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**TRIAL CHAMBER III**

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

**SITUATION IN THE CENTRALAFRICANREPUBLIC  
*IN THE CASE OF  
THE PROSECUTOR  
V. JEAN-PIERRE BEMBA GOMBO***

**Public Document**

**Prosecution's Observations on the Admission into evidence of prior statements of  
trial witnesses**

**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 all prior witness statements listed in Annex A of the Chamber's Order,<sup>1</sup> albeit in accordance with the three-stage admissibility test and subject to witness consent, may be inconsistent with the fair and expeditious conduct of proceedings. The Rome Statute ("Statute") and the Rules of procedure and evidence ("Rules") give the 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 to ensure that prior statements do not unnecessarily replace *viva voce* testimony through systematic admission and equal consideration of all prior statements without distinction. This would unnecessarily lengthen judicial assessment of largely duplicative evidentiary materials amounting to thousands of pages with potentially little added value.

2. A Chamber may admit a prior statement either partially or entirely.<sup>2</sup> The Trial Chamber III ("Chamber"), Judge Ozaki dissenting, has admitted entire witness statements under Rule 68 in addition to courtroom testimony and as prior consistent statements to, *inter alia*, rebut an express or implied charge of recent fabrication or collusion. Additionally, the Chamber may exercise this discretion to admit prior inconsistent statements in order to freely assess and contextualize discrepancies with, and/ or omissions in, courtroom testimony. The Office of the Prosecutor ("Prosecution") submits that these statements should fall outside the scope of Rule 68 and therefore not require witness consent. Prior inconsistent statements may be admitted not only to assess witness credibility, but as substantive evidence for the truth of their contents where the statements are reliable.

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<sup>1</sup> 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 2013.

<sup>2</sup> 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.

3. Admitting prior statements does not contravene the principle of primacy of orality if an assessment is conducted on a case-by-case basis following the three-stage test, and with due regard for the fair and expeditious conduct of proceedings. This requires a selective approach to prior statements of each witness in order to justify the exceptional need to add to oral testimony.

## II. Procedural History

4. On 4 October 2010, the Chamber issued its "Order for submissions on the presentation of evidence at trial" requesting the parties and participants to provide "observations on the potential submission into evidence of the witness statements of those witnesses to be called to give evidence at trial."<sup>3</sup>

5. On 11 October 2010, Prosecution filed its observations, submitting that the Chamber has discretionary authority to admit prior statements of witnesses who appear at trial and are available for cross-examination.<sup>4</sup> It further stated that the Chamber can admit prior statements in their entirety or discrete portions only.<sup>5</sup>

6. On 11 October 2010, the Office of Public Counsel for Victims acting as Legal Representative for victims filed observations stating that the systematic admission of prior recorded statements of witnesses to be called at trial will not render the proceedings more expeditious.<sup>6</sup> They should only be admitted in exceptional circumstances where necessary to determine the truth.<sup>7</sup>

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<sup>3</sup> ICC-01/05-01/08-921, Order for submissions on the presentation of evidence at trial, 4 October 2010, para. 2.

<sup>4</sup> ICC-01/05-01/08-941, para. 3.

<sup>5</sup> *Ibid*, para. 6.

<sup>6</sup> ICC-01/05-01/08-943, Legal Representative's Observations on the potential submission into evidence of the prior recorded statements of Prosecution witnesses testifying at trial, 11 October 2010, para. 3.

<sup>7</sup> *Ibid*, para. 6.

7. On 18 October 2010, the Defence filed its observations concurring that the admission of prior statements will not expedite proceedings.<sup>8</sup> Additionally, it stated that such evidence should only be admitted exceptionally and construed in an extremely narrow fashion to avoid prejudice to the rights of the Accused.

8. On 19 November 2010, the Chamber, by majority, rendered the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" admitting *prima facie* all items, including witness statements.<sup>9</sup> On 23 November 2010, Judge Ozaki filed a dissenting opinion.<sup>10</sup> Both Prosecution and Defence appealed the majority decision.<sup>11</sup>

9. On 3 May 2011, the Appeals Chamber issued its decision reversing the Chamber's majority decision.<sup>12</sup> The Appeals Chamber decided, *inter alia*, that "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."<sup>13</sup>

10. 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").<sup>14</sup>

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<sup>8</sup> ICC-01/05-01/08-960, Defence Observations on the Potential Submission into Evidence of the Prior Recorded Statements of Prosecution Witnesses Testifying at Trial, 18 October 2010, paras. 4-5.

<sup>9</sup> ICC-01/05-01/08-1022, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 19 November 2010.

<sup>10</sup> 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.

<sup>11</sup> ICC-01/05-01/08-1191, Defence appeal against the "Decision on the admission into evidence of material contained in the Prosecution's list of evidence" of 19 November 2010, 7 February 2011; and ICC-01/05-01/08-1194, Prosecution's Document in Support of Appeal against Trial Chamber III's "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" (ICC-01/05-01/08-1022), 7 February 2011.

<sup>12</sup> 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.

<sup>13</sup> *Ibid*, para. 3.

<sup>14</sup> ICC-01/05-01/08-2824 + Anx.

### III. Submissions

11. 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 documentary and audio or video material provided that it meets the legal requirements.<sup>15</sup> The Chamber ruled that the admission of evidence 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.<sup>16</sup>

12. Thus far the Chamber has admitted prior statements of 6 witnesses under Rule 68 where there was a specific reason to justify 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.<sup>17</sup> The Chamber further admitted the complete prior statements of prosecution witnesses 23, 42, 73 and 209 after the Prosecution requested that the first three statements were necessary to demonstrate consistency with in-court testimony to, *inter alia*, rebut the express or implied charge against recent fabrication or collusion;<sup>18</sup> and the latter was specifically necessary under Rule 68 for P-209's testimony.<sup>19</sup>

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<sup>15</sup> ICC-01/05-01/08-1386, paras. 36 and 37.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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, pages 7 to 8.

