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**International
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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 Redacted Document

**Public Redacted Version of “Prosecution’s Application for Admission of
Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”**

Source: Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) seeks the admission of 65 documents and 30 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) Items Related to Testimony of D04-19; (ii) Documents Related to Testimony of D04-45; (iii) Items Related to Testimony of D04-53; (iv) Items Related to Testimony of D04-65; (v) Items related to Testimony of D04-7; (vi) Items related to Testimony of D04-57; and (vii) Other Documents.

2. The procedure of tendering materials from the bar table has been accepted by Chambers of the International Criminal Court,² including Trial Chamber III (“Chamber”).³ In its first decision on the admission of evidence on 15 December 2011⁴ (“First Admission Decision”), the Chamber held that the use of a bar table motion is a permissible way to seek the admission of documentary evidence.⁵

3. Independently of the form of submission, in applying the principle of free assessment of evidence submitted to determine its relevance or admissibility pursuant to Rule 63(2) of the Rules, the Chamber also referred to the three-part test whereby it would examine, on a preliminary basis, whether the submitted materials: (i) are relevant to the trial; (ii) have probative value; and (iii) are sufficiently relevant

¹ On 27 March 2013, the Chamber issued its “Third Order on the submission into evidence of material used during the questioning of witnesses”, 27 March 2013, ICC-01/05-01/08-2565 requesting the identification of material that the parties wish to submit as evidence ranging from the date of D04-53’s testimony to that of D04-45.

² ICC-01/04-01/06-1981, Decision on the admission of material from the bar table, 24 June 2009; and ICC-01/04-01/07-2635, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010.

³ ICC-01/05-01/08-2012-Conf, First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011; and ICC-01/05-01/08-2299-Conf, Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012.

⁴ ICC-01/05-01/08-2012-Red, First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011.

⁵ *Ibid*, para. 55.

and probative to outweigh any prejudicial effect to a fair trial or to a fair evaluation of the testimony of a witness that could be caused from their admission.⁶ This approach was subsequently reiterated by the Chamber in another decision on the admission of evidence on 6 September 2012⁷ ("Second Admission Decision").

4. The Prosecution submits the proposed items for the truth of their content and in some cases 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.

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. By virtue of its lists of documents for the examination of Defence witnesses, the Prosecution has put Jean-Pierre Bemba Gombo ("Accused") on sufficient notice of its intention to request the admission of the proposed items. Not only did the Prosecution indicate its intention to tender items in its various lists of documents, it subsequently made use of these items during the hearings where the Defence was afforded the opportunity to re-examine witnesses after the Prosecution's examination on these items. Consequently, the admission of the proposed items will not unfairly prejudice the Accused's right to a fair trial.

⁶ ICC-01/05-01/08-2012-Red, para. 13.

⁷ ICC-01/05-01/08-2299-Conf, Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012, paras. 7 and 8.

II. Annex A

6. Annex A appended to this application lists in respect of each item proposed for admission: (i) Evidence Registration Number (“ERN”); (ii) Title; (iii) Date, where available; (iv) Source/ author; (v) Description of item; (vi) Relevance; (vii) Probative value; and (viii) Date of disclosure.

III. Overview of bar table materials

a) Category 1 – Items Related to Testimony of D04-19

7. This category consists of 29 video recordings of D04-19’s interview, 29 transcripts of those recordings, 10 documents showing the witness’ signature, as well as 6 documents from the CAR authorities and 2 press articles that relate [REDACTED]. These video recordings, along with the related transcripts, constitute prior recorded statements of D04-19. These statements are relevant to, *inter alia*, his credibility regarding his testimony before the Chamber and issues in the case. The prior statements of D04-19 are probative because these interviews were conducted [REDACTED]. The prior statements contain sufficient indicia of reliability because they were created in accordance with Rule 112 of the Rules to sufficiently safeguard the integrity of the recordings and clearly register relevant information such as persons present, dates and circumstances of the recordings.

8. Admission of D04-19’s prior statements is not only an appropriate use of a bar table motion, it is necessary so as not to prejudice the Chamber’s fair evaluation of his testimony in seeking to determine the truth. [REDACTED].⁸

⁸ The Prosecution explicitly stated its intention to tender these recordings and related transcripts and translations: ICC-01-05-01-08-T-293-CONF-ENG-ET, 13 March 2013, page 23, line 7 to page 24, line 17.

