

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/05-01/08

Date: 19 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***

**URGENT  
Public**

**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:**

**The Office of the Prosecutor**

Ms Fatou Bensouda, Deputy Prosecutor  
Ms Petra Kneuer, Senior Trial Lawyer

**Counsel for the Defence**

Mr Nkwebe Liriss  
Mr Aimé Kilolo Musamba

**Legal Representatives of the Victims**

Ms Marie-Edith Douzima Lawson  
Mr Assingambi Zarambaud

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

Mr Jean-Xavier Keïta

**States Representatives**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, hereby renders the following Decision on the admission into evidence of materials contained in the prosecution’s list of evidence:

## **I. Background and Submissions**

1. On 15 January 2010, the Office of the Prosecutor (“prosecution”) filed its confidential *ex parte* “Updated list of evidence” (“List of Evidence”), submitting evidence on which it will rely at trial. The List of Evidence is divided into groups as follows: (a) witness statements, (b) documents to be tendered through witnesses, and (c) “other evidence”.<sup>1</sup>
2. On 4 October 2010, the Chamber issued an “Order for submissions on the presentation of evidence at trial” (“Order”),<sup>2</sup> in which it recalled its duty to ensure that a trial is fair and expeditious pursuant to Article 64(2) of the Rome Statute (“Statute”). In pursuance of this objective, the parties and participants were ordered to file 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>
3. On 11 October 2010, the prosecution filed its observations,<sup>4</sup> in which it submits that the Chamber has authority under the Statute and the Rules of Procedure and Evidence (“Rules”) to admit prior statements of witnesses who appear at trial and who are available for “cross-examination”.<sup>5</sup> The prosecution bases its observations on Article 69(2) of the Statute and Rule

<sup>1</sup> Confidential *Ex Parte* Prosecution and Defence only Annex B to the Prosecution’s submission of its “Updated Summary of Presentation of Evidence”, 15 January 2010, ICC-01/05-01/08-669-Conf-AnxB.

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

<sup>3</sup> ICC-01/05-01/08-921, paragraph 3.

<sup>4</sup> 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.

<sup>5</sup> ICC-01/05-01/08-941, paragraph 6.

68(b) of the Rules.<sup>6</sup> The prosecution submits that if the Chamber agrees in principle to consider the admission of prior statements, the prosecution will make applications pursuant to Rule 68(b) of the Rules for the admission of particular witness statements, whether in whole or in part, at appropriate stages in the trial.<sup>7</sup>

4. On 11 October 2010, the Office of the Public Counsel for Victims (“OPCV”)<sup>8</sup> filed its observations,<sup>9</sup> in which it argues that the admission into evidence of the prior recorded witness statements of each prosecution witness called to testify at trial, in addition to their oral testimonies, would not facilitate the expeditious conduct of the proceedings.<sup>10</sup> The OPCV submits that Article 69(2) of the Statute stipulates that the core evidence from a witness must come from his or her “live” testimony, which is thereby subjected to questioning and scrutiny by the parties, the participants and the Chamber.<sup>11</sup> Finally, the OPCV observes that, should the Chamber deem it appropriate to have written statements of witnesses admitted into evidence in addition to their oral testimony at trial, such a scenario should be allowed only in exceptional circumstances when the Chamber considers it necessary in its determination of the truth.<sup>12</sup>
5. On 18 October 2010, defence counsel for Mr. Jean Pierre Bemba Gombo (“defence”) filed its observations,<sup>13</sup> concurring with the OPCV.<sup>14</sup> The defence

<sup>6</sup> ICC-01/05-01/08-941, paragraph 2.

ICC-01/05-01/08-941, paragraph 4.

<sup>8</sup> Acting as the legal representative at the time of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09.

<sup>9</sup> 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.

<sup>10</sup> ICC-01/05-01/08-943, paragraph 3.

<sup>11</sup> ICC-01/05-01/08-943, paragraph 3.

<sup>12</sup> ICC-01/05-01/08-943, paragraph 6.

