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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 THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public document

**Prosecution's Document in Support of Appeal against Trial Chamber III's
"Decision on the admission into evidence of materials contained in the
prosecution's list of evidence" (ICC-01/05-01/08-1022)**

Source: Office of the Prosecutor

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Introduction

1. In its “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence” (“Decision”),¹ the Majority of Trial Chamber III (“Majority”) decided to *prima facie* admit into evidence “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”.² Judge Ozaki dissented.³
2. The Majority did so without ruling on its admissibility in the manner prescribed by the Statute and the Rules. In particular, the Majority failed to assess the admissibility of the evidence on an item-by-item basis pursuant to Article 69(4). By admitting all material referred to by the List of Evidence before the start of the trial and without prior notice, the Majority also denied the parties an opportunity to raise issues on the admissibility of the evidence. This led to the admission of evidence without applying the standard and procedures prescribed by the Statute and the Rules. This constitutes the basis of the first reversible error raised by the Prosecution (“First Error”).
3. In addition, by admitting all prior witness statements before the start of the trial, the Majority appeared to circumvent the primacy of oral evidence in violation of Article 69(2) (“Second Error”).
4. The Prosecution supports any effort by a Trial Chamber to streamline the trial and focus on essential issues. The Prosecution also agrees that flexibility and innovation may assist that goal and promote the effectiveness of the Court, so long as the innovations are done within the framework of the Statute and Rules.

¹ ICC-01/05-01/08-1022.

² Decision, para.35.

³ ICC-01/05-01/08-1028(“Dissenting Opinion”).

5. The Decision's *prima facie* admission of evidence, assuming its admissibility, while designed to promote efficiency, also appears to contravene the Statute and the Rules. As Judge Ozaki noted, there is no textual support for a *prima facie* admissibility determination.
6. It may be possible to reconcile the Decision with the Court's legal texts, as the Prosecution will discuss in this document. However, there is no clarity or certainty that implementation of the Decision will be done in accordance with the Statute and Rules. Failure to do so could infect the trial proceedings with a reversible error. Thus, this Chamber should consider the legal issues posed by the Decision to ensure that the trial proceeds on a sound basis and to avert any potential prejudice from the improper admission of evidence.

Procedural Background

7. On 15 January 2010, the Prosecution filed its confidential *ex parte* "Updated list of evidence" ("List of Evidence").⁴ This List of Evidence includes the prior statements of 36 fact witnesses and reports of four expert witnesses.
8. On 19 November 2010, the majority of Trial Chamber III ("Majority") issued the Decision,⁵ in which it *prima facie* admitted into evidence all material contained on the List of Evidence. Judge Ozaki dissented.⁶
9. During a hearing of 23 November 2010 the Prosecution submitted that the new regime could be compatible with the Rome Statute as long as the witnesses are consulted in accordance with Rule 68(b).⁷
10. During the same hearing, the Presiding Judge of the Trial Chamber clarified that the Decision was not based on Rule 68(b).⁸

⁴ ICC-01/05-01/08-669-Conf-AnxB.

⁵ ICC-01/05-01/08-1022.

⁶ ICC-01/05-01/08-1028.

⁷ ICC-01/05-01/08-T-33-Red-ENG, p.32,lns.2-11.

11. On 29 November 2010, the Prosecution⁹ and the Defence¹⁰ sought leave to appeal the Decision.
12. On 26 January 2011, the Trial Chamber granted the Prosecution and the Defence leave to appeal the Decision on the following issue: “whether the legal framework of the ICC allows for *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Majority Decision, including witnesses’ written statements and related documents previously disclosed to the defence and which form part of the prosecution’s Revised List of Evidence”.¹¹

The Decision and Dissenting Opinion

13. In the Decision, the Majority found that “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 [and] all documents submitted to the Chamber by the prosecution in its List of Evidence”.¹² The Majority found 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”;¹³ “nothing in the ICC legal framework”, the Chamber continued, “prevents the Chamber from *prima facie* admitting non-oral evidence, whether written, audio, visual”.¹⁴
14. It thus determined that the statements and documents in the List of Evidence “are *prima facie* admitted as evidence for the purpose of the trial”,¹⁵ while emphasizing

⁸ ICC-01/05-01/08-T-33-Red-ENG, p.32,ln.12-p.33,ln.12.

