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The Appeals Decision in the ICC's *Jean-Pierre Bemba Gombo* Case on the Trial Chamber's 'Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence'

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Abstract

When, on 3 May 2011, the Appeals Chamber reversed the decision of Trial Chamber III in the *Bemba* case that had admitted material on a list of the prosecution into evidence, it addressed various central issues related to the admission of evidence under the legal framework of the International Criminal Court (inter alia, the orality principle). The present article critically analyses both decisions. In particular, it views the Trial Chamber's approach that envisages a multi-tiered process of admitting evidence, in light of the approaches of civil law and common law, and expresses concerns about uncertainties and protraction that may result. As the Court's legal framework does not determine that the processing of evidence follow either the civil-law or the common-law model, this is left for the trial chambers to decide in each case. In determining the preferable approach for each respective case, consideration of the procedural context is key. The Appeals Chamber decision allows for the required leeway of the trial chambers in regulating the processing of evidence, to adopt a way that fits the particular circumstances best.

Key words

Appeals Chamber; admissibility; *Bemba*; civil law; common law

On 3 May 2011, the Appeals Chamber of the International Criminal Court (ICC) rendered its '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"' ('Appeals Chamber decision').[1] In reversing the Trial Chamber's 'Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence' of 19 November 2010 ('Trial Chamber decision'), the Appeals Chamber addressed various central issues related to the admission of evidence into the proceedings

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1 *Prosecutor v. Jean-Pierre Bemba Gombo*, 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', Case No. ICC-01/05-01/08-1386 OA 5 OA 6, 3 May 2011.

under the Court's legal framework. The present article highlights some of those issues.

1. The Trial Chamber's decision

After the confirmation of the charges against Mr Jean-Pierre Bemba Gombo ('the accused')[2] and shortly before the start of the trial,[3] Trial Chamber III decided in a decision taken by majority[4] that all items listed on the prosecution's list of evidence that the prosecution intended to use at trial and that were disclosed to the defence be '*prima facie* admitted as evidence for the purpose of the trial'.[5] The prosecution had filed this list at the request of the Chamber, as part of its summary of the presentation of its evidence.[6] This list referred to witness statements, items to be tendered through witnesses, and 'other evidence', including audio-visual and documentary materials apparently not to be tendered through a witness[7] – all items that the prosecution, according to its own submissions, intended to rely on at trial.[8]

After the prosecution had filed its summary of the presentation of its evidence, containing the list at issue, the Chamber had, on 4 October 2010, ordered the parties and the legal representatives of victims to file submissions containing 'observations on the potential submission into evidence of the witness statements of those witnesses to be called to give evidence at trial'.[9] It had placed this order in the context of its considerations – in view of the imminent start of the trial – about the manner in which evidence is to be presented at trial, to ensure fair and expeditious proceedings pursuant to Article 64(2) of the Rome Statute.[10] The parties and the victims' representatives had filed their submissions, as requested.[11]

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2 *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, 15 June 2009.

3 Trial Chamber decision, para. 30.

4 Judge Kuniko Ozaki dissenting, Trial Chamber decision, para. 8, footnote 20.

5 Ibid., para. 35.

6 *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Submission of its 'Updated Summary of Presentation of Evidence' with Confidential, *Ex Parte*, Prosecution and Defence Only Annexes A, B, C, D and Public Annex E, Case No. ICC-01/05-01/08-669, 15 January 2010 (hereafter, 'Prosecution's 15 January 2010 Submission'), paras. 1–2. The list apparently was contained in both Annex B and Annex D; see Appeals Chamber decision, *supra* note 1, para. 8, particularly footnotes 13–14. In fact, three different versions of this list have been filed in the course of the proceedings: a first one was filed upon the Trial Chamber's initial request (*Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Submission on Evidence that It Intends to Positively Rely upon at Trial, Case No. ICC-01/05-01/08-592, 4 November 2009); the list mentioned above, filed on 15 January 2010, in fact constituted an updated version of that original list as requested by the Trial Chamber; the third and last updated version of the list was requested by the Trial Chamber decision (ibid., para. 30; *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Submission of Updated List of Evidence and Other Information, Case No. ICC-01/05-01/08-1027, 22 November 2010). The Trial Chamber decision admitted the items into evidence that appeared on this third list (ibid., paras. 30, 35). Other than that, the distinction between the three versions of the list is irrelevant for the purpose of the discussion in this paper, and will therefore not be pointed out further.

