

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 3 September 2013

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public

**Decision on the admission into evidence of items deferred in the Chamber's
"First decision on the prosecution and defence requests for the admission of
evidence" (ICC-01/05-01/08-2012)**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Aimé Kilolo-Musamba

Mr Peter Haynes

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Victims**

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Chamber” or “Trial Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* hereby issues the Decision on the admission into evidence of items deferred in the Chamber’s “First decision on the prosecution and defence requests for the admission of evidence” (ICC-01/05-01/08-2012) (“Decision”).

I. Background and Submissions

1. On 31 May 2011, the Chamber issued its “Order on the procedure relating to the submission of evidence”,¹ in which it ordered the prosecution and the defence to identify, by 14 June 2011, the materials which they wished to submit as evidence from the commencement of the trial until and including the testimony of Witness 209.² The Chamber further ordered that any responses be submitted by 21 June 2011 and any replies by 27 June 2011.³ When setting out the procedure for the submission as evidence of written statements of witnesses called to testify at trial, the Chamber stressed the need to ensure that the relevant witness did not object to the submission in accordance with Rule 68(b) of the Rules of Procedure and Evidence (“Rules”).⁴
2. On 14 June 2011 the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s submission of the list of materials it requests to be admitted into evidence” (“Prosecution Application”),⁵ in which it

¹ Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1470.

² ICC-01/05-01/08-1470, paragraph 3.

³ ICC-01/05-01/08-1470, paragraph 4.

⁴ ICC-01/05-01/08-1470, paragraph 10.

⁵ Prosecution’s submission of the list of materials it requests to be admitted into evidence, 14 June 2011, ICC-01/05-01/08-1514 with Annex A ICC-01/05-01/08-1514-Conf-AnxA and a corrigendum ICC-01/05-

requested, *inter alia*, the admission into evidence of the written statement of Witness 23 and the translations thereof.⁶

3. On 14 June 2011, the defence of Mr Jean-Pierre Bemba Gombo (“defence”) filed its “Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l’ordonnance de la Chambre du 31 mai 2011” (“Defence Application”),⁷ in which it requested, *inter alia*, the admission into evidence of the written statements of Witnesses 6 and 9.⁸
4. On 21 June 2011, the prosecution and the defence filed their respective objections to the admission into evidence of the items submitted by the other party.⁹ On 27 June 2011, the prosecution filed its reply to the defence’s response, challenging the defence’s objections.¹⁰ The defence did not file a reply to the prosecution’s response.

01/08-1514-Conf-AnxA-Corr, filed on 18 June 2012, a public redacted version of Annex A ICC-01/05-01/08-1514-AnxA-Red, was originally filed on 20 January 2012 with its corrigendum ICC-01/05-01/08-1514-AnxA-Red2-Corr filed on 18 June 2012.

⁶ ICC-01/05-01/08-1514-AnxA-Red2-Corr, pages 7 to 8.

⁷ Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l’ordonnance de la Chambre du 31 mai 2011, 14 June 2011, ICC-01/05-01/08-1515-Conf, pursuant to the Chamber’s instruction, the document was reclassified as public on 25 January 2012, ICC-01/05-01/08-1515.

⁸ ICC-01/05-01/08-1515, pages 5 to 7.

⁹ Prosecution’s Response to the Defence’s “Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l’ordonnance de la Chambre du 31 mai 2011”, 21 June 2011, ICC-01/05-01/08-1557-Conf with Annex A ICC-01/05-01/08-1557-Conf-AnxA, and public redacted versions ICC-01/05-01/08-1557-Red and ICC-01/05-01/08-1557-AnxA-Red, both filed on 20 January 2012, a second redacted version of Annex A was filed on 14 February 2012, ICC-01/05-01/08-1557-AnxA-Red2; and Defence Response to the Prosecution’s List of documents to be submitted into evidence pursuant to Trial Chamber III’s order of 31 May 2011, 21 June 2011, ICC-01/05-01/08-1558-Conf and public redacted version ICC-01/05-01/08-1558-Red, filed on 20 January 2012.

