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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public with Public Annex A and B

Public Redacted Version of Closing Brief of Mr. Jean-Pierre Bemba Gombo

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

Paolina Massida

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verrill

Detention Section

Victims Participation and Reparations Section Other

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I. Introduction

The CAR has experienced years of military rule, corruption and severe social turmoil, and therefore suffered a history of political instability. Essentially every ruler of the CAR since its independence either obtained power or was overthrown in a military coup.¹

Luis Moreno Ocampo

1. At the heart of this case is a fundamental untruth, namely that all of the crimes which were committed against the population of the Central African Republic between October 2002 and March 2003 were the sole preserve of just one of the armed factions on the territory at that time, namely the “Banyamulengue” which had come from the DRC.²

2. The evidence in this case shows that such a suggestion is not only false, it is ridiculous. Any judgment which recorded that as a finding would be a profound injustice, not just to the Accused, but to the victims of those offences, and most seriously of all, to history itself.

3. Notwithstanding this self-evident fallacy, the Prosecution and the Legal Representative of Victims persist in their attempt to airbrush completely out of the events President Patassé and the incumbent Central African authorities of the time, and more seriously, to sanitize the image of General François Bozizé.³

4. Of course, it was not always thus. When the Prosecution first placed draft charges before the ICC, the basis of its allegations was that Mr. Bemba and Mr. Patassé were jointly directly responsible for the crimes committed in the CAR

¹ ICC-01/05-01/08-128-Conf-AnxA.

² Prosecution Closing Brief, para. 200.

³ Prosecution Closing Brief, para. 200.

between October 2002 and March 2003.⁴ A lengthy and doubtless costly investigation had been conducted to establish the extent of their cooperation and the cooperation of their operational commanders. Military and political figures were interviewed to establish that the MLC unit, sent by Mr. Bemba as support, had been annexed to the other loyalist forces defending Patassé.

5. However, once those charges were rejected,⁵ and the Prosecution chose to adopt a completely different case and mode of liability against Mr. Bemba, the evidence gathered up to that point was simply jettisoned as inconvenient to the charges now being pursued. Rather than an unbiased search for the truth, this rather represents a determination on the part of the Prosecution to “get their man at all costs”.

6. That determination has been echoed in other quarters, notably, those with most to gain from Mr. Bemba’s incarceration and an historical record purged of any reference to the wrongdoing of Bozizé, namely the governments of the Central African Republic (at least until 2013) and the DRC (where Mr. Bemba remains a credible political opponent of President Kabila). Both the Bozizé and Kabila regimes have actively encouraged and assisted in the prosecution of Mr. Bemba before this court.⁶

7. The principal form of that assistance has been the provision of the substance of the false narrative central to this case; the victims from CAR, corralled by the Bozizé-sponsored OCODEFAD,⁷ and trained to tell their stories of

⁴ ICC-01/05-01/08-1-tENG, p.6.

⁵ ICC-01/05-01/08-1-tENG, p.6; ICC-01/05-01/05-424.

⁶ ICC-01/05-5-Anx2.

⁷ P-29, T-81, p.38; P-229, T-101, p.15; P-68, T-50, pp.27-28; P-23, T-52, p.26; P-81, T-54, pp.24-25; P-81, T-55, pp.53-54; P-42, T-65, p.47; P-6, T-95, pp.8-9; P-229, T-101, p.16; P-82, T-59, p.15; T-60, pp.31-41.

“Banyamulengue”;⁸ how they and only they offended against the population. President Kabila sent his spies to testify,⁹ and any former member of Mr. Bemba’s inner circle as could be persuaded to implicate him, however indirectly, in the events in the CAR.

8. The Chamber has been provided by the Prosecution with scant evidence about the command of operations in the CAR, simply raft upon raft of inexperienced opinion, gossip, rumour and hearsay all delivered by witnesses with a keen interest in seeing history and justice caricatured and Mr. Bemba simply taken out of the game.¹⁰ In a vain attempt to supplement this weak evidence, resort has been had to “evidence” never previously considered worthy of such a description in this Court or any other: partisan newspaper articles, internet reports of radio broadcasts, NGO reports, unattributed and unauthenticated documents.¹¹ The Defence alone in this case has endeavoured to furnish the Chamber with direct oral evidence of the crucial issues.

9. Having been absolved by the Pre-Trial Chamber of responsibility as a direct perpetrator, Mr. Bemba prepared to meet the allegation that he bore superior responsibility for the actions of the MLC troops which joined the disparate other elements, collectively known as the “loyalist forces” which combined to defend the elected head of state of the CAR from the unlawful coup d’état authored by Bozizé’s rebels.¹² The express basis of the charges which he had to face was that he **knew**, as a commander, that the MLC troops were committing or were about to commit the confirmed crimes.¹³

⁸ P-42, T-67, p.26; T-64, pp.12-13; P-9, T-102, p.46; T-104, p.4; P-119, T-87, pp.30-33; P-6, T-95, p.67; V-02, T-225, p.46; P-82, T-59, p.15; T-60, pp.31-41; P-79, T-77, pp.31-34; P-69, T-192; pp.39-40; P-80, T-61, p.27; P-68, T-48, pp.19-32; P-73, T-72, p.20.

⁹ P-169, T-136, pp.19-20, 23; T-139, pp.26-27; P-173, T-144, p.9.

¹⁰ Prosecution Closing Brief, paras. 509-769.

¹¹ See Chapter II.

¹² EVD-T-OTP-00446/CAR-OTP-0013-0082.

¹³ ICC-01/05-01/08-424.

10. On that basis he met the Prosecution case, such as it was, and started the presentation of his Defence. However, on 21 September 2012,¹⁴ the goalposts for Mr. Bemba's Defence were moved yet again: the Trial Chamber indicated that it may re-characterise the charges to allege that Mr. Bemba "should have known" that the MLC troops had committed or were committing the confirmed offences.¹⁵ Despite numerous requests for specificity as to allegations which gave rise to any such liability on his part,¹⁶ he remains in the dark as to the basis on which he might be convicted, save that it is apparently, and incongruously based on the same evidence.

11. The evidence in the case having been completed, on 23 November 2013,¹⁷ Mr. Bemba, his Lead Counsel and Case Manager and two others were arrested on warrants issued by the ICC alleging that they had committed offences against the administration of justice.¹⁸ The fact at least that the Prosecution had a course of that sort in mind had been known to this Trial Chamber for over a year.¹⁹

12. The five arrested in that case (including Mr. Bemba) face concurrent charges contrary to Article 70 of the Statute of Rome.²⁰ The Trial Chamber having determined that no material from those proceedings would be admitted in this case at this stage,²¹ the Defence does not condescend into the facts of those allegations, such as it knows them to be.

13. However, the mere existence of those indeterminate proceedings presents the Accused with a conundrum in making his final submissions. Whilst not making any concession that any Defence witness gave anything less than truthful evidence,

¹⁴ ICC-01/05-01/08-2324.

¹⁵ ICC-01/05-01/08-2324.

¹⁶ ICC-01/05-01/08-2365; ICC-01/05-01/08-2451; ICC-01/05-01/08-3076.

¹⁷ ICC-01/05-01/08-T-353 and ICC-01/05-01/08-T-357.

¹⁸ ICC-01/05-01/13-1-Red2-tENG.

¹⁹ ICC-01/05-01/08-2548.

²⁰ ICC-01/05-01/13-1-Red2-tENG.

²¹ ICC-01/05-01/08-3029.

he cannot ignore the fact that the outcome of the Article 70 case will impact upon this case one way or another at some future date. The impact, moreover, may not depend upon the outcome in his own individual case.

14. With that in mind, and being on notice of some specifics of the Prosecution's allegations in that case, the Defence in drafting this Brief have relied on the following Defence witnesses: D-53; D-60; D-65; D-9; D-59; D-48; D-7; D-49; D-45; D-16; D-50; D-51; D-66; D-21, D-39, D-36; D-56; D-19; D-18 and D-30. The Defence will rely on other witnesses who do not appear on the above list where the same is relied upon by the Prosecution.

15. The basis upon which the above list has been compiled should be obvious and Counsel for the Defence does not regard it to be within the range of their ethical responsibilities to make subjective value judgments above and beyond that. After all, if the fact that a witness had received money were, for example, the yardstick then Counsel for the Prosecution would be ethically bound to abandon its whole case.

16. All the same this approach is designed to protect the integrity of these proceedings and Mr. Bemba's position on appeal. Should the Trial Chamber find certain facts in the Article 70 case, the Defence reserves its right to seek to make further submissions before this Chamber or the Appeals Chamber.

17. Ultimately, once all the hyperbole is swept aside, this case is very simple, largely because of the dearth of direct, admissible and reliable material available. There is insufficient evidence to prove who the perpetrators of the crimes confirmed by the Pre-Trial Chamber were, and there is insufficient evidence to prove that Mr. Jean-Pierre Bemba Gombo was in operational command of those people or any others in the Central African Republic at the relevant time.

18. This Brief will illustrate that in five chapters. Chapter 2 will highlight the poor quality of the oral and documentary evidence available to the Chamber. Chapter 3 will set out the chronology of all relevant events as established by the reliable and direct evidence. Chapter 4 will illustrate the Prosecution's failure to prove either the contextual elements of the crimes or the crimes themselves. Chapter 5 will discuss the impossibility of identifying any of the perpetrators of crimes in the CAR, and Chapter 6 will discuss the Prosecution's failure to establish to the requisite standard that the Accused bore superior responsibility for MLC troops in the CAR.

II. SUBMISSIONS ON EVIDENCE

*As you know, its always good to tell the truth. When I told that person this, he told me,
“But listen. People are mentioning large sums of money, and you, you are just
mentioning just small amounts of money. You don’t want to eat of the cake?”²²*

Prosecution Witness P-73

A. The Burden and Standard of Proof

19. The Prosecution case is founded on unreliable evidence, lacking in probative value.

20. Although admitted in the case, before this evidence can be relied upon in the judgment, the Chamber must make a determination that the Prosecution has established that the probative value and weight of the evidence in support of each material fact and circumstance meets the threshold of beyond reasonable doubt.²³ In contrast, if the Defence evidence suffices to establish a reasonable doubt on a particular fact, then the Trial Chamber must dismiss the Prosecution case on that point.

21. Both the Prosecution’s burden of proof and the standard of beyond reasonable doubt require the Chamber to apply a more stringent standard as concerns its analysis and reliance on Prosecution evidence, as compared to evidence submitted to counter the Prosecution case. In this context, the Prosecution’s failure to include any analysis of the credibility and weight of its evidence in its brief is remarkable.

²² P-73, T-73, p.19.

²³ Orić TJ, para. 15.

22. Given the importance of credibility to a verdict, article 67(1)(a) requires that the Defence should have been informed of the Prosecution position on this point, and provided with an opportunity to address it. The belated introduction of substantive arguments on credibility in a response or during the oral hearing would be inconsistent with the adversarial nature of this process. Judges should not be forced to engage in “judicial guesswork”,²⁴ and nor should the Defence.

23. The Chamber should also take into account the absence of Prosecution submissions in determining whether the Prosecution evidence, in whole or in part, meets the threshold of beyond reasonable doubt.

B. Documentary Evidence

24. The following analysis of specific types of Prosecution evidence highlights the particular problems of these sources, but should not be construed as a concession concerning the weight of any other items of Prosecution evidence which are not individually addressed.²⁵

1. Unattributed documents must be approached with caution

25. The Prosecution has sought to rely on several documents, which were neither admitted through a witness nor authenticated in another way, and in some cases, are unattributed to a specific source.

26. Although the Statute does not prohibit the Chamber from relying on documentary evidence, it does impose an obligation to approach such evidence

²⁴ ICC-01/04-01/06-T-342, p.64; *Lubanga* TJ, para. 95.

²⁵ ICC-01/05-01/08-1386, paras. 1-2, 53.

with caution,²⁶ and to ensure that reliance on such evidence does not prejudice the rights of Mr. Bemba, and the fairness of the trial.²⁷ This obligation is heightened if the evidence concerns core issues in the case, or if it is not corroborative of other, more reliable evidence.²⁸

27. Even if documents have been admitted from the bar table, the Prosecution remains under the obligation to establish the reliability and probative value of the document in question.²⁹ Proper authentication is the *sine qua non* as concerns reliability.³⁰

28. Where the source and origin of a document is not established, it should either not be admitted,³¹ or attributed no evidential weight.³² Although the Prosecution has sought to rely on assorted reports concerning the alleged conduct of the MLC, it has not called the author of these reports nor any person who is familiar with either their contents or the manner and methodology by which they were produced. In such circumstances, they can be attributed little, if any, evidential weight.

2. Press Reports are an unreliable source of evidence

29. Throughout this trial, the Defence has maintained that media reports can be accorded little, if any weight,³³ and should not be employed as a means of

²⁶ ICC-01/05-01/08-1386, para. 78.

²⁷ ICC-01/05-01/08-1386, para. 78.

²⁸ ICC-01/05-01/08-1386, para. 78.

²⁹ ICC-01/04-01/07-2635, para. 23.

³⁰ ICC-01/04-01/07-2635, para. 22.

³¹ ICC-01/04-01/06-T-170-ENG, pp.17-19.

³² *Boškovski and Tarčulovski* TJ, para. 265.

³³ See for example, ICC-01/05-01/08-2617; ICC-01/05-01/08-2168; ICC-01/05-01/08-2892-AnxA; ICC-01/05-01/08-2893-AnxA, ICC-01/05-01/08-2916-AnxA.

establishing core issues in the case;³⁴ they are “a highly unreliable source of information”, which “cannot by themselves be sufficient evidence for a court of law.”³⁵

30. The press reports in this case are often comprised of nothing more than anonymous hearsay, innuendo and rumours. Articles are not attributed to a specific reporter,³⁶ or if they are, the Prosecution has not provided information concerning the background and qualifications of the journalist in question.³⁷ The sources of the reported information are not divulged.³⁸

31. Press-statements and media reports cannot safely be relied upon under such circumstances:³⁹ reliability cannot be established by virtue of the fact that the articles in question are available online, or were issued by a well-known media agency,⁴⁰ and it is inadequate to identify the source of the media outlet, which published the article.⁴¹ The Chamber (and the Defence) must be in a position to identify the source of the information reported in the article.⁴²

³⁴ *Taylor*, Decision on Prosecution Motion For Admission of Newspaper Articles, 27 February 2009, paras. 11-14.

³⁵ *Kupreškić*, Decision 3 September 1999, para. 7, See also *Karera*, Decision on Admissibility of Newspaper Article and Subpoena to Journalist, para. 5 “The Prosecution has not shown that the newspaper article complies with Rule 92 bis or, alternatively, that some other provision justifying admission is applicable in the present circumstances”.

³⁶ EVD-T-CHM-00032/CAR-OTP-0071-0049; EVD-T-CHM-00031/CAR-OTP-0071-0043; EVD-T-OTP-00821/CAR-OTP-0030-0274; EVD-T-OTP-00849/CAR-OTP-0013-0320; EVD-T-V20-00006/CAR-V20-0001-0177; EVD-T-OTP-00825/CAR-V20-0001-0165.

