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TRIAL CHAMBER III

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

**Public Redacted Document
with
Confidential Annex A**

**Public redacted version of ‘Prosecution’s Response to the Defence Closing Brief’,
15 September 2014, ICC-01/05-01/08-3141-Conf**

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INTRODUCTION

1. Trial Chamber III (“Chamber”) should carefully scrutinise the assertions made in the Closing Brief of Mr Jean-Pierre Bemba Gombo (“Defence Closing Brief”). As this Response demonstrates¹, the brief is rife with inaccuracies, hyperbolic assertions unsupported by evidence, and misleading statements of the evidence. The Defence Closing Brief reads like a patchwork of obfuscations supported by discredited Defence witnesses and false documents. The Prosecution is constrained by the page limit to list every Defence misstatement or faulty argument. To the extent that the Prosecution does not address specific Defence arguments in this brief, it relies on the Prosecution Closing Brief as a summation of the evidence in the case and the totality of the evidence in the trial record. In this sense, the Prosecution emphasises that the fact that a particular portion of the Defence Closing Brief has not been addressed by the Prosecution by no means implies that such portion is accepted or otherwise “unchallenged”.

2. As it will be demonstrated below, none of the Defence arguments raise reasonable doubt as to the legal elements proved by the evidence of the case. Further, the Defence Closing Brief is replete with inaccurate representations of the evidence of the record, the applicable law and the Prosecution’s submissions.

I. THE PROSECUTION DID NOT RADICALLY ALTER ITS CASE THEORY

3. The Defence complains that the Prosecution radically altered its case theory to the detriment of Mr Bemba (“Bemba” or “Accused”) and has consequently violated his right to be informed promptly of the charges.² In support of this contention, the Defence refers to the fact that, although the Prosecution had originally charged the Accused with the co-perpetration mode of liability, the Pre-Trial Chamber II (“PTC II”) confirmed charges under Article 28(a) of the Rome Statute (“Statute”).³

¹ The Prosecution’s Response is filed pursuant to the Chamber’s Decision, ICC-01/05-01/08-3131, 3 of July 2014. The authoritative version of the Response is filed in English, pursuant to Regulation 39(1) of the Regulations of the Court. A French translation is attached as Annex A

² Defence Brief, paras.69-77.

³ ICC-01/05-01/08-424, pp.184-185.

4. The Defence argument is without merit. The Prosecution did not radically alter its case theory throughout the case, as the facts originally pled in support of the co-perpetration mode of liability are in no way inconsistent with the current case theory whereby the Accused is responsible pursuant to Article 28(a) of the Statute.

5. First, the allegation that the Prosecution shifted its theory of liability misconstrues the procedural history of this case: PTC II ruled that the evidence presented by the Prosecution appeared to establish a mode of liability other than Article 25(3)(a) of the Statute and requested the Prosecution to consider submitting an amended document containing the charges (“Amended DCC”).⁴ Accordingly, the Prosecution filed an Amended DCC that included superior responsibility as an alternative to co-perpetration.⁵ The Confirmation Decision declined to confirm charges under Article 25(3)(a) and confirmed Mr. Bemba’s responsibility pursuant to Article 28(a) of the Statute.⁶ Upon the Chamber’s order, the Prosecution filed a Second Amended DCC to accurately reflect the way in which the PTC II defined the charges.⁷ Finally, upon Defence application,⁸ the Chamber further ordered the Prosecution to revise the Second Amended DCC so as to describe the charges precisely as confirmed by the PTC II.⁹ The revised Second Amended DCC was filed two months prior to the commencement of the trial.¹⁰ The Appeals Chamber confirmed that the information regarding the nature, cause, and content of the charges was provided to Bemba, who was made fully aware of the factual and legal allegations against him.¹¹

6. Second, President Patassé’s essential contributions, according to the Prosecution’s original pleading, include: requesting the intervention of MLC troops; providing transportation for MLC troops and leaders; providing food; providing government bases; providing fuel and uniforms.¹² None of the above-mentioned facts undermines, or is inconsistent with, the facts that establish Bemba’s responsibility under an Article 28(a) mode of liability.

⁴ ICC-01/05-01/08-388, para.17.

⁵ ICC-01/05-01/08-395-Anx1A.

⁶ ICC-01/05-01/08-424, pp.184-185.

⁷ ICC-01/05-01/08-593-Conf-AnxA.

⁸ ICC-01/05-01/08-694.

⁹ ICC-01/05-01/08-836, para.280.

¹⁰ ICC-01/05-01/08-856-Conf-AnxA.

¹¹ ICC-01/05-01/08-1386 OA5 OA6, para.63.

¹² ICC-01/05-01/08-129-Anx1A, para.63.

7. Furthermore, the facts originally pled by the Prosecution include, among others: that the Accused maintained contacts with Patassé throughout the MLC intervention in the Central African Republic (“CAR”); the Accused also maintained contacts with MLC’s subordinates during the 2002 intervention; operations during the CAR conflict were coordinated between Bangui and Gbadolite; a Coordination/Operation Cell was manned by both the MLC and FACA members.¹³ The above-mentioned facts are not inconsistent with Bemba’s criminal responsibility under Article 28(a) of the Statute. Indeed they support the Prosecution’s arguments that the MLC forces in the CAR were under the authority and control of the Accused and contradict the Defence’s theory that the Accused relinquished such authority and control.

A. The Accused received sufficient notice of additional evidence to support the charges confirmed

8. The Defence argues that certain evidence pertaining to specific incidents of rape, pillage, and murder, falls outside the confirmed facts and circumstances and should be excluded by the Chamber.¹⁴ The discussion of the evidence in the Prosecution’s Closing Brief does not go beyond the parameters of the Confirmation Decision, and the subsequent Amended DCC.¹⁵ The Prosecution has also taken note of the Chamber’s Decision 836.¹⁶ The Chamber stressed “...the importance of distinguishing between the charges and the evidence, that the charges are defined and set by the Pre-Trial Chamber, and the Prosecutor advances the evidence”.¹⁷ The Prosecution reiterates its position in this case regarding the factual allegations and the evidence it is required to put forward at different stages.¹⁸ It is the Prosecution’s prerogative and duty to furnish and use evidence admitted during trial in order

¹³ ICC-01/05-01/08-129-Anx1A, paras.64, 66, 67.

¹⁴ Defence Brief, paras.426-428,431,446-447.

¹⁵ ICC-01/05-01/08-4244; ICC-01/05-01/08-950-Conf-AnxA; ICC-01/05-01/08-935, para.11; ICC-01/05-01/08-836, para.37.

¹⁶ ICC-01/05-01/08-836.

¹⁷ ICC-01/05-01/08-836, para.31.

¹⁸ The Prosecution has previously submitted that “...if the Prosecution, to meet the “substantial grounds” test, omitted certain evidence from the confirmation hearing, it should not be foreclosed from including them in the trial. This is consistent with the seminal ruling of the Appeals Chamber in the Lubanga case, where the Appeals Chamber described the “facts described in the charges” as “the factual allegations which support each of the legal elements of the crime(s) charged”. The Appeals Chamber further clarified that “these factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from the background or other information that, although contained in the Document Containing the Charges or the Confirmation Decision, does not support the legal element of the crime(s) charged”, ICC-01/05-01/08-731, para.14.

to prove the charges confirmed. With regard to the counts listed in the Amended DCC¹⁹ the Prosecution can include other instances of rape, murder or pillaging. It can use trial evidence on any incidents of rape, murder or pillaging, not specifically referenced in the charges, as long as they are committed within the territorial and temporal scope of the confirmed charges.²⁰

9. The charges against the Accused are clear: he is responsible for his troops' commission of crimes against humanity through rapes and killings and war crimes through rapes, killings and pillaging against civilians throughout the territory of the CAR and within the period from on/or about 26 October 2002 to 15 March 2003.²¹ The specific examples of the crimes, dates or locations referenced in the charges²² are representative within each of the counts Bemba is charged with. They do not represent an exhaustive list. This is clearly shown by the use of "include" or "include, but are not limited to" in these charges. This position is also endorsed by the Chamber in its findings relevant to the charges.²³ In addition each of the respective incidents was discussed at length during the examination of the witnesses in trial. Regarding the evidence from the testimony of two victims authorised to testify,²⁴ their incidents too fall squarely within the charges against the Accused. If the Chamber were not to consider it, it would render meaningless victims' participation as witnesses during the trial proceedings.

10. Further, the Prosecution does not seek to expand the charges. It does not seek to add new counts or new criminal acts attributed to Bemba. Requesting the Chamber to consider all evidence on specific incidents of rape, pillaging and murder adduced during trial, which were committed within the temporal and geographical scope of the charges against Bemba, does not materially affect the nature of the charges against him because the mode of liability ascribed to him is one of command responsibility under Article 28 of the Statute. He is not charged as the direct perpetrator of these specific incidents of murders, pillaging and rapes. In addition, Bemba was provided with sufficient notice of the additional evidence and the Defence had the opportunity to question the witnesses.²⁵ The Accused suffered no prejudice.

¹⁹ ICC-01/05-01/08-950-Conf-AnxA, see Section VIII – Charges.

²⁰ The incidents referred to in the Defence Brief at paras.426-428, 431, 446-447, fall within the geographical and temporal scope of the charges as confirmed.

²¹ ICC-01/05-01/08-950-Conf-AnxA, para.57 and Section VIII – Charges.

²² ICC-01/05-01/08-950-Conf-AnxA, see Section VIII – Charges.

²³ ICC-01/05-01/08-836, see *inter alia*, paras.85-87, 256-279.

²⁴ See ICC-01/05-01/08-2138, para.55(a).

²⁵ ICC-01/05-01/08-669-Conf-AnxA, see Section IV, paras.136-183; ICC-01/05-01/08-793, Annexes C1-C33.

He was informed in an adequate manner of the scope and nature of the Prosecution's case against him, including the widespread nature of the crimes, their scale and the lengthy period of the conflict during which they were committed.

11. Lastly, this approach is in compliance with Article 74(2) of the Statute requiring the Chamber's decision to be based on its evaluation of the evidence submitted and discussed at trial and the entire proceedings. In addition, it complies with the Chamber's approach regarding (i) the scope of the evidence discussed during trial;²⁶ and (ii) the evaluation of the evidence in that, once an item has been admitted into evidence, it is free to analyse it in full and within the context of the evidence as a whole, unless the item was admitted for a limited purpose.²⁷

II. DOCUMENTARY EVIDENCE RELIED UPON BY THE PROSECUTION

12. The Defence attempts to undermine the reliability of the documentary evidence relied upon by the Prosecution.²⁸ It argues that documentary evidence should be approached with caution and in the specific circumstances of this case little, if any, evidential weight should be attributed to such evidence. In particular, in the Defence view, this is true of press reports that often comprise nothing more than anonymous hearsay and rumours.

13. The Defence's analysis is misleading. The Prosecution's resort to documentary evidence aligns with the law governing the Court and the ICC Appeals Chamber's jurisprudence. Article 74(2) of the Statute and the jurisprudence of the Trial Chambers of this Court make it clear that individual items of the evidence have to be analysed in the light of the entire body of evidence presented.²⁹ The Defence approach which considers documentary evidence in isolation, is incorrect.

²⁶ For example, during the testimony of P47, the Defence objected questions regarding incidents of rapes and murders as irrelevant on the basis that they were not retained in the Confirmation Decision [P47-T178-ENG-ET-p10-L21-p11-L13]/[P47-T178-FRA-ET-p11-L7]. The Chamber, found that the facts he was testifying about were related to confirmed charges, among them killings, rapes and pillaging. It overruled the Defence objection see [P47-T178-ENG-ET-p11-L14]/[P47-T178-FRA-ET-p12-L1].

²⁷ ICC-01/05-01/08-2299-Conf, para.14.

²⁸ Defence Brief, paras.24-68.

²⁹ ICC-01/04-01/06-2842, para.94, ICC-01/04-01/07-3436, para.79.

14. Moreover, the Appeals Chamber ruled that, notwithstanding the principle of primacy of orality, documentary evidence not authenticated by a witness in court can be relied upon by a Trial Chamber. A key factor is whether the evidence in question is corroborative of other evidence.³⁰ It is evident that, if put in the context of the entire evidence, the items of the Prosecution's documentary evidence corroborate each other and, more importantly, are corroborative of other evidence, including evidence disclosed by the Defence or originating from the Accused.

15. A remarkable example is the RFI report regarding the date of arrival of the MLC troops in Bangui. The Defence contends that this report must be regarded with suspicion when it asserts that 500 MLC soldiers arrived in Bangui on 26 October 2002.³¹ Another Prosecution document, a press report from the Central African newspaper *Le Citoyen*, also reported the presence of MLC troops in Bangui from 26 October 2002 onwards. The Defence conveniently labelled the corroboration provided by *Le Citoyen* as duplication of inaccuracy or bias.³²

16. These two press reports are corroborative of evidence disclosed by the Defence. The communications logbook of situation reports sent to the MLC headquarters point to the presence of the MLC troops in Bangui on 26 and 27 October 2002.³³ In the letter to General Cissé, the Accused himself - in plain contradiction with the Defence submissions - dates the intervention of the MLC in the CAR on 27 October 2002.³⁴

17. The same holds true with regard to other Prosecution's allegations, particularly the large scale crimes committed by the ALC troops in the CAR. Press reports, NGO reports, and other documentary evidence are corroborative of other reliable evidence, including testimonies on the crimes charged.

18. The Defence also disputes the reliability of the 2003 FIDH report, which they allege was founded on anonymous hearsay³⁵- and the 2004 Amnesty International report, which

³⁰ ICC-01/05-01/08-1386 OA5 OA6, paras.74-78.

³¹ Defence Brief, para.37.

³² Defence Brief, para.43.

