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Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
v. Jean-Pierre Bemba Gombo**

Public
With Public Annex A

Public Redacted Version of Mr. Bemba's Reply Brief

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

Paolina Massida

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

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I. INTRODUCTION

1. The Prosecution bears both the evidential and argumentative burden of proving all aspects of its case. Where the Prosecution has failed to do so, the Trial Chamber's duty of impartiality precludes it from taking over the role of prosecuting the case against the Accused and rebutting the submissions raised by the Defence. The Chamber explicitly instructed the parties to:¹

set out in their respective closing briefs their legal and factual submissions concerning the contextual and specific elements of the war crimes and crimes against humanity charged...

2. The Prosecution has failed to do so. It also failed to respond to a vast number of key arguments raised in the Defence Closing Brief. Its brief is, in many respects, non-responsive. The Prosecution failed to address the Defence submissions on, *inter alia*:

- the Prosecution's selective use of evidence;²
- the reliability of the evidence of witnesses, P-36 and P-47;³
- the impermissibility of attempting to resuscitate allegations rejected by both the Pre-Trial Chamber and the Trial Chamber;⁴
- the weight of the interviews of persons not called as witnesses;⁵
- the identification of perpetrators;⁶
- the impact of [REDACTED] videotape on its case concerning the identity of perpetrators;⁷

¹ ICC-01/05-01/08-2731, para. 38(m).

² Defence Closing Brief, paras. 81-88.

³ Defence Closing Brief paras. 145-155, 175-187 and Prosecution Response Brief paras. 101-118.

⁴ Defence Closing Brief, paras. 406-407, 427-428, 446-447, 491, 601-604, 672-675, 777, 799, 811-813, 844, 910, 962, 982, 985, 997, 1052.

⁵ Defence Closing Brief, paras. 55-63.

⁶ Defence Closing Brief, paras. 521-593.

⁷ Defence Closing Brief, paras. 78-80, 249, 300, 303, 308, 318, 350, 353-359, 361, 456, 467, 566, 569-573, 584.

- the Prosecution's previous submissions that President Patassé was giving orders to MLC troops;⁸
- the existence of a functioning command and control centre (CCOP) and the FACA military hierarchy in place during the events;⁹
- the principle of unity of command;¹⁰
- the mixing of MLC and FACA troops in the Central African Republic;¹¹
- the popularisation of the Code of Conduct;¹²
- the provision of logistics by the Central African hierarchy;¹³
- the purpose of the flights into Bangui during the intervention period;¹⁴
- the ability of the UN and FIDH to investigate, and the ability of the UN to investigate and prosecute.¹⁵

This is a non-exhaustive list.

3. To protect and maintain the principle that it is for the Prosecution, not the Chamber, to prosecute the case against the Accused, un-answered factual submissions should be regarded as un-opposed. While the Prosecution has invited the Chamber to "scrutinise" the Defence submissions,¹⁶ this cannot relieve the Prosecution from providing reasoned responses to key elements in the case. Any effort by the Chamber to supplement the Prosecution's arguments, or seek to rebut the Defence case *proprio motu* would deprive the Accused of an impartial adjudicatory body, and knowledge of the case he was required to meet.

4. The Prosecution Response also exhibits a flawed understanding of key legal and evidential issues, such as the facts and circumstances of the charges, and the

⁸ Defence Closing Brief, paras. 73-77.

⁹ Defence Closing Brief, paras. 637-655.

¹⁰ Defence Closing Brief, paras. 608-628.

¹¹ Defence Closing Brief, paras. 656-666.

¹² Defence Closing Brief, paras. 944-949.

¹³ Defence Closing Brief, paras. 777-798.

¹⁴ Defence Closing Brief, paras. 788-795.

¹⁵ Defence Closing Brief, paras. 1038-1040.

¹⁶ Prosecution Response Brief, para. 1.

nature of corroboration. Corroboration is only corroboration if the corroborating evidence comes from an independent (and reliable) source, and corroborates the specific point relied upon by the Prosecution. This lack of attention to such crucial details exemplifies the Prosecution approach as a whole, and underscores why this house of cards must fall.

II. EVIDENTIAL ISSUES

A. Burden of proof

5. The Prosecution's filings betray a startling misapprehension of its function and responsibilities in these proceedings and an ignorance of the basic precept of criminal litigation, namely, that it, the Prosecution bears the burden of proving each and every element of every crime alleged, and that the Defence bears the burden of proving nothing at any stage.

6. This misconception is borne out by the repetitive use of legally erroneous assertions throughout its Response Brief, such as, "none of the Defence arguments raise reasonable doubt",¹⁷ "no evidence has been adduced by the Defence",¹⁸ "the Defence has failed to meet the legal threshold of...".¹⁹

7. The Prosecution moreover, fails completely to grasp the fact that a piece of evidence cited by the Defence needs only to raise a doubt about the establishment of any element of a crime, whereas the Prosecution needs to provide evidence to a level such that no doubt can exist.²⁰

¹⁷ Prosecution Response Brief, para. 2.

¹⁸ Prosecution Response Brief, paras. 98, 105.

¹⁹ Prosecution Response Brief, paras. 36, 55, 73, 95.

²⁰ One example is the assertion that the Defence only relies on media articles when they support its case, Prosecution Response Brief, para. 66.

8. The Prosecution has also wrongly accused the Defence of introducing the *in dubio pro reo* rule. In this very case, the Pre-Trial Chamber found that in assessing whether the Prosecution had satisfied the applicable evidential threshold, the Chamber must be “guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings.”²¹ The rule thus derives from article 66. In particular, the existence of ambiguity or lack of certainty constitutes reasonable doubt. If the Chamber were to interpret such ambiguity or lack of certainty in a ‘flexible’ manner, in order to comport with the Prosecutor’s theory of the case, it would be violating the presumption of innocence.

9. Contrary to the Prosecutor’s submissions, it is not possible to “cure” the ambiguities or absence of details in specific items of evidence by reference to the evidence as a whole in this particular case, since the evidence as a whole is plagued by such ambiguities. For example, the Prosecution has failed to plead or prove with any specificity which troops were in which locations at different times, and the names of specific perpetrators. It has failed to follow any protocol or safeguards concerning the use of identification evidence, and witnesses have acknowledged that they have wrongly posited information as being based on their own knowledge and belief when it was in fact, based on information supplied by another witness.²² In such circumstances, to infer information such as the date of the alleged crimes from the evidence “as a whole” would be a bridge too far.

10. The ability of either the Chamber or the Defence to assess items of Prosecution evidence in the context of the evidential record as a whole was also undermined by the Prosecution’s own failure to tender relevant evidence through

²¹ ICC-01/05-01/08-424, para. 31.

²² See ICC-01/05-01/08-314-Conf, para. 98.

witnesses or to put their case to witnesses, a fact which it readily concedes but asserts to be “irrelevant”.²³

B. Unchallenged evidence

11. The path advocated by the Prosecution is one of trial by ambush. Such a path is not permitted by the Statute or Rules, which proscribe an adversarial system, and is wholly inconsistent with the position that the Prosecution advanced in these very proceedings.²⁴

12. The requirement to put your case or to challenge evidence which contradicts it is the cornerstone of adversarial proceedings, and underpins the basic precept of notice to the Accused of the case against him. If he adduces evidence on a material point, and the Prosecution doesn’t challenge it, he (and the Chamber) are entitled to assume it no longer remains part of the case against him.

13. Article 54(1) requires the Prosecution to respect the interests of witnesses, and fully to respect the rights of persons arising under the Statute (such as the Defendant and Defence witnesses). This entails a corollary duty to witnesses to allow them to respond to any accusations or challenges to their credibility.²⁵

14. Rule 64(1) requires the parties to raise issues concerning relevance and admissibility at the time that evidence is submitted to the Chamber. Witness testimony is a form of evidence. Rule 64(1) expressly precludes parties from failing to raise issues regarding admissibility of such testimony (including reliability and probative value) for “strategic reasons”.²⁶

²³ See following section B and para. 23 of the Prosecution’s Response Brief.

²⁴ ICC-01/05-01/08-1060, paras. 26-28.

²⁵ ICC-01/04-01/06-T-337-Red-ENG, p.47, lines 1-25 and p.48 lines 1-5. See also ICC-01/04-01/06-T-122-ENG, pp.44-46.

²⁶ See also, ICC-01/05-01/08-1023, paras. 48-50.

15. Rule 140(2)(b) provides that the parties shall have the right to question the witness in relation to relevant matters pertaining to their testimony and its reliability and their credibility. There is no right to raise such matters if the party fails to do so during their testimony. Similarly, rule 140(2)(d) provides that the Defence shall have the right to be the last to examine a witness. This right would be meaningless if the Prosecution was permitted to reserve its challenges to the credibility of witnesses, and to raise them after the witness is no longer before the Court and can no longer be questioned by the Defence.

16. The case law of the ICC regarding rule 140 has recognised the obligation of the cross-examining party to raise all relevant matters pertaining to this witness through cross-examination.²⁷

17. In the *Lubanga* case, Trial Chamber I reminded the Defence of its obligation to put its case to the witness; fairness to the witness dictates that the witness should be afforded an opportunity to respond to allegations impugning his testimony.²⁸ If this obligation applies to the Defence, then it applies even more forcefully to the Prosecution, in light of its duty under article 67(1)(a) to put its case to the Defence in a clear and prompt manner.

18. The Prosecution has also misinterpreted the Trial Chamber's decision on the conduct of the proceedings.²⁹ The Prosecution sought leave to appeal this decision in relation to the issue of the Chamber's alleged failure to impose an obligation on the parties to put their case to witnesses.³⁰ The Trial Chamber denied leave to

²⁷ ICC-01/04-01/07-1665-Corr, para. 73.

²⁸ ICC-01/04-01/06-T-337-Red-ENG, p.47, lines 1-25 and p.48 lines 1-5. See also ICC-01/04-01/06-T-122-ENG, pp.44-46.

²⁹ Prosecution Response Brief, para. 23, citing ICC-01/05-01/08-1023, para. 13, and ICC-01/05-01/08-1086, para. 22.

³⁰ ICC-01/05-01/08-1060.

appeal on the grounds that the issue did not arise from the decision.³¹ The Chamber further underscored that its omission to address this issue was without prejudice to “counsel's obligations in either presenting evidence or acting on behalf of the accused pursuant to the Rules and in keeping with counsel's respective codes of conduct.”³² The obligation thus inheres in the parties’ ethical obligations to the Court.

19. Furthermore, in this case, the Trial Chamber rejected a Prosecution request to admit documents after the close of the Defence case. The Chamber found that it would not facilitate its determination of the truth to admit such evidence in circumstances in which the Prosecution had been afforded a full opportunity to raise issues concerning the credibility of Defence witness at the time of their testimony.³³ The Trial Chamber also ruled that if the parties have any concerns about the reliability and integrity of a witness, they must put this to the witness in the form of direct questions.³⁴

20. The Appeals Chamber has further emphasised that the principle of orality continues to govern this trial. This, in itself, equates to an obligation to address issues primarily through witness testimony rather than through bar table motions or written statements.³⁵ The principle of orality would be subverted if the Prosecution were, for “strategic purposes”, permitted to contravert a witness’s testimony through documents or argumentation which is submitted **after** the witness has completed his or her testimony. Such an approach would undermine the Chamber’s oversight of the proceedings, and deprive it of the ability to assess the witness’s reaction and response to such issues.³⁶

³¹ ICC-01/05-01/08-1086, para. 22.

