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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

**Public Redacted Version of Defence Response to the Prosecution's Motion to
Exclude CAR Documents**

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. INTRODUCTION

1. On 6 September 2012, the Prosecution filed its *Request to Reject the Admission into Evidence of Several Fraudulent Documents Disclosed by the Defence on 12 July 2012 and Submitted on 16 August 2012*, ('Prosecution Motion').

2. The Defence responds to the Prosecution Motion herein. In brief, the Defence contends that it is (i) an inappropriate and premature motion, (ii) it contravenes the Trial Chamber's established procedures for the admission of documents into evidence, (iii) it is based upon no admissible evidence whatsoever, and (iv) it is, furthermore, based upon a number of false assertions.

B. BACKGROUND

3. In March 2008, the Office of the Prosecutor met with [REDACTED] and conducted a lengthy interview.¹ In March 2009, the Prosecution met with [REDACTED], over three days, and similarly interviewed him at length.²

4. The Prosecution called neither individual to give evidence as part of its case (and does not seek to do so now). Despite being key players in the events of 2002 to 2003, and in a position to provide the Chamber with relevant and direct evidence, in particular as regards the nature of MLC's involvement in the operation in Central African Republic ('CAR') and relevant aspects of the command structure of that operation, the Prosecution chose not to call either [REDACTED], nor rely upon their accounts in any respect.

5. In addition, the Prosecution interviewed a comprehensive cross-section of the higher officers of the FACA Etat Major and Army, and individuals from within

¹ CAR-OTP-0008-0219_R01.

² CAR-OTP-0038-0289_R01; CAR-OTP-0038-0313_R01; CAR-OTP-0038-0339_R01.

the Ministry of Defence who had knowledge about the 2002-2003 MLC intervention in the CAR. These included not only [REDACTED],³ Again, the Prosecution called none of them. In addition, the Prosecution produced not one single document as part of its case which emanated from the office of the President of the CAR, the Etat Major of the FACA, or the MLC, intended to illuminate the issue of the command of loyalist forces in the conflict. Instead, the Prosecution elected to present a command responsibility case which predominantly relied on the testimony of civilians.

6. On 12 July 2012, the Defence disclosed fourteen (14) documents from the Central African Republic ('CAR documents') to the parties and participants.⁴ On 13 July 2012, the Defence included the CAR documents on its list of evidence.⁵ The Prosecution did not seek to inspect these documents.

7. On 6 August 2012, the Defence included the CAR documents on its list of documents for the examination of Witness D-53.⁶ This list indicated that the Defence intended to tender each into evidence. The Prosecution did not seek to inspect these documents. Nor did the Prosecution challenge their admission into evidence by way of email as per the proscribed procedure.⁷

8. On 6 September 2012, the Prosecution Motion was filed describing eleven (11) of the CAR documents as "apparently fraudulent,"⁸ and then in the following paragraph as "plainly forgeries."⁹

³ CAR-OTP-0008-0287_R01

⁴ CAR-D04-0003-0128; CAR-D04-0003-0129; CAR-D04-0003-0130 ; CAR-D04-0003-0131 ; CAR-D04-0003-0132 ; CAR-D04-0003-0133 ; CAR-D04-0003-0134 ; CAR-D04-0003-0135 ; CAR-D04-0003-0136 ; CAR-D04-0003-0137 ; CAR-D04-0003-0138 ; CAR-D04-0003-0139 ; CAR-D04-0003-0140 ; CAR-D04-0003-0141.

⁵ ICC-01/05-01/08-2243-Conf-AnxB.

⁶ List of documents which may be used by the Defence for the purpose of examination of Witness CAR-D04-PPPP-0053, documents 56, 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68.

⁷ ICC-01/05-01/08-1470, para. 7.

⁸ ICC-01/05-01/08-2301-Conf, para. 1.

⁹ ICC-01/05-01/08-2301-Conf, para. 2.

9. Three (3) of the documents which share an identical chain of custody are not subject to challenge.¹⁰ The illogicality of this concession as to their authenticity will be underlined below.

