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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 Second
Application for Admission of Evidence from the Bar Table**

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 27 March 2013, Trial Chamber III rendered its *Third Order on the submission of evidence of material used during the questioning of witnesses* (“Third Order”).¹ The Third Order set a deadline of 22 April 2012 for the parties to identify the materials which had been used during the first tranche of Defence Witnesses, that they wished to submit as evidence.²

2. The Third Order reflected the procedure for the admission of documents adopted following the Appeals Chamber’s quashing of the Chamber’s original approach.³ This procedure, established in Order 1470, is that parties “should announce in their respective lists of materials **to be used during questioning of a witness** whether they intended to submit any items into evidence.”⁴

3. In its Third Order, the Chamber noted that “although the parties have continued to indicate their intention to submit items into evidence in their respective lists of documents, since the commencement of evidence by the Defence both parties have failed to materially submit certain items into evidence in court.”⁵ It accordingly ordered the parties to do so.⁶

B. THE PROSECUTION HAS IGNORED AND/OR FAILED TO COMPLY WITH THE THIRD ORDER

4. Rather than complying with the Chamber’s Third Order and identifying materials used during the questioning of Defence witnesses which it intended to admit as evidence, the Prosecution instead filed a so-called bar table motion.⁷

5. Under headings entitled “Items **Related to** the Testimony of [Defence Witness]”, the Prosecution seeks the admission of a large number of documents, a significant proportion of which were not put to nor otherwise used with Defence witnesses, and some which did not even feature on the Prosecution’s lists of evidence for the Defence Witnesses in question.⁸ The Prosecution does not attempt to disguise its approach, asserting that “the admission of evidence from the bar table... will provide evidence while streamlining proceedings **and avoiding the need**

¹ ICC-01/05-01/08-2565-Red.

² ICC-01/05-01/08-2565-Red, para. 6.

³ ICC-01/05-01/08-1386 OA5 OA56.

⁴ ICC-01/05-01/08-1470, para. 7(a).

⁵ ICC-01/05-01/08-2565-Red, para. 5.

⁶ ICC-01/05-01/08-2565-Red, para. 6: “the Chamber hereby ORDERS the parties to identify by 22 April 2013, at the latest, all materials which they wish to submit as evidence ranging in date from the testimony of Witness D04-53 to the testimony of Witness D04-45.”

⁷ ICC-01/05-01/08-2596-Red (“Prosecution’s Second Bar Table Motion”).

⁸ See, for example, CAR-OTP-0069-0636; CAR-OTP-0069-0100; CAR-OTP-0069-0083_R01.

to introduce items listed in Annex A through witnesses (the authors, information providers or custodians).”⁹

6. In fact, this is precisely the exercise in which the Chamber asked the parties to engage. In refusing to do so, the Prosecution is seeking to circumvent the established and more restrictive procedure for the admission of evidence in this case as set out in Order 1470, and is in contravention of the Chamber’s Third Order. The problems with the Prosecution’s approach are more particularly set out below.

7. Firstly, there is an inherent unfairness in seeking the admission of documents on the basis that they “go to the credibility of a witness” without having given the witness the opportunity to comment on the material at hand. If given the opportunity, the witnesses may well have been able to explain to the Chamber how these documents were not in fact inconsistent with their testimony or conclusions, or the witnesses may in fact have wished to revise or explain their evidence in light of the new information contained therein. To deprive the witnesses of this opportunity, but then to seek admission on the basis that material impugns their credibility, is both contrary to the philosophy of the admission of documentary evidence adopted by the Chamber since the Appeals Chamber decision referred to above, and also, patently unfair. By way of example, the Prosecution seeks the admission of CAR-OTP-0069-0043 and CAR-OTP-0069-0045 for no other reason¹⁰ than to allegedly impugn the credibility of General Jacques Seara, a retired French General who gave evidence as a military expert. However, since he was not questioned about this material, General Seara was deprived of the opportunity to demonstrate how CAR-OTP-0069-0043 and CAR-OTP-0069-0045 may not in fact have impacted upon his testimony, credibility or conclusions, or even to revise or explain his evidence in light of these documents as appropriate. The unfairness in this approach is apparent, and falls far outside the procedure set by the Chamber in Order 1470.

8. Moreover, the necessary corollary of adopting and authorising the Prosecution’s approach would be to permit all parties and participants (including the Defence) to submit as evidence any material they might have or discover on the simple basis that it is in some way inconsistent with the evidence called by another party, regardless of the fact that the relevant witnesses were deprived of the opportunity of commenting on these documents during their testimony. This necessarily relegates the importance of oral evidence in the proceedings, and moreover, given the inevitable source of much of the material advanced, would result in “trial by Google”.

⁹ ICC-01/05-01/08-2596-Red.

¹⁰ [REDACTED].

