

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 the First decision on the prosecution and defence
requests for the admission of evidence, dated 15 December 2011**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Petra Kneuer

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo-Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Fiona Mckay

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) hereby issues the following Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011.

I. Background and Submissions

1. On 19 November 2010, the Trial Chamber issued its “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence” (“November 2010 Decision”),¹ in which it ruled, by majority, that “any materials, including witnesses’ written statements and related documents previously disclosed to the defence and which will form part of the prosecution’s Revised List of Evidence are *prima facie* admitted as evidence for the purpose of the trial.”² Both the Office of the Prosecutor (“prosecution”) and defence lodged requests for leave to appeal the decision,³ which were granted.⁴
2. On 3 May 2011, the Appeals Chamber issued its “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision

¹ Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 19 November 2010, ICC-01/05-01/08-1022; *see also* Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 23 November 2010, ICC-01/05-01/08-1028.

² ICC-01/05-01/08-1022, paragraph 35.

³ Prosecution’s Application for Leave to Appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 29 November 2010, ICC-01/05-01/08-1059; Application for leave to appeal Trial Chamber III’s decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 29 November 2010, ICC-01/05-01/08-1061.

⁴ Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169.

of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution's list of evidence’” (“Appeal Judgment”),⁵ in which it reversed the November 2010 Decision. The Appeal Judgment held, *inter alia*, that “the Trial Chamber erred when it made a ‘*prima facie* finding of the admissibility’ of the evidence listed on the Revised List of Evidence without assessing the evidence on an item-by-item basis.”⁶

3. On 31 May 2011, the Chamber issued its “Order on the procedure relating to the submission of evidence” (“Order 1470”),⁷ requesting the parties to file a list of all materials “included in their lists of documents and used in the questioning of witnesses from the commencement of the trial until and including the testimony of Witness 209, as well as any other material used in court since the commencement of the trial until and including the testimony of Witness 209, which they wish to submit as evidence.”⁸ Prospectively, Order 1470 also established a procedure for the submission of evidence that would apply after the completion of Witness 209’s testimony.⁹

⁵ Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution's list of evidence”, 3 May 2011, ICC-01/05-01/08-1386.

⁶ ICC-01/05-01/08-1386, paragraph 57; *see also ibid.*, paragraphs 2, 52-53 and 59.

⁷ Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1470; *see also* Partly Dissenting Opinion of Judge Kuniko Ozaki on the Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1471.

⁸ ICC-01/05-01/08-1470, paragraph 3.

⁹ ICC-01/05-01/08-1470, paragraphs 7-8.

4. On 14 June 2011, the prosecution filed its list of materials to be admitted into evidence ("Prosecution Submission").¹⁰ The Prosecution Submission contains an item-by-item explanation of the reasons why the prosecution believes the items on its list are admissible.¹¹
5. On 14 June 2011, the defence filed its list of materials to be admitted into evidence ("Defence Submission").¹² Apart from general observations regarding several procès-verbaux,¹³ the Defence Submission does not explain why the defence believes the items on its list are admissible.
6. On 21 June 2011, the prosecution filed its objection to the admission into evidence of some of the items listed in the Defence Submission ("Prosecution Response").¹⁴
7. Also on 21 June 2011, the defence filed its objection to the admission into evidence of some of the items listed in the Prosecution Submission ("Defence Response").¹⁵

¹⁰ Prosecution's submission of the list of materials it requests to be admitted into evidence, 14 June 2011, ICC-01/05-01/08-1514; Annex A to the Prosecution's submission of the list of materials it requests to be admitted into evidence, 14 June 2011, ICC-01/05-01/08-1514-Conf-AnxA.

¹¹ ICC-01/05-01/08-1514-Conf-AnxA.

¹² Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l'ordonnance de la Chambre du 31 mai 2011, 14 June 2011, ICC-01/05-01/08-1515-Conf.

¹³ ICC-01/05-01/08-1515-Conf, paragraphs 2-3.

¹⁴ Prosecution's Response to the Defence's "Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l'ordonnance de la Chambre du 31 mai 2011", 21 June 2011, ICC-01/05-01/08-1557-Conf; Annex A to Prosecution's Response to the Defence's "Liste des documents que la Défense entend faire valoir comme éléments de preuve conformément à l'ordonnance de la Chambre du 31 mai 2011", 21 June 2011, ICC-01/05-01/08-1557-Conf-AnxA.

¹⁵ Defence Response to the Prosecution's List of documents to be submitted into evidence pursuant to Trial Chamber III's order of 31 May 2011, 21 June 2011, ICC-01/05-01/08-1558-Conf.

8. On 27 June 2011, the prosecution filed its reply to the Defence Response, in which it challenges the objections contained in the Defence Response.¹⁶ The defence did not file a reply to the Prosecution Response.
9. In addition to the items listed in the Prosecution and Defence Submissions, the parties have each requested the admission of items discussed during the testimonies of several witnesses who followed Witness 209 – namely, Witnesses 31, 33, 47, 65, 69, 108, 110, 112, 169, 173, 213 and 219. In this Decision, the Chamber will rule on the admissibility of the items contained in the Prosecution and Defence Submissions, as well as items submitted up until the completion of Witness 213's testimony.
10. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber has considered Articles 64(2), 64(9)(a), 67 and 69 of the Statute and Rules 63, 64 and 68 of the Rules of Procedure and Evidence ("Rules") in making its determination.

II. Analysis and Conclusions

11. Article 64(9)(a) of the Statute provides the Chamber with the power to "[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

¹⁶ Prosecution's Reply to the "Defence Response to the Prosecution's list of documents to be submitted into evidence pursuant to Trial Chamber III's order of 31 May 2011", 27 June 2011, ICC-01/05-01/08-1564-Conf; Annex A to Prosecution's Reply to the "Defence Response to the Prosecution's list of documents to be submitted into evidence pursuant to Trial Chamber III's order of 31 May 2011", 27 June 2011, ICC-01/05-01/08-1564-Conf-AnxA.

its relevance or admissibility in accordance with article 69.” Article 69(4) of the Statute directs the Chamber to “tak[e] into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness [...]”. The Chamber is also guided by Article 69(3) of the Statute, which permits it “to request the submission of all evidence that it considers necessary for the determination of the truth” and Article 64(2) of the Statute, which requires the Chamber to ensure that the trial is fair and expeditious, and is conducted with full respect for the rights of the accused. Further, the Chamber may consider the form or manner in which evidence is presented, giving due regard to the desirability of witnesses giving evidence orally in accordance with Article 69(2) of the Statute, while at the same time acknowledging that the Statute and Rules contain “a clear recognition that a variety of other means of introducing evidence may be appropriate”.¹⁷

12. The Appeals Chamber has held that in making an admissibility determination under Article 69(4) of the Statute, the Trial Chamber is afforded a measure of discretion. 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.”¹⁸ Alternatively, the Trial Chamber may defer its admissibility assessment until the end of the proceedings.¹⁹ Irrespective of the timing of the assessment, however, the Trial Chamber is required “to

¹⁷ Corrigendum to Decision on the admissibility of four documents, 20 January 2011, ICC-01/04-01/06-1399-Corr, paragraph 22; *see also* Corrigendum to Redacted Decision on the defence request for the admission of 422 documents, 8 March 2011, ICC-01/04-01/06-2595-Red-Corr, paragraph 37.

¹⁸ ICC-01/05-01/08-1386, paragraph 37.

¹⁹ *Ibid.*

consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings”.²⁰

13. In applying the principle of free assessment of submitted evidence to determine its relevance or admissibility pursuant to Rule 63(2) of the Rules, it is important to refer to the three-part test formulated by Trial Chamber I and adopted, with slight variations, by Trial Chamber II.²¹ Under this test, the Chamber examines, on a preliminary basis, whether the submitted materials (i) are relevant to the trial; (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused from their admission.²² Each part of the inquiry is discussed in more detail below.

14. **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.”²³ 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.²⁴ Put differently, an item will be relevant only if it has the potential

²⁰ *Ibid.*

²¹ Corrigendum to Decision on the admissibility of four documents, 20 January 2011, ICC-01/04-01/06-1399-Corr, paragraphs 27-32; ICC-01/04-01/06-2595-Red-Corr, paragraph 39; Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 27 August 2010, ICC-01/04-01/07-2289-Corr-Red, paragraph 13.

²² ICC-01/04-01/06-1399-Corr, paragraphs 27-32; ICC-01/04-01/06-2595-Red-Corr, paragraph 39; ICC-01/04-01/07-2289-Corr-Red, paragraph 13.

²³ ICC-01/04-01/06-1399-Corr, paragraph 27; ICC-01/04-01/06-2595-Red-Corr, paragraph 39.

²⁴ Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, paragraph 16; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, paragraph 41; *see also* R. May, *International Criminal Evidence*, (Transnational Publishers, 2002), page 102; D. Piragoff in O. Triffterer (Ed.),

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.

15. 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.²⁵ 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.²⁶ 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.²⁷

16. 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".²⁸ While

Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article (C.H. Beck, 2nd ed., 2008), page 1322, MN 37.

²⁵ ICC-01/04-01/06-1399-Corr, paragraphs 28-29; ICC-01/04-01/06-2595-Red-Corr, paragraph 39.

²⁶ ICC-01/04-01/06-1399-Corr, paragraphs 28-29; ICC-01/04-01/06-2595-Red-Corr, paragraph 39; *see also* V. Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Martinus Nijhoff, 2008), pages 412-13; *Archbold International Criminal Courts: Practice, Procedure and Evidence*, (Sweet & Maxwell, 3rd Ed., 2009), pages 711-12, §9-60.

²⁷ ICC-01/04-01/07-2635, paragraph 22.

²⁸ Article 69(4) of the Statute; *see also* ICC-01/04-01/06-1399-Corr, paragraphs 31-32; ICC-01/04-01/06-2595-Red-Corr, paragraph 39.

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.²⁹ 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.³⁰ 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.³¹

17. Where a challenge has been made to an item's admissibility, the burden rests on the party seeking admission of the item to demonstrate its admissibility.³² If an item's admissibility is uncontested, this will weigh heavily in favour of admission, and the Chamber will exclude the item only if one or more elements of the three-part test above are clearly not met.³³

18. Finally, it is important to note that the Chamber's admissibility inquiry has no bearing on the Chamber's final determination of the weight that it will give to any particular item of evidence. That task is to be performed at the end of the case when the Chamber assesses the evidence as a whole.

²⁹ Piragoff, *supra*, note 24, page 1325, MN 45.

³⁰ Archbold, *supra*, note 26, page 711, §9-59.

³¹ *Ibid.*

³² ICC-01/04-01/06-1399-Corr, paragraph 25.

³³ ICC-01/05-01/08-1470, paragraph 7(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 [...] following consideration by the Trial Chamber").

Thus, any factual analysis undertaken in this Decision is preliminary in nature and has been performed for the limited purpose of the Chamber's admissibility determination. It does not in any way predetermine the eventual assessment of the evidence or the weight to be afforded to it.

19. The Chamber has identified 13 categories of materials whose admission has been sought by the parties. These categories will be considered in turn below, in accordance with the three-part test outlined above.

1. Sketches

i. Prosecution Submission

20. The prosecution requests the admission of three sketches. The first (CAR-ICC-0001-0001 (public)) was drawn in court by Witness 38, during the prosecution's questioning.³⁴ The second (CAR-ICC-0001-0004 (confidential)) was modified from document CAR-OTP-0007-0529_R02 by Witness 22 during the prosecution's questioning.³⁵ The third (CAR-ICC-0001-0009 (confidential)) was modified from document CAR-OTP-0027-0808 by Witness 42 in court during the prosecution's questioning.³⁶ With regard to the first two sketches, the prosecution argues that they are relevant and probative to show the scene of the alleged crimes and the existence of an armed conflict, and that their admission will not prejudice

³⁴ Transcript of hearing on 23 November 2010, ICC-01/05-01/08-T-33-CONF-ENG ET, page 28, line 8 to page 30, line 22 and page 34, line 6 to page 41, line 24.

³⁵ Transcript of hearing on 30 November 2010, ICC-01/05-01/08-T-40-CONF-ENG ET, page 23, line 6 to page 25, line 21 and transcript of hearing on 1 December 2010, ICC-01/05-01/08-T-41-CONF-ENG CT2, page 5, line 22 to page 9, line 9.

³⁶ Transcript of hearing on 14 December 2010, ICC-01/05-01/08-T-65-CONF-ENG ET page 49, line 3 to page 52, line 12.

the accused because the defence had the opportunity to question the witnesses about them.³⁷ As for the third sketch, the prosecution submits that its admission will assist the Chamber in understanding the witness' in-court testimony, and that it is relevant to, and probative of, the presence and organization of the *Mouvement de Libération du Congo* ("MLC") at PK12.³⁸

21. The defence does not object to the admission of the sketches submitted by the prosecution.

ii. Defence Submission

22. The defence requests the admission of six sketches. The first (CAR-ICC-0001-0002 (public)) is a modified version of document CAR-ICC-0001-0001, the admission of which is sought by the prosecution. This sketch was modified by Witness 38 in court during the defence's questioning.³⁹ The second sketch was drawn by Witness 82 when the witness met with prosecution investigators in Bangui.⁴⁰ The defence questioned Witness 82 on this sketch in court.⁴¹ The third and fourth sketches⁴² were drawn by Witness 119 when the witness met with prosecution investigators. The defence questioned Witness 119 on the sketches in court.⁴³ The fifth

³⁷ ICC-01/05-01/08-1514-Conf-AnxA, pages 1 and 3.

³⁸ ICC-01/05-01/08-1514-Conf-AnxA, page 8.

³⁹ Transcript of hearing on 25 November 2010, ICC-01/05-01/08-T-35-CONF-ENG ET, page 26, line 11 to page 29, line 8; page 32, line 8 to page 39, line 15.

⁴⁰ CAR-OTP-0028-0040 (confidential).

⁴¹ Transcript of hearing on 4 February 2011, ICC-01/05-01/08-T-60-CONF-ENG CT, page 4, line 8 to page 11, line 7.

⁴² CAR-OTP-0044-0155_R01 (confidential) and CAR-OTP-0044-0178_R01 (confidential), respectively.

⁴³ Transcript of hearing on 24 March 2011, ICC-01/05-01/08-T-87-CONF-ENG CT, page 4, line 7 to page 11, line 24.

sketch⁴⁴ is an annotated version of CAR-OTP-0038-0396, which was modified by Witness 110 in court during the defence's questioning.⁴⁵ The sixth sketch (CAR-ICC-0001-0076) was drawn by Witness 31 in court.⁴⁶ The defence fails to explain why it believes that the sketches are admissible.

23. The prosecution does not object to the admission of the sketches submitted by the defence.⁴⁷

iii. Analysis

24. The sketches' relevance and probative value derive from their creation and use. They were drawn or modified by witnesses at the time they gave evidence before the Chamber and were used by the parties during their questioning. The sketches will therefore assist the Chamber to understand the witnesses' evidence. The sketches are also relevant because, as visual representations of the areas in which the crimes under consideration allegedly took place and/or the locations of MLC troops, they will enable the Chamber to contextualise the evidence presented on the alleged commission of the criminal acts. There is no suggestion that admitting the sketches will cause any prejudice. For these reasons, and because the parties do not object to the sketches' admission, the Chamber will admit them.

⁴⁴ CAR-ICC-0001-0068 (confidential).

⁴⁵ Transcript of hearing on 14 June 2011, ICC-01/05-01/08-T-128-CONF-ENG CT2, page 7, line 18 to page 24, line 19.

⁴⁶ Transcript of hearing on 7 November 2011, ICC-01/05-01/08-T-183-CONF-ENG, page 62, line 4 to page 68, line 7; page 70, line 22 to page 71, line 10.

⁴⁷ ICC-01/05-01/08-1557-Conf-AnxA, pages 1, 4 and 8.

25. In light of the above, the Chamber admits into evidence documents CAR-ICC-0001-0001, CAR-ICC-0001-0004, CAR-ICC-0001-0009 submitted by the prosecution, and documents CAR-ICC-0001-0002, CAR-OTP-0028-0040, CAR-OTP-0044-0155_R01, CAR-OTP-0044-0178_R01, CAR-ICC-0001-0068 and CAR-ICC-0001-0076, submitted by the defence.

2. *Maps*

i. Prosecution Submission

26. The prosecution requests the admission of six maps. The first is a map of Bangui,⁴⁸ and the second is a map of the Central African Republic (“CAR”).⁴⁹ Both maps were annotated by Witness 6 in court during the prosecution’s questioning, from the originals CAR-OTP-0007-0321 and CAR-OTP-0030-0131, respectively.⁵⁰ The prosecution argues that these maps are relevant to show the contextual elements under Articles 7 and 8 of the Statute.⁵¹ It further submits that the maps have probative value because Witness 6 (i) has sufficient knowledge of the CAR to locate certain towns on the maps;⁵² and (ii) as the prosecutor who investigated the relevant events at the national level, is able to identify the locations of the alleged crimes.⁵³ The prosecution argues that admitting the maps will

⁴⁸ CAR-ICC-0001-0065 (confidential).

