICC Statute was drafted, the ICTY and ICTR Statutes and Rules expressed a clear preference for live, in-court testimony.⁶³ Depositions and out of court testimony were considered to be the exception to the rule, which should only be resorted to carefully, in a manner which is consistent with the rights of the accused. According to Piragoff, when the ICC Rules of Procedure and Evidence were finalized, "*[i]n a clear departure from the approach of the ad hoc Tribunals, the ICC Rules do not include any alternative route for admitting prior recorded testimony outside the protections of article 56 or rule 68 or 69*".⁶⁴ Rule 68 itself is and was intended to be more stringent than its ICTY counterparts;⁶⁵ the State parties were aware that the ICTY and ICTR had broadened their approaches, but the "*negotiations in the Preparatory Commission make it clear that the stricter standard incorporated in rule 68 was deliberate*".⁶⁶

62. The clear intention of the State Parties to restrict the occasions under which the Judges could have resort to out of court statements would be frustrated if the Judges were to

⁶² ICC-01/05-01/08-886, para. 7.

⁶³ See for example, Prosecutor v. Kordic and Cerkez, Case No. IT-95-1412-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, and Prosecutor v. Kupreskic, Decision On Appeal By Dragan Papić Against Ruling To Proceed By Deposition 15 July 1999.

⁶⁴ Donald K. Piragoff, 'Article 69: Evidence', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) at page 1316.

⁶⁵ Donald K. Piragoff, 'Article 69: Evidence', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) at page 1317.

⁶⁶ Donald K. Piragoff, 'Article 69: Evidence', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) at page 1318.

have recourse to their general power to admit relevant evidence under article 69(4) in order to avoid the explicit procedural safeguards in articles 56 and rules 68 and 69.⁶⁷

63. As such, it is submitted that the Majority erred in admitting all documents listed on the Prosecution Revised List of Evidence, given that this practice is incompatible with the principle of the primacy of orality which exists in the legal framework of the Court.

c. CONCLUSION

64. For all of the above reasons, the Defence respectfully requests that the Appeals Chamber:

QUASH the Impugned Decision; and

REVERSE the order admitting on a *prima facie* basis as evidence all documents which form part of the prosecution's Revised List of Evidence; and

ORDER that, in cases where one of the Parties objects to the admission of an item of evidence, the Trial Chamber make an assessment of admissibility for each of the documents and/or materials sought to be admitted at the trial stage of the proceedings by (a) ensuring that it is *prima facie* relevant to the trial; (b) assessing whether it has probative value; and (b) weighing the probative value against its prejudicial effect.



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Dated this 7th of February 2011

At the Hague, the Netherlands

⁶⁷ According to Piragoff, the Court “cannot use a broad discretionary power to circumvent the specific requirements of a relevant rule”. Donald K. Piragoff, ‘Article 69: Evidence’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2008) at page 1318, citing Prosecutor v. Kordic, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement’, 18 September 2000.