9. Secondly, the Defence does not dispute that certain material can, in particular circumstances, be admissible in criminal proceedings when introduced other than through a witness who is giving oral evidence.¹¹ However, the Defence recalls that the principle of the “primacy of orality”, which is enshrined in Article 69(2) of the Statute is “one of the cornerstones of the proceedings under the Rome Statute.”¹² The Prosecution’s attempt to introduce swathes of un-tested documentary material for the truth of its contents, in lieu of introducing them through witnesses whose evidence can be tested through questioning, cannot be reconciled with this principle. It is worth noting that the Prosecution appealed the Chamber’s first procedure for the admission of evidence in February 2011,¹³ asserting that the principle of orality of proceedings “is in the Prosecution’s view a central aspect of the fairness of the proceedings and the rights of the accused.”¹⁴

10. Thirdly, it is plain that the Prosecution has sought to evade its obligations under the more specific and detailed regime set out by Order 1470, by simply falling back on the broader procedure of a bar table motion. To do so effectively renders the Chamber’s regime under Order 1470 obsolete, and takes the parties back to a system of admission of documents which comes perilously close to that which was criticized and overturned by the Appeals Chamber on 3 May 2011. Moreover, the Prosecution’s decision to circumvent the restrictions of the procedure for the admission of documents set out by the Chamber in Order 1470, means that it has failed to explain why the admission of these documents was not sought during the evidence of witnesses. It is worth noting that at the ICTY, Chambers have refused to admit documents when no explanation was given as to why the documents were not used with witnesses who could have commented upon them.¹⁵ This is relevant to a large number of the documents on the Prosecution list.

11. Lastly, whilst the Defence response to the present filing, more particularly detailed below, is not unduly technical, the Defence cannot fail to observe that the Prosecution’s ignorance of the Third Order is total and complete. No concurrent filing was made pursuant to the Chamber’s Third Order, and no alternative basis for the admission of documents, which were in fact used with Defence witnesses, is advanced. Accordingly, in the Defence submission, absent any concession on its part that material ought to be admitted in the interests of justice, there is no basis for doing

¹¹ *Prosecutor v. Lubanga*, “Decision on the Prosecution’s application for admission of four documents from the bar table pursuant to Article 64(9)”; 16 December 2010; ICC-01/04-01/06-2662; Decision on the Bar Table Motion of the Defence of Germain Katanga”; 21 October 2011; ICC-01/04-01/07-3184.

¹² ICC-01/05-01/08-1028, para. 8.

¹³ Prosecution’s Document in Support of Appeal against Trial Chamber III’s “Decision on admission into evidence of materials contained in the prosecution’s list of evidence”, ICC-01/05-01/08-1022 OA6.

¹⁴ ICC-01/05-01/08-1022 OA6, para. 38.

¹⁵ *Prosecutor v. Milutinovic et al*, Decision on Lukic Defence Motions for Admission of Documents from Bar Table, 11 June 2008, paras. 35, 37-38.

so where such admission is not justified from the bar table pursuant to the test appropriate to such applications.

C. DEFENCE RESPONSE TO THE DOCUMENTS OFFERED FOR ADMISSION

(a) Category 1 – “Items Related to the Testimony of D04-19”

12. **29 video recordings and 29 transcripts of interview:** The Defence firstly notes that the Chamber appears to have already decided to admit the video-recordings without hearing Defence submissions on their admissibility, relevance or probative value. During the testimony of Witness D04-19, the Presiding Judge cautioned the witness in the following terms:¹⁶

[REDACTED]

13. Had the Chamber not already decided to admit the video-recordings as evidence, it would not be in a position to “check” or “compare” his testimony with documents not admitted in the case. As such, the remarks of the Presiding Judge appear to suggest that the issue of the admissibility of the 29 video recordings (and ancillary transcripts) of the interviews conducted by the OTP with Witness D04-19 was effectively *res judicata*, prior to any application being made pursuant to Order 1470 (or indeed any other procedure), in spite of the fact that no party (particularly the Defence) had been heard on the issue. The Defence notes that this is precisely the approach to the admission of evidence which the Appeals Chamber deprecated in its decision of 3 May 2011.¹⁷

14. The Defence remains concerned by this apparent approach to the admissibility and relevance of material within the Prosecution’s original case file and beyond, to which the Chamber might have access. It offends the most basic principles of disclosure for any judgment to be based upon material of which the accused is either ignorant as to its very existence, or its consideration as evidence in his case. The Defence reserves its right to make further submissions elsewhere on this point concerning the intention of the Chamber to review materials not explicitly in evidence in the present case.

15. Nonetheless, the Defence cannot fail to note the heavy irony involved in the Prosecution’s submissions in this regard. The interviews concerned were conducted by the Office of the Prosecutor with a view to garnering evidence against the accused concerning the now-abandoned allegation of Mr Bemba’s individual responsibility for crimes in the CAR. In relation to the charges Mr. Bemba now faces, it is the position of the Defence that both the video interviews and

¹⁶ [REDACTED].

¹⁷ ICC-01/05-01/08-1386 OA5 OA56.

their written transcripts are exculpatory in terms of his now-alleged superior responsibility, and an extremely useful tool for the Chamber as it searches for the truth of the events in question. The Defence regrets greatly that the Prosecution took a deliberate decision not to call witnesses such as Witness D04-19 who have direct knowledge of the events in question, and welcomes the introduction of material with such relevance to the case.