9. The 10 documents showing D04-19's signature ("signature documents") are highly pertinent to his credibility [REDACTED].⁹

10. [REDACTED].¹⁰

11. [REDACTED] The Prosecution submits that the video recordings and the signature samples are necessary for the Chamber to fairly evaluate D04-19's testimony.

12. The 6 documents from the CAR authorities are internal CAR Defence memoranda emanating from units such as the *Gendarmerie nationale*, which were prepared contemporaneously between November and December 2002 in the ordinary course of operations. These messages are important in providing a better understanding of the nature of the relationship between CAR authorities and the regular MLC soldiers in the field. [REDACTED]. The 2 media articles were prepared by the media organisations of British Broadcasting Corporation ("BBC") and *Le Citoyen* in November 2002 and March 2003, contemporaneously with the events, and relate directly to the charges. They are directly relevant to, *inter alia*, [REDACTED].¹¹

b) Category 2 – Documents Related to Testimony of D04-45

13. The 8 documents consist of 5 publicly available press articles from *Radio France Internationale* ("RFI"), *Jeune Afrique* and *Le Citoyen*; 1 document from the CAR authorities; 1 newsletter from the MLC; and 1 script. The 2 RFI press articles were prepared contemporaneously by a reputable international media organisation in the ordinary course of the organisation's activities. They relate directly to the 2002-2003 CAR events that form the basis of the charges. The documents are reliable because

⁹ See ICC-01-05-01-08-T-293-CONF-ENG-ET, 13 March 2013, page 10 line 19 to page 11, line 5; and ICC-01-05-01-08-T-286-CONF-ENG-ET, 27 February 2013, page 36, lines 7-9 where the Presiding judge asked: [REDACTED]

¹⁰ See, for example, CAR-ICC-0001-0086.

¹¹ ICC-01/05-01/08-T-287-CONF-ENG ET, 28 February 2013, page 41, line 6 to page 44, line 7.

they are complete and contain the RFI logo. CAR-OTP-0031-0011, the third document stamped and signed from RFI, authenticates the handwritten dates on various RFI articles and goes to the weight of those documents. CAR-OTP-0010-0471 is a press article from *Jeune Afrique*. Although it is dated 4 May 2003, it relates directly to the temporal framework of the charges as the Accused is interviewed and questioned about the 2002-2003 events in CAR. It contradicts D04-45's testimony that CAR authorities ordered the withdrawal of MLC soldiers.¹² This document is reliable because it is a complete document that was prepared in the normal course of events. It comes from a reputable international news organisation and emanated from the organisation's website. CAR-V20-0001-0165, from *Le Citoyen*, is dated 14 March 2003 and was prepared by a reputable media organisation in the ordinary course of its activities. It is relevant to, *inter alia*, the CAR's lack of authority over the MLC troops operating in the CAR. The article is complete and reflects the newspaper's logo as well as the edition reference.

14. CAR-OTP-0042-0255, from the CAR authorities, is an internal memorandum emanating from the *Gendarmerie nationale*, which was prepared contemporaneously in March 2003 in the ordinary course of operations. This message provides information regarding crimes committed by MLC soldiers that were reported to the CAR authorities and is important in providing a better understanding of the lack of authority CAR officials had over the MLC troops and the lack of co-ordination between MLC and CAR soldiers, particularly the troops from the Presidential Guard (USP).

15. CAR-OTP-0064-0265 is a newsletter emanating from the MLC. It covers the period from December 2002 to January 2003, a period that falls squarely within the charges. This document is relevant to the issue of authority over MLC soldiers in CAR and it directly contradicts D04-45's testimony that it was the CAR authorities

¹² ICC-01/05-01/08-T-295-CONF-ENG-ET, 15 March 2013, page 38, lines 4 to 19.

who ordered the MLC withdrawal.¹³ The document was seized from the Accused's residence in Belgium and bears the MLC logo.

16. CAR-ICC-0001-0089, a script that was brought into the courtroom by D04-45 to assist him in testifying before the judges,¹⁴ is relevant to, *inter alia*, his credibility. This document is probative because the information contained therein demonstrates that prior to even commencing his testimony in court, D04-45 was aware of material issues in the case. This information is probative in showing that D04-45 entered the courtroom with a clear agenda for his testimony, which included general information that he should have been in a position to recall without prompting, such as under whose authority and control he operated during the operations in CAR.¹⁵ Moreover when asked by the Chamber about the notes, D04-45 failed to reveal the extent of the full information contained therein but instead only referred to "dates".¹⁶ It would be prejudicial to the fair evaluation of D04-45's testimony and the Chamber's determination of the truth to exclude his script.