³² ICC-01/05-01/08-1086, para. 22.

³³ ICC-01/05-01/08-3029, para. 30.

³⁴ P-108, T-134-ENG-ET, p.51, lines 12-14.

³⁵ ICC-01/05-01/08-1386, paras. 76, 68.

³⁶ ICC-01/05-01/08-1386, para. 76.

21. For this reason, the Trial Chamber must adopt a cautious approach as concerns the introduction of evidence through statements or documents, in lieu of oral testimony, and ensure that the approach does not prejudice the rights of the Defence.³⁷

22. The Prosecution's failure to raise relevant challenges during the witnesses' testimony is prejudicial to the Accused, as it has deprived the Defence of the opportunity to re-examine the witnesses on these issues, or to allow the witnesses to respond or explain their point of view on these issues. The Prosecution concedes that it failed to challenge evidence which contradicted its case throughout the trial and maintains now that it did so "tactically".³⁸ Such a submission cannot be entertained since it relies exclusively on Counsel giving evidence through the Response Brief.

23. Moreover, the attempt to explain the philosophy of the "tactic" as being driven by the constraints of time is impossible to accept. D-19, for example, was cross-examined by the Prosecution for more than five days.³⁹ It would have been the work of a moment to ask him if he remembered Mr. Bemba's arrival in Damara on board an Antonov which spectacularly landed on the highway, or whether he remembered its taxiing to a nearby building where Mustapha [REDACTED] helped load it up with stolen generators. The allegation wasn't put, not because of lack of time but because of lack of credibility. The story is not plausible, and neither is P-209, its raconteur.⁴⁰

24. Similarly, Mr. Bemba's alleged visit to Mongoumba is the key to the credibility of P-213. If that is a lie, then his evidence as a whole simply cannot be believed. It is an inherently implausible story anyway, because the evidence does

³⁷ ICC-01/05-01/08-1386, para. 78.

³⁸ Prosecution Response Brief, para. 22.

³⁹ D-19, T-286-ENG-ET, from p.37; T-287-ENG-ET; T-288-ENG-ET; T-289-ENG-ET; T-290-ENG-ET; T-291-ENG-ET.

⁴⁰ P-209, T-120-ENG-ET, pp.15, line 6–p.17, line 25, p.27, lines 11-25, p.35, line 5–p.36, line 25.

not suggest that the “Banyamulengue” occupied the town, but rather that there was an early morning raid, and then they left. However, that having been said, the Prosecution’s failure to question P-29,⁴¹ its own witness, or V-01, who denied any visit by Mr. Bemba, or any helicopter landing,⁴² can only lead to the inference that the Prosecution has abandoned the allegation, and with it, P-213.

25. The Defence Closing Brief is replete with examples of the Prosecution’s failure to challenge evidence contradicting its case. The most shocking failure of all, however, is the Prosecution’s failure to question P-45 about [REDACTED]. It simply isn’t good enough to say the Defence didn’t question him about [REDACTED].⁴³ The Defence had no obligation to question him at all. The Prosecution called him and the Prosecution now makes certain assertions about those events. If it wanted any evidential basis for those assertions, it should have adduced it from him.

C. The 22 Witnesses

26. On 5 August 2014, Prosecution witness, P-169 wrote a letter to the ICC.⁴⁴ In that letter he indicated that he had entered a “marché des dupes” when he agreed to testify and he now wished to reconsider his evidence.⁴⁵ He further asserted that 21 witnesses whose names and [REDACTED] were annexed to the letter were prepared to bring evidence of their subornation.⁴⁶ The position of P-169 will be dealt with more particularly below, however, the letter provides compelling evidence that the testimony of all those listed should be seriously called into question. The Prosecution has made liberal use of letters and other hearsay accounts as apparent means of proof,⁴⁷ relying upon them for the truth of their contents and seeking to

⁴¹ See P-29, T-80-ENG-ET, p.8, lines 18-22 and Defence Closing Brief, para. 87.

⁴² V-01, T-221-ENG-ET, p.17, lines 3-24.

⁴³ Prosecution Response Brief, para. 106.

⁴⁴ ICC-01/05-01/08-3138-Conf-AnxA.

⁴⁵ ICC-01/05-01/08-3138-Conf-AnxA.

⁴⁶ ICC-01/05-01/08-3138-Conf-AnxA.

⁴⁷ See for example Prosecution Closing Brief, paras. 525, 547, 632-639; Prosecution Response Brief, paras. 16, 67, 68, 106, 113. See also, Defence Closing Brief, paras. 89, 103, 118, 122, 128.

contradict or undermine direct oral testimony with such documents.⁴⁸ The Prosecution put P-169 forward as an entirely credible and reliable witness. They cannot have it both ways.⁴⁹ If a credible and reliable witness asserts in and signs a letter that other named witnesses were suborned, then that is cogent evidence of the truth of that fact.

27. Following P-169's recall, and the recall of any other relevant witnesses, the Defence reserves the right to make further submissions as to the reliability of the evidence of the 21 witnesses listed in P-169's letters.

D. The Central Witnesses

28. P-169's evidence is beyond belief. He has described his evidence as being part of a bargain and evinced a clear intention to reconsider it.⁵⁰ According to the Prosecution's Senior Trial Attorney he is capable of writing letters which are "entirely untruthful".⁵¹ Interestingly, VWU has consistently taken a similar view of his credibility.⁵²

29. The Prosecution makes no submissions about P-36 and P-47. Whether that has been done "tactically" is unclear to the Defence. Certainly, it cannot have been for want of time or space; the Prosecution was granted an extension of time to respond⁵³ and could have asked for a further extension if it thought one was merited, and it did not utilise all its permitted pages for response.⁵⁴

⁴⁸ Prosecution Response Brief, paras. 17, 59.

⁴⁹ Prosecution Closing Brief, para. 93.

⁵⁰ ICC-01/05-01/08-3138-Conf-AnxA.

⁵¹ ICC-01/05-01/08-3139-Conf-AnxB.

⁵² ICC-01/05-01/08-T-148-Conf-Red2, pp.12-13. See also ICC-01/05-01/08-2912-Conf-AnxD [REDACTED]

⁵³ ICC-01/05-01/08-3131.

⁵⁴ ICC-01/05-01/08-2731, para. 38 p), the Chamber granted 50 pages for the Response. ICC-01/05-01/08-3141, the Prosecution Response Brief comprises of 47 pages.

30. It is perhaps unsurprising that the challenges to the credibility of these witnesses are not addressed. The central themes of P-47's evidence were not advanced in the Prosecution's Closing Brief,⁵⁵ which, taken together with the absence of any attempt to rehabilitate his evidence in response, the Defence assumes to be a tacit acknowledgment of their implausibility. P-36, moreover, is a fertile source of evidence to the Defence on the issue of Mr. Bemba's effective control of the units in the CAR.⁵⁶ Abandoning his evidence *in toto* would accordingly offer the Prosecution some tactical advantage.

31. P-213 is beyond salvage, mainly because his accounts [REDACTED] are plainly untrue. Indeed the Prosecution does not even seek to address the credibility of these assertions. The same goes for P-209 and the aircraft landing on the road at Damara. Interestingly, no such flight featured in the evidence of [REDACTED],⁵⁷ [REDACTED], [REDACTED], of course was "tactically" not asked about it.⁵⁸

32. P-45's evidence about looted vehicles in Gbadolite is untrue,⁵⁹ a fact which he acknowledged himself,⁶⁰ and his evidence about the lengths of sentences passed and the terms served by the convicted soldiers is now completely discredited by the [REDACTED]'s evidence⁶¹ and the prison records themselves.⁶²

33. With respect, the limp assertion that the Defence did not cross-examine P-45 about [REDACTED]⁶³ is yet another illustration of the Prosecution's worrying ignorance of the burden of proof. P-45 was a Prosecution witness and it is the

⁵⁵ Save for fn. 26, in the Prosecution Closing Brief, P-47 is not mentioned at all.

⁵⁶ Defence Closing brief paras. 145-155.

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ Prosecution Response Brief, para. 106.

⁶⁰ P-45, T-201-ENG-ET, p.71, lines 7-10, 11-16.

⁶¹ D-48, T-267-ENG-ET, p.64, lines 1-24, p.66, line 17-p.68, line 19.

⁶² EVD-T-OTP-00393/CAR-DEF-0002-0001 at 0091-0092, 0094-0095, 0097.

⁶³ Prosecution Response Brief, para. 106.

Prosecution case that [REDACTED].⁶⁴ Absent his evidence on the subject, such a submission is impermissible. It is the Defence case, in any event, that in response to an open question, the witness chose deliberately to conceal [REDACTED] from the Chamber.⁶⁵ The Defence rejects the suggestion that it has not undermined the credibility of the witness' evidence about [REDACTED]. The dates of [REDACTED] are impossible when considered against [REDACTED] which were put to him in evidence.⁶⁶

34. As to the outrageous submission made (and subsequently withdrawn)⁶⁷ about the honesty of the assertion by Defence Counsel that P-33 "[REDACTED]", the Defence maintains that the assertion is entirely borne out by an explicit answer on the point.⁶⁸ Moreover, it cannot seriously be suggested that this man [REDACTED] for about [REDACTED] and **did not** [REDACTED].⁶⁹

35. The Prosecution's Response in relation to P-173 and P-178⁷⁰ merits no further submission. The Defence maintains that their evidence is inherently unreliable.

E. The Prosecution's position on the credibility of Defence witnesses is incongruous

36. In paragraph 119 of the Response Brief, the Prosecution states that "[t]he Chamber should accord very little weight, if at all to the testimonies of the remaining 20 Defence witnesses" relied upon in the Defence Closing Brief.

37. The Prosecution then groups these witnesses into categories, purporting to give a basis on which their credibility is impugned. Of the 20 witnesses, it refers

⁶⁴ [REDACTED].

⁶⁵ Defence Closing Brief, para. 165.

⁶⁶ Defence Closing Brief, paras. 159, 161-162.

⁶⁷ Prosecution Response Brief, para. 101; ICC-01/05-01/08-3148.

⁶⁸ P-33, T-163-ENG-ET, p.63, lines 11-13.

⁶⁹ P-33, T-163-ENG-ET, p.62, line 8–p.63, line 13; T-164-ENG-ET, p.16, lines 22-25.

⁷⁰ Prosecution Response Brief, paras. 110-113.

only to 13. The Prosecution points to no basis upon which the credibility of D-9, D-50, D-51, D-53, D-59, D-60 and D-65 is allegedly undermined. Its attempt to impugn these witnesses should be rejected as unsubstantiated.

38. As for the remaining witnesses, the Prosecution's extremely vague submissions, are surprising, given the Prosecution's own reliance on these Defence witnesses in both its Closing Brief,⁷¹ and its Response Brief.⁷² The Prosecution relies extensively, for example, on the testimony of D-56 concerning the structure and composition of Bozizé's troops. He is very often the only witness cited by the Prosecution in support of a submission.⁷³ If the Prosecution now stating that his evidence must be discounted, where does this leave its pleadings on these points? The Prosecution relies solely on D-48 in support of its submissions on the functioning of the MLC judicial system.⁷⁴ He is relied on extensively elsewhere.⁷⁵ Again, if he is not a credible witness, then these submissions must be withdrawn.

39. The Prosecution cannot have it both ways. Either the witnesses are capable of reliance, or they are not. The Prosecution has both a legal and ethical obligation to present reliable evidence to the Trial Chamber.⁷⁶ The Prosecutor has signed a Closing Brief and a Response Brief which relies on the evidence of these Defence witnesses, while simultaneously asserting that these witnesses are incapable of belief. The two positions are irreconcilable. Reliance on evidence which it deems unreliable puts the Prosecution in breach of its statutory and professional duties.

