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TRIAL CHAMBER III

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

SITUATION INTHE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR
***v.* Jean-Pierre Bemba Gombo**

Public

Defence Submissions on the proposed *proprio motu* admission of 100 transcripts of Prosecution witness interviews

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. INTRODUCTION

1. The Defence again opposes the Majority of Trial Chamber III ("the Majority")'s second attempt to admit *en masse* the transcripts of Prosecution witness interviews, which have not been submitted as evidence by the parties, on the eve of the close of the trial. The admission of these transcripts is irreconcilable with the fair trial guarantees of Mr. Bemba, and the Appeals Chamber's previous decision on this point.[1]

2. The proposed admission of nearly 3,000 pages of transcripts of 100 Prosecution witness interviews would mean the Majority's deliberations would include consideration of evidence that has not been tested during the course of the proceedings. The parties have not been given the opportunity to make submissions on reliability, probative value or prejudice of this wealth of potential new evidence, as required by Rule 64(1). Given that the transcripts contains allegations that did not form part of the case against Mr. Bemba during the course of the trial, fairness dictates that he be permitted to recall the relevant Prosecution witnesses to explore the veracity and reliability of these allegations. At the end of a three year trial, and after the close of the presentation of evidence, this is irreconcilable with Mr. Bemba's right to expeditious proceedings. The *en masse* admission of transcripts of witness interviews also runs counter to the primacy afforded to oral testimony in ICC proceedings, a principle safeguarded by Trial Chambers I and II which have consistently restricted the admission of witness statements to limited circumstances, particularly when requests for admission have been made after the witness has testified.[2] As noted by Trial Chamber II in *Katanga and Ngudjolo*:[3]

[1] ICC-01/05-01/08-2731.
[2] See, for example, ICC-01/04-01/07-2954, 25 May 2011, ICC-01/04-01/07-3046, para.8; See also ICC-01/04-01/06-T-306-Red-ENG.
[3] ICC-01/04-01/07-T-202-RED-ENG, pp.38-39.

> The oral nature of the proceedings is the rule. The true testimony is the evidence that the witness provides in the courtroom, and this comes within the framework of the questions and answers that we have here in the courtroom… and when it comes to statements, prior statements given by the witness, those do not seem to fall within the framework.

3. The Defence notes that Majority has failed to specify the purpose for which the 100 transcripts of interview will be admitted as evidence; most significantly whether they will be admitted for the truth of their contents. This failing has deprived the Defence of the opportunity to make full and complete submissions.

B. BACKGROUND

4. The proceedings in the present case opened on 22 November 2010. Prior to presenting its witnesses, the Prosecution disclosed extensive transcripts of its pre-trial interviews. During the course of the proceedings, the parties have submitted a small number of these transcripts of witness interviews as evidence, through the procedure set by the Chamber for the admission of evidence.[4]

5. On 16 July 2013, the Chamber ordered the Defence to close the presentation of its evidence by 25 October 2013.[5]

6. 25 days prior to this deadline, the Majority informed the parties that it was "considering" requesting the submission as evidence of 100 transcripts of interviews of 30 Prosecution witnesses which "were not submitted into evidence". The Majority refers to these transcripts of interview as "witness statements".[6] These transcripts total 2919 pages in length.

[4] ICC-01/05-01/08-2012-Red, paras. 126-131.
[5] ICC-01/05-01/08-2731, para. 38.
[6] ICC-01/05-01/08-2824, paras. 10-12.

7. The Majority provides its brief rationale in a footnote:[7]

> 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's testimony against the entirety of the prior recorded statements or interviews**.