7 Trial Chamber decision, para. 1.

8 Prosecution's 15 January 2010 Submission, *supra* note 6, paras. 3(b), 9.

9 *Prosecutor v. Jean-Pierre Bemba Gombo*, Order for Submissions on the Presentation of Evidence at Trial, Case No. ICC-01/05-01/08-921, 4 October 2010, para. 2.

10 Ibid., para. 1.

11 *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Position on Potential Submission of Witness Statements at Trial Pursuant to Trial Chamber III's Order, Case No. ICC-01/05-01/08-941, 11 October 2010; *Prosecutor v.*

2. The Appeals Chamber's decision

Leave to appeal the Trial Chamber decision was sought by both the accused and the prosecution and granted by the Trial Chamber. The Appeals Chamber found the Trial Chamber decision faulty in several respects and materially affected by those errors, and, consequently, found it appropriate to reverse it.[12]

At the outset, the Appeals Chamber explored the implications of the Trial Chamber's prima facie admission – a term as such not foreseen by the Court's legal framework – and understood it to mean that the Trial Chamber indeed appeared to have ruled on 'the *admissibility* of all items on the . . . [l]ist of [e]vidence', with the intended effect that the Trial Chamber can rely on them for the purpose of the judgment pursuant to Article 79(2) of the Rome Statute.[13] The Appeals Chamber arrived at this interpretation of the Trial Chamber's decision, notwithstanding that the Trial Chamber had stated that the prima facie admission would not rule out a later decision on admissibility.[14]

The Appeals Chamber found the Trial Chamber decision to be erroneous because it admitted items into evidence that had not yet been submitted.[15] The Appeals Chamber drew from a number of articles of the Rome Statute and rules of the Court's Rules of Procedure and Evidence the understanding that evidence is '"submitted" if it is presented to the Trial Chamber by the parties on their own initiative or pursuant to a request by the Trial Chamber for the purpose of proving or disproving the facts in issue before the Chamber'.[16] It found that the prosecution in this case had not 'submitted' the items on its list in that sense, but had filed the list of evidence merely for information purposes and as a 'case management tool' to assist the Chamber and the other participants by pointing out the material that the prosecution intended to use at trial.[17] The Appeals Chamber further criticized the Trial Chamber decision for impinging on the parties' right to raise issues relating to admissibility or relevance, as enshrined in Rule 64(1) of the Rules of Procedure and Evidence.[18] It found that the Trial Chamber's order of 4 October 2011 seeking 'observations on the potential submission into evidence of the witness statements of those witnesses to be called to give evidence at trial' and the subsequent submissions by the parties and participants did not amount to an exercise of the right to raise issues pursuant to Rule 64(1). The Appeals Chamber based this on the fact that the Trial Chamber, in its order, had not

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Jean-Pierre Bemba Gombo, Legal Representative's Observations on the Potential Submission into Evidence of the Prior Recorded Statements of Prosecution Witnesses Testifying at Trial, Case No. ICC-01/05-01/08-943, 11 October 2010; *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence Observations on the Potential Submission into Evidence of the Prior Recorded Statements of Prosecution Witnesses Testifying at Trial, Case No. ICC-01/05-01/08-960, 18 October 2010.