40. It is true that in certain circumstances, some aspects of a witness' testimony can be capable of belief while other parts cannot safely be relied upon.⁷⁷ The

⁷¹ See, for example, Prosecution Closing brief, fn. 23-25, 27, 50, 53, 66, 386, 399-401, 409, 459-460, 489, 493, 495-496, 501-504, 507, 510, 512-516, 521-523, 2076, 2288-2289, 2294, 2328, 2331.

⁷² See, for example, Prosecution Response Brief, fn. 143, 145, 179, 182-184, 281-282.

⁷³ See, for example, Prosecution Closing Brief, paras. 127, 163, 165, 166, 167.

⁷⁴ Prosecution Closing Brief, para. 724.

⁷⁵ See, for example, Prosecution Closing Brief, paras. 652, 736-737.

⁷⁶ ICC-01/04-01/07-3436-AnxI, para. 141.

⁷⁷ See, for example, Defence Closing Brief, paras. 145-155.

Prosecution was certainly entitled to make reasoned submissions that particular witnesses were reliable on certain aspects, and give a basis upon which the Chamber should approach other aspects with caution (for example, as the Defence did with P-36).⁷⁸ It patently has not. Its submissions on Defence witness credibility are wholly without nuance. As such, the Defence invites the Prosecution to either re-file its Closing Brief and Response Brief deleting references to the Defence witnesses it now impugns, or withdraw the submissions in paragraph 119.

F. The Prosecution arguments regarding notice confuse the notion of incidents with evidence

41. Contrary to the Prosecution's submissions,⁷⁹ the Defence did not argue that evidence pertaining to specific incidents fell outside the confirmed charges, but that the incidents themselves had not been confirmed by the Pre-Trial Chamber.

42. ICC case law has established that the factual circumstances of a case are comprised of separate incidents.⁸⁰ The Appeals Chamber has defined this notion as "a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators".⁸¹

43. In confirming the charges, the Pre-Trial Chamber does not simply confirm the abstract notion that offences were committed in CAR between October 2002 and March 2003,⁸² but the specific incidents which were both set out in the Document Containing the Charges, and established through sufficiently reliable evidence. The decision of the Pre-Trial Chamber not to confirm specific incidents therefore

⁷⁸ Defence Closing Brief, paras. 145-155.

⁷⁹ Prosecution Response Brief, para. 8.

⁸⁰ ICC-01/11-01/11-565, para. 99; ICC-02/11-01/11-9-Red, para. 10; ICC-01/04-01/06-8-Corr, para. 31.

⁸¹ ICC-01/11-01/11-547-Red, para. 62.

⁸² ICC-01/09-02/11-536, para. 14.

excluded such incidents from the scope of the charges.⁸³ Conversely, a failure by the Prosecution expressly to include specific incidents in the charges also has the effect of excluding such matters from the facts and circumstances of the case.⁸⁴

44. The Prosecution submissions regarding the issue of notice further miss the point: the Trial Chamber has no legal competence to base its judgment on incidents which were not confirmed by the Pre-Trial Chamber, to hold otherwise would render the role of the Pre-Trial Chamber meaningless.⁸⁵ The Defence was entitled to rely on this statutory restriction and is not required to demonstrate prejudice, although it is of course self-evident that a decision to rely on uncharged incidents, which is only issued at the end of the trial, would undermine the very foundations of Mr. Bemba's right to be informed of the case against him.

III. CHRONOLOGY OF EVENTS

45. The Prosecution Response fails almost entirely to engage the Defence submissions about the dates upon which MLC troops were engaged in combat in the CAR. It conveniently conflates the notions of arrival, deployment and engagement.⁸⁶ In fact the only evidence that MLC troops were involved in combat prior to 30 October derives from the discredited internet report of an RFI broadcast of 30 October.⁸⁷ Set against that, the Prosecution has simply not confronted the compelling evidence of [REDACTED] contemporaneous video tape,⁸⁸ the IRIN report,⁸⁹ the flight logs,⁹⁰ the entry in the cahiers de communications,⁹¹ as well as the

⁸³ See for example, ICC-01/05-01/08-424, para. 140. See also ICC-01/09-02/11-584, paras. 74-75.

⁸⁴ ICC-02/11-01/11-432, paras. 21, 45.

⁸⁵ ICC-01/04-01/07-1547-tENG, paras. 22, 31.

⁸⁶ Prosecution Response Brief, para. 65.

⁸⁷ EVD-T-OTP-00822/CAR-OTP-0005-0129, Prosecution Response Brief, fn. 154.

⁸⁸ EVD-T-OTP-00345/CAR-OTP-0039-0058.

⁸⁹ EVD-T-OTP-00438/CAR-OTP-0011-0293.

⁹⁰ EVD-T-OTP-00585/CAR-OTP-0045-0002; EVD-T-OTP-00586/CAR-OTP-0045-0228.

⁹¹ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1630, 1631, 1635, 1637.

oral evidence of P-31, D-56, D-45, D-65, D-9 and D-19,⁹² all of whom suggest that no MLC troops were in areas of Bangui where crimes were being committed during the period 26-31 October. The impact on the Prosecution case theory is devastating, and no case has been made for continuing to hold liable Mr. Bemba's subordinates for the offences *inter alia* committed against P-119, D-30, P-22, [REDACTED], and P-68.⁹³

IV. CONTEXTUAL ELEMENTS OF WAR CRIMES

46. The Prosecution Response seeks to confine the importance of the MLC's active participation in armed hostilities to the question as to whether there was an armed conflict.⁹⁴ This was not the point argued by the Defence: the participation of the MLC as an organised group in hostilities with pro-Bozizé armed groups is relevant to the question as to whether the Prosecution has established a nexus between the armed conflict and the charged crimes.⁹⁵

47. As a matter of law, the Prosecution has not disputed, nor could it dispute, its obligation to establish a nexus between the internal armed conflict and the specific war crimes with which Mr. Bemba is charged.⁹⁶ This nexus will not be established by virtue of the mere fact that the alleged incidents occurred at the same time that a generic armed conflict was in existence.

48. The Prosecutor's failure to establish the existence of protracted hostilities between MLC and pro-Bozizé forces in the charged localities is fatal to their case,

⁹² See for example, P-31, T-182-ENG-ET, p.15, line 1–p.17, line 16, p.23, lines 8-15, p.26, lines 4-8 (Lengbe says that the attack by Bozizé's forces in Bangui was on 22 October and he remembers that the whole of the MLC troops arriving on 27 October, so five days later); D-56, T-313-ENG-ET, p.30, line 25–p.31, line 15; T-314-ENG-ET, p.17, lines 8-17; T-316-ENG-ET, p.10, lines 16-20; D-45, T-294-ENG-ET, p.8, line 25–p.9, line 23; T-298-ENG-ET, p.8, lines 13-25; D-65, T-246-ENG-ET, p.7, lines 10-24; D-9, T-322bis-ENG-ET, p.21, lines 12-17, p.23, lines 2-17; D-19, T-284-ENG-ET, p.19, lines 1-11, p.22, lines 3-23; T-293-ENG-ET, p.51, lines 11-21; Defence Closing Brief paras. 346-352.

⁹³ See Defence Closing Brief, paras. 311, 313-315, 320-323, 328-332.

⁹⁴ Prosecution Response Brief, paras. 71-79.

⁹⁵ ICC-01/05-01/08-3121-Conf, paras. 377, 413.

⁹⁶ See for example, ICC-01/05-01/08-3079-Conf, para. 353.

insofar as the Pre-Trial Chamber confirmed the existence of a nexus between the armed conflict and the charged crimes by virtue of the fact that the crimes allegedly took place within the context of such hostilities between MLC and pro-Bozizé forces.

49. For example, in relation to the charges of murder, the Pre-Trial Chamber found that “as MLC soldiers moved in battle throughout the CAR, they killed civilians thus committing war crimes according to article 8(2)(c)(i) of the Statute.”⁹⁷ The confirmed case for murder is thus predicated on the allegation that the killing of civilians had at least some temporal and geographic nexus to hostilities between MLC and pro-Bozizé forces.

50. In relation to the charges of rape, the Pre-Trial Chamber also concluded that “the evidence shows that as MLC soldiers moved in battle throughout the CAR territory civilians were raped by force, or by threat of force or coercion”.⁹⁸ The Pre-Trial Chamber then clarifies that the nexus requirement was satisfied due to the temporal and territorial correlation between such “battles” and the alleged acts of rape.⁹⁹ Again, the confirmed case required the Prosecution to establish that the MLC were engaged in a series of battles with pro-Bozizé forces in the different localities of the CAR, and that the alleged rapes in conjunction with (or within the context of) such specific “battles”.

51. The same approach was utilised with respect to pillage: the Pre-Trial Chamber found the existence of a nexus on the basis that “[t]he evidence shows that MLC soldiers appropriated belongings of CAR civilians while moving through the country in battle”.¹⁰⁰

⁹⁷ ICC-01/05-01/08-424, para. 277.

⁹⁸ ICC-01/05-01/08-424, para. 286.

⁹⁹ ICC-01/05-01/08-424, para. 288.

¹⁰⁰ ICC-01/05-01/08-424, para. 332.

52. The confirmed case for all allegations of war crimes thus required the Prosecution to establish that the MLC was engaged in battles with pro-Bozizé forces as it moved throughout the territory of CAR, and it was within the context of such battles that the alleged war crimes occurred.

53. The Prosecution case is nonetheless, flawed by an inherent contradiction. On the one hand, it asserts in its Closing Brief, without evidential citations, that the nexus requirement is met with respect to rape, because the alleged crimes have a specific geographic and temporal nexus to battles between the MLC and pro-Bozizé forces.¹⁰¹ But, on the other, the Prosecution also advances the thesis that the pro-Bozizé forces had evacuated the towns in question before the MLC troops arrived, and that as such, there were no battles between the different forces in the specific locations where the alleged crimes took place.¹⁰²

54. In relation to the allegations of pillage,¹⁰³ the Prosecution has failed to provide any argument as to how and why the nexus requirement is met, apart from a brief assertion that crimes occurred as the MLC were moving through the territory of the CAR.¹⁰⁴

55. It is wholly inappropriate for the Defence to have to “guess” the particular aspect relied upon by the Prosecution to establish the existence of a nexus with an armed conflict. It is impossible for the Defence to be informed of, and respond to an issue, which the Prosecution appears to have overlooked in putting its case to the Trial Chamber.

56. With respect to the charges of murder, the Prosecution attempts to incorporate by reference the evidence relied upon to establish the existence of

¹⁰¹ ICC-01/05-01/08-3079-Conf, para. 331 (as concerns rape).

¹⁰² ICC-01/05-01/08-3079-Conf, paras. 18, 35, 86, 90, 99, 101, 188.

¹⁰³ ICC-01/05-01/08-3079-Conf, p.153 et sequitur.

¹⁰⁴ ICC-01/05-01/08-3079-Conf, para. 445.

murder as a crime against humanity,¹⁰⁵ thus obliterating the distinction between the two, and ignoring the distinction between civilians and organised armed groups.

