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

Date: 01/05/2012

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
With Confidential Annex A

**Defence submission in compliance with the Order on the procedure relating to the
submission of evidence**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. BACKGROUND

1. On 26 March 2012, Trial Chamber III (“the Chamber”) rendered its *Order on the procedure for the submission as evidence of material used during questioning of witnesses*¹ (“Order”), identifying the uncertainty which exists in the present case as to which materials used during the trial proceedings have been admitted into evidence.²

2. In order to address this confusion, the Order required that the parties file a document:

identifying all materials which they wish to submit as evidence ranging in date from the testimony of Witness 110 to the testimony of Witness 36. The filings should include all relevant information in accordance with the Statute and the Rules. This should also be in accordance with the three part test of relevance, probative value and potential prejudice which is necessary for the Chamber's determination of the admissibility of each piece of evidence.

3. On 20 April 2012, the Chamber granted a Defence request for an extension of time to comply with the Order,³ requiring the Defence to file its list of materials by 16.00 on 1 May 2012.⁴ Pursuant to that Decision, the Defence files the present submissions.

B. SUBMISSIONS

(i) *Admissibility of the Proposed Materials*

4. The Defence requests that the materials contained in the appended Confidential Annex A (“Proposed Materials”) be admitted into evidence. The

¹ ICC-01/05-01/08-2177

² ICC-01/05-01/08-2177, para. 3.

³ ICC-01/05-01/08-2192, Decision on Defence Request for an Extension of Time.

⁴ *Ibid.*, para. 6.

Proposed Materials are **relevant** to the charges and allegations as set out in the *Revised Second Amended Document Containing the Charges*,⁵ or are directly relevant to the credibility of the evidence of particular Prosecution witnesses. As such, they “relate to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused.”⁶ Moreover, given that each of the Proposed Materials has been discussed by Prosecution witnesses during the course of the proceedings, they provide necessary context to the transcripts.

5. The Proposed Materials also possess sufficient **probative value** warranting admission. While probative value is a fact-specific enquiry, the Defence in Annex A has noted various indicia of reliability, and links between the documents and the witnesses who discussed them, identified them, recognised them, or sometimes authored or created them.⁷ The Defence notes that while it is not necessary that each item be authenticated via witness testimony, each item of the Proposed Materials is what it purports to be, either because this is evident on its face, or because other testimony or evidence demonstrates the item’s provenance.⁸

6. The admission of the Proposed Materials will not cause **prejudice** to a fair trial, or to the fair evaluation of the testimony of a witness. There is no prejudice that can be identified to the parties in the presentation of their case;⁹ rather, these are documents which were disclosed in advance to the Prosecution, and upon which the Prosecution and witnesses were given an opportunity to comment.

(ii) *Other Issues*

⁵ ICC-01/05-01/08-856-Conf-AnxA, 18 August 2010.

⁶ ICC-01/05-01/08-2012-Conf, First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011, para. 14; see also ICC-01/05-01/08-424, para. 41; ICC-01/04-01/07-2635, para. 16.

⁷ ICC-01/04-01/06-1399-Corr, paras. 28-29; ICC-01/04-01/06-2595-Red-Corr, para. 39.

⁸ ICC-01/05-01/08-2012-Conf, First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011, para. 15; see also ICC-01/04-01/07-2635, para. 22.

⁹ ICC-01/05-01/08-2012-Conf, First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011, para. 16.

7. The Chamber has held¹⁰ that the Defence may respond Prosecution's Submission seeking to admit evidence¹¹ by 7 May 2012. However, as an initial point, the Defence notes the overlap between the parallel procedures for the admission of evidence in the present case. Particularly, the Defence notes that the Prosecution has now sought for the admission of certain documents through both the current exercise and its pending request to admit documents from the Bar Table.¹² The Defence requests that the present submissions be accepted without prejudice to those made in response to the Bar Table Motion, particularly insofar as they relate to the same documents.

8. The Defence also reiterates its concern that the relevance and probative value of particular documents will shift during the case, depending on their use with different witnesses.¹³ The Defence therefore reserves its position to make additional submissions on the admissibility of any of the Proposed Materials which the Chamber declines to admit at the present stage, if and when appropriate.

9. In addition, the Defence makes the following submission with regard the admissibility of the application forms of dual status victim/witnesses. In its previous decision on the admission of evidence,¹⁴ the Majority of Trial Chamber III refused the Defence request to admit victims' application forms on the basis that they were not relevant; their probative value is diminished by the circumstances in

¹⁰ ICC-01/05-01/08-2192

¹¹ ICC-01/05-01/08-2191, Prosecution's submissions of the second list of materials it requests to be admitted into evidence.

¹² ICC-01/05-01/08-2147-Conf-AnxA, Prosecution's Application for Admission of Evidence from the Bar Table.

¹³ ICC-01/05-01/08-2190, Defence Request for an Extension of Time, para. 5.

¹⁴ ICC-01/05-01/08-2012-Conf, First decision on the prosecution and defence requests for the admission of evidence ("Decision")

which they were created; and their admission into evidence **may be** perceived as unfair and thus prejudicial to the proceedings.¹⁵

10. The Defence refers to and adopts the reasoning of Her Honour Judge Kuniko Ozaki in her partly dissenting opinion,¹⁶ who noted (a) that victim application forms are relevant, as they refer to the events charged and relate to the credibility of witnesses, being an issue to be determined by the Chamber;¹⁷ (b) while the forms' probative value can be lessened by the circumstances under which they are made, this is not as significant as to deprive them of any probative value;¹⁸ and (c) their admission does not cause prejudice to the fairness of the proceedings as the witnesses had ample opportunity to discuss and explain the content of these application forms.

11. Moreover, concerning the application form for which admission is sought as part of the Proposed Materials,¹⁹ the witness was questioned not only on the form itself, but was also questioned on a document annexed to the form, acknowledged the authenticity of the copy of this document, and was given an opportunity to discuss the document. In such circumstances, the Defence respectfully submits that the application form is admissible, given that it is relevant, of sufficient probative value, nor is there any indication that the witness was of the view that the forms admission was an "unfair" use of this documentation.²⁰

The whole respectfully submitted.

¹⁵ Decision, paras. 99-100, 102.

¹⁶ ICC-01/05-01/08-2015-Conf, Partly Dissenting Opinion of Judge Kuniko Ozaki on the First decision on the prosecution and defence requests for the admission of evidence

¹⁷ *Ibid.*, para. 15.

¹⁸ *Ibid.*, paras. 16-18.

¹⁹ ICC-01/05-01/08-796-Conf-Anx151-Red2

²⁰ Decision, para. 102.



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Done on the 1st of May 2012
At The Hague, The Netherlands