16. However the wider question - Witness D04-19 now having given live evidence - is what relevance his unsworn interviews have if admitted wholesale. The Prosecution submits that these 58 documents should be introduced into evidence for the truth of their contents. That has far-reaching implications, namely that the Prosecution is actually asserting that everything the witness said, on those occasions, for example, about the commission of crimes, his knowledge of such events, and operational command structure during the events in the CAR, is true, and the Prosecution accept it to be so.

17. Of the 29 video-recordings now sought to be admitted, the Prosecution put only short excerpts from 4 to Witness D04-19 during his testimony.¹⁸ Of the 29 transcripts of interview, the Prosecution put only short excerpts from 12 to the witness.¹⁹ This limited use of these materials needs to be viewed in the context of a Prosecution cross-examination which witness spanned 7 court days. However, the admission of the whole of every document and video tape is now sought.

18. As to the general principle of admitting the prior interviews or statements of witnesses who have testified, the Chamber has held previously, that the witnesses in question “each testified in court as to the accuracy of their written statements.”²⁰ This factor, together with the statements having been taken in accordance with the formal requirements of Rule 111, provided “sufficient probative value to justify the statements’ admission”.²¹ This is not the case with the interviews of Witness D04-19. On no understanding of his evidence could it be said that Witness D04-19 “testified as to the [complete] accuracy of the written statements.” Repeatedly throughout his testimony he expressed concerns about the accuracy of the recorded statements, stating, for example:²²

[REDACTED]

¹⁸ CAR-OTP-0012-0011_R01; CAR-OTP-0012-0013_R01; CAR-OTP-0024-0016_R01; CAR-OTP-0056-0429.

¹⁹ CAR-OTP-0020-0191_R02; CAR-OTP-0020-0215_R02; CAR-OTP-0020-0239_R02; CAR-OTP-0020-0263_R02; CAR-OTP-0020-0283_R02; CAR-OTP-0027-0585_R02; CAR-OTP-0027-0607_R02; CAR-OTP-0027-0629_R02; CAR-OTP-0027-0681_R02; CAR-OTP-0027-0681_R02; CAR-OTP-0058-0535; CAR-OTP-0058-0566.

²⁰ ICC-01/05-01/08-2012-Red para. 144.

²¹ ICC-01/05-01/08-2012-Red, para. 144.

²² [REDACTED].

19. Nor did Witness D04-19 accept that the witness statements should be used as evidence in the present case, without the caveat that they be subject to the amendments he had made in his testimony:

[REDACTED]

On this point, it is significant that Witness D04-19 was only given the opportunity to comment upon or revise short excerpts of 12 of the 29 transcripts. As such, the criteria applied by the Chamber in previously instances in this case in order to assess probative value of prior written statements of testifying witnesses has not been met.

20. However, notwithstanding its overall procedural submissions *supra*, the Defence has no objection to the wholesale admission of D04-19's interviews in both video and transcript form, on the basis that the whole of their contents are accepted to be true, subject to the witness' comments and explanations during his oral evidence.

21. **10 "signature documents"**²³: the Defence notes that CAR-OTP-0056-0439 and CAR-OTP-0024-0004_R01 were not put to the witness during his examination, and their admission solely for the purpose of allegedly impugning the credibility of the witness' testimony is improper and unfair for the reasons set out above.

22. Concerning the remaining 8 "signature documents", the Prosecution seeks their admission solely on the basis that the Chamber should engage in amateur graphology, compare these signatures to other signatures of Witness D04-19, and find that they undermine his credibility. Firstly, had the Prosecution wished these documents to be admitted solely for that purpose, the proper procedure would have been to seek to reopen its case to call a graphological expert in order to provide the Chamber with expert testimony concerning the Prosecution's theory as regards Witness D04-19's signature. Secondly, the Defence strenuously contests the Prosecution's own amateur attempts to analyse these signatures. CAR-ICC-0001-0085 and CAR-ICC-0001-0086 do not show "a different signature by the witness",²⁴ (indeed the witness' ability to reproduce the signature in evidence, involving as it does, an at least partial inversion of the document to be signed, shows an ability to make a virtually unique mark or signature) and the Prosecution again mistakes a signature with an "initial" or "paraph" – a confusion which plagued this part of its questioning of the witness. Given that the sole basis for the admission of these documents is the

²³ CAR-OTP-0011-0381; CAR-OTP-0011-0382; CAR-OTP-0011-0383; CAR-OTP-0011-0384; CAR-OTP-0011-0385; CAR-OTP-0011-0375_R01; CAR-OTP-0056-0439; CAR-OTP-0024-0004_R01; CAR-ICC-0001-0085; CAR-ICC-0001-0086.

²⁴ ICC-01/05-01/08-2596-Red, para. 11.

Prosecution's own analysis of the various "marks" upon documents, the Defence submits that the criteria for admission has not been met, and contests their admission as evidence in the case.