⁹ ICC-01/05-01/08-1059.

¹⁰ ICC-01/05-01/08-1061.

¹¹ ICC-01/05-01/08-1169, para.37.

¹² Decision, para.8

¹³ Decision, para.10.

¹⁴ Decision, para.13.

¹⁵ Decision, para.35.

that it would determine the probative value and weight of the evidence when making its final judgment.¹⁶ It did not further define *prima facie* in this context.

15. On the first day of testimony at trial, the Prosecution proposed to follow the procedure established by Rule 68(b), harmonizing the Decision with the Court's legal texts. However, the Presiding Judge clarified that the Majority's ruling:

"has not as a legal basis Rule 68(b). [...] [A]ll statements [...] and related documents should be given EVD numbers. So they are already evidence admitted *prima facie* as evidence, unless any of the parties decide to challenge admissibility in accordance with the Statute and the Rules. [...]"¹⁷

16. In her Dissenting Opinion, Judge Ozaki stated, *inter alia*, that the concept of *prima facie* admissibility does not exist in the Statute and the Rules.¹⁸ In her view, the Majority's approach violates the principle of orality under Article 69(2)¹⁹ and is inconsistent with the rights of the accused²⁰ and the expeditiousness of the proceedings.²¹ Judge Ozaki recommended that the Chamber follow the Court's established practice and analyze the admissibility of evidence item-by-item.²²

Standard of Review

17. The Majority admitted *prima facie* all evidence enclosed in the Prosecution's List of Evidence, including statements of witnesses. These errors, either legal or

¹⁶ Decision, para.9.

¹⁷ ICC-01/05-01/08-T-33-Red-ENG, p.32,ln.12-p.33,ln.12.

¹⁸ Dissenting Opinion, paras.4-5.

¹⁹ Dissenting Opinion, paras.6-12.

²⁰ Dissenting Opinion, paras.13-21.

²¹ Dissenting Opinion, paras.22-28.

²² Dissenting Opinion, para.32.

procedural, materially impact on the Decision;²³ however characterized, they are reviewable *de novo*.²⁴

The Prosecution's Grounds of Appeal

18. This appeal concerns the authority of a Trial Chamber to admit into evidence documents, including witness statements, referred to in a List of Evidence submitted to the Chamber in advance of the start of trial, without discrete findings pertaining to the criteria in Article 69(4) or following the specific procedures in Rule 64 and/or Rule 68.²⁵ The Prosecution submits that in order to admit prior witness statements or any other documents into evidence, the Chamber must follow the principles and processes provided for in the Statute and the Rules. The Majority failed to do this and as a consequence made two errors which materially affect the Decision.

A. The First Error: The Majority erred by admitting all proposed evidence without assessing admissibility on a item-by-item basis and giving the parties an opportunity to raise any issues of admissibility prior to admission.

19. The Majority found that “a ruling on admissibility is not a pre-condition for the admission of any evidence”²⁶ and that “the Chamber is under no obligation to

²³ ICC-01/05-01/08-1019OA4, para.69. The Decision restricts the Prosecution's right to withdraw evidence. Its systemic nature also means that the same flawed principles will also apply to the admission of evidence adduced by the Defence in its case. Further, the processes by which the Decision would be implemented could create an error sufficient to reverse on appeal any conviction. Finally, the Prosecution has the duty to bring an appeal pertaining to matters that go to the heart of the fairness and integrity of the proceedings.