⁴⁹ CAR-ICC-0001-0066 (public).

⁵⁰ Transcript of hearing on 4 April 2011, ICC-01/05-01/08-T-94-CONF-ENG ET, page 13, line 20 to page 15, line 20; transcript of hearing on 5 April 2011, ICC-01/05-01/08-T-95-CONF-ENG CT, page 24, line 12 to page 27, line 18.

⁵¹ ICC-01/05-01/08-1514-Conf-AnxA, pages 15-17.

⁵² ICC-01/05-01/08-1514-Conf-AnxA, pages 15-17.

⁵³ ICC-01/05-01/08-1514-Conf-AnxA, page 17.

cause no prejudice because they were used in court during the testimony of Witness 6 and because the defence had notice, since they were tendered by the prosecution during its questioning.⁵⁴

27. The third and fourth⁵⁵ maps whose admission is sought by the prosecution were annotated by Witness 169 in court⁵⁶ from the original CAR-OTP-0030-0131.⁵⁷ The fifth⁵⁸ and sixth⁵⁹ maps are of the CAR, as annotated by Witness 213 during the prosecution's questioning,⁶⁰ showing the CAR locations where, according to Witness 213, the accused visited during the period covered by the charges and where Witness 213 saw dead bodies. These maps are annotated from the original CAR-OTP-0030-0154.

28. The defence does not object to the admission of the maps.

ii. Defence Submission

29. The defence requests the admission of four maps. The first is a map of Bangui, used during the questioning of Witness 68.⁶¹ The second is a map of the CAR and bordering areas of the Democratic Republic of the Congo ("DRC"), which was used during the confirmation of charges hearing in the pre-trial proceedings in the *Bemba* case and shown to Witness 68 in

⁵⁴ ICC-01/05-01/08-1514-Conf-AnxA, pages 16-17.

⁵⁵ CAR-ICC-0001-0070 (confidential) and CAR-ICC-0001-0071 (confidential).

⁵⁶ Transcript of hearing on 4 July 2011, ICC-01/05-01/08-T-137-CONF-ENG ET, page 12, line 8 to page 16, line 20.

⁵⁷ Transcript of hearing on 4 July 2011, ICC-01/05-01/08-T-137-CONF-ENG ET, page 12, line 8 to page 16, line 20; page 37, line 20 to page 40, line 16.

⁵⁸ CAR-ICC-0001-0077 (confidential).

⁵⁹ CAR-ICC-0001-0078 (confidential).

⁶⁰ Transcript of hearing on 15 November 2011, ICC-01/05-01/08-T-187-CONF-ENG ET, page 9, line 14 to page 14, line 22; page 30, line 16 to page 32, line 23.

⁶¹ CAR-D04-0002-1081 (public).

court.⁶² The third map was used during the questioning of Witness 29 and shows the south of the CAR.⁶³ The fourth map is the unannotated version of the map of the CAR (CAR-OTP-0030-0154) that Witness 213 altered in court.⁶⁴ The defence fails to explain why it believes that the maps are admissible.

30. The prosecution opposes the admission of the second map tendered by the defence (CAR-ICC-0001-0007) and argues that the document does not constitute “evidence” pursuant to Article 69(4) of the Statute, as it is a “[p]rosecution-generated slide produced solely for the purpose of these proceedings”.⁶⁵ The prosecution also asserts that Witness 68 cannot provide a sufficient basis for the map’s admission.⁶⁶

iii. Analysis

31. As a preliminary matter, the Chamber notes that no objections have been raised to the admission of nine of the maps: the six submitted by the prosecution (CAR-ICC-0001-0065, CAR-ICC-0001-0066, CAR-ICC-0001-0070, CAR-ICC-0001-0071, CAR-ICC-0001-0077 and CAR-ICC-0001-0078), and three of the four submitted by the defence (CAR-D04-0002-1081, CAR-D04-0002-1286 and CAR-OTP-0030-0154) All nine of these maps were annotated by witnesses during their in-court testimony and/or were the subject of questioning by the parties. For this reason, and because the

⁶² CAR-ICC-0001-0007 (confidential).

⁶³ CAR-D04-0002-1286 (public).

⁶⁴ Transcript of hearing on 15 November 2011, ICC-01/05-01/08-T-187-CONF-ENG ET, page 9, line 18 to page 14, line 22.

⁶⁵ ICC-01/05-01/08-1557-Conf-AnxA, page 6.

⁶⁶ ICC-01/05-01/08-1557-Conf-AnxA, page 6.

maps show the areas in which the crimes were allegedly committed, they are relevant and probative, and may assist the Chamber's assessment of the witnesses' testimony and its understanding of the location of the alleged crimes. There is no suggestion that admitting the maps will cause prejudice, a possibility made even less likely because the parties had the opportunity to question the witnesses about the maps. The nine unopposed maps will be admitted on this basis.

32. Turning to the one map whose admissibility is disputed (CAR-ICC-0001-0007), the Chamber is not persuaded that it is relevant. While the defence used the map during its questioning of Witness 68 as a means of locating the witness' residence in relation to Bangui, the Ubangi River and the DRC, the witness was unable to identify those locations.⁶⁷ The witness did not mark the map and did not give any substantive testimony in relation to it. As such, its admission would not assist the Chamber in assessing the witness' testimony. Nor would its admission otherwise assist the Chamber to understand the geographic area covered by the charges, particularly given the admission of the nine maps discussed above. For these reasons, the Chamber is not persuaded that CAR-ICC-0001-0007 is relevant and therefore refuses to admit it.

33. In light of the above, the Chamber admits into evidence documents CAR-ICC-0001-0065, CAR-ICC-0001-0066, CAR-ICC-0001-0070, CAR-ICC-0001-0071, CAR-ICC-0001-0077, CAR-ICC-0001-0078, CAR-D04-0002-1081, CAR-D04-0002-1286 and CAR-OTP-0030-0154.

⁶⁷ Transcript of hearing on 18 January 2011, ICC-01/05-01/08-T-49-CONF-ENG ET, page 38, line 3 to page 45, line 21.

3. *Expert-related materials*

i. Prosecution submission

34. The prosecution requests the admission of (i) the *curriculum vitae* of Dr Adeyinka Akinsulure-Smith (Witness 221),⁶⁸ her expert report on sexual violence and post-traumatic stress disorder,⁶⁹ and its translation;⁷⁰ (ii) the *curriculum vitae* of Dr William Samarin (Witness 222),⁷¹ his expert report on linguistics,⁷² and its translation;⁷³ (iii) the *curriculum vitae* of Dr André Tabo (Witness 229),⁷⁴ his expert report on the use of sexual violence as a tool of war,⁷⁵ and its translation.⁷⁶ The prosecution submits that all three expert reports are relevant and probative because they formed the basis of the respective expert witnesses' testimonies, and that their admission into evidence will cause no unfair prejudice because (i) they were disclosed to the defence in advance of the testimony; and (ii) the defence had the opportunity to question all expert witnesses on their reports.⁷⁷ With regard to the experts' *curricula vitae*, the prosecution argues that they are relevant and probative to demonstrate the qualifications and expertise of the experts in their respective fields.⁷⁸ The prosecution further submits that the admission of the three *curricula vitae* is not prejudicial because

⁶⁸ CAR-OTP-0054-0943 (confidential).

⁶⁹ CAR-OTP-0064-0560 (confidential).

⁷⁰ CAR-OTP-0064-0621 (confidential).

⁷¹ CAR-ICC-0001-0012 (confidential); ICC-01/05-01/08-705-Conf-AnxA (confidential).

⁷² CAR-OTP-0064-0305 (confidential).

⁷³ CAR-OTP-0064-0577 (confidential).

⁷⁴ CAR-OTP-0054-0961 (confidential); ICC-01/05-01/08-1248-Conf-AnxA (confidential).

⁷⁵ CAR-OTP-0065-0023 (public).

⁷⁶ CAR-OTP-0065-0043 (public).

⁷⁷ ICC-01/05-01/08-1514-Conf-AnxA, pages 2, 11-13.

⁷⁸ ICC-01/05-01/08-1514-Conf-AnxA, pages 2, 12-14.

(i) they were disclosed to the defence in advance of the expert witnesses' testimonies; and (ii) the defence had the opportunity to question the experts.⁷⁹

35. The defence does not object to the admission of the expert-related documents.

ii. Analysis

36. The Chamber considers that the above-mentioned materials are relevant,⁸⁰ probative and not prejudicial for the reasons advanced by the prosecution. For these reasons, and because the defence does not object to the admission of the expert-related materials, the Chamber admits into evidence documents CAR-OTP-0064-0560, CAR-OTP-0064-0621, CAR-OTP-0054-0943, CAR-OTP-0064-0305, CAR-OTP-0064-0577, CAR-ICC-0001-0012, CAR-OTP-0065-0023, CAR-OTP-0065-0043 and CAR-OTP-0054-0961.

4. *Medical reports and certificates*

i. Prosecution submission

37. The prosecution requests the admission of a medical certificate⁸¹ and a medical report⁸² related to Witness 22. The prosecution argues that the

⁷⁹ ICC-01/05-01/08-1514-Conf-AnxA, pages 2-3, 12-13 and 14.

⁸⁰ In this regard, the Chamber recalls its oral decision of 29 March 2010, in which it accepted the prosecution submission of expert witnesses and determined that the proposed subjects of expertise – which the reports focus upon – were relevant to the issues at trial.

⁸¹ CAR-OTP-0004-0316 (confidential).

documents (i) are relevant and probative to show that the witness is HIV positive; (ii) support Witness 22's testimony and bolster her credibility; (iii) were not produced for the purpose of the trial; and (iv) would not prejudice the defence if admitted because they were disclosed in advance of the trial and because the defence had the opportunity to question the witness on their content.⁸³

38. The prosecution also requests the admission of a medical certificate related to Witness 68.⁸⁴ The prosecution contends that the certificate is relevant and probative to prove the rape of the witness, as it "makes it more probable than not that the witness's rape occurred during the events, or at the very least an inference may be drawn from the fact that she sought medical assistance for rape in [November] 2002".⁸⁵ The prosecution further submits that the certificate contains sufficient indicia of reliability, and that its admission would not be prejudicial to a fair trial because (i) "it was received from the witness and provides support to her testimony about the time-frame within which her rape occurred";⁸⁶ and (ii) the defence was on notice that the prosecution intended to tender the certificate into evidence and questioned Witness 68 on its content.⁸⁷

39. The defence objects to the admission of all three documents. *First*, the defence contends that the medical certificate and medical report of Witness 22 are not relevant to an issue in the case, as they "neither prove,

⁸² CAR-OTP-0007-0569 (confidential).

⁸³ ICC-01/05-01/08-1514-Conf-AnxA, pages 3-5.

⁸⁴ CAR-OTP-0020-0442 (confidential).

⁸⁵ ICC-01/05-01/08-1514-Conf-AnxA, page 5.

⁸⁶ ICC-01/05-01/08-1514-Conf-AnxA, page 6.

⁸⁷ ICC-01/05-01/08-1514-Conf-AnxA, page 6.

nor disprove that the witness in question was the subject of rape or sexual violence, and do not identify physical injuries consistent with rape.”⁸⁸ The defence further contends that the documents do not indicate an infection resulting from any alleged sexual assault, and in any event, the contraction of HIV is not an element of the crimes charged against the accused.⁸⁹ For these reasons, the defence submits that the admission into evidence of Witness 22’s medical certificate and medical report “would have a prejudicial effect far outweighing any probative value.”⁹⁰

40. *Second*, the defence challenges the probative value and reliability of the medical certificate tendered through Witness 68.⁹¹ The defence notes that the certificate was prepared in 2004, two years after the witness was allegedly attacked, and that there is no explanation as to why no such certificate was prepared when the witness first met with the medical authorities in November 2002.⁹² The defence contends that this, combined with the certificate’s lack of an address or telephone number, undermines the document’s probative value and reliability.⁹³

41. The prosecution replies that Witness 22’s medical certificate and medical report are “relevant to confirm her testimony that she was raped by multiple soldiers and infected with the HIV virus by the MLC troops.”⁹⁴ The prosecution contends that these facts “constitute aggravation [sic] evidence that is relevant at the sentencing phase” and that admitting the

⁸⁸ ICC-01/05-01/08-1558-Conf, paragraph 10.

⁸⁹ ICC-01/05-01/08-1558-Conf, paragraph 10.

⁹⁰ ICC-01/05-01/08-1558-Conf, paragraph 10.

⁹¹ ICC-01/05-01/08-1558-Conf, paragraph 11.

⁹² ICC-01/05-01/08-1558-Conf, paragraph 11.

⁹³ ICC-01/05-01/08-1558-Conf, paragraph 11.

⁹⁴ ICC-01/05-01/08-1564-Conf, paragraph 5.

documents now will avoid recalling the witness later on.⁹⁵ With respect to Witness 68's medical certificate, the prosecution argues that it is irrelevant that the document was prepared two years after the alleged rape, and that the lack of an address or telephone number on the document "is not proof that the report concerned another person and does not cast a doubt on its reliability."⁹⁶

ii. Analysis

42. All three medical documents are relevant since they tend to corroborate the testimony of Witnesses 22 and 68 regarding their alleged rapes and will therefore assist the Chamber in assessing that testimony.

43. There is no merit to the defence argument that the documents do not *prove* that the witnesses were raped or sexually assaulted by MLC troops.⁹⁷ An item need not prove a fact at issue to be relevant. Rather, an item is relevant if it has the capacity to make a fact at issue more or less probable than it would be without the item.⁹⁸ The three documents at issue here do not, by themselves, prove that Witnesses 22 and 68 were in fact raped by MLC troops or that Witness 22 was infected with HIV as a result. But they make those factual propositions more probable than they would otherwise be because the documents tend to corroborate the testimony of Witness 22 (who testified that she was raped by MLC troops and contracted HIV) and Witness 68 (who testified that she was raped by MLC troops). The

⁹⁵ ICC-01/05-01/08-1564-Conf, paragraphs 5 and 8.

⁹⁶ ICC-01/05-01/08-1564-Conf, paragraphs 9-10.

⁹⁷ ICC-01/05-01/08-1558-Conf, paragraph 10.

⁹⁸ *See supra*, paragraph 14.

documents are therefore relevant to the Chamber's determination of facts at issue in this case.

44. The Chamber is not persuaded by the defence arguments regarding the (non) relevance of the transmission of HIV to the issues in the case.⁹⁹ While it is correct that HIV transmission is not an element of the crime of rape, this does not render the medical documents irrelevant. In the case of conviction, it may be relevant as an aggravating factor in sentencing or to show the harm allegedly suffered by victims for the purposes of reparations.¹⁰⁰

45. While the defence is correct that Witness 22's medical report (CAR-OTP-0007-0569) does not, by itself, establish a causal link between the witness' HIV status and her alleged rape,¹⁰¹ this does not render the document irrelevant. As explained above, an item need not *prove* a fact in issue to be relevant; it simply must have the capacity to make a fact at issue more or less probable than it would otherwise be.¹⁰² Witness 22's medical report satisfies that threshold. While it does not establish that Witness 22 was infected with HIV *as a result* of her alleged rape, it *tends* to show that Witness 22 contracted HIV, which is a necessary (although insufficient) condition for a finding that she contracted HIV as a result of the alleged rape in 2002. For this reason, the medical records are relevant to facts that may be in issue in the event of a conviction – namely, whether Witness 22's HIV status resulted from her alleged rape by MLC troops.

⁹⁹ ICC-01/05-01/08-1558-Conf, paragraph 10.

¹⁰⁰ See Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, paragraph 28.

¹⁰¹ ICC-01/05-01/08-1558-Conf, paragraph 10.

¹⁰² See *supra*, paragraph 14.

46. In terms of probative value, the documents possess sufficient indicia of reliability to warrant their admission into evidence. They were authenticated in court by Witnesses 22 and 68, who recognised the documents and discussed them at length. The documents also possess other indicia of reliability, including the seals and letterheads of established medical providers, and appear to have been produced in the ordinary course of those organisations' operations.

47. The Chamber is not persuaded by the defence argument that Witness 68's medical certificate is inadmissible because it was not prepared contemporaneously with the alleged rape and lacks an address or telephone number.¹⁰³ These factors do not undermine the reliability of the document to such a degree that it becomes inadmissible. They simply go to the weight that the Chamber will afford the document in its final determination.

48. Finally, the Chamber concludes that any prejudicial effect that could flow from admitting the documents does not outweigh their probative value. While the Chamber acknowledges that the emotional resonance of information regarding HIV transmission has the potential to distract from the salient issues in a case, such a risk is minimal here. Moreover, any potential prejudice is reduced because the defence had an opportunity to question Witnesses 22 and 68 on the basis of their medical documents and

¹⁰³ ICC-01/05-01/08-1558-Conf, paragraph 11.

on the alleged deficiencies or inconsistencies therein, which will, of course, be assessed by the Chamber when it determines the weight to be given to these documents.