³³ EVD-T-OTP-00702/CAR-D04-0002-1514-at-1630,1631-1632.

³⁴ EVD-T-OTP-00453/CAR-OTP-0017-0363_R01.

³⁵ Defence Brief, para.49.

they allege was prepared on the basis of unreliable methodologies.³⁶ The Majority of the Chamber, however, has already ruled on the reliability of these two reports, stating that they contain sufficient details of their sources of information and methodology.³⁷ Moreover, they corroborate other evidence.

19. The Defence submits that very little evidential weight should be given to the 203 “*procès-verbaux d’audition de victime*” that were admitted into evidence³⁸. As stated by the Chamber, these documents were created by P9 in the course of his normal functions as an investigating judge, signed by both the witness and the alleged victim³⁹ and authenticated by P9 before the Chamber.⁴⁰ The *procès-verbaux* were admitted for the limited purpose of proving that the crimes committed by the MLC were widespread⁴¹ and are corroborative of other evidence. The Defence’s objections are therefore groundless.

20. As to the Willy Bomengo case file (“Bomengo dossier”), the Chamber did not limit its admission to any specific purpose.⁴² Contrary to the Defence assertions,⁴³ therefore, when evaluating the whole evidence and making its judgement pursuant to Article 74 of the Statute, the Chamber will be free to rely on the evidence contained therein to adjudicate any issue at stake in this case.

III. INAPPLICABLE RULES THAT THE DEFENCE ATTEMPTS TO INTRODUCE

A. Unchallenged evidence

21. The Defence in its Closing Brief repeatedly made reference to the concept of “unchallenged evidence”.⁴⁴ The Defence seems to assume that legal consequences derive from the fact that evidence provided by a Defence witness was not challenged by the Prosecution during the examination of that witness.

³⁶ Defence Brief, para.52.

³⁷ ICC-01/05-01/08-2299-Conf, paras.35,41.

³⁸ Defence Brief, para.60.

³⁹ ICC-01/05-01/08-2012-Conf, para.65.

⁴⁰ *Ibid.*, para.67.

⁴¹ *Ibid.*, para.69.

⁴² ICC-01/05-01/08-2299-Conf, para.62.

⁴³ Defence Brief, paras.65-66.

⁴⁴ See Defence Brief, paras.297,545,630,687,706,735,767,806,955.

22. Challenging evidence is not limited to the examination of a particular witness in court. Evidence can also be contradicted by other witness testimonies or documentary evidence.⁴⁵ In the present case part of the evidence labelled by the Defence as “unchallenged” is contradicted by other evidence in the record.⁴⁶ Evidence was sometimes not challenged by the Prosecution during its examination of Defence witnesses simply as a tactical decision to spend the time allocated on other subjects.

23. The Prosecution, however, does not intend to discuss whether the Defence is correct in arguing that certain evidence went unchallenged as it is irrelevant. Nowhere in the Court’s legal framework, can a rule be found that a party faces legal consequences when it fails to challenge evidence provided by a witness called by the other party. Furthermore, the directions on the conduct of the proceedings in the present case, with regard to the scope of the questioning, do not strictly require that the party not calling a witness put its case to that witness, when it is in contradiction with the evidence given by him/her.⁴⁷ Nor is such a requirement anywhere to be found in the Statute or the Rules of Procedure and Evidence of this Court.

24. The Statute framework provides the Chamber with a considerable degree of flexibility with regard to the evidence submitted before it. The Chamber has been given a wide discretion to assess freely all evidence submitted.⁴⁸ The decision of the Chamber with respect to unchallenged evidence will depend on its evaluation of the totality of the evidence before it, and not on the absence of a specific challenge to that evidence through a specific witness.

⁴⁵ *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, (“*Nahimana et al Appeals Chamber Judgement*”), 28 November 2007, footnote 1893.

⁴⁶ For instance, the Defence refers in para.630 of its Closing Brief to “unchallenged” evidence provided by Defence witness D53 that the decision to withdraw the MLC troops from the CAR was made by President Patassé. The Prosecution presented abundant evidence, listed in para.561 of the Prosecution Brief, to the effect that that decision was made by Mr. Bemba.

⁴⁷ ICC-01/05-01/08-1023, para.13; ICC-01/05-01/08-1086, para.22.

⁴⁸ ICC-01/04-01/06-2842, para.107; ICC-01/04-01/07-3436, para.88; Rule 63(2) of the Rules of Procedure and Evidence.

B. Assessment of the evidence in light of the beyond reasonable doubt standard and the in *dubio pro reo* principle

25. The Defence attempts to introduce a procedural rule favouring the evaluation of the evidence to benefit the Accused.⁴⁹ According to the Defence, if a witness dates his/her victimisation by the MLC troops at a time when the evidence establishes that the MLC troops could not be present at his/her location, the Chamber should reach a finding that the Prosecution has failed to identify MLC troops as the direct perpetrators of that incident. The Defence supports its argument by invoking the evidential requirement of beyond reasonable doubt and the principle of in *dubio pro reo*.

26. Regardless of the merits of the issue of the presence of MLC troops' at the various locations in the CAR, the Prosecution submits that the Defence's argument is without merit. The wide discretion given to the Chamber to assess the evidence excludes the possibility of automatic findings without considering the entirety of a witness's account in light of the entire evidence submitted and discussed at trial.⁵⁰ The Chamber will have to assess witness' credibility against certain factors, bearing in mind the overall context of the case and the individual circumstances of each witness.⁵¹ The Chamber has the authority to rule that a testimony is reliable, although the witness provides an imprecise date for the crimes suffered. As observed by Trial Chambers of this Court, memory can fade over events that occurred in 2002 and 2003.⁵² An implausible date for an incident, if the specific circumstances and the overall testimony make the witness credible, should not be the basis for the Chamber to disbelieve his/her evidence. The Chamber can nevertheless reach a finding that crimes were committed by the perpetrators that the witness identified.

⁴⁹ Defence Brief, paras.528-530.

⁵⁰ ICC-01/04-01/06-2842, para.107; ICC-01/04-01/07-3436, para.88.

⁵¹ ICC-01/04-01/06-2842, paras.102,103,106; ICC-01/04-01/07-3436, paras.82,83,86,87.

⁵² ICC-01/04-01/06-2842, para.103; ICC-01/04-01/07-3436, para.83.

IV. CONTROL AND MEASURES

A. The Defence arguments do not raise reasonable doubt that Bemba was effectively acting as a military commander and had effective authority and control over the MLC troops in the CAR

27. One important fact that should not be lost on the Chamber is the non-disputed fact that Bemba was the commander in chief of the MLC. Though the law does not permit the Chamber to find that Bemba had effective authority and control over his forces on that fact alone, it is a very significant fact. And, very rarely in history has a military commander, such as Bemba, ever lent out his military forces to a foreign country to use as it saw fit and then allow that country to dictate when and how it would return the troops to the lending commander in chief. In fact it is so rare that neither the Prosecution nor the Defence can offer one similar example of what the Defence expects the Chamber to believe - that Bemba turned over control of an entire brigade of troops to Patassé to command without conditions. States and non-state entities always retain the material ability to investigate and prosecute their own forces, thereby retaining the dispositive factor in control - the material ability to prevent and punish crimes.⁵³

28. Despite the lengthy Defence discussion in its Closing Brief about “operational command,” the Defence failed to engage with the compelling evidence that Bemba demonstrated his effective authority and control by ordering the investigation, arrest, and prosecution of seven MLC soldiers in the CAR.⁵⁴ Bemba’s operational control over his troops is but one factor that may be considered by the Chamber to establish Bemba’s effective authority and control, and operational control is not dispositive to the broader legal issue of effective authority and control. Effective authority and control, defined as a commander’s material ability to prevent and punish the commission of crimes,⁵⁵ allows a commander to regulate the behaviour of his or her forces. Thus, while evidence of a commander’s operational command may provide a strong inference that the commander who could give operational orders (to attack the enemy, for instance) also had the ability to order his troops to stop committing crimes, direct evidence that the commander had the ability to take his troops

⁵³ [P219-T197-ENG-ET-p14-L11-p15-L4]/[P219-T197-FRA-ET-p15-L23-p16-L19].

⁵⁴ EVD-T-OTP-000391/CAR-DEF-0001-0152; EVD-T-OTP-00453/CAR-OTP-0017-0363.

⁵⁵ ICC-01/05-01/08-424, para.415.

out of the fight by arresting them and trying them by court-martial is a much more compelling proposition. The evidence is clear on this point - Bemba could order the investigation, arrest, and trial of the forces under his command.⁵⁶

29. The Defence fails to engage with the indisputable fact that Bemba had the material ability to prevent and punish the commission of crimes.⁵⁷ The evidence shows that Bemba actually used that ability to order the arrest and court-martial of seven MLC troops located in the CAR.⁵⁸ Once Bemba's effective authority and control is established through his ability to order arrests, launch investigations, and court-martial MLC troops in the CAR, the question becomes whether that process constituted a reasonable and necessary measure. If that process did constitute one reasonable and necessary measure, the question then becomes did Bemba take all necessary and reasonable measures. Considering the absence of genuine action taken by Bemba, the response to whether Bemba took all necessary and reasonable measures can only be answered in the negative.⁵⁹

30. The Defence claims that the Prosecution "abandoned" its case on control.⁶⁰ Though it was never the Prosecution's case that the term "operational control" is dispositive or essential to the legal element of "effective authority and control". Contrary to what the Defence asserts, Bemba's "operational command" did not form the core of the case confirmed by PTC II.⁶¹ The Defence cites to paragraphs 446-477 of the Confirmation Decision to support its assertion that this case revolves around a concept, the term "operational command". The above-cited paragraphs do not contain reference to "operational command." Rather the Confirmation Decision discusses the evidence supporting Bemba's effective authority and control in that he had the material ability to prevent and punish crimes, which is exactly what was proved at trial.⁶²

31. Notwithstanding Defence pleadings to the contrary, the evidence is clear that Bemba was in operational command of the MLC troops. The fact that Bemba was in operational command of his troops further underscores the level of his authority and control to order his

⁵⁶ EVD-T-OTP-000391/CAR-DEF-0001-0152; EVD-T-OTP-00453/CAR-OTP-0017-0363.

⁵⁷ Defence Brief, para.720.

⁵⁸ Prosecution Brief, paras.728-734.

⁵⁹ Prosecution Brief, paras.723-764.

⁶⁰ Defence Brief, para.601.

⁶¹ Defence Brief, para.601.

⁶² ICC-01/05-01/08-424, paras.446-477.

troops to stop committing crimes. The Defence rely primarily on D19 and false documents to support its theory that Bemba's troops were under the operational command of Patassé and his subordinates. However as noted in paragraph-119 below, D19 testimony is not credible. The Chamber should not countenance the Defence's resort to relying on forged documents and discredited testimony.

32. The evidence presented at trial supports a finding that Bemba had operational control. Eight Prosecution witnesses all similarly testified that Bemba gave Mustapha operational orders, or gave him instructions to attack MLC's enemy in the CAR.⁶³ There can be no plausible argument that [REDACTED] either knew, or knew how [REDACTED] had testified; or that [REDACTED] knew [REDACTED] or that [REDACTED] knew [REDACTED], and, yet, each of these independent witnesses all stated that Bemba was in control through the Thuraya satellite phone, which, in turn, is corroborated by Bemba's Thuraya records themselves.

33. The Defence asserts that the Thuraya phone records, which show the times, dates, and durations, of numerous calls to Mustapha and Central African numbers are not Bemba's records. The Prosecution provided compelling evidence to show that the records belong to Bemba. Despite Defence claims that the records are unauthentic and are not Bemba's records, the Defence cannot explain away that, in addition to the emails showing Bemba's ownership of the phone number of the records, the numbers called clearly demonstrate that the records belong to Bemba. No one apart from Bemba would have been calling from Gbadolite to Bemba's wife in Belgium several times per week.⁶⁴

34. The Defence also attacks the veracity of Mustapha's Thuraya phone number, which was recorded in P178's diary. Acceptance of the Defence theory would require the Chamber to believe that in 2002-2003, P178 just happened to record the exact same 13-digit number as is found in Bemba's phone records, a distinct and independent source of evidence. The fact of the matter is that P178 wrote down Mustapha's phone number and, years later, the OTP investigators found that it matched one of the numbers Bemba frequently called during the

⁶³ Prosecution Brief, para.571.

⁶⁴ EVD-T-OTP-00591/CAR-OTP-0055-0893. There are [REDACTED] calls to Bemba's wife in Bemba's Thuraya records. The number is [REDACTED] and listed as "[REDACTED]" in Bemba's SIM card EVD-T-OTP-00833/CAR-OTP-0047-1660 at 1673.

conflict period. P178 had no way of fabricating the number in his diary. The records of the phone calls do not in and of themselves prove control but, rather, are corroborative of Prosecution witnesses who all testified that Bemba used the Thuraya to issue orders to Mustapha and others.

35. The Defence asserts that the Chamber should not consider Bemba's use of communications devices to control his troops alleging that "at no point in time was the Defence put on notice "that communication devices were relevant to the question of control"". ⁶⁵ This is simply not a serious argument. Considering Bemba's distance from his troops in the CAR (roughly 280 km), his ability to communicate is a key consideration in effective control. The evidence proves beyond reasonable doubt that Bemba was in effective control and the means by which he achieved control is shown through the multiple pieces of evidence establishing both his ability to communicate and his actual communications. Contrary to Defence's allegation, communications and communications devices have been one of the central issues in this trial and one would only need to look at paragraph 459 of the Confirmation Decision, for example, to come to that realisation.