57. In its Response, the Prosecution seeks to justify this flawed position by advancing an incorrect interpretation of the *Lubanga* judgment.¹⁰⁶ Trial Chamber I did not characterise the attacks in question as one-sided attacks against unarmed civilians. Although civilian casualties are referred to, it did not exclude the possibility that the villagers in question had self-defence committees or that they were guarded by opposing soldiers. The Trial Chamber also cited the attacks in connection with its assessment as to whether a peaceful settlement had been reached in Ituri. The attack on the villages is thus relevant to the existence or not of an agreement rather than the existence of protracted hostilities between organised armed groups.

58. The Prosecution Response further submits that as a matter of evidence, it has established that the MLC were participating in hostilities with pro-Bozizé forces, but then completely fails to substantiate its point. Vague references to fighting between loyalists and pro-Bozizé forces on unspecified dates and in unspecified locations do not establish the existence of “battles” between MLC and pro-Bozizé forces at the time and place the charged crimes alleged occurred.¹⁰⁷ Similarly, the participation of the MLC in battles cannot be established or presumed from evidence concerning the sound of “gunfire”,¹⁰⁸ and the withdrawal and subsequent deployment of Bozizé’s troops.¹⁰⁹

¹⁰⁵ ICC-01/05-01/08-3079-Conf, para. 503.

¹⁰⁶ Prosecution Response Brief, para. 79.

¹⁰⁷ Prosecution Response Brief, para. 72.

¹⁰⁸ In any case, the evidence cited by the Prosecution does not support its factual assertion: Prosecution Response Brief, fn. 177.

¹⁰⁹ Prosecution Response Brief, paras. 74-75.

59. In contrast to the position advanced in its Closing Brief, which is that the MLC troops were the only troops present in Sibut when they arrived,¹¹⁰ the Prosecution Response asserts that “there were direct engagements to gain [...] Sibut”.¹¹¹ The Prosecution relies on the same witness to establish this paradoxical position: V-02. The passage relied upon in the Response also establishes the contrary; V-02 testifies that the rebels withdrew one week before the Banyamulengue arrived,¹¹² which disproves rather than proves there were “direct engagements to gain [...] Sibut”.

60. The Prosecution evidence regarding Bozoum is similarly misleading. The Prosecution relies on media reports, which were read into the evidence during the testimony of D-56.¹¹³ Regarding the report of the Bangui radio station, D-56 was only questioned in relation to the commission of crimes against civilians by Bozizé’s troops. The Defence did not rely on the exhibit for the purpose of establishing hostilities between the MLC and Bozizé’s troops nor could they: D-56 testifies that he was not present when the FACA and MLC troops arrived.¹¹⁴ Similarly, in relation to the RFI report, D-56 explicitly testified that he did not “know the author of the statement. I cannot comment on it. I cannot accept it. I am not aware of what was said”.¹¹⁵

61. The Prosecution’s reliance on an RFI report to establish such engagements in Bossangoa,¹¹⁶ simply serves to underscore its failure to adduce sufficiently reliable evidence to meet the standard of beyond reasonable doubt. Evidence that the MLC were running away from rather than towards Bozizé’s forces on 15 March 2003 also

¹¹⁰ Prosecution Closing Brief, paras. 90, 101, relying on [V2-T222-ENG-ET-p48-L20-p49-L3]/[V2-T222-FRA-ET-p52-L9]; [V2-T223-ENG-ET-p29-L7]/[V2-T223-FRA-ET-p28-L16]; [V-V2-T224-ENG-ET-p49-L22-and-p50-L1]/[V2-T224-FRA-ET-p56-L6].

¹¹¹ Prosecution Response Brief, para. 75.

¹¹² The Prosecution relied upon V-02-T-223-ENG-ET, p.36, line 14.

¹¹³ ICC-01/5-01/08-3141-Conf, para. 76.

¹¹⁴ D-56, T-316-Conf-ENG-ET, p.50, lines 6-7.

¹¹⁵ D-56, T-315-Conf-ENG-ET, p.51, lines 24-25.

¹¹⁶ ICC-01/5-01/08-3141-Conf, para. 76.

rebutts rather than establishes the existence of protracted hostilities between the MLC and pro-Bozizé forces.¹¹⁷

62. Finally, in relation to the legal notion of a non-international armed conflict (NIAC), the Prosecution's reliance on the *Tadić* test is inapposite.¹¹⁸ According to the Prosecution, the *Tadić* test triggers the application of IHL to areas controlled by an organised armed group, which is a party to the conflict. This would thus require the Prosecution to establish that the MLC was a party to protracted hostilities with Bozizé forces at all relevant times (or at the very least, when it was in control of the particular geographic areas referred to by the Prosecution). This has not occurred. Although the Prosecution asserts that the identification of clashes is only one indicator of intensity,¹¹⁹ it fails to elaborate or establish others. In the absence of proof that the MLC engaged in protracted hostilities with Bozizé forces, the possibility that MLC forces might have been in control of certain areas would not have sufficed to trigger the application of IHL concerning NIACs in these areas. If the Prosecution wish to "grandfather" the MLC into the conflict by virtue of the MLC's association with Patassé's troops, then they would have to accept the necessary implications this would have as concerns Patassé's overall control of MLC forces operating in CAR.

63. It is also not correct that no peaceful settlement was reached during the charged period.¹²⁰ The MLC agreed to withdraw from CAR on 16 January 2003.¹²¹ In the absence of any proof that the MLC engaged in protracted hostilities after this date, the MLC cannot be considered to be a party to the conflict from this point onwards.

¹¹⁷ ICC-01/5-01/08-3141-Conf, para. 77.

¹¹⁸ Prosecution Response Brief, para. 78.

¹¹⁹ Prosecution Response Brief, para. 73.

¹²⁰ Prosecution Response Brief, para. 78.

¹²¹ P-15, T-209-ENG-ET, p.19, lines 7-21; p.33, lines 15-p.34, line 16; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0687.

V. PILLAGE

64. The Prosecutor's novel interpretation of the relevance of military necessity to pillage is misconceived and inconsistent with the jurisprudence of the ICC.

65. The confirmed charges against Mr. Bemba specifically cite the absence of military necessity as an element, which the Prosecution was required to prove in order to establish the crime of pillage. The Pre-Trial Chamber found that "[t]he Elements of Crimes clarify in footnote 61 to article 8(2)(e)(v) of the Statute that as indicated in the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging".¹²² The Chamber's assessment as to whether the allegedly pillaged items were taken for reasons of military necessity was a key component in the Chamber's decision to confirm the charge of pillage, and forms part of the facts and circumstances of the confirmed case.¹²³ The Prosecution did not request leave to appeal this aspect of the decision.

66. The Prosecution's interpretation also flies in the face of any reasonable interpretation of footnote 61 to the Elements of the Crimes. The footnote stipulates in clear and plain language that appropriations, which are justified by military necessity, do not constitute the crime of pillage. It does not provide that appropriations that are taken for personal use are not justified for military necessity: that is the wrong order of things. The manner in which footnote 61 is phrased therefore requires the Prosecution to prove that the appropriations were not justified by military necessity in order to demonstrate that the appropriations are for personal use: this is a threshold element.

67. The Defence's primary submission is that the Prosecution has not established beyond reasonable doubt that members of the MLC contingent committed pillage. In any event, even if the Prosecution demonstrates that the appropriation of the

¹²² ICC-01/05-01/08-424, fn. 392.

¹²³ ICC-01/05-01/08-424, para. 332.

items was not justified by military necessity, the Prosecution must still prove that the perpetrator intended to appropriate the item for personal use. Whereas the fact that the items were appropriated for military necessity excludes the application of the crime of pillage, the converse does not hold true. Items might be appropriated for reasons of non-personal use other than military necessity.¹²⁴

68. Items which can be taken for military necessity therefore comprise a separate category of items above and beyond the particular instances set out under customary international law, which govern when property may be seized for non-personal uses. Accordingly, contrary to the Prosecution's position,¹²⁵ the specific exceptions set out in Articles 51, 52, and 53 of The Hague Regulations apply alongside the explicit military necessity exception, and serve to supplement rather than delimit this general exception.

69. The types of items and goods set out in Articles 51 to 53 of The Hague Regulations are therefore instructive insofar as they illuminate the type of items and goods, which either fall outside the scope of "personal or private use", or which may be seized for military necessity. In this regard, the Prosecution has alleged that the MLC took money, livestock (food) and bedding, refrigerators (which would have enabled the MLC to store and preserve food during operations), vehicles (which facilitated the transport of soldiers and troops) and telephones and radios (which would have enabled them to receive news related to the military operations).¹²⁶ These items clearly fall within the scope of the type of property enumerated in Regulations 51 to 53 of The Hague Regulations (i.e. contribution of

¹²⁴ The formulation employed for pillage, as a violation of the laws of war, in the US Military Commissions Act of 2009 is instructive insofar as it clarifies that the Prosecution must establish both the absence of military necessity and the use of the appropriated property for personal or private purposes: "PILLAGING. – Any person subject to this chapter who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be punished as a military commission under this chapter may direct" (emphasis added).

https://www.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule52.

¹²⁵ Prosecution Response Brief, paras. 85-89.

¹²⁶ ICC-01/05-01/08-3121-Conf, para. 432.

money, requisitions in kind, and material related to the conduct of military operations).

70. The Prosecution has not discharged its burden of proof by simply asserting that they do not. Its attempt to subvert the meaning of the word “transmission” by arguing that it refers to the sending rather than the receipt of information, is illogical and contrary to the accepted meaning of the word, namely, “[a] programme or signal that is broadcast or sent out”.¹²⁷

71. To the extent, however, that these Regulations impose additional conditions (such as compensation), these conditions cannot serve either to limit or interpolate additional requirements into the military necessity exception. Thus, in the absence of explicit statutory language requiring that the perpetrator must have paid compensation, article 22(2) of the Statute prohibits the adoption of such a requirement.¹²⁸ Indeed, the fact that the issue of compensation is independent of the notion of military necessity is inherent in the requirement that the Prosecution must demonstrate that the perpetrator intended to deprive the person of the property in question.¹²⁹ If compensation has been provided, then this element will not have been fulfilled, and as such, it would be unnecessary to consider whether the additional elements concerning personal use or military necessity have been fulfilled.

72. In terms of the applicability of the *Orić* decision, the Prosecution fails to consider the fact that unlike at the ICTY, the Defence is not required to assert the defence of necessity insofar as footnote 61 subsumes such a defence within the Prosecution’s obligation to prove that the items were not appropriated for reasons

¹²⁷ Oxford Dictionary, ‘Transmission’,
<http://www.oxforddictionaries.com/definition/english/transmission>.

¹²⁸ The Defence refers in any case, to its submissions at ICC-01/05-01/08-3121-Conf, paras. 436-438.

¹²⁹ ICC-01/05-01/08-424, para. 330.

of military necessity. The key aspect of the *Orić* decision is in any case, the fact that livestock can be considered as a means of sustenance rather than just property.¹³⁰

VI. COMMAND RESPONSIBILITY

A. Mr. Bemba was not acting as a military commander and did not exercise effective control

73. The Response Brief further highlights the significant shift in the Prosecution's effective control case. Backing away from the idea that Mr. Bemba was giving command orders to the MLC troops, the Prosecution now gives centre-stage to its allegation that "Bemba ordered the arrest and court-martial of seven MLC troops located in the CAR".¹³¹ This appears to be the basis upon which the Prosecution case on effective control now hangs; no other concrete examples feature.

