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International Criminal Court

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Date: **23 November 2010**

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 - URGENT

Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence

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

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Other

I. Introduction

1. This Dissenting Opinion is in response to the Majority's "Decision on the admission into evidence of materials contained in the prosecution's list of evidence",[1] which is itself partly based on the submissions filed by the parties and participants on the issue of the admission of witness statements into evidence.[2]

2. The dissent will address the reasons underlying my disagreement with the Majority over the issue of the wholesale admission of written witness statements and other materials into evidence.

II. The Wholesale Admission of Written Witness Statements and Other Materials into Evidence

3. In its Decision, the Majority decided "that any materials, including witnesses' written statements and related documents previously disclosed to the defence and which will form part of the prosecution's Revised List of Evidence are *prima facie* admitted as evidence for the purposes of the trial."[3] The Majority argued that

[1] Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 19 November 2010, ICC-01/05-01/08-1022.
[2] Prosecution's Position on Potential Submission of Witness Statements at Trial pursuant to Trial Chamber III's Order, 11 October 2010, ICC-01/05-01/08-941 ("prosecution's Position"); Legal Representative's Observations on the potential submission into evidence of the prior recorded statements of Prosecution witnesses testifying at trial, 11 October 2010, ICC-01/05-01/08-943 ("Legal Representative's Observations"); Defence Observations on the Potential Submission into Evidence of the Prior Recorded Statements of Prosecution Witnesses Testifying at Trial, 18 October 2010, ICC-01/05-01/08-960 ("defence Observations"). These documents were submitted following the Chamber's "Order for submissions on the presentation of evidence at trial", 4 October 2010, ICC-01/05-01/08-921 ("Order").
[3] ICC-01/05-01/08-1022, paragraph 35.

there is "sufficient legal basis provided in the ICC legal framework to consider *prima facie* admitting into evidence, before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial", as well as all documents submitted to the Chamber in the prosecution's List of Evidence.[4] The Majority further argued that "the Statute only envisages a presumption in favour of oral testimony, but no prevalence of *orality* of the procedures as a whole".[5] With due respect, I cannot agree with my Colleagues' reasoning, and after briefly addressing the Majority's use of the expression "*prima facie* admissibility" and after expressing my views on the principle of primacy of orality and the rights of the accused, which are my main concerns, I will address their remaining arguments as appropriate.

a. The concept of prima facie *admissibility*

4. In its Decision, the Majority refers to the concept of "*prima facie* admissibility". The Majority argues that sufficient legal basis exist to apply such a concept, but fails to point to an actual provision in the ICC legal framework which confirms this concept. In my opinion, the concept of *prima facie* admissibility simply does not exist in the Rome Statute ("Statute") or in the Rules of Procedure and Evidence ("Rules").

[4] ICC-01/05-01/08-1022, paragraph 8.
[5] ICC-01/05-01/08-1022, paragraph 14.

5. The Statute rather foresees that the Chamber may make a ruling on the admissibility of the evidence.[6] This ruling will then be final, save in exceptional circumstances which may force the Chamber to revisit its decision at a later stage.[7] The Statute does not, contrary to the Majority's assertion, foresee an "intermediate stage" in the ruling on admissibility. In my view, materials presented to the Court must either be admissible, or not admissible, without the possibility of an interim status such as "*prima facie* admissible".

b. Principle of Primacy of Orality

6. Contrary to the Majority's argument,[8] Article 69(2) of the Statute clearly imposes the principle of primacy of orality in proceedings before the Court. It determines that as a general rule, "[t]he testimony of a witness at trial shall be given in person". The Statute and the Rules also provide for a limited number of exceptions to this general principle.[9] Notably, Rule 68 of the Rules allows for the admission into evidence of prior-recorded testimony, provided that certain conditions are met, and it has been recognised that this Rule indeed "permits the introduction of written statements".[10]

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[6] Article 64(9) of the Statute.
[7] For example, should the Chamber discover at a later stage that materials admitted into evidence were obtained in violation of Article 69(7), the Chamber should then review its prior decision and exclude the material.
[8] ICC-01/05-01/08-1022, paragraph 14.
[9] Article 69(2), Rules 68, 87 (3)(c), and 88(1) of the Rules.
[10] Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603, paragraph 18. This finding was endorsed by this Chamber, see Decision on the "Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108", 16 September 2010, ICC-01/05-01/08-886, paragraphs 5-6.