36. The Defence also attempts to confuse the legal element of effective authority and control, asserting that Mustapha's "undisputed" effective control of the MLC troops displaced Bemba's effective control. ⁶⁶ This assertion misapplies the law and runs contrary to the basic military command structure upon which the doctrine of command responsibility is premised. The MLC chain of command had a typical pyramidal structure with Bemba at the top and Mustapha subordinate to Bemba. In turn, Mustapha had three battalion commanders who were subordinate to him. The battalion commanders had subordinate company commanders and so on and so forth. The logical extension of the Defence's reading of the law is that no commander could be held criminally responsible save for the lowest level commander, who is usually a team leader with the rank of corporal. No plausible reading of Article 28 would sustain such an argument.

37. The Defence is disingenuous with the evidence and the Prosecution's Closing Brief: the Defence alleges that the Prosecution misrepresented the testimony of P15. ⁶⁷ In its Closing

⁶⁵ Defence Brief, para.674.

⁶⁶ Defence Brief, para.603.

⁶⁷ Defence Brief, paras.633-634.

Brief, the Prosecution wrote the following: “P15 stated that Colonel Mustapha was always under the orders of Bemba and reported directly to him,” which is a faithful paraphrasing of P15’s testimony:

“President Patassé was not in any way similar to a general commanding any operations. He actually knew nothing about military matters. Now, the only thing that can be said about the request he made to Colonel Mustapha to set up a foreign legion, and which would be placed under his command, is in fact an anecdote that actually proves the nature of the discussions and relations between--relationship between the two people, so these are not the type of discussions that you would find in a situation of hierarchy. **And then the fact that Mustapha reported on those discussions to his own hierarchy also reveals the fact that Mustapha was always under the orders of President Jean-Pierre Bemba, to the extent that he reported to him exhaustively on the content of that conversation.** If he had at all been under President Patassé’s orders for operational reasons he clearly, that is Mustapha, would have spared himself the trouble of making such a statement, and that to me clearly points to the fact that **Colonel Mustapha received orders** from his hierarchy, from the MLC.”

38. So, far from “manipulating” P15’s testimony, if anything, the Prosecution understated P15’s testimony with regard to Bemba’s control. The Prosecution noted several examples of baseless Defence accusations, such as the above example, peppered throughout its Closing Brief.

39. The Defence relies on D53 for several factual assertions.⁶⁸ While an expert witness may provide an analysis of facts where appropriate, he or she cannot be relied on for facts. D53 does not have personal knowledge of any facts of the case since he was not present in the CAR or Gbadolite during the events.

40. D53 cannot be relied on since he conducted his analysis of events based on false evidence. The false documents presented by the Defence provide a significant pillar for not only the testimony of D53 but the entire Defence case. Additionally, D53 failed to provide specific citation for supporting evidence as to how he arrived at his conclusions, making it impossible for the Chamber to trace back whether D53 relied on credible evidence. D53 was

⁶⁸ See e.g. Defence Brief, paras.637,644,646,662,772.

misled by the false evidence. Indeed he agreed that if the evidence was false, his conclusions would not be sound.⁶⁹

41. The Defence claims that the weight of the evidence indicates that President Patassé ordered the withdrawal of the MLC forces. The Defence attempts to support this proposition by D53's testimony. However, D53 clearly has no personal knowledge of what actually happened during the withdrawal. The only other support the Defence offers is that of D65. However D65's ambivalent testimony does not call into question the evidence of Bemba's order to withdraw from multiple witnesses⁷⁰ who are supported by evidence of Bemba's statements to the press,⁷¹ and an MLC press release published in an MLC newsletter.⁷²

42. The Defence asserts that the MLC did not have jurisdiction to enter into foreign territory to investigate.⁷³ However, the Defence cannot point to anything prohibiting Bemba's ability to investigate in the CAR. In fact, it would be absurd for a deployed military contingent to depend entirely on the nationals of the country they are either assisting or invading to provide the investigatory and prosecutorial capacity for its forces. Instead, military commanders are charged with providing that capacity. The term "exercise control properly" in Article 28(a) of the Statute is recognition of the duty of commanders and implies that commanders must have some mechanism to regulate the behaviour of his or her troops.⁷⁴ In practice this means that military commanders must establish units and personnel to investigate and prosecute crimes within his or her respective areas of responsibility. Additionally, the Defence takes pains to omit the fact that Bemba himself ordered and Mustapha carried out the arrest of the seven MLC troops, a fact which unravels its attempts to create its jurisdictional fiction.

⁶⁹ [D53-T232-ENG-ET-p4-L9]/[D53-T232-FRA-ET-p4-L13].

⁷⁰ Prosecution Brief, para.608.

⁷¹ EVD-T-OTP-00824/CAR-OTP-0010-0471 ("J'ai rappelé mes hommes"); EVD-T-OTP-00407/CAR-OTP-0004-0667-at-0688-0691.

⁷² EVD-T-OTP-00807/CAR-OTP-0064-0265-at-0267.

⁷³ Defence Brief, para.729.

⁷⁴ See e.g. Article 87(3) of AP I requires commanders "to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."

B. The Defence arguments do not raise reasonable doubt that Bemba failed to take all necessary and reasonable measures within his power to prevent or repress the commission of crimes

43. Bemba had the material ability to prevent and punish the commission of the crimes and, though he knew of the crimes, he failed to take necessary and reasonable measures to address them. Bemba did not take all necessary and reasonable measures but rather presided over two failed and faulty processes that did not lead to any genuine accountability for the crimes committed by his troops. Though Bemba had significant powers as commander in chief, he did nothing else to prevent or punish the commission of his troops' crimes.

44. The Defence wishes to have it both ways. On the one hand the Defence claims that Bemba did not have the material ability to prevent and punish the commission of crimes⁷⁵ and on the other hand the Defence claims that Bemba had the authority and control sufficient to take necessary and reasonable measures.⁷⁶ The Defence invite the Chamber to engage in a shell game with the evidence. The argument is flawed and illogical because it is untenable and untrue.

45. The Defence assert that it would be nearly impossible for Bemba to have investigated the crimes of his troops in the CAR.⁷⁷ This ignores that Bemba did actually send investigators to the CAR.⁷⁸ To allow Bemba to escape responsibility because he claims he could not send investigators to the CAR would ignore that it was Bemba's duty to launch investigations. If an investigation required prior CAR approval, as the Defence asserts without credible evidentiary support, then it was Bemba's responsibility to obtain that approval. Furthermore, nothing prevented Bemba from appointing uniformed members of his ALC to act as investigating officers as he did when he appointed Lieutenant Colonel Mondonga and four other officers to conduct the inquiry in Bangui.⁷⁹

46. The Defence excuses for Bemba's impediments to investigation are ludicrous,⁸⁰ claiming that no detention facilities were available or that no trained Sango interpreters were

⁷⁵ Defence Brief, paras.710-715.

⁷⁶ Defence Brief, paras.1006-1044.

⁷⁷ Defence Brief, paras.920-921.

⁷⁸ EVD-T-OTP-000391/CAR-DEF-0001-0152.

⁷⁹ EVD-T-OTP-000391/CAR-DEF-0001-0152.

⁸⁰ Defence Brief, para.923.

available, and are facts directly contradicted by the Defence's own evidence of questions in French to residents of Sibut.⁸¹ Implied in the duty to investigate and prosecute is the duty to make necessary practical arrangements to conduct interviews. None of the claimed impediments would have prevented Bemba from ensuring that his own soldiers were questioned and investigated, including after 15 March 2003. To compare Bemba's task to investigate during the events to Findiro's task of investigating years after the events is not a logical or fair comparison.

47. The mission to Sibut was propaganda. The Defence attempts to build up a straw man argument that the Prosecution did not make: that the entire video was orchestrated and fabricated. The Prosecution does not make that claim. Instead, it is clear that the Sibut video was not intended to be an actual investigation, but rather the persons involved in its production were interested in countering derogatory information about the MLC. It is clear from the scenes in the video, where armed MLC troops were lingering, that no person who had derogatory information about the MLC would have been willing to come forward to state that information. This is supported by previous reports, days prior to the Sibut video, of the local population being too scared to reveal the truth about the MLC. In an RFI interview in Damara approximately one week before the MLC's video in Sibut, Carine Frenck noted that it was difficult to speak alone with local residents as the MLC soldiers did not permit it.⁸² When Carine Frenck was able to speak to a Damara resident alone, "away from the threats", he spoke of the MLC, the piles of bodies in his house and that Bemba's men took away all the goats and chickens.

48. Finally, even assuming, *arguendo*, that Bemba had taken some necessary and reasonable measures to prevent and punish his troops' crimes, Bemba's actions were distressingly insufficient and barely began to scratch the surface of the widespread scale of his troops' crimes.

⁸¹ EVD-T-D04-00008/CAR-DEF-0001-0832.

⁸² EVD-T-OTP-00579/CAR-OTP-0031-0116-at-minutes:12:13-15:00.

C. Article 28(a)(i) - Knowledge

49. The evidence relied upon by the Prosecution establishes beyond reasonable doubt that Bemba knew or alternatively, owing to the circumstances at the time, should have known that his subordinate MLC troops were committing or about to commit the crimes of rape, murder, and pillaging in the CAR.⁸³ The Prosecution relies upon both direct and circumstantial evidence to prove Bemba's actual knowledge.⁸⁴ Even if the Chamber were to consider that Bemba's actual knowledge was not sufficiently established, his constructive knowledge was established beyond reasonable doubt on the totality of the evidence based on the information provided or available to him at the relevant time.⁸⁵

a) *The requisite knowledge threshold to establish Bemba's mens rea*

50. Bemba had actual knowledge that his subordinate MLC troops in the CAR were committing or about to commit the crimes of rape, murder, and pillaging.⁸⁶ This may be proved beyond reasonable doubt by direct or circumstantial evidence.⁸⁷ Bemba had sufficient information to trigger his duty to act, particularly his duty to investigate. Bemba's constructive knowledge is established by showing that he failed to conduct further inquiries or obtain more information about the crimes of his subordinate MLC troops.⁸⁸

51. There is direct and credible evidence to show that, during the events, Bemba received specific information from within the MLC,⁸⁹ as well as UN and FIDH representatives,⁹⁰ that his subordinates committed or were about to commit crimes in the CAR. For example, [REDACTED] provided Bemba with intelligence reports containing information about acts of rape, murder, and pillaging committed by the MLC troops in the CAR.⁹¹ The FIDH report,

⁸³ See, Prosecution Brief, paras.614-676. Confirmation Decision, ICC-01/05-01/08-424, para.428, Article 28(a)(i) requires that the suspect must have knowledge or should have known that his forces were about to engage or were engaging or had engaged in a conduct constituting the crimes.

⁸⁴ See, Prosecution Brief, paras.618-671.

⁸⁵ ICC-01/05-01/08-424, para.429; ICTY, Čelebići Appeal Judgement, para.233.

⁸⁶ Prosecution Brief, paras.614-676.

⁸⁷ ICC-01/05-01/08-424, para.430; *Hadžihasanović and Kubura* Appeal Judgement, para.94; *Blaškić* Appeal Judgement, para.57. [Emphasis added]

⁸⁸ ICTY, Čelebići Appeal Judgement, para.233; see, ICC-01/05-01/08-424, paras.429,432-433.

⁸⁹ See, for example, Prosecution Brief, paras.623-627.

⁹⁰ See, for example, Prosecution Brief, paras.631-639.

⁹¹ [P33-T159-ENG-ET-p16-L2, p40-L11]/[P33-T159-FRA-ET-p16-L26-p17-L6,p41-L26-p42-L4]; [P33-T162-ENG-ET-p50-L12]/[P33-T162-FRA-ET-p40-L25-p41-L27]; [P33-T159-ENG-ET-16-L17-p17-L1,p38-L21-p39-L1]/[P33-T159-FRA-ET-p17-L15,p40-L5].

which Bemba acknowledged he received and read,⁹² also clearly identified the perpetrators as “Banyamulenge” or MLC troops, and specifically detailed their commission of the same crimes.⁹³ Bemba himself acknowledged the commission of pillaging by MLC troops in the CAR at the beginning of the conflict.⁹⁴

52. The Prosecution also relies upon circumstantial evidence to further support the only reasonable finding on the totality of the evidence that Bemba had actual knowledge that his subordinate MLC troops were committing or about to commit the crimes of rape, murder, and pillaging.⁹⁵ Bemba’s actual knowledge is proved beyond reasonable doubt by the numerous and widespread crimes;⁹⁶ his position within the MLC;⁹⁷ his access to various communication means;⁹⁸ his access to reporting and monitoring systems;⁹⁹ his location at the time of the crimes (including visits to the CAR);¹⁰⁰ information from other members of the MLC;¹⁰¹ information from external sources such as UN and FIDH representatives;¹⁰² and multiple media reports.¹⁰³ The totality of this evidence establishes that, during the events, Bemba had actual knowledge of specific information that clearly identified MLC troops as the perpetrators of the crimes of rape, murder, and pillaging in the CAR.¹⁰⁴

⁹² EVD-T-OTP-000391/CAR-DEF-0001-0152 at 0153.

⁹³ Prosecution Brief, p48; EVD-T-OTP-00401/CAR-OTP-0004-0409-at-0422-0429.

⁹⁴ EVD-T-OTP-000391/CAR-DEF-0001-0152; EVD-T-OTP-00453/CAR-OTP-0017-0363.