74. [REDACTED] evidence concerning the arrest of the seven soldiers comes from D-19. [REDACTED].¹³² [REDACTED].¹³³ [REDACTED] corroborated D-19's testimony, in evidence that is simply ignored by the Prosecution.¹³⁴ The Prosecution did not challenge D-19's version of the arrests.¹³⁵ His evidence is convincing and corroborated, and it raises reasonable doubt as to the Prosecution's insistence that the orders came from Mr. Bemba.

75. D-19's evidence also makes sense. The group of soldiers in question, which included FACA soldiers,¹³⁶ were caught red-handed.¹³⁷ The idea that these soldiers were caught in the act, yet everyone involved had to wait for this information to be

¹³⁰ *Orić*, 98bis Oral Decision, pp.9026-9031, <http://www.ictytranscripts.org/trials/oric/050608IT.htm>

¹³¹ Prosecution Response Brief, paras. 28, 29, 42.

¹³² D-19, T-285-ENG-ET, p.33, line 13–p.34, line 21.

¹³³ D-19, T-285-ENG-ET, p.33, line 13–p.34, line 21.

¹³⁴ D-39, T-310-ENG-ET, p.6, lines 3–p.7, line 5.

¹³⁵ D-19, T-287-ENG-ET, p.9, lines 7-17.

¹³⁶ D-19, T-285-ENG-ET, p.34, lines 17-21.

¹³⁷ D-16, T-278-ENG-ET, p.16, lines 4-14; D-48, T-268-ENG-ET, p.74, line 22–p.75, line 2.

transmitted to Gbadolite (with its unreliable communication capabilities),¹³⁸ Mr. Bemba had to be found, a decision taken, and orders transmitted back, is objectively unlikely. It is worth remembering that Mustapha did not yet have a Thuraya,¹³⁹ and the Prosecution has never offered a theory as to how this contact was even possible, let alone produced any oral or written evidence of the alleged order. The cahier is silent.¹⁴⁰

76. What is the Prosecution's position on the FACA soldiers who were also caught red-handed? Did Mr. Bemba also give the order to arrest the FACA soldiers involved? The Prosecution has neither pleaded nor advanced a case that he had the ability to do so. Is it the Prosecution's position that the FACA soldiers were immediately arrested by the Central African gendarmes, but the MLC soldiers were separated out, and remained at liberty amongst the pile of stolen goods until the order came through from Mr. Bemba for this arrest? This is hardly credible.

77. In fact, the Prosecution relies on no oral testimony whatsoever in support of what has become a key plank of its case. It cites to two letters written by Mr. Bemba to allege that he "ordered the investigation, arrest and prosecution of the seven MLC soldiers in the CAR".¹⁴¹ Nowhere in the first letter does Mr. Bemba say that he ordered the arrest or prosecution of the soldiers in question.¹⁴² In the second, the language used by Mr. Bemba suggests that he is talking about the arrest of the soldiers once they had been transported to Zongo, and were no longer on CAR territory, nor part of the MLC battalion which remained. His specific reference to the soldiers' behaviour "in Bangui" indicates that they were on DRC soil when their arrests were ordered:¹⁴³

¹³⁸ Defence Closing Brief, para. 757.

¹³⁹ D-19, T-284-ENG-ET, p.39, line 24–p.40, line 3. See also D-53, T-230-ENG-ET, p.16, line 14–p.17, line 2.

¹⁴⁰ See EVD-T-OTP-00702/CAR-D04-0002-1514 and EVD-T-OTP-00703/CAR-D04-0002-1641.

¹⁴¹ Prosecution Response Brief, para. 28, fn. 54. See also fn. 56.

¹⁴² EVD-T-OTP-000391/CAR-DEF-0001-0152.

¹⁴³ EVD-T-OTP-00453/CAR-OTP-0017-0363.

Aussi ai-je ordonné l'arrestation, à titre préventif, de huit militaires dont le comportement à Bangui s'est avéré contraire aux consignes données tant aux officiers qu'aux hommes de troupe avant leur départ en République Centrafricaine.

78. Certainly nothing in the letter demonstrates that he ordered their arrest while they were in the CAR. The Chamber cannot reasonably exclude that Mr. Bemba is talking about their arrest once back in the Congo, particularly given that it heard direct evidence that this was in fact the case:¹⁴⁴

...if [Mr. Bemba] said he had ordered the arrest of soldiers in the Central African Republic I said, "No." I said, "No, not in the Central African Republic." The letter says that he ordered the arrest of those eight soldiers, but this was in territory under MLC control and I do not want to be misunderstood here. The understanding that should be drawn from this note is that Mr Jean-Pierre Bemba ordered the arrest of these eight officers within the territory under MLC control and his authority was not extra-territorial. So these officers that he mentions here were not in Central African territory, but under MLC -- in territory under MLC control. That is what I wanted to clarify.

79. This is also consistent with the fact that the interviews of these soldiers were conducted only once they were back in Zongo.¹⁴⁵ An order for the arrest of these soldiers once back in the DRC is not indicative of effective control at the time the crimes were committed. The Prosecution was required to establish effective control over the perpetrators of the crimes with which Mr. Bemba was charged. It cannot meet that standard or seek an inference to that effect by showing he had control (effective or otherwise) over individuals at a different time.

¹⁴⁴ D-39, T-310-ENG-ET, p.16, lines 3-13.

¹⁴⁵ EVD-T-OTP-00393/CAR-DEF-0002-0001 at 0002.

80. Moreover, despite its protestations to the contrary,¹⁴⁶ the Prosecution continues to retreat from its original case that Mr. Bemba was in operational command of the MLC contingent. It asserts that the confirmation decision does “not contain reference [*sic*] to operational command”. In the cited paragraphs, the Pre-Trial Chamber held:

- “...the reporting system in place also enabled Mr. Jean-Pierre Bemba to monitor the military operations conducted by the MLC **and to transmit his orders**”¹⁴⁷
- “...Mr. Jean-Pierre Bemba bypassed [the Chief of Staff] and directly contacted commanders in the field **and issued orders**. Evidence shows that these orders were complied with”¹⁴⁸
- Mr. Bemba gave “**the order to withdraw** the MLC troops from the CAR. This was an order which [Mustapha] immediately started to implement”.¹⁴⁹

81. The Prosecution then adopted this confirmed case in its DCC, charging Mr. Bemba in the following terms:

- BEMBA retained control of MLC forces through his direct involvement in **strategic planning and tactical support of field operations**.¹⁵⁰
- “**BEMBA gave orders**, his subordinates obeyed.”¹⁵¹

82. In May 2010, the Prosecution served the Defence with its “In-Depth Analysis Chart of Incriminatory Evidence”. This document also made clear that Mr. Bemba’s

¹⁴⁶ Prosecution Response Brief, para. 30.

¹⁴⁷ Confirmation Decision, para. 459.

¹⁴⁸ Confirmation Decision, para. 459.

¹⁴⁹ Confirmation Decision, para. 474.

¹⁵⁰ ICC-01/05-01/08-856-Conf-AnxA, para. 69.

¹⁵¹ ICC-01/05-01/08-856-Conf-AnxA, para. 71.

operational command was central to the Prosecution case,¹⁵² and that this was the case Mr. Bemba was required to meet:

- [REDACTED].¹⁵³
- [REDACTED].¹⁵⁴
- [REDACTED]...¹⁵⁵
- [REDACTED].¹⁵⁶

83. This was then reflected in the Prosecution's presentation of its evidence. Time, and time, and time again, the Prosecution put its case to witnesses that Mr. Bemba was the operational commander of the MLC troops in the CAR. There are hundreds of examples, some of which are noted below:

- "Are you aware that Bemba issued operational orders to Moustapha in the CAR?"¹⁵⁷
- "Mr Bemba had the power to give binding instructions to Colonel Moustapha even in CAR; correct?"¹⁵⁸
- "Sir, this shows... that the troops in the CAR were subject to Bemba's orders; right?"¹⁵⁹
- "So does that surprise you, Mr Witness, that the supreme commander contacted commanders out in the field in the Central African Republic directly?"¹⁶⁰

¹⁵² See, for example, ICC-01/05-01/08-781-Conf-AnxA, pp.310, 312, 315, 318-319, 321-325, 327-328, 333-334, 336-339, 341- 343, 350-351, 355- 357, 360-361, 370, 372-373, 375-378, 380-382, 386, 388, 394-396, 398-399, 402-408, 413, 420, 429-430, 433-434, 456, 460, 464, 471-472, 474, 477, 479-480, 483-486, 500-503, 505, 540-542.

¹⁵³ ICC-01/05-01/08-781-Conf-AnxA, p.291.

¹⁵⁴ ICC-01/05-01/08-781-Conf-AnxA, pp.318-319.

¹⁵⁵ ICC-01/05-01/08-781-Conf-AnxA, p.324.

¹⁵⁶ ICC-01/05-01/08-781-Conf-AnxA, pp.324-325.

¹⁵⁷ D-51, T-262-ENG-ET, p.22, lines 1-8.

¹⁵⁸ D-53, T-234-ENG-ET, p.21, lines 1-2.

¹⁵⁹ D-45, T-298-ENG-ET, p.58, lines 11-12.

¹⁶⁰ D-39, T-309-ENG-ET, p.51, lines 19-21.

84. The Prosecution also produced a military expert to assert that in the CAR, “Mr Bemba regularly issued orders directly to commanders in the field”.¹⁶¹ Although General Opande ultimately testified that with additional information concerning the command structure his conclusions would have altered,¹⁶² and despite the Prosecution’s virtual abandonment of this expert,¹⁶³ the Defence was still put on notice by both his report¹⁶⁴ and testimony¹⁶⁵ that this was the Prosecution’s position on effective control.

85. Simply because the evidence demonstrates that Mr. Bemba had no operational command over the troops does not permit the Prosecution to shift away from the case as confirmed, charged, and presented in Court. This was the case that Mr. Bemba had notice he was required to meet. Principles of fairness, and an obligation to provide sufficient and timely notice prevent such a shift.¹⁶⁶

86. The Prosecution’s shift in focus is a calculated one. It means the Prosecution can avoid grappling with the evidence concerning the FACA command hierarchy, or the CCOP.¹⁶⁷ The Prosecution ignores the wealth of evidence (much of it its own) concerning the functioning central command centre where operational orders were being formulated. The only attempt by the Prosecution to rebut the evidence that the MLC received orders from the FACA hierarchy is the following: “the Defence rely primarily on D19 and false documents to support its theory that Bemba’s

¹⁶¹ P-219, T-197-ENG-ET, p.54, lines 16-25.

¹⁶² P-219, T-199-ENG-ET, p.26, line 22–p.27, line 2, p.27, lines 19-25, p.45, lines 15-22.

¹⁶³ In a command responsibility case, the Prosecution refers to its own Military Expert on a total of six occasions in a 412 page Closing Brief (fn. 14, 455, 1935, 2162, 2192, 2321). He is referred to on one occasion in the Prosecution Response Brief (fn. 53).

¹⁶⁴ EVD-T-OTP-00119/CAR-OTP-0064-0547, para. 29.

¹⁶⁵ P-219, T-197-ENG-ET, p.54, lines 16-25.

¹⁶⁶ Article 67(1)(a). See also, *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgment, 16 October 2007, paras. 68-70, where the Prosecution was prevented on appeal from arguing a different basis for effective control than that which had been pleaded at trial.

