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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

Defence Submissions on the proposed admission of Witness CHM-01's statement

Source: Defence for 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. In March 2008, the Prosecution interviewed Witness CHM-01. The transcript of his interview runs to 67 pages (“CHM-01’s Statement”).¹

2. On 6 November 2013, Trial Chamber III (“the Chamber”) rendered its *Decision on the presentation of additional testimony pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute*,² in which it decided to call Witness CHM-01 to testify in the present proceedings.³ The Chamber did not indicate that it was considering admitting Witness CHM-01’s Statement into evidence.

3. The parties and participants were then asked to communicate to the Chamber their estimates of the time required to question Witness CHM-01 by 13 November 2013.⁴ These estimates were provided to the Chamber in the absence of any notification that Witness CHM-01’s Statement might be admitted as evidence.

4. On 15 November 2013, the Chamber rendered its *Decision on the modalities of the presentation of additional testimony pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute*.⁵ Again, this decision on modalities did not indicate that the Chamber might enter Witness CHM-01’s Statement into the record as evidence.

5. On 22 November 2013, Witness CHM-01 completed his testimony.⁶

6. On 13 December 2013, the Chamber issued its *Order seeking observations on the admission into evidence of written statement of Witness CHM-01*,⁷ indicating for the first

¹ CAR-OTP-0008-0219_R01.

² ICC-01/05-01/08-2863-Red.

³ ICC-01/05-01/08-2863-Red, paras. 4 and 14 (i).

⁴ ICC-01/05-01/08-2863-Red, paras. 11 and 14 (vii).

⁵ ICC-01/05-01/08-2898.

⁶ ICC-01/05-01/08-T-357-CONF-ENG ET.

⁷ ICC-01/05-01/08-2923.

time that it was considering entering Witness CHM-01's Statement into evidence.

The Chamber held:

The Chamber notes that although the abovementioned Statement was used by the Chamber, the parties and the legal representatives of victims during their questioning, it was not submitted into evidence by either party or participant.

Pursuant to its powers under Article 69(3) of the Statute, the Chamber hereby informs the parties and participants that it is considering admitting the Statement into evidence, subject to its assessment in accordance with the three-prong test. Should the parties and participants not oppose its admission, they may make observations on its relevance, probative value and prejudicial effect, if any.

7. Unlike in previous decisions,⁸ the Chamber's Order did not provide any indication of the intended use by the Chamber of Witness CHM-01's Statement, should it be admitted. Notably, the Chamber did not indicate whether the statement would be admitted for the truth of its contents, or which version the Chamber would accept in the event of inconsistencies as between Witness CHM-01's oral testimony and his recorded interview.

8. The Chamber ordered the parties to file submissions by Friday, 10 January 2014.⁹ On this same day, the Defence sought leave for an extension of time within which to file its submissions, until Monday 13 January 2014.

B. APPLICABLE LAW

⁸ See, for example, ICC-01/05-01/08-2824. "in line with the Majority of the Chamber's view that in order for it to properly discharge its statutory truth-finding mandate, rather than merely assessing the testimony of a witness against those excerpts of the prior interviews or 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' testimony against the entirety of the prior recorded statements or interviews.

⁹ ICC-01/05-01/08-2923, para.6.

9. The Appeals Chamber has held that the admission of written statements must “not [be] prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally.”¹⁰

10. Article 67(1)(a) safeguards the right of an accused appearing before the ICC to know the case against him. He also has a right to expeditious proceedings pursuant to Article 67(1)(c), and to confront the case against him under Article 67(1)(e).

11. Article 69(4) of the Statute requires the Chamber to “[r]ule on the admissibility of evidence.” In doing so, the Chamber must be guided by Article 64(2) of the Statute which requires the Chamber to ensure that the trial is fair and expeditious, and is conducted with the full respect for rights of the accused.

12. Rule 64(1) provides that an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Rule 64(2) requires that a Chamber give reasons for any rulings it gives on evidentiary matters.

