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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

**Public Document
With
Confidential Annex A and Public Annex B

Prosecution's Application for Admission of
Materials into Evidence Pursuant to Article 64(9) of the Rome Statute**

Source: Office of the Prosecutor

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I. Introduction

1. The Prosecution seeks the admission of 85 documents and 12 audio/video recordings from the bar table pursuant to Articles 64(9) and 69(2), (3) and (4) of the Rome Statute (“Statute”) and Rule 63(2) and (5) of the Rules of Procedure and Evidence (“Rules”).¹ The materials sought to be tendered are grouped into seven categories listed below: (i) United Nations (“UN”) reports; (ii) non-governmental organization (“NGO”) reports; (iii) documents belonging to the Accused; (iv) documents disclosed by the Defence; (v) media and press articles; (vi) audio files from *Radio France Internationale* (“RFI”); and (vii) other documents, which include forensic reports, two dossiers of the Bangui Court Proceedings and a project report for victims of sexual violence carried out jointly by the Central African Republic (“CAR”) authorities and the UN.

2. The procedure of tendering materials from the bar table has been accepted by Trial Chamber I,² Trial Chamber II,³ and the *ad hoc* tribunals and is a vital tool for streamlining large and complex war crimes cases. This practice expedites the proceedings by obviating the need to call witnesses solely to introduce materials that, on their face, are sufficiently relevant and reliable to justify admission without the need for further evidence.⁴

3. In its decision on the admission of evidence on 15 December 2011⁵ (“First Admission Decision”), Trial Chamber III (“Chamber”) held that the use of a bar table

¹ On 2 June 2010, the Chamber issued its “Order for the filing of submissions in preparation for the commencement of the trial”, 2 June 2010, ICC-01/05-01/08-785 asking whether the Prosecution will be filing an application for the admission of evidence from the bar table.

² ICC-01/04-01/06-1981, Decision on the admission of material from the bar table, 24 June 2009.

³ ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010.

⁴ *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, transcript 23 October 2002, p. 12305: “We really have to get away from some very outmoded practices which require all evidence to be given orally when there is very little point to it”. See also *Prosecutor v. Milutinovic et al*, Case No. IT-05-87, Decision on Pavkovic First Motion for Admission of Documents from the Bar Table, 27 September 2007, para. 18: “[G]iven the depth and breadth of this case, the Trial Chamber is generally sympathetic to parties presenting documents from the bar table”.

⁵ ICC-01/05-01/08-2012-Red, First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011.

motion is a permissible way to seek the admission of documentary evidence.⁶ Independently of the form of submission, in applying the principle of free assessment of submitted evidence to determine its relevance or admissibility pursuant to Rule 63(2) of the Rules, the Chamber also referred to the three-part test formulated by Trial Chamber I in its Decision on the admissibility of four documents (“Admissibility Decision”),⁷ and adopted, with slight variations, by Trial Chamber II.⁸ Under this test, the Chamber examines, on a preliminary basis, whether the submitted materials: (i) are relevant to the trial; (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused from their admission.⁹

4. The Prosecution submits the proposed items for the truth of their content without calling the authors of these materials or the individuals who provided the information contained therein to testify at trial. The proposed items are relevant, probative to issues at trial, and bear sufficient indicia of reliability to outweigh any prejudicial effect, in order for the Chamber to assess freely the weight to be attached to these items against the entire record of the trial. The items are pertinent to the “...determination of the truth” and they corroborate evidence already received by the Chamber in the course of the trial. Documents belonging to the Accused are additionally or alternatively probative, apart from the truth of their contents, to establish that the Accused had the requisite intent and/or relevant knowledge.

5. The admission of these items thus satisfies the requirements under Articles 64(2) and 67(1) of the Statute by furthering the goal of expeditiousness without infringing on the Chamber’s obligation to ensure that the trial is fair. The Accused

⁶ *Ibid*, para. 55.

⁷ ICC-01/04-01/06-1399-Corr, Corrigendum to Decision on the admissibility of four documents, 20 January 2011, at paras. 27-32; ICC-01/04-01/06-1981, at para. 33.

⁸ ICC-01/04-01/07-2289-Corr-Red, Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 27 August 2010, para. 13.