¹⁶⁷ Defence Closing Brief, paras. 614-666.

troops were under the operational command of Patassé” and “D19 testimony [*sic*] is not credible.”¹⁶⁸

87. It is not correct that the Defence relied primarily on D-19. Unlike the Prosecution,¹⁶⁹ the Defence relied on the testimony of FACA, [REDACTED],¹⁷⁰ and MLC soldiers,¹⁷¹ members of the FACA¹⁷² [REDACTED],¹⁷³ other MLC [REDACTED];¹⁷⁴ the investigation conducted by the Central African authorities;¹⁷⁵ civilians on the ground;¹⁷⁶ both military experts;¹⁷⁷ as well as contemporaneous documents,¹⁷⁸ videos¹⁷⁹ and reports.¹⁸⁰ All of this evidence aligned with the Defence case, and undermined the Prosecution’s.

88. Secondly, the Prosecution’s claim that “D19 testimony [*sic*] is not credible” is astounding. The Prosecution is attempting to impugn the credibility of a [REDACTED] witness without making a single substantiated submission as to why his testimony is not capable of belief.¹⁸¹ It is an extraordinary (and ultimately unhelpful) way of proceeding, made even more so by the fact that the Prosecution itself relies so extensively on D-19’s testimony.¹⁸²

89. To give one example, the Prosecution relies **solely** on the testimony of D-19 for each of its claims in paragraph [REDACTED]”.¹⁸³ In a complete (and

¹⁶⁸ Prosecution Response Brief, para. 31.

¹⁶⁹ Defence Closing Brief, paras. 596-599.

¹⁷⁰ Defence Closing Brief, paras. 617, 637-638, [REDACTED], 642, 645-647.

¹⁷¹ Defence Closing Brief, paras. 617, 627, 630-631, 650, 653.

¹⁷² Defence Closing Brief, paras. [REDACTED], 644, 647[REDACTED], 650, 654, [REDACTED].

¹⁷³ Defence Closing Brief, paras. 618-620, 633, 657-658, 660-661.

¹⁷⁴ Defence Closing Brief, paras. 612, 618, 653, 663.

¹⁷⁵ Defence closing brief, paras. 621, 637, 639, 647, 649-650, 652, 654.

¹⁷⁶ Defence Closing Brief, paras. 629, 659-660.

¹⁷⁷ Defence Closing Brief, paras. 609-611, 616, 622, 625, 630, 636-637, 640, 643-644, 646-647, 650, 653, 657, 659, 662.

¹⁷⁸ Defence Closing Brief, paras. 619, 622, 626, 630, 635, 640, 646, 654, 663-665.

¹⁷⁹ Defence Closing Brief, paras. 663.

¹⁸⁰ See for example Defence Closing Brief, para. 809.

¹⁸¹ Paragraph 119 to which the Prosecution refers does not cite to D-19’s testimony.

¹⁸² See, for example, Prosecution Closing Brief, fn. 23-25, 27, 50, 53, 399-401, 409, 459-460, 521-523.

¹⁸³ [REDACTED].

unsubstantiated) turnaround, the Prosecution is now asserting that D-19 is not capable of reliance.¹⁸⁴ If this were true, the Prosecution would evidently be required to re-file its Closing Brief having deleted all examples of reliance on his testimony. Otherwise, the Prosecution is relying on evidence which it deems unreliable, in breach of its statutory and professional duties.

90. The claim that the Defence relies on “false” documents is similarly problematic. Although this claim is made six times,¹⁸⁵ no footnote is ever given. Neither the Chamber nor the Defence is therefore in a position to understand which particular documents are being referred to, and this allegation stands to be dismissed for lack of specificity. If the Prosecution is referring to the so-called “FACA documents”,¹⁸⁶ this allegation is improper.

91. The Chamber admitted the FACA documents as evidence, after a full consideration of the Prosecution’s submissions,¹⁸⁷ and having heard testimony from [REDACTED].¹⁸⁸ In admitting these documents, the Chamber was explicit that it would “consider the materials in accordance with the three-part test of relevance, probative value and potential prejudice.”¹⁸⁹ Central to the assessment of “probative value” is whether or not the document is authentic, namely “the Chamber needs to be satisfied that the item is what it purports to be”.¹⁹⁰ If the documents were not

¹⁸⁴ Prosecution Response Brief, para. 31.

¹⁸⁵ Prosecution Response Brief, paras. 1, 31, 40.

¹⁸⁶ EVD-T-D04-00058/CAR-D04-0003-0128, EVD-T-D04-00059/CAR-D04-0003-0129, EVD-T-D04-00060/CAR-D04-0003-0130, EVD-T-D04-00061/CAR-D04-0003-0131, EVD-T-D04-00062/CAR-D04-0003-0132, EVD-T-D04-00063/CAR-D04-0003-0133, EVD-T-D04-00064/CAR-D04-0003-0134, EVD-T-D04-00058/CAR-D04-0003-0135, EVD-T-D04-00065/CAR-D04-0003-0136, EVD-T-D04-00066/CAR-D04-0003-0137, EVD-T-D04-00067/CAR-D04-0003-0138, EVD-T-D04-00068/CAR-D04-0003-0139, EVD-T-D04-00069/CAR-D04-0003-0140, EVD-T-D04-00075/CAR-D04-0003-0141.

¹⁸⁷ ICC-01/05-01/08-3019-Conf, paras. 43-50.

¹⁸⁸ CHM-01, T-357-ENG-ET, p.49, line 6–p.58, line 21, p.102, line 15–p.107, line 5.

¹⁸⁹ ICC-01/05-01/08-3019-Conf, para. 22.

¹⁹⁰ ICC-01/05-01/08-2299-Red, para. 8: Probative value. Under the second part of the admissibility test, the Chamber must consider, on a preliminary basis, whether the item in question has probative value. This will always be a fact-specific inquiry and may take into account innumerable factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inhere in the item of potential evidence, as well as the circumstances in which the evidence arose. It may also take into account the extent to which the item has been authenticated. While it is not necessary that each item

authentic, then they could not have satisfied the Chamber's three-part test and would never have been admitted into the record of the case.¹⁹¹

The first issue the Chamber must consider, in this respect, is whether the item of evidence is authenticated. In the absence of authentication, there can be no guarantee that a document is what the party tendering it purports it to be. **Under no circumstances can the Chamber admit unauthenticated documentary evidence** since, by definition, such evidence has no probative value. The Prosecution's assertion that "there is no legal basis in the jurisprudence of the tribunals that proof of authenticity is a threshold requirement for the admissibility of documentary evidence", irrespective of its accuracy, is misconceived in the context of proceedings before this Court. To admit unauthenticated evidence would unjustifiably burden the record of the trial with non-probative material and serve no purpose in the determination of the truth.

92. The Prosecution did not seek leave to appeal decision admitting the FACA documents, and cannot now accuse a Trial Chamber of the International Criminal Court of having admitted false documents when the test applied would have necessarily precluded this.

93. Of greater concern, the Prosecution is impermissibly making allusions to material pertaining to the Article 70 Case, in breach of the Trial Chamber's ruling on this point.¹⁹² The Prosecution cannot assert that the materials are "false" unless this has been established. The Prosecution's submissions should be disregarded.

94. The allegation that an expert witness "cannot be relied on for facts" is inconsistent with the Prosecution's own reliance on the very same expert to support

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.

¹⁹¹ ICC-01/04-01/07-2635, para. 22 (citations omitted). The Trial Chamber cited this passage with approval in ICC-01/05-01/08-2012, para.15, fn. 27.

¹⁹² ICC-01/05-01/08-3029.

factual propositions in its Closing Brief.¹⁹³ In fact, elsewhere in its Response Brief, the Prosecution asserts that “D53 testified that the MLC delegation crossed to the CAR on 26 October 2002 and stayed there for a few days.”¹⁹⁴ It cannot sensibly be argued that the Defence cannot rely on an expert witness to support facts, but it is absolutely fine for the Prosecution to do so.

95. The Prosecution either misunderstands or misconstrues the Defence arguments concerning “double command”.¹⁹⁵ The Defence is not asserting that only the immediately direct superior can be liable for the criminal activity of subordinates.¹⁹⁶ Rather, the Prosecution erred in law in failing to lead evidence on the case as charged. The Prosecution asserts Mr. Bemba is liable as the superior of the rank and file on the ground in the CAR.¹⁹⁷ This cannot be reconciled with the Prosecution’s case that in fact their commander was Mustapha.¹⁹⁸ The Prosecution neither pleaded nor attempted to argue that Mr. Bemba was liable for criminal activity by Mustapha. It neither pleaded nor attempted to argue that Mr. Bemba was liable for failing to prevent or repress the failure of Mustapha to prevent and punish the crimes of the soldiers (double command). This is not only a question of law (namely whether such a proposition is legally possible), but rather the absence of adequate pleading, and the failure to present the case as confirmed by the Pre-Trial Chamber.

96. The Defence did point to something “prohibiting Bemba’s ability to investigate in the CAR”¹⁹⁹ – basic notions of state sovereignty.²⁰⁰ France and the United Kingdom are accessible to each other by air, sea and rail. It is inconceivable

¹⁹³ See, for example, Prosecution Closing Brief, paras. 10, 16.

¹⁹⁴ Prosecution Response Brief, para. 65.

¹⁹⁵ Prosecution Response Brief, para. 36.

¹⁹⁶ Defence Closing Brief, paras. 602-606.

¹⁹⁷ Confirmation Decision, ICC-01/05-01/08-424, paras. 444, 446, 501; ICC-01/05-01/08-856-Conf-AnxA, paras. 55, 57, 60, 68, 78, 87-90.

¹⁹⁸ Prosecution Closing Brief, para. 10.

¹⁹⁹ Prosecution Response Brief, para. 42.

²⁰⁰ Defence Closing Brief, para. 921.

that simply because a crime is alleged to have been committed by a British citizen in France, British police are able to get on the Eurostar and start investigating, interviewing, collecting evidence, and detaining suspects.

B. Mr. Bemba did not know that his troops were committing or about to commit crimes

97. The Prosecution again misconstrues the Defence arguments concerning Mr. Bemba's actual knowledge.²⁰¹ Legally, Mr. Bemba is required to have knowledge of the crimes **with which he is charged**.²⁰² Even should the Chamber accept that the Prosecution is not required to prove Mr. Bemba's knowledge of the specific identities of the victims or perpetrators, the relevant point is the following: absent such information, how could Mr. Bemba have taken measures further to those he employed? Should Mr. Bemba have simply ordered Mustapha to "start arresting people"? Who should have been arrested? [REDACTED].²⁰³ The Prosecution fails to grapple with this central point; what else could Mr. Bemba have done absent concrete and actionable information concerning particular incidents and perpetrators?

98. Concerning the "should have known" threshold, the Prosecution claims that "Article 28(a)'s duty to investigate recognises that a superior need not wait for facts to be established before he takes action."²⁰⁴ The footnote cited for this proposition simply says "emphasis added". As such, the Defence is not clear what the Prosecution is arguing. Regardless, the Prosecution fails to engage with the numerous steps taken by Mr. Bemba on the basis of the vague information and

²⁰¹ Prosecution Response Brief, para. 55.

²⁰² *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, paras. 416-417; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, 17 September 2003, paras. 155, 178-179; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Judgment, 15 March 2006, para. 106.

²⁰³ [REDACTED].

²⁰⁴ Prosecution Response Brief, para. 58.

rumours in his possession;²⁰⁵ he certainly did not wait for “facts to be established” before taking steps.²⁰⁶

99. There is conflicting jurisprudence as to whether the information available to a superior is required to indicate that crimes by subordinates “would occur”, or only that crimes “might occur”. The Prosecution’s claim that there need only be a “mere risk” of the commission of crimes²⁰⁷ is inconsistent with the weight of authority²⁰⁸ which requires a “likelihood”, not possibility, that crimes will occur,²⁰⁹ which is also consistent with the ICRC Commentary to Additional Protocol I.²¹⁰ In the light of conflicting jurisprudence, the Chamber should interpret this requirement strictly and in the manner most favourable to the Accused in light of article 22(2) of the Statute.