⁹⁵ The circumstantial evidence at issue include the superior’s position; existence of an organised command structure with established reporting and monitoring systems; the number of illegal acts, their scope, whether their occurrence is widespread; the time during which the prohibited acts took place; the type and number of forces involved; the means of available communication; the modus operandi of similar acts; the scope and nature of the superior’s position and responsibility in the hierarchal structure; the location of the commander at the time and the geographical location of the acts: Confirmation Decision, ICC-01/05-01/08-424, paras.430-431; ICTY, *Prosecutor v Delalic et al*, Case No.IT-96-21-T, Judgment, 16 November 1998, para.386; ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, "Judgment", 3 March 2000, para.307; ICTY, *Prosecutor v Strugar*, Case No.IT-01-42-T, "Judgment", 31 January 2005, para.368; ICTY, *Prosecutor v One*, Case No.IT-03-68-A, "Appeals Chamber Judgment", 3 July 2008, para.319; ICTR, *The Prosecutor v Bagosora et al*, Case No.ICTR-98-41-T, "Judgment and Sentence", 18 December 2008, para.2014; SCSL, *The Prosecutor v. Sesay et al*, Case No.SCSL-04-15-T, "Judgment", 2 March 2009, para.309; ICTY, *Prosecutor v Hadzihasanovic et al*, Case No.IT-01-47-T, "Judgment", 15 March 2006, para.94.

⁹⁶ See, for example, Prosecution Brief, para.671 and chapter 2 on crimes against humanity.

⁹⁷ See, for example, Prosecution Brief, paras.668-670.

⁹⁸ See, for example, Prosecution Brief, paras.661-667.

⁹⁹ See, for example, Prosecution Brief, paras.640-649.

¹⁰⁰ See, for example, Prosecution Brief, paras.619-622.

¹⁰¹ See, for example, Prosecution Brief, paras.623-627.

¹⁰² See, for example, Prosecution Brief, paras.631-639.

¹⁰³ See, for example, Prosecution Brief, paras.650-660.

¹⁰⁴ See, Prosecution Brief, paras.614-671.

b) Bemba had sufficient information that constitutes actual knowledge

53. To prove actual knowledge, the Prosecution need only establish that Bemba knew that: (i) the alleged perpetrators were subordinates under his effective control;¹⁰⁵ and (ii) his subordinates were committing or about to commit the crimes charged.¹⁰⁶ The ICTY/ICTR Appeals Chambers have repeatedly held that the information available to the Accused “does not need to provide specific information about unlawful acts committed or about to be committed”.¹⁰⁷ Further, “the relevant information only needs to have been provided or available to the superior [...] It is not event required that he actually acquainted himself with the information.”¹⁰⁸

54. Bemba was provided with specific information,¹⁰⁹ and other relevant information was available to him, which clearly identified the perpetrators as subordinate troops under his authority and control, and that their crimes were specified and widespread.¹¹⁰ In the case of the FIDH report, Bemba received 13 sufficiently detailed accounts of crimes to hold that he actually knew of the rape, pillage, and murder committed by his subordinate troops in the CAR.¹¹¹ With respect to the Bomengo dossier, the MLC’s own inquiry and MLC intelligence reports both identified the force commander, Mustapha, as responsible for pillaging.¹¹² The MLC’s inquiry also points to the Poudrier battalion on the Damara-axis as perpetrators of widespread rape and pillaging.¹¹³

55. The Prosecution is not required, contrary to Defence assertions,¹¹⁴ to establish that Bemba had knowledge of additional information such as the specific identities of perpetrators, names of specific victims, and/or specific information relating to the incidents

¹⁰⁵ ICTY, Oric, Appeals Judgment, paras.35,52,55-60,169-174.

¹⁰⁶ *Milutinović* TJ, Vol.1, para.119; *Krnojelac* AJ, para.155.

¹⁰⁷ ICTY, *Čelebići* Appeal Judgement, para.238; ICTR, Bagilishema Appeal Judgement, para. 28. [Emphasis added]; *Prosecutor v. Milutinović et al*, IT-05-87-T, Judgement, 26 February 2009 (“*Milutinović* TJ”), Vol.1, para.120; *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003 (“*Krnojelac* AJ”), para.154

¹⁰⁸ *Čelebići*, Appeal Judgement, para.239.

¹⁰⁹ *Celebici* Appeals Judgment, paras.235,238.

¹¹⁰ See, Defence Brief, para.815.

¹¹¹ EVD-T-OTP-00401/CAR-OTP-0004-0409-at-0422-0429.

¹¹² [P33-T162-ENG-ET-p50-L21]/[P33-T162-FRA-ET-p52-L22]; EVD-T-OTP-00393/CAR-DEF-0002-0001-at-0032.

¹¹³ EVD-T-OTP-00393/CAR-DEF-0002-0001-at-0032.

¹¹⁴ Defence Brief, paras.810,830-832.

charged.¹¹⁵ The fact that Bemba was physically absent from the crime scene requires that the Prosecution provide additional indicia to prove knowledge.¹¹⁶ This, however, does not in any way expand the legal threshold for proving knowledge.¹¹⁷ Further, the Defence's overly restrictive interpretation of the legal threshold, suggesting that the Prosecution has to prove that Bemba was aware of the specific incidents charged would result in a new and legal standard that is impossible to meet. The command responsibility doctrine would be essentially rendered ineffective if, for example, witnesses of specific incidents known to the Accused are no longer alive or otherwise unavailable in spite of sufficient information to prove that he knew of his subordinates' crimes and failed to act. The Defence position is simply untenable.

c) Bemba had sufficient notice of his subordinates' crimes to constitute constructive knowledge

56. The Defence concedes that Bemba received some information regarding the crimes committed by his subordinate MLC troops in the CAR, but opines that this information is insufficient to constitute knowledge.¹¹⁸ The PTC II recognised that, under Article 28(a)(i) of the Statute, the drafters intended to take a more stringent approach towards commanders and military-like commanders due to the nature and type of responsibilities they hold.¹¹⁹ It therefore held that the "should have known" standard requires "more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime."¹²⁰ Therefore, at the outset, Bemba had a duty to make additional and genuine inquiries about his subordinates.

57. At minimum, the Chamber should consider and apply the ICTY Appeals Chamber's standard of the superior's "duty to inquire further where he receives information of a general

¹¹⁵ *Prosecutor v Blagojević & Jokić*, IT-02-60-A, Judgement, 9 May 2007, para.287: the ICTY Appeals Chamber "agree[d] that a superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 7(3) of the Statute." *Blaškić* AJ, paras.217-218 (citing *Prosecutor v. Krnojelac*, IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para.46): subordinates need only be "sufficiently identified" for the purpose of pleading superior responsibility in an indictment, and that "the identification of subordinates who allegedly committed the criminal acts by their 'category' or 'as a group' was sufficient, if the Prosecution was unable to identify those directly participating in the alleged crimes by name."

¹¹⁶ ICC-01/05-01/08-424, para.484.

¹¹⁷ Defence Brief, para.844.

¹¹⁸ Defence Brief, paras.829,833.

¹¹⁹ ICC-01/05-01/08-424, para.433.

¹²⁰ ICC-01/05-01/08-424, para.433 [references omitted and emphasis added].

nature of possible crimes by his subordinates” and its recognition that the “should have known” in Article 28(a)(i) of the Statute and “had reason to know” standard at the *ad hoc* tribunals have no material difference when interpreted in accordance with this legal standard.¹²¹ However, in any event in the present case, Bemba was in possession of “some general information” which is sufficient to put him on notice of possible crimes by his subordinates.¹²² The Defence erroneously asserts a requirement that “the information indicated that such crimes would occur” rather than “might occur”.¹²³ To the contrary, the standard requires “*possible* unlawful acts”;¹²⁴ that is, a mere risk of the commission of the crimes will suffice.

58. The Prosecution’s evidence establishes that the information available to Bemba was sufficient to justify the need for additional investigation.¹²⁵ The Defence however claims, without any basis, that Bemba had “no credible evidence” and was not in possession of “actionable or concrete information”.¹²⁶ In fact, Bemba ordered the Bangui and Zongo inquiries based on press reports.¹²⁷ In any event, it was Bemba’s duty to act given that he had both specific and general information, which clearly put him on notice of possible unlawful acts that were committed or about to be committed by his subordinates. Article 28(a)’s duty to investigate recognises that a superior need not wait for facts to be established before he takes action.¹²⁸ Therefore even the Defence attempt to characterise Bemba’s information as “general and unsubstantiated rumours”,¹²⁹ confirms that Bemba had sufficient notice to trigger a more active duty to inform himself of the activities of his MLC subordinates in the CAR.¹³⁰ The legal threshold advocated by the Defence, to the contrary, would allow Bemba

¹²¹ *Celebici* Appeals Judgment, paras.235,238 [Emphasis added].

¹²² ICTY, *Čelebići* Appeal Judgement, para.238 [Emphasis added].

¹²³ Defence Brief, para.816. *See e.g. Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, paras.302 (defining the standard “as requiring an assessment, in the circumstances of the case, of whether a superior possessed information that was sufficiently alarming to put him on notice of the risk that crimes might [...] be carried out by subordinates and justify further inquiry” [Emphasis added]), 304 (“under the correct legal standard, sufficiently alarming information putting a superior on notice of the risk that crimes might [...] be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable” [Emphasis added]); *see also* paras.306-308. *See further Prosecutor v. Delalić et al*, IT-96-21-A, Judgement, 20 February 2001 (“*Delalić* AJ”), paras.223,241.

¹²⁴ *Nahimana* Appeal Judgement, para.791 (emphasis added); *Bagilishema* Appeal Judgement, para.42; *Celebici* Appeals Judgment, paras.238,241.

¹²⁵ ICC-01/05-01/08-424, para.432; Prosecution Brief, paras.614-671.

¹²⁶ Defence Brief, paras.854,867.

¹²⁷ The fact that these do not suffice as taking all necessary and reasonable measures is addressed in the Prosecution Brief, paras.677 onwards.

¹²⁸ Emphasis added.

¹²⁹ Defence Brief, paras.814,817.

¹³⁰ ICC-01/05-01/08-424, para.433.

to transfer his legal responsibility to others, and wait for either the crimes to be established or virtual certainty of their occurrence before he takes any action. This is not the law.

59. Bemba cannot use his failure to conduct the necessary additional investigations as a defence to argue that he lacked knowledge of the crimes.¹³¹ Even when other sources such as FIDH provided him with additional information, Bemba neither requested further information, nor did he use the information provided to conduct additional investigations in the locations specified. Contrary to the Defence assertions that Bemba made a direct appeal,¹³² the evidence shows that he did not request FIDH to provide additional information.¹³³ Bemba's knowledge is imputed from his failure to conduct additional inquiries in spite of the information available to him.¹³⁴

d) Bemba received contemporaneous information clearly identifying his subordinate MLC troops as perpetrators of the crimes

60. The evidence supporting the Prosecution's allegation that Bemba had actual knowledge, or alternatively constructive knowledge, of the crimes of his subordinate troops is based on contemporaneous information that was provided to him during the events.¹³⁵ Whether information was reported by the press a few days after the actual incident(s), for example, does not negate its contemporaneous nature as the information was available to Bemba during the events.¹³⁶ Furthermore, the fact that Bemba alleges that he did not believe certain media reports is contrary to, for example, the measures he took in response to similar allegations that led to his arrest of seven of his subordinates. In any event, Bemba had a duty to inquire further.

61. Moreover, the Defence failed to explain why Bemba disregarded contemporaneous reports from his own intelligence services and other external sources. Considering the scope of the numerous allegations from various sources, Bemba cannot simply stand behind the sham Bangui and Zongo inquiries to argue, without any additional and genuine inquiries, that

¹³¹ Defence Brief, para.854; see, ICTY, *Blaskic* Appeals Judgment, para.406.

¹³² Defence Brief, para.834.

¹³³ Prosecution Brief, paras.634-639.

¹³⁴ AFRC TC judgment, paras.794,799; and RUF TC Judgment, paras.305,310; *Čelebići*, Appeal Judgement, para.239.

¹³⁵ See, Prosecution Brief, paras.614-671.

¹³⁶ Defence Brief, paras.831-832.

the information in his possession was not believable.

e) The legal elements and factual allegations for “knew” and “should have known” are not mutually exclusive

62. The PTC II held that the factors that determine actual knowledge are also relevant to its final assessment of whether a superior “should have known” of the commission of the crimes or the likelihood of their occurrence.¹³⁷ The Defence simply disagrees with this position. The Prosecution’s Closing Brief reiterates its use of the same evidence to satisfy both the legal elements and factual allegations to prove knowledge.¹³⁸ Neither the facts nor the legal elements are mutually exclusive. The “should have known” standard is simply a lesser standard of proof that may be satisfied with the same evidence.

63. The Prosecution notes that the PTC II correctly assessed the contextual elements with respect to the physical perpetrators of the crimes and addressed Bemba’s knowledge in accordance with his responsibility under Article 28 of the Statute.¹³⁹ In any event, 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.

V. CHRONOLOGY OF EVENTS

64. The Defence would have the Chamber believe that the MLC forces were not responsible for the crimes suffered by the CAR civilian population during the conflict on the premise that: (i) the MLC forces did not engage the rebels forces until 30 October 2002;¹⁴⁰ (ii) between 25 October and 8 November 2002 crimes experienced by the CAR civilian population were perpetrated by Bozizé’s forces.¹⁴¹

65. The claim that the MLC forces did not engage the rebel forces until 30 October 2002 is unsustainable given contradictory accounts by Defence witnesses regarding the MLC’s initial deployment to the CAR. D53 testified that the MLC delegation crossed to the CAR on 26

¹³⁷ ICC-01/05-01/08-424, para.434.

¹³⁸ Prosecution Brief, paras.672-676.

¹³⁹ ICC-01/05-01/08-424, para.89.

¹⁴⁰ Defence Brief, paras.285-293.

¹⁴¹ Defence Brief, paras.299-366.