³⁷ EVD-T-CHM-00033/CAR-OTP-0071-0063; EVD-T-CHM-00044/CAR-OTP-0071-0051; EVD-T-CHM-00020/CAR-OTP-0069-0271; EVD-T-OTP-00832/CAR-OTP-0013-0106.

³⁸ EVD-T-OTP-00447/CAR-OTP-0013-0151; EVD-P-00051/CAR-OTP-0013-0115; EVD-T-OTP-00854/CAR-OTP-0013-0113.

³⁹ ICC-01/04-01/07-2635, para. 31.

⁴⁰ ICC-01/05-01/08-3034-Conf, para. 109.

⁴¹ EVD-T-OTP-00399/CAR-OTP-0004-0343, EVD-T-OTP-00400/CAR-OTP-0004-0345, EVD-T-OTP-00407/CAR-OTP-0004-0667, EVD-T-OTP-00413/CAR-OTP-0005-0133, EVD-T-OTP-00427/CAR-OTP-0008-0413, EVD-T-OTP-00438/CAR-OTP-0011-0293, EVD-T-OTP-00444/CAR-OTP-0013-0053, EVD-T-OTP-00445/CAR-OTP-0013-0065, EVD-T-OTP-00368/CAR-OTP-0032-0167, OTP failed to provide detail concerning provenance of reported information (ICC-01/05-01/08-2147-Conf-AnxA); EVD-T-OTP-00846/CAR-OTP-0004-0874, EVD-T-OTP-00847/CAR-OTP-0013-0012, EVD-T-OTP-00848/CAR-OTP-0013-0051, EVD-T-OTP-00849 /CAR-OTP-0013-0320, OTP failed to provide

32. The burden remains at all times with the Prosecution to establish that there are exceptional circumstances that would warrant displacing the general caveats against the admission of media articles.

33. The inherent unreliability of such a medium is exacerbated by the propaganda and misinformation that accompanies war reporting. The Chamber heard extensive testimony concerning the fact that the reporting of RFI was inaccurate or biased.⁴³ The Prosecution thus failed to establish that the news-source in question did not have an allegiance towards one of the parties in the case, and that there were no other indicators of bias, which would undermine the reliability of the reports in question.⁴⁴

3. RFI reports are inaccurate, biased and unreliable

34. The dangers of relying upon the contents of news reports as sources of information can be illustrated by an empirical analysis of some of the RFI reports cited to by the Prosecution in its brief. The Prosecution cites almost exclusively to a narrow selection of RFI reports,⁴⁵ forswearing the reports of local radio stations,

detail concerning provenance of reported information (ICC-01/05-01/08-2868-Conf-AnxA; EVD-T-OTP-00822/CAR-OTP-0005-0129, EVD-T-OTP-00820 /CAR-OTP-0013-0114, EVD-T-OTP-00821/CAR-OTP-0030-0274, EVD-T-OTP-00825/CAR-V20-0001-0165, OTP failed to provide detail concerning provenance of reported information (ICC-01/05-01/08-2596-Conf-AnxA); EVD-T-OTP-00823/CAR-OTP-0005-0131, EVD-T-OTP-00824/CAR-OTP-0010-0471, OTP failed to provide detail concerning provenance of reported information (ICC-01/05-01/08-2956-Conf-AnxA); EVD-T-OTP-00852/CAR-OTP-0013-0052, EVD-T-OTP-00853/CAR-OTP-0013-0090, EVD-T-OTP-00854/CAR-OTP-0013-0113, EVD-T-OTP-00855/CAR-OTP-0013-0115, OTP failed to provide detail concerning provenance of reported information (ICC-01/05-01/08-2909-Conf-AnxA); CAR-D04-PPPP-0015/CAR-OTP-0073-0850, OTP failed to provide detail concerning provenance of reported information (ICC-01/05-01/08-2854-Conf-AnxA).

⁴² *Taylor*, Decision on Prosecution Motion for Admission of BBC Radio Broadcasts, 25 February 2009, at para. 27; ICC-01/04-01/07-2635, paras. 29-33.

⁴³ P-173, T-149, pp.22-24; P-45, T-201, pp.65-66; P-15, T-208, p.31; P-15, T-209, p.36; P-15, T-210, p.53; D-18, T-119, p.28 ; D-48, T-267, pp.70-71 ; D-21, T-306, p.83 ; P-33, T-162, p.6.

⁴⁴ ICC-01/04-01/07-2635, para. 27.

⁴⁵ There are no available reports between 25 December 2002 and 13 February 2003 and none between 19 February and 14 March; EVD-T-OTP-00582/CAR-OTP-0031-0124; EVD-T-OTP-00583/CAR-OTP-0031-0136; EVD-T-OTP-00579/CAR-0031-0116; EVD-T-OTP-00578/CAR-OTP-0031-0106.

such as Ndeke Luka,⁴⁶ whose reporting of the conflict was more proximate to the events, and on the face of it more balanced.⁴⁷

35. RFI reports were poorly researched and often, palpably inaccurate. The Chamber heard evidence about its broadcasting stories of MLC cannibalism⁴⁸ without any adequate research into the truth of such serious allegations, which subsequently had to be retracted.⁴⁹

36. This was not, however, an isolated incident of irresponsible reporting. In July 2001, according to CAR-OTP-0008-0409, RFI reported that the leader of the MLC forces which had been sent to the CAR, Colonel Amuli, had been arrested. This allegation is doubly inaccurate; firstly, [REDACTED], the leader of that operation Colonel Bokolombe, was not arrested for his part in it,⁵⁰ and, secondly, Amuli was the MLC Chief of Staff, not the leader of the battalion sent to Bangui.⁵¹ The gratuitous commentary at the end of this false report can be seen as an indication of RFI's institutional bias against Mr. Bemba.

37. Against that background, RFI's reports must be regarded with suspicion. Notably, their broadcasts for 27, 28⁵² and 29⁵³ October make no mention of the presence of MLC troops in Bangui at all, whilst that for 30 October asserts that 500 troops arrived on 26 October and commenced a counter-offensive a day later. It would be extraordinary for reporters neither to have noticed, nor even heard of the presence of those forces, nor their involvement in combat throughout four days,

⁴⁶ Many witnesses mentioned the local radio, see for example P-119, T-85, p.36; P-63, T-108, p.43; P-108, T-132, pp.17-18; D-50, T-254, pp.44-45, T-255, p.45; D-51, T-261, p.31.

⁴⁷ D-51, T-261, pp.30-31; EVD-T-CHM-00035/CAR-D04-0004-0032; EVD-T-CHM-00060/CAR-D04-0002-1380; EVD-T-CHM-00004/CAR-DEF-0001-0205.

⁴⁸ EVD-T-OTP-00580/CAR-OTP-0031-0120, track 1, at 02.50-03.22.

⁴⁹ D-48, T-267, pp.70-71; D-49, T-272, pp.60-63; D-21, T-306, p.83; P-33, T-162, p.6; P-15, T-210, p.53.

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² EVD-T-CHM-00023/CAR-OTP-0005-0125.

⁵³ EVD-T-CHM-00024/CAR-OTP-0005-0127.

and it may be significant that on the day it reported and backdated the MLC presence in Bangui, it also broadcast a wholly self-serving interview with General François Bozizé in Paris.⁵⁴ The only safe finding that the Chamber could make in this regard is that RFI first reported the presence of MLC troops in Bangui on 30 October 2002.

38. RFI's reporting of events in Sibut in February 2003⁵⁵ was inaccurate. Gabriel Khan, the RFI reporter, was amongst the journalists given free rein to interview, photograph and observe the civic leaders and population of Sibut after the arrival of the MLC.⁵⁶ Notably, he did not report the fact that events on that day had been staged, as the Prosecution now alleges.⁵⁷ The Chamber cannot but conclude that the videotape and photographs of that visit by the press is clear evidence of RFI being caught out once again in the act of broadcasting false and misleading news reports. Moreover, following the mission to Sibut, RFI's reporting was "of an entirely different register".⁵⁸ On 26 February 2003, Gabriel Khan wrote an article describing the violence committed by Bozizé's rebels in Sibut and the return of the population from the bush following its liberation by the MLC.⁵⁹ Thus RFI acknowledged the falsehood of its earlier reporting on Sibut. All suggestions that the videotape does not accurately portray the reaction of the Central African people fall to be dismissed.

39. As can be seen from the cited examples, the common feature of falsehood in RFI's reports is the pro-Bozizé/anti-Bemba slant. This is not unexpected. RFI is the

⁵⁴ EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0084; Bozizé denied that his forces were supported by Chadians.

⁵⁵ See for example EVD-T-OTP-00580/CAR-OTP-0031-0120, track 1.

⁵⁶ EVD-T-D04-00008/CAR-DEF-0001-0832; D-21, T-302, pp.23-26; 41; T-304, p.53; T-306, pp.3; p.81-82; P-15, T-208, p.31; T-209, pp.4-5; T-210, p.55; EVD-T-OTP-00730/CAR-OTP-0046-0224; V-02, T-225, pp.3-6.

⁵⁷ Prosecution Closing Brief, paras. 744-746.

⁵⁸ D-21, T-306, p.82.

⁵⁹ EVD-T-OTP-00416/CAR-OTP-0005-0147.

radio station of the French government. Bozizé was welcomed in Paris at the start of his rebellion⁶⁰ and was interviewed by RFI.⁶¹ The French government put significant diplomatic pressure on the MLC to withdraw its support for President Patassé,⁶² to which it ultimately bowed.⁶³ There is even evidence of France providing prior military assistance to Patassé's opponents.⁶⁴

40. RFI sought out for its reports and commended the views of pro-Bozizé activists, such as Ngoungaye Wanfiyo.⁶⁵ Wanfiyo was massively influential within OCODEFAD,⁶⁶ and represented large numbers of victims within the case,⁶⁷ some of whom he assisted to obtain and present false documents.⁶⁸ He also represented the Bozizé government, provided evidence to the OTP, and filed petitions to the ICC to encourage the indictment of Mr. Bemba.⁶⁹

41. RFI's obvious political leanings in this conflict coupled with the inaccuracy of much of its reporting make reliance upon the contents of selected broadcasts extremely difficult. Where those broadcasts are contradicted by direct witness testimony, the Chamber ought always to prefer the latter.

4. Le Citoyen's reports are inaccurate and biased

⁶⁰ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0429; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0168 and 0188; EVD-T-OTP-00438/CAR-OTP-0011-0293 at 0294; D-56, T-315, pp.21-22; Prosecution Closing Brief, para. 169.

⁶¹ EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0084.

⁶² P-15, T-209, pp.20-21.

⁶³ P-15, T-209, pp.19, 28.

⁶⁴ EVD-T-CHM-00045/CAR-D04-0002-2027.

⁶⁵ EVD-T-OTP-00576/CAR-OTP-0031-0099 at 04.00-05.30.

⁶⁶ ICC-01/05-5-Conf-Anx1.

⁶⁷ P-87, T-45, pp.18-19; P-9, T-102, pp.33-34; P-22, T-42, p.43; P-68, T-49, p.49; P-23, T-52, p.32.

⁶⁸ See for example P-22, T-42, pp.43-47.

⁶⁹ ICC-01/05-5-Conf-Anx1.

42. The Prosecution places heavy reliance upon the reporting of Le Citoyen newspaper of the events.⁷⁰ This publication is beset with the same difficulties of credibility as RFI, namely that it reports events in a partisan way, and that many of its reports are inaccurate.

43. It is moreover, seldom independently corroborative of RFI reports because it relies so heavily on those reports for the contents of its own publications.⁷¹ It merely duplicates any inaccuracy or bias expressed by RFI.

44. The submissions above are made against the background of the available material. No original copies of Le Citoyen are available to the parties and participants as exhibits, and hardly any complete copies, rather excerpts of a few pages have been submitted as evidence. It is a striking feature of the chain of custody evidence that the sources of these partial copies are not the offices of the newspaper itself, nor the central library in Bangui, but rather the French embassy in Bangui,⁷² assorted Bozizé government lawyers⁷³ and Legal Representatives of Victims.⁷⁴

45. The provenance of these documents is thus questionable, and whether they were actually produced, printed, distributed or read by anybody at the time must

⁷⁰ Prosecution Closing Brief, paras. 14, 45, 135, 631, and no less than 24 times in the 20 first pages, see fn. 3, 16, 17, 18, 19, 27, 29, 30, 31, 32, 33, 35, 36, 37, 47, 49, 50, 63, 65, 79, 81, 85, 86, 104.

⁷¹ EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0082, 0084; EVD-T-OTP-00832/CAR-OTP-0013-0106 at 0108.

⁷² EVD-T-OTP-00443/CAR-OTP-0013-0005; EVD-T-OTP-00848/CAR-OTP-0013-0051; EVD-T-OTP-00852/CAR-OTP-0013-0052; EVD-T-OTP-00444/CAR-OTP-0013-0053; EVD-T-OTP-00445/CAR-OTP-0013-0065; EVD-T-OTP-00853/CAR-OTP-0013-0090; EVD-T-CHM-00049/CAR-OTP-0013-0098; EVD-T-OTP-00832/CAR-OTP-0013-0106; EVD-T-OTP-00854/CAR-OTP-0013-0113; EVD-T-OTP-00820/CAR-OTP-0013-0114; EVD-T-OTP-00855/CAR-OTP-0013-0115.

⁷³ EVD-T-OTP-00398/CAR-OTP-0004-0336; EVD-T-OTP-00399/CAR-OTP-0004-0343; EVD-T-OTP-00400/CAR-OTP-0004-0345.

⁷⁴ EVD-T-OTP-00825/CAR-V20-0001-0165; EVD-T-V20-00006/CAR-V20-001-0177.

be open to debate. There is evidence of power cuts during the conflict,⁷⁵ and no witness in the whole case has actually testified to having seen and read contemporaneously any copy of *Le Citoyen* now relied upon.

46. The earliest copy apparently available is that dated 5 November 2002.⁷⁶ Significantly, this records, in the same manner as RFI, the alleged arrival of MLC troops on 26 October, and yet no apparent combat activity on 28 or 29 October. It reprints a number of RFI reports as well as the complete text of its interview with Bozizé.⁷⁷ The account is inconsistent with the Prosecution case theory, referring, as it does, to only one arrival of MLC troops, rather than a series of waves. Nor does a counter-offensive on 27 October, followed apparently by a period of two-three days inactivity make sense. Lengbe, of course says the lull was before the large number of MLC troops arrived.⁷⁸ To that end the report in *Le Citoyen* about the date of the arrival of the troops must be unreliable.

47. Like RFI, *Le Citoyen* has also been guilty of reporting false events, including the death of Mustapha, the commander of the operations in the CAR, in December 2002.⁷⁹ [REDACTED].

5. Other Reports

Courts must guard against allowing prosecutions to present evidence which amounts to no more than hearsay demonisation of defendants by human rights groups and the media.⁸⁰

Justice Robertson, QC

⁷⁵ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, minute 36.28; P-87, T-46, p.47; P-23, T-51, p.49; P-79, T-77, p.9; P-63, T-109, p.11; T-116, p.7.