7. Trials which have so far taken place before international criminal tribunals in principle have relied on oral testimonies of witnesses, with written statements having been exceptionally admitted on a specific case-by-case basis.[11] In fact, in-court, live testimony is arguably the best way for a Chamber to evaluate the credibility of a witness, through his/her demeanour, hesitations, facial expressions, etc and thus to gauge the reliability of his/her testimony. This is especially true in cases before this Court, where most witnesses come from remote areas, have completely different cultural backgrounds and are testifying in a criminal case of extreme complexity. It is therefore unsurprising that the principle of primacy of orality has also been systematically applied by Trial Chambers of the Court, including this Chamber, which has consistently treated the admission into evidence of witness statements and other prior-recorded testimonies as an exception to the rule, and has considered such requests for admission on a case-by-case basis.[12] This Chamber

[11] See, ICTY, *The Prosecutor v. Kupreškic et al.*, *Case No IT-95-16-AR73.3*, Appeals Chamber, Decision on Appeal by Drajan Papic against Ruling to Proceed by Deposition, 15 July 1999, paragraphs 18 and 21; ICTR, *Prosecutor v. Ndindiliyimana et al.*, *Case No ICTR-00-56-T*, Trial Chamber II, Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision dated 11 May 2007 Regarding Admission of Exhibits P.132 and P.135, 25 July 2007, paragraph 6. The Majority refers to Rule 92 *ter* of the Rules of Procedure and Evidence of the ICTY as a basis for justifying its decision. This parallel cannot stand for two main reasons: First, such a provision does not exist in the legal framework of the Court. Second, Rule 92 *ter* refers to circumstances which are completely different from those prevailing before the ICC in general and in the Bemba case in particular. For example, Rule 92 *ter* only allows the admission of statements or transcripts from testimony of witnesses who already testified before the Tribunal, and the admission of the statement or transcript is made on a case-by-case basis. In my opinion, Rule 92 *ter* is in fact, far less radical than the measure adopted by the Majority's decision in the present case.

[12] See ICC-01/05-01/08-886, paragraph 7; ICC-01-04-01/06-2595-Red, paragraphs 39, 42; ICC-01/04-01/06-1603, paragraphs 18-21; Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, paragraphs 22, 26 and 32; Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140, 29 January 2008, paragraph 41; Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 27 August 2010, ICC-01/04-01/07-Corr-Red-2289, paragraph 14; Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219,

recently adopted this approach and found that: "the introduction of such prior-recorded testimony remains an option which should be adopted only in specific and exceptional circumstances."[13]

8. The Majority's decision to oblige the prosecution to submit wholesale all witness statements as evidence, and without prior determination of the merits of the admission of each of these statements constitutes, in my opinion, an infringement of the principle of orality, which is one of the corner-stones of the proceedings under the Rome Statute.

9. The Majority Decision argues that the statements (and the other documents in the prosecution's List of Evidence) are to be submitted in addition to, and not *in lieu* of, the oral testimony of witnesses.[14] However, the Majority concedes that the purpose of this will be to limit the questioning of the witnesses by the prosecution[15] – which in itself, constitutes a substitution of the oral testimony for the written statements, curtailing the principle of primacy of orality. On the other hand, if the general admission of statements into evidence does not result in a shortening of questioning, then it is essentially superfluous as statements are not, at the trial stage, of assistance to assess the witness' credibility.

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3 September 2009, ICC-01/04-01/07-2362, paragraphs 14, 15 and 19; Transcript of hearing on 4 March 2010, ICC-01/04-01/07-T-112-Red-ENG, page 3, lines 20 to 24.
[13] ICC-01/05-01/08-886, paragraph 7.
[14] ICC-01/05-01/08-1022, paragraph 20.
[15] ICC-01/05-01/08-1022, paragraph 23.

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. Moreover, the absence, in the Statute, of a prohibition on hearsay evidence should not lead to the conclusion that hearsay has the same probative value as direct, first-hand evidence – it does not. Witness statements are, by their nature, of a lower probative value than oral testimony. While professional judges are, unlike a jury, capable of evaluating the probative value that may be granted to hearsay evidence, this should not serve as a justification for the automatic introduction into evidence of statements which may be, given their nature, prejudicial to the fair conduct of the proceedings or to a fair evaluation of the in-court testimony of a witness.