¹⁰ Prosecution’s Reply to the “Defence Response to the Prosecution’s List of documents to be submitted into evidence pursuant to Trial Chamber III’s order of 31 May 2011”, 27 June 2011, ICC-01/05-01/08-1564-Conf with Annex A, ICC-01/05-01/08-1564-AnxA and public redacted version ICC-01/05-01/08-1564-Red, filed on 20 January 2012.

5. On 15 December 2011, the Chamber issued its “First decision on the prosecution and defence requests for the admission of evidence” (“Decision 2012”),¹¹ in which it decided on the admission into evidence of the items submitted by the prosecution and the defence, and deferred its decision with regard to the written statements of Witnesses 6, 9 and 23.¹²

6. The Chamber deferred the admissibility assessment of the abovementioned statements in light of the fact that, while the witnesses had attested to the truth of their statements and/or testified that they heard, saw or experienced the matters described therein, they did not expressly consent to the submission of their statements into evidence, as required by Rule 68(b) of the Rules.¹³ That notwithstanding, the Chamber stated that it would revisit the issue of admissibility if satisfied that the witnesses did not object to their submission.¹⁴ The Chamber therefore instructed the Victims and Witnesses Unit to contact Witnesses 6, 9 and 23, to inform them that the admission of their statements had been sought by the parties and to ask them whether they had any objection to their admission into evidence.¹⁵

7. On 6 February 2012, the Registry filed its “Registry’s report on the implementation of decision ICC-01/05-01/08-2012-Conf”,¹⁶ appending

¹¹ First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011, ICC-01/05-01/08-2012-Conf and public redacted version ICC-01/05-01/08-2012-Red, filed on 9 February 2012.

¹² ICC-01/05-01/08-2012-Red, paragraph 139.

¹³ *Ibid.*

¹⁴ ICC-01/05-01/08-2012-Red, paragraph 140.

¹⁵ ICC-01/05-01/08-2012-Red, paragraphs 140 and 163(6).

¹⁶ Registry’s report on the implementation of decision ICC-01/05-01/08-2012-Conf, 6 February 2012, ICC-01/05-01/08-2121 with confidential *ex-parte* Annexes 1, 2 and 3, ICC-01/05-01/08-2121-Conf-Exp-Anx1, ICC-01/05-01/08-2121-Conf-Exp-Anx2 and ICC-01/05-01/08-2121-Conf-Exp-Anx3.

three "*procès verbaux*" in which the relevant witnesses declare that they have no objection to the admission of their statements as evidence.

II. Analysis and Conclusions

8. In accordance with Article 21(1) of the Rome Statute ("Statute"), in making its determination, the Chamber has considered Articles 64(2), (6)(d) and (9)(a), 67, and 69 of the Statute, and Rules 63, 64, and 68 of the Rules.

9. The Chamber recalls its general approach to the admission of evidence. In particular, for an item to be admitted into evidence it must satisfy the three-part test under which it must (i) be relevant to the case; (ii) have probative value; and (iii) be sufficiently relevant and probative as to outweigh any prejudicial effect its admission may cause.¹⁷ Further, the Chamber underlines once more that its determination on the admissibility of an item has no bearing on the final weight to be afforded to it, which will only be determined by the Chamber at the end of the case when assessing the evidence as a whole.¹⁸

10. The Chamber also reiterates its view that, when the admission into evidence of the statements of witnesses who testify at trial is sought:

134. The starting point for the Chamber's analysis is the presumption, enshrined in Article 69(2) of the Statute, that the "testimony of a witness at trial shall be given in person". As the Appeals Chamber has held, this "principle of orality", "makes in-court personal testimony the rule". However, the Appeals Chamber

¹⁷ ICC-01/05-01/08-2012-Red, paragraphs 13 to 16; Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012, ICC-01/05-01/08-2299-Conf and public redacted version ICC-01/05-01/08-2299-Red, filed on 8 October 2012, paragraphs 7 to 9.

