



Original: English

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**

Public
With Confidential Annex A

Defence Submissions pursuant to the “Order seeking observations on the submission as evidence of items used during the questioning 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:

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. Jean-Jacques Badibanga

Counsel for the Defence

Mr. Aimé Kilolo-Musamba

Mr. Peter Haynes QC

Legal Representatives of the Victims

Ms. Marie-Edith Douzima-Lawson

Mr. Zarambaud Assingambi

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for the Victims

Ms. Paolina Massida

The Office of Public Counsel for the Defence

Mr. Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Mr. Patrick Craig

Detention Section

**Victims Participation and Reparations Other
Section**

A. BACKGROUND

1. On 23 October 2013, Trial Chamber III (“the Chamber”) rendered its *Order seeking observations on the submission as evidence of items used during the questioning of witnesses but not submitted as evidence by the parties or participants*.¹ Appended to the Chamber’s Order was a confidential annex listing 69 documents that had been used by the parties or participants in the proceedings, but for which admission into evidence had not been sought (“Annex A”).²

2. The Chamber noted that “although certain items used during the questioning of witnesses may appear, in principle, relevant to issues under examination, the parties and participants did not submit these items as evidence for the Chamber’s assessment of their admissibility.”³ As such, it informed the parties and participants that it “is considering admitting into evidence the 69 documents listed in confidential Annex”. The Chamber held that:⁴

Should the parties and participants not oppose the admission of any of the listed documents, they may make observations on their relevance, probative value and the prejudicial effect of their admission into evidence, if any. However, should they oppose the admission of the listed documents, the Chamber will make a determination in due course.

3. Accordingly, the Chamber ordered:

The parties and participants to file, by 15 November 2013, their observations on the possible admission into evidence, pursuant to Article 69(3) of the Statute, of the documents referred to in confidential Annex to the present Order, including specific considerations as to the admissibility of each item, if any.

¹ ICC-01/05-01/08-2841.

² ICC-01/05-01/08-2841-Conf-Anx.

³ ICC-01/05-01/08-2841, para. 8.

⁴ ICC-01/05-01/08-2841, para. 10.

4. Pursuant to that order, the Defence files the present submissions.

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 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.⁵

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

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

⁵ ICC-01/05-01/08-2012-Red, para. 13.

⁶ ICC-01/05-01/08-2012-Red, paras. 14-16.

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 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. Document 3 on the Chamber's list in Annex A has already been admitted into evidence pursuant to the Trial Chamber's "*First decision on the prosecution and defence requests for the admission of evidence*" of 15 December 2011.⁷ Moreover, Document 45 and Document 46 of Annex A are listed in E-court as "Admitted pursuant to ICC-01/05-01/08-2299-Conf".

8. The Defence further notes that the transcript reference provided by the Chamber for Document 35 in Annex A does not correspond to the witness listed. There also appears to be an error in the transcripts provided for Document 34.

9. For the remainder, the Defence submits its observations on each of the documents contained in ICC-01/05-01/08-2841-Conf-Anx in Confidential Annex A, appended to the present motion.

⁷ ICC-01/05-01/08-2012-Red, para. 57.

The whole respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 15th of November 2013

At The Hague, The Netherlands