B. APPLICABLE LAW

10. Article 64(9)(a) of the Statute provides that the Chamber can "[r]ule on the admissibility or relevance of evidence". When making such a determination, Rule 63(2) of the Rules provides the Chamber with "the authority [...] to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69."

11. As to **when** this assessment should be made, the Trial Chamber has a discretion. The Appeals Chamber has held that in making an admissibility determination under Article 69(4) of the Statute, the Trial Chamber "may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial."¹¹ Alternatively, the Trial Chamber may defer its admissibility assessment until the end of the proceedings.¹²

C. SUBMISSIONS IN RESPONSE TO THE PROSECUTION MOTION

(i) The Prosecution has Failed to Comply with the Procedure set out by the Trial Chamber in Order 1470

12. In May 2011, six months after the start of the proceedings, the Chamber set a procedure by which the parties must comply in order to object to the admission

¹⁰ CAR-D04-0003-0129; CAR-D04-0003-134.

¹¹ ICC-01/05-01/08-1386, para. 37.

¹² ICC-01/05-01/08-2012-Red, para. 12, citing ICC-01/05-01/08-1386, para. 37.

of documents, contained in *Order on the procedure relating to the submission of evidence* ('Order 1470'). Following the circulation of a parties' list of documents for examination of a witness, parties are permitted to object in the following manner:¹³

b. Any objections as regards the relevance or admissibility of the material that the parties identify as intended to be submitted as evidence shall be provided with detailed reasons for preparation purposes by way of an email sent to the opposing party and participants and copied to the Chamber as soon as practicable and before the hearing at which the document is to be submitted as evidence. The objection shall then be formally raised in court at the time the material is submitted to the Chamber. The opposing party will be given an opportunity to respond to the objection orally. The fact that notice of any objection is to be provided by email in advance of the hearing for preparation purposes will not preclude a party from raising any issue related to the relevance or admissibility of the material at the time the evidence is submitted to the Chamber, in accordance with the Rules.

c. Whenever the parties do not raise an objection as regards the relevance or admissibility of an item which is submitted, it will be admitted into evidence and receive an EVD-T number, following consideration by the Trial Chamber. The Chamber will rule on any objections that are raised to the admission of items as evidence in due course.

13. The challenged CAR Documents were included on the Defence List of Evidence filed on 13 July 2012.¹⁴ The Prosecution did not request to inspect them. Twenty four days later, on 6 August 2012, the Defence included the documents in its list for the examination of Witness D-53.¹⁵ This list indicated that the Defence intended to tender all of the CAR documents.

14. In accordance with Order 1470, had the Prosecution wished to challenge the admissibility of the documents, they were required to provide detailed reasons in an email "as soon as practicable and before the hearing at which the document is

¹³ ICC-01/05-01/08-1470, para. 7.

¹⁴ ICC-01/05-01/08-2243-Conf-AnxB.

¹⁵ List of documents which may be used by the Defence for the purpose of examination of Witness CAR-D04-PPPP-0053, documents 56, 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68.

to be submitted as evidence.”¹⁶ This was not done. The reasons given by the Prosecution for not following the procedure set by the Chamber were as follows:¹⁷

MR IVERSON: Madam President, I didn't mean to interrupt Mr Kilolo, but this is the time in the proceedings, as I understand them, where if we have objections we note them, and so I would just like to note the Prosecution's objection to documents 56 through 69 of the Defence list of documents. And I understand we did not submit objections in writing, and that's due to the fact that **I didn't understand that the Defence actually wanted to submit these documents through this witness.** In the past the Defence have continually marked documents to be tendered but they don't actually tender through witnesses, and to me that established kind of an intent that they eventually want to submit evidence but not necessarily through the witness in question. At this time we would object to all those documents, because it's our position that he's in no position to authenticate any of these documents. That's our objection.