11. In civil law jurisdictions, where there is no strict rule prohibiting hearsay evidence, judges are also often bound to rely on live evidence given before the Court and cannot replace live testimony with written evidence. [16] Moreover, unlike in certain domestic jurisdictions, witness statements at the ICC are not taken in neutral, impartial circumstances. They are taken by a party (often by an

[16] For example, see the German Principle of Unmittelbarkeit, Strafprozeßordnung, StPO § 250: "If the proof of a fact is based on the observation of a person, such person shall be examined at the main hearing. The examination shall not be replaced by reading out the record of a previous examination or reading out a written statement." Translation provided http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#StPO_000P250.

investigator), mainly in order to gather evidence to mount a case against an accused, and without the supervision of any impartial arbiter. These witness statements are taken with the intention of summarising a witness's oral evidence that will be given at trial and act as a guide or preview of this evidence which is disclosed to the defence. For all of these reasons, I believe that 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.

12. The admission of a witness statement into evidence is not required for the Chamber to be able to ask questions, or direct questioning, or for the parties to impeach a witness whose oral testimony contradicts his/her prior-recorded statement. Should the latter occur, the parties or the Chamber may simply refer to the prior-recorded statement and confront the witness in court, the resulting exchange thereby being included in the record of the case. In appropriate cases, the parties may request the Chamber to admit the prior-recorded statements in order to impeach the witness,[17] 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. In any event, the impeachment of a witness remains exceptional in most court proceedings, and therefore, in the vast

[17] ICC-01-04-01/06-2595-Red, paragraphs 49 and 52.

majority of cases, the admission into evidence of witness statements will be superfluous and futile.

c. Rights of the Accused

13. The Majority argues that the wholesale admission of documents contained in the prosecution's List of Evidence will not deprive the accused of his rights to examine witnesses,[18] and that arguably, it will in fact allow the defence to better prepare its case, as the "material is *prima facie* admitted as evidence, which may provide the basis for the questioning of the witnesses called by the prosecution".[19] In my opinion, this reasoning does not stand up to in-depth analysis.

14. Articles 64(2), 69(2) and (4) of the Statute expressly require the Trial Chamber to take into consideration the rights of the accused when dealing with evidence. It follows from such provisions, and in particular from Article 69(4), that it is not sufficient for the evidence to have a *prima facie* authenticity, relevance and probative value, as the introduction of such evidence needs also to be balanced against the fairness of the trial and the expeditiousness of the proceedings.[20]

[18] ICC-01/05-01/08-1022, paragraph 20.
[19] ICC-01/05-01/08-1022, paragraph 21.
[20] ICC-01/04-01/06-1603, paragraph 23, when speaking about the decision to introduce written statements *in lieu* of oral testimony: "However, the right of the accused to a fair trial must not be undermined by decisions of this kind, and the Chamber must ensure that the accused's rights are appropriately protected". See also Redacted Decision on the Prosecution third and fourth applications for admissions of documents from the "bar table", 17 November 2010, ICC-01/04-01/06-2600-Red, paragraph 27: when speaking about receiving document or written transcripts "The Court can receive [...] subject to the Statute and Rules of Procedure and Evidence, so long as these measures are not prejudicial to or inconsistent with the rights of the Accused".

In my opinion, the wholesale admission into evidence of witness statements and other materials may negatively affect the rights of the accused in three main areas:

15. Firstly, the Majority decision is based on the assumption that all statements, or in fact, any material, may be tendered and admitted into evidence, without prior assessment of authenticity, relevance or probative value.[21] Such an assessment, according to the Majority, would be left for the end of the trial proceedings, unless the opposing party or the Chamber *proprio motu*, challenges the admissibility upon its presentation by the party.[22]

16. In my opinion, this methodology may put the defence at a disadvantage. The defence has a right to know with certainty what the evidence against the accused actually is. 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. Moreover, given that Rule 64(1) provides that "[a]n issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber", the defence will have to examine the issue of admissibility of each and every witness statement and related materials, prior to a witness's testimony, or arguably, even at the very beginning of the trial, since the Majority decision foresees the immediate admission into evidence of all

[21] ICC-01/05-01/08-1022, paragraphs 9-10, 18 and 24.
[22] ICC-01/05-01/08-1022, paragraphs 9 and 19.

documents contained in the prosecution's List of Evidence. This puts an additional immense burden on the defence. Due to the very late filing of the Majority Decision, it is virtually impossible for the defence to comply with the delays prescribed in Rule 64(1) of the Rules. If such a measure was to be put in place, a decision should have been issued well in advance of the trial, so as to avoid imposing on the defence such an impossible task.

