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TRIAL CHAMBER III

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

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

Public Document

**Prosecution's Observations on the admission into evidence of the written
statement of witness CHM-01**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The admission of the written statement of witness CHM-01 (“CHM-01”)¹ as stated in the Chamber’s Order,² albeit in accordance with the three-stage admissibility test and subject to witness consent, does not appear necessary to evaluate the probative value and credibility of CHM-01’s evidence. The Rome Statute (“Statute”) and the Rules of Procedure and Evidence (“Rules”) give Trial Chamber III (“Chamber”) discretion to admit prior statements of witnesses who appeared at trial and were available for examination by the other party. However, this discretion should be exercised cautiously and in exceptional circumstances only to ensure that prior statements do not unnecessarily replace *viva voce* testimony through systematic admission and to prevent equal consideration of prior statements without distinction. This could needlessly lengthen judicial assessment of duplicative evidentiary materials with potentially little added value.

2. A Chamber may admit a prior statement either partially or entirely.³ The Chamber, Judge Ozaki dissenting, has admitted entire witness statements under Rule 68 in addition to courtroom testimony. The Chamber may exercise this discretion to admit prior statements in order to freely assess and contextualize discrepancies with, and/or omissions in, a courtroom testimony. The Chamber may admit prior statements not only to assess witness credibility, but also as substantive evidence for the truth of the content of the statements, where they are reliable. The Office of the Prosecutor (“Prosecution”) submits that none of the above reasons are applicable to the admission into evidence of the statement of CHM-01.

¹ CAR-OTP-0008-0219_R01.

² ICC-01/05-01/08-2923, Order seeking observations on the admission into evidence of written statement of witness CHM-01, 13 December 2013.

³ ICC-01/05-01/08-941, Prosecution’s Position on Potential Submission of Witness Statements at Trial pursuant to Trial Chamber III’s Order, 11 October 2010, paras 3-6.

II. Procedural History

3. On 3 May 2011, the Appeals Chamber issued its decision reversing the Chamber's "Decision on the admission into evidence of materials contained in the prosecution's list of evidence."⁴ The Appeals Chamber decided, *inter alia*, that the "admission into evidence of the witnesses' written statements without a cautious item-by-item analysis and without satisfying Rule 68 of Rules was incompatible with the principle of orality established by Article 69 (2) of the Statute."⁵

4. On 1 October 2013, the Chamber issued the "Order on the submission of final applications for the admission of material into evidence and seeking observations on the admission into evidence of witnesses' written statements" listing a number of witnesses and their statements in Annex A ("Annex A of the Order").⁶

5. On 6 November 2013, the Chamber issued the "Decision on the presentation of additional testimony pursuant to Articles 64(6)(b) and (d) and 69(3) of the Statute" requesting witness CHM-01 to testify.⁷ Witness CHM-01 testified before the Court from 18 to 22 November 2013.⁸

6. On 13 December 2013, the Chamber issued the "Order seeking observations on

⁴ ICC-01/05-01/08-1386, Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence," 3 May 2011.

⁵ *Ibid*, para. 3.

⁶ ICC-01/05-01/08-2824+Anx, Order on the submission of final applications for the admission of material into evidence and seeking observations on the admission into evidence of witnesses' written statements, 1 October 2010.

⁷ ICC-01/05-01/08-2863-Red, Public redacted version of Decision on the presentation of additional testimony pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute, 6 November 2013, para. 5. CHM-01 testified between 18 – 22 November 2013.

⁸ ICC-01/05-01/08-2923, Order seeking observations on the admission into evidence of written statement of witness CHM-01, 13 December 2013, para. 2.

the admission into evidence of written statement of witness CHM-01" from the parties and participants.⁹

III. Submissions

7. Pursuant to Articles 64(9)(a), 69(2), and 69(4) of the Statute and Rules 63 and 68 of the Rules, a Chamber has discretion to admit any type of evidence at trial, including prior recorded statements, provided that the evidence meets the legal requirements of Article 69(4) of the Statute.¹⁰ The Chamber ruled that the admission of all evidence, including prior statements, is subject to the three-stage test of relevance, probative value and prejudicial effect; only evidence that is sufficiently relevant and probative to outweigh any prejudicial effect will be admitted.¹¹

8. Thus far, the Chamber has admitted prior statements of six witnesses under Rule 68. Specific reasons justified their admission. Following the Defence request for admission of prior statements of Prosecution witnesses 6 and 9, the Chamber, by majority, decided to admit their complete statements.¹² The Chamber further admitted the complete prior statements of Prosecution witnesses 23, 42, 73 and 209 after the Prosecution requested their admission. The Prosecution submitted that the admission of the first three statements was to demonstrate consistency with in-court testimony to, *inter alia*, rebut the express or implied charge against recent fabrication or collusion;¹³ the latter was admitted to supplement P-209's testimony provided in

⁹ *Ibid*, para. 6.

¹⁰ ICC-01/05-01/08-1386, paras. 36 and 37.

¹¹ See for example, ICC-01/05-01/08-2012-Red, Public redacted version of First decision on the prosecution and defence requests for the admission of evidence, 9 February 2012, para. 13; and ICC-01/05-01/08-2299-Conf, Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012, paras. 7 and 8.

¹² ICC-01/05-01/08-2793, 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), 3 September 2013, paras. 12 to 18.

