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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
With Confidential Annex A

Defence submission in compliance with the *Third Order on the submission into evidence of materials used during the examination of witnesses*

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 19 November 2010, Trial Chamber III (“the Chamber”) issued *its Decision on the admission into evidence of materials contained in the prosecution’s list of evidence*,¹ in which the majority of Judges found all documents contained on the Prosecution’s list of evidence were *prima facie* admissible, simply by virtue of their appearance on this list.

2. The Appeals Chamber overturned this decision on 3 May 2011, finding that “the Trial Chamber erred with it made a ‘prima facie’ finding of admissibility on the evidence listed on the Revised List of Evidence without assessing the evidence on an item-by-item basis”.²

3. As a result, the Chamber instituted a new procedure for the admission of documents, in its 31 May 2011 *Order on the procedure relating to the submission of evidence* (“Order 1470”).³ By Order 1470, the parties were required to file a list of all materials “included in their lists of documents and used in the questioning of witnesses from the commencement of the trial until and including the testimony of Witness 209... which they wish to submit as evidence.”⁴ Order 1470 also established a procedure for the submission of evidence that would apply for the remainder of the case.

4. On 15 December 2011, the Chamber rendered its *First decision on the prosecution and defence requests for the admission of evidence*, in which it admitted documents which had been used during the examination of the first 21 Prosecution witnesses,⁵ as well as “Witnesses 31, 33, 47, 65, 69, 108, 110, 112, 169, 173, 213 and 219”.

¹ ICC-01/05-01/08-1022

² ICC-01/05-01/08-1386, para. 57. See also paras 2, 52-53, and 59.

³ ICC-01/05-01/08-1470.

⁴ ICC-01/05-01/08-1470, para. 3.

⁵ ICC-01/05-01/08-2012, paras 3, 9.

5. On 26 March 2012, the Chamber rendered its *Order on the procedure for the submission as evidence of material used during questioning of witnesses*⁶ identifying the uncertainty which still existed as to which materials used during the trial proceedings had been admitted into evidence.⁷ This second order required the parties to file submissions identifying all materials which they wished to submit as evidence ranging in date from the testimony of Witness 110 to the testimony of Witness 36. Defence submissions were filed in compliance with this order on 1 May 2012.⁸

6. On 6 September 2012, the Chamber rendered its *Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute* of 6 September 2012, in which it admitted a substantial volume of material into the casefile from the bar table at the request of the Prosecution, the majority over the objection of the Defence.⁹ A request for leave to appeal this decision by the Defence was denied.¹⁰

7. On 27 March 2013, the Chamber rendered its *Third Order on the submission into evidence of materials used during the examination of witnesses* ("Third Order"),¹¹ in which it noted that "although the parties have continued to indicate their intention to submit certain items into evidence in their respective lists of documents, since the commencement of presentation of evidence by the defence both parties have materially failed to submit certain items of evidence into court."¹² As such, the Chamber ordered:¹³

⁶ ICC-01/05-01/08-2177

⁷ ICC-01/05-01/08-2177, para. 3.

⁸ Defence submission in compliance with the *Order on the procedure relating to the submission of evidence* ICC-01/05-01/08-2198

⁹ Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012, ICC-01/05-01/08-2299-Red.

¹⁰ ICC-01/05-01/08-2399

¹¹ ICC-01/05-01/08-2565

¹² ICC-01/05-01/08-2565, para. 5.

¹³ ICC-01/05-01/08-2565, para. 6.

In view of the foregoing, the Chamber hereby ORDERS the parties to identify by April 2013, at the latest, all materials they wish to submit as evidence ranging in date from the testimony of Witness D04-53 to the testimony of Witness D04-45. The requests should include all the information necessary for the Chamber to assess the documents according to the three-part admissibility test. Specifically, the party seeking an item's admission should demonstrate, in line with the test applied by the Chamber, that each item (i) is relevant to the case; (ii) has probative value; (iii) is sufficiently relevant and probative as to outweigh any prejudicial effect that could be caused by its admission.