c) Category 3 - Items Related to Testimony of D04-53

17. This consists of 6 items: 1 video and 1 corresponding transcription, as well as 2 witness statements and 2 annexes. Although outside the temporal framework of the charges, CAR-OTP-0068-0002 is a video that is directly related to the Accused's communication means and ability to command military operations from Gbadolite, which serves to contradict the testimony of the military expert witness.¹⁷ This video contains sufficient indicia of reliability as it is of good quality, complete and clearly identifies the Accused and other persons therein. This information is equally

¹³ ICC-01/05-01/08-T-295-CONF-ENG-ET, 15 March 2013, page 38, lines 4 to 19.

¹⁴ ICC-01/05-01/08-T-293-CONF-ENG ET, 13 March 2013, page 36, line 6 to page 40, line 13.

¹⁵ ICC-01/05-01/08-T-293-CONF-ENG-ET, 13 March 2013, page 36, lines 20 to 23; ICC-01/05-01/08-T-296-CONF-ENG-ET, 18 March 2013, page 16, lines 14-17

¹⁶ See, CAR-ICC-0001-0089.

¹⁷ See, for example, ICC-01/05-01/08-T-233-CONF-ENG CT, 21 August 2012, page 54, line 22 to page 55, line 7; and page 56 line 3 to page 58 line 12.

reflected in the corresponding extract transcription. The remaining 4 documents are relevant to the authenticity of documents relied upon by the military expert and consequently his conclusions in both his expert report and testimony regarding command and control.¹⁸ These witness statements along with the appointment and promotion orders are probative in demonstrating that the documents relied upon by the expert, [REDACTED].¹⁹ The statements are reliable as they were prepared in accordance with Rule 111 of the Rules as they register information such as date, time and place of interview, signature of the witness and other persons present. In evaluating the report and testimony of the D04-53, it would be prejudicial to both a fair trial and a fair evaluation of his testimony for the Chamber to not consider these documents in its determination of the truth.

d) Category 4 - Items Related to Testimony of D04-65

18. CAR-DEF-0002-0108 is a book written by the witness regarding his personal experience during the 2002-2003 events in the CAR. The book was published in January 2006²⁰ and forms the basis of D04-65's testimony. It is relevant to D04-65's credibility as well as pertinent issues put to him by the Prosecution such as the identification of MLC troops and role of the MLC brigade commander after D04-65 was released by Bozize's rebels.²¹ The book was provided by the Defence and authenticated by the D04-65 in court.²²

e) Category 5 – Items Related to Testimony of D04-7

¹⁸ ICC-01/05-01/08-T-232-CONF-ENG-ET, 17 August 2012, page 4, lines 1-17; ICC-01/05-01/08-T-230-ENG-ET, page 10, line 8 to page 11, line 21; ICC-01/05-01/08-T-230-ENG-ET, 15 August 2012, page 21, line 6 to page 22, line 17; ICC-01/05-01/08-T-230-ENG-ET, 15 August 2012, page 25, line 14 to page 26, line 20.

¹⁹ See, ICC-01/05-01/08-2301-CONF, [REDACTED] on 12 July 2012 and submitted on 16 August 2012, 6 September 2012.

²⁰ ICC-01/05-01/08-T-246-CONF ENG ET, 17 September 2012, page 10 lines 7 to 17.

²¹ ICC-01/05-01/08-T-246-CONF-ENG ET, 17 September 2012, pages 17 to 21.

²² ICC-01/05-01/08-T-246-CONF ENG ET, 17 September 2012, page 10 line 7 to page 12 line 2.

19. CAR-OTP-0013-0118 is a contemporaneous press article from *Agence Centrafrique Presse* dated 21 November 2002 and prepared in the ordinary course of the organisation's activities. It relates to D04-7's credibility regarding co-ordination with MLC troops and the fact that he was not aware publicly available information about the location of the residence of the MLC brigade commander. The article, dated 21 to 27 November 2002, contains the bulletin reference number at the bottom of the page and cites the complete article.

f) Category 6 - Items Related to Testimony of D04-57

20. CAR-OTP-0069-0148 is a report from the International Crisis Group (ICG). [REDACTED].²³ The document is reliable because it emanates from the ICG website and was prepared in the ordinary course of the organisation's activities. The report is complete and carries ICG's logo. The document will allow the Chamber to fairly evaluate D04-57's testimony against the information contained in this report.

g) Category 7 - Other Documents

21. This consists of 1 document that is publicly available from the MLC website. CAR-OTP-0069-0363 is the 30 June 1999 MLC statute, the founding document that was operative during the 2002-2003 charging period. It is relevant to, *inter alia*, the Accused's role as President of MLC and commander-in-chief of the *Armée de Libération du Congo* ("ALC"). Although a different version of the same document was previously rejected by the Chamber in the Second Admission Decision because it emanated from unofficial sources that made it unable to verify the information contained therein,²⁴ the Prosecution re-submits the MLC statute in a different and

²³ ICC-01/05-01/08-T-257-CONF-ENG ET, 18 October 2012, pages 13 to 15.