²⁴ ICC-01/05-01/08-962OA3, para.63; ICC-01/05-01/08-631-RedOA2, paras.61-63. The errors may be “procedural” since they primarily relate to the interpretation and application of procedural rules pertaining to evidentiary issues. See *C. Staker in O. Triffterer*, Commentary on the Rome Statute of the International Criminal Court, Second Edition (“Triffterer”), Article 81, pp.1458-1459. If the Appeals Chamber considers that the errors are better qualified as errors of law (namely by misinterpreting the relevant evidentiary provisions and creating an evidentiary regime that lacks any statutory basis- see *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004, para.15.), this should not have any impact on the applicable standard of review, since in both cases the Appeals Chamber should review *de novo* the manner in which the Trial Chamber interpreted and applied the relevant procedural rules.

²⁵ This appeal is limited to the admission of evidence at trial. The admission of evidence for the purpose of the confirmation of charges is partially governed by different rules (see for instance Article 61(5)). The Majority incorrectly relied on the practice during pre-trial proceedings for the purpose of the present Decision (see Decision para.10 and fn.24).

²⁶ Decision, para.10.

make rulings on admissibility for each item of evidence presented before it”.²⁷ According to the Majority, Article 69(4) provides that “the Chamber ‘*may*’ rule on relevance or admissibility of evidence”.²⁸ As a result, the Majority admitted into evidence everything referred to in the List of Evidence, including all prior witness statements, without assessing on an item-by-item basis the requirements underpinning admissibility pursuant to Article 69(4) and Rule 64, or accepting the possibility that during the trial the Prosecution might determine to not call one or more witnesses or to not offer material on the list into evidence. The Chamber also failed to give the parties an effective opportunity to raise issues on the admissibility of the material pursuant to Rule 64(1). This error materially affects the Decision, as it led to the admission of evidence without applying the standard and procedures prescribed by the Statute and the Rules.

(i) The Majority failed to assess the admissibility of evidence on an item-by-item basis

20. The Decision discusses at length whether the ICC’s legal framework allows for the *prima facie* admission of prior statements of witnesses or other documents included in the List of Evidence before the start of the presentation of evidence.²⁹ The Majority concluded that “there is sufficient legal basis” to do so,³⁰ and further elaborated that this approach would promote the fair and expeditious conduct of the proceedings.³¹

21. However, the Majority failed to make any findings on whether the items of Evidence were admissible within the terms of Article 69(4): it did not determine whether those statements, reports and documents are relevant and have

²⁷ Decision, para.24.

²⁸ Decision, para.18 (emphasis added).

²⁹ Decision, paras.10-20; 25-26;28.

³⁰ Decision, para.8.

³¹ Decision, paras.21-24; 27.

probative value and whether their admission causes prejudice to a fair trial or to a fair evaluation of the testimony of a witness.³²

22. The Majority also failed to verify whether Article 69(7) and Rule 71, which regulate the inadmissibility of certain categories of material, would apply to the material that it admitted into evidence.³³ In this sense, it is important to note that neither Article 69(7) nor Rule 71 make the exclusion of material that falls within their scope dependent on a challenge by any of the participants, as found by the Majority.³⁴ In the absence of a challenge, the Chamber must assess on its own motion whether any of these provisions apply before admitting it into evidence.³⁵ Because the Chamber failed to enter specific findings on the circumstances of each piece of evidence admitted, it necessarily failed also to provide a reasoned decision pursuant to Rule 64(2).

a. The two analytical methods provided for in the Statute

23. The Prosecution agrees that Trial Chambers have discretion pursuant to Articles 64(9)(a), 69(3) and 69(4) to rule on the relevance or admissibility of any piece of evidence,³⁶ and that pursuant to Rule 63(2), a Chamber has “the authority, in accordance with the discretion described in article 69, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69”.³⁷ Article 69(4) also authorizes, but does not require, the Chamber to rule on the admissibility of evidence.³⁸ As a result, the Chamber

³² ICC-01/04-01/07-2635, para.14; ICC-01/04-01/06-1399, paras.27-32.

³³ The Majority acknowledges the existence of these rules (Decision, para. 10), but did not apply them when admitting all material into evidence.