This excuse is implausible. The documents had been included as “to be tendered” on the Defence list of documents since 6 August 2012, triggering the Prosecution's obligation to object via email as soon as practicable. Nor can this excuse be reconciled with the Chamber's decision of 15 December 2012, which was clear that the “list of documents” system set in Order 1470 “provides the parties with the flexibility to decide, after questioning a witness, not to request the admission of items previously identified as “intended to be submitted” on its list of documents.”¹⁸ The fact that the Defence, in the past, had decided not to request the admission of documents which had been marked as “to be tendered” was perfectly in line with this decision, and provided no basis for the Prosecution's failure to comply with the Chamber's procedure set out in Order 1470.

15. The Prosecution's failure to raise this via email is not fatal, given that the Chamber also ruled that in Order 1470 a party that does not manage to object by email can raise “any issue related to the relevance or admissibility of the material

¹⁶ ICC-01/05-01/08-1470, para. 7(b).

¹⁷ ICC-01/05-01/08-T-231-Red-ENG WT 16-08-2012 60/67.

¹⁸ ICC-01/05-01/08-2012-Red, para. 161.

at the time the evidence is submitted to the Chamber, in accordance with the Rules.”¹⁹

16. The Prosecution objected at the time on the basis that the expert witness was not in a position to authenticate the documents.²⁰ No challenge was raised to their reliability, nor were any of the challenges or assertions contained in the Prosecution Motion raised in court during the Prosecution questioning of the witness.²¹ It is only now that the Prosecution seeks to impugn the challenged CAR Documents by way of an additional *ex post facto* motion. As such, the Prosecution Motion falls outside the procedure proscribed by the Chamber for objecting to the admissibility of documents, and should accordingly be rejected.

17. Nor is the Prosecution failure to comply with the procedure set out by the Chamber a mere technicality. Consideration of the Prosecution Motion would lead to substantial procedural unfairness. Since 31 May 2011, the Defence has been bound by the constraints of Order 1470.²² The “list of documents” system gives the parties an opportunity to object to documents which are alleged to have insufficient *prima facie* indicia of reliability at the time that admission is sought. Consideration of the Prosecution Motion would potentially re-open to similar objections and litigation the entire evidentiary record of the case to date, lest there be prejudice to the Defence in its previous compliance with the Chamber’s regime for admissibility.

(ii) Even if Admissible the Prosecution Motion is Premature

18. As noted above, the Appeals Chamber has held that a Trial Chamber may defer its admissibility assessment of tendered documents until the end of the

¹⁹ ICC-01/05-01/08-1470, para. 7(b).

²⁰ ICC-01/05-01/08-T-231-Red-ENG WT 16-08-2012 60/67.

²¹ ICC-01/05-01/08-T-231-CONF-ENG ET, at 60.

²² See, for example, ICC-01/05-01/08-2012-Red, paras. 157 - 162.

proceedings.²³ As the Prosecution itself notes, the chain of custody submitted by the Defence shows that the CAR documents were provided to the Defence by the sixth witness on the Defence list.²⁴ The Prosecution appears to be seeking to have the Chamber exclude these documents before his evidence (and the evidence of other relevant Defence witnesses) is heard.

19. The proper course would be to hear and test further evidence as to the authenticity and provenance of the CAR documents, rather than to exclude them before other relevant evidence has been heard. The exclusion of the documents at the present stage would effectively prevent the Chamber from hearing from those Defence witnesses who can give sworn testimony as to factors relevant to their authenticity and reliability, and would be inconsistent with the Chamber's practice thus far,²⁵ and cause significant unfairness to the Defence.

(iii) The Prosecution's Allegations of Fraud are Without Basis

20. Even in the event that the Chamber entertains the Prosecution Motion, notwithstanding the fact that it is procedurally incorrect and/or premature, the Defence submits that the Prosecution's basis to invite the Chamber to determine the provenance, admissibility and reliability of these documents, namely, the acceptance of out-of-court interviews alleging that they are fraudulent, is improper, for the reasons set out below.

(a) The Prosecution's Reliance on Untested Out-of-Court Statements is Improper

21. The primary submission of the Defence in this regard is that the interviews of [REDACTED] contain no admissible evidence at all. Should the Prosecution

²³ ICC-01/05-01/08-1386, para. 37.

²⁴ [REDACTED].