100. The assertion that Mr. Bemba “did not request FIDH to provide additional information”²¹¹ is undermined by the content of his letter:²¹²

²⁰⁵ EVD-T-OTP-00453/CAR-OTP-0017-0363: Letter from Mr. Bemba to General Cissé dated 4 January 2003; EVD-T-OTP-00391/CAR-DEF-0001-0152: Letter from Mr. Bemba to FIDH dated 20 February 2003; D-48, T-267-ENG-ET, p.51, lines 2-16: Mr. Bemba wrote to the Central African Prime Minister asking for an enquiry to be undertaken; [REDACTED]; P-36, T-215-ENG-ET, p.6, lines 3-24; T-218-ENG-ET, p.39, line 11–p.40, line 3: the Mondonga commission; EVD-T-OTP-00392/CAR-DEF-0001-0155, D-48, T-267-ENG-ET, p.31, line 5–p.33, line 22: Zongo Enquiry; D-21, T-302-ENG-ET, p.23, line 11–p.31, line 1: Mission to Sibut; See also Defence Closing Brief, paras. 1006-1044.

²⁰⁶ EVD-T-OTP-00453/CAR-OTP-0017-0363: Letter from Mr. Bemba to General Cissé dated 4 January 2003; EVD-T-OTP-00391/CAR-DEF-0001-0152: Letter from Mr. Bemba to FIDH dated 20 February 2003; D-48, T-267-ENG-ET, p.51, lines 2-16: Mr. Bemba wrote to the Central African Prime Minister asking for an enquiry to be undertaken; [REDACTED]; P-36, T-215-ENG-ET, p.6, lines 3-24; T-218-ENG-ET, p.39, line 11–p.40, line 3: the Mondonga commission; EVD-T-OTP-00392/CAR-DEF-0001-0155, D-48, T-267-ENG-ET, p.31, line 5–p.33, line 22: Zongo Enquiry; D-21, T-302-ENG-ET, p.23, line 11–p.31, line 1: Mission to Sibut; See also Defence Closing Brief, paras. 1006-1044.

²⁰⁷ Prosecution Response Brief, para. 57.

²⁰⁸ See, for example, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, paras. 417-418; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgment, 29 July 2004, paras. 41-42; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgment, 16 November 2005, para. 68; *Prosecutor v. Alić*, Case No. X-KR-06/294, Verdict, 11 April 2008, para. 31.

²⁰⁹ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Judgment, 10 July 2008, para. 414, citing Čelebići Trial Judgment, para. 393; *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, para 437; *Prosecutor v. Mrkšić*, Trial Judgement, Case No. IT-95-13/1-T, 27 September 2007, para 564; *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-A, Appeals Judgment, para. 27.

²¹⁰ Preux, 'Commentary on Articles 86 and 87' in Sandoz, Swinarski and Zimmerman, Commentary on the Additional Protocols (1987) 3545.

²¹¹ Prosecution Response Brief, para. 59.

Je suis prêt, si vous le jugez utile, à tenter avec vous, dans un esprit de transparence et de responsabilité, d'établir la vérité - toute la vérité - sur les événements qui se sont déroulés à Bangui en Centrafrique au cours des derniers mois

His letter to FIDH is, in fact, most accurately summarised as a plea for information.

101. The claim that “the Defence failed to explain why Bemba disregarded reports from his own intelligence services”²¹³ again demonstrates an alarming misapplication of the burden of proof and a misunderstanding of the Prosecution’s own role. **The Defence has no obligation to explain anything.** The Prosecution is required to establish its case beyond reasonable doubt. By simply skipping over the fact that it brought no documentary proof, and no credible testimonial evidence of the alleged contemporaneous reports in question,²¹⁴ and completely ignoring the conflicting information Mr. Bemba was receiving,²¹⁵ the Prosecution has failed to do so.

C. Mr. Bemba took necessary and reasonable measures

102. The Prosecution claims that Mr. Bemba presided over “two failed and faulty processes” that failed to produce accountability.²¹⁶ The duty to take necessary and reasonable measures is not a form of “*responsabilité de résultat*”, whereby a superior could be held criminal responsibility merely because his actions failed to prevent or repress a crime. It is a “*responsabilité de moyens*”, given that it compels superiors to adopt certain measures and gives rise to liability if they fail to do so.²¹⁷ The fact that

²¹² EVD-T-OTP-00391/CAR-DEF-0001-0152 at 0153.

²¹³ Prosecution Response Brief, para. 61.

²¹⁴ Defence Closing Brief, paras. 871-886.

²¹⁵ Defence Closing Brief, paras. 809, 855-870, 896.

²¹⁶ Prosecution Response Brief, para. 42.

²¹⁷ See for example, *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-2004-16-T, Trial Judgement, 20 June 2007, para. 1740: “The law does not require proof that the Accused Brima could have prevented the commission of the crimes. The law requires that the Accused Brima took all steps reasonably open to him in an attempt to do so.”

the measures taken were alleged to have been unsuccessful in preventing crimes or identifying perpetrators does not permit an inference to be drawn that Mr. Bemba failed in his duty. The Prosecution failed to establish that his conduct was grossly inadequate and this failure contributed to the commission of the crime or the perpetrators remaining unpunished.²¹⁸

103. On this point, the Trial Chamber in *Hadžihasanović* found that when the competent judicial authorities had been seized, the duty of the superior to punish in relation to the referred crimes was effectively extinguished.²¹⁹ The fact that an investigation had been initiated was proof of Hadžihasanović fulfilling his duty to take necessary and reasonable measures,²²⁰ despite there being no evidence that the prosecutor in question took any action following the referral.²²¹ These findings were not impugned on appeal.

104. The Prosecution clings to its theory that all possible and conceivable measures were open to Mr. Bemba. The realities on the ground are simply ignored.²²² While insisting and repeating that Mr. Bemba could do anything and yet did not do enough, the Prosecution never once suggests what information Mr. Bemba was in a position to generate in the normal course of events which would have enabled him to punish the alleged perpetrators. The Prosecution has never pointed out any means or additional practical steps that Mr. Bemba could have reasonably taken and failed to take which would have produced information about the identity of the victims, the perpetrators, or the dates or locations of alleged crimes. In reality, there were none.

²¹⁸ G. Mettraux, 'The Law of Command Responsibility', OUP (2009), p.46.

²¹⁹ *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Judgment, 15 March 2006, paras. 1052-1055, 1061-1062. (*Hadžihasanović* TJ)

²²⁰ *Hadžihasanović* TJ, para. 1062.

²²¹ *Hadžihasanović* TJ, para. 1055.

²²² Prosecution Response Brief, para. 46.

D. The Prosecution has failed to argue and establish Mr. Bemba's knowledge of the contextual elements

105. Finally, it is extraordinary that the Prosecution attempts to rectify in one sentence²²³ its failure to make any submissions on Mr. Bemba's knowledge of the chapeau elements of war crimes and crimes against humanity.²²⁴ Its claim that "the facts supporting Bemba's knowledge under Article 28 also prove his knowledge of the armed conflict, widespread attack against the civilian population and their nexus to the crimes" falls wildly below the standard of establishing Mr. Bemba's knowledge on this key element beyond a reasonable doubt.

106. The Prosecution has a specific burden to establish the *mens rea* requirement of knowledge of the existence of an armed conflict, independently of the *mens rea* of the offence itself.²²⁵ Arguments concerning knowledge for the purpose of command responsibility do not necessarily satisfy the knowledge requirement for contextual elements. Knowledge that forces were committing or about to commit crimes does not equal knowledge of (i) the existence of an armed conflict and the nature thereof; (ii) the fact that the underlying crimes were part of it; (iii) the existence of a widespread and systematic attack against a civilian population and (iv) the fact that the underlying crimes were part of that.²²⁶

107. The Prosecution must be aware that such paltry submissions would never meet its burden. Its apparent assumption that the Trial Chamber will do the Prosecution's job was in error, particularly on such a critical pre-requisite to a finding of liability on Mr. Bemba's behalf.

VII. OBSERVATIONS ON THE SUBMISSIONS OF THE LRV

²²³ Prosecution Response Brief, para. 63.

²²⁴ Defence Closing Brief, para. 819.

²²⁵ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgment, 3 May 2006, paras. 120-121.

²²⁶ Elements of Crimes, Article 7 (1)(a); Article 7 (1)(g)-1; Article 8 (2)(b)(xvi); Article 8 (2)(b)(xxii)-1; Article 8 (2)(c)(i)-1.

108. The Defence has harboured a long-standing alarm at the tone of these proceedings, and the lack of collegiality exhibited throughout their duration. However, the language used and directed personally towards the members of Mr. Bemba's Defence team in both the Prosecution's Response Brief, and more particularly by the Legal Representative of Victims'²²⁷ is unacceptable,²²⁸ and inconsistent with the recognised principle that Defence lawyers must be able vigorously to defend the interests of their client.

109. The use of phrases such as "pathologie chronique",²²⁹ "faute professionnelle",²³⁰ "abnégation qui dépasse l'entendement",²³¹ "facilité chronique et déconcertante",²³² "légèreté avec laquelle la Défense a rédigé ses conclusions"²³³ are personal attacks that have no place in a written filing before the International Criminal Court. It is regrettable that the tone of these proceedings have been permitted to descend to such depths, and the Defence invites the Chamber to instruct the LRV to re-file her brief having deleted this language.

A. The LRV Submissions

110. The LRV asserts that she "partage les préoccupations du Bureau du Procureur quant au fait que la Défense a fourni des références incomplètes et/ou incorrectes, voir erronées."²³⁴

111. Firstly, the LRV asserts that the Defence is in error when it alleges that all victim witnesses were members of OCODEFAD.²³⁵ The paragraph cited by the LRV

²²⁷ ICC-01/05-01/08-3140-Conf (LRV Response Brief).

²²⁸ ICC-01/05-01/08-3148-Conf.

²²⁹ LRV Response Brief, para. 21.

²³⁰ LRV Response Brief, para. 12.

²³¹ LRV Response Brief, para. 43.

²³² LRV Response Brief, para. 60.

²³³ LRV Response Brief, para. 62.

²³⁴ ICC-01/05-01/08-3129-Conf, para. 6.

²³⁵ LRV Response Brief, para. 20.

to the Defence Brief makes no mention of individual witnesses being members.²³⁶ This error aside, the Defence withdraws the general statement that each victim witness is a member of OCODEFAD,²³⁷ and notes instead that P-68,²³⁸ P-75,²³⁹ P-23,²⁴⁰ P-81,²⁴¹ P-82,²⁴² P-80,²⁴³ P-42,²⁴⁴ P-73,²⁴⁵ P-79,²⁴⁶ P-69²⁴⁷ were members of OCODEFAD. In relation to P-87, P-22, and P-110, the Defence recalls that each individually completed an ICC victim application forms,²⁴⁸ two filled these in with the help of Maître Ngoungaye,²⁴⁹ and P-87 attended the meeting with former Chief Prosecutor of the ICC during his visit in the CAR.²⁵⁰ P-87 also insisted that she had never heard the name OCODEFAD,²⁵¹ which seems unlikely given the familiarity exhibited by all other victim witnesses with the organisation; P-87's contact with Maître Ngoungaye²⁵² who was OCODEFAD's lawyer;²⁵³ her knowledge of Bernadette Sayo;²⁵⁴ and the links between her and other victims who attended the meeting with the ICC Prosecutor.²⁵⁵ Interestingly, she was candid in her testimony that only victims of the Banyamulengue attended the meeting with the ICC Prosecutor,²⁵⁶ the "impartial minister of justice".²⁵⁷ However, the Defence accepts that they did not own to being members of OCODEFAD, and, accordingly, withdraws its statement that they were, having been alerted to this error by the LRV.