49. In light of the above, the Chamber admits into evidence documents CAR-OTP-0004-0316, CAR-OTP-0007-0569 and CAR-OTP-0020-0442.

6. Academic articles and reports.

i. Prosecution Submission

50. The prosecution requests the admission of two academic articles co-authored by expert witness Dr André Tabo.¹⁰⁴ The prosecution argues that the first article, entitled "*Ces maux sans mots: l'impact des violences sexuelles subies par les femmes centrafricaines*", is relevant and probative because it served as a basis for Dr Tabo's expert report.¹⁰⁵ The prosecution submits that the second article, entitled "*Quels problèmes sanitaires posent les violences chez les femmes lors des conflits armés ? L'expérience de Bangui, Centrafrique*", is relevant and probative because it "analyses the impact of sexual violence in Bangui after the 2002-2003 events through the medical problems which victims of sexual violence are confronted with."¹⁰⁶ The prosecution submits that admitting the articles would not cause any prejudice because (i) they were disclosed to the defence in advance of

¹⁰⁴ CAR-OTP-0065-0173 (public) and CAR-OTP-0065-0178 (public).

¹⁰⁵ ICC-01/05-01/08-1514-Conf-AnxA, page 14.

¹⁰⁶ ICC-01/05-01/08-1514-Conf-AnxA, page 15.

Dr Tabo's testimony; and (ii) the defence had the opportunity to question Dr Tabo on their content.¹⁰⁷

51. The defence does not object to the admission of the articles.

ii. Defence Submission

52. The defence requests the admission of three reports. The first report, published by the United Nations Development Program, is entitled "*La RCA: Une étude de cas sur les armes légères*",¹⁰⁸ and is tendered through Witness 119. The second report, tendered through Dr Tabo, is an "Epidemiological Fact Sheet" on AIDS and HIV in the DRC, published by the World Health Organisation, UNAIDS and UNICEF in 2008.¹⁰⁹ The third report was published in 2004, and is entitled "*Rapport National République Centrafricaine, Objectifs du millénaire pour le développement*".¹¹⁰ It is also tendered through Dr Tabo. The defence fails to explain why it believes that the reports are admissible.

53. The prosecution does not object in principle to the admission of the three reports tendered by the defence, but asserts that they should have been submitted through a bar table motion.¹¹¹

¹⁰⁷ ICC-01/05-01/08-1514-Conf-AnxA, pages 14-15.

¹⁰⁸ CAR-DEF-0002-0713 (confidential).

¹⁰⁹ CAR-D04-0002-1090 (public).

¹¹⁰ CAR-D04-0002-1095 (public).

¹¹¹ ICC-01/05-01/08-1557-Conf-AnxA, page 8.

iii. Analysis

54. In relation to the articles tendered by the prosecution, the Chamber notes the non-opposition from the defence and is satisfied that the prosecution has demonstrated that the articles are relevant, probative and not prejudicial. They will be admitted on this basis.

55. Turning to the reports tendered by the defence, the Chamber notes that while there is no dispute regarding the relevance or probative value of the reports, none were authored by the witnesses through whom they are tendered, nor were they authenticated by the witnesses during their testimony. For this reason, the prosecution argues that the reports should have been submitted via a “bar table” motion. The Chamber does not take such a restrictive view. The Court’s legal framework contains no requirement that items sought to be admitted into evidence must be submitted via the “bar table” when they cannot be submitted through a witness. While the use of a “bar table” motion is one permissible way to seek the admission of documentary evidence,¹¹² it is not the only one.¹¹³ In any event, whether an item’s admission is sought via the “bar table” is a distinction without a difference because, regardless of the manner in which an item’s admission is sought, its admissibility will be determined under the three part test discussed above.¹¹⁴

¹¹² See transcript of hearing on 21 October 2010, ICC-01/05-01/08-T-30-ENG ET, page 12, line 16 to page 14, line 25.

¹¹³ To the extent that there is any inconsistency between this holding and the Chamber’s oral ruling on 2 March 2011, this ruling prevails. See transcript of hearing on 2 March 2011, ICC-01/05-01/08-T-78-ENG ET, page 18, line 8 to page 19, line 9.

¹¹⁴ See, e.g., ICC-01/04-01/06-1981, paragraphs 33-49; (Trial Chamber I applying three part test in relation to bar table motion); ICC-01/04-01/06-2600-Red, paragraphs 15 to 30 (same); ICC-01/04-01/07-2635, paragraphs 11 to 65 (Trial Chamber II applying three part test in relation to bar table motions).

56. In applying that test, the Chamber notes that the prosecution does not dispute the relevance or probative value of the reports, nor does it suggest that their admission would be prejudicial. Against this background, and taking into consideration that these reports are relevant to the case and have probative value, the Chamber considers that there is no reason to refuse their admission. They are therefore admitted.

57. In light of the above, the Chamber admits into evidence documents CAR-OTP-0065-0173, CAR-DEF-0002-0713, CAR-D04-0002-1090, CAR-D04-0002-1095 and CAR-OTP-0065-0178.

7. *Procès-verbaux d'audition de victime, d'interrogatoire and d'audition de témoin*

i. Prosecution Submission

58. The prosecution requests the admission of a “dossier” of 203 confidential “*procès-verbaux d'audition de victime*”, tendered through Witness 9.¹¹⁵ The

¹¹⁵ ICC-01/05-01/08-1514-Conf-AnxA, pages 17-34. (requesting the admission of CAR-OTP-0001-0159, CAR-OTP-0001-0160, CAR-OTP-0001-0161, CAR-OTP-0001-0162, CAR-OTP-0001-0163, CAR-OTP-0001-0164, CAR-OTP-0001-0165, CAR-OTP-0001-0166, CAR-OTP-0001-0167, CAR-OTP-0001-0168, CAR-OTP-0001-0169, CAR-OTP-0001-0170, CAR-OTP-0001-0171, CAR-OTP-0001-0172, CAR-OTP-0001-0173, CAR-OTP-0001-0174, CAR-OTP-0001-0178, CAR-OTP-0001-0182, CAR-OTP-0001-0187, CAR-OTP-0001-0190, CAR-OTP-0001-0196, CAR-OTP-0001-0199, CAR-OTP-0001-0200, CAR-OTP-0001-0204, CAR-OTP-0001-0212, CAR-OTP-0001-0218, CAR-OTP-0001-0222, CAR-OTP-0001-0227, CAR-OTP-0001-0231, CAR-OTP-0001-0235, CAR-OTP-0001-0239, CAR-OTP-0001-0243, CAR-OTP-0001-0244, CAR-OTP-0001-0248, CAR-OTP-0001-0253, CAR-OTP-0001-0257, CAR-OTP-0001-0263, CAR-OTP-0001-0267, CAR-OTP-0001-0268, CAR-OTP-0001-0273, CAR-OTP-0001-0277, CAR-OTP-0001-0281, CAR-OTP-0001-0284, CAR-OTP-0001-0287, CAR-OTP-0001-0290, CAR-OTP-0001-0291, CAR-OTP-0001-0295, CAR-OTP-0001-0299, CAR-OTP-0001-0304, CAR-OTP-0001-0310, CAR-OTP-0001-0314, CAR-OTP-0001-0318, CAR-OTP-0001-0324, CAR-OTP-0001-0328, CAR-OTP-0001-0332, CAR-OTP-0001-0340, CAR-OTP-0001-0345, CAR-OTP-0001-0350, CAR-OTP-0001-0358, CAR-OTP-0001-0362, CAR-OTP-0001-0367, CAR-OTP-0001-0371, CAR-OTP-0001-0375, CAR-OTP-0001-0382, CAR-OTP-0001-0387, CAR-OTP-0001-0393, CAR-OTP-0001-0400, CAR-OTP-0001-0405, CAR-OTP-0001-0410, CAR-OTP-0001-0414, CAR-OTP-0001-0419, CAR-OTP-0001-0426, CAR-OTP-0001-0431,

prosecution asserts that the documents are “relevant to prove *inter alia* that crimes committed by the MLC were widespread.”¹¹⁶ The prosecution submits that the documents are “probative to issues at trial and bear sufficient indicia of reliability”, since they were authored by Witness 9 and were “part of the dossier that was tendered during trial.”¹¹⁷ The prosecution further submits that admitting these documents would not be prejudicial because they were disclosed to the defence and because the defence used the “dossier” during its questioning of Witness 9.¹¹⁸ The prosecution finally argues that the documents are “necessary to a fair

CAR-OTP-0001-0440, CAR-OTP-0001-0445, CAR-OTP-0001-0449, CAR-OTP-0001-0454, CAR-OTP-0001-0460, CAR-OTP-0001-0465, CAR-OTP-0001-0469, CAR-OTP-0001-0476, CAR-OTP-0001-0482, CAR-OTP-0001-0487, CAR-OTP-0001-0492, CAR-OTP-0001-0500, CAR-OTP-0001-0501, CAR-OTP-0001-0502, CAR-OTP-0001-0503, CAR-OTP-0001-0506, CAR-OTP-0001-0507, CAR-OTP-0001-0508, CAR-OTP-0001-0509, CAR-OTP-0001-0511, CAR-OTP-0001-0512, CAR-OTP-0001-0513, CAR-OTP-0001-0514, CAR-OTP-0001-0515, CAR-OTP-0001-0516, CAR-OTP-0001-0517, CAR-OTP-0001-0518, CAR-OTP-0001-0523, CAR-OTP-0001-0524, CAR-OTP-0001-0527, CAR-OTP-0001-0530, CAR-OTP-0001-0533, CAR-OTP-0001-0538, CAR-OTP-0001-0539, CAR-OTP-0001-0540, CAR-OTP-0001-0541, CAR-OTP-0001-0542, CAR-OTP-0001-0546, CAR-OTP-0001-0547, CAR-OTP-0002-0002, CAR-OTP-0002-0004, CAR-OTP-0002-0006, CAR-OTP-0002-0009, CAR-OTP-0002-0012, CAR-OTP-0002-0018, CAR-OTP-0002-0021, CAR-OTP-0002-0024, CAR-OTP-0002-0028, CAR-OTP-0002-0029, CAR-OTP-0002-0030, CAR-OTP-0002-0031, CAR-OTP-0002-0032, CAR-OTP-0002-0033, CAR-OTP-0002-0034, CAR-OTP-0002-0035, CAR-OTP-0002-0036, CAR-OTP-0002-0037, CAR-OTP-0002-0038, CAR-OTP-0002-0039, CAR-OTP-0002-0040, CAR-OTP-0002-0041, CAR-OTP-0002-0042, CAR-OTP-0002-0043, CAR-OTP-0002-0044, CAR-OTP-0002-0045, CAR-OTP-0002-0046, CAR-OTP-0002-0047, CAR-OTP-0002-0048, CAR-OTP-0002-0049, CAR-OTP-0002-0050, CAR-OTP-0002-0051, CAR-OTP-0002-0052, CAR-OTP-0002-0053, CAR-OTP-0002-0054, CAR-OTP-0002-0055, CAR-OTP-0002-0056, CAR-OTP-0002-0057, CAR-OTP-0002-0058, CAR-OTP-0002-0059, CAR-OTP-0002-0060, CAR-OTP-0002-0061, CAR-OTP-0002-0062, CAR-OTP-0002-0063, CAR-OTP-0002-0064, CAR-OTP-0002-0065, CAR-OTP-0002-0066, CAR-OTP-0002-0067, CAR-OTP-0002-0068, CAR-OTP-0002-0069, CAR-OTP-0002-0070, CAR-OTP-0002-0071, CAR-OTP-0002-0072, CAR-OTP-0002-0073, CAR-OTP-0002-0074, CAR-OTP-0002-0075, CAR-OTP-0002-0076, CAR-OTP-0002-0077, CAR-OTP-0002-0081, CAR-OTP-0002-0082, CAR-OTP-0002-0083, CAR-OTP-0002-0084, CAR-OTP-0002-0085, CAR-OTP-0002-0086, CAR-OTP-0002-0087, CAR-OTP-0002-0088, CAR-OTP-0002-0089, CAR-OTP-0002-0090, CAR-OTP-0002-0091, CAR-OTP-0002-0092, CAR-OTP-0002-0096, CAR-OTP-0002-0097, CAR-OTP-0002-0098, CAR-OTP-0002-0099, CAR-OTP-0002-0102, CAR-OTP-0002-0103, CAR-OTP-0002-0107, CAR-OTP-0002-0109, CAR-OTP-0002-0110, CAR-OTP-0002-0111, CAR-OTP-0002-0115, CAR-OTP-0002-0118, CAR-OTP-0002-0119, CAR-OTP-0002-0125, CAR-OTP-0002-0126, CAR-OTP-0002-0130, CAR-OTP-0002-0133, CAR-OTP-0002-0134, CAR-OTP-0002-0135, CAR-OTP-0002-0136, CAR-OTP-0002-0137).

¹¹⁶ ICC-01/05-01/08-1514-Conf-AnxA, pages 17-18.

¹¹⁷ ICC-01/05-01/08-1514-Conf-AnxA, page 18.

¹¹⁸ ICC-01/05-01/08-1514-Conf-AnxA, page 18.

evaluation of the testimony of the witness since this witness was an overview witness with the *dossier* forming the basis of his testimony.”¹¹⁹

59. The defence opposes the admission of all 203 *procès-verbaux*. The defence argues that the “wholesale admission of these documents into the evidence of this case in this manner is impermissible.”¹²⁰ The defence asserts that the prosecution did not sufficiently authenticate the *procès-verbaux* because it failed to ask Witness 9 about each of the *procès-verbaux* and therefore failed to demonstrate a link between the documents and the witness.¹²¹ The defence further recalls that during Witness 9’s testimony, he cast doubts on the veracity of some of the documents and their content, which, the defence submits, defeats the prosecution’s assertion that the documents bear sufficient indicia of reliability.¹²²

60. The prosecution replies that the *dossier* has been sufficiently authenticated and that the *procès-verbaux* bear sufficient indicia of reliability.¹²³ The prosecution contends that the “fact that the witness was not questioned about each entry does not require the exclusion of the dossier”.¹²⁴ The prosecution further contends that the *dossier* constitutes one piece of evidence, which has been authenticated by Witness 9.¹²⁵ The prosecution finally submits that the admission of the *dossier* is essential to the fair evaluation of the testimony of Witness 9.¹²⁶

¹¹⁹ ICC-01/05-01/08-1514-Conf-AnxA, pages 18-19.

¹²⁰ ICC-01/05-01/08-1558-Conf, paragraph 28.

¹²¹ ICC-01/05-01/08-1558-Conf, paragraph 28.

¹²² ICC-01/05-01/08-1558-Conf, paragraphs 29-30.

¹²³ ICC-01/05-01/08-1564-Conf, paragraphs 19-20.

¹²⁴ ICC-01/05-01/08-1564-Conf, paragraph 21.

¹²⁵ ICC-01/05-01/08-1564-Conf, paragraph 22.

¹²⁶ ICC-01/05-01/08-1564-Conf, paragraph 23.

ii. Defence Submission

61. The defence requests the admission of one “*procès-verbal d’audition de victime*” (through Witnesses 79 and 9),¹²⁷ three “*procès-verbaux d’interrogatoire*” (through Witnesses 6 and 9)¹²⁸ and four “*procès-verbaux d’audition de témoin*”,¹²⁹ all of which are official documents of the Bangui Court of Appeal. The defence submits that most of these *procès-verbaux* relate to the questioning of high ranking CAR military officers who were involved in the leadership and organisation of troops in the CAR.¹³⁰ Other *procès-verbaux*, the defence submits, demonstrate the presence of different armed groups that were operating in the CAR at the same time and in the same location as the events that form the basis for the charges in this case.¹³¹

62. The prosecution does not object to the admission of any of these documents, provided that they are admitted through their author, Witness 9.¹³²

iii. Analysis

63. The Chamber will first address the 203 *procès-verbaux* tendered by the prosecution.

¹²⁷ CAR-OTP-0001-0539 (confidential).

¹²⁸ CAR-OTP-0019-0207 (public), CAR-OTP-0019-0211 (public), CAR-OTP-0019-0215 (public).

¹²⁹ CAR-OTP-0019-0230 (public) and CAR-OTP-0019-0234 (public), through both Witnesses 6 and 9, and CAR-OTP-0019-0237 (public) and CAR-OTP-0019-0245 (public), through Witness 9.

¹³⁰ ICC-01/05-01/08-1515-Conf, paragraph 2.

¹³¹ ICC-01/05-01/08-1515-Conf, paragraph 3.

¹³² ICC-01/05-01/08-1557-Conf-AnxA, pages 6-7, 9-14.

64. The Chamber is satisfied that the *procès-verbaux* are relevant for two reasons. *First*, the *procès-verbaux* are relevant to the Chamber's assessment of the contextual elements of the crimes for which the accused is charged. They memorialise Witness 9's interviews of hundreds of victims of crimes allegedly committed by MLC troops, and may therefore assist the Chamber in its assessment of whether the crimes allegedly perpetrated by MLC troops were committed as part of a widespread or systematic attack directed against a civilian population, pursuant to or in furtherance of a State or organizational policy. *Second*, the *procès-verbaux* were the focus of a significant part of Witness 9's testimony and will therefore assist the Chamber in assessing that testimony.

