Commentary

1. Introduction

The Charter of the Nuremberg Tribunal stated that the Tribunal shall not be bound ‘by technical rules of evidence’. Instead, it was left to ‘adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value’. Indeed, the majority of the evidence submitted in that trial was documentary, with relatively little live witness testimony being used.

The rules of evidence in international criminal law have moved on since the Nuremberg Charter was written. The predominance of documentary evidence has largely been replaced with a strong preference for oral witness testimony. The Rules of Evidence of the ICTY and ICTR, as well as the Statute of the ICC, all contain provisions that grant primacy to the principle of orality.

The principle of orality is traditionally associated with common law traditions, but is now also an important part of civil law criminal procedure. Orality requires that information be presented orally in court by a witness who is available for cross-examination; only then can the evidence be used against an accused. This restricts the use of prior recorded testimony, and means that, when a witness is unavailable to testify, the facts they would have recounted are lost. The consequence of this principle for documentary evidence, such as a map or a logbook, is that this evidence must be presented to the Court through a witness who can attest to its authenticity.

Why is this principle afforded such prominence in international criminal procedure? There are two main reasons. The first is its role in the ascertainment of the truth. Being able to observe a witness directly while he is giving testimony is an important way in which a judge can assess the credibility of the witness and their evidence. The witness’ demeanour, composure, expressions, and body language may contradict their words or reinforce them. Particularly where the witness comes from a remote area with a distinctive cultural background, observing their testimony live can help overcome difficulties arising from cultural differences. If any issues remain unclear, having the witness in the court allows the judge to ask for clarification. In these ways, orality helps the judges to arrive at the truth of the charges against the accused.

The second reason for the principle of orality’s primacy in international criminal procedure is its role in safeguarding the rights of the accused. There are a number of rights which orality helps to protect, one of which is the right to examine, or have examined, adverse witnesses. This is one of the central elements of the right to a fair trial, both under the Statutes of international criminal tribunals, and in human rights law.

3 Although the preference for orality was removed from the ICTY Rules in a 2000 amendment, it was present when the Statute was drafted and remains relevant in the case law (see Yvonne McDermott, The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis, 26 Leiden Journal of International Law 2013, at 982–5). The ICTR retains the preference for orality in Rule 90(A) of its Rule of Procedure and Evidence.
5 Definition developed by Keen based on a number of materials, supra note 4, at 778.
6 ICC, 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”, Prosecutor v Bemba Gombo, Case No. ICC-01/05–01/07–1386, A. Ch., 3 May 2011, par. 76 (ICC, Appeals Chamber); ICC, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, Prosecutor v Bemba Gombo, Case No. ICC-01/05–01/07–1028, T. Ch. III, 23 November 2010, par. 7 (ICC, Trial Chamber III).
7 Bemba Dissenting Opinion, supra note 6, par. 7.
8 The matter of being able to ask for clarification was important in a decision of Trial Chamber II in the Katanga and Ngudjolo case, where a lack of clarity in a witness statement which the Prosecutor was trying to enter into evidence was an important reason for its inadmissibility. Instead, the Chamber stated that it would be desirable to hear from the witness in person so that clarification could be sought – ICC, Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, Prosecutor v Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04–01/07–2362, T. Ch. II, 3 September 2010, par. 34 (ICC, Trial Chamber II).
9 Rome Statute, Art. 67(1)(e); ICTR Statute, Art. 20(4)(e); ICTY Statute 21(4)(e).
Admission of Evidence

generally. Arguably, the best way to fulfil this right is through an oral confrontation with witnesses. Being able to ask a witness who is present in the courtroom about the evidence they are providing, and thereby expose inconsistencies or contradictions, is more effective than working with a written text with a fixed content.

Despite these two points, it is sometimes desirable to set the principle of orality to one side. Indeed, having some exceptions is necessary for ensuring that certain pieces of relevant evidence are seen by the court, albeit always with the caveat that the rights of the accused must not be prejudiced. There are numerous reasons why exceptions to the principle of orality might be desirable. The clearest reasons are where the witness has died (or their personal appearance in court is otherwise problematic), and where a witness recants their testimony in court as a result of witness interference.

