

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 15/11/2013

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**

Confidential

**Defence Response to the Third Prosecution Application for Admission of
Materials into Evidence Pursuant to Article 64(9) of the Rome Statute**

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 8 November 2013, the Prosecution filed *its Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute*. In this, its third "Bar Table Motion", the Prosecution asked the Chamber to admit seven additional documents into evidence.¹

2. The Prosecution seeks the admission of these documents "for the truth of their contents"² despite having called none of the authors of these materials, nor any individuals who provided the information contained therein to testify at trial.

3. In its *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*, Trial Chamber III ("the Chamber"), gave the parties until 31 October 2013 to file any additional requests for the admission of documents, with responses to the applications due "within seven days of their notification".³ In its Order 2855 of 30 October 2013, the Chamber "extend[ed] the deadline set out in Order 2824 to 8 November 2013".⁴ Pursuant to that extended deadline, the Defence files the following response.

4. Given that both the Prosecution's cover filing and Annex A were filed confidentially,⁵ the Defence also classifies the current filing as confidential.

B. APPLICABLE LAW

5. The Chamber has previously held that, for any tendered item to be admitted into evidence, it must satisfy a three-part admissibility test. Under this test, the

¹ ICC-01/05-01/08-2868-Conf

² ICC-01/05-01/08-2868-Conf, para. 4.

³ ICC-01/05-01/08-2824, para. 13.

⁴ ICC-01/05-01/08-2855, para. 18.

⁵ ICC-01/05-01/08-2868-Conf, para. 8.

Chamber will examine, on a preliminary basis, whether the submitted materials (i) are relevant to the case; (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused by their admission.⁶

6. The Chamber has held that in applying the admissibility test, the Chamber will examine each of the three requirements as follows:⁷

Relevance. The first question is whether a submitted item is relevant in the sense that it "relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused." To pass the relevance test, 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. Put differently, an item will be relevant only if it has the potential to influence the Chamber's determination on at least one fact that needs to be determined to resolve the case. The relevance of an item may be assessed in isolation or in relation to other items of evidence in the case.

Probative value. Under the second part of the admissibility test, the Chamber must consider, on a preliminary basis, whether the item in question has probative value. This will always be a fact-specific inquiry and may take into account innumerable 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. It may also take into account the extent to which the item has been authenticated. While it is not necessary that each item of evidence be authenticated via witness testimony, the Chamber needs to be satisfied that the item is what it purports to be, either because this is evident on its face or because other admissible evidence demonstrates the item's provenance.

Prejudice. Under the third part of the admissibility test, the Chamber must, where applicable, weigh the probative value of the item in question against the prejudicial effect that its admission as evidence "may cause to a fair trial or to a fair evaluation of the testimony of a witness". While this inquiry extends to prejudice to the proceedings as a whole, one

⁶ ICC-01/05-01/08-2012-Red, para. 13.

⁷ ICC-01/05-01/08-2012-Red, paras. 14-16.

important component is the extent to which an item's admission would unfairly prejudice the parties in the presentation of their cases. This will always be a fact-sensitive inquiry and the Chamber 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. If 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.

C. SUBMISSIONS

7. The Defence makes substantive submissions on each of the seven documents for which the Prosecution seeks admission in the appended confidential Annex A.

The whole respectfully submitted.



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Peter Haynes
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Done on the 15th of November 2013

At The Hague, The Netherlands