⁹ ICC-01/05-01/08-2012-Red, para. 13.

has been on notice for a considerable time with respect to the proposed items referred to in this application. The Prosecution's pre-trial brief and in-depth analysis chart collectively outline for the Chamber, parties, and participants the majority of the proposed items sought to be tendered from the bar table, along with an explanation of why those materials are relevant to discrete areas of its case, over a year ago. The remaining materials sought to be tendered are Defence documents, disclosed by the Defence to the Prosecution because the Defence intended to use them for the questioning of Prosecution witnesses. Consequently, the admission of these items will not unfairly prejudice the Accused since the Defence has been in possession of the proposed items for a considerable time.¹⁰

II. Annex A

6. Annex A appended to this application lists in respect of each item proposed for admission: (i) its date, where available; (ii) a description of the item; (iii) its source; (iv) its relevance and probative value to discrete areas in the Prosecution's case; and (v) the date of disclosure of each item.

III. Overview of bar table materials

a. Category 1 – UN documents

7. This category consists of four UN Reports. Two reports dated 17 December 2002 and 7 March 2003 were prepared and distributed by the UN Resident Coordinator's Office in the CAR. These four reports collectively provide information on the background to the CAR armed conflict in 2002-2003, the identities of the armed groups involved as well as information on the victimization of CAR civilians

¹⁰ All items proposed for admission in this application either were disclosed to the Defence, and are contained in the Prosecution's Updated List of Evidence under the heading "Other Documents", or were disclosed by the Defence and included in its list of documents to be used for questioning of the witnesses.

during that conflict. The reports identify the *Mouvement de Libération du Congo* (“MLC”) as the armed group that deployed extensively to different areas in the CAR. The reports attribute responsibility for rapes, killings and pillaging of civilians in different areas of the country to the MLC.

b. Category 2 – Reports issued by NGOs

8. Category 2 contains seven reports issued by two NGOs - Amnesty International (“AI”) and the *Fédération Internationale des Droits de l’Homme* (“FIDH”). Two of these reports were issued by AI in 2002 and 2004. Both AI reports relate to the events in the CAR conflict in 2002-2003, the period relevant to the charges. These reports provide information about widespread rapes, pillaging and murders against the CAR civilian population in areas of the country where MLC troops were deployed.

9. The remaining five reports, issued by the FIDH, were prepared and distributed between February 2002 and October 2006. These reports provide information on the conflict in the CAR in 2002-2003, the period relevant to the charges. They are the product of investigations led by the FIDH to investigate the human rights situation in the CAR as a result of 2002-2003 armed conflict and its aftermath. They reflect interviews of victims, eye-witnesses as well as other persons present in the CAR during the armed conflict in 2002-2003. The reports provide detailed information on the background to the CAR armed conflict in 2002-2003, the various armed groups involved as well as identification of the leadership of these armed groups. The reports provide information about crimes of rapes, pillaging and murders against the CAR civilians in different parts of the country.

c. Category 3 – Documents belonging to the Accused

10. Category 3 comprises of seven documents belonging to the Accused. These documents are dated between November 2002 and February 2003.

11. The Accused signed and/or presumably authored three of these documents. One is a correspondence addressed to the UN Secretary-General, informing him of the steps taken by the MLC to investigate and prosecute its soldiers allegedly involved in the commission of crimes against civilians in Mambasa, Ituri, Democratic Republic of Congo ("DRC"). Another letter is addressed to the UN Special Representative in the CAR informing the latter that he had been informed of alleged human rights violations by MLC troops in the CAR, and accordingly sought UN's assistance in investigating MLC soldiers in the CAR. The third document is a decree issued by the Accused regarding the re-organization of military justice under MLC administration.

12. The remaining four documents comprise of a letter from the UN Representative in the CAR acknowledging receipt of the Accused's letter (referred to in para. 11, above) and three documents from the MLC. The three MLC documents provide information on the arrest and trial of MLC soldiers for crimes allegedly committed in the DRC as well as in the CAR conflict in 2002-2003.

d. Category 4 – Documents disclosed by the Defence

13. Category 4 comprises of 21 documents and two videos previously disclosed by the Defence and contained in its lists of material to be used for the questioning of witnesses. The Defence documents are all relevant and probative on issues related to the mode of liability or to prove the organization and structure of the MLC and its military judicial system.