<sup>19</sup> See, ICC-01/05-01/08-2012-Red, paras. 143-154; and ICC-01/05-01/08-2793, paras. 19-25.

13. 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. Although their very nature makes admission more probable, the specific circumstances should determine whether the Chamber exercises its discretion to admit prior inconsistent statements in addition to discrepancies addressed in court.<sup>20</sup> Though operating under slightly different rules, the International Criminal Tribunal for the former Yugoslavia ("ICTY") Appeals Chamber 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 their contents where they fulfil the criteria of relevance, reliability, and probative value.<sup>21</sup>

14. In the *Bemba* case, the issue of prior inconsistent statements only relates to Defence witnesses 18 and 19.<sup>22</sup> These statements are reliable because they were recorded with the required safeguards, including signatures and dates, in accordance with Rules 111 and 112. Therefore, the Chamber may exercise its discretion to admit these prior statements to fully assess inconsistencies for both witness credibility and the truth of their contents. Distinct from prior inconsistent statements, the purpose of Rule 68 is to support rather than challenge live testimony.<sup>23</sup> If witnesses were allowed to prevent admission of their own prior inconsistent statements through lack of consent, then the Chamber would be barred from admitting evidence deemed necessary to determine the truth where a witness had deliberately chosen to provide

<sup>20</sup> ICC-01/05-01/08-1028, 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]

<sup>21</sup> 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.

<sup>22</sup> See, ICC-01/05-01/08-2596-Conf, Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 22 April 2013, paras. 7-8; and ICC-01/05-01/08-2596-Conf-AnxA, pages 3-8.

<sup>23</sup> 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, para. 19: "Therefore, applying the straightforward language of Rule 68, its correct interpretation is that the Chamber has the discretion to order that written statements (viz. "the transcript or other documented evidence off[...] the testimony") are to replace "live" evidence if, but only if, one of the two following conditions are met ..." [Emphasis added]

different testimony at trial. The Prosecution submits that prior inconsistent statements should fall outside the scope of Rule 68, at a minimum where their admission is sought to challenge the credibility of an opposing party's witness or a hostile witness. Therefore, the only legal requirement for admitting prior inconsistent statements should be the three-stage test in Article 69 (4).

15. The Appeals Chamber ruled that the admission of prior recorded witness testimony requires a "cautious item-by-item analysis".<sup>24</sup> [Emphasis added] 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."<sup>25</sup> This has been the practice of Trial Chambers I and II.<sup>26</sup> The exceptional nature of this discretion derives from a general acceptance that witness testimony is primarily evaluated on the basis of oral testimony in court and other documentary evidence apart from prior statements. Therefore admitting a prior statement under Rule 68 should be handled differently; a distinction should be made to ensure that only selective statements are admitted where good reasons exist.

16. The admission of the prior statements of 31 witnesses listed in Annex A of the Order, along with that of 6 witnesses previously admitted and 1 pending, would result in the admission of prior statements for 38 witnesses in total. This may be prejudicial to a fair and expeditious trial depending on how the Chamber exercises

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<sup>24</sup> ICC-01/05-01/08-1386, para. 81.

<sup>25</sup> 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 2011*", 21 June 2011, see for example, 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."

<sup>26</sup> 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.



its discretion.<sup>27</sup> For instance, Prosecution witnesses could be subjected to various assessments based on multiple pieces of evidence on the same issues emanating from the same witness; Defence witnesses, in contrast, do not have substantive statements for each witness containing additional information than that discussed in the courtroom. Further, to ensure that only evidence discussed at trial is considered in the judgment under Article 74(2), particular caution is required to assess such voluminous witness statements.<sup>28</sup> Consequently, the potential prejudice of admitting all prior statements in each case rather than statements of selected witnesses upon good cause may outweigh their probative value. Moreover, admitting largely duplicative materials amounting to thousands of pages with the likelihood of little added value would considerably lengthen the judicial assessment of the evidence and potentially delay the judgment.<sup>29</sup> The Chamber's discretion to admit all prior statements should be exercised cautiously.

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<sup>27</sup> ICC-01/05-01/08-2824 + Anx, para 12: The Majority of the Chamber, Judge Ozaki dissenting, is considering, pursuant to Article 69(3) of the Statute, requesting the submission as evidence of the statements listed in the Annex to this Order, subject to an assessment in accordance with its three-prong test. This will be subject to the witnesses' consent, if not already given. To this end, the Majority orders the parties and the legal representatives of victims to submit their observations, if any, on this matter." [footnotes omitted]

<sup>28</sup> ICC-01/05-01/08-1386 OA5 OA6, para. 45: "Accordingly, 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."

<sup>29</sup> ICC-01/05-01/08-1028, paras. 27 and 28: "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.// Even though the judges of this Court are all highly qualified individuals and are professional judges who operate according to very high standards, in my view, increasing the amount of documentation in the case record may create potential problems caused by the sheer volume and possible incompatibility of the material's content, thereby increasing the risk of confusion in the drafting of the judgment in the case. In my opinion, this risk is not worth taking in the present circumstances of the Bemba case."

#### IV. Conclusion

17. The Prosecution respectfully observes that systematic recourse to available prior statements does not appear necessary to evaluate the probative value and credibility of every witness.<sup>30</sup> Additional and more detailed submissions can only be made once specific reasons are advanced for seeking admission of all statements for each witness listed in Annex A of the Order.




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Fatou Bensouda, Prosecutor

Dated this 11<sup>th</sup> Day of October 2013

At The Hague, The Netherlands

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<sup>30</sup> 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.”