This footnote provides no indication as to what happens at the end of this "comparison" of contemporaneous oral testimony given under oath, versus prior recorded transcripts, or what would happen in the event of an inconsistency between the in-court oral testimony of a witness and a transcript of their interview. The logic of the Majority's reasoning is, moreover, difficult to follow given that it is apparently not "considering" requesting the submission as evidence of the prior statements of **all** Prosecution witnesses.[8] Indeed its disinterest in considering the prior interviews of certain witnesses whose evidence was markedly at odds, even irreconcilable,[9] with their statements raises for the Defence a worrying inference. The parties were given 10 days to make submissions.[10]

8. This is not the first time the Majority has sought to introduce transcripts of Prosecution witness interviews that have not been submitted as evidence by the parties. Its first attempt to do so was prevented by the Appeals Chamber as being inconsistent with the Statute and general principles on admission of evidence,[11] after being opposed by both the Prosecution and the Defence ("First Appeals Chamber Decision").

[7] ICC-01/05-01/08-2824, paras. 10-12.
[8] The Chamber is not considering requesting the submission of the statements of CAR-OTP-PPPP-0221; CAR-OTP-PPPP-0023; CAR-OTP-PPPP-0042; CAR-OTP-PPPP-0073; CAR-OTP-PPPP-0222; CAR-OTP-PPPP-0006; CAR-OTP-PPPP-0229; CAR-OTP-PPPP-0009; CAR-OTP-PPPP-0209; CAR-OTP-PPPP-0219.
[9] See, for example: T-73-RED-ENG, page 13, line 23 – page 14, line 16 ; T-123--ENG, page 19, line 14 – page 20, line 4.
[10] ICC-01/05-01/08-2824, para. 13.
[11] ICC-01/05-01/08-1386, para. 57. See also paras. 2, 52-53, and 59.

B. APPLICABLE LAW

9. 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).

10. 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.

11. 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.

12. 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."[12] 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.

C. SUBMISSIONS

[12] ICC-01/05-01/08-1028, para. 8.

(a) The transcripts of prosecution witness interviews have not been submitted and discussed at trial as required by the Statute

13. Neither the Defence nor the Prosecution have submitted the transcripts of Prosecution witness interviews as evidence. Indeed the Defence notes that the Prosecution was opposed to the admission of these materials by the Chamber at the start of the case,[13] and has systematically passed up opportunities to seek to admit witness interviews throughout the case, either under the Chamber's revised procedure for the admission of evidence, or its various bar table motions. The Majority states that it is "considering… requesting the admission of the statements". 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 First Appeals Chamber Decision is 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."[14]

14. No reasonable argument can be made that these thousands of pages of transcripts of witness interviews have been submitted and discussed at trial. The time for an examination and discussion of the veracity, probative value, and reliability of a transcript of a witness interview is when the witness is available to the parties for questioning. The Majority's proposed approach of "considering" whether it will "request" the submission of these transcripts at the close of a three year trial comes years after the Defence conducted its examination of Prosecution witnesses without notice that the thousands of elements contained in the transcripts of interviews – many potentially inculpatory which go directly to the acts and conduct of the accused – would form part of the evidence against him. In such

[13] ICC-01/05-01/08-1194.
[14] ICC-01/05-01/08-2731, para. 45.

circumstances, the Majority's approach is in breach of Article 74(2) and the First Appeals Chamber Decision.

(b) The parties have been deprived of their right to raise issues

15. As noted above, the parties were given 10 days to "submit their observations" on the fact that the Majority is considering requesting the submission of 2919 pages of transcripts of witness interviews as evidence.

16. Significantly, the parties were not invited to make submissions as to the admissibility of the transcripts with reference to the "three-pronged test", namely whether the transcripts are (i) relevant; (ii) have probative value; and (iii) are sufficiently relevant and probative as to outweigh any prejudicial effect caused by admission. Nor did the timeframe set by the Chamber permit this. Rule 64(1) explicitly provides that issues of admissibility or relevance must be raised at the time the evidence is **submitted** to the Chamber. This has not yet occurred. Thus any admission of these statements without full submissions being made on the three-pronged test, for each statement for which the Chamber is seeking admission, would be in breach of Rule 64(1). The Appeals Chamber was unequivocal in the First Appeals Chamber Decision, that "by admitting into evidence items… without first giving the parties an opportunity to raise issues as to their relevance and admissibility, the Trial Chamber failed to give effect to Rule 64(1) of the Rules of Procedure and Evidence."[15] To inflict such a monumental task on the parties in the final days of the trial, when the deadlines for the preparation and submission of Final Trial Briefs are about to start running, is difficult to reconcile with the right of an accused to have adequate time and facilities to defend the case against him. This is not a task that can be done in a wholesale manner. Each transcript must be assessed as against the witness' oral testimony, and individual indicators of