²⁵ ICC-01/05-01/08-2012-Red.

wish to challenge the documents through the evidence of [REDACTED], then the proper procedure would be to seek to call them to present this evidence to the Chamber. The Rules provide for the possibility of calling rebuttal evidence where conditions are met. Simply appending their statements to a Motion has no legal or evidential effect, and prevents the parties, participants and the Chamber from testing the veracity of his evidence through examination. The principle of the “primacy of orality”, which is enshrined in Article 69(2) of the Rome Statute is “one of the cornerstones of the proceedings under the Rome Statute.”²⁶ Out of court statements are admissible in only very limited circumstances prescribed by Rule 68, namely when “both the Prosecutor and the defence have had the opportunity to examine the witness during the recording”. Obviously, this did not occur.

22. The danger in reliance on out-of-court statements is that it precludes the Chamber, the parties and participants from exploring any ulterior motives the witness’ testimony or examining any personal interest in the outcome of the proceedings which could colour the witness’ testimony. This danger is magnified in the case of [REDACTED] given their indisputable personal interest in claiming that the challenged CAR documents have been created after the fact. The decision of the Prosecutor not to call them calls for a necessary inference as regards the unreliability of their account.

23. [REDACTED].²⁷ A live issue in the present case is whether the crimes in question were committed by the MLC troops allegedly commanded by Mr. Bemba, or were committed by the rebels of President Bozizé, the witness’ current hierarchical superior. Notably, the Prosecution was clear during its interview that the allegedly fraudulent documents in question **came from the Defence**.²⁸ Instead of asking for [REDACTED] opinion on the documents in a neutral manner, the

²⁶ ICC-01/05-01/08-1028, para. 8.

²⁷ CAR-OTP-0069-0011.

²⁸ CAR-OTP-0069-0024.

Prosecution lawyer conducting the interview was very clear that all documents came **from the Defence**, before she even showed him the first document. She was also clear that the Prosecution was investigating the **authenticity** and **credibility** of these Defence documents.²⁹ As a result of this deliberate interview technique, the opportunity was lost for [REDACTED] to review and comments on these documents in a neutral manner. His interest and motivation in claiming that these “Defence” documents are falsified should be tested in the courtroom if any weight is to be given to his word.

24. In addition to exculpating his direct superior, [REDACTED] has a second obvious motivation for claiming that the challenged CAR documents have been forged. The CAR documents demonstrate that the MLC contingent in the CAR had in fact been subsumed into the command chain of the FACA.³⁰ [REDACTED]. It is the Prosecution’s case that the crimes in the CAR were committed by the MLC contingent. It is therefore not difficult to identify his motivation for claiming that these documents are falsified. This is the kind of motivation which can be properly explored in a judicial environment, but is out of reach when statements are merely appended to a Prosecution Motion.

25. In addition, the recently conducted interview between the Prosecution and [REDACTED] dated 25 August 2012 makes reference to an earlier meeting with the Prosecution **on 3 August 2012**, namely after the CAR documents were disclosed.³¹ No screening note has been disclosed from this interview. On 16 August, Mr. Iverson stood in court and only objected to the documents on the basis that Witness D-53, the Defence Military Expert, was not in a position to

²⁹ CAR-OTP-0069-0018.

³⁰ CAR-D04-0003-0128; CAR-D04-0003-0129; CAR-D04-0003-0130 ; CAR-D04-0003-0131 ; CAR-D04-0003-0132 ; CAR-D04-0003-0133 ; CAR-D04-0003-0134 ; CAR-D04-0003-0135 ; CAR-D04-0003-0136 ; CAR-D04-0003-0137 ; CAR-D04-0003-0138 ; CAR-D04-0003-0139 ; CAR-D04-0003-0140 ; CAR-D04-0003-0141.

³¹ CAR-OTP-0069-0015.

authenticate them.³² Presuming that Mr. Iverson would have been obliged to tell the Court if the Prosecution had doubt as to their authenticity or believed them to be forgeries, it can only be presumed that at the initial meeting **on 3 August 2012** (for which there was no disclosure), no doubts were raised. The Defence is not asking the Chamber to engage in speculation, but merely notes that these significant and numerous questions as to the circumstances in which the statement was given and the motivation of the witness can only be explored by his appearance before the Chamber in a manner consistent with the practice of this Chamber and the ICC Statute and Rules.