⁷⁶ EVD-T-OTP-00446/CAR-OTP-0013-0082.

⁷⁷ EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0084.

⁷⁸ P-31, T-182, p.43.

⁷⁹ EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0068.

⁸⁰ *Brima*, Separate and Concurring Opinion, Justice Robertson, QC, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150, para. 35.

48. Notwithstanding the *bona fides* of NGOs, their mandates and methodologies are not conducive to reliable, independent and impartial evidence gathering, and their findings (which are primarily geared towards advocacy purposes) cannot be attributed anywhere near the same evidential weight as evidence collected in accordance with the procedural standards and obligations set out in article 54(1) of the Statute.

49. The 2003 FIDH Report, which is relied on by the Prosecution throughout its brief,⁸¹ is founded on anonymous hearsay: the names of all witnesses and sources have been withheld.⁸²

50. The report was prepared on the basis of a mission of extremely limited temporal and geographical scope (Bangui from 25 November – 1 December 2002). The specific purpose of the mission and related report appears to be to agitate for the instigation of proceedings before the ICC against pro-Patassé forces and the Banyamulengue.⁸³ The report does not purport to address the events in a neutral or even-handed manner, as exemplified by the limited scope of the persons and organisations spoken to.⁸⁴

51. No further information is provided concerning the methodology employed to collect information or testimony, in particular, whether any assessment was made as concerns the credibility of the persons spoken to by the FIDH mission, whether records of such interviews were made, and whether the reported

⁸¹ Prosecution Closing Brief, paras. 45, 47, 50, 69, 74, 76, 80, 111, 112, 303, 463, 615, 617, 618, 638, 676, 718. See fn. 384, 405, 448, 479, 555.

⁸² EVD-T-OTP-00395/CAR-OTP-0001-0034 at 0039.

⁸³ Reports prepared for the purposes of litigation have low probative value: *Milošević*, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002.

⁸⁴ CAR-OTP-0001-0070.

information is first-hand, second-hand or even fifth-hand hearsay.⁸⁵ No-one was called from FIDH in order to testify in relation to such matters. In such circumstances, it is not a report upon which the Chamber can safely rely.⁸⁶

52. The 2004 Amnesty International report was also prepared on the basis of unreliable methodologies: two unidentified researchers met with unidentified persons who had been gathered by unidentified persons or entities to meet with them in Bangui. AI's stance regarding the identity of the perpetrators also appears to have been influenced by its position that MLC forces committed similar crimes during earlier forays into the CAR.

53. The fact that the reports are, in some circumstances, relied upon in support of contextual or background elements is irrelevant. If a report has insufficient indicia of reliability, then it has no evidential weight, and it is equally incapable of supporting a background or contextual issue than it is, a core issue in the case.

54. Care should also be taken not to assume that the reporting of anonymous hearsay corroborates it: a baseless rumour does not become true simply because someone else reports it.⁸⁷ Neither, absent clear evidence about methodology, of which there is none, should the Chamber use anonymous accounts within the reports as corroboration of each other.⁸⁸ Allegations which are founded solely on the basis of media and NGO reports should be dismissed.⁸⁹

⁸⁵ *Milutinović et al.*, Decision Denying Prosecution's Second Motion for Admission of Evidence, 13 September 2006, para. 14; *Milutinović*, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, paras. 15-19.

⁸⁶ ICC-01/04-01/07-2635; para. 29. See also, ICC-01/05-01/08-802, para. 255, in which the Trial Chamber found that FIDH reports would not satisfy the balance of probabilities standard in the absence of information concerning the provenance of the allegations contained therein.

⁸⁷ ICC-01/04-01/06-803, para. 106 (anonymous hearsay can only be employed to corroborate other evidence); ICC-01/04-01/07-717, para. 119.

⁸⁸ ICC-02/11-01/11-432, para. 30.

⁸⁹ See for example Prosecution Closing Brief, fn. 19, 31, 36, 37, 313, 339, 421, 1801.

6. Interviews of Persons not called as witnesses

55. The Trial Chamber must give due regard to the principle of orality and ensure that the use – if any – of documentary evidence does not prejudice the rights of Mr. Bemba, in particular, the right to examine, or have examined the witnesses called against him.⁹⁰ The Trial Chamber also has no discretion to admit written statements outside of the framework of the Rome Statute and Rules – in particular, article 69(2) and rule 68.⁹¹

56. In simple terms, a witness is someone on whose statement the Prosecution intends to rely.⁹² A statement is no more than:⁹³

an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.

57. There is little or no requisite formality.⁹⁴

58. The large number of *procès-verbaux* (PVs) admitted in the case fall squarely within the definition of a witness statement.⁹⁵ It is also relevant that it appears that the CAR authorities collected the PVs in order to substantiate their subsequent referral of the situation to the ICC.⁹⁶

59. The fact that the PVs do not actually meet the rule 68 criteria is grounds for excluding them altogether. To hold otherwise would deprive rule 68 of legal effect: namely, if the Prosecution were permitted to argue that statements, which are not

⁹⁰ ICC-01/05-01/08-1386, para. 79.

⁹¹ ICC-01/05-01/08-1386, para. 3.

⁹² ICC-01/04-01/06-376-Corr, p.3.

⁹³ ICC-02/05-03/09-253, para. 13, citing *Blaškić*, Decision 26 September 2000, para. 15.

⁹⁴ ICC-02/05-03/09-253, para. 14.

⁹⁵ ICC-01/05-01/08-2012, paras. 58-71.

⁹⁶ ICC-01/05-01/08-128-AnxA, para. 2.

capable of satisfying the criteria under rule 68, do not have to be submitted through this rule, the exception would be allowed to defeat the rule itself.

60. Even if rule 68 does not *stricto sensu* apply to the PVs, the fact that they do not comply with the criteria set out in rule 68 should, in itself, mean that the Chamber can give them very little evidential weight (and in any case, much less weight than statements admitted through rule 68). If the Statute and Rules require the rule 68 safeguards to apply to statements, which have been collected in accordance with the rigorous standards set out in articles 54, and 55 of the Statute, and rules 111 and 112 of the Rules, then there is even greater reason to restrict the Chamber's reliance on witness statements which do not comport to such standards.

45. In assessing the reliability and weight of the PVs, the Chamber must take into consideration the fact that the "witnesses" have not provided the information under oath – either before a domestic court or more importantly, the ICC, nor is there any indication that they were ever cautioned as to the consequences of false testimony. The "witnesses" have also provided no subsequent confirmation that the PVs were transcribed properly, and accurately reflect the statement provided by the witnesses to the magistrate.

61. The Prosecution's attempt to use the PVs to corroborate other unreliable forms of evidence (such as NGO and media reports)⁹⁷ or to establish contextual elements of war crimes and crimes against humanity⁹⁸ runs directly counter to the Appeals Chamber's direction that the Chamber must treat rule 68 written statements with caution.⁹⁹

⁹⁷ Prosecution Closing Brief, fn.355. P-9 is not a witness of fact, and is unable to provide any corroboration as to the subject matter of the PVs: *Milošević*, Appeal Chamber Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 22.

⁹⁸ Prosecution Closing Brief, fn. 101.

⁹⁹ ICC-01/05-01/08-1386, para. 78.

62. The Appeals Chamber has also confirmed that it would be wrong to apply less rigour to the evidential standard required to establish contextual elements of the crimes, as compared to the elements of Mr. Bemba's individual responsibility: all such elements must be established to the standard of beyond reasonable doubt.¹⁰⁰ Contextual elements form part of the facts and circumstances of the charges; they are not "background information". This is of particular relevance to the Trial Chamber's earlier finding that the prejudicial impact of the admission of the PVs is lessened if they are used to substantiate the contextual elements of the crime.¹⁰¹

63. Finally, it would be inconsistent for the Chamber to rely on the PVs for the truth of their contents, in light of its refusal to allow the Defence to employ victim application forms as a means of challenging the credibility of witnesses. The rationale employed by the Majority in rejecting their admission applies equally to the PVs: namely, they were transcribed by a third person, and the witnesses were not put on notice that the information could be used as evidence before the ICC, nor did they consent to such a use.¹⁰²

7. The Willy Bomengo case file

64. The file relating to the prosecution of Bomengo and others¹⁰³ is admissible for the purposes of establishing the fact of an investigation, trial and sentence. The assertions made by the accused during their interrogation cannot be relied upon for the truth of their contents.

¹⁰⁰ ICC-02/11-01/11-572.

¹⁰¹ ICC-01/05-01/08-2012, para. 69.

¹⁰² ICC-01/05-01/08-2012, para. 101.

¹⁰³ EVD-T-OTP-00393/CAR-DEF-0002-0001

65. When it admitted them into evidence, the Trial Chamber found that the documents were relevant to “the accused's alleged knowledge of the existence of allegations of the commission of crimes by MLC troops in the CAR, and the measures taken to punish them.”¹⁰⁴

66. Admission for any broader purpose is impermissible under the Rome Statute framework. Article 69(2) enshrines the principle of orality, and requires that any deviation to this principle must compromise the fairness of the proceedings or the rights of the Defence.

67. In terms of the circumstances of the Bomengo proceedings, the statement that Mr. Bomengo gave to military police officers was not given under oath, he was not represented by counsel, and although the interview record is allegedly signed by him, Mr. Bomengo does not assert that its contents are true.¹⁰⁵ Even if the written record accurately reflects what he said, it has to be borne in mind that he is a convicted thief who had several weeks in custody with his co-accused to think of a story. It is apparent from the verdict issued in his case that the Court did not find his statements concerning the commission of crimes by the MLC on dates prior to 30 October 2002 to be credible, substantiated, or truthful.¹⁰⁶

68. The contents of the interviews with Mr. Bomengo and others therefore have insufficient probative value to warrant the Chamber's reliance on them to establish the particularities of the alleged crimes committed in the CAR.

C. Presumptions and Inferences

¹⁰⁴ ICC-01/05-01/08-2299, para.59.

¹⁰⁵ EVD-T-OTP-00393/CAR-DEF-0002-0001.

¹⁰⁶ EVD-T-OTP-00393/CAR-DEF-0002-0049 at 0054.

1. The Prosecution should not be permitted radically to alter its case theory or the factual elements underpinning its case

69. An accused has the right to be informed promptly of the charges. This right presupposes that the Prosecution case will not shift its underpinnings or radically alter throughout the case, to the detriment of the Defence.

70. The Prosecution is an impartial Minister of Justice, required to assist the Court in the determination of the truth. Accordingly, if the Prosecution asserts that there are reasonable or substantial grounds to believe that there is evidence in support of certain key facts, then it is obviously improper for the Prosecution to later advance a case that seeks to rebut these same facts.

71. It would also be unsafe for the Trial Chamber to reach a verdict based on the threshold of beyond reasonable doubt, when the case record establishes that both the Prosecution and the Pre-Trial Chamber considered that there were, at the very least, reasonable grounds to doubt the current Prosecution version of the “facts”.

72. In its application for an arrest warrant against Mr. Bemba, the Prosecution dates the intervention of the MLC in CAR after 29 October 2002.¹⁰⁷ The reference to events occurring from 26 October onwards appears to have been designed to capture Patassé’s responsibility from this date,¹⁰⁸ as none of the evidence relied upon supports the presence of the MLC at this point.¹⁰⁹

¹⁰⁷ ICC-01/05-01/08-128-AnxA, para. 14: “Between 11 and 29 October 2002, just before their intervention in Bangui, MLC soldiers [...]”.

¹⁰⁸ ICC-01/05-01/08-128-AnxA, para. 22.

¹⁰⁹ See for example, ICC-01/05-01/08-128-AnxA, para. 23, which relies upon CAR-OTP-0006-0491 at 0546 to substantiate the commencement of hostilities involving the MLC.

73. The Prosecution's original case was also predicated on the position that President Patassé made an essential contribution to the coordination and control of MLC troops operating in CAR:¹¹⁰

This agreement between Bemba and Patassé is evidenced by the actions of the MLC and USP troops on the field. Findiro stated that MLC troops which arrived in the CAR were deployed in coordination with the USP, which were first in line when the MLC did not know the battlefield. The coordination was done by Patassé, who gave orders.

74. The Prosecution also asserted that Patassé made an essential contribution to the realisation of the actions of MLC troops *in situ*, through the following:¹¹¹

Patassé's essential contributions included: (i) requesting the MLC's presence in the CAR; (ii) providing the MLC with base camps; (iii) providing the MLC troops with new uniforms; (iv) providing transportation; (v) financing the troops; (vi) giving additional orders to the troops; and (vii) providing additional troops (USP) as support to MLC. During the MLC's presence in the CAR, the troops were situated in Camp Beal and PK12 with the assistance of Lengbe, who was coordinating with Yangongo. Patassé also provided MLC troops with green uniforms, and provided them with vehicles including pick-ups that were distributed to the MLC *via* the Ministry of Defence. The MLC troops were fed by Patassé through the CAR Public Treasury Fund.

75. Importantly, the Prosecution averred, on the basis of its own evidence, that Patassé coordinated and gave orders to the MLC troops, and that victims had given evidence that their attackers had informed them that it was Patassé that ordered them to kill any rebel sympathisers.¹¹²

76. The Prosecution never withdrew the above positions, nor informed the Trial Chamber or Defence that the witnesses or exhibits, which the Prosecution cited in

¹¹⁰ ICC-01/05-01/08-128-AnxA, para. 73.

¹¹¹ ICC-01/05-01/08-128-AnxA, para. 14.

¹¹² ICC-01/05-01/08-128-AnxA, para. 112.

support of such positions, were false or no longer capable of belief. The Pre-Trial Chamber also found that this evidence met the threshold of *reasonable grounds to believe*, and in so doing, cited the Prosecution position that:¹¹³

Mr. Ange-Felix Patassé gathered combatants from various countries (about 1500 MLC troops headed by Mr. Jean-Pierre Bemba, a mostly Chadian mercenary force of 500 combatants known as the *Bataillon de sécurité frontalière* or the Anti-Zaraguina Brigade, led by Mr Abdoulaye Miskine, and at least 100 Libyan combatants), who were assigned different tasks and whose military operations in the field **were coordinated as a single unified force** (emphasis added).

77. In the absence of a formal withdrawal of the evidence in question, the Trial Chamber is driven to the conclusion that there is evidential corroboration of the Defence case from the fact that both the Prosecution and the Pre-Trial Chamber concluded that there were reasonable grounds to believe that the pro-Patassé forces “were coordinated as a single unified force”, and that President Patassé coordinated, ordered, equipped, and financed the MLC troops whilst they were in the CAR.

2. Electronic recording devices produce inherently reliable evidence

78. The date metadata of [REDACTED] videotapes and photographs provides incontrovertible support of the Defence case regarding the chronology of the crossing of the MLC from DRC to the CAR and undermines Prosecution submissions concerning identification of the perpetrators by dress.