¹⁸ ICC-01/05-01/08-2012-Red, paragraph 18; and ICC-01/05-01/08-2299-Red, paragraph 11.

has also made clear that "in-court personal testimony is not the exclusive mode by which a Chamber may receive witness testimony", and that "a Chamber has the discretion to receive the testimony of a witness by means other than in-court personal testimony, as long as this does not violate the Statute and accords with the Rules" and "is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally".

135. Where a witness testifies before the Chamber, Rule 68 of the Rules is of particular relevance to the question of the admissibility of their written statements. This provision empowers a Trial Chamber to allow, in accordance with Article 69(2) of the Statute:

the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

- (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
- (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

136. As this and other Chambers have previously held, Rule 68 is directed at the "testimony of a witness" in a broad sense and covers written witness statements, permitting the Chamber to admit written statements when the conditions enumerated in Rule 68(a) or Rule 68(b) are satisfied. If the conditions of Rule 68(a) or Rule 68(b) are met, the Chamber will proceed to analyse the relevance and probative value of the witness' statements, together with the potential prejudice that their admission may cause, in line with the three-part test outlined above in paragraphs 13 to 16. In the Chamber's view, this procedure complies with the "cautious item-by-item analysis" mandated by the Appeals Chamber (footnotes omitted).¹⁹

11. The Chamber will hereinafter consider the admissibility of the written statements of Witnesses 6, 9 and 23, in accordance with Rule 68 of the Rules and the three-part test of relevance, probative value and potential prejudice.

¹⁹ ICC-01/05-01/08-2012-Red, paragraphs 134 to 136.

Written statements of Witnesses 6 and 9

12. The defence requests the admission of the written statement of Witness 6, document **CAR-OTP-0005-0099** (Confidential),²⁰ and two of the three parts of the written statement of Witness 9, documents **CAR-OTP-0010-0107** (Confidential)²¹ and **CAR-OTP-0010-0170_R03** (Confidential).²² The remaining part of Witness 9's statement, the admission of which has not been sought, is document **CAR-OTP-0010-0120** (Confidential).²³ The Chamber notes that the defence has not given reasons as to the relevance, probative value, or potential prejudice of the statements it submits.

13. The prosecution objects to the defence's submission of the statements of Witnesses 6 and 9 "on the basis of the principle of the primacy of orality in the proceedings", adding that the Chamber "may only admit a prior statement on an exceptional basis after a cautious analysis in accordance with Article 69(2) and 69(4) of the Statute and with Rule 68 of the Rules."²⁴

14. As to the fulfilment of the requirements of Rule 68 of the Rules,²⁵ the Chamber is satisfied that the requirements of Rule 68(b) of the Rules are met. In particular, Witness 6 – the Public Prosecutor at the *Tribunal de Grande Instance de Bangui* who carried out investigations in relation to the events that occurred in the Central African Republic ("CAR") from October 2002 to March 2003 ("2002-2003 events") – and Witness 9 – the

²⁰ The English translation bears ERN CAR-OTP-0049-0363 (Confidential).

²¹ The English translation bears ERN CAR-OTP-0052-0189 (Confidential).

²² The English translation bears ERN CAR-OTP-0055-0483 (Confidential).

²³ The English translation bears ERN CAR-OTP-0055-0434 (Confidential).

²⁴ ICC-01/05-01/08-1557-Conf-AnxA, pages 9, 12 and 13.

²⁵ ICC-01/05-01/08-2012-Red, paragraphs 132 and 135.