26. The same concerns apply to [REDACTED]. [REDACTED] during the relevant events,³³ and as such has the same evident motivation in putting himself outside the chain of command. The Prosecution lawyer who interviewed [REDACTED] also identified the CAR documents as coming **from the Defence**, before they were shown to him.³⁴ Unlike [REDACTED] no longer lives in the [REDACTED]. However, the Prosecution lawyer who took his statement made it clear that his statement could be provided to the regime in [REDACTED], specifying that that a state can request a copy of witness statements, “et la Court peut decider de transmettre cette declaration à l’État requérant, y **compris la** [REDACTED].”³⁵ [REDACTED] at this point in the interview became demonstrably nervous, asking if he could say yes or no to such a request, and raising concerns with his statement being transmitted to certain states.³⁶ Moreover, he ends his statement with the following disclaimer.³⁷

[REDACTED].

³² ICC-01/05-01/08-T-231-Red-ENG WT 16-08-2012 60/67.

³³ CAR-OTP-0069-0084.

³⁴ CAR-OTP-0069-0095.

³⁵ CAR-OTP-0069-0094.

³⁶ CAR-OTP-0069-0094.

³⁷ CAR-OTP-0069-0103.

As such, [REDACTED] motivations and credibility should also be tested through his sworn testimony and examination by the parties in the normal manner.

27. The Prosecution's invitation to the Chamber to rely on these out-of-court statements is accordingly improper and irreconcilable with the approach to evidence adopted by the Chamber in the present proceedings.

(b) The Prosecution Allegations as to the Authenticity of the CAR Documents are Without Merit

28. Without prejudice to the primary submission of the Defence that the interviews of [REDACTED] do not amount to admissible evidence, it is further submitted that the assertions made therein do not stand up to any sensible scrutiny.

29. To take but one example, [REDACTED] alleges that the document, CAR-D04-0003-0133, is of questionable authenticity because it:³⁸

[REDACTED].

30. The Chamber has heard a wealth of evidence from Prosecution witnesses that the MLC troops were provided with vehicles by the FACA upon their arrival. For example:

- **Witness 173** testified that President Patasse, General Bombayake and the Minister of Defence provided vehicles to the MLC which had FACA or GP licence plates.³⁹
- **Witness 63** said that [REDACTED].⁴⁰

³⁸ [REDACTED].

³⁹ ICC-01/05-01/08-T-146-CONF-ENG ET 25-08-2011 10/60.

⁴⁰ ICC-01/05-01/08-T-110-CONF-ENG ET 17-05-2011 28/55.

- **Witness 6** testified that the MLC had army vehicles that had been requisitioned and provided to them, or vehicles from the administration.⁴¹
- **Witness 119** testified that the Banyamulenge were transporting goods in military vehicles that had been given to them by the Central African Army.⁴²
- **Witness 23** testified that when the Banyamulenge arrived they were on foot, but after 8 November they had four-by-fours, and they also had vehicles with the steering wheel on the right-hand side.⁴³

31. As such, the Prosecution is in effect asking the Chamber to accept and rely upon an out-of-court statement which contradicts its own case and its own witnesses' sworn evidence.

32. Secondly, [REDACTED] impugns documents **all seven documents** shown to him⁴⁴ on the basis that [REDACTED] as at their date.⁴⁵ He then provided the Prosecution with CAR-OTP-0069-0043, which he claims is a document [REDACTED].

33. Firstly, two of the seven challenged CAR documents are dated 17 January 2003 and 20 January 2003, so the Prosecution's challenge to their authenticity on the basis that [REDACTED] cannot be reconciled with [REDACTED] own statement or CAR-OTP-0069-0043, which he provided.⁴⁶

34. Secondly, the statement of [REDACTED] that [REDACTED] was not **appointed** Chef d'Etat Major of the FACA until January 2003 is uncontentious, so far as the Defence is concerned. However, whilst the statement may be technically

⁴¹ ICC-01/05-01/08-T-95-CONF-ENG ET 05-04-2011 12/68.

