

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 May 2013

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 Reply to "Defence Response to the
Prosecution's Second Application for Admission of Evidence from the Bar
Table"".**

Source: The 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 Defence offers various objections to the Office of the Prosecutor (Prosecution)'s motion to admit evidence. These objections are without merit. The Prosecution has properly submitted the items for admission as evidence based on the requisite time-frame and in accordance with the Trial Chamber III ("Chamber") 's sole requirement that it adhere to the three-stage admissibility test.

II. Procedural History

2. On 31 May 2011, the Chamber issued its "Order on the procedure relating to the submission of evidence" ("Order 1470").¹

3. On 15 December 2011² and 6 September 2012,³ the Chamber issued two decisions on the admissibility of evidentiary items submitted by both parties.

4. On 27 March 2013, the Chamber issued its "Third Order on the submission into evidence of material used during the questioning of witnesses" ("Third Order").⁴ The Chamber ordered the parties to identify "... all materials which they wish to submit as evidence ranging in date from the testimony of Witness D04-53 to the testimony of Witness D04-45" and to "... include all the information necessary for the Chamber to assess the documents according to the three-part admissibility test."⁵

¹ ICC-01/05-01/08-1470, Order on the procedure relating to the submission of evidence, 31 May 2011.

² ICC-01/05-01/08-2012-Conf, First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011.

³ 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-01/05-01/08-2565, Third Order on the submission into evidence of material used during the questioning of witnesses, 27 March 2013.

⁵ ICC-01/05-01/08-2565, para. 6.

5. On 22 April 2013, the Prosecution filed the “Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” (“Prosecution’s Application”).⁶

6. On 6 May 2013, the Defence filed the “Defence Response to the Prosecution’s Second Application for Admission of Evidence from the Bar Table” (“Defence Response”).⁷

The Prosecution’s Application is in accordance with the Chamber’s Orders

7. The Defence alleges that the Prosecution “ignored and/or failed to comply with the Third Order” by not identifying materials used during the questioning of Defence witnesses which it intended to submit as evidence and has sought “to circumvent the established and more restrictive procedure for the admission of evidence in this case as set out in Order 1470”.⁸ This is incorrect. Order 1470 in fact states that the procedure set by the Chamber “does not preclude the parties from requesting the submission as evidence of any item, listed or not, either in the course of the questioning of a witness or at a later stage during the proceedings through a motion.”⁹ [Emphasis added] The order therefore allows for a subsequent request to tender evidence regardless of whether prior indication was provided by the requesting party. Each time the Prosecution provides a list of documents to the Defence, it notes that it reserves the right to submit or tender items during or after the examination of that particular witness.¹⁰

⁶ ICC-01/05-01/08-2596-Conf+Conf-AnxA, Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 22 April 2013.

⁷ ICC-01/05-01/08-2617-Conf, Defence Response to the Prosecution’s Second Application for Admission of Evidence from the Bar Table, 6 May 2013.

⁸ *Ibid*, section B and para. 6.

⁹ ICC-01/05-01/08-1470, Order on the procedure relating to the submission of evidence, 31 May 2011, para. 8.

¹⁰ In every list of document circulated for each witness to the Defence and participants, the Prosecution consistently states that “The Prosecution reserves the right to tender or submit the listed documents under paragraph 8 of ICC-01/05-01-08-1470 should a justifiable issue arise during or after the examination of ...”.