23. **6 "internal CAR Defence memoranda"**²⁵: the Prosecution has failed to provide any particularised submissions as regards the provenance or probative value of these documents. As such the Chamber is not in a position to evaluate their admissibility, and the Defence objects to their admission.

24. **2 media articles:**²⁶ the Defence firstly recalls its position generally that the admission of media articles cannot be reconciled with the consistent jurisprudence of Trial Chambers I and II (and Her Honour Judge Kuniko Ozaki)²⁷ that media reports are generally not considered a source of reliable evidence and their admission is generally rejected for lack of probative value.²⁸ Trial Chamber I has held that "generally, newspaper articles cannot usually be relied upon to report with sufficient reliability the events they purport to address".²⁹ Similarly, Trial Chamber II has held that "[m]edia reports often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources."³⁰ That Chamber highlighted that opinion evidence is only admissible when provided by an expert, and refused to admit into evidence several media reports where the Prosecution had failed to satisfy the Chamber as to their objectivity. Her Honour Judge Ozaki has adopted this approach,³¹ and stated further that "[e]ven when media reports appear to describe contemporary events objectively, the authors of these reports often rely on hearsay, and there are no guarantees that the sources have been selected impartially."³² On this basis alone, the Defence opposes the admission of the 2 media articles in general, and in particular for the truth of their contents as sought by the Prosecution.

25. In any event, the 2 media articles in question do not even meet the much lower standard for admission set by the Majority of the Chamber.³³ CAR-OTP-0013-0114 consists of a single-page extract from an apparently larger newspaper "Le Citoyen", however there is no attached front page or other sections of the newspaper to provide sufficient indicia of reliability.³⁴ The Prosecution has failed to make any particularised submissions on the indicia of reliability or probative value of this

²⁵ CAR-OTP-0042-0235; CAR-OTP-0042-0236; CAR-OTP-0042-0242; CAR-OTP-0042-0243; CAR-OTP-0042-0246; CAR-OTP-0042-0253.

²⁶ CAR-OTP-0013-0114; CAR-OTP-0030-0274.

²⁷ ICC-01/05-01/08-2300-Red.

²⁸ As set out in ICC-01/05-01/08-2186, para. 35.

²⁹ ICC-01/04-01/06-2589-Anx, pp. 14-15.

³⁰ ICC-01/04-01/07-2635, para. 31.

³¹ ICC-01/05-01/08-2300-Conf, para. 5.

³² ICC-01/05-01/08-2300-Conf, para. 4.

³³ ICC-01/05-01/08-2012-Red, paras. 99-100.

³⁴ ICC-01/05-01/08-2012-Red, para. 97.

1-page extract. Not only does it not identify its author, the author does not identify his or her sources. The Defence further notes that an extract allegedly coming from “Le Citoyen” has previously been admitted by Majority over Defence objection, after the Chamber took into account that a witness had been questioned on the content of the article in question and was aware of the events discussed.³⁵ In this case, Witness D04-19 was read the contents of CAR-OTP-0013-0114, and not only testified that he had never heard of the events in question, but also gave quite lengthy testimony about why the events could not in fact have taken place.³⁶ As such, CAR-OTP-0013-0114 is not admissible under the criteria previously set by the Chamber.

26. Similarly, CAR-OTP-0030-0274 consists of a 2-page printout from a webpage with no author identified. Again, it was put to Witness D04-19, and not only had he never heard of its contents, he provided sworn testimony as to why the article was inaccurate.³⁷ The Prosecution has failed to provide any particularised submissions on the indicia of reliability of this printout. The Defence accordingly objects to its admission.

27. **Map**³⁸: the Defence contests the Prosecution’s basis for admission, which is its self-serving interpretation of its relevance. Witness D04-19 did not annotate the map during his testimony, unlike the other maps admitted into evidence in this case by the Chamber,³⁹ by contrast he testified that he found it difficult to see on the screen as presented.⁴⁰ The Prosecution has made no submissions indicating of the provenance or accuracy of the map in question. As such, the Defence objects to its admission.

(b) Category 2 – “Items Related to the Testimony of D04-45”

28. **“Script/Notes”**⁴¹: The Defence notes that the admission of the notes in question has already been decided, and the Prosecution has provided no basis warranting reconsideration or review of the Chamber’s decision. Witness D04-45 was erroneously permitted to enter the video-link location with this item of his personal property, being notes he had taken of issues about which he intended to discuss during his testimony. The witness was visibly making no attempt to hide the notes, which were on the table in front of him, in view of the parties and the Chamber.⁴² Witness

³⁵ ICC-01/05-01/08-2012-Red, para. 94.

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ CAR-ICC-0001-0087

³⁹ ICC-01/05-01/08-2012-Red, para. 31.

⁴⁰ [REDACTED].

⁴¹ CAR-ICC-0001-0089.