⁴² ICC-01/05-01/08-T-85-CONF-ENG ET 23-03-2011 17/47.

⁴³ ICC-01/05-01/08-T-51-Red-ENG CT2 WT 21-01-2011 13/53.

⁴⁴ CAR-D04-0003-0130; CAR-D04-0003-0131; CAR-D04-0003-0132 ; CAR-D04-0003-0133 ; CAR-D04-0003-0136 ; CAR-D04-0003-0137 ; CAR-D04-0003-0140.

⁴⁵ ICC-01/05-01/08-2301-Conf, para. 2.

⁴⁶ CAR-D04-0003-0130, CAR-D04-0003-0132.

correct, it is substantially disingenuous, and in no way undermines the challenged CAR documents. [REDACTED] predecessor in the role of Chef d'Etat Major General, General Ernest Mbeti Bangui,⁴⁷ died in early December 2002, after a period of illness. The suggestion that there was no acting or effective Chef d'Etat Major of the FACA during what was a crucial 2-month phase of the conflict is little short of fanciful.

35. In fact, the document which [REDACTED] provided to the Prosecution (CAR-OTP-0069-0043) supports the fact that [REDACTED] was acting as Chef d'Etat Major General during the period during which the CAR documents were issued. The Prosecution asserts that this document, dated shows '[REDACTED]'⁴⁸ In fact, the document reads that:

[REDACTED].

36. As such, this document is **confirming** General Gambi's appointment to the position which he had been filling since his predecessor fell ill.

37. Moreover, General Gambi's assumption of the duties of Chef d'Etat Major finds support in the record of the case. The Chamber will remember the following exchange during the testimony of Prosecution Witness 36, held out by the Prosecution to be a significant "insider" witness:⁴⁹

[REDACTED].

38. The Defence agrees that it is extraordinary that after the close of the Prosecution case the record could be unclear as to who was holding *de facto* and *de jure* positions of power as critical as Chef d'Etat Major General of the FACA

⁴⁷ ICC-01/05-01/08-T-106-CONF-ENG ET 09-05-2011 15/71.

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

during the relevant period. This is a consequence of the Prosecution's failure to meet its burden and cannot be imputed to the Defence. The Prosecution intentionally and actively avoided calling witnesses with knowledge of the operation of the Etat Major General of the FACA in 2002 and 2003. As such, this evidence will be elicited from the Defence witnesses, after which the Chamber will be in a better position to determine the validity (such as it is) of the Prosecution's assertions, and on the basis of testimony given under oath and which has been subjected to examination by the parties, participants and the Chamber.

39. The Prosecution also seeks to impugn these same seven CAR documents on the basis that they indicate that [REDACTED].⁵⁰ This submission mischaracterizes the documents and their contents and form. In fact, these documents do not record [REDACTED] as having **personally** the rank of Brigadier-General as alleged. They merely recite the title of the office of the Chef d'Etat Major General and reflect the fact that the same headed notepaper was used during the period that [REDACTED] was acting Chef d'Etat Major General, and prior to his confirmation in that role.

40. As to the assertion that [REDACTED] signatures are not genuine, the Prosecution has disclosed two documents which it avers were signed by [REDACTED] on 25 August 2012.⁵¹ It is not a proper exercise of a trier of fact's function to indulge in amateur expertise, however, since the Prosecution has done so in its motion, the Defence is compelled to observe that it appears that the signature on these two documents bears striking similarities to those appearing in the challenged CAR documents (given especially the expected developments in a man's signature over a period of ten years).⁵²

⁵⁰ [REDACTED].

⁵¹ CAR-OTP-0069-0043; CAR-OTP-0069-0045.

⁵² CAR-D04-0003-0130; CAR-D04-0003-0131; CAR-D04-0003-0132; CAR-D04-0003-0133; CAR-D04-0003-0136; CAR-D04-0003-0137; CAR-D04-0003-0140.