79. The ICC Prosecution has advanced the position to the Appeals Chamber that the existence of time and date stamps on a video should be taken as proof of

¹¹³ ICC-01/05-01/08-14-tENG, para. 50 (evidence accepted by Pre-Trial Chamber at para. 53). See also para. 74.

the authenticity of a video, and accuracy of the images depicted.¹¹⁴ This position presupposes that video and time stamps are presumed to be accurate (in the absence of any proof to the contrary). Trial Chamber II has also ruled that it will accept into evidence the date, which can be inferred from the contents of the document.¹¹⁵

80. Absent evidence to the contrary, and there was none, the dates on the photographs and video tapes submitted by [REDACTED] must be taken as accurate.

3. Adverse inferences should be drawn from the Prosecution's selective use of evidence

81. As if oblivious to its obligation to "investigate incriminating and exonerating circumstances equally",¹¹⁶ the Prosecution's investigation in the present case was one-sided. That any other of the plethora of armed groups on the ground could have been committing crimes is not considered. In 2008-2009, the period in which the Prosecution was investigating the present case, there was considerable material in the public domain concerning the crimes committed by Bozizé's rebels during their violent overthrow of the elected Patassé government.¹¹⁷

82. Evidence that Bozizé's troops were committing crimes in the same areas and at the same time as the alleged MLC crimes undermines the Prosecution case. An

¹¹⁴ ICC-01/04-01/06-T-363-Red-ENG, p.63. The practice of the ICTY also demonstrates that time-stamps are presumed to be accurate: However, the video footage that was shown yesterday, there is a time stamp or a notification about the time. I cannot really suggest to the Chamber, but it might be good for the previous one, from the Witness Bouckaert to be taken off the list. Because, after all, this video material has been shown to this witness and the time is identified on the video footage. *Boškoski et al.*, Transcript.

¹¹⁵ ICC-01/04-01/07-2635, para. 24.

¹¹⁶ Article 54(1)(a) of the ICC Statute.

¹¹⁷ See, for example EVD-T-CHM-00034/CAR-D04-0004-0030; EVD-T-D04-00008/CAR-DEF-0001-0832; EVD-T-CHM-00004/CAR-DEF-0001-0205; EVD-T-CHM-00035/CAR-D04-0004-0032. EVD-T-OTP-00416/CAR-OTP-0005-0147.

impartial Minister of Justice would have sought this information but the Prosecution did not.

83. Nor did the Prosecution appear to look beyond the small number of interlinked victim-witnesses handpicked by the intermediary OCODEFAD. The links between these witnesses and evidence of fabrication and collusion are discussed in detail below. It also appears, from the material disclosed to the Defence, that the Prosecution did not investigate outside of Bangui, failing to visit key areas in which it alleges the MLC was committing crimes, such as Sibut, Damara, Bossembélé and Bossangoa. Prosecution investigators did not speak with the population in these areas about their experiences during the events, or seek to piece together a balanced and detailed picture of the identity of perpetrators. The Prosecution had the MLC in its unwavering cross hairs, and no other theory was to be entertained.

84. This investigative strategy must be viewed against the credible evidence presented by the Defence concerning the widespread and violent crimes committed by Bozizé's rebels – many aspects of which were not challenged. Not one of Bozizé's militia was interviewed by the Prosecution. Adverse inferences should be drawn by the Chamber from the Prosecution's failure thoroughly and properly to investigate the identity of the perpetrators of crimes committed during the conflict.

85. The Prosecution's command responsibility case suffers from similar holes. The Prosecution chose not to call a single member of the FACA or MLC who had been on the ground during the events. Nor did they interview a single soldier who had fought amongst the other loyalist forces, either from among the troops commanded by Abdoulaye Miskine, the Karakos, Balawa, Sarawi, members of Baril's militia, or Victor Ndouba's SCPS, or even the Libyan CEN-SAD forces stationed in Bangui; an extraordinary omission given the ability of these witnesses

to provide the Chamber with first-hand evidence as to how effective control was exercised on the ground.

86. A final lacuna in the Prosecution's investigations in the present case was the systematic failure to look behind the statements given by Prosecution witnesses and verify the credibility and reliability of their claims. While a significant proportion of Prosecution witnesses claimed to have been attacked by the "Banyamulengue" in front of other friends or family members, the Prosecution consistently failed to verify these claims by interviewing the alleged witnesses to the crimes. Take, for example, the very first Prosecution witness P-22. She claimed to have been raped in a house full of relatives, including uncles, wives and children. Four other women were present in the house.¹¹⁸ None were called by the Prosecution in an attempt to verify or assess the credibility of her claims. P-87 testified that the "Banyamulengue" killed her brother. A second brother played a significant part in her story, with P-87 alleging he was present in the house when she was allegedly attacked.¹¹⁹ P-87 confirms that this second brother is still alive,¹²⁰ and confirmed that "No, he was not interviewed. I don't remember that. If he was interviewed, well I wasn't aware of that."¹²¹

87. The Prosecution appears to have interviewed only one witness from Mongoumba, P-29. The Prosecution again failed to verify any of her claims, despite them allegedly involving significant local personalities like "Mayor [REDACTED]" and the "Monseigneur",¹²² necessarily making her claims able to be cross-checked. No attempt was made to do so. P-29 also gave second-hand hearsay accounts of other alleged attacks by the "Banyamulengue" in Mongoumba, including a girl

¹¹⁸ P-22, T-43, pp.21-22.

¹¹⁹ P-87, T-44, pp.13-14; T-46, pp. 9, 42.

¹²⁰ P-87, T-46, p.9.

¹²¹ P-87, T-47, p.9.

¹²² P-29, T-81, p.11.

who was shot in her parents' house, and a Muslim called [REDACTED] who was also killed. She was examined as to whether the girls' husband or parents were interviewed, or whether any of [REDACTED] friends, relatives or parents were contacted by the Prosecution to verify her allegations.¹²³ Again, nothing had been done.

88. In the context of an analysis of the weakness of Prosecution investigations in the *Katanga* case, the Prosecution has been described as having "both a legal and ethical obligation to make all reasonable efforts to ensure that the evidence it presents is reliable".¹²⁴ During the Bemba investigations, a single account of alleged "Banyalamulenge" atrocities was deemed sufficient, and the book was closed. This was not a search for the truth.

D. THE CREDIBILITY OF THE PROSECUTION'S WITNESSES

1. The central Prosecution witnesses whose evidence cannot be relied upon

89. The Prosecution refers to this group of witnesses to support a wide range of assertions across a broad temporal and geographical area. Their evidence is at best hearsay, often unattributed and secondhand, at worst little more than rumour, myth or gossip.

90. There is also good reason to doubt the *bona fides* of the witnesses in testifying, and to question whether their evidence is objective or even represents an attempt at honesty. Each had an open hostility towards the Accused, and was quite prepared to say anything that was damaging to him, truthful or not.

91. Often there was an ancillary motive for testifying, usually financial, and in most cases demonstrable lies were told on oath. Their evidence upon close analysis,

¹²³ P-29, T-81, pp.16-18.

¹²⁴ ICC-01/04-01/07-3436-AnxI, para. 141.

lacks indicia of reliability and probity. No reliance should be placed on any of them on important issues, even if they appear to corroborate each other.

(a) P-213: [REDACTED]

P-213 was one of Mr. Bemba's many close protection officers,¹²⁵ although his evidence might lead one to believe that he was the only one. [REDACTED].¹²⁶

92. [REDACTED].¹²⁷ Eventually, in 2009, with the help of [REDACTED], he composed a letter to the ICC offering himself as a witness in the Bemba case.¹²⁸ It is plain from his evidence that his sole concern was that he should obtain [REDACTED] in return for his cooperation with the Court.¹²⁹

93. The financial and material benefits to him [REDACTED] of testifying are almost incalculably large and it has to be noted, firstly, that he sought out the Prosecution and not the other way around,¹³⁰ and secondly, [REDACTED].¹³¹ He is a simple [REDACTED] and a mercenary witness.

94. An ancillary motivation for the tenor of his evidence arises from the fact that he attributes some responsibility to Mr. Bemba for the death of [REDACTED] who was fighting for Kabila in 1998.¹³²

95. P-213 told the Chamber a number of palpable lies. His account of [REDACTED] Mr. Bemba on visits to, inter alia PK22, Bossembélé, Mongoumba

¹²⁵ P-213, T-186, p.8.

¹²⁶ P-213, T-189, pp.10-11.

¹²⁷ P-213, T-189, pp.19-21; pp.27-29; pp.31-32.

¹²⁸ P-213, T-189, pp.35-36; EVD-T-OTP 00736/CAR-OTP-0062-0094_R01.

¹²⁹ P-213, T-189, p.33; 37-38; 40-41.

¹³⁰ P-213, T-189, pp.35-38.

¹³¹ P-213, T-189, p.37.

¹³² P-213, T-188, p.10.

and other cities¹³³ finds no support anywhere else in the evidence. V-1 specifically denied that Mr. Bemba visited Mongoumba (a small town) or that any helicopter had landed there during the conflict,¹³⁴ and the Prosecution and the LRV (whose case it was that he did) chose not to put the suggestion to P-29,¹³⁵ the only other witness from that area. Moreover, the Prosecution did not put the alleged visit of Mr. Bemba to various Defence witnesses who said they were present in Bossembélé.¹³⁶ The Chamber must infer those alleged visits have been abandoned by the parties and participants as untrue.

96. P-213 was unable to describe a single feature of [REDACTED], and more particularly changed in his evidence dramatically from [REDACTED], once confronted with a map of the CAR.¹³⁷

97. The Prosecution rely exclusively on P-213 to support the suggestion that Mr. Bemba addressed the departing forces at Zongo.¹³⁸ This allegation is also untrue. Several witnesses have said so and no attempt to contradict them has been made.¹³⁹ Neither does the suggestion resonate with the Prosecution's current case theory that 500 men crossed on 26 October¹⁴⁰ (as opposed to the 151 recorded in the cahier)¹⁴¹ i.e. one battalion, and the rest crossed in waves thereafter, with the commander crossing on 30 October.¹⁴² Which part of the "wave" therefore did Mr. Bemba address? There would have been little sense in Mr. Bemba travelling from Gbadolite to deliver such an address to a portion of them, and less still in the report

¹³³ P-213, T-186, p.63, 65; T-187, p.12.

¹³⁴ V-01, T-221, p.17.

¹³⁵ P-29, T-80, p.8.

¹³⁶ See, for example, D-19, T-289, p.8.

¹³⁷ P-213, T-191, pp.19-23; pp.26-27.

¹³⁸ Prosecution Closing Brief, para. 519.

¹³⁹ P-65, T-171, p.8; D-19, T-286, p.18; T-292, p.49; D-45, T-294, p.11; D-21, T-306, p.3, 69; D-66, T-281, p.4.

¹⁴⁰ Prosecution Closing Brief, para. 11.

¹⁴¹ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1631.

¹⁴² EVD-T-OTP-00702/CAR-D04-0002-1514 at 1637; P-33; T-159, p.35; P-65, T-170, pp.51-52; D-53, T-230, pp.42-43; T-234, p.41; D-49, T-270, pp.47-52, 55-56; D-19, T-284, pp.18-19, 26.

of 26 October recording the arrival of 150 men into which Mr. Bemba was copied¹⁴³ or Mr. Bemba's visit to PK12 a few days later to address the troops as to their conduct.¹⁴⁴

98. P-213's evidence finds further contradiction within the Prosecution case itself. P-36, disagrees with his recollection of the planning meeting which took place with the senior members of the MLC prior to the insertion of troops in October 2002¹⁴⁵ and his account of Mr. Bemba's address to the troops at PK12.¹⁴⁶ [REDACTED].

99. [REDACTED],¹⁴⁷ not least because of his revision of his evidence to the effect that those visits were carried out by helicopter not motor car.¹⁴⁸ [REDACTED].¹⁴⁹

100. Equally implausible are his accounts of [REDACTED] conversations between Mr. Bemba and President Patassé¹⁵⁰ [REDACTED](again contradicted by P-36),¹⁵¹ Mr. Bemba and Mustapha, [REDACTED] on the telephone,¹⁵² and Mr. Bemba and MLC soldiers.¹⁵³

101. His evidence about Mr. Bemba's command practices generally is not based on any direct experience but rather on sections of his autobiography, which he had taken the trouble to read.¹⁵⁴ It is, even if true, worthless.

¹⁴³ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1631.

¹⁴⁴ See for example, P-65, T-170, pp.59-61; P-36, T-215, pp.19-21.

¹⁴⁵ P-213, T-186, pp.30-35; T-190, p.25; P-36, T-215, p.41.

¹⁴⁶ P-213, T-187, p.21; P-36, T-215, p.20.

¹⁴⁷ P-213, T-191, pp.19-23, 26-27, 34-35.

¹⁴⁸ [REDACTED].

¹⁴⁹ P-213, T-187, pp.19-20.

¹⁵⁰ [REDACTED].

¹⁵¹ P-213, T-187, p.4; T-191, pp.53-54, 62.

¹⁵² P-213, T-187, p.27.

¹⁵³ P-213, T-187, pp.66-67.

¹⁵⁴ P-213, T-187, pp.33-34, 37-38.

102. His knowledge of crimes committed by MLC soldiers from his conversations with them after the conflict are simple invention and involve “Captain Willy” committing rapes and a confession from a man who is conveniently either incarcerated or dead.¹⁵⁵

103. His evidence is a complete montage of hearsay, rumour and invention designed principally to [REDACTED].¹⁵⁶ A few lies are not a great price to pay for that.

(b) P-169: [REDACTED]

104. P-169 was a spy paid by [REDACTED] who allegedly masqueraded as a [REDACTED].¹⁵⁷ Although the extent to which he was prepared to acknowledge this was limited to activities in the DRC,¹⁵⁸ that itself is implausible, not least because of his presence in the CAR during the conflict together with the very man who had recruited him, P-173, [REDACTED].¹⁵⁹ He continued to report to the Kabila regime after March 2003 about the MLC, providing them with information intended to discredit Mr. Bemba.¹⁶⁰

105. On his own admission he was corrupted by the offer of money.¹⁶¹ Money continues to be a strong motivator for him in his continued participation in the case, as has been seen from his active leadership of the cause of the 22 witnesses. It is not his only motivation. He perceives himself as a victim of the MLC as a result of events in 1998.¹⁶² He was specifically selected for his role as a spy because he was

¹⁵⁵ P-213, T-187, pp.38-39.

¹⁵⁶ P-213, T-189, p.33, 37.

¹⁵⁷ P-169, T-136, p.19-20, 23.

¹⁵⁸ P-169, T-137, p.36; T-139, p.7, 9, 12-13, 15-16.

¹⁵⁹ P-169, T-137, p.36.

¹⁶⁰ P-169, T-139, pp.26-27.

¹⁶¹ P-169, T-139, p.12.