Further reasons can be found in the case law. The Prosecution in the Lubanga case wanted to use the testimony of one of its witnesses, ‘Witness 5’, as rebuttal evidence to the Defence case. Witness 5 had already testified during the Prosecution case, which had by then rested, and the witness had returned home. For this reason, the Prosecution asked for a transcript of his testimony to be admitted instead of recalling him in person and disrupting the Court’s schedule. During the Katanga and Ngudjolo case, the Prosecution sought to introduce the written testimony of an individual who was yet to appear in person as a witness, with the argument that this would decrease the amount of time needed for the examination in chief, and so speed up proceedings.

In the situations described above, the evidence is labelled as coming “from the bar table”. This expression describes the situation when prior recorded testimony or other evidence documents are submitted directly by counsel, rather than introduced via a witness as part of their testimony. Admitting evidence from the bar table is an exception to the principle of orality. After briefly describing the place of orality in the Rome Statute, the rest of this commentary will outline the limitations placed on the admission of evidence from the bar table under the Rome Statute. From a number of decisions that have dealt with this issue, it is possible to discern three broad ways in which any exceptions to the principle of orality are kept within tight bounds.

2. The Principle of Orality in the Rome Statute

Orality is placed front and centre by Art. 69(2) of the Rome Statute, a provision described as the embodiment of the right to examine, or have examined, adverse witnesses. The wording of the provision makes clear that orality is the norm in ICC proceedings: ‘The testimony of a witness at trial shall be given in person’. However, Art. 69(2) is also explicit as to the existence of exceptions to orality, as it allows the Court to permit the introduction of video or audio-recorded testimony, as well as documents and written transcripts.

The inclusion of these exceptions in the article led to a controversial decision of Trial Chamber III in the Bemba case, where the Majority used the exceptions as evidence for its proposition that the ‘Statute only envisages a presumption in favour of oral testimony, but no prevalence of orality of the procedures as a whole’. Indeed, the decision in that case, which will be considered in more detail below, would have constituted a major erosion of the principle of orality. The decision met with strong opposition from the

---

10 For example, Art. 6(3)(d) ECHR, Art. 14(3)(e) ICCPR.
11 Peter Carmichael Keen, supra note 4, at 778.
12 As happened in, for example, ICC, Decision on Prosecution Request for Admission of Prior Recorded Testimony, Prosecutor v Ruto and Arap Sang, Case No. ICC-02-09–01/-1938-Corr-Red2, T. Ch. V, 19 August 2015 (ICC, Trial Chamber V(A)).
13 ICC, Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witnesses DRC-OTP- WWWW-0005, Prosecutor v Lubanga, Case No. ICC-01/04–01/06–2727-Red, T. Ch. I, 28 April 2011 (ICC, Trial Chamber I).
14 ICC, Corrigendum of Decision on the “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)”, Prosecutor v Lubanga, Case No. ICC-01/04–01/06-2589-Corr, T. Ch. I, 25 October 2010, par. 1 (ICC, Trial Chamber I).
15 Christopher Gosnell, ‘Admissibility of Evidence’ in Karim Khan, Caroline Buisman and Christopher Gosnell (eds), Principles of Evidence in International Criminal Justice, Oxford University Press 2010, 375 at 413.
16 ICC, Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, Prosecutor v Bemba Gombo, Case No. ICC-01/05–01/08–1022, T. Ch. III, 19 November 2010, par. 14 (ICC, Trial Chamber III).
dissenting judge, Judge Kuniko Ozaki, as well as from the Appeals Chamber. A few months after it was rendered, the decision was overturned in its entirety and the primacy of orality reaffirmed.

The principle of orality in the Rome Statute may have exceptions, but these are themselves subject to important restrictions. The overarching restriction is that any exception to orality must be in accordance with the Rome Statute and the Rules of Procedure and Evidence (RPE). As the decisions discussed below demonstrate, this overarching restriction has been expounded upon in detail by the different ICC Chambers.


There are three principal ways in which the Rome Statute and the RPE ensure that the exceptions to the principle of orality remain limited. Two of these are substantive and one procedural. On the substantive side, first the content of all evidence must be subject to a three-stage test for admissibility: relevance, probative value, and prejudice. Secondly, if the bar table evidence consists of prior recorded witness testimony, there are additional substantive hurdles concerning how the testimony was collected. On the procedural side, there is the requirement that each piece of evidence must be individually scrutinised on an item-by-item basis. These will now be discussed in turn.