12 Appeals Chamber decision, *supra* note 1, para. 82.

13 Ibid., paras. 38–39, referring to the Trial Chamber decision, paras. 13, 15, 27–28 (emphasis in original).

14 Ibid., paras. 38–39, referring to the Trial Chamber decision, paras. 10, 19.

15 Ibid., paras. 41–46, particularly paras. 44, 46.

16 Ibid., paras. 42–43.

17 Ibid., para. 44.

18 Ibid., paras. 47–50.

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indicated that it intended to admit all items on the prosecution's list into evidence, and that it did not request submissions on these items' relevancy or admissibility.[19]

The Appeals Chamber considered the Trial Chamber decision to be erroneous because the Trial Chamber had not assessed the evidence on an item-by-item basis when deciding on the admissibility of the items on the prosecution's list, but took a '[w]holesale' decision.[20] The Appeals Chamber further found that, in doing so, the Trial Chamber also ignored the requirement to provide reasons for rulings on admissibility, as required by Rule 64(2) of the rules, as it did not give item-specific reasons.[21]

The Appeals Chamber also examined the accused's arguments that the Trial Chamber decision violated his fair-trial rights.[22] Notably, Bemba had alleged that his right to be informed in detail and promptly of the nature, content, and cause of the charges brought against him pursuant to Article 67(1)(a) of the Rome Statute had been violated in that the Trial Chamber intended to consider the admissibility of the items that it had admitted prima facie in the Trial Chamber decision only at the end of the trial. The accused asserted that this would entail that he would only know at the close of the trial the precise nature of the prosecution's evidence against him.[23] The Appeals Chamber rejected this ground of appeal. It referred to the fact that the accused had been provided with the document containing the charges, the supporting evidence, and the confirmation decision. It argued that this satisfied the accused's right to be informed pursuant to Article 67(1)(a), which pertained only to information on the nature, cause, and content of the *charges* and not necessarily to the supporting evidence.[24]

Second, the Appeals Chamber found Bemba's assertions premature and speculative that the prima facie admission of *all* items on the prosecution's list would curtail his right to adequate time and facilities for the preparation of his defence, pursuant to Article 67(1)(b) of the Rome Statute. The accused had asserted that this would require him to litigate (and possibly conduct investigations to that effect) against admission of a large number of items, which the Trial Chamber later would find inadmissible in any event. This would have 'the potential' to greatly increase the amount of the resources required for his defence. This is why the Appeals Chamber did not consider this a violation of Bemba's right, but merely a potential violation, and that a violation could not be determined at this point in time.[25] For the same reason, the Appeals Chamber did not find any merit in the accused's reasoning that the Trial Chamber decision ruling on the admissibility of *all* the items on the list would require greater efforts from his side to rebut the admitted evidence and thus

19 Ibid., para. 49.
20 Ibid., paras. 51–57.
21 Ibid., paras. 58–60.
22 Ibid., paras. 61–73.
23 Cf. ibid., para. 62.
24 Ibid., paras. 63–65. In doing so, the Appeals Chamber referred to the definition of the European Court of Human Rights and the European Commission of Human Rights of a 'cause of a charge' as being 'the acts [the accused] is alleged to have committed and on which the accusation is based', and to their definition of the 'nature' of a charge as the legal characterization of these alleged acts.
25 Ibid., paras. 66–68.

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lead to a violation of his right to be tried without undue delay, as enshrined in Article 67(1)(c) of the Rome Statute.[26]

The Appeals Chamber also did not concur with Bemba's assertions that the Trial Chamber's wholesale admission of all items on the list shifted the burden of proof from the prosecution onto him, as it allegedly required him to challenge the admissibility of the prima facie admitted items, instead of requiring the prosecution to show the admissibility of the items prior to admission. In the Appeals Chamber's view, the burden of proof in the sense of Articles 67(1)(i) and 66(2) of the statute pertains to *proving the guilt* of the accused, namely proving the case against the accused beyond reasonable doubt, but not to the admissibility of evidence. However, the Appeals Chamber acknowledged that the wholesale admission of all items prima facie placed an additional burden on the accused because it required him to challenge the admitted items' admissibility, instead of being heard on admissibility pursuant to Rule 64(1) of the rules before the admission decision is taken.[27]