³⁴ Decision, para.10.

³⁵ Rule 63(3).

³⁶ Decision, paras.16-17, 28. Note however that *Terrier F.*, in *Cassese, Gaeta and Jones*, The Rome Statute of the International Criminal Court, Oxford University Press, 2002, has indicated that under Articles 69(4) and 64(9) “the judges may, and undoubtedly must, rule on the relevance and admissibility of all evidence, taking into account [...] the probative value of that piece of evidence, and [...] the requirements of a fair trial”.

³⁷ Decision, para.9.

³⁸ Decision, paras.16-18. The only exception is constituted by Rule 63(3) and Article 69(7) as acknowledged in the Decision (para.18). See also *Triffterer*, Article 69, p.1306; see also *Donald K. Piragoff* (2001) Evidence in The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence, Roy S. Lee (ed), (“Lee”) p. 351.

may decide on the admission of the evidence when the evidence is put before it (“First Analytical Method”),³⁹ or refrain from deciding on admission of the evidence, *strictu sensu*, and consider admissibility factors – relevance, probative value and prejudice, for example -- in its final decision on the weight⁴⁰ of the evidence (“Second Analytical Method”).⁴¹

24. Regardless of the method, the process must “ensure the protection of other values in the adjudication process”, including the rights of the accused, the fair evaluation of the testimony of a witness or the rights of the victims.⁴² The Chamber’s discretion is not unfettered, but must be exercised in a manner that best serves the statutory goal of assuring ‘the efficacy of the criminal process’ and the fair and expeditious conduct of the proceedings.⁴³ Trial Chambers I and II adhere to the First Analytical Method and determine admissibility when the evidence is adduced by a party.⁴⁴ In addition, other international criminal tribunals have also followed this practice.⁴⁵

b. The Chamber did not follow either of the analytical methods provided for in the Statute, but imposed a new method that is not established by the Statute

25. The Majority decided to rule on the admission of evidence, and did so by admitting “*prima facie*” all material referred to in the List of Evidence without

³⁹ A ruling on admissibility may be entered either as soon as the evidence is adduced by a party or deferred to a later stage in the proceedings. The latter approach may be appropriate for instance, when the Chamber considers that it should hear other related evidence before considering reliability and probative value of the evidence presented.

⁴⁰ In this respect, Trial Chamber II clarified that “probative value and evidentiary weight are two similar but distinct concepts. [...] Probative value is determined on the basis of a number of considerations pertaining to the inherent characteristics of the evidence. Evidentiary weight, [...] is the relative importance that is attached to an item of evidence in deciding whether a certain issue has been proven [...]” (ICC-01/04-01/07-2635, para.13).

⁴¹ See *Lee*, p.351 (referred to in Decision, para. 17); *Triffterer*, Article 69, p.1322. The latter option effectively merges admissibility, credibility, and weight.

⁴² See *Triffterer*, Article 69 [26], p.1322; and *Lee*, p. 351.

⁴³ ICC-01/04-01/07-2259OA10, para.47.

⁴⁴ ICC-01/04-01/07-2635, paras.12-20. It may occur that “at the time of tendering an item of evidence, the party is unable to demonstrate its relevance and probative value, including its authenticity” In those cases the Chamber may postpone its decision to a later stage when it can provide a more informed ruling on the probative value or authenticity of that evidence (para.13). ICC-01/04-01/06-1399, paras.19-32.