e. Category 5 – Media articles on the situation in the CAR

14. Category 5 consists of 27 contemporaneous media articles from various media organizations regarding the situation in the CAR. These media articles were prepared and distributed in 2002-2003 and deal with the events relevant to the Prosecution's charges in 2002-2003. The articles were prepared by media organizations in the DRC, CAR and other international news agencies such as *Le Citoyen*, *Le Confident*, *Les Coulisses*, RFI, Integrated Regional Information Networks ("IRIN") or Associated Press. They provide information on the background to the armed conflict in the CAR in 2002-2003, the various armed groups involved in that conflict and more specifically on the MLC's intervention in the CAR as well as the crimes they allegedly perpetrated against CAR civilians in various areas of the country where they were deployed. Additionally, they provide information on the MLC's withdrawal from the CAR in March 2003. This category also contains articles that provide information on the MLC's military and political structure from the year 2000-2003, covering the period relevant to the charges. Three press articles in this category were issued by a Congolese online medium, providing information on DRC conflict. Of the three press articles in this category, one is dated 1 November 2000, while the remaining two press articles are undated. The press articles reproduce the MLC's Statute and reference the Statute for its position that the Accused is the President of the MLC and Commander-in-Chief of the *Armée de Libération du Congo* ("ALC"), during the period of 2002-2003.

f. Category 6 – Audio recordings from RFI

15. In Category 6, the Prosecution submits 10 contemporaneous audio recordings from RFI concerning the events in the CAR in 2002-2003. RFI is a well-known and reputable international broadcasting entity with a global presence. It also has field correspondents in many countries, including the CAR in 2002-2003, the

period relevant to the charges. The reports were prepared and broadcasted contemporaneously with the events under investigation and were based in part on observations by its CAR correspondents, as well as interviews of victims and witnesses who had first-hand experiences of these events. The reports provide information on the background to the conflict, the identity of the different armed groups as well as the various territories of the CAR where the conflict occurred in 2002-2003. Additionally, the reports provide accounts from victims and eye-witnesses on the crimes of rapes, pillaging and murders perpetrated by MLC troops against the CAR civilians in different parts of that country.

g. Category 7 – Other documents

16. Category 7 consists of 19 miscellaneous documents originating from a variety of sources. Generally, these documents comprise of the referral of the situation in the CAR to the Court by the CAR authorities and other materials supporting the referral of the CAR situation to the Court. This category also contains a joint United Nations Development Program (“UNDP”) and CAR Government report on rapes of women and children in the CAR in 2002-2003 as well as other reports providing information on the conflict in the CAR in 2002-2003. The last set of reports in this category provide information on the Accused’s communication records from a *Thuraya* based company, two logbooks from Bangui airport which collectively provide information on MLC flights into Bangui during the times relevant to the charges as well as the findings of an academic research into the CAR conflict in 2002-2003. This category also contains forensic reports relevant and probative to Counts 6 and 7, Murder.

IV. Request for confidentiality

17. The Prosecution requests that Annex A to this application be received by the Chamber as “Confidential” due to the confidential nature of the information contained therein.

V. Prosecution’s submissions

18. As outlined above in paragraph 3, for the assessment of evidence being introduced the Chamber relies on the three-part test previously promulgated by Trial Chamber I in its Admissibility Decision.¹¹ The Chamber examines: (i) the relevance; (ii) the probative value; and (iii) the balance between probative value and prejudicial effect.¹² The items proposed for admission satisfy these three key considerations, as summarized below and explained in greater detail in Annex A appended to this application.

The materials are relevant of issues to be determined at trial

19. In its First Admission Decision, the Chamber has held that to be relevant, an item must be logically connected to one or more facts at issue, in the sense that the item must have the capacity to make a fact at issue more or less probable than it would be without the item.¹³ While the relevance of each individual item is detailed in Annex A, as a general matter the proposed items are relevant to the following themes in the case: (i) crimes charged in the Corrected Revised Second Amended

¹¹ ICC-01/04-01/06-1399-Corr, paras 27-32.

¹² ICC-01/05-01/08-2012-Red, para. 13.

¹³ *Ibid*, para. 14. See also Sir Rupert Cross, *Cross on Evidence*, 4th Edition, p. 16, 1974 explaining relevance in the law of evidence as follows: “For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.”

Document Containing the Charges (“Second Amended DCC”)¹⁴ relating to the events in the CAR in 2002-2003; (ii) the background, existence and nature of the armed conflict in the CAR during 2002-2003, the period relevant to the charges; (iii) the existence of the MLC’s widespread and systematic attack against the civilian population in different territories in the CAR; (iv) information on the historical background of the MLC as well as its command structure, placing the Accused as the military and political leader of the MLC during the CAR intervention in 2002-2003; (v) information supporting the Accused’s material ability to issue orders and commands to MLC troops at the time of the CAR conflict in 2002-2003; (vi) documentation providing evidence of the Accused’s material ability to discipline and punish MLC soldiers and to submit matters for investigations to competent authorities; (vii) information establishing a nexus between the crimes charged and the armed conflict in the CAR in 2002-2003; and (viii) information on the MLC’s prior conduct in the CAR in 2001 and Ituri, DRC in 2002.