Lastly, as far as the admission of witness statements is concerned, the Appeals Chamber found that the Trial Chamber decision did not live up to the requirements of the principle of orality envisaged by the Court's procedure and was not compatible with the accused's right to examine witnesses against him.[28] The Appeals Chamber confirmed that the principle of orality is enshrined in Article 69(2) of the statute. It found that this principle mandates as a rule that witnesses must appear in person before court to testify.[29] In the following, the Appeals Chamber discussed exceptions to this rule, notably those contained in Rule 68.

Rule 68 of the Rules of Procedure and Evidence allows for admission of previously recorded testimony in audio or visual form or other, if (i) the witness is not present in court and the prosecutor and the defence had the opportunity to examine the witness while his or her testimony was recorded; or (ii) the witness is present in court and does not object to the submission of his or her recorded testimony, and the prosecutor, the defence, and the chamber have the opportunity to examine the witness.[30] The Appeals Chamber noted further that admission of such recorded testimony must not prejudice or be inconsistent with the rights of the accused or with the fairness of the proceedings. It referred to the Court's case law that postulates a careful consideration, and suggests consideration of several factors, such as whether the evidence relates to an issue that is not materially disputed, whether the evidence relates to background information and is 'not central to core issues', or whether the evidence merely serves corroboration.[31] The Appeals Chamber criticized that the Trial Chamber decision did not indicate that the Trial Chamber had considered whether the witness statements met these requirements.[32]

26 Ibid., paras. 69–70.
27 Ibid., paras. 71–73.
28 Ibid., paras. 74–81.
29 Ibid., paras. 75–76.
30 Cf. ibid., para. 77.
31 Ibid., para. 78.
32 Ibid., para. 79.

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3. Selected issues of the Trial Chamber and the Appeals Chamber decisions

With its decision on a prima facie admission of the items on the prosecution's list, the Trial Chamber introduced a multi-step procedure to process evidence. The first step consisted of a decision on the prima facie admission of the evidence, before the start of the presentation of evidence, involving an a priori assessment of the items' relevance.[33] This, however, in the Trial Chamber's view, would not preclude a later ruling on admissibility as a potential second step.[34] Furthermore, as a third step, the chamber would evaluate and determine the evidence's appropriate weight, reliability, and probative value (and whether this is outweighed by the evidence's prejudicial effect), at the close of a case, when considering it in the context of the other evidence before it.[35] This ruling appears to introduce a new approach to processing evidence, in addition to the two existing and distinct methods of the two most prevalent legal systems of the world: the civil-law and the common-law legal systems.

Common-law legal systems generally include an admissibility stage at which evidence is formally admitted to the proceedings. This means that, at this stage, the evidence is scrutinized most closely concerning whether the requirements for admission are fulfilled.[36] These are the evidence's relevance (or materiality) and probative value. While the former concerns an item's relation to the alleged facts of the case, the latter refers to the quality or capacity of an item to prove or disprove an alleged fact.[37] Civil-law systems in general allow evidence to be used at trial much more readily. In civil-law procedures, evidence receives close scrutiny at the close of a case when the evidence that was submitted in the course of the trial is evaluated in its entirety, and the judge attributes appropriate weight to each item of evidence.[38] However, neither the common-law nor the civil-law approach utilizes the prima facie admission of evidence as an interim step in the processing of evidence.

Perusing the Trial Chamber decision, the multi-tiered processing of the evidence as foreseen by the Trial Chamber creates a puzzling setting – at least when viewed with the traditional common-law concept of admissibility in mind; for example, the Trial Chamber has held that, in this setting:

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33 Trial Chamber decision, paras. 8–11.