⁴⁵ It is worthy of note that the ECCC, where a *dossier* system governs the investigation phase, has also adopted this method. See *Prosecutor v. Kaing Guek Eav*, Trial Judgment, 001/18-07-2007, paras.38-42.

making any individualized assessments on its admissibility. While a Chamber, as already stated, has discretion to decide whether and at what time a determination on admissibility shall be made,⁴⁶ Trial Chambers I and II have concluded that after they opt to enter a formal ruling on admissibility they must necessarily examine the factors included in Article 69(4) and follow the process set out in Rule 64.⁴⁷ Following the First Analytical Method, accordingly, Trial Chambers I and II “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. [...] This is a balancing test which must be carried out on a case-by-case basis. [...] [A]lthough the applicable admissibility test allows the Chamber wide discretion, the Chamber has no discretion in whether or not to apply the test. Before admitting any item of evidence, the Chamber must be satisfied that the admissibility criteria have been met.”⁴⁸

26. Although the initial part of the Decision states that the ruling to admit all prior witness statements “is based on making a *prima facie* finding of the admissibility of this evidence”,⁴⁹ *no such finding* has in fact been entered and there has been no discussion on the applicability of the criteria under Article 69(4) to the individual items of material admitted, as mandated by Rule 64(2).
27. The Majority’s approach to the admission of evidence also raises potential issues under Article 74(2), according to which “[t]he Court may base its decision only on evidence submitted and discussed before it at the trial”.

⁴⁶ See Article 69(4). The only exception is constituted by Rule 63(3) and Article 69(7) as acknowledged in the Decision (para. 18).

⁴⁷ ICC-01/04-01/07-2635, para.13; ICC-01/04-01/06-1399, paras.24-31.

⁴⁸ ICC-01/04-01/07-2635, para.14-15; ICC-01/04-01/06-1399, paras.27-32; ICC-01/04-01/06-1981, para.33; ICC-01/04-01/06-2135, para.21.

⁴⁹ Decision, para.9.

28. The Majority appears to consider that by filing the List of Evidence all material referred to therein has been *submitted* to the Trial Chamber. The List of Evidence is a case management tool not provided in the Statute or the Rules which primarily serves the purpose of informing the Trial Chamber and the other parties and participants of the materials that a party intends to use at trial. Certainly the Prosecution did not intend, from the mere filing of this document, to “submit” the materials themselves for the purposes of Article 74(2) and Rule 64(1). In any event, in order for evidence to form the basis of the Chamber’s decision, the evidence must also be *discussed*. This “discussion” can either take place during the presentation of evidence at trial,⁵⁰ or as part of the discussion on its admissibility pursuant to Article 69(4) and Rule 64.⁵¹ By admitting all evidence referred to by the List of Evidence without allowing any discussion, the Majority is effectively depriving the Prosecution of its right to submit the evidence at trial and to withdraw particular items that it considers have become irrelevant.
29. It is not clear that the “*prima facie*” nature of the admission – something seemingly less certain than a final determination - can cure the errors in the Decision. This concept is not to be found in the Statute or the Rules, which instead require that if a Chamber makes a determination on admissibility, such determination involve a clear-cut result, whereby evidence is either admissible or inadmissible, the latter being excluded for the purposes of any decision under Article 74(2).⁵²
30. In fact, the approach endorsed by the Chamber in the Decision appears to reflect a proposal on Rule 63(2) which was expressly rejected when adopting the final text of the provision. The proposal read: “All evidence submitted by the parties shall, *in principle*, be admissible before the chambers of the Court, which shall freely assess its probative value, in accordance with article 69, paragraph 4.” This text

⁵⁰ According to O. Triffterer, no discussion as such is needed, as long as the presentation of the evidence has been made and all parties have had the opportunity to ask questions or to make submission on this evidence, even if none of them used this opportunity (Triffterer, Article 74, p.1396).

⁵¹ Article 69(4).

⁵² Rule 64.

was the subject of considerable criticism: according to some drafters, it undermined the compromise of Article 69(4) and, according to others it was contrary to the spirit and the letter of the Statute. The proposal was reformulated so as not to imply when or how evidence would be admissible, but instead reflect the delicate balance enshrined in Article 69(4), which gives discretion to the Chamber, but also clearly sets out the relevant factors to consider once a Chamber decides to rule on admissibility.⁵³

31. It may be that by *prima facie* admission the Chamber contemplated something different than admission “in principle”. The Chamber may have concluded, after examining the List of Evidence, that nothing that looked per se problematic in terms of admissibility had been included therein, and that accordingly, *once submitted*, evidence at trial would be admitted if no party contested it. If contested by a party, evidence would only be admitted if, in accordance with the procedures and standards established in the Statute and Rules, the Chamber was satisfied that the evidence was admissible. If that was the case, the Majority’s approach would have in essence followed the First Analytical Method, and any ensuing error (e.g. lack of precision in the terminology used) would not invalidate the Decision. However, the Decision does not clarify whether this was the process established, and without clarification the risk of error remains.