Investigative Judge who carried out an investigation in the CAR into the 2002-2003 events and interviewed numerous alleged victims of rape, pillaging and murder – were both present before the Trial Chamber.²⁶ The Chamber is further satisfied that, during the trial proceedings, the prosecution, the defence, the legal representatives of victims, and the Chamber had the opportunity to question them. In addition, the Chamber is satisfied that both witnesses consented to their statements being submitted into evidence.²⁷

15. In terms of relevance, the Majority of the Chamber, Judge Kuniko Ozaki dissenting, is of the view that the written statements of witnesses that have testified at trial are relevant because they may assist the Chamber in assessing, contextualising, and weighing the witnesses' testimony.²⁸ In this regard, the Majority reiterates its view that, in order for the Chamber to properly discharge its statutory truth-finding mandate, rather than merely assessing the testimony of a witness against those excerpts of his or her prior statements that the parties decide to refer to in court in the limited time available to them to conduct questioning, it should be able to compare a witness's testimony against the entirety of his or her written

²⁶ Witness 6 provided testimony before the Chamber from 4 to 12 April 2011, *see* transcript of hearing of 4 April 2011, ICC-01/05-01/08-T-94-ENG ET, transcript of hearing of 5 April 2011, ICC-01/05-01/08-T-95-Red-ENG CT, transcript of hearing of 6 April 2011, ICC-01/05-01/08-T-96-Red-ENG CT, transcript of hearing of 7 April 2011, ICC-01/05-01/08-T-97-ENG ET, transcript of hearing of 11 April 2011, ICC-01/05-01/08-T-98-Red2-ENG CT, and transcript of hearing of 12 April 2011, ICC-01/05-01/08-T-99-ENG CT3. Witness 9 provided testimony before the Chamber from 3 to 11 May 2011, *see* transcript of hearing of 3 May 2011, ICC-01/05-01/08-T-102-Red-ENG, transcript of hearing of 4 May 2011, ICC-01/05-01/08-T-104-Red-ENG CT, transcript of hearing of 5 May 2011, ICC-01/05-01/08-T-105-Red-ENG CT, transcript of hearing of 9 May 2011, ICC-01/05-01/08-T-106-Red-ENG CT, transcript of hearing of 10 May 2011, ICC-01/05-01/08-T-107-ENG ET, and transcript of hearing of 11 May 2011, ICC-01/05-01/08-T-108-Red-ENG.

²⁷ ICC-01/05-01/08-2121-Conf-Exp-Anx1 and ICC-01/05-01/08-2121-Conf-Exp-Anx2.

²⁸ ICC-01/05-01/08-2012-Red, paragraph 142.

statement(s).²⁹ The Majority notes that during the defence's questioning of Witness 6, document CAR-OTP-0005-0099 was shown to the witness, who was asked whether he recognised it,³⁰ and was extensively questioned on its content.³¹ Further, the Majority notes that during the testimony of Witness 9, the witness was shown, asked whether he recognised,³² and extensively questioned on the content of documents CAR-OTP-0010-0107, CAR-OTP-0010-0170_R03, and CAR-OTP-0010-0120 by the parties, the legal representatives of victims, and the Chamber.³³ The Majority is therefore satisfied that documents CAR-OTP-0005-0099, CAR-OTP-0010-0107, CAR-OTP-0010-0170_R03, and CAR-OTP-0010-0120 are all relevant to matters that are properly to be considered by the Chamber, particularly the investigations conducted in the CAR in relation to the 2002-2003 events, and would assist in the Chamber's assessment of the witnesses' testimony.

16. In terms of probative value, the documents' reliability stems, firstly, from the fact that they all appear to have been taken in accordance with Rule 111 of the Rules and, secondly, from the fact that both Witnesses 6 and 9 testified in court as to their accuracy. In the view of the Majority, these factors provide the documents with sufficient probative value for admission as evidence.

²⁹ ICC-01/05-01/08-2012-Red, paragraph 143.

³⁰ ICC-01/05-01/08-T-97-ENG ET, page 51, lines 9 to 16.