[15] ICC-01/05-01/08-1386, paras. 48-50.

credibility, and assessed as against any disclosed audio or video recordings of the interviews before meaningful submissions can be attempted.

17. Submissions on admissibility and reliability of these thousands of pages of transcripts are crucial, given the wealth of evidence from Prosecution witnesses, given under oath before the Chamber, that the transcripts of witness interviews are not accurate or reliable. In fact, the majority of the Prosecution witness had complaints about the accuracy of the transcripts of their interviews. Witness CAR-OTP-PPPP-0178 stated that on re-reading his statements he discovered a number of errors: [16]

> When I read through my statement, I realised that there were several mistakes, particularly made by one lady who was an investigator who did not have a full mastery of the French language and so a few errors slipped into the statement. And I do understand that these may have their significance, so if you could give me name of the investigator then we can re-read that segment and then I will give you the exact true and correct answer in relation to that specific excerpt.

18. These alleged errors often concerned critical issues, such as was the case with Witness CAR-OTP-PPPP-0073. In response to direct questions from the Presiding Judge, he denied that he had told Prosecution investigators that his daughter had been raped, despite this appearing in his recorded transcript of interview:[17]

> PRESIDING JUDGE STEINER: So you are saying that someone from the Office of the Prosecutor - an investigator - wrote it down in this form that your daughter was raped by force by more than one Banyamulengue.
> THE WITNESS: (Interpretation) If my declaration was taken in Bangui, well, what I'd like to say is that we're speaking in French, and the interpreter said that I had to speak in Sango and that it was up to him to interpret everything that I was saying into French. And at that time, I started to speak to them in Sango. So did they speak between themselves to fill in this document? Did they make mistakes when they filled in this document? To my knowledge, to not tell any lies, to say that it was the Banyamulengue who attacked my daughter, raped

[16] T-152-RED-ENG, page 47, lines 6-11.
[17] T-73-RED-ENG, page 13, line 23 – page 14, line 16.

> her afterwards, that's not something I can accept. Even if it's what's said in my so-called "statement," I cannot accept that. I'm the father of the daughter myself, chief of the family. I cannot accept that. They didn't rape her.
> PRESIDING JUDGE STEINER: Is that correct that, when you gave your statements to the investigators of the Office of the Prosecutor in May 2009, that you didn't mention any rape, any daughter of yours being raped?
> THE WITNESS: (Interpretation) That is correct. I have told you clearly that, in the house where I gave that interview, I never said that my daughter was attacked and raped. No, I never said any such thing.

19. Similarly, Witness CAR-OTP-PPPP-0209 asserted that his interview with the Prosecution had not been accurately recorded, stating that:[18]

> A. I am done reading the excerpt, but I have realised that my statement was not properly recorded. The investigators appear to have modified what I said. …
> Q. I wasn't going to ask you about Wabeta's head. What the investigators have recorded -- and, perhaps, we ought to go into this a little bit. This interview, was it, so far as you could see, recorded on an audio device?
> A. My statement was recorded, but not on an audio device or on a tape. Since this statement is here, somebody must have jotted some points down. But I want to point out that the meaning in this excerpt is not what I intended to convey to the investigators.