Beginning with the substantive challenge that applies to the admissibility of all bar table evidence: the three-stage test. For evidence to be admissible, it must be relevant to the charges, have probative value, and when that probative value is balanced against its prejudicial effect, the prejudice to the accused must not be disproportionate. This test is well known in criminal procedure generally, and is common to the ad hoc tribunals. The elements that make up the test were considered in detail in a Trial Chamber II decision in the Katanga and Ngudjolo case.

Stage 1 of the test is relevance. For the most part, this is a logical standard, requiring that the evidence tendered makes the existence of a fact at issue more or less probable. The party tendering the evidence must make clear at the time it is presented what factual proposition the evidence is relevant to and how the evidence makes that proposition more or less probable. Trial Chamber I in the Lubanga case endorsed a slightly broader phrasing: evidence will be relevant if it relates to matters that are properly to be considered by the Chamber in its investigation of the charges against the accused.

Stage 2 of the test is probative value. Probative value is the ability of a piece of evidence to prove or demonstrate a particular fact. Live testimony of a witness in court almost always has sufficient probative value, as long as it is not mere speculation. According to Trial Chamber II, probative value is determined by two factors: 1) the inherent reliability of the item of evidence; and 2) the significance of the evidence. The first of these is quite self-explanatory: if the evidence is not reliable, how can it be said to prove a fact? The Chamber provides some guidance on how reliability can be assessed.

The second factor is more interesting. Evidence must be significant; it must in some way advance the Chamber’s inquiries. It might do this by significantly helping the Chamber reach a conclusion about the existence or non-existence of a material fact, or to assess the reliability of other evidence in the case.

The importance of Stages 1 and 2 lies in ensuring that the principle of orality is not side-stepped, unless to do so would significantly advance the pursuit of the truth. Despite the lack of live witness testimony, it could be worthwhile for judges to see evidence where it is relevant to the charges and has probative value. Given

17 Bemba, supra note 6, par. 8.
18 Bemba, supra note 6, par. 74–81.
19 Christopher Gosnell, supra note 15, at 378.
20 ICC, Decision on the Prosecutor’s Bar Table Motions, Prosecutor v Katanga and Ngudjolo Chui, Case No. ICC-01/04–01/07–2635, T. Ch. II, 17 December 2010 (ICC, Trial Chamber II).
21 Ibid., par. 16.
22 Corrigendum of Decision on the “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), supra note 14, par 27.
23 Christopher Gosnell, supra note 15, at 384.
24 Decision on the Prosecutor’s Bar Table Motions, supra note 20, par. 21–28.
25 Ibid., par. 34–35.
26 Ibid.
27 Decision on the Prosecutor’s Bar Table Motions, supra note 20, par. 34.
that one of the rationales for the principle of orality is the ascertainment of the truth, it would be counter-
tuitive to insist upon orality when to do so would hinder this purpose.

If the first and second stages of the three-stage test relate to one of the aims of orality, the third step relates
to the other aim. The object of the third step is to balance the pursuit of the truth against the rights of the
accused. Indeed, the final sentence of Art. 69(2) subjects the entire provision to the requirement that the
admission of bar table evidence cannot be ‘prejudicial or inconsistent with the rights of the accused’.

As such, Step 3 is prejudice. Once the probative value has been determined, the Chamber must then weigh
this against any potential prejudice that admission might cause to the accused. If the prejudice outweighs
the probative value, the evidence will not be admitted. While Trial Chamber II does not purport to define
prejudice concretely, it does provide some examples of types of prejudice, including the right to be tried
without undue delay, to remain silent, to the presence of counsel during an interrogation, and to examine, or
have examined, witnesses against you.