¹⁶² P-169, T-138, pp.17-20.

resentful towards Mr. Bemba and the MLC.¹⁶³ He is “angry against Jean-Pierre Bemba.”¹⁶⁴

106. It is an alarming feature of the case that this [REDACTED], the Accused’s political arch enemy, has the contact details of all the Prosecution’s protected witnesses, made contact with them, called meetings and has taken to acting as their negotiator with the Prosecution and the Registry of the ICC.¹⁶⁵ No satisfactory explanation has been offered as to how or why that has happened but the obvious inference is that there is a hand on the tiller of this case which extends from Kinshasa to Bangui and thence to The Hague.

107. P-169’s evidence is in large part a work of fantasy. He claims to have met a number of significant and important actors in the events, including Mr. Bemba.¹⁶⁶ The allegation is without corroboration or foundation. It is a fabrication. Similarly, his alleged meeting with Mr. Patrick Mbong, a man who had apparently come to buy gold from Mr. Bemba¹⁶⁷ is an invention.

108. The witness’ animus towards Mr. Bemba and the MLC is plain from his determination to put the blame solely on the Banyamulengue, by systematically avoiding all questions about FACA soldiers, pretending he knew nothing because he was not a soldier or didn’t remember.¹⁶⁸ Indeed such was the depth of his discomfort during Defence questions on that point, the Presiding Judge had to intervene to remind him that these were relevant questions which he had to answer.¹⁶⁹

¹⁶³ P-169, T-139, p.17.

¹⁶⁴ P-169, T-139, p.22.

¹⁶⁵ EVD-T-D04-00057/CAR-OTP-0072-0504_R01; EVD-T-D04-00056/CAR-OTP-0072-0508_R01.

¹⁶⁶ P-169, T-138, p.21.

¹⁶⁷ P-169, T-138, p.23.

¹⁶⁸ P-169, T-139, pp.44-45.

¹⁶⁹ P-169, T-139, pp.45-46; T-141, pp.43, 47, 51, 52.

109. He made obvious efforts to exaggerate the inculpatory effect of his evidence, changing significant aspects of his account as previously recorded in his witness statement. For example, whereas in his statement he said that **all** the soldiers had the same new uniform, he testified that some were wearing old ones.¹⁷⁰ He also testified that he didn't know who provided Thurayas to the soldiers, but in his statement he was clear it was Patassé.¹⁷¹

110. His demeanour as a witness left the clearest impression of a man not trying to be helpful to the Chamber or tell the truth. He systematically denied in Court everything that could imply that FACA soldiers were involved in the conflict, while accusing Defence Counsel of trying to irritate him.¹⁷² He developed the practice, before answering every question, of demanding that Counsel tell him what he had said in his statement.¹⁷³

111. So profound was his reluctance to cooperate that the Chamber had to have VWU explain to the witness his duty to answer Defence questions,¹⁷⁴ and to adjourn the hearing over a weekend to allow him to consider whether he was prepared to answer questions.¹⁷⁵ His behaviour before the Trial Chamber left little doubt that this was a witness upon whom no reliance could be placed.

112. The basic premise of his evidence is implausible, namely that the command of the loyalist forces, as well as the operational commander of the MLC should [REDACTED] and overhear phone calls. Having said that, his evidence about the content of those calls is unpersuasive. It amounts to him having heard two alleged

¹⁷⁰ P-169, T-140, pp.5-6.

¹⁷¹ P-169, T-140, p.13.

¹⁷² P-169, T-139, pp.45- 46; T-141, pp.43, 47, 51- 52.

¹⁷³ See P-169, T-140, pp.14, 16-18; T-141, pp.40, 42, 46, 48, 52; T-142, p.20.

¹⁷⁴ P-169, T-140, p.19.

¹⁷⁵ P-169, T-141, pp.54-55.

calls between Mustapha and Bemba, in which Mustapha used the term of address “Excellency”, but he was unable to hear the other collocutor.¹⁷⁶

113. His conclusions and assertions are implausible and unreliable. Despite the fact that he saw no crime committed with his own eyes,¹⁷⁷ just some bodies,¹⁷⁸ he asserts his knowledge of crimes based on what he has heard on the radio or has been told by people.¹⁷⁹ Although he claims that the soldiers bragged about their deeds,¹⁸⁰ most of the time he is simply reporting gossip.¹⁸¹ Often his information was obtained six months to one year later.¹⁸² His alleged sources are dubious. He was supposedly told about some events by [REDACTED],¹⁸³ as well as [REDACTED],¹⁸⁴ [REDACTED],¹⁸⁵ Richard, Frank.¹⁸⁶ There is no evidence such people existed. The witness provided no adequate description, and the Prosecution chose not to seek to identify them in records or in its cross examination of the many Defence witnesses who could have confirmed or denied their existence.

114. There is no corroboration for any of the events he claims happened. His whole testimony on the crossing of looted goods is not credible: he acknowledges that he never saw soldiers pillage anything and that [REDACTED].¹⁸⁷ His evidence included demonstrable lies. His account, for example of the looting of a cotton bale by the Banyamulengue is impossible as the factory had been dismantled even before MLC’s arrival.¹⁸⁸

¹⁷⁶ P-169, T-140, pp.5-6.

¹⁷⁷ See for example P-169, T-140, p.21; T-141, p.31.

¹⁷⁸ P-169, T-136, pp.39, 43.

¹⁷⁹ P-169, T-137, pp.27-28.

¹⁸⁰ P-169, T-138, p.3.

¹⁸¹ P-169, T-137, pp.48, 56.

¹⁸² P-169, T-136, p.39.

¹⁸³ P-169, T-136, p.40.

¹⁸⁴ P-169, T-136, p.40.

¹⁸⁵ P-169, T-136, p.43.

¹⁸⁶ P-169, T-136, p.43.

¹⁸⁷ P-169, T-141, p.31.

¹⁸⁸ P-169, T-140, p.29.

115. His story of the Banyamulengue, Ngoundele, who used to rape only children to contaminate them with AIDS,¹⁸⁹ is at best rumour, at worst a blatant lie. The only inference that the Chamber can draw from the Prosecution's failure to put that name to any MLC witness called by either party is that the Prosecution has abandoned the allegation as untrue.¹⁹⁰

116. Much reliance is placed upon his evidence in relation to the allegation that Mr. Bemba ordered the commission of crimes at Mongoumba,¹⁹¹ however, in the light of all of the above, that evidence lacks any credibility. Leaving aside the witness' obvious lack of objectivity, the story is implausible in any event. The witness couldn't possibly know what, if any, orders Mr. Bemba gave, as he couldn't hear what was said at the other end of the telephone,¹⁹² and he couldn't have known what happened in Mongoumba, as he was himself in Bossangoa at that time.¹⁹³

(c) P-173: [REDACTED]

117. P-173 was [REDACTED].¹⁹⁴ During the relevant period he was purporting to be a [REDACTED]. He was an opponent of Mr. Bemba before, during and after the conflict in the CAR. He fought the MLC at Mobaye in 2002.¹⁹⁵ After the war, he continued to work to destroy the MLC and Mr. Bemba personally, firstly, by trying to [REDACTED],¹⁹⁶ and secondly, by [REDACTED].¹⁹⁷ A man who was determined

¹⁸⁹ P-169, T-138, p.3.

¹⁹⁰ P-169, T-137, p.57.

¹⁹¹ Prosecution Closing Brief, para. 702.

¹⁹² P-169, T-136, p.41.

¹⁹³ P-169, T-136, p.40.

¹⁹⁴ P-173, T-144, p.9.

¹⁹⁵ P-173, T-144, p.9.

¹⁹⁶ P-173, T-145, pp.56-57.

¹⁹⁷ P-173, T-145, pp.57-58.

to destroy Mr. Bemba and his political party can have no credibility as a witness against him.

118. As noted above, P-173 [REDACTED] was responsible for recruiting P-169 [REDACTED] to spy on the MLC. As with P-169, he gives a great deal of hearsay evidence about all aspects of the case, seldom identifying the sources of his information. One inference is that P-169 was one of his sources. There is, however, a marked lack of synergy between their evidence. For example:

- [REDACTED],¹⁹⁸ [REDACTED];¹⁹⁹
- [REDACTED],²⁰⁰ [REDACTED];²⁰¹
- [REDACTED];²⁰² [REDACTED];²⁰³
- [REDACTED]²⁰⁴ [REDACTED];²⁰⁵
- [REDACTED];²⁰⁶ [REDACTED].²⁰⁷

119. These inconsistencies derive from the evident difficulty that both P-169 and P-173 faced in attempting to fabricate a coherent narrative.

120. P-173's evidence covered a wide range of topics, many of which he could not have known about, and contained a number of untruths. He testified that Mr. Bemba would come to the CAR every week.²⁰⁸ He testified about the sanctions that could have been applied to the soldiers when they returned to their home country,

¹⁹⁸ P-169, T-139, p.10.

¹⁹⁹ P-173, T-144, p.24.

²⁰⁰ P-169, T-139, p.13.

²⁰¹ P-173, T-145, p.48.

²⁰² P-169, T-139, p.12.

²⁰³ P-173, T-145, pp.49-50.

²⁰⁴ P-169, T-139, p.10.

²⁰⁵ P-173, T-146, pp.33-35.

²⁰⁶ P-169, T-141, pp.3-6.

²⁰⁷ P-173, T-146, pp.36-37.

²⁰⁸ P-173, T-146, p.40.

and the money that they would receive when they got back,²⁰⁹ whereas he was [REDACTED], and had no way of knowing anything about punishments or rewards being handed out in Gbadolite.²¹⁰ He testified about looting in Mongoumba even though he only went there in 1997.²¹¹

121. His assertion that the MLC soldiers were not paid leading them to loot the local population²¹² is contradicted by the weight of the evidence.²¹³ His evidence on this topic is inconsistent, as firstly, he said that Mustapha would buy food for the soldiers from the money he received from Patassé,²¹⁴ therefore they would not have to loot to feed themselves. Later, however, he stated that Patassé gave money to Mr. Bemba for onward distribution to the troops, but that didn't happen.²¹⁵

122. His ability to observe anything or have any contact with MLC soldiers [REDACTED] was limited. He confined himself to PK5, PK12, PK15 and Damara during the entire war²¹⁶ and even in those localities he didn't see any crimes with his own eyes.²¹⁷ Most of his information came from the radio and from hearsay.²¹⁸ His information about the MLC came from "friends".²¹⁹ Much of what he regurgitated was "well-known stories in Bangui".²²⁰

123. Given that he had been recognized by MLC soldiers in Bangui [REDACTED],²²¹ and that [REDACTED],²²² it is inconceivable that [REDACTED].

²⁰⁹ P-173, T-144, pp.66-70, 72, 76.

²¹⁰ P-173, T-136, pp.14-15.

²¹¹ P-173, T-149, p.37.

²¹² P-173, T-144, pp.34-35.

²¹³ P-6, T-96, pp.16-17; P-9, T-106, pp.45-46, 50-53; P-63, T-116, pp.30-31; P-31, T-182, pp.29-30.

²¹⁴ P-173, T-146, pp.15-16, 17, 19.

²¹⁵ P-173, T-144, pp.67-68.

²¹⁶ P-173, T-149, p.31.

²¹⁷ P-173, T-147, pp.21-23; 27-28; T-149, pp.31-32, 39, 42, 52.

²¹⁸ P-173, T-146, p.19; T-149, pp.33-34, 36, 60.

²¹⁹ P-173, T-144, pp.14, 57.

²²⁰ P-173, T-144, p.28; T-145, p.29.

²²¹ P-173, T-144, p.46.

124. His evidence about crimes is exaggerated and hyperbolic. He talks, for example about the “razing” of villages,²²³ which appears nowhere else in the evidence of the whole case. He makes assumptions and places exclusive blame on the MLC, assuming always that everything they have was looted.²²⁴ He contradicts all Defence suggestions concerning, for example, the chain of command, notwithstanding the fact that he has no basis for doing so. Even though he was never in the frontline and could not possibly know if the troops were mixed²²⁵ he, nevertheless, testified that the MLC and FACA were not fighting together.²²⁶

125. This witness has made a career out of [REDACTED] try to destroy the MLC and Mr. Bemba. He has lied to the Chamber, exaggerated and made up his evidence. At best he has recycled gossip and rumour. No reliance should be placed on his testimony.

(d) P-178: [REDACTED]

126. P-178 represents the third part of a triumvirate of witnesses who might loosely be described as “hangers-on”. He claims to have had contact with a number of MLC officers and soldiers during the period of the conflict by reason of his being [REDACTED] who occasionally [REDACTED].²²⁷ Of course his further connection with P-169 and P-173 is his active collaboration with them in the claiming of extra funds from the ICC as compensation for their becoming witnesses.²²⁸

²²² P-173, T-145, p.54.

²²³ P-173, T-144, p.43.

²²⁴ P-173, T-149, p.55.

²²⁵ P-173, T-144, pp.21-22, 30.

²²⁶ P-173, T-145, p.61.

²²⁷ P-178, T-150, pp.8, 24-25.

²²⁸ EVD-T-D04-00057/CAR-OTP-0072-00504; EVD-T-D04-00056/CAR-OTP-0072-0508.

127. The starting point for P-178 is the fact that he can give no direct evidence of any crime because he did not see one committed.²²⁹ More than that, if one is to give any credence to his cover story, he can have had little opportunity to mix with or observe MLC soldiers or officers, because he was for the larger part of the time, either [REDACTED] or travelling. He couldn't, apart from anything else, go to the front.²³⁰

128. Notwithstanding that, he purports to have a great deal of knowledge of crimes. The sources of his knowledge, however, are all hearsay, including the radio,²³¹ people he met in bush taxis,²³² and other unnamed individuals.²³³

129. In other respects his evidence is either mere speculation or the product of an active imagination. He opines that "Mr Bemba perhaps told Mustapha, "Well, as someone dear to me is dead, you have to kill all those people there." Perhaps that is what was said. That would be it."²³⁴ Elsewhere he claims that Mr. Bemba was the ultimate beneficiary of all looted goods which were taken back to Gbadolite²³⁵ although he never went there.²³⁶ He asserts that Mr. Bemba decorated the MLC officers after the war instead of punishing them²³⁷ without any basis whatsoever.

130. He claims that the MLC were untrained and employed child soldiers on the sole basis that he had seen children who were using a cane or a baton behind a

²²⁹ P-178, T-157, pp.4, 36-38.

²³⁰ P-178, T-151, p.15.

²³¹ P-178, T-151, p.8.

²³² P-178, T-151, pp.8, 14, 18.

²³³ P-178, T-156, pp.33-35, 41, 42-46.

²³⁴ P-178, T-151, p.21.

²³⁵ P-178, T-150, p.73.

²³⁶ P-178, T-150, p.74.