20. Witness CAR-OTP-PPPP-0112 also spoke about the errors in the recording of his statement:[19]

> Q. When you began your evidence, Madam President asked you, "Have you been given the opportunity to read, or have read to you, the statement or statements that you made to the Court?", and you said, "Yes, I had the opportunity to listen to the audio recording," and that is why I asked you the question I did. Did you listen to your statement, or statements?
> A. Yes. Yes, I was able to listen to the recording - an audio recording - and I saw that there were some errors.

[18] T-123-RED-ENG, page 19, line 14 – page 20, line 4.
[19] T-131-RED-ENG, page 31, line 5 – page 32, line 6.

21. Witness CAR-OTP-PPPP-0151 noted numerous mistakes in the recording of his interview.[20]

> THE WITNESS: (Interpretation) I read over the statements that were taken on that day. There is one thing I saw that in my statements made earlier, some of the things that I said, some of the information that I gave, well, I noticed a number of errors in those statements. That is why I would like to take this opportunity, being here before the Court, to ask for an opportunity, or for permission, to correct some of these mistakes, and I believe that by speaking in Sango it would be better. It would be easier for me to make myself understood.

22. Witness CAR-OTP-PPPP-0069 also cited mistakes in his interview:[21]

> Q. Sir, I'm going to leave this topic after this question, but can you explain to the Court why you told the investigators from the Office of the Prosecutor that the soldiers that came to your house were speaking Sango?
> A. No, I think that in likelihood there must be a mistake here. They must have got it wrong. That was a statement I made and that is being referred to here. My -- they called for my sister to come out of the house, they searched her clothes, they took her money and they killed her.… Now, people who took my statement no doubt got it wrong.

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[20] T-172-RED-ENG, page 4, lines 9-15. See also: T-172-RED-ENG, page 35, lines 14-20.
A. Yes, I recognise that those are my own words, my own statement. I'm going to tell you that I do stammer and sometimes I speak very fast, and I told you earlier that in my previous statement it is possible that there might be some errors and I'd like to take opportunity of my presence here before the Court to correct these errors. I gave my earlier statements and it is possible that there might be some errors in them. A great deal of time has gone by and, if you have any questions for me, please ask me those questions. I'm willing to answer and ready to answer; T-173-ENG, page 41, lines 3-4: A. Well, to answer that question, I told you earlier that there were some mistakes in my previous statements and I specified that; T-174-RED-ENG, page 4, lines 3-5 : Mr Witness, is this an accurate reflection of the words you used in your answer to the Prosecutor? A. In that statement, I believe there is an error; T-174-RED-ENG, page 28, lines 18-20 : I've already said that there were mistakes in my previous statements and I was willing to correct them; T-174-RED-ENG, page 49, lines 17-18 : It is possible that there might be some error that crept in here, but that's what I can tell you to shed more light on this matter; T-174-RED-ENG. page 51, lines 19-20 : In these declarations I thought or I think that there is a mistake. Perhaps it was badly written down, or perhaps the interpretation was not accurate.
[21] T-196-RED-ENG, page 27, lines 1-14.

23. Some witnesses, while not blaming the discrepancies on recording, communication, language, translation or transcription errors, simply deviated from their statements when testifying under oath. For example:[22]

> Q. In your statement given to the investigators, CAR-OTP-0037-0047 is the reference, in that statement you said that it was the Banyamulengue themselves who told you that they were Banyamulengue; is that correct?
> A. No, they didn't say that to me. There were people in our neighbourhood who spoke that same language as the Banyamulengue. That is how I identified them as the Banyamulengue.

Witness CAR-OTP-PPPP-0080 testified:[23]

> Q. …You stated, furthermore, to the investigator that this high level person is somebody that you recognised by his medals… Can you describe these medals, or what do you understand by medals? …
> A. I have no information with regards to the medals. I may have made a mistake in saying that. I don't know. What I do know is that he was reprimanding them. I don't know all that.