⁴² ICC-01/05-01/08-T-299-CONF-ENG ET 21-03-2013 p. 32: When I arrived at the waiting room here on the first day of my testimony, it was on that day that I started taking notes. When I got into the room, a court officer was there. The court staff who were with me were present. I did not hide anything.”... ICC-01/05-01/08-T-300-CONF-

D04-45 testified that he thought he was going to have to make a speech, or a statement to the Court about what he remembered about the events in the CAR, and did not understand that in fact his testimony would involve a question and answer session.⁴³ It was in this context that he prepared these notes or talking points. This evidence was unchallenged.

29. Having noted this procedural anomaly, the Presiding Judge asked the parties to make submissions on the appropriate next steps. After the Prosecution requested that the notes be seized, circulated to the parties, and entered into evidence, the Presiding Judge's position was unequivocal:⁴⁴

[REDACTED]

Her Honour ruled that the notes should be taken from the witness and returned to him at the end of his testimony.⁴⁵

30. A week later, following the completion of the examination by the Defence, and notably with no further submissions having been made on the issue, the Presiding Judge [REDACTED].⁴⁶ The Presiding Judge cited "previous practice" of the Chamber. In fact the one instance to which the Presiding Judge referred was inapposite, given that the witness in question (who was in fact an expert witness) had been willing for his notes to be distributed to the parties.⁴⁷

31. Given that the Defence had concluded its examination of Witness D04-45, the Defence objected contemporaneously on the basis that this late reversal of the Presiding Judge's original decision was prejudicial to the Defence. No legal or factual basis was given for the reconsideration. When the Defence asked for such a basis, the Presiding Judge asserted as follows:

PRESIDING JUDGE STEINER: Mr Haynes, a document was sent to the parties for the benefit of the parties before the end of the testimony of the witness, otherwise it would become moot. The reasons that may have driven the Chamber to decide to disclose this document before the end of the testimony **are part of the deliberations of the Chamber, and the Chamber is of the view that the Chamber doesn't need to give any explanations on the issue to the Defence,**

ENG ET 22-03-2013 page 24 "no-one - stopped me from bringing those documents into the courtroom."

⁴³ ICC-01/05-01/08-T-300-CONF-ENG ET 22-03-2013 p. 25: I thought that the Judges were going to call me and hear my testimony regarding the facts as I experienced them and that when I finish that testimony, or that statement, then the Judges will begin to put questions to me. But when I got here, I had to face questions which I did not expect. In my mind, I thought that the Presiding Judge was going to ask me to make an opening statement about everything that had happened in the Central African Republic during the operations from the beginning to the end, that is what I expected, but now the questions that came up, I really did not expect them. Now, the fact that I mentioned a few facts and questions in that -- in those notes was simply to help me in my testimony.

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ ICC-01/05-01/08-T-265-CONF-ENG ET 30-10-2012, p. 12: PRESIDING JUDGE STEINER: "Thank you, Mr Witness. Since it appears that the witness is not bothered by the fact that the notes are taken, I'll ask, please, court usher to take the notes from the witness and provide after the break copies to the parties in this hearing and to the Chamber."

or to whoever. So if this is what Defence wanted to listen, we can go back and try to advance on the testimony of this witness.

32. In any event, the reconsideration of the Presiding Judges' decision concerned only her decision to seize the notes and distribute them to the parties for use during questioning. [REDACTED]. The parties are entitled to rely on decisions from the Chamber in the conduct of the proceedings as being final. On this basis, the Defence objects to this second attempt on behalf of the Prosecution to have the same document admitted, this time from the bar table, but remarkably not on the basis that it was used with the witness during his evidence.

33. The Defence submits that the Presiding Judge's original decision is correct in law. Firstly, on any version of events, the notes in question are an aide-memoire. Even as a "script" as suggested by the Prosecution, or a series of points about which the witness wanted to remind himself on his understanding that he would be giving a statement or speech,⁴⁸ aide-memoires are not admissible as evidence particularly when – as was the case with Witness D04-45 – the notes were removed from him before he started his testimony. All Prosecution witnesses were given the opportunity to read through their prior recorded statements before taking stand, and this did not give rise to admissibility on the part of these written statements into evidence. Secondly, the evidence of Witness D04-45 bore almost no resemblance to the notes. Upon questioning, his detailed descriptions of the fighting in PK12, the battles in Damara, in Bossangoa, and the retreat of the MLC troops from the CAR, was all evidence that fell outside the scope of the content of the notes, and was not subject to any substantial challenge during examination by the Prosecution. The Prosecution assertion that the mere existence of the notes impugns his credibility ignores the fact that the vast majority of Witness D04-45's evidence was credible, detailed, and substantially unchallenged. Notably, the Prosecution does not attempt to identify the points on which it asserts he should be disbelieved on the basis of the existence of these notes. Simply alleging that the notes are relevant to "credibility" is insufficient to ascribe them admissibility in the present case.

34. **5 Media Reports:**⁴⁹ The Defence repeats and relies on its general observations on media reports set out in detail above. In particular, the Defence objects to CAR-OTP-0005-0131 as it was not put to the witness during his examination, and its admission solely for the purpose of allegedly impugning the credibility of the witness' testimony is improper and unfair for the reasons set out above.

⁴⁸ ICC-01/05-01/08-T-300-CONF-ENG ET 22-03-2013 page 25.