34 Ibid., para. 10.

35 Ibid., para. 9.

36 Cf. M. Damaška, 'Atomistic and Holistic Evaluation of Evidence: A Comparative View', in D. Clark (ed.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (1990), 91, at 91, 92, 96; A. Rodrigues and C. Tournaye, 'Hearsay Evidence', in R. May et al. (eds.), *Essays on the ICTY Procedure and Evidence* (2001), 291, at 292–3.

37 Cf. K. Khan and R. Dixon, *Archbold International Criminal Courts, Practice, Procedure and Evidence* (2009), 697; see, e.g., US law that distinguishes between materiality and probative value as constituting elements of relevance and, ultimately, admissibility; J. Strong (ed.), *McCormick on Evidence*, 4th edn (1992), 338; cf. Rule 401 of the US Federal Rules of Evidence that reads: 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

38 Cf. Damaška, *supra* note 36, at 91, 92, 96; Rodrigues and Tournaye, *supra* note 36, at 293.

> a [prima facie] 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.[39]

The Trial Chamber also held that such a prima facie ruling on admissibility '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'.[40] This may lead to a ruling on 'the admissibility of the items it admitted into evidence'[41] – which, on the face of it, appears to be a contradiction in terms. Or it leads to a situation in which, after a prima facie admission of items by the Chamber, these will or will not be tendered by the prosecution at trial.[42]

This results in precarious ambiguities with regard to the status of an item. Envisaging more than one point in time when the chamber rules on the admissibility of an item creates considerable uncertainty as to whether the parties can rely on it being admitted or on having been denied admission. This indeed raises concern, because a prima facie admission of an item suffices for the Trial Chamber to be able to rely on it for the judgment, as the Appeals Chamber has pointed out.[43] The Appeals Chamber based its reasoning mainly on paragraphs 27 and 28 of the Trial Chamber decision. There, the Trial Chamber had held that it would 'not see any compelling reason for the [items] . . . not to be used at trial by the Trial Chamber'. It further held that the (prima facie) admission of the items 'would be in line with the Chamber's statutory obligation under Article 69(3) of the Statute, to search for the truth' and that '[i]n this regard, the Chamber would have at its disposal all the evidence upon which the prosecution seeks to rely'.[44]

One can imagine many ways in which such a duplication of the admissibility stage exposes the parties to uncertainties. For example, if an item is found to be prima facie admissible, and found to be inadmissible only at the end of the trial, this deprives a party of the opportunity to further substantiate a request for admission, and to move for having the item admitted in a second attempt after it had been denied admission the first time (for instance, by requesting to have the evidence admitted through a witness). Furthermore, such a twofold process of taking decisions on admission as envisaged by the Trial Chamber further causes the Court's procedure to proliferate. It already contains an additional stage of admitting evidence compared to common-law systems, namely that for the purpose of a confirmation hearing.

One can fathom that the mentioned uncertainties that a party faces regularly trigger greater efforts and possibly broader investigations, for instance, in order to make an admission request or the objection to such a request, respectively, as strong as possible, and preferably watertight. In the case of items having been admitted prima facie, this requires showing their inadmissibility after their admission or investigating further evidence to rebut those facts. This carries particular weight

39 Trial Chamber decision, para. 10, cited by the Appeals Chamber decision, *supra* note 1, paras. 13, 39.
40 Trial Chamber decision, para. 19, cited by the Appeals Chamber decision, *supra* note 1, paras. 16, 38.
41 Appeals Chamber decision, *supra* note 1, para. 62, paraphrasing the submissions of the accused.
42 Cf. Trial Chamber decision, para. 33.
43 Appeals Chamber decision, *supra* note 1, paras. 38–39.
44 Ibid., para. 38, footnote 89, referring to Trial Chamber decision, paras. 27–28.