8. Nor does the Third Order place the limitations alleged by the Defence on the Prosecution's ability to submit relevant items into evidence. The Third Order permits the submission of "all materials" with the sole limitation that the temporal scope runs from the testimony of Defence witness D04-53 to that of D04-45.¹¹ Thus it authorizes the Prosecution to submit all materials that were and are relevant and probative to the examination and evaluation of those Defence witnesses. Order 1470 and the Third Order are thus fully consistent with the Chamber's authority and discretion to freely admit evidence in accordance with Article 64(9)(a) of the Rome Statute ("Statute") and Rule 63(2) of the Rules of Procedure and Evidence ("Rules"), provided that the three-stage admissibility test is satisfied.¹²

9. The Defence further claims that the principle of orality cannot be reconciled with "[t]he Prosecution's attempt to introduce swathes of un-tested documentary material for the truth of its contents, in lieu of introducing them through witnesses whose evidence can be tested through questioning ..."¹³ Contrary to the Defence's contention, however, all materials submitted were used by the Prosecution at some point to examine witnesses and therefore the Defence had a full opportunity to test them.¹⁴

10. In addition, this Chamber has accepted the submission of evidentiary items by *both* parties through bar table motions.¹⁵ Specifically, it ruled that "... whether an item's admission is sought via the "bar table" is a distinction without a difference because, regardless of the manner in which an item's admission is sought, its

¹¹ ICC-01/05-01/08-2565, Third Order on the submission into evidence of material used during the questioning of witnesses, 27 March 2013, para. 6.

¹² ICC-01/05-01/08-2012-Conf, para. 13; ICC-01/05-01/08-2299-Conf, paras. 7 and 8; ICC-01/05-01/08- 2565, para. 6.

¹³ ICC-01/05-01/08-2617-Conf, para. 9.

¹⁴ For instance, CAR-OTP-0068-0002, though not used during the examination of D04-53, was used during the examination of D04-49: ICC-01/05-01/08-T-273-CONF ENG ET, 22 November 2012, page 13, line 22 to page 16, line 18.

¹⁵ ICC-01/05-01/08-2012-Conf and ICC-01/05-01/08-2299-Conf. See, for example, ICC-01/05-01/08-1515-Conf, *Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l'ordonnance de la Chambre du 31 mai 2011*, 14 June 2011, page 5.

admissibility will be determined under the three part test ...”¹⁶ [Emphasis added]. In fact, the essence of the Third Order is to allow both parties to submit all materials they deem necessary regarding the identified witnesses since the question of admission of evidence was not considered at the time the witnesses testified.¹⁷

Specific objections raised by the Defence:

11. The Prosecution’s Application justifies each of the items requested for admission following the Chamber’s three-stage test. The Defence submissions that the Prosecution failed to address the relevance or probative value of some specific items¹⁸ cannot be reconciled with the Prosecution’s submissions in its annex where it addresses both categories in relation to each item submitted.¹⁹

12. The Defence alleges that “the Chamber appears to have already decided to admit the video-recordings without hearing Defence submissions on their admissibility, relevance or probative value.”²⁰ The Defence interprets the Chamber’s statement that it [REDACTED]²¹ to mean that this evidence has been admitted into the case record. This is incorrect. There is no decision to this effect. Additionally, in Order 1470 the Chamber expressly stated that where it requests the submission of prior statements of a witness called to testify, “[t]he parties will be given an opportunity to raise any objection to the potential admission of these statement(s) into evidence.” In any event, the Prosecution has submitted these items and despite its lengthy submissions, the Defence does not object to the admission into evidence of the videos and transcripts in their entirety.²²

¹⁶ ICC-01/05-01/08-2012-Conf, para. 55.

¹⁷ ICC-01/05-01/08- 2565, para. 5.

¹⁸ See, for example, ICC-01/05-01/08-2617-Conf, para. 23.

¹⁹ ICC-01/05-01/08-2596-Conf-AnxA.

²⁰ ICC-01/05-01/08-2617-Conf, para. 12.

²¹ ICC-01/05-01/08-2617-Conf, para. 12; [REDACTED].

²² ICC-01/05-01/08-2617-Conf, para. 20. Moreover, this Chamber’s majority ruling decided that evidence would be admitted in its entirety and not as extracts: ICC-01/05-01/08-1470, para. 11.