⁴⁹ CAR-OTP-0005-0131; CAR-OTP-0005-0129; CAR-OTP-0031-0011; CAR-OTP-0010-0471; CAR-V02-0001-0165.

35. In addition, as regards CAR-OTP-0005-0131 and CAR-OTP-0005-0129, the Chamber has now heard significant, corroborated and consistent Prosecution and Defence evidence that RFI made baseless allegations against the MLC, and at the time there was doubt as to the truth of their reporting.⁵⁰ Against a backdrop of consistent jurisprudence from Trial Chambers I and II of the ICC declining to admit media reports on the basis that they cannot be relied upon to report with sufficient reliability the events they purport to address, the Defence submits that these RFI radio reports do not contain sufficient indicia of reliability to be admissible given the evidence heard in this case concerning this media outlet's approach to the MLC at the time of these reports. This is particularly so in light of the failure of the Prosecution to provide any particularized submissions as to their accuracy or reliability, and when the Prosecution seeks to admit the document for the truth of its contents. The Defence objects to the admission of these documents. The Defence also objects to CAR-OTP-0031-0011 on the basis that it has no evidential value, and cannot serve to "authenticate" handwritten dates on other documents without its author having been called to give evidence. Had the authenticity of these reports been important to the Prosecution case, the proper course would have been to call the authors or RFI archivists to authenticate these transcripts or recordings and face questioning by the parties and Chamber.

36. As regards the *Jeune Afrique* article CAR-OTP-0010-0471, the Prosecution is seeking its admission for the truth of its contents as a prior statement of Mr. Bemba made to a journalist. The fact that it purports to be a transcript of an interview with Mr. Bemba, yet is not acknowledged, signed or even initialled by him renders it inadmissible, particularly for the truth of its contents. The Chamber has previously granted a Prosecution objection, and prevented the Defence from even questioning a Prosecution witnesses on a *procès-verbal* on which she had rejected her signature, despite it being written in her name. To then allow the Prosecution to admit a purported *procès-verbal* of an interview with the Accused, which has not been initialled, is inconsistent with this practice.⁵¹ This is particularly so given that the document is an internet printout, and exhibits insufficient indicia of reliability as regards its source of provenance. Its admission is also inconsistent with the principle of the primacy of orality, given that Mr. Bemba appears on the Defence witness list but has not yet testified. The Defence further objects on the basis that it falls outside the temporal jurisdiction of the charges.

37. Concerning CAR-V02-0001-0165, the Defence notes that the Prosecution is seeking only the admission of the article entitled "Pillage à Mongoumba", and not the newspaper as a whole, in

⁵⁰ [REDACTED]; ICC-01/05-01/08-T-298-CONF-ENG ET 20-03-2013 p.65; ICC-01/05-01/08-T-305-CONF-ENG ET 11-04-2013 page 59.

⁵¹ ICC-01/05-01/08-T-79-CONF-ENG ET 03-03-2011 page 18.

contravention of the Chamber's stated preference for admission of whole documents rather than excerpts.⁵² The Defence objects to its admission on the basis that although no author is identified, the source appears to be "AFP", which the Defence assumes means *Agence France Presse*. However, no AFP reference, date or article name is given. The Chamber has previously rejected the admission of media articles citing to other news agencies, where "the Chamber has not been able to verify that the information they contain emanates from the media source or institution they purport to emanate from."⁵³ The same should apply to the present document. This is particularly so given that the article was put to Witness D04-45 and he knew nothing about the events in question,⁵⁴ in contrast to other media reports which the Chamber considered admissible because, *inter alia*, the witness in question acknowledged the contents.⁵⁵ In addition, it is plain, as the witness testified, that the article was allegedly filed from "Kigali", being some 3000 kilometres away from the events about which it purported to report, and that it represented Mongoumba as being 200 kilometres east of Bangui, whereas the witness recalled to the Chamber that the map used during his testimony placed Mongoumba due south.⁵⁶ Given this basic inaccuracy, in addition to the factors outlined above, the Defence objects to its admission as evidence in the case, either for the truth of its contents or otherwise.

38. The Defence rejects the Prosecution submission that CAR-OTP-0064-0265 is inconsistent with Witness D04-45's testimony on the withdrawal of troops, and as such objects to its admission. As regards CAR-OTP-0042-0255, the Defence objects to its admission on the basis that the Prosecution has provided no particularised submissions as to its provenance or indicia of reliability, and as such it is inadmissible under the regime established by the Chamber.

(c) Category 3 – "Items Related to the Testimony of D04-53"

39. It is in relation General Seara that the Prosecution steps the furthest outside the bounds of the regime established by the Chamber in Order 1470. Of the 6 documents for which the Prosecution seeks admission allegedly to impugn the General's credibility, only one was shown to him during his testimony. The Defence accordingly objects to their admission for the reasons set out above. The Defence notes that the sole justification given for the admission of each of these documents is the "credibility of witness". In such circumstances when they were never presented to the witness for his comment or explanation, their admission would be manifestly unfair and cause prejudice to the Defence.