65. The probative value of the *procès-verbaux* inheres in the fact that they were (i) created by Witness 9 in the course of his normal functions as an investigating judge; (ii) created during an officially-sanctioned inquiry carried out by the CAR judiciary; (iii) created during the immediate aftermath of the alleged crimes for which the accused is charged; and (iv) signed by both Witness 9 and the alleged victims.¹³³

66. There is no merit to the defence argument that the *procès-verbaux* lack probative value because the information contained therein was undermined by Witness 9's testimony.¹³⁴ Even if there were possible contradictions between Witness 9's testimony and certain assertions in some *procès-verbaux*, this does not cast doubt on the process through

¹³³ See ICC-01/04-01/07-2635, paragraph 24.

¹³⁴ ICC-01/05-01/08-1558-Conf, paragraphs 29-30.

which the documents were created, which is the principal source of their reliability. Such considerations go to the weight that the *procès-verbaux* should be afforded if admitted, not the threshold question of admissibility.

67. The reliability of the *procès-verbaux* is also supported by the fact that Witness 9 authenticated them in court. While the defence is correct that Witness 9 did not authenticate the 203 *procès-verbaux* “one by one”,¹³⁵ it was unnecessary for him to do so. There is no requirement in the Court’s legal framework that documentary evidence be authenticated on an item-by-item basis. The key is that the party seeking to introduce the evidence must demonstrate that the evidence is what it purports to be. If the party is able to save time by authenticating multiple documents at once, that is perfectly permissible. Indeed, in this instance, where all documents were of the same type, it was a preferable alternative to using hours or days of court time to have witnesses authenticate them on an item-by-item basis. Here, Witness 9’s testimony, taken as a whole, establishes that the 203 *procès-verbaux* are what they purport to be, which constitutes proper authentication.

68. In light of the above, the Chamber concludes that the *procès-verbaux* have sufficient probative value to be admitted, subject to the prejudice inquiry below.

69. The potential prejudice that may be caused if the *procès-verbaux* are admitted depends on the purpose for which their admission is sought.

¹³⁵ ICC-01/05-01/08-1558, paragraph 28.

The prosecution states that the *procès-verbaux* are “relevant to prove *inter alia* that crimes committed by the MLC were widespread”.¹³⁶ The Chamber is satisfied that the potential prejudice to the accused will be minimal if the *procès-verbaux* are admitted for this limited purpose. The Chamber reaches this conclusion because (i) as is generally the case, if the Chamber finally concludes that the *procès-verbaux* are hearsay evidence,¹³⁷ the Chamber will ascribe less probative value to the *procès-verbaux* than testimony or other evidence that is testable in court; (ii) the *procès-verbaux* are being offered to prove the contextual elements of the crimes charged and not the accused’s individual criminal responsibility; and (iii) the defence had the opportunity to question Witness 9 regarding the circumstances in which the *procès-verbaux* were created and in which the statements therein were made. In light of the above, the Chamber will admit the 203 *procès-verbaux* submitted by the prosecution.

70. The Chamber now turns to the *procès-verbaux* submitted by the defence. They will be admitted, consistent with the admission of the 203 *procès-verbaux* submitted by the prosecution. The relevance of the *procès-verbaux* to the facts at issue in this case is apparent on their face. They are also relevant to the Chamber’s assessment of the testimony of prosecution witnesses, because they were a significant topic of Witness 9’s questioning, while some were also discussed during the testimony of Witnesses 79 and 6. The probative value of the *procès-verbaux* is derived from the factors

¹³⁶ ICC-01/05-01/08-1514-Conf-AnxA, pages 17-34.

¹³⁷ The *procès-verbaux* will constitute hearsay only if they are relied upon for the truth of their contents. See, e.g., ICTY, *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, Case No. IT-95-14/1-AR73, paragraph 15; ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR 73.2, Decision on interlocutory appeal concerning rule 92bis(C), 7 June 2002, paragraph 27.

discussed above in paragraph 65, and also because they have been authenticated by their author, Witness 9. While in-court authentication by a witness is not a prerequisite to admission,¹³⁸ it will often add to an item's probative value, and the Chamber is satisfied that it does so here. Finally, there is no suggestion that admitting the documents will cause any prejudice. For these reasons, the Chamber will admit them.

71. In light of the above, the Chamber admits into evidence the 203 *procès-verbaux* tendered by the prosecution: CAR-OTP-0001-0159, CAR-OTP-0001-0160, CAR-OTP-0001-0161, CAR-OTP-0001-0162, CAR-OTP-0001-0163, CAR-OTP-0001-0164, CAR-OTP-0001-0165, CAR-OTP-0001-0166, CAR-OTP-0001-0167, CAR-OTP-0001-0168, CAR-OTP-0001-0169, CAR-OTP-0001-0170, CAR-OTP-0001-0171, CAR-OTP-0001-0172, CAR-OTP-0001-0173, CAR-OTP-0001-0174, CAR-OTP-0001-0178, CAR-OTP-0001-0182, CAR-OTP-0001-0187, CAR-OTP-0001-0190, CAR-OTP-0001-0196, CAR-OTP-0001-0199, CAR-OTP-0001-0200, CAR-OTP-0001-0204, CAR-OTP-0001-0212, CAR-OTP-0001-0218, CAR-OTP-0001-0222, CAR-OTP-0001-0227, CAR-OTP-0001-0231, CAR-OTP-0001-0235, CAR-OTP-0001-0239, CAR-OTP-0001-0243, CAR-OTP-0001-0244, CAR-OTP-0001-0248, CAR-OTP-0001-0253, CAR-OTP-0001-0257, CAR-OTP-0001-0263, CAR-OTP-0001-0267, CAR-OTP-0001-0268, CAR-OTP-0001-0273, CAR-OTP-0001-0277, CAR-OTP-0001-0281, CAR-OTP-0001-0284, CAR-OTP-0001-0287, CAR-OTP-0001-0290, CAR-OTP-0001-0291, CAR-OTP-0001-0295, CAR-OTP-0001-0299, CAR-OTP-0001-0304, CAR-OTP-0001-0310, CAR-OTP-0001-0314, CAR-OTP-0001-0318, CAR-OTP-0001-0324, CAR-OTP-

¹³⁸ See *supra*, paragraph 15.

0001-0328, CAR-OTP-0001-0332, CAR-OTP-0001-0340, CAR-OTP-0001-0345, CAR-OTP-0001-0350, CAR-OTP-0001-0358, CAR-OTP-0001-0362, CAR-OTP-0001-0367, CAR-OTP-0001-0371, CAR-OTP-0001-0375, CAR-OTP-0001-0382, CAR-OTP-0001-0387, CAR-OTP-0001-0393, CAR-OTP-0001-0400, CAR-OTP-0001-0405, CAR-OTP-0001-0410, CAR-OTP-0001-0414, CAR-OTP-0001-0419, CAR-OTP-0001-0426, CAR-OTP-0001-0431, CAR-OTP-0001-0440, CAR-OTP-0001-0445, CAR-OTP-0001-0449, CAR-OTP-0001-0454, CAR-OTP-0001-0460, CAR-OTP-0001-0465, CAR-OTP-0001-0469, CAR-OTP-0001-0476, CAR-OTP-0001-0482, CAR-OTP-0001-0487, CAR-OTP-0001-0492, CAR-OTP-0001-0500, CAR-OTP-0001-0501, CAR-OTP-0001-0502, CAR-OTP-0001-0503, CAR-OTP-0001-0506, CAR-OTP-0001-0507, CAR-OTP-0001-0508, CAR-OTP-0001-0509, CAR-OTP-0001-0511, CAR-OTP-0001-0512, CAR-OTP-0001-0513, CAR-OTP-0001-0514, CAR-OTP-0001-0515, CAR-OTP-0001-0516, CAR-OTP-0001-0517, CAR-OTP-0001-0518, CAR-OTP-0001-0523, CAR-OTP-0001-0524, CAR-OTP-0001-0527, CAR-OTP-0001-0530, CAR-OTP-0001-0533, CAR-OTP-0001-0538, CAR-OTP-0001-0539, CAR-OTP-0001-0540, CAR-OTP-0001-0541, CAR-OTP-0001-0542, CAR-OTP-0001-0546, CAR-OTP-0001-0547, CAR-OTP-0002-0002, CAR-OTP-0002-0004, CAR-OTP-0002-0006, CAR-OTP-0002-0009, CAR-OTP-0002-0012, CAR-OTP-0002-0018, CAR-OTP-0002-0021, CAR-OTP-0002-0024, CAR-OTP-0002-0028, CAR-OTP-0002-0029, CAR-OTP-0002-0030, CAR-OTP-0002-0031, CAR-OTP-0002-0032, CAR-OTP-0002-0033, CAR-OTP-0002-0034, CAR-OTP-0002-0035, CAR-OTP-0002-0036, CAR-OTP-0002-0037, CAR-OTP-0002-0038, CAR-OTP-0002-0039, CAR-OTP-0002-0040, CAR-OTP-0002-0041, CAR-OTP-0002-0042, CAR-OTP-0002-0043, CAR-OTP-0002-0044, CAR-OTP-0002-0045, CAR-OTP-0002-0046, CAR-OTP-0002-0047, CAR-OTP-0002-0048, CAR-

OTP-0002-0049, CAR-OTP-0002-0050, CAR-OTP-0002-0051, CAR-OTP-0002-0052, CAR-OTP-0002-0053, CAR-OTP-0002-0054, CAR-OTP-0002-0055, CAR-OTP-0002-0056, CAR-OTP-0002-0057, CAR-OTP-0002-0058, CAR-OTP-0002-0059, CAR-OTP-0002-0060, CAR-OTP-0002-0061, CAR-OTP-0002-0062, CAR-OTP-0002-0063, CAR-OTP-0002-0064, CAR-OTP-0002-0065, CAR-OTP-0002-0066, CAR-OTP-0002-0067, CAR-OTP-0002-0068, CAR-OTP-0002-0069, CAR-OTP-0002-0070, CAR-OTP-0002-0071, CAR-OTP-0002-0072, CAR-OTP-0002-0073, CAR-OTP-0002-0074, CAR-OTP-0002-0075, CAR-OTP-0002-0076, CAR-OTP-0002-0077, CAR-OTP-0002-0081, CAR-OTP-0002-0082, CAR-OTP-0002-0083, CAR-OTP-0002-0084, CAR-OTP-0002-0085, CAR-OTP-0002-0086, CAR-OTP-0002-0087, CAR-OTP-0002-0088, CAR-OTP-0002-0089, CAR-OTP-0002-0090, CAR-OTP-0002-0091, CAR-OTP-0002-0092, CAR-OTP-0002-0096, CAR-OTP-0002-0097, CAR-OTP-0002-0098, CAR-OTP-0002-0099, CAR-OTP-0002-0102, CAR-OTP-0002-0103, CAR-OTP-0002-0107, CAR-OTP-0002-0109, CAR-OTP-0002-0110, CAR-OTP-0002-0111, CAR-OTP-0002-0115, CAR-OTP-0002-0118, CAR-OTP-0002-0119, CAR-OTP-0002-0125, CAR-OTP-0002-0126, CAR-OTP-0002-0130, CAR-OTP-0002-0133, CAR-OTP-0002-0134, CAR-OTP-0002-0135, CAR-OTP-0002-0136 and CAR-OTP-0002-0137.

72. The Chamber further admits documents CAR-OTP-0019-0207, CAR-OTP-0019-0211, CAR-OTP-0019-0215, CAR-OTP-0019-0230, CAR-OTP-0019-0234, CAR-OTP-0019-0237 and CAR-OTP-0019-0245, tendered by the defence. The defence's request to admit document CAR-OTP-0001-0539 is moot because this document is being admitted as a prosecution document, as explained above in paragraphs 63 – 69.

8. Other domestic court documents or official CAR documents

i. Defence submission

73. The defence requests the admission of four documents from the Bangui Court of Appeal, namely, two “*procès-verbaux de constat*” used during the questioning of Witness 79,¹³⁹ one “*réquisitoire de non-lieu partiel et de renvoi devant la cour criminelle*”, used during the questioning of Witnesses 6 and 9,¹⁴⁰ and one “*acte de procédure*”, also used during the questioning of Witness 9.¹⁴¹ The defence also tenders into evidence, through Witnesses 6 and 9, a “*note de service*” from the CAR Ministry of National Defence.¹⁴² Finally, the defence tenders a former CAR code of penal procedure, used during the questioning of Witness 9.¹⁴³ The defence fails to explain why it believes that these documents are admissible.

74. The prosecution objects to the admission of the two *procès-verbaux de constat* and argues that the defence failed to establish a foundation to tender the documents through Witness 79.¹⁴⁴ With respect to the *réquisitoire de non-lieu partiel et de renvoi devant la cour criminelle* and the *acte de procédure*, the prosecution submits that these documents should be tendered through their author, Witness 6.¹⁴⁵ Regarding the *note de service*, the prosecution does not oppose its admission, but indicates that it should

¹³⁹ CAR-OTP-0002-0298 (confidential) and CAR-OTP-0003-0150 (confidential).

¹⁴⁰ CAR-OTP-0004-0065 (confidential).

¹⁴¹ CAR-D04-0002-1365 (public).

¹⁴² CAR-OTP-0042-0237 (confidential).

¹⁴³ CAR-D04-0002-1293 (public).

¹⁴⁴ ICC-01/05-01/08-1557-Conf-AnxA, page 7.

¹⁴⁵ ICC-01/05-01/08-1557-Conf-AnxA, page 12.

be submitted via a bar table motion.¹⁴⁶ Finally, the prosecution does not object to the admission of the former CAR code of penal procedure.¹⁴⁷

ii. Analysis

75. With regard to both *procès-verbaux de constat*, the Chamber considers that they are relevant because they tend to show the alleged activities of the MLC during the period covered by the charges in this case. In terms of probative value, the prosecution is correct that the defence has failed to establish a proper foundation for tendering the *procès-verbaux de constat* through Witness 79. The documents were not authored by Witness 79 and when they were shown to her in court, she did not know the name of the person mentioned therein.¹⁴⁸

76. As stated above, however, there is no requirement under the Court's legal framework for items submitted as evidence to be authenticated by a witness. The documents at issue here possess other indicia of reliability. They are official court documents and bear the letterhead — and in one instance, the seal — of the Bangui Court of Appeal, as well as the signature of the official who authored the documents. Moreover, the documents appear to have been created (i) during the normal course of inquiries conducted by the CAR judiciary; and (ii) in 2003, relatively soon

¹⁴⁶ ICC-01/05-01/08-1557-Conf-AnxA, pages 11 and 14.

¹⁴⁷ ICC-01/05-01/08-1557-Conf-AnxA, page 11.

¹⁴⁸ For document CAR-OTP-0003-0150, *see* transcript of hearing on 3 March 2011, ICC-01/05-01/08-T-79-CONF-ENG CT2, page 31, lines 24-25 and page 32, lines 1-22; for document CAR-OTP-0002-0298, *see* transcript of hearing on 3 March 2011, ICC-01/05-01/08-T-79-CONF-ENG CT2, page 34, line 10 to page 37, line 12.

after the events to which they relate. These factors provide the *procès-verbaux de constat* with adequate probative value.

77. The Chamber dismisses the prosecution's argument that the *note de service* should have been submitted via a "bar table motion".¹⁴⁹ As discussed above in paragraph 55, bar table motions are not the only permissible method by which the admission of documentary evidence may be sought.

78. The Chamber's ability to assess the potential prejudice of admitting the documents is limited by the defence's failure to explain the purpose (or purposes) for which their admission is sought. That said, the Chamber notes that the prosecution does not advance a prejudice argument and that both parties had the opportunity to question Witness 79 in court regarding the basis for her declarations in the *procès-verbaux de constat*. Against this backdrop, the Chamber is satisfied that any prejudice that may be caused by admitting the documents will be minimal and does not outweigh their probative value. The *procès-verbaux de constat* are therefore admitted.

79. The Chamber turns next to the *réquisitoire de non-lieu partiel et de renvoi devant la cour criminelle* (CAR-OTP-0004-0065) and the *acte de procédure* (CAR-D04-0002-1365). There is no dispute as to the relevance or probative value of these documents, nor is it suggested that their admission would be prejudicial. Furthermore, Witnesses 6 and 9 attested to the documents'

¹⁴⁹ ICC-01/05-01/08-1557-Conf-AnxA, pages 11 and 14.

authenticity during their questioning.¹⁵⁰ Since the documents are relevant to the case, possess probative value and are not prejudicial, the Chamber admits them into evidence.