²³⁷ P-178, T-151, p.39.

house,²³⁸ and he claims to have met [REDACTED] several times, despite the fact that [REDACTED] only visited Bangui once.²³⁹

131. The basis for the witness' resentment towards Mr. Bemba seems to be his belief that the only reason he came to the CAR was to "enrich himself on the back of Central African people, to equip himself for his rebellion".²⁴⁰ The purpose of his testimony seems to strike a chord with the attempts of P-173 to discredit Mr. Bemba, and the witness is quite prepared to make assertions about Mr. Bemba's failure to prevent or punish crimes,²⁴¹ as well as his knowledge of them.²⁴²

132. P-178's lack of objectivity as a witness is best illustrated by, firstly, the hyperbolic language he used throughout his testimony to demonise the Accused and the MLC, testifying that

absolutely everybody, without any exception, was involved in the looting. They looted from the commander of the operation right down to the -- every soldier, no exceptions;²⁴³ and
[...] once a neighbourhood or a town was captured they would mop it up, and it is during that mop-up operation that they went from house to house, looting, stealing, raping, and whenever they ran into any resistance they would kill the persons who were resisting.²⁴⁴

133. He also stated that the Banyamulengue were guilty of "barbaric conduct" and that they "were savages",²⁴⁵ they were "glorifying themselves".²⁴⁶

²³⁸ P-178, T-151, p.43.

²³⁹ P-178, T-154, pp.63-65.

²⁴⁰ P-178, T-151, p.61.

²⁴¹ P-178, T-151, pp.62-63.

²⁴² P-178, T-151, pp.62-63.

²⁴³ P-178, T-150, p.66.

²⁴⁴ P-178, T-150, p.73.

²⁴⁵ P-178, T-151, p.35.

²⁴⁶ P-178, T-151, p.36.

134. Secondly, it manifests in his transparent concern to see Mr. Bemba convicted. He told the Chamber, for example, "I'm trying to help the ICC to obtain the correct information so that justice may be done in relation to the crimes committed by Bemba"²⁴⁷ and "Mr. Bemba will not leave this place, I can tell you that. He will be sentenced."²⁴⁸ Moreover, he asserted that Mr. Bemba was aware of the crimes because, even if he didn't hear Mustapha talking about the crimes over the phone, he was writing reports to Mr. Bemba and the reports "will not be incomplete".²⁴⁹

135. This witness' evidence about his knowledge of crimes, the command system among the loyalist forces, and Mr. Bemba's contacts with the MLC troops on the ground is without any value whatsoever.

(e) P-33: [REDACTED]

136. Originally a [REDACTED].²⁵⁰ At the time he gave evidence he was working [REDACTED].²⁵¹

137. P-33 is a member of [REDACTED],²⁵² [REDACTED]. Certainly, all of them, like P-33, benefitted from [REDACTED].

138. As [REDACTED],²⁵³ P-33 was in no position to know either about events in Bangui, or about military matters. He acknowledged this himself in his evidence on a number of occasions²⁵⁴

²⁴⁷ P-178, T-155, p.17.

²⁴⁸ P-178, T-155, p.22.

²⁴⁹ P-178, T-154, pp.46-47.

²⁵⁰ P-33, T-163, pp.62-63.

²⁵¹ P-33, T-164, p.36.

²⁵² [REDACTED].

²⁵³ P-33, T-158, p.56.

²⁵⁴ P-33, T-162, p.52, P-33, T-162, p.53, P-33, T-163, p.7

139. As an illustration of how little he knew, even through [REDACTED], he did not know that Mr. Bemba had visited the CAR at all in 2002-2003.²⁵⁵ Nonetheless, he was prepared to advance a deal of opinion about the command chain, and recycle gossip and rumour about the crimes committed by MLC forces. Both the Prosecution and LRV have been keen to use him as a key witness in their final trial briefs especially regarding the command superiority and the alleged knowledge of Mr. Bemba about crimes.²⁵⁶

140. His evidence ascribed full responsibility for any crimes in the CAR to the MLC and imputed knowledge to Mr. Bemba. He gave a caricature portrait of Mr. Bemba as an omnipotent dictator,²⁵⁷ demonised the MLC soldiers with baseless stories about mythical units (“effacer le tableau”),²⁵⁸ refused to acknowledge even the possibility that Central African soldiers might have offended,²⁵⁹ and rejected genuine documents as forgeries where they tended to show that Mr. Bemba took steps to punish crimes in the DRC.²⁶⁰

141. He also sought to protect the reputation of [REDACTED], General Amuli,²⁶¹ [REDACTED], [REDACTED]. Accordingly, he is bound to say that the MLC were a well-trained, disciplined and professional force,²⁶² notwithstanding his evidence about their behaviour in Bangui,²⁶³ because General Amuli was the Chef d’Etat Major. He was, moreover, only repeating what Amuli [REDACTED] when he asserted that Mustapha received orders directly from Bemba in the CAR.²⁶⁴ Amuli,

²⁵⁵ P-33, T-160, p.15.

²⁵⁶ See for example, Prosecution Closing Brief, paras. 531, 534, 535, 571, 630; LRV Closing Brief, paras. 234, 249, 301, 314.

²⁵⁷ See for example, P-33, T-163, p.10.

²⁵⁸ See for example, P-33, T-163, p.10.

²⁵⁹ P-33, T-163, p.14.

²⁶⁰ P-33, T-163, pp.18-20.

²⁶¹ P-33, T-158, p.45.

²⁶² P-33, T-159, p.7; T-160, p.4.

²⁶³ P-33, T-163, pp.27-28.

²⁶⁴ P-33, T-161, pp.14-15.

of course, would say that, given that all the relevant messages in the cahiers de communication were addressed to him. The irony of this evidence is that it only tends to reveal that Mustapha checked all his instructions with his Chef d'Etat Major, wherever they came from.²⁶⁵

142. P-33's assertion that Mr. Bemba commanded the military operations in the DRC as well,²⁶⁶ based upon his experience of [REDACTED],²⁶⁷ is unworthy of sensible consideration.

143. His evidence about looted goods was patently disingenuous, if not downright dishonest. He asserted that there were looted vehicles in Gbadolite²⁶⁸ being driven by MLC officials, notwithstanding the fact that he knew that Amuli's vehicle had been taken from the enemy and not looted,²⁶⁹ and Bokolombe's was a present from Patassé.²⁷⁰ Significantly, of course, [REDACTED].²⁷¹ [REDACTED] a report or reports²⁷² just before the end of the conflict²⁷³ concerning crimes in Bangui, [REDACTED],²⁷⁴ is impossible to accept.

144. P-33's evidence is borne of little or no direct knowledge of events whatsoever, it is motivated by a need to fulfil a deal linked to [REDACTED], and is in many respects, just dishonest. It cannot be relied upon.

(f) P-36: [REDACTED]

²⁶⁵ P-33, T-161, pp.17-18.

²⁶⁶ P-33, T-159, p.51.

²⁶⁷ P-33, T-158, pp.34-35, 56; EVD-T-OTP-00357/CAR-OTP-0009-0134.

²⁶⁸ P-33, T-163, pp.37-38.

²⁶⁹ P-33, T-163, p.41.

²⁷⁰ P-33, T-163, p.45.

²⁷¹ P-36, T-215, p.4.

²⁷² P-33, T-162, p.47.

²⁷³ P-33, T-162, pp.39-40, 42.

²⁷⁴ P-33, T-160, pp.11-12.

145. P-36 was [REDACTED]. He is now [REDACTED],²⁷⁵ [REDACTED]. [REDACTED],²⁷⁶ [REDACTED].²⁷⁷

146. As [REDACTED]. He was interviewed by the Prosecution three times over the course of two days in 2008²⁷⁸ and between the 2nd and 3rd interviews [REDACTED].²⁷⁹ This resulted in a significant change in his recollection, one which he carried through to his testimony before the Chamber.²⁸⁰

147. P-36's evidence as to command structure generally [REDACTED]. His assessment that the Central African authorities necessarily would have coordinated and commanded forces on the ground in 2002 is highly valuable to the Chamber.²⁸¹

148. His assessment of Mr. Bemba's qualities (or rather deficiencies) as a military commander are perhaps the most precious available.²⁸² As indeed are his responses to questions about his attitudes to discipline.²⁸³ His evidence about the training and discipline of the MLC troops is objective and reliable. He testified that:

- The MLC soldiers and the intelligence officers were trained in one of the many training centres and the more disciplined received leadership training.²⁸⁴ The soldiers would also be trained on military discipline.²⁸⁵

²⁷⁵ P-36, T-213, p.12.

²⁷⁶ P-36, T-217, pp.4-5.

²⁷⁷ P-36, T-217, pp.8-9.

²⁷⁸ CAR-OTP-0009-0345_R01; CAR-OTP-0009-0402_R01.

²⁷⁹ P-36, T-218, pp.29-30.

²⁸⁰ In particular, he suddenly recalled that [REDACTED].

²⁸¹ P-36, T-218, pp.44-46.

²⁸² P-36, T-217, p.31.

²⁸³ P-36, T-217, p.44.

²⁸⁴ P-36, T-213, pp.50-51.

²⁸⁵ P-36, T-213, p.51.

- The minimum age to be a soldier in the MLC was 18 and the commander-in-chief insisted that this rule had to be respected and those under 18 had to be excluded of the army.²⁸⁶
- A code of conduct of the Army, created at the beginning of the movement punished murder, rape and desertion by death penalty.²⁸⁷ The code was given to the higher soldiers, the more educated, the one who had the opportunity to talk to the soldiers.²⁸⁸ The officers who received the code had to explain the soldiers what their duties were, the discipline they had to respect and those “causerie morale” were given every morning.²⁸⁹ The code was in French but others documents which had to do with discipline as well were produced in Lingala.²⁹⁰ Every soldier, even those who could not speak French or read were informed about the code of conduct by their commanders.²⁹¹ The code was put into practice as there were executions following murders.²⁹²
- The commander-in-chief’s personal attitude toward discipline was that it must come first and foremost.²⁹³
- Incidents of violence happened from time to time but it was isolated cases on some of the units.²⁹⁴
- The persons responsible for this violence would not go unpunished.²⁹⁵ The commander of the unit would punish the soldiers responsible, or made a report to the hierarchy if the problem was serious. The soldiers could be

²⁸⁶ P-36, T-217, p.41.

²⁸⁷ P-36, T-213, p.52.

²⁸⁸ P-36, T-213, pp.52-53.

²⁸⁹ P-36, T-213, pp.51-52.

²⁹⁰ P-36, T-213, p.53.

²⁹¹ P-36, T-217, pp.44-45.

²⁹² P-36, T-213, p.55.

²⁹³ P-36, T-217, p.44.

²⁹⁴ P-36, T-213, p.49.

²⁹⁵ P-36, T-217, p.46.

arrested sometimes, served a sentence and then be sent elsewhere in order not to create problem with the population.²⁹⁶

- If the violence was perpetrated by an officer, he would receive the same treatment.²⁹⁷
- Echo Brigade was a good brigade, with a good commander and a good level of discipline.²⁹⁸

149. His evidence about his own knowledge of crimes committed by MLC troops has more weight than those witnesses who [REDACTED]. P-36 knew nothing about crimes committed by the MLC. His only knowledge concerned the arrest of a few soldiers [REDACTED], but he never [REDACTED] any information concerning crimes [REDACTED].²⁹⁹ Otherwise he was told by people in Gbadolite who had heard about crimes over the radio.³⁰⁰ He states that MLC intelligence services made reports about the crimes in the CAR but he never saw any of those reports, so actually he didn't know what they were about.³⁰¹ He had absolutely no information whatsoever about pillaging. His only knowledge was of the pillage which had been punished after the joint commission was established.³⁰² The witness also believed that the pillage stopped after those arrests³⁰³ and that the accusation of pillage over the radio was made because some people weren't happy with MLC troops' intervention so they made a "fuss".³⁰⁴

150. As to the proportionality of the MLC response to those reports and the duty to punish, the position of Mr. Bemba regarding crimes is that they had to be

²⁹⁶ P-36, T-213, pp.49-50.

²⁹⁷ P-36, T-213, p.50.

²⁹⁸ P-36, T-217, pp.47-48.

²⁹⁹ P-36, T-214, p.47.

³⁰⁰ P-36, T-214, p.49.

³⁰¹ P-36, T-214, pp.51-52.

³⁰² P-36, T-214, pp.53-54.

³⁰³ P-36, T-214, p.54.

³⁰⁴ P-36, T-214, p.54.

punished and that's why he created the joint committee.³⁰⁵ He also believed that Patassé had the power to take sanctions over the MLC troops because they had been made available to him, or at least he could have asked Mr. Bemba to take sanctions; but instead, his chief of staff, Colonel Gambi, kept asking for reinforcements.³⁰⁶ This was a plain indication that Patassé was happy with MLC troops' behaviour.

151. The witness is clear about the fact that he knew that the FACA were fighting alongside the MLC,³⁰⁷ and that during the course of the five month operation in the CAR, he never heard Mr. Bemba give any orders to the troops stationed there.³⁰⁸ It is his evidence, however, about his own role in the command of the troops during the conflict in the CAR which beggars belief. It is wholly exculpatory and self-serving. He maintains that he never led the operations in the CAR,³⁰⁹ didn't established the schedule nor the plan for manoeuvres,³¹⁰ wasn't in charge of the good application of the code of conduct or the behaviour of the troops,³¹¹ never managed the troops on a daily basis,³¹² never participated in a meeting linked to the decision to support Patassé,³¹³ never received reports from Mustapha, the commander of the Brigade sent to the CAR³¹⁴ and didn't even know Mustapha's signature.³¹⁵

³⁰⁵ P-36, T-215, p.6.

³⁰⁶ P-36, T-215, pp.17-18.

³⁰⁷ P-36, T-214, pp.45-46.

³⁰⁸ P-36, T-218, pp.27-28, 58.

³⁰⁹ P-36, T-215, p.38.

³¹⁰ P-36, T-215, p.39.

³¹¹ P-36, T-215, p.39.

³¹² P-36, T-215, pp.39-40.

³¹³ P-36, T-215, p.41.

³¹⁴ P-36, T-215, p.52.

³¹⁵ P-36, T-215, p.59.

152. His evidence on this point is in complete contradiction to that of virtually every witness who took part in the combat on the loyalist side,³¹⁶ whether called by the Prosecution or the Defence, as well as the contemporaneous communications record as set out in the cahiers.

153. So determined was he to distance himself from events, that he even testified, wholly disingenuously, that the Deputy Commander of the ALC was [REDACTED] Olivier Kamitatu, the Secretary-General of the political party.³¹⁷

154. [REDACTED], he elevated Mr. Bemba's military role to that of micro-manager, insisting in comical terms that no one could even take a single magazine out of the depot without receiving the authorization from the commander-in-chief.³¹⁸ This is in direct contradiction with his evidence of the general autonomy of the brigade commanders.³¹⁹ The witness also stated that Mr. Bemba talked about the decision to intervene in the CAR [REDACTED] with political members of the party.³²⁰

155. P-36, [REDACTED]. In doing so, he has sought falsely to attribute [REDACTED] responsibilities as well as some other alleged deeds, to Mr. Bemba. The Chamber should reject as unreliable his evidence to that extent.

(g) P-45: [REDACTED]

156. Originally a [REDACTED],³²¹ P-45 defected [REDACTED].³²² He plainly retains feelings of resentment for Mr. Bemba, [REDACTED].³²³ Another of the

³¹⁶ See for example D-19, T-284, pp.17-18; T-285, p.45; T-287, pp.29-30; T-289, pp.74-75; [REDACTED].