<sup>13</sup> 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.

stresses that, as a general rule, testimony should be heard live in court, and exceptions should be narrowly construed and never in a manner which could prejudice the rights of the accused.<sup>15</sup> The defence argues that the envisaged procedure should not be adopted in those situations where the subject matter of the testimony in question is either materially in dispute or central to the core issues in the case.<sup>16</sup> The defence further suggests 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”.<sup>17</sup> Finally, the defence recalls the decision of Trial Chamber I which stated that there are “material advantages” to be gained from hearing *viva voce* testimony delivered in full before the Court, “especially when the evidence concerned requires comprehensive investigation and credibility issues demand observation of a witness’s demeanour”.<sup>18</sup>

6. On 26 October 2010, the prosecution filed a confidential “Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning” (“Revised Order of Witnesses”),<sup>19</sup> in which it submits that it has implemented the Chamber's instructions with regard to grouping some of the witnesses and the general order in which witnesses are to be called.
7. In accordance with Article 21(1) of the Statute, the Trial Chamber, in making its decision has considered Article 54(1)(a), Article 64(2), Article 64(3)(a) and (c), Article 64(6)(b) and (6)(f), Article 64(8)(b), Article 64(9)(a), Article 67(1)(c) and (e), Article 69(2) to Article 69(4), Article 69(7) and Article 74(2) of the

---

<sup>14</sup> ICC-01/05-01/08-960, paragraph 4.

<sup>15</sup> ICC-01/05-01/08-960, paragraph 5.

<sup>16</sup> ICC-01/05-01/08-960, paragraph 6.

<sup>17</sup> ICC-01/05-01/08-960, paragraph 7.

<sup>18</sup> ICC-01/05-01/08-960, paragraph 8.

<sup>19</sup> Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning, 26 October 2010, ICC-01/05-01/08-975-Conf with public redacted version filed on 5 November 2010, ICC-01/05-01/08-975-Red. The order of witnesses was approved by the Chamber by the 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.

Statute, Rule 63(2), (3) and (9), Rule 64, Rule 68(b), Rule 88(5), Rule 130, Rule 131(1), Rule 134(1), Rule 140(1) and Rule 140(2)(c) of the Rules of Procedure and Evidence ("Rules") and Regulations 43 and 54(g) and (i) of the Regulations of the Court.

## II. Analysis and Conclusions

8. Having considered the observations submitted by the parties and participants pursuant to Article 64(3)(a) of the Statute, the Majority of the Chamber ("Majority")<sup>20</sup> is convinced that there is a 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. For the same reasons, the Majority is of the view that it shall admit, *prima facie*, all the documents submitted to the Chamber by the prosecution in its List of Evidence.<sup>21</sup>
9. The Majority decision to admit into evidence all of the materials included by the prosecution in its List of Evidence, is based on making a *prima facie* finding of the admissibility of this evidence. It is important to distinguish this from the Chamber's future determination of the probative value to be given to the evidence since the Chamber will evaluate, in accordance with Rule 63(2) of the Rules, the probative value and appropriate weight to be given to the evidence as a whole, at the end of the case when making its final judgement. The Chamber would then make the appropriate determinations on whether the probative value of the evidence is outweighed by its prejudicial effect. By probative value, the Majority refers,

<sup>20</sup> Judge Kuniko Ozaki dissenting.

<sup>21</sup> See the 3 disclosed types of documents in ICC-01/05-01/08-669-Conf-AnxB.

*inter alia*, to the reliability and weight to be attached to the evidence concerned.<sup>22</sup>

10. The Majority considers that a ruling on admissibility is not a pre-condition for the admission of any evidence, as it only implies a *prima facie* assessment of the relevance of any material, on the basis that it appears to be *a priori* relevant to the case.<sup>23</sup> Apart from what is provided for in Article 69(7)(a) and (b) of the Statute and Rule 71 of the Rules, no evidence is *per se* inadmissible, and the uncontested jurisprudence of the Court determines that any evidence may be “admitted [...] unless [it] is expressly ruled inadmissible [...] by the Chamber upon a challenge by any of the participants at the hearing”.<sup>24</sup>
11. The Majority considers that the *prima facie* admission of witnesses’ written statements and related documents included in the prosecution’s List of Evidence, as evidence to be used at trial, is consistent with the Chamber’s role to direct and ensure the proper conduct of the proceedings pursuant to Article 64(8)(b) of the Statute and Rule 140 of the Rules. Furthermore, pursuant to Regulation 54(g) and (i) of the Regulations of the Court, the Trial Chamber has the discretion to issue any order in the interests of justice for the purposes of the proceedings including, on the number of documents or exhibits to be introduced and on the extent to which a participant can rely on recorded evidence.

<sup>22</sup> Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Mr Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paragraphs 58-60.