²³⁶ LRV Response Brief, fn. 23: the correct paragraph number should not be paragraph 83 of the Defence Closing Brief, but rather paragraph 224.

²³⁷ Defence Closing Brief, para. 224.

²³⁸ P-68, T-49-ENG-ET, p.3, lines 13-16.

²³⁹ P-75, T-92-ENG-ET, p.31, lines 18-25; T-93-ENG-ET, p.19, lines 19-22.

²⁴⁰ P-23, T-50-ENG-ET, p.55, lines 7-10.

²⁴¹ P-81, T-54-ENG-ET, p.23, lines 20-24.

²⁴² P-82, T-60-ENG-ET, p.30, lines 6-10.

²⁴³ P-80, T-61-ENG-ET, p.26, lines 13-17.

²⁴⁴ P-42, T-63-ENG-ET, p.36, lines 14-17.

²⁴⁵ P-73, T-71-ENG-ET, p.55, lines 3-10.

²⁴⁶ P-79, T-77-ENG-ET, p.30, lines 9-10.

²⁴⁷ P-69, T-194-ENG-ET, p.5, lines 5-6.

²⁴⁸ P-110, T-126-ENG-ET, p.17, line 22–p.18, line 24; P-112, T-131-ENG-ET, p.50, line 13–p.52, line 4.

²⁴⁹ P-22, T-42-ENG-ET, p.46, lines 21-24; P-87, T-45-ENG-ET, p.20, lines 1-9.

²⁵⁰ P-87, T-45-ENG-ET, p.20, line 2–p.22, line 20.

²⁵¹ P-87, T-46-ENG-ET, p.7, lines 5-9.

²⁵² P-87, T-45-ENG-ET, p.19, lines 10-12.

²⁵³ P-23, T-54-ENG-ET, p.30, lines 15-23.

²⁵⁴ P-87, T-45-ENG-ET, p.21, lines 6-11.

²⁵⁵ P-87, T-46-ENG-ET, p.6, lines 6-22.

²⁵⁶ P-87, T-46-ENG-ET, p.6, lines 1-5.

²⁵⁷ Article 54(1) of the Rome Statute.

112. This error aside, the Defence submits that the criticism of Mr. Bemba's Closing Brief is without merit, and is especially impertinent in light of the difficulties the Defence has experienced with the filings submitted by the LRV herself. The LRV submissions contains many incorrect references,²⁵⁸ incomplete references,²⁵⁹ references which either have no line numbers indicating the end of a reference, or no line numbers at all.²⁶⁰ Some references only cite to the transcript without a page or line reference being given,²⁶¹ others do not give the transcript number,²⁶² some footnotes are erroneously repeated²⁶³ and some references within a footnote are erroneously repeated.²⁶⁴ Footnotes 113, 150, 174, 199, 201, 203, 207, 261, 354 and 531 do not refer to the text. There are no EVD-T number provided for any admitted documents.

113. Moreover, the LRV makes assertions without evidential support. At paragraph 61 footnote 58, the LRV asserts that "Le mode opératoire des Banyamulengue a été clairement observé par le témoin qui a pu constater l'usage de la force au moyen d'armes à l'encontre de ces deux victimes". Footnote 58 refers to ICC-01/05-01/08-T-82-CONF-FRA ET, p. 41 line 11, which reads "Ceux-là, ils avaient toujours leurs armes sur eux". Nowhere at this reference does the witness testify that the Banyamulengue allegedly committing rape were using their weapons against the victims. The Defence has been unable to locate this evidence. At paragraph 241, footnote 295, the LRV makes references to both P-47 and P-63. In the footnote, there only one witness cited, and the reference is wrong.²⁶⁵ She asserts

²⁵⁸ LRV Closing Brief, fn. 225, 233, 238, 252, 259-260, 264, 268-269, 282, 295, 315-316, 342, 350, 352, 358-359, 391, 396, 404, 485, 488, 495-496, 514-515, 545, 555.

²⁵⁹ LRV Closing Brief, fn. 198, 228, 247, 269, 299, 314, 322, 341, 513, 524, 540.

²⁶⁰ LRV Closing Brief, fn. 191-192, 261, 283, 289, 293, 308, 352, 354, 367, 419, 437, 443-444, 451, 456, 463, 471, 473, 487, 525-526, 530, 539, 546-548, 550, 558.

²⁶¹ LRV Closing Brief, fn. 299, 300, 345, 412.

²⁶² LRV Closing Brief, fn. 363, 453, 502.

²⁶³ LRV Closing Brief, fn. 241.

²⁶⁴ LRV Closing Brief, fn. 417.

²⁶⁵ In the text – it's arms that are being transported by sea, and in the footnote, it's pillaged goods which are transported by sea.

elsewhere that many witnesses talked about the cahier de communication yet only references P-36.²⁶⁶ She states that numerous witnesses acknowledge that Mr. Bemba was the chairman yet only cites to the testimony of P-173.²⁶⁷ Similarly, she asserts that a few witnesses associate the term Banyamulengue to the MLC troops, but yet only refers to P-47.²⁶⁸ The LRV appears to have assumed that the Chamber should itself seek out all relevant references. This approach to pleading is problematic, given the right of Mr. Bemba to a clear understanding of which witnesses the LRV is relying on. He has a right to challenge the case against him.

B. The submissions about the “demandes de participation” are inadmissible

114. The LRV attempts to counter the Defence arguments concerning the veracity of victims’ claims with reference to the thousands of victims’ application forms that have been analysed by the Trial Chamber.²⁶⁹

115. These submissions are impermissible. The parties are required to base their submissions on evidence admitted in the record of the case. Following a request from the Defence for the admission of a discrete number of “demandes de participation” from victim/witnesses, the Majority of the Chamber ruled 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.”²⁷⁰ Their admission was accordingly rejected. As such, the LRV is precluded from making submissions based on these documents, and her submissions stand to be rejected.

²⁶⁶ LRV Closing Brief, fn. 365.

²⁶⁷ LRV Closing Brief, fn. 366.

²⁶⁸ LRV Closing Brief, para. 476.

²⁶⁹ LRV Response Brief, para. 43.

²⁷⁰ ICC-01/05-01/08-2012-Conf, para. 102; ICC-01/05-01/08-2012-Conf, paras. 16, 18.

C. In any event the “demandes” underpin the defence questions concerning the veracity of victims’ claims

116. Whilst the Defence’s primary submission remains faithful to the Trial Chamber’s ruling on the admissibility of the “demandes de participation”, it cannot countenance the casual reference by the LRV to some of the contents in her response brief without noting the impact the contents elsewhere have upon the overall pattern of credibility of victims’ claims.²⁷¹ The facts as described in many of the “demandes de participation” of participating victims simply cannot be true. Participating victims describe violence by the “Banyamulengue” in locations and on dates where not only has the Prosecution never alleged that MLC troops were present, but where the evidence overwhelmingly demonstrates that they could not have been. The Chamber has heard direct evidence of untruthful and exaggerated claims being submitted to the Court in the present case.²⁷² The content of many of the “demandes” bears this out.

117. [REDACTED] alleges harm by “Banyamulengue” in PK22 on 29 October 2002.²⁷³ It is simply impossible that MLC soldiers had made it 22 kilometres north of Bangui by this date.²⁷⁴ [REDACTED] alleges harm by the “Banyamulengue” in Bossembélé on 12 March 2002. There were no MLC troops still this far north by this date.²⁷⁵ There are many such examples of victims whose claims cannot be reconciled with the evidence heard.

118. Also impacting on their credibility, many “demandes” seek hundreds of thousands of euros as compensation for pillaged goods. [REDACTED] demands

²⁷¹ LRV Response Brief, paras. 74, 89, 94-95, 98, 100.

²⁷² P-73, T-73-ENG-ET, p.19, line 3–p.21, line 20.

²⁷³ ICC-01/05-01/08-981-Conf-Anx204-Red.

²⁷⁴ The MLC contingent started crossing on 29 October 2002 and Mustapha and his unit arrived in Bangui on 30 October: D-56, T-313-ENG-ET, p.31, lines 1-15; D-19, T-284-ENG-ET, p.19, lines 1-11, p.22, lines 3-23; D-45, T-294-ENG-ET, p.8, line 1–p.9, line 3; T-298-ENG-ET, p.8, lines 13-25; D-50, T-254-ENG-ET, p.22, lines 3-9; EVD-T-OTP-00702/CAR-D04-0002-1514 at 1637; Defence Closing Brief, paras. 333-351.

²⁷⁵ P-169, T-137-ENG-ET, p.30, line 18–p.31, line 2; D-19, T-285-ENG-ET, p.9, line 4–p.10, line 8; Defence Closing Brief, paras. 371-374.

1,417,775 euros for goods (mainly foodstuffs) pillaged on 28 December 2002, in a [REDACTED] location.²⁷⁶ [REDACTED] demands 876,581.85 euros for the pillage of goods and the destruction of her house on 8 January 2003 in Bossangoa.²⁷⁷ [REDACTED] demands 846,090.19 euros for goods pillaged in 15 January 2003, although he does not identify a location.²⁷⁸ [REDACTED] demands 223,950,000 euros for goods pillaged in PK13 on 29 October 2002.²⁷⁹ These amounts are so exaggerated as to be implausible, and accordingly undermine the veracity of the entire application.

119. As such, these “demandes de participation” serve as some of the best evidence of the shaky foundation upon which the present proceedings are based, with claims of exaggerated harm occurring on dates and locations which are rendered impossible on the evidence.

VIII. CONCLUSION

120. The Prosecution has systematically failed properly to litigate this case. It has sought throughout to absolve itself of the burden of proving the case and to present the well-established standard of proof for a prosecutor as a novel concept. It has neglected to provide evidence or argument concerning many aspects of the confirmed case against Mr. Bemba, whilst concurrently persisting to argue aspects which it has been enjoined from doing. It has deliberately declined to put its case to witnesses throughout the evidence and failed to respond to many crucial Defence arguments in its closing written filings. Its position on the credibility of witnesses and other sources of evidence in the case is incomprehensible. Its Response Brief is merely a series of excuses and/or apologies for these failings.

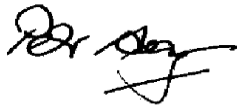
²⁷⁶ ICC-01/05-01/08-1559-Conf-Anx61.

²⁷⁷ ICC-01/05-01/08-1559-Conf-Anx-66.

²⁷⁸ ICC-01/05-01/08-1559-Conf-Anx178.

²⁷⁹ ICC-01/05-01/08-1381-Conf-Anx113-Red.

121. The Chamber should not countenance this and engage in constructing some sort of basis of liability which has not been made out. The Prosecution has not met the legal and evidential thresholds to prove any of the charges against Mr. Bemba. Accordingly, he must be acquitted.



Peter Haynes QC

Lead Counsel of Mr. Jean-Pierre Bemba



Kate Gibson

Co-Counsel of Mr. Jean-Pierre Bemba



Melinda Taylor

Co-Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

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