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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 Document
With
Confidential Annex A**

**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 21 documents and 1 audio/video recording 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 two categories listed below: (i) Items Related to Testimony of D04-15; and (ii) Other Documents. The Prosecution will make another application in due course, if necessary, for any subsequent witnesses called to testify.

2. The procedure of tendering materials from the bar table has been accepted by Chambers of the International Criminal Court,² including the 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 has repeatedly 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

¹ ICC-01/05-01/08-2824, Order on the submission of final applications for the admission of material into evidence and seeking observations on the admission into evidence of witnesses' written statements, 1 October 2013, para. 13 wherein the Chamber requested that applications for admission into evidence of documents used during the testimony of Witness D04-15 and any further witnesses called by the defence up to 25 October 2013, as well as the submission of any remaining materials into evidence should be filed no later than 31 October 2013.

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-Red, First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011; and ICC-01/05-01/08-2299-Red, 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.

⁵ *Ibid*, para. 55.

sufficiently relevant and probative to outweigh any prejudicial effect that could be caused from their admission ("Three-stage test").⁶

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 in these 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.

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

⁶ See, for example, ICC-01/05-01/08-2012-Red, para. 13; and ICC-01/05-01/08-2299-Red, paras. 7 and 8.

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 D04-15

7. This consists of 2 Amnesty International reports, 2 reports from United Nations, 2 flight log books for Bangui Airport, 3 sim-card analysis reports, 1 witness annotation, 1 video and 3 corresponding transcripts/ translations, and 2 press articles. Annex A contains detailed information under Article 69(4) for the Chamber's consideration.

b) Category 2 - Other Documents

8. This consists of 3 emails, 1 agreement and 2 prior inconsistent statements. The 3 emails clearly identify the Accused's Thuraya telephone number and email address. CAR-D04-0003-0527, the Lusaka agreement signed on 10 July 1999, was provided by the Defence. It is a cease-fire agreement to end the conflict between warring factions, including *Mouvement de Libération du Congo* ("MLC"), in the Democratic Republic of Congo. CAR-OTP-0054-0005 and CAR-OTP-0054-0019 are prior inconsistent statements of Defence witness, CAR-D04-PPPP-0018. These documents are further justified in accordance with the three-stage test in Annex A.

IV. Request for confidentiality

9. 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

10. The items proposed for admission satisfy the three-stage test 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

11. In its Decisions on the admission of evidence, 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.⁷ 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) information supporting the Accused's material ability to command and control MLC troops in the Central African Republic ("CAR"); (ii) Accused's knowledge of crimes committed by MLC troops in the CAR; (iii) Accused's failure to take reasonable and necessary measures; and (iv) information challenging the credibility of Defence witnesses.

The materials are probative of issues to be determined at trial

12. 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.⁸ As will be demonstrated in greater detail in Annex A, each of the items proposed for admission provides significant

⁷ See, for example, *Ibid*, para. 14.

⁸ ICC-01/05-01/08-2012-Red, para. 15.

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

13. The proposed items possess sufficient indicia of reliability to warrant their admission into evidence. At the stage of admission of evidence, the Chamber 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.⁹ 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”.¹⁰ 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.

⁹ 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.

¹⁰ ICC-01/05-01/08-2299-Red, para. 9.

Probative value of the evidence against its prejudicial effect

14. 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”.¹¹ 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.¹² In any event, the Chamber held that “[i]f potential prejudice is identified, this will not necessarily 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.”¹³

15. 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 item 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 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.

¹¹ ICC-01/05-01/08-2012-Red, para. 16; and ICC-01/05-01/08-2299-Red, para. 8.

¹² ICC-01/05-01/08-2012-Red, para. 16; and ICC-01/05-01/08-2299-Red, para. 8.

¹³ ICC-01/05-01/08-2012-Red, para. 16; and ICC-01/05-01/08-2299-Red, para. 8.

16. 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

17. 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 30th Day of October 2013

At The Hague, The Netherlands