⁵² ICC-01/05-01/08-2299-Red, para. 96, citing ICC-01/05-01/08-1470, para. 11; ICC-01/05-01/08-2012-Red, para. 20.

⁵³ ICC-01/05-01/08-2299-Red, para. 113.

⁵⁴ ICC-01/05-01/08-T-300-CONF-ENG ET 22-03-2013 page 17.

⁵⁵ ICC-01/05-01/08-2299-Red, para. 94.

⁵⁶ ICC-01/05-01/08-T-300-CONF-ENG ET 22-03-2013 page 20.

40. The Defence, moreover, notes that attacks on the “credibility” of independent expert witnesses strike at the very heart of the ICC’s procedures for the designation of professionals to that role. To suggest that a former General in the army of the Republic of France has been untruthful is a very serious allegation indeed, and should not be made by counsel without the clearest evidence. The Defence regrets the Prosecution submissions in this regard

41. **Out-of-Court Statements:**⁵⁷ The Defence notes that the Prosecution’s attempt to admit the out-of-court statements of [REDACTED] falls outside the statutory regime of the ICC. As recalled by the Chamber in its *First decision on the prosecution and defence requests for the admission of evidence*, Article 69(2) contains a presumption that “the testimony of a witness at trial shall be given in person.” 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”. This did not (and evidently, will not) occur.

42. Should the Prosecution have wished to challenge the credibility of General Seara through evidence from [REDACTED], the proper procedure would have been to seek to call them as witnesses. The Rules allow for the possibility of calling rebuttal evidence where conditions are met. 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 these individuals given their indisputable personal interest in claiming that the challenged CAR documents were created after the fact. The decision of the Prosecutor not to call them calls for a necessary inference as to its perception of their reliability. The Chamber has, moreover, during the Defence case, heard evidence that the now deposed Bozizé regime, of which they were both part, was lacking in credibility. The deposition of that regime, and the apparent lack of immediate action by the UN or the ICC is a matter deserving of judicial notice.

43. At the time he gave the out-of-court statement, [REDACTED]⁵⁸ 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’ then hierarchical superior. Notably, the Prosecution was clear during its interview that the allegedly fraudulent

⁵⁷ CAR-OTP-0069-0010; CAR-OTP-0069-0083_R01.

⁵⁸ CAR-OTP-0069-0011.

documents in question **came from the Defence**.⁵⁹ Instead of asking for [REDACTED] opinion on the documents in a neutral manner, the Prosecution lawyer conducting the interview was very clear that all documents came **from the Defence**, before he even showed him the first document. He was also clear that the Prosecution was investigating the **authenticity** and **credibility** of these Defence documents.⁶⁰ 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.

44. In addition to exculpating his then 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.⁶¹ [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 if the out-of-court statements are admitted from the bar table.

45. In addition, the 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 by the Defence.⁶² No screening note has been disclosed from this interview. On 16 August 2012, Mr. Iverson stood in court and only objected to the documents on the basis that Witness D04-53 was not in a position to authenticate them.⁶³ Presuming that Mr. Iverson would have been obliged to tell the Chamber if the Prosecution had doubts 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 Statute and Rules.

⁵⁹ CAR-OTP-0069-0024.

⁶⁰ CAR-OTP-0069-0018.

⁶¹ 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.

⁶² CAR-OTP-0069-0015.

⁶³ ICC-01/05-01/08-T-231-Red-ENG WT 16-08-2012 60/67.

46. The same concerns apply to [REDACTED]. [REDACTED],⁶⁴ 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.⁶⁵ Unlike [REDACTED] no longer lives in [REDACTED] or works directly for [REDACTED]. However, the Prosecution lawyer who took his statement made it clear that his statement could be provided to the regime [REDACTED] specifying that that a state can request a copy of witness statements, “et la Cour peut décider de transmettre cette déclaration à l’État requérant, [REDACTED].”⁶⁶ [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.⁶⁷ Moreover, he ends his statement with the following disclaimer.⁶⁸

[REDACTED]

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

47. On this point, the Defence notes that the Chamber has previously refused to admit the statement of Prosecution Witness 209, who testified in the present proceedings, as the Prosecution sought its admission to fill the gaps in his testimony. Relevantly, the Chamber reasoned that:⁶⁹

[a]dmitting Witness 209’s statement for the purpose sought by the prosecution would encourage the parties to rely on favourable answers contained in written statements rather than trying to elicit the same information through testimony, due to the risk that the witness’ answers in court may be less favourable than those in his written statement. **Permitting such an approach would be incompatible with the presumption in favour of oral testimony. It would also raise reliability concerns because written statements are not subjected to the same degree as testing as oral evidence.**

The same considerations apply *a fortiori* to the out-of-court statements of non-witnesses, for whom the Chamber has been completely deprived of the opportunity to test their credibility to any extent. The Prosecution’s request to the Chamber to admit these out-of-court statements is accordingly improper in accordance with the Statute and Rules, and irreconcilable with the approach to evidence adopted by the Chamber in the present proceedings.