80. As far as the *note de service* (CAR-OTP-0042-0237) is concerned, there is no dispute as to its relevance, probative value or potential prejudice. It is relevant because it relates to the operational cell that allegedly coordinated operations between the MLC and the armed forces of the CAR during the time period under consideration. The document's probative value inheres in the fact that it bears the letterhead and seal of the CAR Ministry of Defence and appears to have been created during the normal course of that institution's functions. Further, it is an important item for determining the function, management and membership of the operational cell. The Chamber does not see any prejudice in admitting the document and the prosecution does not argue that there is any. The prosecution's only objection is that the *note de service* should have been sought via a bar table motion. The Chamber disagrees for the reasons discussed above. On this basis, the *note de service* is admitted.

81. Finally, whilst there is no objection to the admission of the former CAR code of penal procedure (CAR-D04-0002-1293), its admission into evidence is unnecessary because, under Article 69(6) of the Statute, the Chamber may take judicial notice of facts that are of common knowledge

¹⁵⁰ The *réquisitoire de non-lieu partiel et de renvoi devant la cour criminelle* was authenticated by both Witnesses 6 and 9. Although the *acte de procédure* was signed by Witness 6, it was authenticated by Witness 9 in court. Witness 9 was able to authenticate the *acte de procédure* because he is familiar with the document due to his position as a senior investigative judge.

such as the content of publicly available legislation. Thus, the request to admit the code is denied as unnecessary.

82. In light of the above, the Chamber admits into evidence documents CAR-OTP-0003-0150, CAR-OTP-0002-0298, CAR-OTP-0042-0237, CAR-OTP-0004-0065 and CAR-D04-0002-1365 tendered by the defence. The Chamber rejects the defence request for the admission of document CAR-D04-0002-1293.

9. [REDACTED] materials

i. Prosecution Submission

83. The prosecution requests the admission of one [REDACTED],¹⁵¹ its transcript¹⁵² and its French and English translations,¹⁵³ as well as 52 [REDACTED],¹⁵⁴ all of which were used during the questioning of

¹⁵¹ CAR-OTP-0039-0058 (confidential).

¹⁵² CAR-OTP-0056-0253 (confidential).

¹⁵³ CAR-OTP-0056-0226 (confidential). The Chamber notes that due to an apparent typographical error, this document is incorrectly referred to as CAR-OTP-0056-0226 in filing ICC-01/05-01/08-1514; CAR-OTP-0058-0167 (confidential).

¹⁵⁴ CAR-OTP-0035-0141 (confidential), CAR-OTP-0035-0143 (confidential), CAR-OTP-0035-0150 (confidential), CAR-OTP-0035-0152 (confidential), CAR-OTP-0035-0159 (confidential), CAR-OTP-0035-0160 (confidential), CAR-OTP-0035-0168 (confidential), CAR-OTP-0035-0175 (confidential), CAR-OTP-0035-0176 (confidential), CAR-OTP-0035-0178 (confidential), CAR-OTP-0035-0185 (confidential), CAR-OTP-0035-0193 (confidential), CAR-OTP-0035-0199 (confidential), CAR-OTP-0035-0207 (confidential), CAR-OTP-0035-0213 (confidential), CAR-OTP-0035-0214 (confidential), CAR-OTP-0035-0223 (confidential), CAR-OTP-0035-0230 (confidential), CAR-OTP-0035-0235 (confidential), CAR-OTP-0035-0240 (confidential), CAR-OTP-0035-0242 (confidential), CAR-OTP-0035-0246 (confidential), CAR-OTP-0035-0256 (confidential), CAR-OTP-0035-0258 (confidential), CAR-OTP-0035-0260 (confidential), CAR-OTP-0035-0263 (confidential), CAR-OTP-0035-0269 (confidential), CAR-OTP-0035-0277 (confidential), CAR-OTP-0035-0280 (confidential), CAR-OTP-0035-0284 (confidential), CAR-OTP-0035-0288 (confidential), CAR-OTP-0035-0291 (confidential), CAR-OTP-0035-0293 (confidential), CAR-OTP-0035-0294 (confidential), CAR-OTP-0035-0300 (confidential), CAR-OTP-0035-0303 (confidential), CAR-OTP-0035-0307 (confidential), CAR-OTP-0035-0309 (confidential), CAR-OTP-0035-0321 (confidential), CAR-OTP-0035-0324 (confidential), CAR-OTP-0035-0331 (confidential), CAR-OTP-0035-0339 (confidential), CAR-OTP-0035-0345 (confidential), CAR-OTP-0035-0352 (confidential), CAR-OTP-0035-0355

Witness 63 and authenticated by him. The prosecution submits that the [REDACTED] is relevant and probative because it shows, *inter alia*, (i) the existence of an armed conflict; (ii) the widespread nature of the alleged crimes; (iii) the MLC's presence during the period covered by the charges; and (iv) MLC troops committing the crime of pillage.¹⁵⁵ The prosecution argues that the transcript of the [REDACTED] and its translations are "necessary to provide the proper understanding and context of the [REDACTED]".¹⁵⁶

84. With respect to the 52 [REDACTED] tendered, the prosecution argues that they are all relevant and probative to show, *inter alia*, "the presence of the MLC" in the CAR during the period covered by the charges.¹⁵⁷ The prosecution also submits that the information contained in the [REDACTED] tends to corroborate other information from various witnesses.¹⁵⁸

85. The defence does not object to the admission of the [REDACTED] or the [REDACTED] and transcripts, provided that the prosecution tenders the entire [REDACTED], and not just excerpts of it.¹⁵⁹

(confidential), CAR-OTP-0035-0356 (confidential), CAR-OTP-0035-0359 (confidential), CAR-OTP-0035-0366 (confidential), CAR-OTP-0035-0369 (confidential), CAR-OTP-0035-0376 (confidential), CAR-OTP-0035-0385 (confidential), CAR-OTP-0035-0390 (confidential).

¹⁵⁵ ICC-01/05-01/08-1514-Conf-AnxA, pages 34-35.

¹⁵⁶ ICC-01/05-01/08-1514-Conf-AnxA, page 35.

¹⁵⁷ ICC-01/05-01/08-1514-Conf-AnxA, page 35.

¹⁵⁸ ICC-01/05-01/08-1514-Conf-AnxA, page 35.

¹⁵⁹ ICC-01/05-01/08-1558-Conf, paragraph 31.

86. During the testimony of Witness 47,¹⁶⁰ the prosecution requested the admission of four additional [REDACTED]¹⁶¹ that were used as a basis for the witness' questioning. The defence did not object to this request.

ii. Defence Submission

87. The defence requests the admission of one video, which was allegedly filmed in the town of Sibut from a helicopter, and was used during the questioning of Witnesses 81, 169 and 173.¹⁶² The defence also requests the admission of a photograph, which was used during the questioning of Witness 29.¹⁶³ The defence fails to explain why it believes that these materials are admissible.

88. The prosecution concedes that the video submitted by the defence bears sufficient indicia of reliability but argues that it should be tendered in its entirety via a bar table motion.¹⁶⁴ It does not object to the admission of the photograph.¹⁶⁵

iii. Analysis

89. There is no dispute between the parties as to the relevance, probative value or potential prejudice of the [REDACTED] tendered by the

¹⁶⁰ Transcript of hearing on 27 October 2011, ICC-01/05-01/08-T-176-CONF-ENG ET, page 51, lines 10-11, page 54, lines 10-11, and page 65, lines 2-3; transcript of hearing on 28 October 2011, ICC-01/05-01/08-T-177-CONF-ENG ET, page 40, lines 3-4.

¹⁶¹ CAR-OTP-0028-0398, CAR-OTP-0028-0399, CAR-OTP-0028-0400, CAR-OTP-0028-0404.

¹⁶² CAR-DEF-0001-0832 (public).

¹⁶³ CAR-D04-0002-1287 (confidential).

¹⁶⁴ ICC-01/05-01/08-1557-Conf-AnxA, pages 1-2; *see also* transcript of hearing on 29 August 2011, ICC-01/05-01/08-T-149-CONF-ENG ET, page 42, lines 4-11.

¹⁶⁵ ICC-01/05-01/08-1557-Conf-AnxA, page 7.

prosecution. In the Chamber's view, the [REDACTED] is relevant because, among other matters, it shows troop movements in the CAR during the period covered by the charges, which goes to the contextual elements of the crimes charged, as well as the factual question of the activities of MLC troops in the field during the relevant period. The [REDACTED] has probative value because it (i) was [REDACTED] by Witness 63, who recognised and authenticated excerpts of it in court, and gave accompanying testimony; (ii) was created contemporaneously with the events under consideration in the present case; and (iii) constitutes a [REDACTED] record of those events.

90. The only potential prejudice identified by the defence is the admission of excerpts of the [REDACTED] rather than the whole [REDACTED]. This concern will be allayed by admitting the entire [REDACTED]. In this regard, the Chamber recalls its expressed preference for the admission of whole documents [REDACTED] rather than excerpts.¹⁶⁶ This approach enables the Chamber to assess the item in its proper context and to avoid any issues of selective references or quoting. In this instance, it appears that the prosecution is seeking admission of the whole [REDACTED] because it has also tendered the full transcript of the [REDACTED], rather than excerpts. Against this backdrop, the Chamber admits the [REDACTED] in its entirety, together with the transcript and translations, which may assist the Chamber in its analysis.

¹⁶⁶ ICC-01/05-01/08-1470, paragraph 11. Judge Ozaki dissented from this ruling, in paragraphs 7 to 18 of her Partly Dissenting Opinion on the Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1471.

91. Turning to the 56 [REDACTED] used during the questioning of Witnesses 63 and 47, the Chamber notes at the outset that the defence does not object to their admission. In the Chamber's view, the [REDACTED] are relevant because they appear to [REDACTED] MLC troops entering into, or operating in, the CAR during the relevant period. Moreover, the [REDACTED] are relevant because they will assist the Chamber in assessing the testimony of Witnesses 63 and 47, which concerned the [REDACTED] to a meaningful degree. Their probative value inheres in the fact that they (i) were recognised and authenticated by the witnesses during their testimony; (ii) were created contemporaneously with the events under consideration in the present case; and (iii) constitute a [REDACTED] record of those events. There is no suggestion that admitting the [REDACTED] would cause any prejudice. They are therefore admitted.

92. The Chamber will now turn to the video submitted by the defence (CAR-DEF-0001-0832). The prosecution's only objection is that the video should have been tendered via a bar table motion.¹⁶⁷ The Chamber disagrees. As explained above in paragraph 55, bar table motions are not the sole method by which the admission of documentary evidence may be sought.

93. In any event, the distinction has little practical impact. Whether or not an item's admission is sought via a bar table motion, Rule 63(2) of the Rules as well as the three part test guide the Chamber's admissibility determination. In applying that test, the Chamber finds that the video is

¹⁶⁷ ICC-01/05-01/08-1557-Conf-AnxA, pages 1-2.

relevant because it (i) will assist the Chamber in evaluating Witness 81's testimony regarding the helicopter in which Mr Bemba allegedly travelled to Begoua during the period under examination in this case; (ii) will assist the Chamber in evaluating the testimony of Witness 173, who was questioned on several parts of the video; and (iii) contains statements by several Sibut residents regarding the conflict in that area, which goes to the contextual elements under Articles 7 and 8 of the Statute. In terms of probative value, there is no indication that the video is anything other than what it purports to be: a video of the town of Sibut and interviews conducted with individuals there. While the video has not been authenticated in court,¹⁶⁸ this does not prevent its admission. As explained above in paragraph 15, in-court authentication is but one factor for the Chamber to consider when determining an item's probative value. Finally, there is no suggestion that admitting the video would lead to any prejudice. The video is therefore admitted.

94. Finally, the Chamber will consider the photograph used during the questioning of Witness 29 (CAR-D04-0002-1287). The prosecution does not contest the photograph's relevance or probative value and there is no suggestion that its admission would be prejudicial. The photograph is relevant because Witness 29 used it to identify an individual who has allegedly interfered with witnesses in the *Bemba* case, which may bear on the reliability of those witnesses' testimony. The photograph itself will enable the Chamber to contextualise Witness 29's questioning and may

¹⁶⁸ The video is tendered through Witnesses 23, 81 and 173. While the video was shown to Witnesses 81 and 173 during their testimony, neither witness testified about the video's origin or creation, nor authenticated it in any sense. The video was not mentioned or used during the defence questioning of Witness 23 at all. Part of the video was shown to Witness 169, but he was not asked any questions about it.

assist in evaluating the testimony of other witnesses who were allegedly contacted by the individual pictured. In terms of probative value, there is no suggestion that the photograph is anything other than what it purports to be. There is no suggestion that admitting the photograph would cause any prejudice. The photograph is therefore admitted.

95. In light of the above, the Chamber admits into evidence items CAR-OTP-0039-0058, CAR-OTP-0056-0253, CAR-OTP-0056-0226, CAR-OTP-0058-0167, CAR-OTP-0035-0141, CAR-OTP-0035-0143, CAR-OTP-0035-0150, CAR-OTP-0035-0152, CAR-OTP-0035-0159, CAR-OTP-0035-0160, CAR-OTP-0035-0168, CAR-OTP-0035-0175, CAR-OTP-0035-0176, CAR-OTP-0035-0178, CAR-OTP-0035-0185, CAR-OTP-0035-0193, CAR-OTP-0035-0199, CAR-OTP-0035-0207, CAR-OTP-0035-0213, CAR-OTP-0035-0214, CAR-OTP-0035-0223, CAR-OTP-0035-0230, CAR-OTP-0035-0235, CAR-OTP-0035-0240, CAR-OTP-0035-0242, CAR-OTP-0035-0246, CAR-OTP-0035-0256, CAR-OTP-0035-0258, CAR-OTP-0035-0260, CAR-OTP-0035-0263, CAR-OTP-0035-0269, CAR-OTP-0035-0277, CAR-OTP-0035-0280, CAR-OTP-0035-0284, CAR-OTP-0035-0288, CAR-OTP-0035-0291, CAR-OTP-0035-0293, CAR-OTP-0035-0294, CAR-OTP-0035-0300, CAR-OTP-0035-0303, CAR-OTP-0035-0307, CAR-OTP-0035-0309, CAR-OTP-0035-0321, CAR-OTP-0035-0324, CAR-OTP-0035-0331, CAR-OTP-0035-0339, CAR-OTP-0035-0345, CAR-OTP-0035-0352, CAR-OTP-0035-0355, CAR-OTP-0035-0356, CAR-OTP-0035-0359, CAR-OTP-0035-0366, CAR-OTP-0035-0369, CAR-OTP-0035-0376, CAR-OTP-0035-0385, CAR-OTP-0035-0390, CAR-OTP-0028-0398, CAR-OTP-0028-0399, CAR-OTP-0028-0400 and CAR-OTP-0028-0404 tendered by the prosecution, and items CAR-D04-0002-1287 and CAR-DEF-0001-0832 tendered by the defence.

10. *Victims' applications forms*

i. Defence submission

96. The defence requests the admission of four victims' application forms, relating to dual status Witnesses 23,¹⁶⁹ 68,¹⁷⁰ 81,¹⁷¹ and 82.¹⁷²

97. The prosecution objects to the admission of all four application forms on the basis of the principle of the primacy of orality in proceedings, arguing that applications are "prior statements", which the Chamber may admit only on an exceptional basis after a cautious analysis in accordance with Article 69(2) and 69(4) of the Statute and Rule 68 of the Rules.¹⁷³ The prosecution further argues that the defence had the opportunity to use the application forms in its questioning of the relevant witnesses and that the defence took that opportunity with respect to at least two of the witnesses (Witnesses 23 and 82), confronting them with the applications to clarify details or explain any alleged inconsistencies.¹⁷⁴ It finally argues that because this questioning is already reflected in the transcripts, the admission of these documents is cumulative and unnecessary.¹⁷⁵

¹⁶⁹ ICC-01/05-01/08-328-Conf-Anx4-Red, application a/0459/08 (confidential).

¹⁷⁰ CAR-D04-0002-1053 (confidential); *see also* ICC-01/05-01/08-328-Conf-Anx3-Red, application a/0288/08.

¹⁷¹ ICC-01/05-01/08-954-Conf-Anx371-Red2, application a/2412/10 (confidential).

¹⁷² ICC-01/05-01/08-954-Conf-Anx372-Red2, application a/2413/10 (confidential).

¹⁷³ ICC-01/05-01/08-1557-Conf-AnxA, pages 2-6.

¹⁷⁴ ICC-01/05-01/08-1557-Conf-AnxA, pages 2 and 4.

¹⁷⁵ ICC-01/05-01/08-1557-Conf-AnxA, pages 2-5.

ii. Analysis

98. At the outset, the Chamber notes that the application forms in question relate to dual status individuals; those who testified at trial as prosecution witnesses and who were, at the same time, victims granted the right to participate in the proceedings.

99. The majority, comprised of Judges Steiner and Aluoch, is of the view that victims' application forms may, in certain circumstances, be relevant to the questioning of dual status individuals. For example, it may be appropriate to admit the victim application form of a dual status individual if the application form is needed to properly understand his or her questioning as a witness. However, the majority is not persuaded that this is the case here.