October 2002 and stayed there for a few days.¹⁴² D39, who initially alleged that ten ALC officers were sent to Bangui on 26 October and returned to Zongo on 27 October 2002,¹⁴³ later altered his testimony, in alignment with the MLC communication logbook¹⁴⁴, to reflect that the officers comprised 151 troops.¹⁴⁵

66. In arguing the aforementioned claim, the Defence relies mostly on the evidence of P31 referring to it as “critical” given that he was the coordinating commander and therefore uniquely placed to testify as to the timeline of events during the first few days of the conflict in Bangui.¹⁴⁶ The Prosecution could not agree more with this assertion as P31 indeed confirms that MLC forces committed rape, murder and pillaging between 26 and 30 October 2002.¹⁴⁷ P31’s account regarding these MLC crimes is corroborated by witnesses P38,¹⁴⁸ P22,¹⁴⁹ P87,¹⁵⁰ P68,¹⁵¹ and P178.¹⁵² Contemporaneous media articles (which the Defence deems reliable only as and when they support its case¹⁵³) also confirm MLC presence in the CAR as early as 26 October 2002, committing crimes against the civilian population and engaging Bozizé forces in combat in Bangui prior to 30 October 2002.¹⁵⁴ The Prosecution’s Closing Brief reiterates that the MLC’s first counter-offensive against Bozizé’s rebels occurred on 27 October 2002.¹⁵⁵

67. Moreover Bemba’s letters to General Cissé¹⁵⁶ and the president of FIDH¹⁵⁷ acknowledge the presence of the MLC in the CAR territory between 26 and 30 October 2002 and their commission of crimes. This corresponds with Lieutenant Willy Bomengo’s account

¹⁴² [D53-T234-ENG-ET-p41-L19-p42-L6]/[D53-T234-FRA-ET-p41-L17].

¹⁴³ [D39-T308-ENG-ET-p33-L14]/[D39-T308-FRA-ET-p34-L13].

¹⁴⁴ EVD-T-OTP-00702/CAR-D04-0002-1514-at-1631.

¹⁴⁵ [D39-T310-ENG-ET-p40-L1]/[D39-T310-FRA-ET-p43-L20-p44-L7].

¹⁴⁶ Defence Brief, para.286.

¹⁴⁷ [P31-T182-ENG-ET-p25-L10-p26-L8,p35-L10-p36-L21]/[P31-T182-FRA-ET-p25-L27-p26-L23,p35-L23-p37-L13].

¹⁴⁸ [P38-T33-ENG-ET-p19-L20-p22-L10,p26-L4-p27-L8,p50-L15-p61-L20]/[P38-T33-FRA-ET-p20-L25-p23-L27,p28-L5-P29-L18,p55-L21-p68-L10].

¹⁴⁹ [P22-T40-ENG-ET-p18-L5-p21-L13]/[P22-T40-FRA-ET-p19-L12-p23-L4]; [P22-T42-ENG-ET-p41-L8-p42-L4]/[P22-T42-FRA-ET-p44-L6-p45-L6].

¹⁵⁰ [P87-T46-ENG-CT-p30-L3]/[P87-T46-FRA-ET-p29-L21-p30-L14]; [P87-T44-ENG-CT-p13-L5,p17-L11]/[P87-T44-FRA-CT-p13-L21,p18-L8].

¹⁵¹ [P68-T48-ENG-ET-p18-L6-p29-L10,p30-L25-p31-L13,p32-L15-p33-L12]/[P68-T48-FRA-ET-p20-L2-p31-L17,p33-L7,p34-L28-p35-L27].

¹⁵² [P178-T150-ENG-ET-p17-L11]/[P178-T150-FRA-ET-p18-L6].

¹⁵³ Defence Brief, paras.29-33, footnotes:688,696,697,792,867.

¹⁵⁴ EVD-T-CHM-00023/CAR-OTP-0005-0125; EVD-T-OTP-00822/CAR-OTP-0005-0129; EVD-T-OTP-00281/CAR-OTP-0030-0274; Prosecution Brief, paras.11-13,44-48.

¹⁵⁵ Prosecution Brief, paras.13,45,126,140.

¹⁵⁶ EVD-T-OTP-00453/CAR-OTP-0017-0363.

¹⁵⁷ EVD-T-OTP-00391/CAR-DEF-0001-0152.

that the MLC's operations in Bangui commenced on 25 October 2002, a day before his arrival in Bangui.¹⁵⁸ Two of Bomengo's co-accused also confirmed the commission of crimes by MLC troops between 26 and 30 October 2002.¹⁵⁹ With facts so unfavourable to the Accused it is no wonder that the Defence wants the Chamber to find the Bomengo dossier inadmissible.¹⁶⁰

68. In describing the development of events in the CAR between 25 October and 8 November 2002, the Defence steers away from any evidence confirming the presence and commission of crimes by MLC forces. It instead challenges the testimonies of Prosecution victim-witnesses¹⁶¹ so as to create doubt about the identification of MLC soldiers, subordinate to Bemba, as the perpetrators of the crimes they suffered. So desperate is the attempt by the Accused to persuade the Chamber of the MLC's absence from the northern Bangui neighbourhoods prior to 31 October 2002, that he discredits his own letter to General Cissé¹⁶² confirming the intervention of the MLC as early as 27 October 2002 along with all corroborating evidence to this end.¹⁶³

69. The Defence further contends that "even if one accepts that there were some elements of the MLC in Bangui between 26 and 30 October 2002, there were no communications with those disparate units, nor even the ability to communicate".¹⁶⁴ This allegation should be rejected, given the converse position illustrated in the MLC communication logbook's entry on 26 October 2002.¹⁶⁵ D53, who initially averred that it was impossible to command a force of about 1,500 troops from 1,000 kilometres away,¹⁶⁶ confirmed the possibility for Mustapha, in Bangui, to communicate with the MLC units in locations of a distance equivalent to that between Bangui and Gbadolite, thereby discrediting his initial assertion.¹⁶⁷

70. The Defence also contends that the MLC forces withdrew from the CAR pursuant to an order given by Patassé not Bemba, as Bemba did not order their advancement in the first

¹⁵⁸ EVD-T-OTP-00393/CAR-DEF-0002-0001 at 0003.

¹⁵⁹ EVD-T-OTP-00393/CAR-DEF-0002-0001.

¹⁶⁰ Defence Brief, paras.64-68.

¹⁶¹ Defence Brief, paras.313-315,320-321,328-332,345,352.

¹⁶² EVD-T-OTP-00584/CAR-OTP-0033-0209 at 0210.

¹⁶³ Defence Brief, para.355.

¹⁶⁴ Defence Brief, para.293.

¹⁶⁵ EVD-T-OTP-00702/CAR-D04-0002-1514-at-1631, Prosecution Brief, para.575.

¹⁶⁶ [D53-T230-ENG-ET-p19-L21-p20-L4]/[D53-T230-FRA-ET-p21-L16].

¹⁶⁷ [D53-T233-ENG-CT-p50-L20-p55-L7]/[D53-T233-FRA-ET-p54-L7-p58-L18].

place.¹⁶⁸ It is also claimed that during the course of the withdrawal no MLC unit went to Mongoumba.¹⁶⁹ The Chamber should dismiss this misrepresentation of facts. The evidence demonstrates that the Accused made public statements in relation to the withdrawal of his troops; in an RFI interview Bemba stated that he would proceed with the withdrawal of his troops regardless of the request by Patassé's government for the troops to stay in order to keep Bozizé's rebels at bay.¹⁷⁰ Furthermore, P15 gave extensive accounts of the decision-making process for the withdrawal of the MLC troops, confirming that Bemba orchestrated the withdrawal from his living-room "kilometre by kilometre".¹⁷¹ The Prosecution re-emphasizes its submissions as laid out in its Closing Brief with regard to the claim that MLC forces never went to Mongoumba during their withdrawal from the CAR.¹⁷²

VI. CONTEXTUAL ELEMENTS OF WAR CRIMES

71. The Defence asserts that the Prosecution failed to establish the "existence of an armed conflict throughout the charged period" and that "there were direct and protracted engagements between Pro-Bozizé forces and the MLC".¹⁷³ To the contrary, the evidence in the case establishes that the fighting between the loyalist forces and Bozizé's forces during the charged period was neither sporadic nor isolated acts of violence, and therefore reached the requisite level of intensity to establish a protracted armed conflict.

72. As reported by FIDH, "the many military offenses and counter-offensives carried out by the warring parties for almost 6 months were continuous, well organised and went far beyond a simple uprising or internal tension." The report also stated that "Between November 2002 and March 2003, the rebels and loyalist troops engaged in fighting along a fluctuating line according to victories and setbacks."¹⁷⁴

73. The Defence substantiates its argument by observing that, according to the Prosecution's Closing Brief, the engagement in hostilities of the MLC is limited to the following locations only: PK12 on 30 October 2002; Damara on 7 December 2002;

¹⁶⁸ Defence Brief, para.371.

¹⁶⁹ Defence Brief, para.374.

¹⁷⁰ Prosecution Brief, paras.23,561,608.

¹⁷¹ Prosecution Brief, paras.561,572,622,668.

¹⁷² Prosecution Brief, paras.25-27,107-108,135,259-283,486-493,607-609,701-702.

¹⁷³ Defence Brief, paras.414-417.

¹⁷⁴ EVD-T-OTP-00401/CAR-OTP-0004-0409-at-0419.

Bossembélé on 26 December 2002; Sibut on 14 February 2003.¹⁷⁵ The Defence is legally and factually wrong. According to ICC and ICTY jurisprudence, the identification of a number of clashes between the relevant armed groups is merely one of the indicators of intensity.¹⁷⁶

74. In any event, the list of locations where MLC engagement took place went far beyond what the Defence asserts. Not only in PK12, but Bangui as a whole was the theatre of hostilities between the loyalist forces and Bozizé's forces. After Bozizé's troops attacked and occupied the northern suburbs of Bangui on 25 October 2002, sustained gunfire was heard in the capital for six days.¹⁷⁷ After six days of intense and bloody fighting, Bozizé's forces met considerable resistance from the loyalist troops and began withdrawing northwards.¹⁷⁸

75. D56 testified that Bozizé's forces came under intense attack before they withdrew from Bangui, especially after the MLC arrived. He described the attack as quite strong and more vigorous than previous attacks.¹⁷⁹ The FIDH report states that "[a]t the end of November Bozizé's troops were stationed along an east-west frontline between Bossembélé, Damara, Sibut, Banbari, Bangassou [...] The road from Bouar to Cameroon then became the theatre for fighting between the rebels and loyalist forces who were mainly Congolese mercenaries."¹⁸⁰ After capturing Sibut on 14 February 2003, the MLC withdrew and left it over to the FACA who were subsequently dislodged by Bozizé's forces.¹⁸¹ This shows that there were direct engagements to gain and keep control of Sibut.

76. As reported by the Bangui radio station, there was also fighting in Bozoum. About 20 people died.¹⁸² An MLC soldier called *Coup-par-Coup* was quoted saying that the fighting to take over Bozoum lasted up to 14 February 2003.¹⁸³ RFI also reported that Bemba's men launched a counter-offensive against Bozizé's rebels and took over control of Bozoum.¹⁸⁴ On

¹⁷⁵ Defence Brief, para.417.

¹⁷⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgement, 14 March 2012, para.538; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Judgement, 3 April 2008, para.49; *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, 30 November 2005, para.172.

¹⁷⁷ EVD-T-OTP-00401/CAR-OTP-0004-0409-at-0418; [P108-T132-ENG-ET-p17-L6]/[P108-T132-FRA-ET-p19-L15].

¹⁷⁸ EVD-T-OTP-00401/CAR-OTP-0004-0409-at-0418.

¹⁷⁹ [D56-T313-ENG-ET-p31-L10]/[D56-T313-FRA-ET-p33-L22-p34-L15].

¹⁸⁰ EVD-T-OTP-00401/CAR-OTP-0004-0409-at-0418.

¹⁸¹ [V2-T223-ENG-ET-p36-L14]/[V2-T223-FRA-ET-p36-L4].

¹⁸² EVD-T-CHM-00035/CAR-D04-0004-0032 as read in the record at [D56-T316-ENG-ET-p48-L18]/[D56-T316-FRA-ET-p47-L13].

¹⁸³ [D56-T316-ENG-ET-p49-L2]/[D56-T316-FRA-ET-p47-L22].

¹⁸⁴ [D56-T-315-p51-L11]/[D56-T315-FRA-ET-p47-L13].

19 February 2003, RFI reported that “the military operations in the north had reportedly resulted in loyalist forces supported by Jean-Pierre Bemba’s Congolese recapturing Bossangoa.” Patassé also confirmed to RFI that Bossangoa was indeed captured that morning.¹⁸⁵

77. The Defence further asserts that the Prosecution relies only on P42’s uncorroborated testimony as concerns hostilities that accompanied the departure of the MLC. This argument is without merit, as other witness testimonies and documentary evidence also show that there were hostilities that accompanied the MLC withdrawal from the CAR. P38 testified that upon arrival at PK12 on 15 March 2003, Bozizé’s forces started chasing the MLC forces in PK12.¹⁸⁶ P23 testified that Bozizé’s forces returned to PK12 on the 15 March 2003 causing the MLC to run and climb the hill to get away. Bozizé’s soldiers were shooting.¹⁸⁷

78. The Defence also misstates the law when it asserts that international humanitarian law (“IHL”) only applies during a non-international armed conflict to specific military engagements and is limited to those specific localities.¹⁸⁸ The ICTY Appeals Chamber in *Tadic*, which was quoted by the Trial Chamber I in *Lubanga*, emphasised that until a peaceful settlement is achieved, IHL continues to apply to “the whole territory under the control of a party, whether or not actual combat takes place there.”¹⁸⁹ During the conflict period, the MLC troops occupied and controlled the towns of Bangui, Damara, Sibut, Bossangoa, Bossembélé, Boali and Bozoum, including the areas between these towns.¹⁹⁰ Furthermore, no peaceful settlement was reached prior to the end of the charged period.