8. Pursuant to this Third Order, the Defence files the following submissions.

B. APPLICABLE LAW

9. Article 69(4) of the Statute requires the Chamber to “[r]ule on the admissibility of evidence.” In doing so, the Chamber must be guided by Article 64(2) of the Statute which requires the Chamber to ensure that the trial is fair and expeditious, and is conducted with the full respect for rights of the accused. The Chamber must also give due regard to the desirability of witnesses giving evidence orally in accordance with Article 69(2) of the Statute.

10. Irrespective of the stage at which the Trial Chamber considers the admissibility of evidence, it is required “to consider the relevance, probative value and potential prejudice of each item of evidence at some point in the proceedings”.¹⁴

C. SUBMISSIONS

(i) Admissibility of the Proposed Materials

¹⁴ ICC-01/05-01/08-1386, para. 37. See also ICC-01/04-01/06-1399-Corr, paras. 27-32; ICC-01/04-01/07-2289-Corr-Red, para. 13.

11. The Defence requests that the materials contained in the appended Confidential Annex A (“Proposed Materials”) be admitted into evidence. The Proposed Materials are **relevant** to the charges and allegations as set out in the *Revised Second Amended Document Containing the Charges*,¹⁵ or are directly relevant to the credibility of the Prosecution’s case (or particular Prosecution witnesses), and were used during the examination of Defence witnesses and will accordingly assist the Chamber in its assessment and understanding of Defence witness testimony while providing necessary context to the transcripts. 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.”¹⁶

12. 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 even authored or created them.¹⁷ The Defence notes that 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.¹⁸

13. 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;¹⁹ rather, these are documents which were disclosed in advance to the Prosecution, and were available to the Prosecution to use during their examination of Defence witnesses.

¹⁵ ICC-01/05-01/08-856-Conf-AnxA, 18 August 2010.

¹⁶ 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.

¹⁷ ICC-01/04-01/06-1399-Corr, paras. 28-29; ICC-01/04-01/06-2595-Red-Corr, para. 39.

¹⁸ 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.

¹⁹ 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.

(ii) Timeliness of the Chamber's Decision

14. As to the timing of the Chamber's decision as to the admissibility of documents, the Chamber has repeatedly stressed that it "may defer its admissibility assessment until the end of the proceedings."²⁰ Despite this pronouncement, the Defence hereby respectfully requests that the Chamber render a timely decision on all outstanding requests for the admission of materials in the present case, for the following reasons. Firstly, without a clear picture of the case against him (including which documentary materials ultimately form part of the evidence), the accused is put in a difficult position in terms of presenting his defence. Should the Chamber decide to admit a wealth of incriminating material on the Prosecution's request, fairness dictates that the accused be given notice of this admission in a manner which allows him to bring evidence to counter this material during the course of his defence case. If the assessment of the admissibility of this evidence is deferred until the end of the case, not only is the accused deprived of this opportunity, but he may then be required to seek to introduce additional evidence or recall particular witnesses which would increase the length of the proceedings and interfere with his right to expeditious proceedings.

15. Secondly, the Chamber may ultimately determine that documents for which admission has been requested may not have been sufficiently identified or authenticated by the witnesses through whom admission is currently sought. In such a case, the parties may decide to seek to have the documents identified or authenticated through later witnesses. With each witness who completes his or her testimony, this opportunity is diminished. Finally, it cannot be denied that shifting process for the admission of documents in the present case has caused confusion among the parties – confusion identified by the Chamber itself.²¹ The Defence

²⁰ ICC-01/05-01/08-2012, para. 12; citing ICC-01/05-01/08-1386, para. 37.

²¹ ICC-01/05-01/08-2177, para. 3.

submits that a timely determination by the Chamber on which documents have been admitted into the evidence would go some way to alleviating this confusion.

16. For these reasons, the Defence respectfully requests that the Chamber decides on all outstanding requests for the admission of documents as soon as possible.

The whole respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 22nd of April 2013
At The Hague, The Netherlands