³¹⁷ P-36, T-217, pp.24-25.

³¹⁸ P-36, T-216, p.23.

³¹⁹ P-36, T-217, pp.33-34.

³²⁰ P-36, T-218, pp.3, 4-5.

³²¹ P-45, T-201, p.10; P-33, T-158, p.7; P-15, T-207, p.37.

³²² P-45, T-201, p.10; T-202, pp.21, 45, 57.

[REDACTED] his decision to give evidence against Mr. Bemba has almost certainly benefitted him in concrete terms, financially and in terms of [REDACTED].

157. The tone of his evidence generally against the Accused is hyperbolic and purposefully prejudicial. It lacks even the minimum objectivity. He describes Mr. Bemba as a “tyrant” and “insensitive toward human suffering”.³²⁴ It is also exaggerated. He maintains that Mr. Bemba had seven or eight satellite phones,³²⁵ contrary to all other evidence on the topic.³²⁶

158. His evidence is littered with lies designed to portray the Accused as little more than a gangster, claiming for example, that Mr. Bemba was paid for the intervention in the CAR with money from bank robberies, the money being brought back to Gbadolite by a senior MLC official (either Simene or Bokolombe).³²⁷ He claimed that he had heard this from [REDACTED], who in turn had been told by [REDACTED].³²⁸ The story is a simple invention and it is no surprise that the Prosecution did not seek [REDACTED], appreciating, no doubt the obvious untruth of it.

159. P-45 saw no crimes committed,³²⁹ but more importantly was [REDACTED] in Gbadolite³³⁰ during the events, [REDACTED].³³¹ From his own admission, communication with Gbadolite was difficult.³³² Notwithstanding that, he offers a

³²³ P-45, T-202, p.55.

³²⁴ P-45, T-202, p.18.

³²⁵ P-45, T-202, p.6.

³²⁶ P-15, T-207, p.46; P-33, T-158, p.39; P-36, T-213, p.46.

³²⁷ P-45, T-202, pp.3, 16.

³²⁸ P-45, T-204, pp.59-60, 63.

³²⁹ P-45, T-201, p.63.

³³⁰ P-45, T-203, pp.34, 39, 41, 49-51.

³³¹ P-45, T-203, pp.32-33.

³³² P-45, T-203, p.33.

broad range of opinions and hearsay evidence about events in both Bangui³³³ and Gbadolite.³³⁴

160. The Prosecution reliance upon his evidence centres on two particular issues, in relation to both of which, his evidence is completely unreliable. The first is his apparent attendance at the trials of Bomengo and others, and ancillary opinion that they were not genuine.³³⁵

161. In the first instance, it seems unlikely that he could have attended the trials, as he was elsewhere when they were going on. He stated that he was in Gbadolite in January 2003 for the trial whereas they were held in December 2002, at a time he was [REDACTED] in [REDACTED].³³⁶ His evidence in this regard was inconsistent with his witness statement³³⁷ He claims to have attended the Mambasa trials also, and recalls that they were held **before** the Bangui trials, yet, the Mambasa trial commenced 18 January.³³⁸ The trial was, moreover, substantially conducted in February, when he was not even in Gbadolite.³³⁹ His claims to have been at either do not bear scrutiny and his explanation that the documents which contradict him are incorrect,³⁴⁰ merits no serious consideration.

162. Given that he was in all probability not present at either trial, nor even in Gbadolite, his opinion that the trials were a sham,³⁴¹ whilst convenient for the Prosecution, is worthless. His assertion that those convicted did not serve their

³³³ P-45, T-201, p.63.

³³⁴ P-45, T-201, p.73.

³³⁵ P-45, T-202, pp.11-13.

³³⁶ P-45, T-203, p.69.

³³⁷ P-45, T-203, pp.54-55.

³³⁸ P-45, T-204, p.48.

³³⁹ P-45, T-204, pp.49-50.

³⁴⁰ EVD-T-OTP-00737/DRC-OTP-0098-0005; EVD-T-OTP-00711/CAR-OTP-0017-0358.

³⁴¹ P-45, T-202, pp.11-13.

sentences in full,³⁴² although also fitting with Prosecution case theory, is incorrect, beyond his knowledge, and contradicted by the direct evidence of P-36, D-48 and the prison records.³⁴³ It is a simple lie for effect.

163. Secondly, the Prosecution rely on a conversation he alleges he had with Mr. Bemba following a trip to Bangui in December 2002³⁴⁴ in which:³⁴⁵

I told Mr Bemba simply [is] that we had a problem in the CAR. The intervention was not very welcome by the people, the population, but he was already fully aware of the situation.

164. This was hardly earth-shattering information by December 2002, nonetheless there must be very grave doubts, given the evidence P-45 gave about his movements, whether such a conversation ever took place.

165. One final factor casts a cloud over the credibility of this witness. Asked about travelling to Bangui, he mentioned only the trip in December 2002.³⁴⁶ What he actively sought to hide from the Chamber was the fact that he visited [REDACTED] two months later.³⁴⁷

166. It is inconceivable that he could forget this trip, involving as it did a [REDACTED].³⁴⁸ The only inference for his deliberate silence is that the visit undermines his evidence about the attitude of the local population towards the

³⁴² P-45, T-202, pp.8, 13.

³⁴³ P-36, T-215, pp.9-10; D-48, T-267, pp.63-67; T-269, pp.55-56; T; EVD-T-OTP-00393/CAR-DEF-0002-0001 at 0091, 0092, 0094, 0095, 0097.

³⁴⁴ P-45, T-204, pp.16-17, 34-35, 42.

³⁴⁵ P-45, T-204, p.16.

³⁴⁶ P-45, T-204, p.12.

³⁴⁷ D-21, T-306, p.78.

³⁴⁸ D-21, T-305, pp.6, 15, 21-22; T-306, pp.3-6, 78, 82; P-15, T-208, p.51; T-209, p.5; EVD-T-D04-00008/CAR-DEF-0001-0832 minute 11.40; EVD-T-CHM-00041/CAR-OTP-0046-0196.

MLC, and his attempt to assassinate the character of Mr. Bemba by describing him as insensitive.

167. It is more than a simple omission. It is signature dishonesty which renders his evidence incredible on the main points relied upon.

(h) P-209: [REDACTED]

168. The witness was [REDACTED]. The hallmark of his evidence was his determination to lay the blame for all offending at the doors of the MLC, whilst absolving all other potential perpetrators.³⁴⁹ Even though he spent, along with most of the population of Damara, six weeks hiding in the bush after Bozizé's men arrived (he was afraid for his life)³⁵⁰ and only came out three days after the loyalists had taken the town,³⁵¹ he maintained that Bozizé's men never hurt the population, or took their abandoned goods, stealing only from civil servants,³⁵² and enjoying consensual sexual intercourse with the local women.³⁵³ He refused moreover to acknowledge that any Central African soldiers participated in the taking of Damara.³⁵⁴

169. Even though he hid in the bush for three days after the MLC arrived in the town,³⁵⁵ he does not hesitate to opine about crimes he could not have witnessed.³⁵⁶ He maintains, furthermore, that it was the Libyans who operated with the MLC,

³⁴⁹ P-209, T-117, p.17.

³⁵⁰ P-209, T-122, p.18.

³⁵¹ P-209, T-121, p.35.

³⁵² P-209, T-121, p.43.

³⁵³ P-209, T-121, p.45; T-122, pp.4-6, 14-16, 53; T-123, p.27.

³⁵⁴ P-209, T-122, pp.45-46; T-123, p.11.

³⁵⁵ P-209, T-117, pp.27-28, 33, 42.

³⁵⁶ P-209, T-117, p.28.

even though he never saw them,³⁵⁷ relying, he says, on what he heard over the French radio.³⁵⁸

170. His evidence about alleged crimes in Damara is hearsay of unspecified nature and degree, he didn't witness any of the alleged events,³⁵⁹ but still makes outrageous accusations (e.g cannibalism).³⁶⁰ His evidence is substantially based on assumptions, for instance, he opines that when Mustapha ordered some people to be taken away, he concluded that they were executed, without even knowing if they died.³⁶¹

171. It is his fantastic account of Mr Bemba's aeroplane visit to Damara which is the signature feature of his evidence. According to P-209, although he didn't even know who Mr. Bemba was at the time,³⁶² he claimed to have been told [REDACTED] that it was Mr. Bemba who was in the plane. When he alighted the green plane he was wearing civilian clothing.³⁶³ P-209 just happened to be [REDACTED] at the time of the plane's arrival.³⁶⁴

172. According to the witness, the purpose of Mr. Bemba's visit was to take delivery of some stolen generators. He apparently told Mustapha to load them onto the plane.³⁶⁵ His evidence about what he saw is implausible, saying ultimately that he didn't see the goods being loaded into the plane because he was too far away, but that he saw allegedly "looted" goods taken out of the HQ and brought towards

³⁵⁷ P-209, T-117, pp.30-31.

³⁵⁸ P-209, T-122, p.51.

³⁵⁹ See for example P-209, T-119, pp.24, 34; T-120, pp.26-28.

³⁶⁰ P-209, T-119, p.21.

³⁶¹ P-209, T-119, pp.34-35.

³⁶² P-209, T-118, p.18; T-120, p.11.

³⁶³ P-209, T-119, pp.40-43; T-124, pp.3-7.

³⁶⁴ P-209, T-120, p.37.

³⁶⁵ P-209, T-120, pp.35-36.

the plane, but then they had disappeared.³⁶⁶ He is absolutely sure that the plane when he left was heading towards the Congo³⁶⁷ although he didn't see it taking off.³⁶⁸

173. The truly fantastic aspect of his story is that the cargo plane³⁶⁹ is said by the witness to have landed and taken off from National Route 3,³⁷⁰ a single track road³⁷¹ which runs over hills,³⁷² and contains bends,³⁷³ which has a grass verge at its edge and houses, trees and telegraph poles alongside it.³⁷⁴ The road is neither wide enough for the wheel carriage of the plane the witness identified,³⁷⁵ nor wide enough for its wingspan, nor straight and flat enough for a sufficient distance for any plane to land there. The story is pure fantasy. He did not see Mr. Bemba on that or any other day.³⁷⁶ Similarly incredible is his account that [REDACTED].³⁷⁷

174. However, not all of the witness' testimony is beyond belief. For example, he acknowledged that when people fled Damara some stayed to take advantage of the situation, *i.e.* to pillage and rape women and those persons were Central Africans.³⁷⁸ He confirmed the content of his witness statement, moreover to the effect that the MLC in the field were accountable to Patassé because Mr. Bemba was too far away in Gbadolite.³⁷⁹ The bulk of the evidence he gives against the MLC and Mr. Bemba

³⁶⁶ P-209, T-124, pp.15-17.

³⁶⁷ P-209, T-124, p.18.

³⁶⁸ P-209, T-124, p.19.

³⁶⁹ P-209, T-124, p.12, EVD-T-CHM-00059/CAR-D04-0002-1377.

³⁷⁰ P-209, T-124, p.27.

³⁷¹ EVD-T-OTP-00637/CAR-OTP-0035-0256; EVD-T-OTP-00637/CAR-OTP-0035-0269; EVD-T-OTP-00637/CAR-OTP-0035-0237; EVD-T-OTP-00637/CAR-OTP-0035-0176.

³⁷² P-209, T-123, p.37

³⁷³ P-209, T-123, p.37

³⁷⁴ EVD-T-OTP-00637/CAR-OTP-0035-0256; P-209, T-123, p.40.

³⁷⁵ P-209, T-124, p.27.

³⁷⁶ P-209, T-119, p.41.

³⁷⁷ P-209, T-123, pp.15-16.

³⁷⁸ P-209, T-122, p.2.

³⁷⁹ P-209, T-123, p.20, 21-22

is unreliable and consists at best of speculation on his part because he was not present.³⁸⁰ At worst, much of it amounts to malicious story telling.

(i) P-47: Francis OSSIBOUYEN

175. Allegedly a boat pilot who oversaw the MLC crossings in October 2002, such is his account of those events, there must be serious doubt as to whether that is true. His evidence in many respects is plainly untrue, exaggerated and misleading.

176. According to him, he made four to five trips a day, during 19 days, transporting 150 to 200 people each time.³⁸¹ In other words between 750 and 1000 soldiers per day, making the total number who crossed 15,000 to 19,000 soldiers, ten times the actual number.

177. His account of how he was selected to pilot the boat is also doubtful. He was taken at night to the naval base, a place which was not his regular place of work, to drive a boat which did not belong to his company but to the ministry of transport.³⁸² He was fetched from home, in PK5 which was 7.5 to 8 km from the ferry³⁸³ although there were mechanics and boat drivers working at the naval base at that time.³⁸⁴ Despite his close and prolonged involvement with the MLC forces, he never mentioned Mustapha,³⁸⁵ but was confident he hadn't transported him.³⁸⁶

178. His description of MLC soldiers does not suggest any real contact with them either. He asserts, for example, that they had multiple weapons.³⁸⁷

³⁸⁰ P-209, T-122, p.32.

³⁸¹ P-47, T-179, pp.35-36.

³⁸² P-47, T-179, pp.42-43.

³⁸³ P-47, T-179, pp.26-27.

³⁸⁴ P-47, T-181, p.3.

³⁸⁵ P-47, T-181, p.19.

³⁸⁶ P-47, T-181, p.19.

³⁸⁷ P-47, T-176, pp.36-38. Contra. EVD-T-OTP-00383/CAR-OTP-0028-0398.

179. He claimed, uniquely, to have taken Mr. Bemba across the river on two round-trips.³⁸⁸ Further, he stated that Mr. Bemba arrived in Zongo by helicopter,³⁸⁹ which is nonsensical.

180. His account of Mr. Bemba's arrival in Zongo, involving the driving out from their homes of the local population and the destruction of the habitat,³⁹⁰ is one of a number of attempts he makes at portraying Mr. Bemba as a pantomime despot. Elsewhere he claimed that Mr. Bemba arrived at the ferry in a red Mitsubishi at break-neck speed,³⁹¹ that his security officers made him open all the manholes on the ferry to check inside,³⁹² that Mr. Bemba stood on the bridge of the ferry, holding a silver cane and a gun in his hand.³⁹³ Mr. Bemba's bodyguards were so fierce that "you would not dare look at them, even for two seconds. They were looking very wild."³⁹⁴

181. He stated that Mr. Bemba had no Central African or Congolese bodyguards, only Libyans,³⁹⁵ not a proposition that the Prosecution put to [REDACTED].

182. The story of his being shot on the ferry, whilst Mr. Bemba stood unmoved on deck, tapping his cane, is a simple work of fantasy,³⁹⁶ which he did not mention when interviewed by the Prosecution (although he alleges that the stenographer "forgot" to record his answers).³⁹⁷

³⁸⁸ P-47, T-176, p.55.

³⁸⁹ P-47, T-176, p.55.

³⁹⁰ P-47, T-176, p.56.

³⁹¹ P-47, T-176, p.57.

³⁹² P-47, T-176, p.58.

³⁹³ P-47, T-176, p.59.