24. The Defence makes no assertions as to the truthfulness of the various claims made above. These examples of numerous complaints by Prosecution witnesses as to the accuracy of their interview transcripts are cited only to highlight the importance of verifying the accuracy of the transcripts through thorough examination of the witnesses in question, and making full and contemporaneous submissions on their reliability and probative value. Given the sheer length of the Prosecution interviews, it was impossible for the Defence to test each and every element contained in the interview transcripts and still participate in an expeditious trial, even more so given that many of the elements contained in the transcripts of interview did not form part of the witness' oral testimony in chief. To attempt the exercise now in relation to 100 interviews given 10 days notice is impractical and

[22] T-58-RED-ENG, page 30, lines 20-25.
[23] T-61-RED-ENG, page 50, line 19 – page 51, line 5.

unfair, especially that the Defence has no idea which elements the Chamber might seek to rely upon.

25. The *Lubanga* Trial Chamber was acutely aware of the potential impact of the admission of transcripts of Prosecution witness interviews on the fairness of the proceedings. In assessing their admission as evidence, Trial Chamber I considered that "[t]hese individuals were not questioned under oath, and their account, as just set out, **was simply part of the information gathering-exercise by the Prosecution**."[24] It accordingly held that witnesses should be called to give evidence in order to assess the reliability and credibility of the information in their possession. The ICTY Appeals Chamber also highlighted that prior recorded statements were often of questionable reliability, stating:

> […] the decision to encourage the admission of written statements prepared for the purposes such legal proceedings in lieu of oral evidence from the makers of the statements was nevertheless taken by the Tribunal as an appropriate mixture of the two legal systems, but with realisation that any evidentiary provision specifically relating to that material required considerable emphasis upon the need to ensure its reliability. **This is particularly so in relation to written statements given by prospective witnesses to OTP investigators, as questions concerning the reliability of such statements have unfortunately arisen, from knowledge gained in many trials before the Tribunal as to the manner in which those written statements are compiled**.[25]

26. To include thousands of pages of untested allegations and elements in the casefile of the present proceedings will accordingly serve to undermine rather than contribute to the Majority's mission to establish the truth of the events in question.

(d) The *proprio motu* admission of transcripts of witness interviews will violate the accused's right to an expeditious trial

[24] ICC-01/04-01/06-2595-RED, paras. 53-58.
[25] *Prosecutor v Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 30.

27. Putting aside the issue of the recall of Prosecution witnesses, discussed further below, the introduction of the 100 transcripts of witness interviews will place a huge additional burden on the Chamber as it deliberates and prepares its judgement.

28. Namely, the Chamber will be required to assess whether each statement contains contradictions, or is consistent with the in-court testimony for each aspect of each witness interview. Otherwise the Chamber will impermissibly be cherry-picking evidence, rather than considering the entirety of the evidence before it as required by Article 74(2) of the Statute.[26] This exercise will undoubtedly lengthen the period of deliberations and delay the delivery of the Judgement, an obstacle foreseen by Judge Ozaki when dissenting from the first erroneous attempt by the Majority to admit the transcripts during the trial: [27]

> 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's evidence.

29. Accordingly, she warned, "[t]he time allegedly saved during the proceedings will therefore be 'lost' again at the end of the case."[28] On this point it is worth noting that Mr. Bemba has been incarcerated without provisional release for over five

[26] See also *Prosecutor v. Kvočka*, Appeals Judgement, paras. 23-24: "It is to be presumed that the Trial Chamber evaluated all the evidence presented to it".
[27] ICC-01/05-01/08-1028, para. 27
[28] ICC-01/05-01/08-1028, para. 26.

years. The delay which is a necessary consequence of the admission of the transcripts mitigates against their forming part of the evidence in this case.

(f) The admission of the transcripts would likely necessitate the recall of Prosecution witnesses

30. There is no way around the fact that the reliability of the transcripts of witness interview can only be tested by the Defence through the questioning of the Prosecution witnesses in question, under oath, and before the Chamber. The numerous errors identified by the witnesses themselves preclude any argument that the information contained in the transcripts necessarily reflect the accuracy of the information conveyed to Prosecution investigators four or five years ago, during interviews conducted in the field, with unverified interpretation.