18. In addition, the defence may not be aware of the conditions in which the statements have been taken and documents obtained, and may not, for example, be able to make an assessment as to whether the conditions set out in Article 69(7) of the Statute and Rule 111 of the Rules have been respected.[23] This burden is normally absent, since there is no such question of admissibility with regard to the live in-court testimony of a witness.

19. In cases where such challenge to the admissibility could only be made later in the proceedings, or where the Chamber would later reject a statement or a document as inadmissible, the defence would nonetheless have spent time, energy and resources in addressing both the issue of admissibility and the substance of the statement and/or document thereafter excluded from the record. This waste of defence resources may negatively affect the right of the accused to a

[23] Regarding the Rule 111 see, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475, Dissenting Opinion of Judge Pikis, paragraph 24: "As such, it cannot be withheld from the defence given that the manner of conducting the investigation and the presence of the attributes of the statements as laid down in rule 111 is a condition of its acceptability as evidential material."

fair trial. In this sense, I note the defence's argument in their Observations, that: "the guiding principle should be the generally accepted rule that nothing is admitted into evidence when its prejudicial value could outweigh its probative effect."[24]

20. Secondly, the Majority does not mention the issue of defence witness statements. It is generally recognised that the defence does not have to take statements from their own witnesses. Therefore, the admission into evidence of all prosecution witness statements may create an imbalance between the parties, inasmuch as the defence, unlike the prosecution, may not be able to rely on written statements to cover any potential lacunae in their questioning. On the other hand, should the defence choose to take statements from their witnesses to benefit from the admission into evidence of written statements, this would raise the question of prior disclosure of these statements to the prosecution, and potentially create additional obligations for the defence. In both scenarios, I see a potential violation of the rights of the accused.

21. Third and finally, the Majority also fails to take into account another important feature of the ICC trial procedure, namely the principle of publicity of the proceedings. Such principle is well established by various international human rights instruments,[25] and enshrined in

[24] ICC-01/05-01/08-960, paragraph 7; see also ICC-01/04-01/06-2600-Red, paragraph 23; ICC-01-04-01/06-2595-Red, paragraph 39.
[25] Article 10 of the Universal Declaration of Human Rights - 1948; Article 14(1) of the International Covenant on Civil and Political Rights - 1966; Article 6 of the European Convention of Human Rights - 1950; Article 47 of the European Charter of Fundamental Rights - 2000; Article 8 (5) of the American Convention on Human Rights - 1969.

Article 67(1) of the Statute as a right of the accused, as well as in Regulations 20 and 21 of the Regulations of the Court. It has also been reiterated in a recent decision of this Chamber.[26] Pursuant to this principle, the Court is under the obligation to ensure that any document or information used in the proceedings is made publicly available, to the extent possible, except when such document is subject to measures adopted pursuant to Article 68 of the Statute. In my opinion, the wholesale admission of written witness statements into evidence may cause difficulties as regards the principle of publicity. While witness statements are normally not in the public record of a case, this Chamber will now have to determine a procedure by which statements are redacted to ensure that the statements reflect the protective measures granted to witnesses where appropriate, and make them publicly available, creating an additional workload, rather than expediting proceedings.

d. Expeditiousness of the Proceedings

22. The right of the accused to an expeditious trial is an important right of the defence, but one which must be balanced along-side other important defence rights included in Article 67 of the Statute, and along with the principle of primacy of orality. The Majority argues that the admission of written statements will have a positive impact on the fair and expeditious conduct of the proceedings, by shortening the questioning time of the party who called the witness

[26] Order on the "Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning", 4 November 2010, ICC-01/05-01/08-996, paragraph 5.

and avoiding repetitive evidence, hence, reducing the overall length of the trial.[27] The Majority also argues that the *prima facie* admission of documents will "save significant time during the proceedings thereby expediting matters."[28] With due respect for my Colleagues, their arguments are not sustainable, for three main reasons.