The materials are probative of issues to be determined at trial

20. The Chamber has ruled that the determination of the probative value of an item of evidence will always be a fact-specific inquiry and may take into account multiple factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inhere in the item of potential evidence, as well as the circumstances in which the evidence arose.¹⁵ As will be demonstrated in greater detail in Annex A, each of the items proposed for admission provides significant value related to contested issues in the case. Second, the proposed items bear on one or more issues in the case. Third, admission of the items will assist the Chamber in assessing a complete picture of the evidence gathered, and in particular, will assist

¹⁴ ICC-01/05-01/08-950-Conf-AnxA, Prosecution’s Submission of its Corrected Revised Second Amended Document Containing the Charges, 13 October 2010.

¹⁵ ICC-01/05-01/08-2012-Red, para. 15.

the Chamber in evaluating the context, in which the remainder of the Prosecution's case will be presented at trial.

The materials bear sufficient indicia of reliability

21. The proposed items possess sufficient indicia of reliability to warrant their admission into evidence. At the stage of admission of evidence, this requires only that there must be sufficient indicia to make out a *prima facie* case that the evidence is reliable - that is, whether it is what the tendering party purports it to be.¹⁶ Trial Chamber I and other *ad hoc* tribunals have considered features such as stamps, signatures and/or seals appearing on proffered documents, as well as considerations such as the identification of the author, the date of the document, and whether it is consistent with or corroborated by other evidence, in finding *prima facie* evidence of authenticity.¹⁷ Beyond authenticity, reliability assessments might also consider such factors as their timing (i.e., whether materials were created contemporaneously with the events under investigation) and the methodology used in their creation.

22. The items proposed for admission in Annex A meet the requirements of *prima facie* reliability, including authenticity, and thus should be admitted into evidence. Features such as dates, where available, their authors, dates of preparation and methodology of preparation appear on each item proposed for admission. These indicia provide sufficient basis for the Chamber to conduct an independent evaluation of the *prima facie* reliability of each item for the purposes of its

¹⁶ Trial Chamber I acknowledged that evidence to be admitted should satisfy minimal indicia of reliability. It nonetheless cautioned that "demonstrable lack of apparent reliability does not mean automatic exclusion of evidence," thus leaving the door open to include even such evidence. See ICC-01/04-01/06-1399-Corr, para. 30. See also *Prosecutor v. Delalic et al*, Case No. IT-96-21-Ar73.2, Decision on Application of Zejnic Delalic for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, Appeals Chamber, 4 March 1998, para. 17.

¹⁷ The various chambers have not drawn up an exhaustive list of these factors, but the jurisprudence reveals that the factors identified above have been considered in determining *prima facie* reliability of evidence sought to be tendered from the bar table. See for instance ICC-01/04-01/06-1399-Corr, paras. 37-40. See also *Prosecutor v. Boskoski and Tarculovski*, Case No. It-04-82-T, Decision on Prosecution's Third Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A through B, 5 December 2007, para. 4.

admissibility determination. Many are also all publicly available and bear dates, where available, reflecting the events described in their contents. The majority of the documents were prepared in 2002-2003, contemporaneous with the period relevant to the charges in this case. Even post-conflict documents were prepared and distributed mainly between 2004-2006, well before this litigation was contemplated (and thus cannot be said to have been fabricated for the purpose of assisting this litigation),¹⁸ and provide information on, *inter alia*, the continued impact of the conflict of 2002-2003 of the CAR civilian population.

23. Third, as to the documents and audio materials, the methodology followed in their preparation supports their admission into evidence. The conclusions reached in the NGO reports from FIDH and AI are based on interviews of victims and eye-witnesses as well as observations by human rights officers present in the CAR at the material time. Similar considerations apply to the preparation of the audio materials from RFI and other materials proposed for admission.

24. With particular respect to UN documents, Trial Chamber I and chambers of other *ad hoc* tribunals have admitted UN documents from the bar table.¹⁹ In developing the rationale for the admission of UN documents from the bar table, an International Criminal Tribunal for Rwanda (“ICTR”) Chamber stated that: “[t]he documents were obtained from the archives of the UN Headquarters, confirming their apparent status as UN documents. [...] these characteristics endow the documents with sufficient reliability to be admissible.”²⁰ Similar considerations apply here. The two UN documents proposed for admission emanate from the Office of the UN Resident Coordinator in the CAR and provide an update on the humanitarian

¹⁸ ICC-01/04-01/06-1399-Corr, para. 37. The context in which an item of evidence comes into existence was a factor considered by Trial Chamber I in this decision.