²⁴ ICC-01/05-01/08-2299-Red, paras. 112 and 113.

complete version taken directly from the MLC's official website. This provides sufficient indicia of its reliability.

IV. Request for Confidentiality

22. The Prosecution requests that this application and Annex A be received by the Chamber as "Confidential" due to the confidential nature of the information contained therein.²⁵

V. Prosecution's submissions

23. As outlined above in paragraph 3, for the assessment of evidence being introduced the Chamber relies on a three-part test and examines: (i) relevance; (ii) probative value; and (iii) balance between probative value and prejudicial effect.²⁶ 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 to issues to be determined at trial

24. 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.²⁷ 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) existence of the MLC's widespread and systematic attack against the civilian population in different locations in the CAR; (ii) information

²⁵ The Prosecution will submit a public redacted version of the application.

²⁶ ICC-01/05-01/08-2012-Red, para. 13; and ICC-01/05-01/08-2299-Red, paras. 7 and 8.

²⁷ *Ibid*, para. 14.

supporting the Accused's material ability to issue orders and commands to MLC troops; (iii) lack of effective authority and control by the CAR authorities over MLC troops; (iv) knowledge of crimes by MLC authorities; and (v) information challenging the credibility of Defence witnesses. Nonetheless, and in line with the principle of free assessment of evidence, the Chamber's determination of the truth is generally not limited to a particular issue unless an item is explicitly admitted for a limited purpose.²⁸ Thus the Chamber is free to analyse an admitted document in full and within the context of the evidence as a whole.²⁹

The materials are probative of issues to be determined at trial

25. 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.³⁰ As will be demonstrated in greater detail in Annex A, each of the items proposed for admission provide 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, enable it to better evaluate the coherence of alternative theories advanced by the Defence within the context of the charges and case presented by the Prosecution at trial.

The materials bear sufficient indicia of reliability

26. The proposed items possess sufficient indicia of reliability to warrant their admission into evidence. At the stage of admission of evidence, the Chamber

²⁸ ICC-01/05-01/08-2299-Red, para. 14.

²⁹ *Ibid.*

³⁰ ICC-01/05-01/08-2012-Red, para. 15.

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.³¹ The Chamber held that items may be *prima facie* reliable if they bear sufficient indicia of reliability such as logo, letter head, signature, date or stamp, and appear to have been produced in the ordinary course of the activities of the persons or organisations who created them”.³² 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 or source, dates of preparation and methodology or context 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 admissibility determination. Many are also all publicly available and bear dates, where available, reflecting the events described in their contents.

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”.³³ The Chamber further determined that this will always be a fact-sensitive inquiry and that it 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.³⁴ In any event, the Chamber held that “[i]f potential prejudice is identified, this will not necessarily

³¹ 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.

³² ICC-01/05-01/08-2299-Red, para. 9.

³³ ICC-01/05-01/08-2012-Red, para. 16; and ICC-01/05-01/08-2299-Red, para. 8.

³⁴ ICC-01/05-01/08-2012-Red, para. 16; and ICC-01/05-01/08-2299-Red, para. 8.

preclude the item's admission. The item will be excluded only if its relevance and probative value are insufficient to justify its admission in light of its potentially prejudicial effect.”³⁵

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 tend to prove one or more discrete issues in the Prosecution’s case; (iii) each proposed item possesses enumerated indicia of reliability to warrant its admission and to enable the Chamber to fairly evaluate it; (iv) the Defence had sufficient notice of both the content of the items and the Prosecution’s intention to offer them into evidence; (v) the proposed 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).

³⁵ ICC-01/05-01/08-2012-Red, para. 16; and ICC-01/05-01/08-2299-Red, para. 8.

VI. Relief sought

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



Fatou Bensouda, Prosecutor

Dated this 26th Day of April 2013

At The Hague, The Netherlands