The last of these rights only applies where the evidence being tendered is witness testimony. Because of
how closely the right to examine witnesses is tied up with the principle of orality – indeed that it is one of the
justifications for the principle – it is especially protected from prejudice. Rule 68(a) of the RPE imposes extra
conditions on the admission of prior recorded witness testimony, whether this be in written, video, or audio
format. This rule is the second substantive restriction on the exceptions to the principle of orality. According
to this rule, testimonial evidence can only be admitted by the Chamber if the Prosecution and Defence both
had the opportunity to examine the witness during the recording.

Two questions are central to Rule 68(a)’s applicability: 1) what evidence counts as testimony; and 2) what it
means for the Prosecution and Defence to have had the opportunity to examine the witness during the
recording. The judges of Trial Chamber II, in pronouncing on when evidence can be classified as testimony,
were clear that not every communication of information by an individual is testimony within the meaning of
Rule 68. That being said, they held that the meaning of testimony should not be construed too narrowly, as
this would undermine the right to examine adverse witnesses, and would deprive Rule 68 of meaning. In
light of these considerations, the Chamber set out the following considerations.

For an out-of-court statement to be considered testimony, the witness must have known, at the time the
statement was made, that it might be used in proceedings before the Court. It is not necessary for the
witness to know against whom the testimony might be used, or even the particular crime being investigated.
The person to whom the statement was made will also be relevant. Was this person or body authorised to
collect evidence for use in judicial proceedings? When the person is part of the office of the Prosecutor this
is straightforward, but the ICC also relies on the cooperation of other actors. If the authority of the person
collecting the statement is dubious, this militates against the evidence being considered testimony.

Turning now to the question of whether both parties had the chance to examine the witness during the
recording. In the decision concerning Witness 5 discussed above, the statements that the Prosecution wanted
admitted into evidence were made during out-of-court meetings with a Prosecution representative. The
witness was not informed that what he said during those meetings would be introduced as freestanding
evidence; indeed the stated purpose of the meetings was for the Prosecution to prepare for the Defence case
and to assist with the management of the proceedings. The Defence was told that they could be present, but
did not ask any questions.

On the basis of these facts the Chamber concluded that the conditions of Rule 68 were not satisfied. The
opportunity to examine the witness during the recording must be a real one, as opposed to a symbolic or
theoretical one. In the circumstances, the Defence was not aware that it was necessary to ask questions; it

28 Ibid., par. 37.
29 Ibid., par. 44.
30 Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219.
supra note 8, par. 11.
31 Ibid., par.13.
32 Decision on the Prosecutor’s Bar Table Motions, supra note 20. par. 49.
33 Ibid., par. 47.
was not put on notice of the possibility that the statement might later be introduced as evidence.34 As such, the Defence could not be said to have had an opportunity to examine the witness.

Even when the two criteria of Rule 68 are satisfied, the rule contains a final obstacle to the admission of prior recorded witness statements. The use of the word ‘may’ in the wording of the rule means that the Trial Chamber retains discretion as to whether to admit evidence, and can insist on orality even if the rule’s conditions are met.

A decision from the Katanga and Ngudjolo case illustrates this point. The Chamber indicated that, while there is no limitation per se on the nature of the content of prior recorded testimony, it will assess the relative importance of the statement to determine whether it would be more appropriate to hear the testimony directly from the witness.35 In that decision, the evidence in the prior recorded statement of the witness was considered to not be of secondary importance only, as the Prosecution contended, but rather was of considerable importance to the case.36 Admission of the recorded evidence was therefore denied, and the witness would have to give all their evidence live during the examination in chief.

In the same application the Prosecution also sought the admission of parts of another witness’ prior recorded testimony, and intended to examine the witness on the rest of the statement in court. While the Chamber agreed that parts of a statement, as opposed to an entire statement, could be admitted in principle, it held that, as in this case the Prosecution still intended to examine the witness on parts of the statement, this would amount to leading the witness. Admission was therefore denied.37

The three-stage test and the additional hurdle of Rule 68(a) thus protect the principle of orality by imposing substantive limitations to the exceptions to the principle. There is also a final limitation in the form of an overarching procedural requirement: the item-by-item assessment. This requirement means that each item of evidence must be individually assessed and scrutinised, and that wholesale admission of evidence is not permitted. This approach is exemplified in decisions from the Lubanga and Katanga and Ngudjolo case, where the Chambers went through the evidence piece-by-piece and discussed the reasons for its admission or rejection.38