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if a large number of items is concerned that are admitted prima facie, as is the case with the decision we discuss here. In light of this, one could wonder whether one could not indeed consider curtailed the accused's rights to adequate time and facilities for the preparation of his defence, and to be tried without undue delay. The Appeals Chamber had rejected the accused's grounds of appeal to those effects. It had only stated an additional burden of the accused of disproving the admissibility of the prima facie admitted items. It did so when considering the accused's ground of appeal to have imposed any reversal of the burden of proof, which it also dismissed, for the reasons stated above when presenting the Appeals Chamber decision.[45]

The Trial Chamber had based its approach of a multi-step admission procedure, inter alia, on a decision in the *Lubanga* case.[46] It appeared to use this decision in support of its prima facie, a priori assessment of the relevance of the items. The *Lubanga* decision indeed considered in a prima facie manner the relevance and probative value of the tendered evidence.[47] It did not, however, distinguish between a prima facie and a subsequent admission decision, but rather simply admitted the evidence after assessing its potential relevance and probative value.[48] It clarified that the purpose of the prima facie assessments of the *potential* relevance and probative value was to avoid any misunderstanding that any conclusions had been reached 'for the purposes of this ruling on admissibility only, and they do not in any sense prejudge the eventual assessment that must be made of the evidence as a whole at the end of the case'.[49] Such formulations are often used in admissibility decisions to avoid the impression that the chamber will use the evidence exclusively in one way or the other when making findings for the judgment. They do not, however, lend support to the Trial Chamber's multi-tiered approach.

The Trial Chamber further grounded its multi-step approach on a historical interpretation of the Court's provisions.[50] This was meant to strike a balance between common-law and civil-law approaches to processing evidence. While the former approach is characterized by a strict regime of evidence rules, the latter displays a much less regulated way to deal with evidence, and is characterized by a 'free evaluation' of evidence.[51] And, to recall what has already been said above, in the former system evidence is scrutinized closely at the admissibility stage, while in the latter type of procedure evidence is carefully evaluated at a later stage, and in context with other evidence submitted at trial.[52]

The judges of the Trial Chamber may have had these idiosyncrasies of the two legal systems in mind, and may have viewed this in light of the compromise between civil

45 Appeals Chamber decision, *supra* note 1, paras. 67–68, 70, 72–73.
46 Trial Chamber decision, para. 10, footnote 23, referring to *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Admissibility of Four Documents, Case No. ICC-01/04–01/06–1399, 13 June 2008 (hereafter, '*Lubanga* decision'), paras. 27, 28.
47 *Lubanga* decision, *supra* note 46, paras. 27–28, 34, compare also paras. 36, 41.
48 Ibid., para. 42.
49 Ibid., para. 33.
50 Trial Chamber decision, paras. 16–18.
51 This term, however, does not mean that civil-law systems are devoid of evidence rules; see C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (2010), especially at 40–1, 47–8.
52 Cf. also the discussion of the Appeals Chamber, Appeals Chamber decision, *supra* note 1, paras. 36–37.

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and common law that the Court's provisions on evidence were intended to strike, to arrive at the conclusion that 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'.[53] Taking it further from there, the Trial Chamber judges have reached the conclusion that the chamber can rule on admissibility at two distinct stages cumulatively.[54]

Certain aspects of the Court's legal framework were left intentionally ambiguous to allow the judges of a particular case to choose from either the civil-law or common-law model for a particular procedural feature. Nevertheless, this does not mean that both alternatives are equally good for a specific case.

