Cour Pénale Internationale

International Criminal Court

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Date: **31 May 2011**

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

Partly Dissenting Opinion of Judge Kuniko Ozaki on the Order on the procedure relating to the submission of evidence

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence
Mr Nkwebe Liriss
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Legal Representatives of the Victims
Ms Marie Edith Douzima-Lawson
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Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
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REGISTRY

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. This Partly Dissenting Opinion is in response to paragraphs 11 and 12 of the "Order on the procedure relating to the submission of evidence" ("Order"),[1] and will address the reasons underlying my disagreement with the Majority over those paragraphs.

2. In paragraphs 9 to 12 of the Order, which constitute a separate section, the Majority singled out the issue of the admission into evidence of written witness statements, and addressed, *inter alia*, the application of Rule 68(b) of the Rules of Procedure and Evidence ("Rules"). The Majority also expressed a preference for "the submission into evidence of the entirety of the witnesses' statement(s), as opposed to excerpts, when considered necessary for the determination of the truth in accordance with Article 69(3) of the Statute and to ensure that information is not taken out of context, and consistent with the relevant provisions of the Statute and the Rules [...]."[2]

3. I fully agree that it is useful and necessary to give notice to the parties and participants in this Order, about the way in which the Chamber will admit materials into evidence. The above mentioned paragraphs, however, are not only imbalanced, by not providing enough guidance, where necessary, about other types of materials, but they also provide wrong or misleading guidelines vis-à-vis witness statements.

[1] Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1470.
[2] ICC-01/05-01/08-1470, paragraph 11.

II. Application of Rule 68(b) of the Rules

4. First, I note that the Majority does not seem to fully appreciate the purposes of Rule 68(b) of the Rules, which is to submit the written statements of a witness *in lieu* of oral testimony, as an exception to the principle of orality enshrined in Article 69(2) of the Rome Statute ("Statute").[3] In this regard, the Appeals Chamber in a recent Judgment prescribed that the application of Rule 68 of the Rules requires a "cautious assessment" of specific factors.[4] It is for this reason that, where a party wants to request such substitution, it should indicate its intention well in advance of the testimony of the witness, either in accordance with paragraph 10 of the Order, or more appropriately, through a separate written motion so that the opposing party has time to respond, and the Chamber, time to consider the issue.[5]

5. While no one contests that the Chamber has a right to request the admission of evidence it considers necessary pursuant to Article 69(3) of the Statute, I have serious doubts as to the exercise of this power as described by the Majority in paragraph 12 of the Order. The Chamber's

[3] 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 5-7; 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, paragraphs 19-21; 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-01/04-01/07-2289-Corr-Red, paragraph 14; 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, ICC-01/04-01/07-2362, paragraph 15.

[4] 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, ICC-01/05-01/08-1386, paragraph 78.

[5] See for example, Corrigendum to "Directions for the conduct of the proceedings and testimony in accordance with rule 140", 1 December 2009, ICC-01/04-01/07-1665-Corr, paragraphs 92-94.

power pursuant to Article 69(3) of the Statue is not unlimited and it should be exercised in accordance with the Statute and the Rules, including the principle of orality and Rule 68(b) of the Rules. In addition, Article 69(3) of the Statute has been interpreted as authorising the Chamber to request in principle the submission of "new evidence".[6] To constitute such new evidence, according to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the "material 1) must be new in the sense of not having been available on the basis of due diligence when it should have been appropriately submitted; 2) not be cumulative and/or repetitious of evidence already given; 3) must be of significance relevance to the core issues of the case; and 4) be of such nature that its admission is in the interests of justice."[7]

6. In any event, if the Chamber requests the admission of written statements, it should be done only in exceptional circumstances, which should be fully explained in accordance with Rule 64(2) of the Rules. It is especially so because paragraph 12 of the Order implies that the Chamber will request the submission of the statements even when parties have no intention to do so. The Majority does not indicate under what kind of exceptional circumstances the Chamber will make such a request. The mere reference to "in accordance with the Statute and the Rules" in this paragraph is

[6] Donald K. Piragoff, "Evidence", in Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court*, second edition, 2008, page 1321.
[7] Donald K. Piragoff, "Evidence", in Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court*, second edition, 2008, page 1321. See also, ICTY, *Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T*, Transcript, 21 November 2000, pages 27358-27359; ICTY, *Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T*, Decision on Prosecutor's submissions concerning 'Zagreb exhibits' and Presidential Transcripts, 1 December 2000; ICTR, *The Prosecution v. Bagosora, Case No: ICTR-98-41-T*, Defence response to Prosecutor's brief on ICTY and ICTR case law relating to the exclusion of newly discovered evidence and the applicability of principles identified in the Kupreskic Appeal Judgment, 1 October 2003, paragraph 17.