79. Finally, despite the Defence’s assertion that the civilian population did not constitute an organised armed group,¹⁹¹ the attacks on the civilian population in Mongoumba on 3 March 2003 and in PK12 occurred in the context of an ongoing armed conflict. Trial Chamber I in

¹⁸⁵ CAR-OTP-0057-0403-at-0407.

¹⁸⁶ [P38-T34-ENG-ET-p48-L7]/[P38-T34-FRA-ET-p54-L26-p55-L12].

¹⁸⁷ [P23-T52-ENG-CT2-p24-L21]/[P23-T52-FRA-CT-p25-L28-p26-L5].

¹⁸⁸ Defence Brief, para.414.

¹⁸⁹ *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.70; *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgement, 14 March 2012, para.533; *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para.57; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgement, 30 November 2005, para.84.

¹⁹⁰ The Prosecution refers here to paras.201-317 and paras.356-436 of the Prosecution Brief regarding control of areas by the MLC troops.

¹⁹¹ Defence Brief, para.422.

Lubanga found that attacks by one party to the conflict on civilian villages were conducted within the context of an ongoing armed conflict, even though the attacks did not involve armed clashes with the opposing forces.¹⁹²

A. Pillaging of property by the MLC was not justified under the Statute or IHL

80. The Defence wrongly asserts that the Prosecution was obliged to prove that the seizure of certain items, including but not limited to “communication devices (such as radios, televisions, and telephones), food items and animals, means of transport, and money”, was not justified by military necessity.¹⁹³ The Defence also raises the argument that “international humanitarian law allows the taking of war booty without the need for justification”,¹⁹⁴ and refers to a broader “right of requisition and seizure” which is “not restricted by the confines [of] military necessity.”¹⁹⁵

81. The Defence wrongly invokes military necessity. The Statute and the Elements of Crimes recognise military necessity as a negative element - that is, the Prosecution must prove that conduct is not justified by military necessity - for crimes other than pillaging under Article 8(2)(e)(v) of the Statute, with which the Accused is charged. The Elements of Crimes remark in a footnote that the distinct requirement for pillaging offences - that the perpetrator intended the appropriation for private or personal use - means that such appropriations for private or personal use are not justified by military necessity.¹⁹⁶ In other words, these appropriations conflict with the concept of military necessity, which is therefore not applicable to the crime of pillaging.

82. The pillaging of property perpetrated by the MLC was not justified by any principle of IHL. Nor is the Prosecution obliged to disprove military necessity for the purpose of a charge under Article 8(2)(e)(v) of the Statute, but rather prove that the perpetrator intended the pillaged property to be appropriated for private or personal use.

¹⁹² *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgement, 14 March 2012, para.548.

¹⁹³ Defence Brief, paras.432,982.

¹⁹⁴ Defence Brief, para.432.

¹⁹⁵ Defence Brief, para.433.

¹⁹⁶ See Elements of Crimes, footnotes 47,62.

83. The Defence refers to the *Orić* decision under Rule 98bis of the ICTY Rules of Procedure and Evidence, as authority for the view that “food items and animals” may be “required for military necessity”.¹⁹⁷ The *Orić* decision does not consider military necessity within the meaning of IHL, but rather the affirmative criminal law defence of necessity.¹⁹⁸ The Accused in the instant case has made no attempt to plead such a defence, nor is such defence otherwise applicable to the facts of this case, and accordingly the *Orić* decision is wholly irrelevant.

84. The Defence overstates and oversimplifies the extent to which IHL permits the seizure of private property. As a general principle, IHL not only proscribes certain conduct harmful to the human person, but also contains rules aimed at protecting property rights in times of armed conflict.¹⁹⁹

85. The exceptions to this general principle are limited in number and narrowly defined. At the ICTY, the *Naletilić* Trial Chamber recalled that “[b]elligerent occupants may, in certain instances, lawfully subject private property in the occupied territory to their military needs.” It enumerated just three ways, which “[a]lthough restricted”—notably in the specific requirements of record keeping and/or compensation that they impose —“are lawful in principle”:

- the forcible contribution of money from private individuals under Article 51 of the Hague Regulations;
- requisition in kind and services from private individuals for the needs of the army of occupation under Article 52 of the Hague Regulations; and
- seizure of material “obviously related to the conduct of military operations” under Article 53(2) of the Hague Regulations.²⁰⁰

None of these exceptions to the general protection of the right to private property is applicable to the facts of this case.

¹⁹⁷ Defence Brief, para.432, footnote 1041.

¹⁹⁸ *Prosecutor v. Orić*, IT-03-68-T, 8 June 2005, T.9027. See also *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Judgement, 15 March 2006, para.53. Compare with Statute, Art.31(1)(d). See further Ambos, ‘Other grounds for excluding criminal responsibility,’ in Cassese et al, *The Rome Statute of the International Criminal Court* (Oxford: OUP, 2002), pp.1035-1038.

¹⁹⁹ For instance, Article 46 of the Hague Regulations states: “Family honour and rights, the lives of persons, and private property [...] must be respected. Private property cannot be confiscated.”

²⁰⁰ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, 31 March 2003, para.616. See also *Prosecutor v. Martić*, IT-95-11-T, Judgement, 12 June 2007, para.102; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Judgement, 15 March 2006, para.51; *Prosecutor v. Simić et al.*, IT-95-9-T, Judgement, 17 October 2003, para.100.

86. The Defence attempt to rely generally on Article 53 of the Hague Regulations is misplaced.²⁰¹ Property can only be seized lawfully under this provision where one of the following two conditions is met:

- the seized property constitutes “movable property belonging to the State which may be used for military operations”; or
- the seized property belongs to private individuals but is one of the items specified in a closed list (appliances adapted for the transmission of news, the transport of persons or things, arms, or munitions of war) *and* appropriate compensation is offered to the private individual.

87. The property pillaged by the MLC was not State property. It belonged to private individuals²⁰² and was not limited to the items specified by Article 53 of the Hague Regulations as being susceptible to seizure from private individuals.²⁰³ The Defence claim that Article 53 applies to food items, animals, and money is unsupportable. Nor indeed is it clear that radios and televisions, which *receive* transmissions of news, may be considered an appliance “adapted for the *transmission* of news”²⁰⁴ Moreover, the property was not returned and no compensation was offered or made.²⁰⁵ Article 53 is thus inapplicable.

88. The Defence refers to the principle that “war booty” may be seized without the need for justification.²⁰⁶ As observed in the ICTY by the *Hadžihasanović* Trial Chamber, citing the ICRC’s Customary International Humanitarian Law study, “in non-international conflicts such regulations authorising or prohibiting war booty and requisitions have not been identified.”²⁰⁷ Yet even if, *arguendo*, the war booty doctrine applied to the 2002-2003 conflict in the CAR, its requirements would not be met. Under customary international law, “war booty includes enemy property or military equipment

²⁰¹ See Defence Brief, paras.432-433, footnotes 1039,1044-1045.

²⁰² See *e.g.* Prosecution Brief, paras.356-357 (P108), 365 (P110), 371 (P112), 380 (P119), 386 (P87), 391 (P68), 395 (P69), 402 (P22), 412 (P23), 418 (P80), 436 (P73).

²⁰³ See *e.g.* Prosecution Brief, paras.359,365,376,383,388,392-393,397,399,403-404,413-414,420,437-438.

²⁰⁴ Emphasis added.

²⁰⁵ See *e.g.* Prosecution Brief, paras.361 (P108), 368-370 (P110), 377-379 (P112), 384-385 (P119), 413 (P23).

²⁰⁶ Defence Brief, para.432.

²⁰⁷ *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Judgement, 15 March 2006, para.52.

captured on the battlefield”.²⁰⁸ The property pillaged by the MLC was neither State property nor property of a military nature. The evidence also demonstrates that the seizures did not take place on the battlefield. In any event war booty is not the property of the individual who seizes it, but rather of the belligerent party as a whole.²⁰⁹ Yet the evidence proves that the MLC appropriated civilian property for private or personal use.

89. The Defence also refers briefly to the “right of requisition”.²¹⁰ Article 52 of the Hague Regulations provides not only that “[s]uch requisitions and services shall only be demanded on the authority of the commander in the locality occupied,” but also that “[c]ontributions in kind shall as far as is possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.” Again, manifestly, the facts of this case exclude that the pillaged goods were validly requisitioned.

VII. THE CREDIBILITY OF THE PROSECUTION’S WITNESSES

90. As remarked by Trial Chambers of this Court, when evaluating a witness’s credibility, the entirety of that witness’s account must be considered.²¹¹ The accounts of witnesses called by the Prosecution are plausible and consistent. The same conclusion can be drawn when assessing their credibility against the factors identified by the ICC jurisprudence.²¹² Contrary to Defence’s assertion no indication whatsoever of the witnesses called by the Prosecution being subject to pressure or influence emerged.

A. No Inducement, Collusion or Coaching of Prosecution Witnesses

91. The Defence, in a failed attempt to argue inducement, collusion, and coaching of the Prosecution’s witnesses, makes references to “the 22 witnesses” or “OCODEFAD” or “selection of victim evidence”. The Defence, in a confusing and misleading manner,

²⁰⁸ *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Judgement, 15 March 2006, para.51; ICRC, Customary International Humanitarian Law database, Rule 49, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule49.

²⁰⁹ ICRC, Customary International Humanitarian Law database, Rule 49, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule49.

²¹⁰ Defence Brief, para.433.

²¹¹ ICC-01/04-01/06-2842, para.102; ICC-01/04-01/06-3436, para.87.

²¹² ICC-01/04-01/06-2842, paras.102,106; ICC-01/04-01/06-3436, paras.86-87.

mixes information discussed in the context of witnesses' security concerns with evidence provided under oath during their testimonies. Based on a distorted reading of selective information, the Defence draws unreasonable conclusions that cannot be accepted.²¹³

92. The credibility of the Prosecution witnesses, as discussed separately above, remains unaffected. Each of their evidence is corroborated by other testimonial and documentary evidence. Their accounts were based on their personal victimisation, experiences and witnessing of the MLC's crimes.

93. There is no such issue as "the 22 witnesses". Defence's reliance upon post testimonial information in P169's letter is incorrect. The mere fact that their names and contact information were attached to one individual's letter, written long after their testimonies, cannot implicate them. It has no effect on the credibility and the reliability of the accounts provided by each of them during trial. Also, the information contained in the filings and decisions pertaining to these letters, points to no inducement, collusion or coaching of witnesses.

94. As the Chamber found, Defence's assertion regarding "collusion" of the witnesses, is unsubstantiated. It, *inter alia*, had previously noted that: (i) the attempted contact allegedly initiated by P178 took place after the relevant witnesses testified; (ii) only five of the nine witnesses contacted by the Prosecution reported having been contacted by either P169 or P178 and all of them rejected the proposals for a meeting made by P169 or P178; and (iii) according to P169 such a meeting never took place. It further recalled the Victims and Witnesses Unit's submission that none of the witnesses received any financial assistance that goes beyond the requirements of ordinary subsistence.²¹⁴ The Defence submission is an attempt to circumvent the Chamber's decision.

95. The Defence makes incorrect assertions regarding OCODEFAD, such as, each of the victim-witnesses is a member of it, or it coached witnesses on how to give evidence, or victims were prepared to collectively bargain with the Prosecution and the Registry,

²¹³ Defence Brief, paras.188-234.

²¹⁴ ICC-01/05-01/08-3077-Conf, paras.15-16,18-21,25-26.

etc.²¹⁵ The ICTR/ICTY Appeals Chambers have held that “collusion can be defined as an *agreement*, usually secret, between two or more persons for a *fraudulent, unlawful, or deceitful purpose*”.²¹⁶ The Defence has failed to meet this legal threshold. Relevant victim-witnesses testified openly and truthfully about their membership in this NGO.²¹⁷ There was nothing sinister about its goal and by implication membership. As they stated, its legitimate objective was to support and speak about the victims of the abuse and violence.²¹⁸ They were not coached or influenced in any way regarding their testimonies. Several of them made this clear. [REDACTED] stated that OCODEFAD did not seek to influence her story in any way²¹⁹ and “the stories of the different members were confidential”.²²⁰ Even in meetings, “we didn’t try and find out what all the different stories were of each victim.”²²¹ P23 provided similar accounts.²²² P29 also testified that this NGO did not give her any advice on how to prepare for her interviews with investigators,²²³ and that no-one had influenced her story.²²⁴ P79 stated clearly that she was not influenced by anyone and the account she gave was what she experienced.²²⁵ P68 testified that OCODEFAD did not advise her on how to tell her story.²²⁶ P42 also stated that this NGO did not influence his testimony before the Court in any way.²²⁷

²¹⁵ Defence Brief, paras.222,224,226.

²¹⁶ See *Setako* Appeal Judgement, para.137; *Renzaho* Appeal Judgement, para.275, referring to *Karera* Appeal Judgement, para.234. [Emphasis added].

²¹⁷ [REDACTED]; [P23-T52-ENG-CT2-p25-L10-p27-L10]/[P23-T52-FRA-CT-p26-L15-p28-L21] ; [P81-T55-ENG-CT-p28-L22-p30-L14]/[P81-T55-FRA-CT-p29-L6-p31-L4] ; [P80-T61-ENG-CT-p26-L13-p27-L14]/[P80-T61-FRA-CT-p26-L16-p27-L15]; [P80-T63-ENG-ET-p36-L11-p38-L10]/[P80-T63-FRA-ET-p37-L28-p40-L3] ; [P69-T194-ENG-ET-p5-L5-p6-L14]/[P69-T194-FRA-ET-p5-L20-p6-L28] ; [P69-T195-ENG-ET-p4-L22-p9-L17]/[P69-T195-FRA-ET-p4-L18-p10-L3]; [P29-T80-ENG-p41-L6-p48-L9]/[P29-T80-FRA-ET-p44-L21-p52-L25]; [P79-T77-ENG-CT-p30-L3-p31-L9]/[P79-T77-FRA-ET-p30-L23-p31-L10,p31-L11-p32-L7]; [P79-T79-ENG-CT2-p23-L6-p28-L17]/[P79-T79-FRA-CT-p24-L3-p30-L5]; [P68-T49-ENG-ET-p3-L14-p5-L8]/[P68-T49-FRA-CT-p3-L18-p5-L11]; [P42-T66-ENG-CT-p32-L7]/[P42-T66-FRA-ET-p34-L23-p35-L6]; [P42-T65-ENG-ET-p41-L15-p48-L3]/[P42-T65-FRA-ET-p39-L23-p46-L7].