⁶⁴CAR-OTP-0069-0084.

⁶⁵CAR-OTP-0069-0095.

⁶⁶CAR-OTP-0069-0094.

⁶⁷CAR-OTP-0069-0094.

⁶⁸CAR-OTP-0069-0103.

⁶⁹ICC-01/05-01/08-2012-Red para. 153.

48. **“CAR Documents”:**⁷⁰ The Defence not only contests the Prosecution’s submissions as to the relevance of these documents to the testimony and conclusions of General Seara, but also notes that the Prosecution has provided the Chamber with no particularised submissions as to the reliability or provenance of these documents, and as such objects to their admission.

49. **Video and Corresponding Transcript:**⁷¹ The Defence disagrees with the Prosecution’s self-serving characterisation of what this video purports to demonstrate in terms of Mr. Bemba’s ability to command troops. Firstly, the Defence notes that the Prosecution showed less than a minute of the 47 minutes of footage to General Seara,⁷² but now seeks the admission of the entire video. The Prosecution says that this extract “clearly shows that the Accused had the ability to communicate and thus, command, from Gbadolite”.⁷³ In fact, the video shows nothing more than the accused speaking on what appears to be a communication device, to an unidentified person or persons, in Lingala, with no translation provided. That the Prosecution believes this footage to be relevant to its command responsibility case is more demonstrative of the weakness of its case than any evidentiary relevance of this extract. The irrelevance of this extract to any reasonable assessment of Mr. Bemba’s command responsibility was not lost on the military expert who testified as follows:⁷⁴

I can’t speak on that, having seen this video, because we don’t know what happened before. We don’t know what happens afterwards. What happened before this communication? Did somebody set it up for him, get it working? He had a connection there. What happened before that in order to establish that communication link? We know nothing about that. That doesn’t change my mind.

50. As such, the Defence submits that the video and accompanying transcript are not relevant to the credibility of General Seara’s testimony or conclusions, nor is it relevant to the question of command, as alleged, and the Defence objects to its admission.

(d) Category 4 – “Items Related to the Testimony of D04-65”

51. **L’Otage du Général Rebelle Centrafricain François Bozizé:**⁷⁵ The Defence disputes the Prosecution’s basis for seeking the admission of Mr. Ndouba’s book, but does not object to its admission in principle.

(e) Category 5 – “Items Related to the Testimony of D04-07”

⁷⁰ CAR-OTP-0069-0043; CAR-OTP-0069-0045.

⁷¹ CAR-OTP-0068-0002 and CAR-OTP-0066-0318.

⁷² ICC-01/05-01/08-T-233-CONF-ENG CT 21-08-2012 page 56.

⁷³ [REDACTED].

⁷⁴ ICC-01/05-01/08-T-233-CONF-ENG CT 21-08-2012 page 56.

⁷⁵ CAR-DEF-0002-0108.

52. **Media Report:**⁷⁶ The Defence repeats its objection set out above to media articles in general. In particular, this one-page printout, allegedly from some kind of press “bulletin” cites no author or sources, and has no indicia of reliability such as a front-page or masthead. While the Prosecution says it was prepared “in the ordinary course of the organisation’s activities”,⁷⁷ it provides no basis for this assertion, nor is it clear how this relates to this report’s provenance or reliability, which the Defence submits have not been established. In any event, the document was not put to Witness D04-07 during his testimony, and as such its admission to allegedly impugn his credibility is manifestly unfair for the reasons set out above

(f) Category 6 – “Items Related to the Testimony of D04-57”

53. **International Crisis Group Report:**⁷⁸ The Defence objects to the admission of this 48-page report, one sentence of which was shown to Witness D04-57. The report alleges that [REDACTED] at some unspecified time and for some unspecified period, and no source is identified for this allegation. [REDACTED],⁷⁹ [REDACTED]. In such circumstances, the simple statement that the report comes from a “reputable international organisation” is insufficient to demonstrate indicia of reliability, and the Defence objects to its admission. Moreover, the report was published in December 2007 and as such falls far outside the temporal limitations of this case.

(g) Category 7 – “Other”

54. **MLC Statute:** This document was not used with any of the Defence witnesses listed in the Chamber’s Third Order, and as such the Defence objects to its admission.

E. RELIEF REQUESTED

55. As such, the Defence respectfully requests that the Chamber:

REJECT the Prosecution request for the admission of documents 1 to 11; 70 to 91 and 93 to 95 from Confidential Annex A of the Prosecution’s Second Bar Table Motion; and **ADMIT** documents 12 to 69 and 92 from Confidential Annex A of the Prosecution’s Second Bar Table Motion.

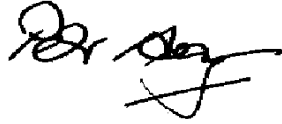
The whole respectfully submitted.

⁷⁶ CAR-OTP-0013-0118.

⁷⁷ [REDACTED].

⁷⁸ CAR-OTP-0069-0148.

⁷⁹ [REDACTED].

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 Jean-Pierre Bemba

Done at The Hague, the Netherlands

31 March 2014