13. 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 principle that witnesses shall be heard orally has been described as “one of the cornerstones of the proceedings under the Rome Statute.”¹¹ 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 this rule is possible only in accordance with Article 68 and the Rules of Procedure and Evidence.

¹⁰ ICC-01/05-01/08-1386, para. 78.

¹¹ ICC-01/05-01/08-1028, para. 8.

C. SUBMISSIONS

14. The Defence has consistently opposed the admission of Prosecution witness statements into the evidence in the present proceedings.¹² Citing to the principle of the primacy of orality,¹³ the Defence has submitted that the admission of voluminous witness statements is inconsistent with both the governing documents and practice of the ICC, and will undermine the fairness and expeditiousness of the present proceedings.¹⁴ The Defence has also previously cited to numerous examples of Prosecution witnesses claiming, under oath, that the recordings of their interviews contained errors and were not reflective of the answers they gave at the time of their interviews.¹⁵ These examples highlight the importance of verifying the accuracy of records of interview through thorough examination of the witnesses in question before prior statements are admitted, and the difficulty of this task given the sheer length of the Prosecution interviews.

15. In this particular case, the Defence accepts and agrees that Witness CHM-01's statement "was used by the Chamber, the parties and the legal representatives of victims during their questioning."¹⁶ However, at the time that the Defence examined Witness CHM-01, there was no indication or suggestion that the entire 67-page statement would be admitted as evidence in the proceedings. While the Defence certainly was able to question Witness CHM-01 on **some** aspects of his statement within the time allocated for its examination, the statement contains many other allegations and assertions that were not tested during the witness'

¹² See, for example, ICC-01/05-01/08-2833, Defence Submissions on the proposed *proprio motu* admission of 100 transcripts of Prosecution witness interviews; ICC-01/05-01/08-1558-Conf, 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, paras. 16-24.

¹³ ICC-01/05-01/08-1386, para. 76.

¹⁴ See, for example, ICC-01/05-01/08-2833, Defence Submissions on the proposed *proprio motu* admission of 100 transcripts of Prosecution witness interviews; ICC-01/05-01/08-1558-Conf, 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, paras. 16-24.

¹⁵ ICC-01/05-01/08-2833, paras. 17-24.

¹⁶ ICC-01/05-01/08-2923, para. 4.

testimony. Had the Chamber informed the parties that it was considering the admission of the entire statement as evidence in advance of Witness CHM-01's testimony, Mr. Bemba would have had the opportunity to test, clarify or contradict the various allegations contained therein. Having been informed only after the testimony was completed, this opportunity has been lost, and prejudice would arise from having these untested allegations as part of the evidentiary record on which the Chamber can rely during its deliberations.

16. Moreover, those portions of Witness CHM-01's Statement referred to by the Chamber, the parties and participants in their questioning already form part of the record by way of their inclusion in the transcripts of his testimony, undermining any need for the entire statement to be admitted. The fairness to Witness CHM-01 himself should also be considered. The length of the statement meant that not all aspects of his account during interview could be addressed during his testimony. Should the Chamber admit Witness CHM-01's Statement and find apparent inconsistencies between the statement and his oral testimony, the witness has lost the opportunity explain or challenge these purported inconsistencies which may well be held to impact his credibility.

17. The admission of Witness CHM-01's Statement is also inconsistent with the right of an accused to know the case against him. The admission CHM-01's Statement expands that case at a time when he is no longer able to confront new allegations. As noted by Her Honour Judge Ozaki in dissenting from the Majority's admission of other Prosecution witness statements, "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."¹⁷ Given the extremely late stage of the proceedings, to admit new allegations against an accused by way of a prior written statement is inconsistent with the obligation to ensure that the accused is informed

¹⁷ ICC-01/05-01/08-1028, para. 16.

promptly of the case he is expected to meet. The Defence moreover submits that in relying on only select portions of Witness CHM-01's statement during its questioning, the Prosecution has waived its right to rely on other aspects of the record of interview.