²¹⁸ [P23-T52-ENG-CT2-p25-L20-p26-L1]/[P23-T52-FRA-CT-p26-L28-p27-L6]; [P81-T55-ENG-CT-p30-L7,p33-L16]/[P81-T55-FRA-CT-p30-L22-p31-L4,p34-L14]; [P80-T61-ENG-CT-p26-L13-p27-L14]/[P80-T61-FRA-ET-p26-L16-p27-L15]; [P79-T79-ENG-CT2-p24-L21-p25-L3]/[P79-T79-FRA-CT-p25-L28-p26-L9]; [P68-T50-ENG-ET-p36-L7]/[P68-T50-FRA-ET-p36-L25-p37-L8].

²¹⁹ [REDACTED].

²²⁰ [REDACTED].

²²¹ [REDACTED]; [REDACTED].

²²² [P23-T52-ENG-CT2-p32-L2]/[P23-T52-FRA-CT-p33-L20].

²²³ [P29-T80-ENG-p42-L16]/[P29-T80-FRA-ET-p46-L8].

²²⁴ [P29-T80-ENG-p45-L3]/[P29-T80-FRA-ET-p49-L10].

²²⁵ [P79-T77-ENG-CT-p33-L1]/[P79-T77-FRA-ET-p33-L26-p34-L6].

²²⁶ [P68-T49-ENG-ET-p5-L18]/[P68-T49-FRA-CT-p5-L22].

²²⁷ [P42-T65-ENG-ET-p45-L24-p46-L2]/[P42-T65-FRA-ET-p44-L4].

96. Some of the alleged 22 witnesses are family members living in the same house or compound,²²⁸ or reside in the same neighbourhood.²²⁹ It is expected that such witnesses would meet and discuss many issues affecting them. Other than alleging that five Prosecution witnesses were in contact regarding compensation from ICC, there is no evidence that the aforesaid 22 witnesses were in contact or engaged in any criminal conduct. As such, the Defence assertions that 22 Prosecution witnesses were induced, colluded and were coached are baseless.

97. The Defence alleges that P23 and P42 colluded about the date on which the MLC troops arrived in PK12.²³⁰ As opposed to Defence witnesses who did not recall any other dates apart from dates that are important to the Defence case,²³¹ Prosecution witnesses admitted that they recalled the events, but were sometimes unable to recall specific dates and times due to passage of time of about ten years.²³² This is both reasonable and normal. The fact that Prosecution witnesses were not able to remember exact dates and times, or to provide the same dates, demonstrates their truthfulness. To the contrary, had they been induced or coached as alleged by the Defence, they would have remembered all the important dates and times relevant to the Prosecution case.

98. P23 and P42's discussion regarding the dates cannot meet the required threshold of collusion or coaching, nor can it affect their credibility in any way. P42 asked P23 the following; "But, my brother, I don't remember the date on which Mr Bemba arrived. Could you tell me? It was questions of this type that I asked."²³³ Nothing in the above quotation suggests inducement, collusion or coaching. No other evidence has been adduced by the Defence to support their assertion. Evidently P42 was driven by the desire to provide accurate and truthful information about events that happened in 2002 in consulting P23 about Bemba's date of arrival in PK12. In fact, the context in which he placed this information clearly indicates that there was no discussion of his statement. He was asking the question in his own "subtle way".²³⁴ The fact that Bemba was in PK12 during the conflict is conceded by the

²²⁸ P23, P80, P81 and P82.

²²⁹ P23, P38, P42, P73, P80, P81, P82.

²³⁰ Defence Brief, paras.204-205.

²³¹ [D51-T261-ENG-ET-p35-L16]/[D51-T261-FRA-ET-p39-L22]; [D51-T262-ENG-ET-p44-L2]/[D51-T262-FRA-ET-p48-L18].

²³² [P38-T33-ENG-ET-p23-L11]/[P38-T33-FRA-ET-p25-L3].

²³³ Defence Brief, para.204.

²³⁴ [P42-T67-ENG-ET-p58-L13-24]/[P42-T67-FRA-CT-p62-L21-p63-L8].

Defence itself.²³⁵ The mere fact that a witness does not remember the exact date Bemba arrived in PK12 ten years later, is insufficient in the absence of other evidence, to show that a witness is not credible.

99. The Defence further alleges that there was collusion between P42 and P73 because the Prosecution contacted P73 using P42's phone and that the two witnesses discussed their evidence with each other.²³⁶ As P42 unequivocally stated, this was one contact with the aim of making an appointment for P73 who did not have a telephone himself.²³⁷ He did not discuss his interview with P73.²³⁸ There is no evidence to demonstrate that a discussion occurred which influenced their testimonies in court or that they engaged in a conduct that would affect their credibility. As such the Defence assertion is baseless.

100. The Defence has failed to advance any sufficient reason to exclude the testimony of 22 Prosecution witnesses from the consideration of the Chamber beyond the general claim that they were not allowed to test their credibility and reliability.²³⁹ The Defence had the opportunity to examine the 22 Prosecution witnesses whose testimony the Defence seeks to exclude. No evidence of inducement, collusion or coaching was led in court against them. There is nothing unusual about certain witnesses being in contact with one another. In fact it would be surprising if those witnesses said they were not in contact at all. Accounts of victim-witnesses stand credible and reliable whether considered individually or jointly with each other and against the entirety of the trial evidence. The question of whether there were inducements, collusion or coaching is a matter of evidence and not speculation.

B. P33: [REDACTED]

101. The Defence proposal to reject P33's testimony is based on the unfounded premises that P33 is [REDACTED] whose testimony is part of a plan to evict Bemba from the politics in the Congo. [REDACTED]²⁴⁰ [REDACTED]. P33 clearly stated that [REDACTED].²⁴¹

²³⁵ [D51-T261-ENG-ET-p55-L1]/[D51-T261-FRA-ET-p60-L8-p61-L10].

²³⁶ Defence Brief, para.205.

²³⁷ [P42-T66-ENG-ET-p39-L8-25;p46-L2]/[P42-T66-FRA-ET-p42-L22-p43-L13, p50-L7-p51-L2].

²³⁸ [P42-T66-ENG-ET-p40-L6-22]/[P42-T66-FRA-ET-p43-L19-p44-L10].

²³⁹ Defence Brief, para.214.

²⁴⁰ Defence Brief, para.136.

²⁴¹ [P33-T163-ENG-ET-p62-L11-p63-L13]/[P33-T163-FRA-ET-p67-L8-p68-L11].

102. Contrary to what the Defence asserts, P33's appointment as [REDACTED]. Evidence in this case shows that the [REDACTED] who had to turn to the private sector for employment.²⁴²

103. P33 provided a comprehensive, plausible and reliable testimony based on his deep knowledge of the MLC and Bemba's *modus operandi* during the events. The Defence attempt to challenge P33's evidence is groundless.

C. P45: [REDACTED]

104. The Defence alleges that P45 is "[a]nother of the 'friends of the ICC' his decision to give evidence against Mr. Bemba has almost certainly benefitted him in concrete terms, financially and in terms of his political career."²⁴³ There is no evidence to support these unsubstantiated assertions and the Chamber should dismiss them as mere aspersions.

105. P45 explained that he had difficulty with recollecting dates due to the passage of time.²⁴⁴ In an attempt to limit the value of his evidence, the Defence incorrectly alleges that P45 "was scarcely even in Gbadolite during the events, living permanently in [REDACTED]."²⁴⁵ However the Defence does not adduce any evidence to contradict P45's trip to Bangui during the events, his information regarding MLC crimes there, or his [REDACTED] with Bemba in Gbadolite informing him of the crimes.²⁴⁶

106. The Defence did not question P45 about his presence [REDACTED]. The Chamber should accept P45's evidence because it is reliable and substantially corroborated by other independent evidence in the trial record, which reinforces his credibility. This includes his reports that he heard about MLC crimes through the media and from CAR people;²⁴⁷ he saw looted vehicles arrive from Bangui via Zongo that were distributed to MLC officials;²⁴⁸ MLC soldiers were given light sentences for crimes in the CAR, were released early and

²⁴² [P33-T164-ENG-ET-p18-L1]/[P33-T164-FRA-ET-p18-L18].

²⁴³ Defence Brief, para.156.

²⁴⁴ Defence Brief, para.160; see, [P45-T203-ENG-ET-p38-L13]/[P45-T203-FRA-ET-p40-L25-p41-L5].

²⁴⁵ Defence Brief, para.159; see, [P45-T203-ENG-ET-p36-L21-p38-L18]/[P45-T203-FRA-ET-p39-L2-p41-L5].

²⁴⁶ [P45-T201-ENG-ET-p20-L20-p21-L5,p61-L23-p62-L1,p64-L22-p65-L11]/[P45-T201-FRA-ET-p22-L24-p23-L18,p69-L14,p71-L11].

²⁴⁷ [P45-T201-ENG-ET-p63-L8]/[P45-T201-FRA-ET-p69-L28].

²⁴⁸ [P45-T201-ENG-ET-p71-L11]/[P45-T201-FRA-ET-p48-L15].

reintegrated into the DRC army.²⁴⁹

D. P169: [REDACTED]

107. P169 is of Congolese origin and lived in Bangui since 2000.²⁵⁰ His account on why [REDACTED] throughout MLC's presence in the CAR is plausible. [REDACTED] that the MLC soldiers could not.²⁵¹ He knew other MLC soldiers and commanders by name and provided details on how they met and what they looked like.²⁵²

108. The Defence seeks to discredit P169's testimony regarding Mustapha's conversation with Bemba and orders received. Defence's reasoning is flawed. [REDACTED]. His accounts on Bemba's order to Mustapha through the telephone are further corroborated by Bemba's call records as well as the events of Mongoumba.²⁵³

109. The Defence attempts to portray P169 as corrupted by money. The Defence's reference to his testimony is taken out of its context and misinterpreted. The wording clearly indicates that P169 is referring to his acceptance of the remuneration in return for the work he was asked to do. P169 makes it clear that such payment had nothing to do with his testimony, stating that "nobody gave me any money."²⁵⁴ Contrary to Defence's assertions, he eye-witnessed MLC crimes.²⁵⁵ P169's accounts are corroborated by those of several other witnesses at trial and documentary evidence.²⁵⁶

²⁴⁹ [P45-T202-ENG-ET-p13-L3,p15-L11,p17-L2]/[P45-T202-FRA-ET-p14-L15,p17-L8,p19-L3].

²⁵⁰ [P169-T136-ENG-ET-p18-L22-p20-L1]/[P169-T136-FRA-ET-p20-L3-p21-L6].

²⁵¹ [P169-T136-ENG-ET-p23-L14]/[P169-T136-FRA-ET-p24-L16].

²⁵² [P169-T136-ENG-ET-p24-L10-p25-L12]/[P169-T136-FRA-ET-p25-L10-p26-L14]; [P169-T137-ENG-ET-p8-L1-p9-L22]/[P169-T137-FRA-ET-p8-L5-p29-L26].

²⁵³ Prosecution Brief, para.702; [P169-T137-ENG-ET-p42-L22-p43-L10]/[P169-T137-FRA-ET-p44-L3].

²⁵⁴ [P169-T138-ENG-ET-p51-L18-p52-L23]/[P169-T138-FRA-ET-p50-L5-p51-L10].

²⁵⁵ [P169-T137-ENG-ET-p26-L15-p27-L14,p27-L20-p29-L6,p30-L2]/[P169-T137-FRA-ET-p27-L11-p28-L10,p28-L17-p29-L27,p30-L19-p31-L12].

²⁵⁶ See, for example, Prosecution Brief, paras.94,96,261,447,491-493,496,497,702.

E. P173: [REDACTED]

110. P173 is of Congolese origin and lived in Bangui from 1999 until [REDACTED].²⁵⁷ He had met and knew several of the MLC soldiers and commanders, [REDACTED], and knew about their situation.²⁵⁸ Contrary to Defence assertions he had direct contact with [REDACTED] and the MLC soldiers as well as direct knowledge of their movements and crimes.²⁵⁹ He had direct knowledge of Mustapha's means of communication and contact with Bemba.²⁶⁰

111. Defence assertions on any potential minor inconsistencies²⁶¹ do not affect the overall reliability of his evidence. Contrary to Defence's assertions, he made clear his motivation to testify.²⁶² His account is corroborated by several testimonial and documentary evidence at trial.²⁶³

F. P178: [REDACTED]

112. P178 is of Congolese origin and lived in Bangui since [REDACTED].²⁶⁴ He was present when the MLC crossed over into the CAR.²⁶⁵ He was in contact with the MLC troops [REDACTED].²⁶⁶ He had to travel to several locations where the MLC was present and was therefore in a position to see and testify about their deployments in several locations throughout the CAR.²⁶⁷ He was in a position to observe first-hand their communication devices, including the Thurayas, and was able to provide the accurate

²⁵⁷ [P173-T144-ENG-ET-p8-L12-p9-L6]/[P173-T144-FRA-ET-p8-L25-p9-L15].

²⁵⁸ [P173-T144-ENG-ET-p14-L5-22,p16-L1-18,p37-L1,p46-L12]/[P173-T144-FRA-ET-p14-L9,p16-L5,p38-L13,p49-L4].