23. First, as discussed above, it is only possible to evaluate a witness' credibility during live, oral testimony, which enables the judges to observe a witness and hear what he/she has to say. The reading of a witness statement can never be a substitute to such observations and live evaluations. Should the prosecution cut short its questioning of the witness based on the fact that the content of the testimony may be found in the written statement, the Chamber will lose the benefit of the live oral testimony. Further, avoidance of repetitive evidence can be done through the Chamber giving directions to the parties in court, rather than by the relying on witness statements.

24. Second, I foresee that rather than shortening the proceedings, the admission into evidence of witness statements could in fact prolong them. Considering the very few agreed facts in this case, and the apparent lack of will from the parties in reaching agreements on a number of issues, admitting the statements into evidence may lead the parties to contest every single potentially contentious fact included in the statements of the other party's witnesses. Where normally, certain facts contained in the statements would not be

[27] ICC-01/05-01/08-1022, paragraph 23.
[28] ICC-01/05-01/08-1022, paragraph 24.

raised in court and therefore would not be on the record, the admission into evidence of all statements may cause the 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. Such prolonged questioning might then create the need for re-examination by the party who called the witness.

25. Similarly, this Chamber's decision filed on 16 September 2010 on the issue of the admission into evidence of certain witness statements, found that:

> [...] the Chamber is not persuaded that avoiding questioning by the prosecution in court will have the effect of expediting the proceedings. On the contrary, direct questioning by the defence based on written statements given in September 2008, two years ago and around six years after the alleged events suffered, is likely to take a significant amount of time as this evidence is contested by it. In addition, the Chamber is concerned that direct questioning by the defence would not facilitate her testimony in court and may cause distress to the witness. Rather, the Chamber is of the view that if the prosecution's questioning is conducted first, it is likely to assist Witness 80 in giving her evidence and may prepare her to face any questions by the defence which she may find challenging.[29]

I see no reasons to depart from the reasoning adopted by this Chamber in the abovementioned decision.

26. Finally, the argument that admitting this material on a *prima facie* basis will save time during proceedings, as the Chamber will not have to rule on the admissibility of each and every document

[29] ICC-01/05-01/08-886, paragraph 19.

submitted to it is misconceived. Indeed, the Chamber will only be postponing, not eliminating, the need to make a ruling on admissibility, to the end of the case. The time allegedly saved during the proceedings will therefore be "lost" again at the end of the case. Therefore, I cannot agree with the Majority that the measure will have any beneficial effect on the expeditiousness of the proceedings.

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.

28. 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.

e. Other arguments in the Majority Decision

29. The Majority puts forward some additional points which I would like to address here. First, the Majority argues that the *prima facie* admission of statements and other documents "will allow for more coherence between the pre-trial and trial stages of the proceedings".[30] With respect, I do not agree that this alleged need for coherence between the stages of the proceedings can be used as an argument justifying the measure adopted in the Decision. The Pre-Trial and Trial proceedings before the ICC are two completely different stages, to which different rules apply. The purpose of the pre-trial stage is to determine whether the evidence against the accused is sufficient to "establish substantial grounds to believe that the person committed each of the crimes charged"[31] and thereby justify the confirmation of any charges against him. To do so, the Pre-Trial Chamber mainly relies on written evidence. This is not the case at the trial stage, as explained above. Pre-Trial and Trial Chambers apply different evidentiary standards.[32] This, in my opinion, militates for a clear demarcation between the two stages and therefore, the argument of the Majority does not support the Majority Decision.

[30] ICC-01/05-01/08-1022, paragraph 27.
[31] Article 61(7) of the Statute.
[32] For this reason, I am not convinced by the relevance of referring to pre-trial decisions as authority to support the arguments of the Majority. See, for example, paragraph 10 of the Majority Decision.

