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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
With Confidential Annex A

Defence Response to the Prosecution's Fourth Bar Table Motion

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 29 November 2013, the Prosecution filed its *Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute* ("Fourth Bar Table Motion").¹

2. On 15 November 2013, in its *Decision on the modalities of the presentation of additional testimony pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute*, Trial Chamber III ("the Chamber") ordered that any responses to such applications be filed within seven days of their notification.²

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

B. APPLICABLE LAW

4. 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.³

5. The Chamber has held that in applying the admissibility test, the Chamber will examine each of the three requirements as follows:⁴

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

¹ ICC-01/05-01/08-2909

² ICC-01/05-01/08-2898

³ ICC-01/05-01/08-2012-Red, para. 13.

⁴ ICC-01/05-01/08-2012-Red, paras. 14-16.

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 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

6. The Defence submits that the Chamber has taken an extremely broad approach to the admission of documents pursuant to Article 64(9) of the Rome

Statute, particularly with respect to press reports and media articles and recordings. The Defence, for its part, has consistently adopted the position adopted by Trial Chamber I and Trial Chamber II of the ICC, and the *ad hoc* criminal tribunals that “media reports are generally not considered a source of reliable evidence and their admission is often rejected for lack of probative value.”⁵ The Defence has argued that:⁶

Most recently, in the *Katanga* case, the Chamber rejected the admission of media reports which the Prosecution had sought to admit through a bar table motion. The Chamber held that media reports often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources. Opinion evidence is, in principle, only admissible if it is provided by an expert. In the case of the newspaper accounts proffered by the Prosecution, the Chamber found that it had failed to provide information either of the background or qualifications of the journalists or of their sources, in order to satisfy the Chamber as to their objectivity and professionalism. In such circumstances, the Chamber held it was unable to attach sufficient probative value to the opinions of even informed bystanders such as journalists in relation to the contested facts.

This is reflective of the practice at the ICTY, summarised well in the *Kupreškić* case, where it was held that “newspapers and other kinds of media are very often a highly unreliable source of information is common knowledge. Their reports, unsubstantiated by other material, cannot by themselves be sufficient evidence for a court of law.”

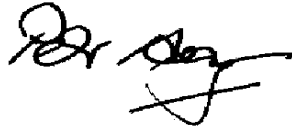
7. The Defence accordingly maintains its objection to the admission of press reports and media articles as set out in its previous filings.⁷ More specifically, the Defence objects to each of the “press articles” submitted for admission by the Prosecution on the grounds set out in the attached confidential Annex A.

The whole respectfully submitted.

⁵ ICC-01/05-01/08-2168, para. 11.

⁶ ICC-01/05-01/08-2168, paras. 36-37, citing Decision on the Prosecutor's Bar Table Motions, 17 December 2010; ICC-01/04-01/07-2635, paras. 29-33 and *The Prosecutor v. Kupreskic et al.* Decision, 3 September 1999, para. 7

⁷ ICC-01/05-01/08-2168, paras. 36-37; ICC-01/05-01/08-2399, para. 9.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Mr. Peter Haynes QC
Counsel of Mr. Jean-Pierre Bemba