(ii) The Decision denies the parties an advance opportunity to contest admissibility pursuant to Rule 64(1)

32. By admitting all material referred to by the List of Evidence before the start of the trial and without prior notice, the Majority denied the parties an opportunity to raise issues on the admissibility of the evidence in violation of Rule 64.

⁵³ Lee, p.352.

33. On 4 October 2010, the Trial Chamber ordered the parties to file “observations on the potential submission into evidence of the witness statements of those witnesses to be called to give evidence at trial”.⁵⁴ The Chamber’s request did not seemingly invite factual issues with respect to the *prima facie* admissibility of witness statements pursuant to Rule 64(1).⁵⁵ Rather the Chamber requested the assistance of the parties to determine “the *manner* in which evidence is to be presented at trial”.⁵⁶

34. Regardless of whether the filing of the List of Evidence with a Trial Chamber can be considered to be the moment when the material is *submitted* to the Chamber within the terms of Rule 64(1), in this case the Majority has already ruled on its admission. Any determination that evidence is *prima facie* admitted circumvents future discussion on its admissibility, which violates Rule 64. As Judge Ozaki noted in her Dissenting Opinion, “since the Majority decision foresees the immediate admission into evidence of all documents contained in the prosecution’s List of Evidence [...] it is virtually impossible for the defence to comply with the delays prescribed in Rule 64(1)”⁵⁷. This directly affects the fairness of the trial.

35. The Majority emphasised that the Decision “does not prevent the parties from challenging the admissibility of such evidence [...] in accordance with Rules 63(3) and 64(1)”, thereby purporting to follow the procedure under Rule 64.⁵⁸ If a subsequent challenge effectively shifts the burden with respect to admissibility to the party *challenging* the evidence, that would be contrary to the principle whereby the party who seeks to tender evidence must establish its admissibility.⁵⁹ This would not happen, however, if, as explained in paragraph 31 above, the

⁵⁴ ICC-01/05-01/08-921, para.2.

⁵⁵ The Trial Chamber’s order was based on Articles 64(3)(a), 69(2), 69(3), 69(4), and 74(2); Rules 68(b) and 134(1); and Regulations 28(2), 34(a) and 54. (ICC-01/05-01/08-921, para.2)

⁵⁶ ICC-01/05-01/08-921, para.1 (emphasis added).

⁵⁷ Dissenting Opinion, para.17.

⁵⁸ Decision, para.19.

⁵⁹ For instance ICC-01/04-01/07-2835, paras.13,16,23.

Chamber actually intended to follow the First Analytical Method, in which case a challenge to the admissibility of the evidence would not imply a shift of the burden, which will effectively rest with the party proffering the evidence.

36. In addition, while Rule 64(1) allows for the possibility to raise issues relating to relevance or admissibility at a later stage, the same provision specifies that this is available “[e]xceptionally, when those issues were not known at the time when the evidence was submitted”. In such a case, they must be raised “immediately after the issue has become known”. Under the procedure adopted by the Majority, however, issues that were known *prior* to the admission of the evidence could not be timely raised simply because the Majority did not allow for any discussion on the admissibility of the material and deferred any such discussion to a later stage. As a result, “known” issues will have to either (a) be discussed at a later stage, in contravention of Rule 64(1), or (b) be excluded altogether as a basis for a challenge to admissibility in the future, which creates a situation of unfairness for the opposing party.