¹⁹ See ICC-01/04-01/06-1981. In that decision, Trial Chamber I in the *Lubanga* case also admitted NGO reports. See also *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request to admit United Nations Documents into Evidence under Rule 89(c), 25 May 2006.

²⁰ *Ibid*, para. 6.

crisis in 2002-2003 to the international community. In these circumstances, the risk of error and fabrication in respect of their creation is negligible.

25. The *ad hoc* tribunals also admit, from the bar table, materials seized from residence or place of business of accused persons as well as media articles providing contemporaneous record of events under investigations. In the case of *Prosecutor v. Delalic et al*, an International Criminal Tribunal for the former Yugoslavia (“ICTY”) Chamber admitted into evidence materials seized from an accused.²¹ In reaching its decision, that Chamber concluded that “the documents at issue were all found at the premises of Inda-Bau, a company with which *Delalic* had some form of association and where he was observed by the Austrian Police a few days before the seizure. The pattern of events described in the documents is, to an extent, consistent between documents themselves, and generally corresponds to witness statements and documents already admitted into evidence...[...] As such they are admissible”²².

26. More generally, in the case of *The Prosecutor v. Sam Hinga Norman et al*, a Special Court for Sierra Leone Trial Chamber considered that “international tribunals admit documentary evidence in various forms, when such evidence is: (a) “crime-base” evidence; (b) whether there was a widespread and systematic attack on a civilian population; (c) issues of command structure (leaving aside, however, whether a particular accused exercised the role of a commander); and (d) whether crimes occurred in the context of an international armed conflict.”²³

²¹ *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the admissibility of evidence, 19 January 1998, para. 31 and 41.

²² *Ibid*, para. 31.

²³ *Prosecutor v. Sam Hinga Norman et al*, Case No. SCSL-04-14-T-447, p.5, para. 6, 14 July 2005.

Probative value of the evidence against its prejudicial effect

27. The Chamber has held that the probative value of the item to be admitted into evidence must be weighed against the unfair prejudicial effect that its admission “may cause to a fair trial or to a fair evaluation of the testimony of a witness”. The Chamber further determined that this will always be a fact-sensitive inquiry and that the Chamber may consider such factors as whether an item’s admission would encroach on the Accused’s rights under Article 67(1) of the Statute or potentially delay proceedings because it is unnecessary or cumulative of other evidence.²⁴ In its Admissibility Decision, Trial Chamber I determined that it would “[...] where relevant weigh the probative value of the evidence against its prejudicial effect.”²⁵ In elaborating on this test, that Chamber cautioned that “it must be careful to ensure that it is not unfair to admit the disputed material, [...] because evidence of slight or minimal probative value has the capacity to prejudice the Chamber’s assessment of the issues in the case”²⁶ and concludes that “this will be a fact-sensitive decision, and the court is free to assess any evidence that is relevant to, and probative of, the issues in the case, so long as it is fair for the evidence to be introduced”²⁷.

28. The Prosecution submits that the probative value of the items proposed for admission outweighs any prejudicial effect for the following reasons: (i) the Prosecution specifically outlines in Annex A how each proposed items fits into the case; (ii) the proposed items each tends to prove one or more discrete issues in the Prosecution’s case; (iii) the proposed items each possesses enumerated indicia of reliability to warrant its admission and to enable the Chamber to fairly evaluate it; (iv) the Defence has long been aware of and been in possession of the items and has known that the Prosecution intended to offer them into evidence; (v) the proposed

²⁴ ICC-01/05-01/08-2012-Red, para. 16.

²⁵ ICC-01/04-01/06-1399-Corr, para. 31.

²⁶ *Ibid.*

²⁷ ICC-01/04-01/06-1399-Corr, para. 32.

items provide significant value related to contested issues in this case; and (vi) the proposed items corroborate the witness testimonies and other evidence received by the Chamber in the course of the trial.

29. The admission of the items from the bar table is in the interest of securing a fair and expeditious trial, as it will provide probative evidence while streamlining the proceedings and avoiding the need to introduce items listed in Annex A through witnesses (the authors, information providers or custodians).

VI. Relief sought

30. For the reasons set out above, the Prosecution requests that all items listed in Annex A be admitted into evidence.



Luis Moreno-Ocampo, Prosecutor

Dated this 28th Day of February 2012

At The Hague, The Netherlands