³¹ ICC-01/05-01/08-T-97-ENG ET, page 50, line 19 to page 59, line 22.

³² ICC-01/05-01/08-T-104-Red-ENG CT, page 53, lines 1 to 9.

³³ ICC-01/05-01/08-T-104-Red-ENG CT, page 22, line 23 to page 27, line 22, page 34, line 8 to page 39, line 5, page 40, line 6 to page 46, line 8, page 53, lines 1 to 9, page 59, line 13 to page 64, line 17; ICC-01/05-01/08-T-105-Red-ENG CT, page 21, line 25 to page 25, line 6; ICC-01/05-01/08-T-106-Red-ENG CT, page 22, line 12 to page 24, line 13, page 43, line 4 to page 44, line 13, page 49, line 9 to page 59, line 17, page 66, line 5 to page 67, line 9, page 69, line 9 to page 70, line 10; ICC-01/05-01/08-T-107-ENG ET page 4, line 11 to page 9, line 13, page 12, line 10 to page 21, line 19, page 32, line 5 to page 34, line 20, page 36, line 23 to page 45, line 11, page 49, line 14 to page 51, line 23; ICC-01/05-01/08-T-108-Red-ENG, page 20, line 22 to page 22, line 3.

17. In terms of potential prejudice, the Majority reiterates its view that, far from causing prejudice, the admission of written statements of witnesses who have testified at trial will enable the Chamber to compare the witnesses' testimony against their prior statements to determine the extent of inconsistencies, if any, which will contribute to the fair evaluation of the witnesses' testimony.³⁴ In addition, the Majority also reiterates its view that the presumption of orality does not prevent the admission of written statements, particularly in relation to witnesses who have testified in court.³⁵ In the case at hand, the substance of the witnesses' testimony was given live in court and was subject to testing through questioning. In these circumstances, witnesses' prior statements are complementary to their oral testimony and not a substitute, and will be used in addition as a basis for assessing it and determining the weight to be afforded to the testimony as a whole.³⁶ Lastly, the Majority notes that the written statement of Witness 6 and two parts of the statement of Witness 9 were submitted into evidence by the defence itself. In view of the foregoing, the Majority sees no reason to believe that the admission of the written statements of Witnesses 6 and 9 would have any prejudicial effect on or be inconsistent with the rights of the accused or the fairness of the trial generally. Therefore, the Majority of the Chamber, Judge Kuniko Ozaki dissenting, admits into evidence documents CAR-OTP-0005-0099, CAR-OTP-0010-0107, and CAR-OTP-0010-0170_R03.

³⁴ ICC-01/05-01/08-2012-Red, paragraph 146.

³⁵ ICC-01/05-01/08-2012-Red, paragraph 147.

³⁶ ICC-01/05-01/08-2012-Red, paragraphs 149 and 150.

18. The Majority notes that document CAR-OTP-0010-0120 is an integral part of the written statement of Witness 9.³⁷ In addition, the witness was extensively questioned in court in relation to the content of this particular document.³⁸ The Majority reiterates its principled approach to the admission of documents in their entirety rather than as excerpts,³⁹ particularly in relation to witnesses' statements, when considered necessary for the determination of the truth and in order to ensure that the information they contain is not taken out of context.⁴⁰ Considering that the document is relevant, has probative value, and that there is no suggestion its admission would cause any prejudice to the rights of the accused or to a fair trial, the Majority of the Chamber, Judge Kuniko Ozaki dissenting, admits into evidence document CAR-OTP-0010-0120, in accordance with Articles 64(6)(d) and 69(3) of the Statute.