insufficient to ensure the proper safeguards against improper use of such power and fails to give necessary guidance to the parties. Moreover, when the Chamber makes such an exceptional request, the parties should be informed well in advance. In the scenario envisaged by the Majority, however, no such notice is to be given, therefore rendering useless the "opportunity to raise any objection to the potential admission of these statements into evidence". Therefore, I believe that paragraph 12 of the Order is misleading, if not incorrect.

III. Submission of evidential materials in its "entirety"

7. Second, with regard to paragraph 12 of the Order, in the absence of any requirements in the legal framework of the Court in relation to the "entirety" of evidentiary materials, including witness statements, the role of the Chamber is simply to "rule on the relevance and/or admissibility of each item of evidence, when it is submitted"[8] in accordance with the obligations set out in the Statute and the Rules, taking into account the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of the witness. This requires that the Chamber assesses these criteria item-by-item, as stipulated by the Appeals Chamber.[9] While I understand that the Majority's concern is to avoid that excerpts of statement be admitted in evidence out of context, a proper application of those criteria will in fact avoid this problem altogether. On the contrary, the rule they stipulated may go against the criteria above as well as other important principles

[8] ICC-01/05-01/08-1386, paragraph 37.
[9] ICC-01/05-01/08-1386, paragraphs 2-3, 44, 53, 56-57, and 59.

enshrined in the Statute, such as the principle of orality and the rights of the defence. Even though the Majority alleges that it will act in accordance with the provisions on the Statute and the Rules, such ambiguous reference is insufficient to safeguard their approach and fails to provide the parties with adequate guidance. Therefore, the establishment of a separate rule in favour of the admission of the entirety of witness statements is unfounded and inappropriately binds the Chamber.

8. The item-by-item assessment mentioned above requires the Chamber to consider the nature of each piece of material submitted as well as to identify the purpose of the submission into evidence of the material. For example, I am of the view that the Chamber should pay special attention in admitting witness statements (as compared to other types of material) not to circumvent the principle of orality.[10] In addition, the two primary purposes of the admission of materials into evidence, which will be discussed below, should also be given due consideration.

9. With regard to these purposes, parties to criminal proceedings generally tender materials into evidence either: (1) to prove the truth of their content; or (2) to assess or test the credibility of a witness. The position on whether and how to admit a prior recorded testimony, or other documents in relation to the witness's credibility or for the truth of the content of the material at stake is a well established distinction in national jurisdictions and in the international jurisprudence.[11] Trial Chamber II

[10] See, *inter alia*, ICC-01/05-01/08-1386, paragraphs 74-81; ICC-01/04-01/07-2362, paragraphs 14-15.
[11] See e.g. ICTY, *Prosecutor v. Delic, Case No. IT-04-83-AR73.1*, Decision on Rasim Delic's Interlocutory Appeal against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, paragraphs 22-23; ICTY, *Prosecutor v. Seselj, Case No. IT-03-67-T*, Decision on the Prosecution's Oral

recently implicitly discussed the distinction between admission of materials to prove the veracity of the content versus admission to test the credibility of a witness.[12] Similarly, in the *Stanisic and Simatovic* case before the ICTY, the Trial Chamber recalled the jurisprudence of the ICTY Appeals Chamber and stated, in relation to a prior statement that:

> The Appeals Chamber has set out that a Trial Chamber may admit a witness's previous inconsistent statement into evidence for the purposes of assessing a witness's credibility. A Trial Chamber may also admit a witness's previous inconsistent statement for the truth of its contents when it fulfils the criteria under the Rules of being relevant and sufficiently reliable to be accepted as probative. [...] Further, when admitting into evidence a witness's previous inconsistent statement, a Chamber must specify whether it admits the statement to impeach the witness's credibility, or for the truth of its contents.[13]

10. Although the Majority's ruling in paragraphs 9 to 12 only deals with the admission of witness statements, I would like to address the issue of the admission in their "entirety" of all types of materials, as first, witness statements should not be isolated from these other types and second, it is important that the Chamber provides proper guidance to the parties and participants. With the abovementioned considerations in mind, I will now turn to the question of whether the different types of materials that may be tendered by the parties, may be admitted either in its entirety or in part.