B. The Second Error: The Majority circumvented the statutory principle of primacy of oral evidence

37. Article 69(2) provides 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”. The Prosecution, following the Dissenting Opinion,⁶⁰ submits that in accordance with the Statute and the Rules prior witness statements could only be included as evidence *per se* by means of exception and under very specific conditions.⁶¹ The Decision circumvents the principle of the primacy of oral witness evidence expressed in Article 69(2).⁶²

⁶⁰ Dissenting Opinion, para.8.

⁶¹ See para. 39 below.

⁶² The principle of orality is a key procedural principle both in common law and civil law jurisdictions. “Historically, oral testimony was the foundation of the common law trial, and in criminal proceedings there is still a strong attachment to the principle of orality.” (Dennis, *The Law of Evidence* (2007) 3rd edition. London;

38. Although the Majority correctly found that Article 69(2) does not envisage “prevalence of *orality* of the procedures as a whole”,⁶³ it failed to recognise that the Statute itself requires witness evidence (as opposed to material evidence or documentary evidence that does not consist of previously recorded witness evidence) shall as a general rule “be given in person”.⁶⁴ This is in the Prosecution’s view a central aspect of the fairness of the proceedings and the rights of the accused.⁶⁵

39. The Majority conceded that the admission of the testimony of a witness other than through *viva voce* testimony constitutes an exception to the rule in Article 69(2).⁶⁶ Examples of such exceptions listed by either the Majority or Judge Ozaki include Article 56 and Rules 47, 68, 87(3)(c), 88(1), 112 and 114.⁶⁷ However, the Majority did not assess on a case-by-case basis whether a deviation from the principle was warranted: rather, and contrary to the express requirements included in Article 69(2), the Majority admitted *all* prior witness statements without enter any findings that ensured that their admission was not “prejudicial to or inconsistent with the rights of the accused”.⁶⁸

Sweet & Maxwell, p.491). In England, the general rule is that witnesses at trial give evidence orally with some exceptions (Sprack, *A Practical Approach to Criminal Procedure* (2006), 11th edition, pp.329,332. In Canada, the evidence of individuals must be tendered in person at trial, subject to some statutory exceptions (Quigley, *Procedure in Canadian Criminal Law* (2005), 2nd edition, 21.3(a),21.6(b)). The same principle is increasingly accepted in civil law jurisdictions: In Germany, there is a duty to introduce relevant evidence orally at the trial. Judgment may only be based on what the court was able to hear. As a rule, the oral interrogation of witnesses cannot be substituted by reading out their written statements or depositions. (Huber, “Criminal Procedure in Germany”, in Vogler and Huber (eds), *Criminal Procedure in Europe* (2008), p.291). French criminal trials rely more heavily on written testimony, but the principle of orality remains important. The reading of written evidence at trial is an exceptional occurrence, and witnesses may only use written statements to refresh their memories with the permission of the court. (Vogler, “Criminal Procedure in France”, in Vogler and B Huber (eds), *Criminal Procedure in Europe* (2008), pp.188-189,217).

⁶³ Decision, para.14.

⁶⁴ Article 69(2). See *Triffterer, Article 69*, pp.1312-1313.

⁶⁵ Although the use of written evidence is not necessarily fatal to the fairness of the proceedings, such use - either in lieu of, or in addition to the oral evidence - must comply with the rights of the accused and the requirements of a fair trial. See inter alia *Unterpertinger v Austria* (1991) 13 E.H.R.R.175; *Kostovski v Netherlands*, 20 November 1989, A.166, p.20; *Prosecutor v Krajisnik*, Order Relating to Prosecution’s Applications to Admit Evidence Pursuant to Rule 92 bis, IT-00-39-T, 19 July 2004, p.2.

⁶⁶ Decision, para.14; Dissenting Opinion, paras.6-7. This is also supported by the consistent jurisprudence of this Court (ICC-01/04-01/07-2362, para. 14; ICC-01/04-01/06-1933, para. 22; ICC-01/04-01/06-2595-Red, para. 42).