100. Further, the majority is of the view that the probative value of the application forms is limited. Unlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature and are created through a relationship of confidence between a potential victim and the Registry of the Court. They are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings pursuant to Rule 89 of the Rules. For this reason, no formal requirements govern their creation, such as those applicable to the collection of "formal statements" under Rules 111 and 112 of the Rules. Moreover, third parties often fill out the

application forms on behalf of victim applicants or assist them in doing so;¹⁷⁶ a process that may increase errors.

101. In addition, the majority rejects the prosecution argument that victims' application forms constitute "prior statements" to which Rule 68 of the Rules applies. A victim's application form does not constitute "testimony" or a "transcript or other documented evidence of [such] testimony" under Rule 68 because, as discussed above, the purpose of such forms is not to provide evidence to assist in the determination of the substantive issues and criminal charges in the case.¹⁷⁷ Further, when submitting their application forms, applicants are not put on notice that the information they provide may be used as evidence in the proceedings, nor is there any suggestion that the applicant acts or is willing to act as a "witness". For these reasons, victims' application forms do not constitute "testimony" and are therefore not subject to the requirements of Rule 68 of the Rules, as the prosecution argues.

102. In terms of potential prejudice to the proceedings, the majority takes the view that admitting application forms as evidence may be perceived by victim applicants as an unfair use of documentation that was provided to the Court for a discrete purpose. As to the potential prejudice to the defence, rejecting the admission of the victims' application forms will not prejudice the defence because its questioning on potential inconsistencies is already reflected in the transcripts.

¹⁷⁶ See, e.g., transcript of hearing held on 20 January 2011, ICC-01/05-01/08-T-50-CONF-ENG CT, page 26, line 9 to page 27, line 11 (Witness 68 testifying that she did not fill in her victim application form herself).

¹⁷⁷ Trial Chamber II has undertaken a useful analysis of the type of statements that may constitute "testimony" for the purposes of Rule 68. See ICC-01/04-01/07-2635, paragraphs 43-50.

103. For these reasons, the majority finds that in applying the three part test, the application forms' limited relevance and probative value is outweighed by the prejudice that their admission would cause. Therefore, the majority, Judge Ozaki dissenting, denies the defence request for the admission into evidence of the victims' application forms for Witnesses 23, 68, 81, and 82.

11. MLC orders and notifications

i. Prosecution Submission

104. During the testimony of Witness 33, the prosecution requested the admission of the following four documents emanating from the MLC:

- (i) CAR-OTP-0009-0134, an 11 September 1999 notification regarding [REDACTED];¹⁷⁸
- (ii) CAR-OTP-0009-0135, an 11 September 1999 order creating the "*Bureau de Renseignement Militaire*" and [REDACTED];¹⁷⁹
- (iii) CAR-OTP-0009-0139, a 14 July 2002 notification regarding [REDACTED];¹⁸⁰ and

¹⁷⁸ Transcript of hearing on 9 September 2011, ICC-01/05-01/08-T-158-CONF-ENG ET, page 49, line 15 to page 52, line 25 and page 54, line 25 to page 55, line 3.

¹⁷⁹ Transcript of hearing on 9 September 2011, ICC-01/05-01/08-T-158-CONF-ENG ET, page 53, line 1 to page 55, line 3.

¹⁸⁰ Transcript of hearing on 9 September 2011, ICC-01/05-01/08-T-158-CONF-ENG ET, page 61, line 22 to page 63, line 15.

- (iv) CAR-OTP-0009-0141, an 11 November 2002 decree restructuring the “*Conseil Politico-Militaire de la Libération*”.¹⁸¹

105. The defence did not raise any objection to the admission of these documents.

ii. Analysis

106. The documents are relevant because (i) they tend to show Witness 33’s [REDACTED] during the period under consideration in this case, as well as the date [REDACTED]; (ii) they were used during Witness 33’s testimony to identify the accused’s [REDACTED];¹⁸² (iii) in the case of the 11 September 1999 notification (CAR-OTP-0009-0134), was used during Witness 33’s testimony as a basis for explaining [REDACTED];¹⁸³ and (iv) in the case of the 11 November 2002 decree (CAR-OTP-0009-0141), tends to show Witness 33’s [REDACTED] during the period under consideration, as well as identifying [REDACTED] members of that body.

107. The documents’ probative value derives from the following factors:

- (i) they were authenticated by Witness 33 in court;¹⁸⁴ (ii) Witness 33’s

¹⁸¹ Transcript of hearing on 12 September 2011, ICC-01/05-01/08-T-159-CONF-ENG ET, page 53, line 20 to page 57, line 7.

¹⁸² Transcript of hearing on 9 September 2011, ICC-01/05-01/08-T-158-CONF-ENG ET, page 50, lines 16-21; page 52, lines 16-25; page 54, lines 1-5; transcript of hearing on 12 September 2011, ICC-01/05-01/08-T-159-CONF-ENG ET, page 54, line 19 to page 55, line 1.

¹⁸³ Transcript of hearing on 9 September 2011, ICC-01/05-01/08-T-158-CONF-ENG ET, page 50, lines 3-7.

¹⁸⁴ Transcript of hearing on 9 September 2011, ICC-01/05-01/08-T-158-CONF-ENG ET, page 49, lines 20-21; page 53, lines 7-9; page 62, lines 2-4; transcript of hearing on 12 September 2011, ICC-01/05-01/08-T-159-CONF-ENG ET, page 53, line 25 to page 54, line 2.

testimony established their chain of custody;¹⁸⁵ and (iii) they appear to have been created in the ordinary course of the MLC's normal operations.

108. In terms of possible prejudice, the Chamber notes that the prosecution did not give notice on its list of documents for use with respect to Witness 33 that it intended to submit the 11 September 1999 notification (CAR-OTP-0009-0134) into evidence. However, Order 1470 provides that a party will not necessarily be precluded from submitting a document into evidence due to a failure to include that document on its list of items to be used in relation to a witness.¹⁸⁶ The defence does not claim to have suffered any prejudice as a result of the prosecution's failure to give notice of its intent to submit CAR-OTP-0009-0134 into evidence and the Chamber cannot see any. Document CAR-OTP-0009-0134 is therefore admitted, along with documents CAR-OTP-0009-0135, CAR-OTP-0009-0139 and CAR-OTP-0009-0141, for which no prejudice is apparent.

¹⁸⁵ Transcript of hearing on 9 September 2011, ICC-01/05-01/08-T-158-CONF-ENG ET, page 54, lines 4-20; page 63, line 22 to page 64, line 4; transcript of hearing on 12 September 2011, ICC-01/05-01/08-T-159-CONF-ENG ET, page 56, line 21 to page 57, line 3.

¹⁸⁶ ICC-01/05-01/08-1470, paragraph 8.

12. Other materials

i. Prosecution Submission

109. The prosecution requests the admission of the first page of Witness 79's witness statement, which bears the witness' signature.¹⁸⁷ The prosecution argues that this page is relevant because the signature shows that Witness 79 was not the author of the *procès-verbal d'audition de victime* (CAR-OTP-0001-0539), admitted above in paragraph 71.¹⁸⁸ The prosecution asserts that if Witness 79 was not the author of the *procès-verbal*, the alleged inconsistencies in that document cannot be attributed to the witness, which bears on the question of her credibility. The prosecution submits that the document is probative, as "it is more probable that the information provided in the [*procès-verbal*] is incorrect as it was neither read back nor signed by the witness as accurate".¹⁸⁹ The prosecution further submits that the document is not prejudicial because (i) Witness 79 testified that she did not author the *procès-verbal*; (ii) the defence questioned Witness 79 about the content of the *procès-verbal* and about her signature; and (iii) the defence was on notice that the document would be tendered into evidence because the prosecution moved for its admission during its questioning of the witness.¹⁹⁰

110. The defence does not object to the admission of the first page of the statement but states that it does object to the admission of the statement as

¹⁸⁷ CAR-ICC-0001-0011 (confidential).

¹⁸⁸ ICC-01/05-01/08-1514-Conf-AnxA, pages 10-11.

¹⁸⁹ ICC-01/05-01/08-1514-Conf-AnxA, page 10.

¹⁹⁰ ICC-01/05-01/08-1514-Conf-AnxA, pages 10-11.

a whole.¹⁹¹ In its reply, the prosecution confirms that it is not requesting the admission of the statement as a whole, but only its first page.¹⁹²

111. During the hearings, the prosecution moved for the admission of the following additional documents.

112. First, during the testimony of Witness 112, the prosecution requested the admission of a *procès-verbal* written and signed by the *chef de village*, which describes the theft allegedly suffered by Witness 112.¹⁹³ The defence objected, invoking the principle of orality and arguing that the document has no provenance, no relevance and is not admissible for the purposes advanced by the prosecution.¹⁹⁴ The defence also challenged the probative value of the document, noting that although Witness 112 testified that the document was created in 2002, it appeared to be dated 2009.¹⁹⁵ The prosecution replied that the document was submitted to facilitate Witness 112's testimony, that its relevance was "out of question" and that the apparent inconsistency with regards to the document's date should not prevent its admission.¹⁹⁶

¹⁹¹ ICC-01/05-01/08-1558-Conf, paragraph 25.

¹⁹² ICC-01/05-01/08-1564-Conf, paragraph 13.

¹⁹³ CAR-OTP-0037-0132_R01 (confidential). See transcript of hearing on 15 June 2011, ICC-01/05-01/08-T-129-CONF-ENG CT2, page 17, lines 17-18.

¹⁹⁴ ICC-01/05-01/08-T-129-CONF-ENG CT2, page 22, line 25 to page 23, line 19.

¹⁹⁵ ICC-01/05-01/08-T-129-CONF-ENG CT2, page 23, lines 1-4.

¹⁹⁶ ICC-01/05-01/08-T-129-CONF-ENG CT2, page 24, lines 10 to page 25, line 14.

113. *Second*, the prosecution submitted, through Witness 108, an MLC service report that Witness 108 testified he found in his house after the MLC troops had departed.¹⁹⁷ The defence did not object.

114. *Third*, the prosecution tendered, also through Witness 108, a document entitled "*Livre de l'instructeur pour la formation élémentaire et complémentaire toutes armes*".¹⁹⁸ Witness 108 testified that he found this document in his house after the MLC troops had departed.¹⁹⁹ Although the defence did not object when the document was submitted for admission, it later challenged the document's veracity, relevance and admissibility during its questioning of the witness.²⁰⁰ The prosecution replied that "the defence [was] mixing up authenticity, admissibility, relevance, custodianship and probative value".²⁰¹

ii. Defence Submission

115. The defence requests the admission of a calendar for the year 2002, which it used during its questioning of Witness 22.²⁰² The defence fails to explain why it believes that the calendar is admissible.

¹⁹⁷ CAR-OTP-0037-0092 (confidential). See Transcript of hearing on 27 June 2011, ICC-01/05-01/08-T-132-CONF-ENG ET, page 42, line 4 to page 43, line 20, and page 46, lines 17-19.

¹⁹⁸ CAR-OTP-0037-0100 (confidential).

¹⁹⁹ Transcript of hearing on 27 June 2011, ICC-01/05-01/08-T-132-CONF-ENG ET, page 43, line 21 to page 46, line 13.

²⁰⁰ Transcript of hearing on 29 June 2011, ICC-01/05-01/08-T-134-CONF-ENG ET, page 34, line 17 to page 35, line 22.

²⁰¹ Transcript of hearing on 29 June 2011, ICC-01/05-01/08-T-134-CONF-ENG ET, page 36, lines 17-18.

²⁰² CAR-ICC-0001-0005 (public).

116. The prosecution asserts that the calendar is unnecessary because Article 69(6) of the Statute permits the Chamber to take judicial notice of facts such as dates.²⁰³

117. During the testimony of Witness 65,²⁰⁴ the defence requested the admission of a diagram,²⁰⁵ annexed to Witness 65's written statement, as modified by the witness in court.²⁰⁶ The defence asserts that the modified diagram is "essential [...] to properly understand the way in which instructions were communicated" between the various organs of the MLC.²⁰⁷ The prosecution did not object.

iii. Analysis

118. At the outset, the Chamber underlines the specificity of the purpose for which the admission of only the first page of Witness 79's statements is considered under this section. The prosecution is seeking the admission of this page to enable the Chamber to verify the signature of Witness 79, and it is for this discrete purpose that the Chamber finds the page to be relevant. Its probative value stems from Witness 79's authentication (and modification) of the page in court, and because it is useful for determining the authorship of the *procès-verbal d'audition de victime* in question (CAR-OTP-0001-0539). There is no suggestion that its admission would be prejudicial. For these reasons, page CAR-ICC-0001-0011 is admitted.

²⁰³ ICC-01/05-01/08-1557-Conf-AnxA, page 1.

²⁰⁴ Transcript of hearing on 4 October 2011, ICC-01/05-01/08-T-169-CONF-ENG ET, page 60, lines 10-18.

²⁰⁵ CAR-OTP-0022-0273.

²⁰⁶ CAR-ICC-0001-0074 (confidential).

²⁰⁷ Transcript of hearing on 4 October 2011, ICC-01/05-01/08-T-169-CONF-ENG ET, page 60, lines 15-18.

119. Turning to Witness 112's *procès-verbal* (CAR-OTP-0037-0132_R01), the document is relevant for two purposes. *First*, the *procès-verbal* is relevant because it was a subject of Witness 112's testimony and will assist the Chamber to assess that testimony. *Second*, the document is relevant because it supports Witness 112's testimony that he suffered the theft about which he testified.

120. In terms of probative value, the document bears what appears to be an official stamp and the author's signature, both of which are indicia of reliability. In addition, Witness 112 identified the document in court. On the other hand, several factors undermine the document's reliability. It is handwritten, is not on official letterhead and is dated February 2009, several years after the alleged commission of the crime to which it relates.²⁰⁸ It is important to note, however, that the Chamber's assessment of an item's probative value at the admissibility stage is preliminary in nature.²⁰⁹ The Chamber is satisfied that despite the factors detailed above, the *procès-verbal* has sufficient probative value to satisfy this *prima facie* standard. These factors do not undermine the reliability of the document to such a degree that it becomes inadmissible. They simply go to the weight that the Chamber will afford the document in its final determination.

121. The Chamber does not see any prejudice in admitting this document as the defence had the opportunity to question the witness on

²⁰⁸ While Witness 112 testified that the document was created in 2002, an item's reliability is determined in the first instance by reference to its inherent characteristics, not extraneous evidence.

²⁰⁹ ICC-01/04-01/06-1399-Corr, paragraph 28; ICC-01/04-01/06-2595-Red-Corr, paragraph 39.

its contents. The *procès-verbal* (CAR-OTP-0037-0132_R01) is therefore admitted.

122. Turning to the MLC service report (CAR-OTP-0037-0092), the document is relevant because it (i) will assist the Chamber in determining the weight that should be afforded to Witness 108's testimony; and (ii) tends to show that the MLC entered onto Witness 108's property. The document's probative value inheres from the fact that it (i) was identified by Witness 108 in court; and (ii) appears to be direct evidence of the MLC's occupation of Witness 108's property. There is no suggestion that its admission would be prejudicial. For these reasons, and because the defence does not object to the report's admission, the Chamber admits it.

123. The "*Livre de l'instructeur pour la formation élémentaire et complémentaire toutes armes*" (CAR-OTP-0037-0100) is relevant for the same reasons as the MLC service report. In terms of probative value, the doubts raised by the defence regarding the document's origin are insufficient to prevent its admission, particularly given that Witness 108 recognised the document in court and identified it as one of two he found when he returned to his house after the MLC troops had departed. The Chamber will, of course, consider the document's alleged defects or inconsistencies when determining the weight to attribute to it. There is no suggestion that the document's admission would cause unfair prejudice. It is therefore admitted into evidence.

124. The Chamber refuses to admit the calendar for the year 2002 (CAR-ICC-0001-0005). Under Article 69(6) of the Statute, the Chamber may take

judicial notice of “facts of common knowledge”, such as dates. As such, the calendar’s admission is unnecessary.

125. Finally, the diagram modified by Witness 65 in court (CAR-ICC-0001-0074) is relevant because (i) it purports to show how the MLC’s communication network was structured during the period under consideration in this case; and (ii) was a subject of Witness 65’s testimony, and will therefore assist the Chamber in assessing that testimony. The diagram’s probative value stems from the fact that Witness 65 authenticated the document in court²¹⁰ and modified it in response to requests for clarification from counsel.²¹¹ There is no suggestion that admitting the modified diagram would cause any prejudice and the Chamber cannot identify any. It is therefore admitted.

12. Witnesses’ written statements

i. Prosecution Submission

126. The prosecution requests the admission of the written statements of Witnesses 23,²¹² 42,²¹³ 73,²¹⁴ and 209,²¹⁵ and the translations thereof. The

²¹⁰ Transcript of hearing on 4 October 2011, ICC-01/05-01/08-T-169-CONF-ENG ET, page 58, lines 17 to 22.

²¹¹ Transcript of hearing on 4 October 2011, ICC-01/05-01/08-T-169-CONF-ENG ET, page 59, lines 4 to 24.