18. Moreover, as noted above, the Chamber has provided no indication as to how it will use Witness CHM-01's Statement upon its admission – in particular whether it will be accepted for the truth of its contents. In justifying the admission of other prior recorded statements of Prosecution witnesses who had testified in these proceedings, the majority of the Chamber has held that “in the view of the majority, composed by Judges Steiner and Aluoch, the statements are primarily relevant because they assist the Chamber in assessing, contextualising and weighing the witnesses' testimony.”¹⁸ However, the Defence recalls the practice of Trial Chamber II in *Katanga and Ngudjolo* when discussing the admission of prior recorded statements:¹⁹

The Chamber is of the view that compliance with the requirements of rule 68(b) of the Rules does not automatically create a sufficient ground to deviate from the orality principle. The simple assertion that a written statement **of a witness who has appeared for testimony provides the broader context in which a specific statement was made, or allegedly corroborates the oral testimony given at trial, does not qualify as a sufficient reason for admitting it into evidence.**

Given the Appeals Chamber's explicit finding that the admission of written statements must “not [be] prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally,”²⁰ the Defence submits that Witness CHM-01's Statement should not form part of the evidentiary record against Mr. Bemba, and that the prejudice to the accused outweighs any relevance of the statement to the charges in issue.

¹⁸ ICC-01/05-01/08-2012-RED, para. 142.

¹⁹ *Katanga & Ngudjolo*, ICC-01/04-01/07-2954, 25 May 2011, para. 7.

²⁰ ICC-01/05-01/08-1386, para. 78.

19. The introduction of prior recorded witness statements will also undoubtedly have an impact on the expeditiousness of the proceedings. For example, the Chamber will be required to assess whether Witness CHM-01's Statement contains contradictions or is inconsistent with his extensive in-court testimony. This exercise will undoubtedly lengthen the period of deliberations, an obstacle foreseen by Judge Ozaki when dissenting from the first erroneous attempt by the Majority to admit Prosecution witness statements during the trial:²¹

Having to evaluate the probative value and to give weight to the written statements in addition to the in-court testimony of witnesses may have serious practical consequences for the Chamber at the end of the case. For example, should the statements and the in-court testimony contain contradictions, the Chamber will have to carefully review these inconsistencies, determine their impact on the credibility of the witnesses, or elect whether to give more importance to the statements or to the testimony. This means analysing and evaluating thousands of additional pages, which adds to the length and the complication of the proceedings, without necessarily adding to the quality of the witness' evidence.

20. Finally, the Defence notes that neither the Defence nor the Prosecution have submitted Witness CHM-01's Statement as evidence. While Article 69(3) provides that "[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth", Article 74(2) provides that the Trial Chamber may base its decision at the end of trial only on evidence that was "submitted and discussed before it at trial." The Appeals Chamber has been clear that "the Trial Chamber may not rely, for the purposes of its final decision, on items that have come to the Chamber's knowledge but that have not been submitted and discussed at trial."²² While Witness CHM-01 was questioned on certain aspects of his statement, no reasonable argument can be made that the

²¹ ICC-01/05-01/08-1028, para. 27.

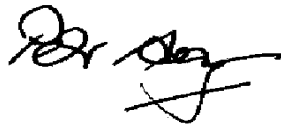
²² ICC-01/05-01/08-2731, para. 45.

entirety of the statement was submitted and discussed at trial. As such, it is inadmissible as evidence in the case against Mr. Bemba.

D. CONCLUSION

21. For all of the above reasons, the Defence respectfully submits that the prejudicial effect of the admission of Witness CHM-01's Statement to the fair trial rights of Mr. Bemba outweighs any probative value or relevance of the statement to the proceedings. As such, it is inadmissible as evidence in the present trial. In the alternative, the Defence submits that only those portions of Witness CHM-01's statement that were relied upon by the parties during his oral testimony should be admitted into the record as evidence in the case.

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

Done this day 13 January 2014

The Hague, The Netherlands