Written statement of Witness 23

19. The prosecution requests the admission of the written statement of Witness 23 contained in documents (i) **CAR-OTP-0008-0033_R04** (Confidential) with its translation into French **CAR-OTP-0034-0106_R02**

³⁷ Document CAR-OTP-0010-0107 is a *proces-verbal d'audition* of an interview conducted by the prosecution on 22 October 2007 from 9.30am to 13.00pm. Document CAR-OTP-0010-0120 is a *proces-verbal d'audition* of an interview conducted by the prosecution on 4 April 2008 from 11.29am to 16.50pm. Finally, document CAR-OTP-0010-0170_R03 is a *proces-verbal d'audition* of an interview conducted by the prosecution on 5 April 2008 from 14.20pm to 15.44pm.

³⁸ ICC-01/05-01/08-T-104-Red-ENG CT, page 22, line 23 to page 24 line 6, page 34, line 20 to page 36, line 9, page 44, line 24 to page 45, line 22; ICC-01/05-01/08-T-106-Red-ENG CT, page 22, line 12 to page 24, line 13, page 49, line 25 to page 59, line 17, page 66, line 5 to page 67, line 9, page 69, line 9 to page 70, line 10; ICC-01/05-01/08-T-107-ENG ET, page 5, line 20 to page 7, line 23, page 12, line 10 to page 13, line 23, page 21, lines 4 to 24, and page 38, line 3 to page 45, line 11.

³⁹ ICC-01/05-01/08-1470, paragraph 11; ICC-01/05-01/08-2012-Red, paragraph 90; ICC-01/05-01/08-2299-Red, paragraph 116.

⁴⁰ ICC-01/05-01/08-1470, paragraph 11.

(Confidential);⁴¹ (ii) **CAR-OTP-0008-0050_R03** (Confidential) with its translation into French **CAR-OTP-0034-0123_R02** (Confidential);⁴² (iii) **CAR-OTP-0008-0088_R03** (Confidential) with its translation into French **CAR-OTP-0034-0154_R02** (Confidential);⁴³ and (iv) **CAR-OTP-0008-0112_R03** (Confidential) with its translation into French **CAR-OTP-0034-0170_R02** (Confidential).⁴⁴ The prosecution states that it seeks to tender the statement to demonstrate its consistency with the witness's testimony and to rebut the express or implied charge against the witness of recent fabrication, influence, motive, or collusion.⁴⁵ The prosecution argues that the documents are relevant to and probative of, *inter alia*, rape and pillaging.⁴⁶ In addition, the prosecution submits that the defence had an opportunity to cross-examine this witness and that the admission of his statement would cause no prejudice to the rights of the accused.⁴⁷

20. The defence objects to the admission of this statement on the basis that the prosecution has not provided a sufficient basis for its admission, arguing that compliance with Rule 68 of the Rules does not automatically create a sufficient ground to deviate from the principle of orality.⁴⁸ The defence further objects to the prosecution's justification for admission, stating that a prior statement does not become admissible simply because an

⁴¹ Written Statement of an interview conducted by the prosecution on 13 March 2008 from 12.20pm to 17.15pm.

⁴² Written Statement of an interview conducted by the prosecution on 14 March 2008 from 08.45am to 17.45pm.

⁴³ Written Statement of an interview conducted by the prosecution on 15 March 2008 from 10.30am to 14.00pm.

⁴⁴ Written Statement of an interview conducted by the prosecution on 16 March 2008 from 09.30am to 10.00am.

⁴⁵ ICC-01/05-01/08-1514- AnxA-Red2-Corr, pages 7 to 8.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ ICC-01/05-01/08-1558-Red, paragraph 14.

allegation of fabrication, motive, or collusion is raised.⁴⁹ In the view of the defence, if there were matters contained in the statements that required clarification the prosecution should have sought to clarify them during re-examination.⁵⁰ Lastly, the defence argues that the admission of these prior statements is not permissible under the statutory regime of the Court, because they relate to matters that are significant to the case or materially in dispute.⁵¹