Motion Seeking the Admission into Evidence of Witness Nebojsa Stojanovic's Three Written Statements, 11 September 2008, paragraph 11; ICTY, *Prosecutor v. Seselj, Case No. IT-03-67-T*, Decision on Admission of Evidence Presented During Testimony of Aleksandar Stefanovic, 23 March 2009, paragraph 5; ICTY, *Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T*, 14 November 2001, page 3.

[12] Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, ICC-01/04-01/07-2954, paragraph 7.

[13] ICTY, *Prosecutor v. Stanisic and Simatovic, Case No. IT-03-69-T*, Decision on admission into evidence of prior testimony, statement and related documents concerning Witness JF-052, 28 January 2011, paragraph 6.

a. The witness's own statement

11. Pursuant to Article 69(2) of the Statute, the "testimony of a witness at trial shall be given in person, except to the extent provided by [...] the Rules of Procedure and Evidence". Therefore, the principle of orality prevails, and in accordance with principles of legal interpretation, exceptions should be applied restrictively. As stated above, one of these exceptions is foreseen in Rule 68(b) of the Rules, according to which the written statement of a witness who testifies in court may be admitted into evidence. [14] In accordance with the above, the parties should, in using this Rule, limit the exception to the primacy of orality by indicating the relevant parts of the witness statement for which they want to seek admission.[15] If this is not possible, or if the Chamber, after hearing from the opposing party, is not satisfied that the selected parts are sufficient in accordance with all relevant requirements of admission or evidence under the Statute and the Rules, the witness statements could then be admitted in their entirety, instead of in part. The parties should also avoid quoting from the statements when questioning the witness, so as to avoid nullifying the principle of orality by improperly introducing the written statements into evidence and/or infringing the Chamber's expressed preference for neutral questions.

12. Where the witness statement is not part of the evidence, the parties, in their questioning of the witness, may still decide to use the statement in order to test the credibility of the witness and/or show contradictions

[14] See ICC-01/05-01/08-1386, paragraphs 74-81.
[15] For example, see ICC-01/04-01/07-1665-Corr, paragraph 92; ICC-01/04-01/07-2362, paragraph 16.

between the in-court and the written statements. When doing so, the parties have two options: (1) they can refer to, or quote a limited part or parts of the statement, in order to have the relevant information in evidence through the transcript; or (2) they may, after a contradiction appears between the witness's written statement and his in-court testimony, request the admission into evidence of the relevant part(s) of the statement, which will then be given an evidence number. In this latter scenario, as long as the part(s) identified by the party is (are) not taken out of context or misleading, the admission into evidence should be allowed, after hearing from the opposing party.[16] The same applies for the opposing party who may subsequently try to restore the credibility of the witness. If we were to follow the preference of the Majority and require the admission of the entire statement (keeping in mind that often, witness statements contain many documents) although the defence merely tries to test the credibility of a witness using a specific part, this would force the defence to tender incriminating evidence, which is a violation of the rights of the accused under Article 67 of the Statute.

13. Similarly, in this regard, and as I indicated in my two Separate Opinions on the oral decisions on the Legal Representatives requests to question Witness 63[17] and Witness 209,[18] the Chamber should not allow the Legal Representatives of victims to use quotations from the witness statements when putting their questions, in a way that would infringe the principle of orality by improperly introducing the witness statement into evidence. In my view, such practice is not justified and is in fact a way to circumvent

[16] See ICC-01/04-01/07-2954, paragraph 7.
[17] Transcript of hearing on 11 May 2011, ICC-01/05-01/08-T-108-CONF-ENG, page 26, lines 9-13.
[18] Transcript of hearing on 26 May 2011, ICC-01/05-01/08-T-117-CONF-ENG, page 3, lines 11-22.

the fact that the statements are not part of the evidence. Also, the use of quotations from the statements results in the Legal Representatives putting leading questions, which is often inappropriate. With regard to the use of statements in the objective of testing a witness's credibility, in line with the approach adopted by Trial Chamber II, I am of the view that Legal Representatives should in principle "not be allowed to ask questions pertaining to the credibility and/or accuracy of the witness's testimony, unless the Victims' Legal Representative can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented."[19]

b. The statement or transcript of interview of an individual who is not a witness at the trial stage