31. The Defence examination of Prosecution witnesses was conducted under the assumption that these transcripts were not in evidence. The Chamber itself notes in footnote 16 that "in the limited time available to them", the parties were only able to refer to "excerpts" of the transcripts of interview. If the entirety of these 100 interviews will now form part of the evidence against him, Mr. Bemba must be permitted to exercise his right to confront the case against him, as safeguarded in Article 67(1)(e), and challenge the witnesses on all aspects of these transcripts. This reality was apparent to Judge Ozaki in dissenting from the Majority's first attempt to admit the transcripts, when she noted that their admission: [29]

> may cause to party opposing the content of the witness statement to attempt to cover and undermine each and every fact contained in the statements, through a lengthy and protracted questioning of the witness.

(g) The proposed admission violates the principle of orality

[29] ICC-01/05-01/08-1028, para. 24.

32. The jurisprudence of the Court is clear that the admission into evidence of witness statements and other prior recorded statements exists as an exception to the general rule. In November 2010, Trial Chamber I in the *Lubanga* case recalled a previous decision where it had discussed the Statute's preference for oral evidence in detail, and held that there is a presumption in favour of oral testimony.[30] This principle of the primacy of orality has also been systematically applied by Trial Chamber II in *Katanga & Ngudjolo*.[31] As the Appeals Chamber held in this case:

> The direct import of the first sentence of [Article 69(2)] is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality. The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.

33. Trial Chamber III (of which the Majority formed a part), discussed the principle of the primacy of orality and its statutory exceptions in a decision rendered on 16 September 2010, and held that the admission of prior statements should only be done in specific and exceptional circumstances.[32] The Chamber's reasoning is worth noting in full:

> Pursuant to Article 69(2) of the Statute, "[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence." Under Rule 68 of the Rules, the Chamber "may in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented

[30] ICC-01/04-01/06-2596-RED, para. 42, citing to ICC-01/04-01/06-1399, para. 22.
[31] ICC-01/04-01/07-Corr-Red-2289, para. 14; ICC-01/04-01/07-2362, paras. 14, 15, 19; Transcript of hearing on 4 March 2010, ICC-01/04-01/07-T-1112-Red-ENG, page 3, lines 20 – 24.
[32] ICC-01/05-01/08-886, para. 7.

> evidence such as testimony." The Chamber may thus depart from the general principle of giving evidence in person and explore the possibility of having evidence submitted in writing, as long as it is not prejudicial to, or inconsistent with, the rights of the accused. **However, the introduction of such prior-recorded testimony remains an option which should be adopted only in specific and exceptional circumstances**.

34. No such exceptional circumstances exist in the present case, and with respect, nor does the Majority seek to advance any. The Prosecution witnesses in question have appeared before the Chamber, and given evidence under oath. They have been questioned by the Prosecution, the Defence, Maître Zarambaud-Assigambi, Maître Douzima-Lawson, and the Chamber. The Prosecution, moreover, had the right to redirect and was thus able, where appropriate, to contextualize any apparent inconsistency between the oral testimony of a witness and his prior statement. Any suggestion by the Majority that this procedure is insufficient for the determination of the truth is fundamentally alarming and inconsistent with the trial procedure set out in the Statute. As stated by Trial Chamber II in *Katanga and Ngudjolo* when discussing the admission of prior recorded statements:[33]

> 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.

35. The Defence accordingly submits that the *en masse* admission of 100 witness statements at this point in the trial undermines the fairness of the proceedings. An accused has a right to know the case against him. The admission of the thousands of pages of Prosecution witness interviews dramatically expands that case at a time when he is no longer able to confront new allegations without recalling Prosecution witnesses. As stated by Judge Ozaki, "the principle of judicial certainty militates in

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

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".[34]

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Done on the 11th of October 2013
At The Hague, The Netherlands

[34] ICC-01/05-01/08-1028, para. 16.