21. In its reply the prosecution argues that the statement of Witness 23 is relevant together with those of Witnesses 42 and 73,⁵² in order to rebut the defence's assertion of collusion among these three witnesses.⁵³ The prosecution contends that it could not have rebutted these allegations through re-examination because the allegations go beyond one single witness and were not raised until Witness 23 had already testified.⁵⁴ Lastly, the prosecution argues that the statement's absence from the record would necessarily prejudice a fair evaluation of the witness's testimony.⁵⁵

22. As to the fulfilment of the requirements of Rule 68(b) of the Rules, the Chamber is satisfied that they are met. Witness 23 was present before the Trial Chamber and the parties, the participants, and the Chamber had the

⁴⁹ ICC-01/05-01/08-1558-Red, paragraph 15.

⁵⁰ *Ibid.*

⁵¹ ICC-01/05-01/08-1558-Red, paragraphs 16 to 20.

⁵² The statements of witnesses 42 and 73 were already admitted into evidence by Decision 2012, *see* ICC-01/05-01/08-2012-Red, paragraphs 142 to 150.

⁵³ ICC-01/05-01/08-1564-Red, paragraph 15.

⁵⁴ ICC-01/05-01/08-1564-Red, paragraph 16.

⁵⁵ ICC-01/05-01/08-1564-Red, paragraph 17.

opportunity to question him.⁵⁶ In addition, the Chamber is satisfied that the witness consented to his statements being submitted into evidence.⁵⁷

23. In terms of relevance, the Majority reiterates its view that the written statements of witnesses who have testified at trial are relevant because they may assist the Chamber in assessing, contextualising and weighing the witnesses' testimony.⁵⁸ In addition, they may assist the Chamber in properly discharging its statutory truth-finding mandate, allowing it to compare a witness's testimony against the entirety of his written statement, as opposed to merely those excerpts that the parties referred to in court.⁵⁹ The Chamber notes that during the testimony of Witness 23, the witness was extensively questioned by both parties about the content of the statement he provided to the prosecution in 2008 and possible contradictions with his testimony.⁶⁰ The Chamber is therefore satisfied that the abovementioned documents are relevant to matters that are properly to be considered by the Chamber; particularly the allegations of rape, murder and pillaging allegedly committed during the 2002-2003 events, and would assist in the Chamber's assessment of the testimony of Witness 23.

⁵⁶ Witness 23 provided testimony before the Chamber from 20 to 26 January 2011, *see* transcript of hearing of 20 January 2011, ICC-01/05-01/08-T-50-Red-ENG CT; transcript of hearing of 21 January 2011, ICC-01/05-01/08-T-51-Red-ENG CT2; transcript of hearing of 24 January 2011, ICC-01/05-01/08-T-52-Red-ENG CT2; transcript of hearing of 25 January 2011, ICC-01/05-01/08-T-53-Red-ENG CT; and transcript of hearing of 26 January 2011, ICC-01/05-01/08-T-54-Red-ENG CT.

⁵⁷ ICC-01/05-01/08-2121-Conf-Exp-Anx3.

⁵⁸ ICC-01/05-01/08-2012-Red, paragraph 142.

⁵⁹ ICC-01/05-01/08-2012-Red, paragraph 143.

⁶⁰ ICC-01/05-01/08-T-51-CONF-ENG CT2, page 28, lines 2 to 20; ICC-01/05-01/08-T-53-Red-ENG CT, page 4, line 5 to page 12, line 13, page 20, line 9 to page 21, line 8, page 22, line 21 to page 23, line 25, page 32, lines 14 to 25, page 37, line 15 to page 38, line 21, page 42, line 1 to page 44, line 15, page 47, line 18 to page 48, line 6; ICC-01/05-01/08-T-54-CONF-ENG CT, page 25, line 15 to page 26, line 4, page 34, line 1 to page 36, line 3.

24. In terms of probative value, the Chamber is satisfied that the statement's reliability stems from the fact that it appears to have been taken in accordance with Rule 111 of the Rules and that Witnesses 23 testified in court as to its accuracy. In the view of the Chamber, these factors provide the documents with sufficient probative value for their admission as evidence.