¹³ ICC-01/05-01/08-1514-AnxA-Red2-Corr, Corrigendum to Second redacted version of the Annex A to Prosecution's submission of the list of materials it requests to be admitted into evidence, 18 June 2012,

court.¹⁴

9. The Chamber may admit prior inconsistent statements, *inter alia*, where their admission is necessary to better assess and contextualise discrepancies and/or omissions beyond oral testimony. While their very nature makes admission more probable, the specific circumstances should determine whether the Chamber exercises its discretion to admit prior inconsistent statements in order to assess discrepancies addressed in court.¹⁵ Although operating under slightly different rules, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has held that prior inconsistent statements may not only be received into evidence for assessing the credibility of the witness, but also as evidence for the truth of the content of the witness statement when they fulfil the criteria of relevance, reliability, and probative value.¹⁶

10. The Appeals Chamber ruled that the admission of prior recorded statements requires a "cautious item-by-item analysis."¹⁷ The Prosecution restates 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."¹⁸ This has been the practice of Trial Chambers I and II.¹⁹ The exceptional

pages 7 to 8, 10 and 39. See, ICC-01/05-01/08-2012-Red, paras. 143-150; and ICC-01/05-01/08-2793, paras. 19-25.

¹⁴ See, ICC-01/05-01/08-2012-Red, paras. 151-154; and ICC-01/05-01/08-1514-AnxA-Red2-Corr, Corrigendum to Second redacted version of the Annex A to Prosecution's submission of the list of materials it requests to be admitted into evidence, 18 June 2012, page 39.

¹⁵ ICC-01/05-01/08-1028, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23 November 2010, para. 12: "In appropriate cases, the parties may request the Chamber to admit the prior-recorded statements in order to impeach the witness, or otherwise, the Chamber may request the parties to submit any evidence considered necessary for the determination of the truth, pursuant to Article 69(3) of the Statute." [footnotes omitted]

¹⁶ ICTY: *Prosecutor v. Popovic et al.*, Case No. IT-OS-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, paras. 31 and 32.

¹⁷ ICC-01/05-01/08-1386, para. 81.

¹⁸ ICC-01/05-01/08-1557-Conf-AnxA, 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*

nature of this discretion derives from a general acceptance that witness testimony is primarily evaluated on the basis of the oral testimony in court and documentary evidence apart from prior statements. The decision to admit a prior statement under Rule 68 should therefore only be made in exceptional circumstances, where good reasons exist.

11. Considering the above stated, no apparent reason exists for the admission into evidence of the written statement of CHM-01. His testimony in court covered all material aspects of his written statement. CHM-01 was subject to Defence questioning, which attempted to test the evidence of the witness taking into account his prior statement. In addition, the witness provided clarifications to his statement as sought by the Chamber,²⁰ parties²¹ and participants,²² all of whom used his written statement while examining him. Consequently, his testimony in court is more comprehensive than his prior written statement and therefore the latter would not meet the threshold for the relevance-criterion for admission. The witness testified under oath in court, under the observation and general oversight of the Chamber, which observed his demeanour and composure.²³ Moreover, since witness CHM-01 did not deny having provided this prior statement, or substantively contradict himself while testifying before the court, admission of the written statement into

2011", 21 June 2011, *see e.g.*, pages 9, 12 and 13; ICC-01/05-01/08-941, paras. 3-6. See, also, ICC-01/05-01/08-1028, para. 11: "...the admission of written statements and other materials must remain the exception and only be allowed in the specific, limited circumstances provided for in the Statute, in particular in the specific, limited cases when such statements bring a clearly specified added value to the testimony."

¹⁹ See, for example, ICC-01/04-01/07-2362, Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010; and ICC-01/04-01/06-1603, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2001.

²⁰ ICC-01/05-01/08-T-353-CONF-ENG ET, page 41, lines 4-25, page 42, lines 1-3. See also page 48, lines 8-24; Page 49, lines 1-25; page 56, lines 16-25; page 57, lines 1-12; page 59, lines 15-25; page 63, lines 9-22,

²¹ ICC-01/05-01/08-T-356-CONF-ENG ET, page 73, lines 7-25 ; page 75, lines 1-25.

²² ICC-01/05-01/08-T-356-CONF-ENG ET, page 29, lines 2-25 ; page 32, lines 6-25.

²³ ICC-01/05-01/08-1386 OA 5 OA 6, 3 May 2011, para. 76. *Prosecutor v. Bemba*, Judgment on the appeals against the decision on the admission into evidence of materials contained in the prosecution's list of evidence.

evidence for the purpose of assessing the credibility of the witness is therefore not necessary.

IV. Conclusion

12. The Prosecution respectfully observes that recourse to CHM-01's prior statement does not appear necessary to evaluate the probative value and credibility of CHM-01's evidence.²⁴ Additional and more detailed submissions can only be made once specific reasons are advanced for seeking admission into evidence of the prior written statement of CHM-01.



Fatou Bensouda
Prosecutor

Dated this 10th Day of January 2014

At The Hague, The Netherlands

²⁴ ICC-01/05-01/08-1028, para. 10: "In my view, the measure adopted by the Majority implies that the oral testimony of witnesses is insufficient in itself for the Chamber to evaluate the probative value and the credibility of witnesses' evidence. However, this is not the case. In proceedings before the ICC, listening to and evaluating witness testimony is at the core of judicial functions, as clearly demonstrated by the wording of Article 69(2) of the Statute."