²¹² CAR-OTP-0008-0033_R04 (confidential), CAR-OTP-0008-0050_R03 (confidential), CAR-OTP-0008-0088_R03 (confidential), CAR-OTP-0008-0112_R03 (confidential); and translations CAR-OTP-0034-0106_R02 (confidential), CAR-OTP-0034-0123_R02 (confidential), CAR-OTP-0034-0154_R02 (confidential), CAR-OTP-0034-0170_R02 (confidential).

²¹³ CAR-OTP-0027-0786 (confidential), CAR-OTP-0027-0809 (confidential), CAR-OTP-0027-0845 (confidential); and translations CAR-OTP-0049-1300 (confidential), CAR-OTP-0049-1323 (confidential), CAR-OTP-0049-1361 (confidential).

prosecution asserts that the statements of Witnesses 23, 42 and 73 are relevant and probative to prove rape and pillage and are being offered as “prior consistent statement[s] [...] offered to rebut an expressed or implied charge against the witness[es] of recent fabrication, influence, motive or collusion.”²¹⁶ With respect to Witness 209’s statement, the prosecution asserts that it reduced its in-court questioning due to the witness’ health and that as a result, his testimony “does not capture entirely the information that the witness provided in his statements.”²¹⁷ The prosecution argues that admitting the statements would not be prejudicial because the defence possessed them before the witnesses’ testimony and had the opportunity to question the witnesses in court.²¹⁸

127. The defence opposes the admission of the statements. The defence challenges the prosecution’s arguments regarding the statements of Witnesses 23, 42 and 73, asserting that prior recorded statements are not admissible “simply because an allegation of fabrication, motive o[r] collusion is raised”.²¹⁹ The defence contends that the admission of these statements into evidence is not permissible under the Court’s legal framework and that the prosecution has not provided a valid justification why the Chamber should deviate from the presumption in favour of the

²¹⁴ CAR-OTP-0039-0315_R01 (confidential), CAR-OTP-0039-0341_R01 (confidential), CAR-OTP-0039-0368_R01 (confidential); and translations CAR-OTP-0051-0003_R01 (confidential), CAR-OTP-0051-0031_R01 (confidential), CAR-OTP-0051-0059_R01 (confidential).

²¹⁵ CAR-OTP-0057-0066_R02 (confidential), CAR-OTP-0057-0080_R01 (confidential), CAR-OTP-0057-0096_R01 (confidential), CAR-OTP-0057-0107_R01 (confidential), CAR-OTP-0057-0128_R01 (confidential), CAR-OTP-0057-0153_R01 (confidential); and translations CAR-OTP-0058-0013_R02 (confidential), CAR-OTP-0058-0025_R01 (confidential), CAR-OTP-0058-0043_R01 (confidential), CAR-OTP-0058-0056_R01 (confidential), CAR-OTP-0058-0079_R01 (confidential), CAR-OTP-0062-0086_R01 (confidential).

²¹⁶ ICC-01/05-01/08-1514-Conf-AnxA, pages 6-9.

²¹⁷ ICC-01/05-01/08-1514-Conf-AnxA, page 38.

²¹⁸ ICC-01/05-01/08-1514-Conf-AnxA, pages 6-9 and 38-39.

²¹⁹ ICC-01/05-01/08-1558-Conf, paragraphs 14-15.

orality of proceedings enshrined in Article 69(2) of the Statute.²²⁰ To this end, the defence relies upon jurisprudence of the Appeals Chamber and Trial Chambers I and II to argue that witness “statements are inadmissible when the evidence contained therein relates to matters that are significant to the case, or materially in dispute”.²²¹

128. The defence asserts the same arguments in relation to Witness 209’s statements.²²² In addition, the defence attacks the prosecution’s assertion that it streamlined its questioning of Witness 209, asserting that the prosecution used approximately seven and-a-half hours to question the witness, whereas it had estimated in advance that it would require only seven hours.²²³ The defence submits that admitting Witness 209’s statement “would set a troubling precedent”, making it possible to avoid a witness’ less favourable answers “on the basis that the more favourable responses contained in prior statements could simply be admitted instead.”²²⁴ The defence finally argues that the admission of the statements is not compatible with the accused’s right to a public trial because the statements are classified as confidential.²²⁵

129. In reply, the prosecution argues that the statements of Witnesses 23, 42 and 73 are relevant “to the Chamber’s fair evaluation of the testimony and credibility of the witnesses” and to rebut the defence’s assertion that the evidence of Witnesses 42 and 73 was fabricated following meetings

²²⁰ ICC-01/05-01/08-1558-Conf, paragraphs 16, 20.

²²¹ ICC-01/05-01/08-1558-Conf, paragraphs 16-17.

²²² ICC-01/05-01/08-1558-Conf, paragraph 33.

²²³ ICC-01/05-01/08-1558-Conf, paragraphs 33-35.

²²⁴ ICC-01/05-01/08-1558-Conf, paragraph 36.

²²⁵ ICC-01/05-01/08-1558-Conf, paragraph 37.

with Witness 23.²²⁶ The prosecution contends that it could not have rebutted these allegations through re-examination of the witnesses “because the allegations of taint go beyond one single witness”.²²⁷ The prosecution finally submits that “[w]ithout the statements, the Chamber will be unable to fully assess the express or implied allegations that [the witnesses] colluded in advance of their testimony to give false evidence”, which will prejudice the fair evaluation of their testimony.²²⁸

ii. Defence Submission

130. The defence requests the admission of the written statement of Witness 6²²⁹ and two²³⁰ of the three parts of the written statement of Witness 9.²³¹ The defence has not sought the admission of the translations of these statements. The defence fails to explain why it believes the statements are admissible.

131. The prosecution objects on the basis of the principle of the primacy of the orality of proceedings, arguing that the Chamber may only admit written statements on an exceptional basis, “after a cautious analysis in

²²⁶ ICC-01/05-01/08-1564-Conf, paragraphs 14-15.

²²⁷ ICC-01/05-01/08-1564-Conf, paragraphs 16.

²²⁸ ICC-01/05-01/08-1564-Conf, paragraph 17.

²²⁹ CAR-OTP-0005-0099 (confidential). The English translation bears document reference number CAR-OTP-0049-0363 (confidential).

²³⁰ CAR-OTP-0010-0107 (confidential), CAR-OTP-0010-0170_R03 (confidential). The English translations bear document reference numbers CAR-OTP-0052-0189 (confidential) and CAR-OTP-0055-0483 (confidential), respectively.

²³¹ The remaining part of Witness 9’s statement – the admission of which has not been sought – bears document reference number CAR-OTP-0010-0120. The English translation bears document reference number CAR-OTP-0055-0434.

accordance with Articles 69(2) and 69(4) of the Statute and with Rule 68 of the Rules.”²³²

iii. Analysis

The admissibility of the written statements of witnesses who testify at trial.

132. As a preliminary matter, the Chamber wishes to make clear that it will not consider, in its present analysis, whether the written statements of individuals not called to testify at trial may be admitted into evidence. This issue has not arisen from the present submissions and will not be addressed. The analysis below is limited to the circumstances under which the written statements of witnesses who testify at trial and whose statements have been sought for admission by the parties, may be admitted into evidence.

133. The Chamber notes that, whilst the parties have requested the admission of certain written witness statements they deem to be useful, they both object to the admission of the statements submitted by the opposing party on the basis of the principle of orality.

134. The starting point for the Chamber’s analysis is the presumption, enshrined in Article 69(2) of the Statute, that the “testimony of a witness at trial shall be given in person”. As the Appeals Chamber has held, this “principle of orality”, “makes in-court personal testimony the rule”.²³³

²³² ICC-01/05-01/08-1557-Conf-AnxA, pages 9 and 12-13.

²³³ ICC-01/05-01/08-1386, paragraph 76.

However, the Appeals Chamber has also made clear that “in-court personal testimony is not the exclusive mode by which a Chamber may receive witness testimony”, and that “a Chamber has the discretion to receive the testimony of a witness by means other than in-court personal testimony, as long as this does not violate the Statute and accords with the Rules” and “is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally”.²³⁴

135. Where a witness testifies before the Chamber, Rule 68 of the Rules is of particular relevance to the question of the admissibility of their written statements.²³⁵ This provision empowers a Trial Chamber to allow, in accordance with Article 69(2) of the Statute:

the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

136. As this and other Chambers have previously held, Rule 68 is directed at the “testimony of a witness” in a broad sense and covers written witness statements, permitting the Chamber to admit written

²³⁴ ICC-01/05-01/08-1386, paragraphs 77-78. Trial Chambers I and II have also held that under the Court’s legal framework, in-court testimony is not the exclusive means through which a witness’ evidence may be adduced at trial. *See* ICC-01/04-01/06-1399-Corr, paragraph 22, Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010, ICC-01/04-01/07-2362, paragraph 14.

²³⁵ ICC-01/05-01/08-1386, paragraph 77.

statements when the conditions enumerated in Rule 68(a) or Rule 68(b) are satisfied.²³⁶ If the conditions of Rule 68(a) or Rule 68(b) are met, the Chamber will proceed to analyse the relevance and probative value of the witness' statements, together with the potential prejudice that their admission may cause, in line with the three-part test outlined above in paragraphs 13 to 16.²³⁷ In the Chamber's view, this procedure complies with the "cautious item-by-item analysis" mandated by the Appeals Chamber.²³⁸

137. In relation to all the statements whose admission has been sought, subpart (b) of Rule 68 of the Rules is applicable because the witnesses to whom the statements relate were "present before the Trial Chamber" during their testimony.

138. There are two requirements under Rule 68(b). *First*, the prosecution, defence and Chamber must have had "the opportunity to examine the witness". In the present case, this requirement is met.

139. *Second*, the witness must "not object to the submission" of the statement. This requirement is satisfied in relation to Witnesses 42,²³⁹ 73,²⁴⁰

²³⁶ Decision on the "Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108", 16 September 2010, ICC-01/05-01/08-886, paragraph 6; ICC-01/04-01/06-1603, paragraph 18; ICC-01/04-01/07-2362, paragraph 10-13.

²³⁷ For a similar approach, *see* ICC-01/04-01/07-2289-Corr-Red, paragraph 13.

²³⁸ ICC-01/05-01/08-1386, paragraph 81.

²³⁹ Transcript of hearing on 14 February 2011, ICC-01/05-01/08-T-65-CONF-ENG ET, page 54 lines 21-25.

²⁴⁰ Transcript of hearing on 22 February 2011, ICC-01/05-01/08-T-71-CONF-ENG ET, page 57, lines 12 to page 58, line 1.

and 209,²⁴¹ who consented to their statements being submitted into evidence during their testimony. It is not satisfied in relation to Witnesses 6, 9 or 23. While they attested to the truth of their statements and/or testified that they heard, saw or experienced the matters described therein,²⁴² they did not expressly consent to the submission of their statements into evidence. Because Rule 68(b)'s consent requirement is not satisfied, the Chamber will not analyse the relevance, probative value and potential prejudice of admitting the statements of Witnesses 6, 9 or 23.

140. The Chamber will revisit the question of the admissibility of the statements of these three witnesses if it is established that they do "not object to the submission" of their statements. Rule 68(b) does not specify a particular manner in which consent is to be obtained and the Chamber considers that it may take the form of a written declaration, as long as the Chamber is provided with sufficient information to establish that the declaration originated from the relevant witness and was given voluntarily. The Chamber will instruct the Victims and Witnesses Unit ("VWU") to contact Witnesses 6, 9 and 23, inform them that the admission of their statements has been sought, and to ask whether they have any objection.

141. The relevance, probative value and potential prejudice of the written statements of Witnesses 42, 73 and 209 are analysed below. The

²⁴¹ Transcript of hearing on 25 May 2011, ICC-01/05-01/08-T-117-CONF-ENG ET, page 6, lines 19-24.

²⁴² See transcript of hearing on 4 April 2011, ICC-01/05-01/08-T-94-CONF-ENG ET, page 6, lines 1-6 (Witness 6); transcript of hearing on 6 April 2011, ICC-01/05-01/08-T-96-CONF-ENG CT, page 59, lines 5-12 (Witness 6); transcript of hearing on 3 May 2011, ICC-01/05-01/08-T-102-CONF-ENG ET, page 6, line 23 to page 7, line 1 (Witness 9); transcript of hearing on 20 January 2011, ICC-01/05-01/08-T-50-CONF-ENG CT, page 51, lines 10-13 (Witness 23).

Chamber's rulings in relation to these documents are made by majority, consisting of Judges Steiner and Aluoch. Judge Ozaki dissents for the reasons explained in her partly dissenting opinion.

The relevance and probative value of the written statements of Witnesses 42, 73 and 209.

142. In the view of the majority, composed by Judges Steiner and Aluoch, the statements are primarily relevant because they assist the Chamber in assessing, contextualising and weighing the witnesses' testimony. Evaluating testimony is one of the Chamber's principal functions, and items that may assist the Chamber in this task are presumptively relevant to its determinations on, *inter alia*, the credibility of the testifying witness, the veracity of his or her testimony, and the weight it should be afforded. Formal witness statements, including those taken pursuant to Rule 111 of the Rules, are particularly useful in this regard because they memorialise the witness' prior account of the events under consideration. When compared against the witness' testimony, written statements provide a powerful tool for testing the accuracy of that testimony and assessing how consistent (or inconsistent) his or her account is. In short, referring to a witness' written statement enables the Chamber to undertake a fuller evaluation of the witness' testimony.

143. To some extent, this process takes place in court because the information recorded in a witness' written statement often forms the basis for his or her questioning by the parties. While the party-driven process is certainly of assistance to the Chamber, it cannot, in the majority's view, be

the beginning and end of the inquiry. The majority believes that, in order for the Chamber to properly discharge its statutory truth-finding prerogative, it should be able to compare a witness' testimony against the entirety of his or her written statement, as opposed to merely those excerpts that the parties decide to refer to in court in the limited time available to them to conduct their questioning. On this basis and for this purpose, the majority considers that Witnesses 42, 73 and 209's written statements are relevant and may thus be admitted into evidence pursuant to Article 69(2) of the Statute and Rule 68 of the Rules, subject to the analysis of probative value and prejudice, discussed below.²⁴³

144. In terms of probative value, the statements' reliability stems from two factors. *First*, they appear to have been taken in accordance with the formal requirements of Rule 111 of the Rules, which are designed to ensure that the written record accurately reflects the witness' questioning. *Second*, Witnesses 42,²⁴⁴ 73²⁴⁵ and 209²⁴⁶ each testified in court as to the accuracy of their written statements. In the majority's view, these factors provide sufficient probative value to justify the statements' admission

²⁴³ ICC-01/05-01/08-1386, paragraph 77.

²⁴⁴ Transcript of hearing on 10 February 2011, ICC-01/05-01/08-T-63-CONF-ENG ET, page 55, lines 1 to 4.

²⁴⁵ Transcript of hearing on 21 February 2011, ICC-01/05-01/08-T-70-CONF-ENG CT, page 4, lines 11-17.

²⁴⁶ Transcript of hearing on 25 May 2011, ICC-01/05-01/08-T-117-CONF-ENG ET, page 6, lines 16-17 and 23 (Witness 209 testifying that although he noticed "a few nuances in terms of form" in his statements, he had "nothing to add" or "to take away" from them).

The potential prejudice of admitting the written statements of Witnesses 42 and 73.

145. Following the Appeals Chamber's direction that the admission of written statements must "not [be] prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally",²⁴⁷ the potential for prejudice is addressed below. The potential prejudice in admitting the statements depends on the use that will be made of them. The majority will first consider the statements of Witnesses 42 and 73 and then the statement of Witness 209.

146. The majority understands from the Prosecution's Submission that the statements of Witnesses 42 and 73 are being submitted to assist the Chamber's evaluation of their testimony and, specifically, to rebut an allegation that some of their testimony was fabricated.²⁴⁸ Far from prejudicing the "fair evaluation of the testimony" of the witnesses,²⁴⁹ admitting the statements for this purpose will enable the Chamber to compare the witnesses' testimony against their prior statements to determine the extent of inconsistencies, if any.

147. The majority is not persuaded by the defence argument that the presumption in favour of orality prevents the admission of statements of witnesses who were called to testify in Court.²⁵⁰ As an initial matter, the defence argument is inconsistent with the principles set down in the

²⁴⁷ ICC-01/05-01/08-1386, paragraph 78.

²⁴⁸ ICC-01/05-01/08-1514-Conf-AnxA, pages 7-9.

²⁴⁹ Article 69(4) of the Statute.

²⁵⁰ ICC-01/05-01/08-1558-Conf, paragraphs 16, 20.

above-mentioned Appeals Judgment.²⁵¹ Further, this is not a situation where written witness statements are being used as a *substitute* for testimony that a testifying witness could have given in court but did not, or for the evidence of an individual who was not called to testify at all. Both Witnesses 42 and 73 have testified in court, and their written statements are being submitted to *complement* that testimony. Admitting the written statements so that the Chamber can better evaluate the witnesses' testimony does not undermine the presumption in favour of oral testimony enshrined in Article 69(2) of the Statute.