<sup>23</sup> See for a similar approach, Trial Chamber I, 13 June 2008, ICC-01/04-01/06-1399, paragraphs 26-27: “Bearing in mind those key considerations, when the admissibility of evidence other than direct oral testimony is challenged the approach should be as follows. First, the Chamber must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims.”

<sup>24</sup> Pre-Trial Chamber I, Decision on the schedule and conduct of the confirmation hearing, 28 January 2010, ICC-01/04-01/06-678, page 9.

12. In addition, the Trial Chamber may, as necessary prior to, or during, the course of the trial, rule on any relevant matter or on any issue concerning the conduct of the proceedings, as provided for in Article 64(6)(f) of the Statute and Rule 134(1) of the Rules.
  
13. Furthermore, the Majority is of the view that nothing in the ICC legal framework prevents the Chamber from *prima facie* admitting non-oral evidence, whether written, audio, visual. According to the Statute and the Rules, a Chamber can rely on all types of evidence, as several legal provisions facilitate evidence being given in writing,<sup>25</sup> orally or by means of video or audio technology.
  
14. In the view of the Majority, the Statute only envisages a presumption in favour of oral testimony, but no prevalence of *orality* of the procedures as a whole. Although it might be argued that such a prevalence of *orality* could be inferred from the first sentence of Article 69(2) of the Statute, the Majority stresses that the rule has several exceptions,<sup>26</sup> and the same Article gives the Court the discretion (“may also”) to permit the giving of recorded testimony or the introduction of documents or written transcripts.<sup>27</sup>
  
15. The Majority also interprets Article 74(2) of the Statute as requiring the Chamber to consider all the evidence “submitted” before it and “discussed” at trial in making its final determination regardless of the type of evidence presented, whether written, audio, visual or oral.

---

<sup>25</sup> See *inter alia*, Article 64(6)(b) of the Statute “documents and other evidence”; Article 68(2) of the Statute “evidence by electronic or other special means”; Article 69(2) of the Statute “introduction of documents or written transcripts”; Rule 68 of the Rules “transcripts or other documented evidence”; Rule 84 of the Rules “documents or other information”.

<sup>26</sup> See for instance Article 56 of the Statute and Rules 47, 68, 112 and 114 of the Rules.

<sup>27</sup> See Rule 68 of the Rules.



16. Moreover, the Majority considers that, under the Court's legal framework, the Chamber has discretion to rule on the admissibility of evidence at any time during the course of the proceedings, pursuant to Articles 64(9) and 69(4) of the Statute.
17. The Majority recalls the drafting history and the compromise reached at the Rome Conference as to the governing principles for assessing relevance or admissibility of evidence.<sup>28</sup> The compromise was to eschew generally the technical formalities of the *common law* system of admissibility of evidence in favour of the flexibility of the *civil law* system, provided that the Court has discretion to rule on the relevance or admissibility of any piece of evidence.<sup>29</sup>
18. This subtle compromise is illustrated by the wording used in Article 69(4) and (7) of the Statute. Whilst in accordance with Article 69(4) the Chamber "may" rule on relevance or admissibility of evidence, Article 69(7) of the Statute, combined with Rule 63(3) of the Rules, orders the Chamber ("shall") to rule on relevance or admissibility on an application of a party or on its own motion, in case the evidence has been obtained by means of a violation of the Statute or internationally recognised human rights standards pursuant to Article 69(7)(a) and (b) of the Statute. This latter provision,

---

<sup>28</sup> Donal K. Piragoff (2001) Evidence in *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee (ed.) (New York, Transnational Publishers), page 351, who stresses that "while the basic principle of both systems – [common law and civil law] – is that all relevant evidence that has probative value is admissible unless affected by an exclusionary rule, common law systems contain more prohibitory or exclusionary rules. Common law systems generally tend to exclude or weed out irrelevant evidence, and inherently unreliable types of evidence, as a question of admissibility, while in civil law systems, all evidence is generally admitted and its relevancy and probative value are considered freely together with the weight of the evidence."