14. The Chamber already had the opportunity to consider this issue, when two transcripts of interviews between the Office of the Prosecutor and individuals not called as witnesses at trial were listed by the defence in the documents to be used for the questioning of Witness 79. With regard to the appropriateness of using this material, the Chamber ruled that:

> [...] the Defence is entitled to put questions to [a witness] based on the information contained in [transcripts of interview], but without actually referencing the transcripts themselves, thereby not actually tendering the transcripts into evidence. Counsel should not mention what another witness has said or is expected to say, save to set the context for the questions in an appropriate case. The Defence, therefore, will be entitled to suggest something to the witness that arises from the information contained in the abovementioned transcripts, but the Chamber will not allow the Defence to directly quote from the transcripts by stating that a particular pre-trial witness has said something or giving a page or line reference. The Chamber will not allow the Defence to tender the transcripts concerned through this witness. If the Defence wishes to actually quote or refer to the information as part of another witness statement, the Defence has to apply for these transcripts to be admitted as

[19] ICC-01/04-01/07-1665-Corr, paragraph 90 c).

evidence by way of a written application for the admission of these transcripts from the Bar table, and the Chamber will duly consider the matter after receiving responses and replies from the parties.[20]

15. As opposed to the scenario explained above concerning a testifying witness's own statement, in the present case, the statement or transcript of interview cannot, in principle, be admitted through a testifying witness. Therefore, regardless of the purpose for which it is sought, the admission into evidence of a statement or transcript of interview of a person who is not a witness at trial must be requested through a bar table motion, unless exceptional circumstances justify another approach. Where the party wants to submit into evidence such material with the intent of testing a witness's credibility, I believe that the admission of only parts of the material is justifiable, for the same reasons as those explained with regard to the statement of testifying witnesses.[21] Also, the parties have the possibility to simply use the material during questioning, without quoting, in accordance with the oral decision mentioned above.

c. Other materials

16. There are countless types of other materials that could be submitted into evidence by the parties to the present proceedings, either through a testifying witness, or via bar table motion. While it would be unrealistic to attempt to cover all possibilities in this dissenting opinion, I would like to address some of the material types which have so far been brought before the Chamber.

[20] Transcript of hearing on 2 March 2011, ICC-01/05-01/08-T-78-Red-ENG, page 18, lines 18-25 and page 19, lines 1-8.
[21] See above, paragraph 12 *in fine*, on the issue of incriminating evidence and rights of the accused.

17. Where the parties want to tender audio or video material, or books, reports, legislation and the like, such materials in most cases are divisible and can be admitted in part. In such cases, no harm will be done in admitting only the part(s) relevant for the purposes of the party requesting its (their) admission into evidence, provided that all relevant requirements of admission or evidence under the Statute and the Rules are fulfilled. This includes the requirement that the excerpt selected must not be taken out of context or otherwise irrelevant or misleading. As such, I see no reason to request the admission of the entire material, since in many cases, most of it may not have any relevance for the proceedings before the Court.[22]

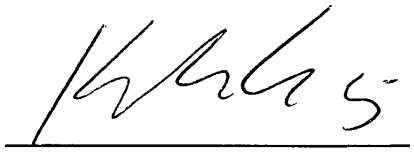
18. On the other hand, some types of materials, by virtue of their nature can simply not be divided without losing their integrity and thus, their relevance and probative value. Therefore, they must be integrally admitted. Such include: maps, sketches, photographs, medical certificates, victim applications forms. These types of materials should be admitted as a whole, regardless of whether they are tendered to prove the truth of their content or to test a witness' credibility.

[22] See for example, ICC-01/04-01/07-2289-Corr-Red, paragraphs 16-21; SCSL, *Prosecutor v. Norman et al., Case No. SCSL–04–14–T, T. Ch. I*, Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92 *bis* and 89 (C), 14 July 2005, page 4 (with reference to *May and Wierda*, International Criminal Evidence, 2002, paragraph 10.59, page 346); ICTY, *Prosecutor v. Krajišnik, Case No. IT–00–39–T, T. Ch. I*, Decision on Admission of Material Sought by the Chamber and Other Exhibits, 14 July 2006, paragraph 13.

IV. Conclusion

19. For the aforementioned reasons, I disagree with the Majority's views expressed in paragraphs 11 and 12 of the Order, with regard to the application of Rule 68(b), and with their expressed preference for the admission of these statements in their entirety.

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



Judge Kuniko Ozaki

Dated this 31 May 2011

At The Hague, The Netherlands