25. In terms of potential prejudice, the Majority reiterates its view that, far from causing prejudice, the admission of written statements of witnesses who have testified at trial will enable the Chamber to compare the witnesses' testimony against their prior statements to determine the extent of inconsistencies, if any, which will contribute to the fair evaluation of the witnesses' testimony.⁶¹ In addition, the Majority also reiterates its view that the presumption in favour of orality does not prevent the admission of written statements, particularly in relation to witnesses who have testified in court.⁶² In the case at hand, the substance of the witness's testimony was given live in court and was subject to testing through questioning. In these circumstances, witnesses' prior statements will be treated as complementary to their oral testimony, and will be used as a basis for assessing it and determining the weight to be afforded to the testimony as a whole.⁶³ In view of the foregoing, the Chamber sees no reason to believe that the admission of the written statement of Witness 23 would have a prejudicial effect on or be inconsistent with the rights of the accused or the fairness of the trial generally. The Chamber therefore admits into evidence documents CAR-OTP-0008-0033_R04, CAR-OTP-

⁶¹ ICC-01/05-01/08-2012-Red, paragraph 146.

⁶² ICC-01/05-01/08-2012-Red, paragraph 147.

⁶³ ICC-01/05-01/08-2012-Red, paragraph 150.

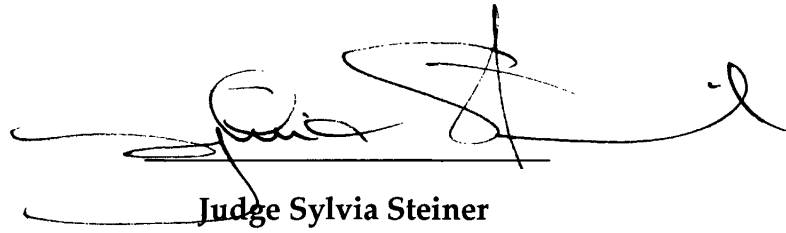
0034-0106_R02, CAR-OTP-0008-0050_R03, CAR-OTP-0034-0123_R02, CAR-OTP-0008-0088_R03, CAR-OTP-0034-0154_R02, CAR-OTP-0008-0112_R03 and CAR-OTP-0034-0170_R02.

II. Conclusions

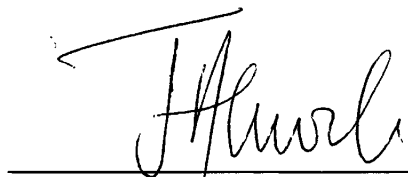
26. In view of the foregoing:

- a. the Majority of the Chamber, Judge Kuniko Ozaki dissenting, ADMITS into evidence documents CAR-OTP-0005-0099, CAR-OTP-0010-0107, CAR-OTP-0010-0170_R03, CAR-OTP-0010-0120;
- b. the Chamber ADMITS into evidence documents CAR-OTP-0008-0033_R04, CAR-OTP-0034-0106_R02, CAR-OTP-0008-0050_R03, CAR-OTP-0034-0123_R02, CAR-OTP-0008-0088_R03, CAR-OTP-0034-0154_R02, CAR-OTP-0008-0112_R03 and CAR-OTP-0034-0170_R02;
- c. the Chamber ORDERS that the EVD-T numbers previously assigned to the items admitted into evidence in the present decision remain unchanged; and
- d. the Chamber INSTRUCTS the Registry to assign new EVD-T numbers to those items which have not as yet been assigned one.

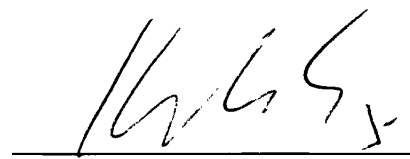
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this **3 September 2013**

At The Hague, the Netherlands