<sup>29</sup> Donal K. Piragoff (2001) Evidence in *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee (ed.) (New York, Transnational Publishers), pages 349-401; and Donald K. Piragoff (2008) Evidence in *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer (ed.) (München, C.H.Beck Hart Nomos), page 1317.

drafted in a restrictive manner, is the only situation in which the Chamber has a duty to make a ruling on admissibility.<sup>30</sup>

19. The Majority reiterates that the *prima facie* admission into evidence of the witnesses' written statements and related documents included in the prosecution's List of Evidence does not prevent the parties from challenging the admissibility of such evidence, or the Chamber from ruling, *proprio motu*, on its admissibility, pursuant to Article 69(7) of the Statute. The defence is therefore at liberty to challenge the admissibility of the evidence in accordance with Rules 63(3) and 64(1) of the Rules.

20. The Majority recalls once again that the admission of the documents contained in the prosecution's List of Evidence is not intended to replace oral testimony. The accused will not in any way be deprived of his right to examine or have examined the witnesses against him, in accordance with Article 67(1)(e) of the Statute.<sup>31</sup>

21. In addition, as the material included in the prosecution's List of Evidence has already been disclosed *inter partes*, the *prima facie* admission into evidence of this material does not infringe the rights of the accused to have adequate time and facilities for the preparation of his defence, in accordance with Article 67(1)(a) of the Statute. Arguably, the defence may be in a better position to prepare its case as this material is *prima facie* admitted as

<sup>30</sup> The Chamber also notes that Rule 71 is the other exclusionary rule for evidence pertaining to the prior or subsequent sexual conduct of victim or witness.

<sup>31</sup> This approach is consistent with the human rights case-law: ECtHR, *Caka v. Albania*, (Application no. 44023/02), Judgment, Strasbourg, 8 December 2009, paragraph 102; ECtHR, *Lüdi v. Switzerland*, Judgment of 15 June 1992, Series A no. 238, page 21, paragraph 49; ECtHR, *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, page 56, paragraph 43; ECtHR, *Vozhigov v. Russia*, no. 5953/02, paragraph 51, 26 April 2007; ECtHR, *Solakov v. The Former Yugoslav Republic Of Macedonia*, (Application no. 47023/99), Judgment, Strasbourg, 31 October 2001, page 14, paragraph 57; ECtHR, *Kostovski v. The Netherlands*, Application No. 11454/85, Judgment. 20 November 1989, paragraph 41 and *mutatis mutandis*, ECtHR, *Unterperinger v. Austria*, Application No. 9120/80, Judgment, 24 November 1986, paragraph 41, in which it was stressed that the rights of the defence require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings, at trial.

evidence, which may provide the basis for the questioning of the witnesses called by the prosecution.

22. The *prima facie* admission into evidence of witnesses' statements and related documents included in the prosecution's List of Evidence would thereby facilitate the fair, expeditious and proper conduct of the proceedings with full respect for the rights of the defence and due regard for the protection of victims and witnesses, pursuant to Articles 64(2) and 64(3)(a) of the Statute.
23. Expeditiousness is one of the factors that secures the fairness of the proceedings, as justice within a reasonable time respects the rights of the accused and best serves the interests of the victims.<sup>32</sup> The Majority considers this *prima facie* admission of evidence will shorten the length of questioning by the parties in court and contribute to the accused being tried without undue delay, pursuant to Article 67(1)(c) of the Statute.
24. As previously stated, the Chamber is under no obligation to make rulings on admissibility for each item of evidence presented before it. The Majority considers that the *prima facie* admission of evidence, without the need to rule on each piece of evidence as it is presented, will save significant time during the proceedings thereby expediting matters.
25. The Majority also recalls that the *prima facie* admission of evidence, including witnesses' written statements is in keeping with the current developments of the procedural models adopted by the international criminal tribunals. In particular that of the International Criminal Tribunal

---

<sup>32</sup> Ekaterina Trendafilova (2009) Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings in *The Emerging Practice of the International Criminal Court*, C Stahn and G Sluiter (eds.) (Leiden, Martinus Nijhoff Publishers), page 441. Judge Trendafilova stresses: "Fairness and expeditiousness are the pillars of criminal justice. Though distinct principles, they are closely related and mutually dependent. Expeditiousness secures the fairness of the proceedings. Justice within reasonable time respects the rights of the accused, is crucial to the case of the Prosecutor, best serves the interests of the victims and observes the public interests in a timely prosecution of crimes within the jurisdiction of the International Criminal Court (...)"

for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") in which, after years of lengthy proceedings and to "enhance the efficiency of trial proceedings",<sup>33</sup> on 13 September 2006 the Statutes of both ICTY and ICTR incorporated Rule 92 *ter*.<sup>34</sup> In the same line with the use of witness statements as evidence by the Chamber, ICTY-ICTR's Rule 92 *ter* provides for written statements and transcripts of interviews to be admitted into evidence in trial proceedings provided that the witness is present in Court, available for cross-examination and questioning by the Judges, and attests that the document reflects his/her declaration.