²⁵⁹ [P173-T144-ENG-ET-p35-L3-p36-L25,p37-L1,p37-L12-p38-L4,p39-L12,p40-L9-p41-L2,p41-L9,p42-L1,p45-L11-19,p47-L8-p48-L8,p48-L9-p49-L6,p49-L19-p50-L16,p50-L20-p52-L16,p52-L18-p54-L6,p72-L14-p73-L10]/[P173-T144-FRA-ET-p36-L12-p38-L12,p38-L13-24,p38-L25-p39-L15,p41-L4-14,p42-L1,p43-L6,p43-L27-p44-L18,p47-L26-p48-L8,p50-L1-28,p51-L1-26,p52-L11-p53-L13,p53-L17-p55-L15,p55-L18-p57-L8,p76-L6-28]; [P173-T147-ENG-ET-p21-L9,p27-L15-p28-L1]/[P173-T147-FRA-ET-p21-L14-p22-L5,p27-L20-p28-L6].

²⁶⁰ [P173-T145-ENG-ET-p5-L9-p6-L20,p7-L20,p18-L10]/[P173-T145-FRA-ET-p5-L6-p6-L20,p7-L18,p19-L15]; [P173-T146-ENG-ET-p36-L8-p37-L6,p38-L23-p39-L23]/[P173-T146-FRA-ET-p34-L22-p35-L19,p37-L17-p38-L14].

²⁶¹ See references to Defence Brief, para.118, footnotes:198-205.

²⁶² [P173-T145-ENG-ET-p17-L8-p18-L5]/[P173-T145-FRA-ET-p18-L7-p19-L10].

²⁶³ See, for example, Prosecution Brief paras.34,39,61,96,107,447,463,489,492,503,562,571,573,593-594

²⁶⁴ [P178-T150-ENG-ET-p13-L9]/[P178-T150-FRA-ET-p14-L2].

²⁶⁵ [P178-T150-ENG-ET-p17-L5-p19-L11]/[P178-T150-FRA-ET-p17-L26-p20-L11].

²⁶⁶ [P178-T150-ENG-ET-p32-L25-p33-L11,p38-L16-p39-L11]/[P178-T150-FRA-ET-p34-L6,p39-L27-p40-L23]

²⁶⁷ [P178-T150-ENG-ET-p32-L12-p40-L7]/[P178-T150-FRA-ET-p33-L19-p41-L23]

number for Mustapha, noted in his personal diary.²⁶⁸ [REDACTED].²⁶⁹ When testifying about MLC's crimes he did not see for himself, he explained the basis of his knowledge. For example, with regard to the case of looting at PK12, he detailed that although he was not there when it happened, [REDACTED], saw the looted goods for himself and saw them speak.²⁷⁰

113. Defence's assertions on P178's testimony do not represent truthfully the entirety of his accounts.²⁷¹ He details the information [REDACTED] on the murder of René and the MLC's reaction to it (i.e the killing of CAR civilians), [REDACTED].²⁷²

G. P209: [REDACTED]

114. The Defence wrongly argues that the hallmark of P209's testimony was his determination to blame the MLC for all the crimes that occurred in the Damara area.²⁷³ P209's effort to provide a truthful account is evident throughout his testimony. P209's evidence about crimes in Damara is not simply hearsay.²⁷⁴ [REDACTED], the witness [REDACTED] from victims of MLC crimes and [REDACTED] stolen goods stored at Mustapha's residence.²⁷⁵ The fact that those goods were loaded into Bemba's aircraft is the only logical conclusion that one can draw from what the witness saw.²⁷⁶

115. As to the landing and taking off of the Accused's airplane in Damara, the witness clarified this part of his testimony. Airplanes were forced to land in Damara on National Road 3 since the occupation of the airport in 1975. Experts would secure that road whenever an airplane had to land in Damara. The witness provided several examples of such landings that he saw, mostly due to emergency situations.²⁷⁷

²⁶⁸ [P178-T150-ENG-ET-p40-L19-p46-L12]/[P178-T150-FRA-ET-p42-L10-p48-L5]

²⁶⁹ [P178-T151-ENG-ET-p51-L20-p55-L22]/[P178-T151-FRA-ET-p58-L21-p63-L18]

²⁷⁰ [P178-T150-ENG-ET-p61-L19-p62-L11]/[P178-T150-FRA-ET-p63-L14-p64-L10]

²⁷¹ Defence Brief, para.129

²⁷² [P178-T151-ENG-ET-p18-L24-p19-L7,p19-L17-p22-L11]/[P178-T151-FRA-CT-p20-L10,p21-L3-p23-L22]

²⁷³ Defence Brief, para.168

²⁷⁴ Defence Brief, para.170

²⁷⁵ [P209-T119-ENG-ET-p8-L20]/[P209-T119-FRA-ET-p9-L16-17]

²⁷⁶ [P209-T124-ENG-CT2-p15-L6]/[P209-T124-FRA-ET-p16-L2-9]

²⁷⁷ [P209-T124-ENG-CT2-p28-L4-p30-L18]/[P209-T124-FRA-ET-p28-L28-p31-L15]

H. P213: [REDACTED]

116. P213 is factually very accurate, although he sometimes confused dates or the sequence of events. For example, P213 indicated several times that there have been three operations in the CAR, respectively in 2001, 2002 and 2003.²⁷⁸ He indicated that Mustapha led the operation in 2003 as Head of the 5th Battalion which came from Basankusu.²⁷⁹ He also stated that there were preparatory meetings before the 2003 operation which started with the visit of the CAR Minister of Defence in Gbadolite.²⁸⁰

117. As a matter of fact, P213 divided the 2002-2003 operation in two, the first one in October 2002 and the second one in early 2003. Based on such clarification, his testimony makes perfect sense. P213 cannot recall when the MLC left the CAR in 2002 because it never happened and the troops stayed until 15 March 2003. D66, a witness called by the Defence confirmed P213's account about Bemba's crossing of the river on a boat from Zongo to Bangui after having landed in Zongo with a plane.²⁸¹ According to D66, this trip occurred between December 2002 and February 2003.²⁸²

118. Concerning the authors of the crimes, P213 testified that Captain Willy has been punished for crimes committed during the operation in 2002 and nobody was held responsible for crimes in 2003.²⁸³ This is corroborated by the Bomengo dossier. P213 provided the name of another soldier, Kule Mbaya, who talked openly about the crimes he had committed in the CAR.²⁸⁴ Counsel Mr Haynes challenged P213's testimony, asserting that Kule Mbaya never went to the CAR,²⁸⁵ whilst evidence provided by the Defence confirms his presence and involvement in the MLC crimes in the CAR.²⁸⁶

²⁷⁸ [P213-T186-ENG-ET-p50-L16]/[P213-T186-FRA-ET-p52-L21]

²⁷⁹ [P213-T186-ENG-ET-p53-L25]/[P213-T186-FRA-ET-p56-L6]

²⁸⁰ [P213-T186-ENG-ET-p23-L20]/[P213-T186-FRA-ET-p25-L11]

²⁸¹ [D66-T279-ENG-ET-p40-L5]/[D66-T279-FRA-ET-p44-L4-and-L24]; [D66-T280-ENG-ET-p52-L2]/[D66-T280-FRA-ET-p55-L17]

²⁸² [D66-T280-ENG-ET-p52-L15]/[D66-T280-FRA-ET-p56-L4]

²⁸³ [P213-T187-ENG-ET-p35-L25-p38-L9]/[P213-T187-FRA-ET-p37-L2-p39-L12]

²⁸⁴ [P213-T187-ENG-ET-p38-L14]/[P213-T187-FRA-ET-p39-L17]; [P213-T191-ENG-ET-p37-L18-p39-L11]/[P213-T191-FRA-ET-p39-L13-p41-L5]

²⁸⁵ [P213-T191-ENG-ET-p44-L23-p46-L5]/[P213-T191-FRA-ET-p46-L12-p47-L20]

²⁸⁶ EVD-T-OTP-00393/CAR-DEF-0002-0001-at-0027

VIII. THE LACK OF CREDIBILITY OF THE DEFENCE WITNESSES

119. Based on the “notice of some specifics” of the related Article 70 case, the Defence had no other choice but to exclude 14 of its witnesses in its Closing Brief - D2, D3, D4, D6, D13, D15, D23, D25, D26, D29, D54, D55, D57, and D64.²⁸⁷ The Chamber should accord very little weight, if at all, to the testimonies of the remaining 20 Defence witnesses who are: (i) witnesses who are extremely close and/or loyal to Bemba and provided biased and unreliable testimony in his favour, including implausible evidence where the reasonable and logical conclusion would have been detrimental to Bemba (D16, D21, D39, D48, D49, D66);²⁸⁸ (ii) witnesses committed to exonerating Bemba to the point where they contradicted the Accused’s own words, which were written at a time when criminal proceedings against him were not contemplated (D18, D19, D21, D39, D36, D48, D49);²⁸⁹ (iii) witnesses who lied under oath (D16, D19, D45, D66);²⁹⁰ (iv) witnesses who provided contradictory versions of the same events (D18, D19);²⁹¹ (v) a witness who requested a bribe in exchange for his testimony (D18);²⁹² (vi) a witness who attempted to testify in line with a pre-planned script, which was brought into the courtroom and covered additional issues that could not have been reasonably foreseen (D45);²⁹³ (vii) witnesses who neither saw nor heard about allegations of any crime committed by the MLC troops despite their presence in the CAR during the events (D19, D30, D56, D66);²⁹⁴ (viii) witnesses who had no knowledge of facts critical to this case

²⁸⁷ Defence Brief, paras.14-15

²⁸⁸ See, for example, [D16-T276-ENG-ET-p22-L1-24]/[D16-T276-FRA-ET-p24-L14-p25-L13] where D16 testified that he believes in Bemba and that as a member of the MLC he has taken oath to remain loyal to Bemba and the MLC party.

²⁸⁹ See, for example, [D18-T319-ENG-ET-p15-L22-p16-L3,p17-L22-p18-L15]/[D18-T319-FRA-ET-p17-L26-p18-L6,p20-L7-p20-L18] and CAR-ICC-0001-0091.

²⁹⁰ See, for example, [D16-T276-ENG-ET-p8-L1]/[D16-T276-FRA-ET-p8-L25-p9-L27] [REDACTED] [D16-T276-ENG-ET-p14-L1]/[D16-T276-FRA-ET-p16-L1] [REDACTED]. See, also, [D66-T280-ENG-ET-p59-L21]/[D66-T280-FRA-ET-p63-L17] where D66 testified that he had no relationship with Bemba and never talked directly to him [REDACTED].

²⁹¹ See, for example, [D18-T319bis-ENG-ET-p8-L17-p9-L2]/[D18-T319-FRA-ET-p70-L12] where D18’s testimony was clearly designed to exonerate Bemba even to the point where he accepted that he allegedly provided information that was less than forthcoming despite his knowledge that the information would be used for judicial proceedings as he was not under oath when the Prosecution interviewed him; also D19 contradicted his statement given during the investigation phase that Bemba was in permanent contact with ALC officers engaged in the CAR

²⁹² See, for example, [D18-T319bis-ENG-ET-p4-L24]/[D18-T319-FRA-ET-p66-L20] where D18, by his own admission, requested a bribe in exchange of his testimony.

²⁹³ The script contains information about the case that D45 could not have anticipated arising during his testimony

²⁹⁴ See for example [D30-T342-ENG-ET-p15-L16]/[D30-T342-FRA-CT-p15-L17] where D30 testified she never heard about any rumour on the Banyamulenge and any crimes they may have committed until being questioned at the ICC Courtroom in August 2013. See also [D56-T314-ENG-ET-p21-L9-p23-L1]/[D56-T314-FRA-CT-p22-L6-p24-L11] p where D56 blamed Bozizé forces for all the crimes that were committed during the

(D30, D39, D66);²⁹⁵ (ix) witnesses who lacked military knowledge in spite of postulating as former CAR soldiers (D7, D56).²⁹⁶

CONCLUSION

120. The Prosecution hereby reiterates and reincorporates by reference all the previous submissions and conclusion set out in its Closing Brief.

PROSECUTION TEAM

The Prosecution team in the case *The Prosecutor v. Jean-Pierre Bemba Gombo* is composed of Jean-Jacques Badibanga, Massimo Scaliotti, Eric Iverson, Shkelzen Zeneli, Horejah Bala-Gaye, Thomas Bifwoli, Sanyu Ndagire, and Sylvie Vidinha.



Fatou Bensouda, Prosecutor

Dated this 22th Day of April of 2016
At The Hague, The Netherlands

CAR conflict and pretended ignorance or completely lacks knowledge of any crime committed by the MLC during the conflict period

²⁹⁵ See for example [D30-T341-ENG-ET-p18-L17]/[D30-T341-FRA-ET-p19-L9] where D30 could not tell if the soldiers coming from the Congo fought in support of Patassé or Bozizé. See also [D39-T308-ENG-ET-p33-L14,p53-L6-8]/[D39-T308-FRA-ET-p34-L13, p54-L2]; [D39-T309-ENG-ET-p5-L18,p48-L20]/[D39-T309-FRA-ET-p5-L26, p51-L15] where D39 testified he was not in the CAR and was away from Gbadolite for months when the MLC troops were deployed, reinforced or withdrawn from CAR; See also [D66-T280-ENG-ET-p42-L17-p43-L25]/[D66-T280-FRA-ET-p46-L1-p47-L8]

²⁹⁶ See for example [D7-T250-ENG-CT-p57-L23]/[D7-T250-FRA-ET-p62-L2] where D7 allegedly former FACA is not aware of incidents between FACA and MLC; See also [D56-T313-ENG-ET-p46-L14]/[D56-T313-FRA-ET-p49-L23] [REDACTED].