30. Secondly, the Majority refers to the *travaux préparatoires* of the ICC, and suggests that the system finally put in place "provided that the Court has discretion to rule on the relevance or admissibility of any piece of evidence".[33] While I do not disagree with this assertion, I do, however, note that this does not imply that the Chamber has a right to *prima facie* admit all documents which may be submitted by a party. Moreover, I recall that during the negotiations of the Rome Statute, France made a proposal which intended to give a great discretion to the Chamber in terms of evidence, and which is in essence identical to the conclusions of the Majority Decision.[34] Some delegations expressed concerns about a free admissibility by the Chamber, which led to the rejection of the French proposal.[35] Instead, the actual system of evidence was put in place.

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[33] ICC-01/05-01/08-1022, paragraph 17.

[34] See Projet de Statut de la Cour Criminelle Internationale: Document de travail présenté par la France, Article 105: " *Les crimes peuvent être établis par tout mode de preuve, et la chambre de première instance décide, d'après son intime conviction. Elle ne peut fonder sa décision que sur des preuves qui lui sont apportées au cours des débats et discutées contradictoirement devant elle. Le doute doit profiter à l'accusé.*" See also the Proposal submitted by France concerning the Rules of Procedure and Evidence, PCNICC/1999/DP.10 of 22 February 1999, Rule 37.1, Principle of freedom of evidence "All evidence submitted by the parties shall, in principle, be admissible before the chambers of the Court, which shall assess freely its probative value in accordance with article 69, paragraph 4". See the proposal after the June draft meeting dated of 1st July 1999, PCNICC/1999/WGRPE/RT.5: 'Rule 6.1 General Provision: (a) All evidence submitted by the parties shall, in accordance with the discretion described in articles 64 paragraph 9, be assessed freely by a chamber of the court to determine its relevance and admissibility in accordance with article 69'. The last version of the rule is the one appearing in the Rules of Procedure and evidence.

[35] Text of The Draft Statute for the International Criminal Court, Part VI-The Trial, 1 April 1998, note 15: "A proposal was made, supported by a number of delegations, to add the following paragraph to the Statute:

> "The Court may decide not to admit evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias."

Other delegations supported a proposal that the Statute or Rules of Procedure and Evidence also make reference to the exclusion of evidence of prior sexual conduct of a witness, evidence protected by the lawyer-client privilege, as well as other grounds of exclusion. It was finally proposed that these matters should be addressed in the Rules of Procedure and Evidence, as opposed to in the Statute. Many delegations also felt that the Rules should provide sufficient flexibility to enable the Court to rule on the relevance and admissibility of evidence where no other rule provides guidance on the standards to be applied. See also, Otto Triffeterer, *Commentary on the Rome Statute of the International Criminal Court*, pages 1305-1306: "an initial French draft of rule 63, setting out the general provisions relating to evidence,

31. Finally, as stated above,[36] I believe that the timing of the issuance of the Majority's Decision is inappropriate. The Decision will have serious consequences on the course of the proceedings, including on the investigations and on the preparation for trial of both parties. Such a decision, which constitutes a major departure from the precedents set by Trial Chambers I and II, should have been rendered well ahead of the commencement of the trial, so as to allow parties and participants to adapt their preparation in consequence. In my opinion, the late filing of the Majority's Decision goes against the principle of judicial certainty and therefore causes irreparable prejudice to both parties.

f. Conclusion

32. For the aforementioned reasons, I disagree with the entirety of the Majority decision. I would recommend that this Chamber follows the established practice and undertakes a case-by-case analysis as to whether statements and other documents are admissible as evidence.

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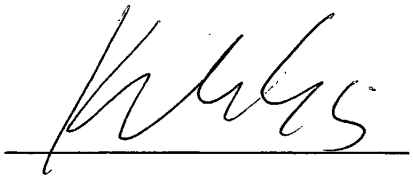
would have established an overarching principle of admissibility for all evidence, effectively undoing the compromise reached in Rome. After a June 1999 drafting meeting the pendulum swung in the other direction, with a proposed version of the rule that would have obligated the Court to assess all evidence for the purpose of admissibility. At the second session of the Preparatory commission, the current form of the rule was developed, which authorizes rather than obligates a chamber to 'assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.' At the fifth session of the Preparatory Commission, an attempt was made to include reliability as a factor to be freely assessed by a chamber in determining relevance or admissibility. No consensus was reached on this proposal, with the result that the Rules are silent in the issue."

[36] See above, paragraph 17.

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



Judge Kuniko Ozaki

Dated this 23 November 2010

At The Hague, The Netherlands