26. The Majority is aware that the application of Rule 92 *ter* before the ICTY and the ICTR is different, to a certain extent, than the procedure to be followed by the Chamber. Indeed, the admission of witness statements in the ICTY-ICTR is applied on a case-by-case basis and after the Chamber's assessment of its admissibility.<sup>35</sup> However, the statutory evolution before the ICTY and ICTR and the adoption of such a procedure with regard to witness statements, even if governed by different modalities than at the ICC, addressed similar concerns to those raised by the Majority, namely the need for expediting procedures. The application of Rule 92 *ter* has been further recognized as the reason for substantial savings of court time within the

---

<sup>33</sup> See ICTY, *The Prosecutor v. Milan Lukic and Sredoje Lukic*, Decision on Confidential Prosecution Motion for the admission of prior testimony with associated exhibits and written statements of witnesses pursuant to Rule 92 *ter*, 9 July 2008, IT-98-32/1-T D3474-D3466, paragraph 13.

<sup>34</sup> Rule 92 *ter* of the Statute of the ICTY states: Rule 92 *ter* Other Admission of Written Statements and Transcripts (Adopted 13 Sept 2006) (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined. (B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

<sup>35</sup> See ICTY, *The Prosecutor v. Milan Lukic and Sredoje Lukic*, Decision on Confidential Prosecution Motion for the admission of prior testimony with associated exhibits and written statements of witnesses pursuant to Rule 92 *ter*, 9 July 2008, IT-98-32/1-T D3474-D3466, paragraph 13.

ICTY proceedings.<sup>36</sup> Finally, it is worth noting that a similar legal provision, and arguably for the same reasons, was also incorporated in the Statute of the Special Tribunal for Lebanon (“STL”), as Rule 156.<sup>37</sup> Such a rule before the STL is also slightly different from the application to be given by the Chamber, as the STL rule is framed in a way so as to avoid questioning by the prosecution as Rule 156 is entitled “Written Statements and transcripts *in lieu of* Examination in Chief”.

27. The Majority finally considers that the *prima facie* admission of evidence will contribute to the expeditiousness and proper conduct of the proceedings as it will allow for more coherence between the pre-trial and trial stages of the proceedings. As it has been recognised by the jurisprudence of the Court, the role of Pre-Trial Chambers is to prepare the case for trial.<sup>38</sup> Most of the witnesses’ written statements and related documents to be relied upon by the prosecution at trial were collected, disclosed and used as evidence forming the basis for confirming the charges at pre-trial stage. The Majority recalls the Chamber’s recent decision in which it stressed the importance of

<sup>36</sup> See paragraph 8 “General Assembly Sixty-second session Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”, 1 August 2007, A/62/172-S/2007/469, that stresses: “The addition of rule 92 *ter*, which authorizes a Trial Chamber to consider written statements and transcripts of witnesses in lieu of oral testimony that go to proof of the acts and conduct of the accused, resulted in substantial savings of court time in both the Milutinović et al. and Popović et al. multi-accused trials. Additionally, in the multi-accused Prlić et al. trial, the Trial Chamber revised and reduced the time allocated to the parties for their cases.”

<sup>37</sup> See Special Tribunal for Lebanon, Rules of Procedure and Evidence (as of 10 June 2009), Explanatory Memorandum by the Tribunal’s President. [online] Available at : [http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/Explanatory\\_memorandum\\_En.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/Explanatory_memorandum_En.pdf), last visited 7 November 2010, page 1-2 stresses : « ICTY, ICTR and SCSL procedural system – although initially based almost exclusively on the adversarial model – has evolved to include several significant elements that are closer to the inquisitorial model (for instance: the Pre-Trial Judge; the admission of written evidence (...)). (...) No one doubts that there is an increasing need for international criminal proceedings to be less lengthy, less cumbersome, and less costly. Finally, the right to an expeditious trial is part and parcel of fundamental human rights standards.” See also page 13, that stresses: “Generally speaking, judges should be trusted in their assessment of the evidence; they are expected to be competent, experienced and therefore capable of attaching to the evidence the value it deserves, on a case-by-case basis.”