⁶⁷ Decision, footnote 26; Dissenting Opinion, footnote 9.

⁶⁸ Article 69(2).

40. The approach taken by the Majority deviates from the previous decisions of Trial Chambers I⁶⁹ and II,⁷⁰ as well as of this same Chamber which had previously found that:⁷¹

The Chamber may [...] 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.

41. The Majority further relies on the Rules of Procedure of the UN *ad hoc* Tribunals, who after years of lengthy proceedings introduced Rules 92*bis* and 92*ter* (and even 92 *quarter* and the most recent Rule 92 *quinquies*) “to enhance the efficiency of trial proceedings”.⁷² These mechanisms, however, are expressly provided for and regulated in the rules of those Tribunals. Further, they set out a restrictive regime for admissibility: first, and as recognized by the Majority, “the admission of written statements in the ICTY-ICTR is applied on a case-by-case basis and after the Chamber’s assessment of its admissibility”;⁷³ second, the material may only be admitted for specific purposes.⁷⁴ More importantly, the Rules of the *ad hoc* Tribunals are not applicable to the Court’s criminal process. As stated by the Appeals Chamber in relation to Article 21(1), when “a matter is exhaustively dealt with by its text or that of the Rules of Procedure and Evidence, in that case no

⁶⁹ ICC-01/04-01/06-1399, paras.26-32; ICC-01/04-01/06-1399, paras.21,32; ICC-01/04-01/06-1603, para.21,25; ICC-01/04-01/06-2595-Red, paras.38-41,43; ICC-01/04-01/06-1140, para.41.

⁷⁰ ICC-01/04-01/07-2289-Corr-Red, paras.13-14. See also ICC-01/04-01/07-2362, paras.21-35); ICC-01/04-01/07-1665-Corr, paras.92-94.

⁷¹ ICC-01/05-01/08-886, para.7; see also paras.5-6.

⁷² Decision, para.25.

⁷³ Decision, para.26.

⁷⁴ Rule 92*bis* was originally designed to expedite the proceedings on matters that are not pivotal to the case and avoiding calling a witness and admitting his/ her statement in lieu of his/ her testimony. In particular, statements that go to the acts and conduct of the accused would not fall within the scope of this provision. *Prosecutor v Limaj*, Decision on Prosecution’s Motions to Admit Prior Statements as Substantive Evidence, IT-03-66-T, 25 April 2005, para.15; *Prosecutor v Krajisnik*, Order Relating to Prosecution’s Applications to Admit Evidence Pursuant to Rule 92 *bis*, IT-00-39-T, 19 July 2004, p. 2.

room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject.”⁷⁵

42. The admission into evidence by the Majority of the totality of the prior statements, at least as formulated under the plain terms of the Decision, infringes on the statutory principle of the primacy of oral evidence. By doing so, the Majority acted beyond the scope of the powers assigned to it by the Statute and the Rules.⁷⁶ However, as the Prosecution submitted during the first day of the hearing, if the witnesses agree and affirm the voluntariness and truth of the statements and are available for examination and cross-examination without restriction, the principle of orality would be preserved.⁷⁷

⁷⁵ ICC-01/04-01/06-772OA4, para.34; ICC-01/04-168OA3, paras.22-24,33-42.

⁷⁶ See ICC-01/04-01/07-2297OA10, Dissenting opinion of Judges Kourula and Trendafilova, para.28.

⁷⁷ ICC-01/05-01/08-T-33-Red-ENG, p.7, lns.17-25 to p.8, lns.1-17; p.32, lns.2-11.

Relief sought

43. For the above reasons, the Prosecution requests the Appeals Chamber to allow the appeal, reverse the Decision and direct the Trial Chamber to determine afresh the admission regime of the relevant evidence, on the basis of the Appeals Chamber's legal findings, and after hearing from the parties.



Luis Moreno-Ocampo, Prosecutor

Dated this 7th day of February 2011

At The Hague, The Netherlands