Trial Chamber III in the Bemba case attempted to move away from the item-by-item approach, indeed away from how the admission of evidence is usually conducted. When presented by the Prosecution at the start of the proceedings with a list of the evidence on which it intended to rely, the Chamber admitted all the evidence on the list on a prima facie basis. The Chamber stated that it did not intend that the evidence should replace oral testimony, but that it would shorten the time needed to question witnesses during the trial.39 It was still open to the parties to challenge the admissibility of a particular item of evidence, but otherwise the probative value and appropriate weight given to the evidence would be determined at the end of the case.40 The three-stage test, explicitly mentioned in decisions by other Chambers, was conspicuously lacking.

With this decision, Trial Chamber III essentially created a multi-step procedure to process evidence. This would start with a decision on a prima facie admission of the items on the Prosecution’s list, before the start of the case. A potential second step would be a ruling on the admissibility of a piece of evidence if a challenge to admissibility was brought by either party, or by the Chamber acting proprio motu. The final step would be a determination by the Chamber of the appropriate weight, reliability, and probative value of the evidence, done at the close of the case.41

34 Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witnesses DRC-OTP-WWWW-0005, supra note 13, par. 53.
35 Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, supra note 8, par. 19.
36 Ibid., par. 33.
37 Ibid., par. 27.
38 Corrigendum of Decision on the “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)”, supra note 14 and note 20.
39 Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, supra note 16, par. 23.
40 Ibid., par. 8–9.
Trial Chamber III’s approach met with fierce opposition from the dissenting judge, with whom the Appeals Chamber largely agreed when it overturned the decision. Both found that there was no legal basis in the Rome Statute or RPE for the notion of *prima facie* admissibility; either evidence was admissible or it was not.42 The Majority’s approach was said to constitute a significant infringement of the principle of orality which, in Judge Ozaki’s words, is ‘one of the corner-stones of the proceedings under the Rome Statute’.43 The dissent outlines the defence rights that the Majority’s approach would jeopardise, and points out that, rather than saving time, that approach would cost time as, among other things, the parties would contest every line of the statement in their questioning.44

On the matter of the item-by-item requirement, the Appeals Chamber stated that a wholesale admission of evidence is not compatible with the Rome Statute. It held that the scheme established by Art. 69(4) anticipates that a Chamber’s decision on the admissibility of evidence is made on an item-by-item basis. The considerations of relevance, probative value, and prejudice will be different for each piece of evidence, and must be determined at the point of admission, not at the end of proceedings. Furthermore, the Appeals Chamber pointed out that a wholesale admission of evidence violates the requirement in Rule 64(2) of the RPE – that the Chamber give reasons for the admission or otherwise of a piece of evidence.

The dissent of Judge Ozaki and the decision of the Appeals Chamber mean that Trial Chamber III’s new approach to the admission of evidence from the bar table was abandoned almost immediately. The three-stage test, the requirements of Rule 68(a), and the item-by-item approach, each retained their respective role in protecting the principle of orality from overly broad exceptions.

4. Conclusion

The principle of orality is central to the pursuit of the truth and safeguarding the rights of the accused in international criminal proceedings. To this end, it is protected through Art. 69(2) Rome Statute, and its primacy affirmed by different configurations of Trials Chambers, as well as the Appeals Chamber. However, some flexibility in the principle is necessary in circumstances where evidence would otherwise be lost, or where the disadvantage to the accused is minor and the benefit of admitting bar table evidence large. This need for flexibility is accommodated in Art. 69(2).

Importantly, flexibility does not mean that the principle of orality can be side-stepped easily. There are substantive and procedural hurdles that ensure the exceptions to orality are kept within tight bounds. In the decisions discussed above, these limitations have been developed in such a way that they can adapt to different circumstances. There is a focus on effectiveness in practice, not just in theory. Attempts to diminish these hurdles, in particular by Trial Chamber III, have been rejected. It seems that the principle of orality is alive and well when it comes to admitting evidence from the bar table at the ICC.

*Emma Irving*

---

42 Bemba Dissenting Opinion, *supra* note 6, par. 4–5.
43 Ibid., par. 8.
44 Ibid., par. 22–28.