<sup>38</sup> For a similar approach on the role of Pre-Trial Chambers as to preparation of trial and contribution to judicial economy and efficiency, although on a different matter, see the Appeals Chamber Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 12 July 2010, ICC-01/04-01/07-2259, paragraph 40.

the Decision Confirming the Charges as the main authoritative document.<sup>39</sup> Therefore, the Majority does not see any compelling reason for the statements and related documents, that were the basis for the charges to be confirmed by the Pre-Trial Chamber, not to be used at trial by the Trial Chamber.

28. Moreover, in the view of the Majority, the admission into evidence of all the materials included in the prosecution's List of Evidence would be in line with the Chamber's statutory obligation under Article 69(3) of the Statute, to search for the truth, and with the discretionary power of the judges to decide on additional elements as they deem necessary for the Chamber's determination of the truth. In this regard, the Chamber would have at its disposal all the evidence upon which the prosecution seeks to rely and could then exercise its function in determining which evidence it considers probative, based on its own evaluation as well as any challenges raised by the parties and participants. This is further supported by the fact that the Chamber may order the production of documents or other evidence, in addition to that already collected by the parties or presented during trial, pursuant to Article 64(6)(b) and (d) of the Statute and Rule 84 of the Rules.

### III – Orders by Majority

29. For the proper implementation of the procedure described above, the Majority notes that the "Updated List of Evidence" of 15 January 2010 does not correspond exactly with the Revised Order of Witnesses to be called at trial, filed on 5 November 2010.<sup>40</sup>

<sup>39</sup> Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges, 8 October 2010, ICC-01/05-01/08-935, paragraph 12 .

<sup>40</sup> In fact, the current List of Evidence still contains statements of certain witnesses whom the prosecution decided not to rely on any more. In addition, this list does not include reports of expert witnesses on whom the prosecution will rely at trial.

30. In order to ensure the proper conduct of the proceedings and in view of the imminent commencement of the trial, the Majority orders the prosecution to file a revised and updated List of Evidence (“Revised List of Evidence” or “Revised List”) in line with the order of appearance of witnesses as approved so far by the Chamber,<sup>41</sup> by 16.00 on Monday 22 November 2010.
31. The Majority considers that this Revised List should state, for each witness and in order of their appearance at trial (starting with Witness 38), the related items of evidence to be tendered through each witness.<sup>42</sup>
32. As the Revised Updated List will follow the order of appearance of prosecution witnesses to be called at trial, this list shall include expert witnesses and their respective reports, disclosed *inter partes*.
33. As to the last category so far included in the prosecution’s List of Evidence, namely “other evidence”, which includes documentary and audiovisual evidence, the Majority understands that this evidence will not be tendered through any witness. Therefore, the prosecution is ordered to specify, when filing its Revised Updated List of Evidence, whether and how items contained in this category “other evidence” will be tendered at trial.
34. Once this Revised List of Evidence is filed in the record of the case, the Registry is ordered to assign an EVD-T number to each item.

---

<sup>41</sup> ICC-01/05-01/08-975-Red.

<sup>42</sup> As an example, for Witness 38, who will come to testify first, the prosecution will file its Revised List of Evidence starting by Witness 38 and the three documents to be used for the purpose of questioning as communicated to the opposing party, the legal representative and the Chamber on 15 November 2010 (Email communication from the Prosecution Case Manager to the Legal Adviser to the Trial Division, 15 November 2010 at 15:15, mentioning three documents with ERN and EVD numbers).

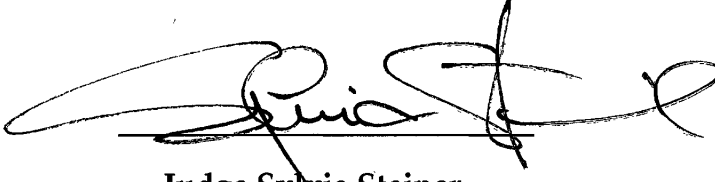
#### IV - Decision

35. In view of the above reasons, the Majority therefore decides 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 purpose of the trial.

The dissenting Opinion of Judge Kuniko Ozaki will follow in due course.



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



Judge Sylvia Steiner



---

**Judge Joyce Aluoch**

---

**Judge Kuniko Ozaki**

Dated this 19 November 2010

At The Hague, The Netherlands