148. Similarly, the majority rejects the defence argument that the statements are inadmissible because they relate "to matters that are significant to the case, or materially in dispute".²⁵² In support of this argument, the defence relies on jurisprudence from Trial Chambers I and II, as well as the ruling of the Appeals Chamber that in deciding on applications for the admission of prior recorded testimony under Rule 68 of the Rules, the Trial Chamber may:

[. . .] for example, take into account, a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.²⁵³ (internal citations omitted)

149. These factors are important considerations when the prior written statement is admitted as a *substitute* for testimony. They reflect the philosophy that evidence that goes to the heart of the case should be

²⁵¹ ICC-01/05-01/08-1386, paragraph 77.

²⁵² ICC-01/05-01/08-1558-Conf, paragraphs 22 and 24 (incorporating paragraphs 16 and 17 by reference).

²⁵³ ICC-01/05-01/08-1386, paragraph 78.

presented via testimony in court because live testimony can be tested by questioning and enables the Chamber “to observe [a witness’] demeanour and composure, and [. . .] to seek clarification on aspects of the witness’ testimony that may be unclear”.²⁵⁴ However, neither the Appeals Judgment nor the decisions of Trial Chambers I and II relied upon by the defence address the question of whether written statements may be admitted as a complement to a witness’ testimony, so that the Chamber may better evaluate that testimony. Therefore, the above jurisprudence does not address directly the issue now before the Chamber.

150. Here, the substance of the witness’ testimony was given live in court and was subject to testing through questioning, whereas their prior statements will be treated as complementary to the oral testimony, and will be used as a basis for assessing that testimony and determining the weight it should be afforded. The defence will not be prejudiced if the statements are admitted for this purpose because it was able to test the veracity of the witnesses’ evidence by questioning them in court regarding any inconsistencies between their written statements and their testimony. On this basis, the majority finds that, in this specific case, there is no potential prejudice that would outweigh the relevance and probative value of the statements. The statements of Witnesses 42 and 73 are therefore admitted.

²⁵⁴ ICC-01/05-01/08-1386, paragraph 76; *see also* ICC-01/04-01/06-1603, paragraph 21.

The potential prejudice of admitting the written statement of Witness 209.

151. The prejudice inquiry in relation to Witness 209's statement is different because the prosecution seeks its admission for a different purpose. The prosecution asserts that "the testimony given by the witness does not capture entirely the information that the witness provided in his statement[]" and seeks to admit the statement to provide "more detailed information".²⁵⁵ In essence, the prosecution seeks to admit Witness 209's statement to cover perceived lacunae in his testimony.

152. As an initial matter, the majority is not persuaded by the prosecution's argument that the admission of Witness 209's statement is warranted on the basis that the "[p]rosecution streamlined its examination [. . .] due to the health conditions of the witness during his testimony".²⁵⁶ The prosecution estimated that it would require seven hours to question Witness 209,²⁵⁷ and, based on the Chamber's calculations, used a little under six and-a-half hours. While it is true that the witness expressed health concerns during his testimony, the prosecution's decision to reduce its questioning time by 30 minutes does not, in and of itself, warrant the admission of the Witness 209's statement for the purpose advanced by the prosecution.

²⁵⁵ ICC-01/05-01/08-1514-Conf-AnxA, page 38.

²⁵⁶ ICC-01/05-01/08-1514-Conf-AnxA, page 38.

²⁵⁷ Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning, 26 October 2011, ICC-01/05-01/08-975-Conf, page 4. A public redacted version was filed on 5 November 2010: Public Redacted Version of "Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning" (ICC-01/05-01/08-975-Conf), 5 November 2010, ICC-01/05-01/08-975-Red.

153. More fundamentally, in the majority's view, considerations of fairness and the presumption in favour of orality dictate that written statements should not be used to fill in the gaps in a witness' testimony. Admitting 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 of testing as oral evidence.

154. In these circumstances, the majority considers that the potential prejudice to the defence prevents Witness 209's statement being admitted for the purpose advanced by the prosecution. However, the statement may be admitted for the same limited purpose as those of Witnesses 42 and 73 – namely, to complement Witness 209's testimony and to enable the Chamber to better assess its veracity and determine the weight it should be afforded. Exercising its power to freely assess the relevance and admissibility of evidence pursuant to Rule 63(2) of the Rules, the majority concludes, for the same reasons discussed above in paragraphs 144 to 149, that the potential prejudice of admitting Witness 209's statement for this purpose would not outweigh its probative value. Witness 209's statement is therefore admitted on the same basis as those of Witnesses 42 and 73.

Conclusion

155. The Chamber, by majority, admits the statements and translations thereof of Witness 42 (CAR-OTP-0027-0786, CAR-OTP-0027-0809, CAR-OTP-0027-0845, CAR-OTP-0049-1300, CAR-OTP-0049-1323, CAR-OTP-0049-1361), Witness 73 (CAR-OTP-0039-0315_R01, CAR-OTP-0039-0341_R01, CAR-OTP-0039-0368_R01, CAR-OTP-0051-0003_R01, CAR-OTP-0051-0031_R01, CAR-OTP-0051-0059_R01) and Witness 209 (CAR-OTP-0057-0066_R02, CAR-OTP-0057-0080_R01, CAR-OTP-0057-0096_R01, CAR-OTP-0057-0107_R01, CAR-OTP-0057-0128_R01, CAR-OTP-0057-0153_R01, CAR-OTP-0058-0013_R02, CAR-OTP-0058-0025_R01, CAR-OTP-0058-0043_R01, CAR-OTP-0058-0056_R01, CAR-OTP-0058-0079_R01, CAR-OTP-0062-0086_R01).

156. The Chamber refuses to admit the statements of Witness 6 (CAR-OTP-0005-0099), Witness 9 (CAR-OTP-0010-0107 and CAR-OTP-0010-0170_R03), and Witness 23 (CAR-OTP-0008-0033_R04, CAR-OTP-0008-0050_R03, CAR-OTP-0008-0088_R03, CAR-OTP-0008-0112_R03; and translations CAR-OTP-0034-0106_R02, CAR-OTP-0034-0123_R02, CAR-OTP-0034-0154_R02, CAR-OTP-0034-0170_R02).

13. Items not submitted in accordance with Order 1470

157. On 8 September 2011, the defence submitted via email its list of documents to be used during the questioning of Witness 33.²⁵⁸ In accordance with the procedure established in paragraph 7(a) of Order 1470, the list identified 39 documents intended to be submitted as evidence during the questioning of the witness.²⁵⁹ On 14 September 2011, the prosecution submitted, via email, notice of its objections to the admission of 32 of the 39 documents.²⁶⁰

158. During Witness 33's testimony, the defence did not formally request the admission into evidence of any documents on its list, although it indicated that it intended to request the admission of certain documents.²⁶¹ On 21 September 2011, following the conclusion of Witness 33's testimony, the defence sent the Chamber an email explaining that "the defence ha[d] revised its application to tender documents into evidence through this witness".²⁶² The defence explained that of the 39 documents initially marked "to be tendered" on the defence list, 24 "stand properly to be admitted into evidence, notwithstanding the prosecution's objection".²⁶³ The prosecution replied via email, "challeng[ing] the tendering of evidence by the Defence through Witness 33 via email" and

²⁵⁸ Email from defence Case Manager, 8 September 2011, at 16:26. The list was subsequently amended three times: email from defence Case Manager, 8 September 2011, at 17:45; email from defence Case Manager, 12 September 2011, at 10:50; email from defence Case Manager, 14 September 2011, at 15:38.

²⁵⁹ Email from defence Case Manager, 12 September 2011, at 10:50. The defence did not take a position on whether it intended to tender into evidence the four items added in the third and final iteration of its list of documents.

²⁶⁰ Email from prosecution Trial Lawyer to Trial Chamber's Legal Officer, 14 September 2011, at 12:41.

²⁶¹ Transcript of hearing on 12 September 2011, ICC-01/05-01/08-159-CONF-ENG ET, page 45, line 8 to page 47, line 1.

²⁶² Email from defence Legal Assistant to Trial Chamber's Legal Officer, 21 September 2011, at 10:42.

²⁶³ Email from defence Legal Assistant to Trial Chamber's Legal Officer, 21 September 2011, at 10:42.

asserting substantive objections to the admissibility of certain documents.²⁶⁴

159. It appears to the Chamber that the defence is proceeding under the assumption that the 24 documents identified in its 21 September email have been “submitted” within the meaning of Article 64(3) of the Statute. The Chamber disagrees with this assumption.

160. For an item to be considered “submitted” within the meaning of Article 64(3) of the Statute, its admission must be requested on the record. This may be done orally during a hearing, or in a written filing. Either way, however, the party’s request for admission must be memorialised in the record of the case. This is a requirement of Order 1470,²⁶⁵ and is necessary to ensure compliance with the Chamber’s duty under Article 64(10) of the Statute to maintain “a complete record of the trial, which accurately reflects the proceedings”. Similarly, a party’s objections to the admission of the items in question must be captured on the record, either orally (if the items are submitted at a hearing) or in writing (if the items’ submission is requested in writing).

161. The formal submission of items into evidence should not be confused with the procedure established in paragraph 7 of Order 1470 regarding the exchange of document lists and objections in advance of hearings. The latter is simply a case management tool, designed to give

²⁶⁴ Email from prosecution Senior Trial Lawyer to Trial Chamber’s Legal Officer, 24 September 2011, at 17:04.

²⁶⁵ See ICC-01/05-01/08-1470, paragraph 7(b) (“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.”) (emphasis added).

the parties notice of the documents that will be used in upcoming hearings. It provides the parties with an opportunity to consider whether to object to an item's admission before the offering party formally submits it into evidence. It also 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. This notice requirement does not, however, displace the requirement that items be formally submitted.

162. Once the defence has formally moved for the admission of the 24 documents identified in its 21 September email – either in court or through a written filing – and once the prosecution has made its objections on the record, the Chamber will rule on the documents' admissibility. The same applies to other items marked "to be tendered" on the parties' lists of documents that have not yet been formally moved into evidence.

III. Orders

163. In view of the foregoing, the Chamber, ruling by majority in part:

- 1) Partially grants the prosecution's requests for the admission of evidence and admits items: CAR-ICC-0001-0001, CAR-ICC-0001-0004, CAR-ICC-0001-0009, CAR-ICC-0001-0065, CAR-ICC-0001-0066, CAR-ICC-0001-0070, CAR-ICC-0001-0071, CAR-OTP-0064-0560, CAR-OTP-0064-0621, CAR-OTP-0054-0943, CAR-OTP-0064-0305, CAR-OTP-0064-0577, CAR-ICC-0001-0012, CAR-OTP-0065-0023, CAR-OTP-0065-0043, CAR-OTP-0054-0961, CAR-OTP-0004-0316, CAR-OTP-0007-0569, CAR-OTP-0020-0442,

CAR-OTP-0065-0173, CAR-OTP-0065-0178, CAR-OTP-0001-0159, CAR-OTP-0001-0160, CAR-OTP-0001-0161, CAR-OTP-0001-0162, CAR-OTP-0001-0163, CAR-OTP-0001-0164, CAR-OTP-0001-0165, CAR-OTP-0001-0166, CAR-OTP-0001-0167, CAR-OTP-0001-0168, CAR-OTP-0001-0169, CAR-OTP-0001-0170, CAR-OTP-0001-0171, CAR-OTP-0001-0172, CAR-OTP-0001-0173, CAR-OTP-0001-0174, CAR-OTP-0001-0178, CAR-OTP-0001-0182, CAR-OTP-0001-0187, CAR-OTP-0001-0190, CAR-OTP-0001-0196, CAR-OTP-0001-0199, CAR-OTP-0001-0200, CAR-OTP-0001-0204, CAR-OTP-0001-0212, CAR-OTP-0001-0218, CAR-OTP-0001-0222, CAR-OTP-0001-0227, CAR-OTP-0001-0231, CAR-OTP-0001-0235, CAR-OTP-0001-0239, CAR-OTP-0001-0243, CAR-OTP-0001-0244, CAR-OTP-0001-0248, CAR-OTP-0001-0253, CAR-OTP-0001-0257, CAR-OTP-0001-0263, CAR-OTP-0001-0267, CAR-OTP-0001-0268, CAR-OTP-0001-0273, CAR-OTP-0001-0277, CAR-OTP-0001-0281, CAR-OTP-0001-0284, CAR-OTP-0001-0287, CAR-OTP-0001-0290, CAR-OTP-0001-0291, CAR-OTP-0001-0295, CAR-OTP-0001-0299, CAR-OTP-0001-0304, CAR-OTP-0001-0310, CAR-OTP-0001-0314, CAR-OTP-0001-0318, CAR-OTP-0001-0324, CAR-OTP-0001-0328, CAR-OTP-0001-0332, CAR-OTP-0001-0340, CAR-OTP-0001-0345, CAR-OTP-0001-0350, CAR-OTP-0001-0358, CAR-OTP-0001-0362, CAR-OTP-0001-0367, CAR-OTP-0001-0371, CAR-OTP-0001-0375, CAR-OTP-0001-0382, CAR-OTP-0001-0387, CAR-OTP-0001-0393, CAR-OTP-0001-0400, CAR-OTP-0001-0405, CAR-OTP-0001-0410, CAR-OTP-0001-0414, CAR-OTP-0001-0419, CAR-OTP-0001-0426, CAR-OTP-0001-0431, CAR-OTP-0001-0440, CAR-OTP-0001-0445, CAR-OTP-0001-0449, CAR-OTP-0001-0454, CAR-OTP-0001-0460, CAR-OTP-0001-0465, CAR-OTP-0001-0469, CAR-OTP-0001-0476, CAR-OTP-0001-0482, CAR-OTP-0001-0487, CAR-OTP-0001-0492, CAR-OTP-0001-0500, CAR-OTP-0001-

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- 2) Partially grant the defence's requests for the admission of evidence and admits items: CAR-ICC-0001-0002, CAR-OTP-0028-0040, CAR-OTP-0044-0155_R01, CAR-OTP-0044-0178_R01, CAR-ICC-0001-0068, CAR-D04-0002-1081, CAR-D04-0002-1286, CAR-OTP-0019-0207, CAR-OTP-0019-0211, CAR-OTP-0019-0215, CAR-OTP-0019-0230, CAR-OTP-0019-0234, CAR-OTP-0019-0237, CAR-OTP-0019-0245, CAR-OTP-0004-0065, CAR-D04-0002-1365, CAR-D04-0002-1287, CAR-DEF-0001-0832, CAR-OTP-0003-0150, CAR-OTP-0002-0298, CAR-DEF-0002-0713, CAR-D04-0002-1090, CAR-D04-0002-1095, CAR-OTP-0042-0237, CAR-ICC-0001-0074, CAR-ICC-0001-0076 and CAR-OTP-0030-0154.

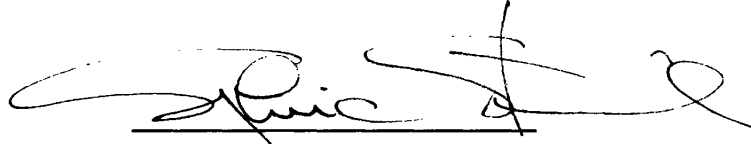
- 3) Denies the prosecution's request to admit items: CAR-OTP-0008-0033_R04, CAR-OTP-0008-0050_R03, CAR-OTP-0008-0088_R03, CAR-OTP-0008-


0112_R03, CAR-OTP-0034-0106_R02, CAR-OTP-0034-0123_R02, CAR-OTP-0034-0154_R02 and CAR-OTP-0034-0170_R02;

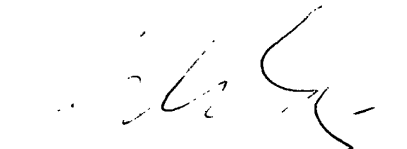
- 4) Denies the defence's request to admit items: CAR-ICC-0001-0007, CAR-D04-0002-1293, ICC-01/05-01/08-328-Conf-Anx4-Red, ICC-01/05-01/08-328-Conf-Anx3-Red (also coded as CAR-D04-0002-1053), ICC-01/05-01/08-954-Conf-Anx371-Red2, ICC-01/05-01/08-954-Conf-Anx372-Red2, CAR-ICC-0001-0005, CAR-OTP-0005-0099, CAR-OTP-0010-0107 and CAR-OTP-0010-0170_R03;
- 5) Orders that the EVD-T numbers previously assigned to items in accordance with the November 2010 Decision shall remain unchanged; and
- 6) Instructs the VWU to (i) contact Witnesses 6, 9 and 23; (ii) inform them that the admission of their statements has been sought; (iii) ask whether they have any objection; and (iv) if the witnesses consent, provide the Chamber with a written declaration from the witnesses to that effect.

Judge Ozaki's partly dissenting opinion to the present Decision will follow in due course.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner

Judge Joyce Aluoch

Judge Kuniko Ozaki

Dated this Thursday, 09 February 2012

At The Hague, The Netherlands