13. The Defence incorrectly asserts that in requesting for admission of all of D04-19's prior interviews for the truth of their contents, "the Prosecution is actually asserting that everything the witness said, on those occasions, for example, [REDACTED], is true, and the Prosecution accept it to be so".²³ The Prosecution raised inconsistencies in both the prior interviews and courtroom testimony. It now seeks admission of the prior interviews to allow the Chamber to assess the credibility of the witness's evidence. The admission of all recordings and transcripts will additionally assist the Chamber to determine that throughout the various interviews, [REDACTED].²⁴

14. [REDACTED].^{25 26 27}

15. Document CAR-ICC-0001-0089 are notes that witness D04-45 brought with him when he testified. This document is plainly relevant to the Chamber's assessment of the witness, his evidence, and his credibility. The document was extensively used during cross-examination and the Prosecution will contend that it shows that his testimony was not candid.

16. The Defence further alleges that the Prosecution seeks to impugn D04-53's testimony by relying upon evidence that was never presented to the witness for his comment or explanation, thereby making its admission unfair and prejudicial.²⁸ As stated above,²⁹ Order 1470 expressly permits the submission of evidence that was not used during the questioning of a specific witness but presented at a later stage. The Prosecution submits that in certain circumstances, and depending on the type of issue, evidence may be submitted subsequently to challenge the credibility of a

²³ ICC-01/05-01/08-2617-Conf, para. 16.

²⁴ ICC-01/05-01/08-2617-Conf, para. 18.

²⁵ ICC-01/05-01/08-2596-Conf-AnxA.

²⁶ ICC-01/05-01/08-2617-Conf, para. 22.

²⁷ [REDACTED].

²⁸ ICC-01/05-01/08-2617-Conf, para. 39.

²⁹ See paras. 8 to 10.

witness's testimony. The evidence submitted by the Prosecution goes to the discrete issue of whether or not the communication means of the Accused allowed him to direct operations from afar. Bearing in mind the totality of the evidence, the Chamber is able to evaluate this straightforward factual issue without further evidence from D04-53. The fact that D04-53 was not afforded the opportunity to respond is a factor that the Chamber may consider in according the necessary weight to the evidence submitted.

17. The Defence seeks to exclude the admission of evidence that is relevant to the credibility of the military expert by arguing that "[t]o suggest that a former General in the army of the Republic of France has been untruthful is a very serious allegation indeed, and should not be made by counsel without the clearest evidence."³⁰ The Prosecution merely stated that the evidence submitted "serves to contradict the testimony of the military expert witness" and is relevant to the Chamber's determination of D04-53's credibility.³¹ No witness that comes before this Court is above scrutiny, and D04-53 should not be afforded special treatment. The evidence submitted will allow a fair assessment of D04-53's testimony.

18. The Defence submits that "[s]hould the Prosecution have wished to challenge the credibility of General Seara through evidence from [REDACTED] the proper procedure would have been to seek to call them as witnesses."³² However, the Prosecution submitted these statements solely to address the discrete issue of [REDACTED].³³ Thus it is not relying upon these two statements to prove any aspect of its case. Nor is the Prosecution seeking to use these statements to directly challenge the *viva voce* testimony of a witness who [REDACTED]. [REDACTED]³⁴.

³⁰ ICC-01/05-01/08-2617-Conf, para. 40.

³¹ ICC-01/05-01/08-2596-Conf, para. 17.

³² ICC-01/05-01/08-2617-Conf, para. 42.

³³ ICC-01/05-01/08-2596-Conf, para. 17.

³⁴ [REDACTED].

The Prosecution is willing to call these two witnesses to testify as rebuttal evidence if the Chamber deems this necessary.

III. Request for confidentiality

19. The Prosecution requests that this Reply be received as “Confidential” due to the same classification afforded to the Defence Response.

IV. Conclusion

20. The Prosecution respectfully requests the Chamber to dismiss the Defence Response and admit the items requested.



Fatou Bensouda, Prosecutor

Dated this 24th Day of May 2013

At The Hague, The Netherlands