41. The same problem arises with [REDACTED] denial of his signature,⁵³ given that the signature on the documents he impugns appears to the Defence to be indistinguishable from that on his statement to the Prosecution of 3 September 2012.⁵⁴

42. In any event, if there is a question as to these signatures, this should properly be dealt with through the examination of [REDACTED] by the parties, or through expert graphological testimony or the evidence of an expert document examiner. Again, the Prosecution has taken none of these steps, but merely appended out-of-court statements to a Prosecution Motion and alleged that the signatures are imitations and the documents are fraudulent.

43. Moreover, [REDACTED] impugns document CAR-D04-0003-0138, on the basis that [REDACTED] who was his [REDACTED].⁵⁵ This document is dated 19 January 2003. The witness himself asserts that [REDACTED].⁵⁶ In fact, the evidentiary record of the case demonstrates that [REDACTED].⁵⁷ [REDACTED], on the evidence before the Trial Chamber self evidently **was** [REDACTED]. Sadly, this could well be an example of the kind of lapse of memory to which [REDACTED] refers in his interview.⁵⁸

44. The defence returns to the fact that the prosecution does not challenge the provenance or authenticity of **all** the documents provided by Witness D-011, but only some of them.⁵⁹ By inference, if not presumption, where a witness provides some genuine documentation, the whole of the cache provided by him has to

⁵³ ICC-01/05-01/08-2301-Conf, paras. 12 a, 12 b : concerning CAR-D04-0003-0139 and CAR-D04-0003-0138.

⁵⁴ CAR-OTP-0069-0085.

⁵⁵ [REDACTED].

⁵⁶ CAR-OTP-0069-0096.

⁵⁷ ICC-01/05-01/08-T-97-ENG ET WT 07-04-2011 19/60; See also ICC-01/05-01/08-T-182-ENG ET WT 04-11-2011 21/46; ICC-01/05-01/08-T-184-ENG ET WT 08-11-2011 12/24.

⁵⁸ CAR-OTP-0069-0103.

⁵⁹ See para 9 *supra*.

regarded as *prima facie* provenant and reliable. Moreover, there are substantial and significant similarities which exist between the challenged CAR documents and the Prosecution's own document disclosed in 2009 coming from the *Ministere de la Defense Nationale*,⁶⁰ particularly in terms of layout, font, form and the stamp.

45. Certainly, and at least, without a proper examination of all the evidence from those who provided and/or received these documents, the claims made in both the Prosecution filing and the appended out-of-court statements, cannot be simply accepted at face value. Principles of fairness demand that the Chamber should have as much information as possible before assessing these documents, and should not actively prevent itself from hearing evidence directly relevant to their reliability and provenance.

C. RELIEF REQUESTED

46. There is no evidential basis for the Prosecution's allegations that the CAR documents are forgeries or have been falsified. The interviews upon which the allegations are based are not validly before the Chamber and the Prosecution has acted improperly in trying to place them before the Chamber in the manner that it has.

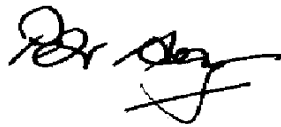
47. The allegations of forgery are also clearly unreliable, contrary to the records of these proceedings and evidently self-serving. The unsubstantiated allegation of forgery are based on the out-of-court statements of two men upon the Prosecution did not to rely during their case against Mr. Bemba, despite their direct knowledge of the events in question. The Prosecution's attempt to have these documents excluded after having failed to comply with the procedure set by the Chamber for challenging the admissibility of documents, and despite the forthcoming Defence witnesses who can testify as to the provenance of these documents, and on the

⁶⁰ CAR-OTP-0042-0237.

basis is pre-emptory and improper. On this basis, the Defence requests that the Chamber:

REJECT the Prosecution's *Request to Reject the Admission into Evidence of Several Fraudulent Documents Disclosed by the Defence on 12 July 2012 and Submitted on 16 August 2012*

The whole respectfully submitted.

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

Peter Haynes, QC

Lead Counsel for Mr Bemba

The Hague, The Netherlands

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