Rather, when determining which approach is preferable over the other, the key lies in the procedural context: which approach fits in more harmoniously in the specific procedural surroundings of the Court that amalgamate features of both legal systems? In this regard, it should be noted that the conduct of the proceedings at trial pursuant to Article 64(8)(b) of the statute and Rule 140 of the rules was another issue that was left intentionally ambiguous in the Court's procedure. This should allow for the choice in a particular case between either a judge-steered civil-law-style trial, in which a judge decides which evidence to bring and in which order, and a common-law-style party-driven trial, in which the prosecution and the defence present their cases in turn.[55] Turning to the directions given by the Chamber in the *Bemba* case, the judges in this trial opted for the common-law way of presenting evidence (in a slightly modified form) that envisages the presentation of the prosecution case followed by that of the defence.[56] Consequently, it is preferable in this case to opt for a decision on admissibility at an early stage (and to abstain from a duplicate ruling on admissibility), to avoid such uncertainties referred to above and not to upset the mechanics of the course of an adversarial party-driven trial. The Appeals Chamber, discussing both ways of processing evidence, voices a caveat along similar lines, speaking in favour of an early decision on admissibility should a party raise concern in this regard.[57]

With the introduction of an additional stage of a prima facie admission, the Trial Chamber had intended to take a short cut in the ruling on admissibility, abstaining from an item-by-item analysis of the evidence and from having to fulfil the requirements of Rule 68, at least at this stage.[58] In reversing the Trial Chamber decision, the Appeals Chamber made it clear that the postulations of the rules must not be forgone. Rulings on admissibility require the consideration of each item individually.[59] The Appeals Chamber also made it clear that the use of written

53 Trial Chamber decision, para. 16.
54 Ibid., paras. 10, 19.
55 Cf., e.g., K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial", or Mixed?', (2003) 3 ICLR 1, at 19–20.
56 *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Directions for the Conduct of the Proceedings, Case No. ICC-01/05-01/08-1023, 19 November 2010, para. 5.
57 Appeals Chamber decision, *supra* note 1, para. 37.
58 Trial Chamber decision, paras. 20 (especially footnote 31), 23–24.
59 Appeals Chamber decision, *supra* note 1, paras. 2–3, 51–57.

witness statements as evidence is clearly limited by the Court's legal framework.[60] Thus, the Appeals Chamber has confirmed that the principle of orality is a principle that is enshrined in the Court's statute.[61] It overruled the Trial Chamber's view that 'the Statute only envisages a presumption in favour of oral testimony, but no prevalence of *orality* of the procedures as a whole'.[62] Thus, the Appeals Chamber paid tribute to the importance of oral testimony, acknowledging the benefits of this type of evidence that the witness, under oath, testifies in person, and his demeanour can be observed.[63]

The Appeals Chamber further considered that the submission of evidence would not necessarily have to take place at a hearing – as long as it is clear what the procedure for the submission of evidence is.[64] Another important aspect of the Appeals Chamber's decision is that, while it rejected the Trial Chamber's multi-step approach to the admission of evidence, at the same time it confirmed that, under the Rome Statute, a chamber may choose *not* to rule on the admissibility of evidence at the time of its submission, but to consider the relevance of the item at the end of the trial.[65] Thus, the Appeals Chamber did not determine the one and only permissible way to rule on the admission of evidence. Rather, it granted future trial chambers certain leeway in regulating the submission and admission of evidence. This allows future trial chambers to adopt a way that fits the particular circumstances best.

60 Ibid., paras. 3, 75–79.
61 Ibid., paras. 75–76.
62 Trial Chamber decision, para. 14 (emphasis in original).
63 Appeals Chamber decision, *supra* note 1, para. 76.
64 Ibid., para. 43. Submitting evidence for the purpose of admission outside a hearing is common practice at the International Criminal Tribunal for the former Yugoslavia by way of so-called written 'bar table' motions. Instead of many, see, e.g., Milan Milutinović *et al.*, Decision on Lazarević Renewed Motion for Admission of Documents from the Bar Table, Case No. IT-05-87-T, 2 June 2008; Milan Lukić & Sredoje Lukić, Decision on Milan Lukić's Renewed Bar Table Motion, Case No. IT-98-32/1-T, 12 May 2009.
65 Appeals Chamber decision, *supra* note 1, para. 37.