³⁹⁴ P-47, T-176, p.61.

³⁹⁵ P-47, T-176, pp.64-65.

³⁹⁶ P-47, T-177, pp.4-5.

³⁹⁷ P-47, T-180, p.20.

183. The second crossing of Mr. Bemba which he oversaw, in which Mr. Bemba collected cigarette cartons in Bangui which were stuffed with American dollars is simply comical and incapable of credence.³⁹⁸

184. However, the most graphic aspect of his evidence was the allegation that he saw cases of rape on the ferry.³⁹⁹ This was embellished by several other claims; that the soldiers said that it was thanks to the president commander that they had the opportunity to sleep with Central African women,⁴⁰⁰ words they often soldiers repeated,⁴⁰¹ that they abducted the women while they were fleeing and brought them on the boat to rape them and take them to Zongo.⁴⁰² The story is beyond belief and was completely different evidence from that previously given in interview: he changed the time of day it occurred,⁴⁰³ the number of perpetrators and victims⁴⁰⁴, and the number of incidents he was a witness to.⁴⁰⁵ Further he never reported any of those crimes to an authority after the war.⁴⁰⁶

185. Significantly, this allegation is not advanced in the Prosecution Brief,⁴⁰⁷ presumably because it has been abandoned as not worthy of belief.

186. He stated that he saw crimes in Mongoumba,⁴⁰⁸ but he was in that city only in March/April 2003, “when the General had come back to Bangui”,⁴⁰⁹ which has to suggest that he saw crimes committed there after 15 March 2003.

³⁹⁸ P-47, T-177, pp.10-11.

³⁹⁹ P-47, T-177, pp.9, 24-25.

⁴⁰⁰ P-47, T-177, p.13.

⁴⁰¹ P-47, T-178, p.21.

⁴⁰² P-47, T-177, p.44.

⁴⁰³ P-47, T-181, pp.29-32.

⁴⁰⁴ P-47, T-181, p.32.

⁴⁰⁵ P-47, T-181, p.33.

⁴⁰⁶ P-47, T-181, pp.34-35.

⁴⁰⁷ Save that P-47, T-177, pp.24-25 is footnoted as support for the contention that wide scale rape, murder and pillage had been committed between 28 and 30 October 2002; para. 45, fn. 131, 555.

⁴⁰⁸ P-47, T-178, p.35.

⁴⁰⁹ P-47, T-181, p.13.

187. The Defence has no intention of taking advantage of this man's evidence on that point to advance the submission that the events in Mongoumba post dated Bozizé's accession to power. None of this man's evidence is capable of belief, whether about what he saw in Mongoumba, Zongo or on his ferry boat.

2. Inducements, Collusion and Coaching

*I was corrupted, because when they met with me I did not have any money.*⁴¹⁰

Prosecution Witness P-169

(a) The "22 Witnesses"

188. The Chamber has an obligation to consider, whether there were indicia that witnesses were pressurised or influenced, or a risk that they were colluding with other witnesses.⁴¹¹

189. Both P-169 and P-173 are [REDACTED].⁴¹² [REDACTED] with undermining Mr. Bemba and MLC.⁴¹³ They have continued this [REDACTED] as witnesses before the ICC, and are no more capable of credibility than the other [REDACTED] involved in ICC cases.

190. As found in *Lubanga*, the fact that a witness has been associated with the [REDACTED] will, in itself, undermine the impartiality of the witness in question.⁴¹⁴ Mr. Bemba is a significant political rival of President Kabila.⁴¹⁵ Both P-

⁴¹⁰ P-169, T-138, p.12.

⁴¹¹ ICC-01/04-02/12-3-tENG, para. 53.

⁴¹² P-169, T-136, pp.19-20, 23; P-173, T-144, p.9.

⁴¹³ P-169, T-139, pp.26-27; P-173, T-145, pp.56-58, P-173, T-145, p.44, P-173, T-145, p.48.

⁴¹⁴ ICC-01/04-01/06-2842, at paras. 302, 368, 374.

⁴¹⁵ P-169, T-139, pp.26-27; P-173, T-144, p.9.

173 and P-169 had contacts with other witnesses in the case in relation to their testimony before the ICC, and issues of financial compensation.⁴¹⁶

191. When questioned in Court as to whether he had received any money from the ICC Prosecution, P-169 stated that “Nobody gave me any money”.⁴¹⁷ However, in a letter addressed to the [REDACTED] *inter alia*, P-169 complained that he had received insufficient funds and compensation from VWU and the Prosecution.⁴¹⁸ P-169 referred to “money promised by the Prosecutor for witnesses”.⁴¹⁹ In response to a question as to what he meant by an earlier answer that “[REDACTED]”, P-169 stated that, “it is important for me not to follow a path that can create a problem for me where I live”.⁴²⁰

192. P-169 further elaborated that the reason he was testifying in Court was that [REDACTED].⁴²¹ During the [REDACTED], P-169 had been asked about the content of his future testimony before the ICC.⁴²² When P-169 asked how the [REDACTED] was aware of his role as a witness, he was informed that “there have already been cases such as this and Bozizé is aware”.⁴²³

193. [REDACTED] that P-169 had contacted him in relation to his testimony before the ICC, and informed another person that [REDACTED] was going to testify before the ICC.⁴²⁴ There was apparently [REDACTED].⁴²⁵

⁴¹⁶ ICC-01/05-01/08-2975-Conf-Anx-Red; EVD-T-D04-00057/CAR-OTP-0072-0504_R01; EVD-T-D04-00056/CAR-OTP-0072-0508_R01; P-169, T-137, p.36.

⁴¹⁷ P-169, T-138, p.52.

⁴¹⁸ EVD-T-D04-00057/CAR-OTP-0072-0504_R01; EVD-T-D04-00056/CAR-OTP-0072-0508_R01.

⁴¹⁹ EVD-T-D04-00057/CAR-OTP-0072-0504_R01.

⁴²⁰ P-169, T-139, p.33.

⁴²¹ P-169, T-139, p.34.

⁴²² P-169, T-139, p.33.

⁴²³ P-169, T-139, p.33.

⁴²⁴ [REDACTED].

⁴²⁵ [REDACTED].

194. VWU was instructed to prepare a report in relation to this matter.⁴²⁶ It is apparent from VWU's intervention at the Status Conference of 26 August 2011 that P-169 and [REDACTED],⁴²⁷ and P-169 had apparently disclosed the fact that [REDACTED] to other persons.⁴²⁸ The clear subtext from VWU's intervention was also that they did not find P-169's allegations to be sufficiently concrete or reliable to warrant action.⁴²⁹ The VWU observed that:

[REDACTED].⁴³⁰

[REDACTED].⁴³¹

195. According to a [REDACTED].⁴³² In the course of about a year, [REDACTED]⁴³³ [REDACTED],⁴³⁴ [REDACTED]. P-169 testified from 1 July 2011 until 11 July 2011. [REDACTED].⁴³⁵

196. P-169 was also in contact with [REDACTED] in August 2011,⁴³⁶ [REDACTED]. In a letter addressed to VWU, the Prosecution, [REDACTED], *inter alia*, P-169 threatened that unless his demands for further compensation were met (which already greatly exceeded the amount that could reasonably be expected as compensation for lost earnings),⁴³⁷ "il y a risque que cette situation tourne au vinaigre [...]".⁴³⁸ P-169's motivation to testify before the ICC was thus clearly not motivated by his desire for justice or to speak the truth.

⁴²⁶ ICC-01/05-01/08-T-358-Conf-Exp. The order was given at an ex-parte Status Conference held on 26 November 2013 as cited in ICC-01/05-01/08-2912.

⁴²⁷ ICC-01/05-01/08-T-148-Conf-Red2, p.5.

⁴²⁸ ICC-01/05-01/08-148-Conf-Red2, p.9.

⁴²⁹ ICC-01/05-01/08-148-Conf-Red2, pp.3-6 [REDACTED].

⁴³⁰ ICC-01/05-01/08-148-Conf-Red2, p.11.

⁴³¹ ICC-01/05-01/08-148-Conf-Red2, p.12.

⁴³² ICC-01/05-01/08-1816-Conf, p.13.

⁴³³ ICC-01/05-01/08-1816-Conf-Exp-Anx2.

⁴³⁴ ICC-01/05-01/08-1816-Conf, p.13.

⁴³⁵ ICC-01/05-01/08-1816-Conf, p.13.

⁴³⁶ ICC-01/05-01/08-1816-Conf-Exp-Anx2.

⁴³⁷ Even if the amount of perquisites allocated to a witness are not "inherently unreasonable", they can still attract an obligation to treat the witness's testimony with caution: *Zigiranyirazo* TJ, para. 139.

⁴³⁸ EVD-T-D04-00057/CAR-OTP-0072-0504_R01, p.4.

197. P-169 referred to meetings which began in [REDACTED], convened by P-178, and attached a list of 22 Prosecution witnesses, who joined his financial demands.⁴³⁹ P-169 included [REDACTED], even though 21 of them were covered by ICC protective measures.

198. According to information obtained by the Prosecution, [REDACTED].⁴⁴⁰ [REDACTED] P-42 [REDACTED]. [REDACTED].⁴⁴¹

199. P-68 informed the Prosecution and VWU that [REDACTED].⁴⁴²

200. P-169's self-confessed "corruption", status as a [REDACTED], and history of collusion with other witnesses such as P-178 would have also tainted these "22 witnesses". Although the specific information collected by the Prosecution and the VWU on this matter pertained to events occurring after the witnesses testified, the evidence demonstrates that P-169 and P-178 had both the means and the desire to contact witnesses before or during their testimony with a view to using their status as witnesses before the Court as leverage for further financial rewards.

201. P-169 and P-178 were the only Prosecution witnesses whose [REDACTED]. They had been in extensive contact with each other. Given the information disclosed by the Prosecution in November 2013 confirmed that P-169 was in possession of the identities [REDACTED] of the 22 witnesses, it is reasonable to expect that there would have been similar levels of contact between such witnesses during the period surrounding their testimony before the ICC.

⁴³⁹ ICC-01/05-01/08-2827-Conf-Red2, para. 15.

⁴⁴⁰ ICC-01/05-01/08-2827-Conf-Red2, para. 13.

⁴⁴¹ ICC-01/05-01/08-2827-Conf-Red2, para. 13.

⁴⁴² ICC-01/05-01/08-2827-Conf-Red, para. 14.

202. Although the Defence were denied the opportunity to cross-examine the witnesses on this specific matter, the witnesses in question had already demonstrated a propensity to collude with each other on key aspects of their testimony, and a willingness to amend their testimony in line with political and financial interests. For example, during his testimony, P-42 acknowledged that he was aware that P-23 had testified at the ICC,⁴⁴³ and that before leaving for the ICC, P-23 called P-42 on 14 January 2011.⁴⁴⁴ P-42 initially claimed that he saw P-23 at [REDACTED] when they were both transiting to and from the ICC,⁴⁴⁵ and that they spoke to each other.⁴⁴⁶

203. It would not have been possible for P-23 and P-42 to have been at [REDACTED] airport at the same time,⁴⁴⁷ which not only means that P-42 was willing to lie under oath in relation to material facts, but that P-42 had a motive to mislead the Trial Chamber in relation to the precise nature and details of his communications with P-23 regarding their testimony before the ICC.

204. P-42 further confirmed that when he was interviewed by the Prosecution, he went to ask P-23 at night for specific information on a range of topics, such as the date on which persons arrived (“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”).⁴⁴⁸ P-42 asked P-23 for this information because he considered P-23 [REDACTED];⁴⁴⁹ P-23’s [REDACTED] therefore clearly influenced and affected the contents of P-42’s testimony before the ICC.

⁴⁴³ P-42, T-65, p.47.

⁴⁴⁴ P-42, T-66, p.35.

⁴⁴⁵ P-42, T-66, pp.43-44.

⁴⁴⁶ P-42, T-66, p.57.

⁴⁴⁷ P-42, T-67, p.4; T-68, pp.2-4.

⁴⁴⁸ P-42, T-67, p.58.

⁴⁴⁹ P-42, T-67, p.59.

205. The Prosecution used P-42's telephone to communicate with P-73; a conversation which occurred at P-42's house.⁴⁵⁰ P-42 had discussed the contents of his interviews with the ICC Prosecution with P-73, in particular, that P-73 had told him the questions that were put to him, and what P-73's answers had been.⁴⁵¹ P-73 had informed P-42 of his belief that the Banyamalengue were responsible for pillaging his house, beating him up, and raping his daughter.⁴⁵² In turn, when P-73 testified that his group of neighbours (which included P-42 and P-23) colluded in relation to what they would testify was the date on which the attackers entered PK 12.⁴⁵³

206. P-42, [REDACTED] P-73 are all members of OCODEFAD.⁴⁵⁴ P-42 testified that he and [REDACTED] filled in their victim participation forms "together" at the OCODEFAD meeting.⁴⁵⁵ According to P-69, because [REDACTED] is literate, he was entrusted with collecting and registering victim applications,⁴⁵⁶ which would have exposed [REDACTED] to the various accounts and details given by different victims.

⁴⁵⁰ P-42, T-66, p.39.

⁴⁵¹ P-42, T-66, p.48. See also p.49, where P-42 further confirms his awareness of the details of [REDACTED]'s statement given to the Prosecution.

⁴⁵² P-42, T-69, p.45.

⁴⁵³ "And with our neighbours, we said to one another, "Those people who listen to us –don't–be careful. Don't make any mistakes about dates." That's what we said to one another. So that date is the one we retained as being a lesson, as it were." P-73, T-72, p.20; "You see, it's, well, one of [REDACTED] who was interviewed by the investigator. I was invited as well. There were also other people who were also interviewed. On reflection I thought –I said, well- to myself – we have to understand each other with regards to the dates. It's necessary to note them down. Because we gave these dates, it's necessary to maintain this date because we've already stated this. We therefore came to an agreement and we noted down these dates. It could be the case that there are investigations which lead to a trial, and if we were asked on what date something occurred, we would refer to the dates that we'd taken, and that's the reason why I stated that we had decided to take those dates." P-73, T-73, p.36.

⁴⁵⁴ P-42, T-66, p.32.

⁴⁵⁵ P-42, T-66, p.53.

⁴⁵⁶ P-69, T-195, p.8.

207. P-42's [REDACTED],⁴⁵⁷ [REDACTED] distribution of "aid" from external donors to victims (which would have included [REDACTED]).⁴⁵⁸ P-42 therefore [REDACTED] to their willingness to identify themselves as "victims" of crimes committed by the Banyamalengue.⁴⁵⁹

208. The Trial Chamber ordered the Prosecution to disclose the information concerning [REDACTED] on 7 November 2013; over five months after the Prosecution became aware of the contacts, and eight days before the close of the Defence case.⁴⁶⁰ The Defence could not properly explore or investigate this issue within such a limited time frame.

209. The Trial Chamber did not sanction the Prosecution or provide any remedy as concerns the Prosecution's failure to disclose information that was clearly relevant to the credibility of Prosecution witnesses. The Chamber also rejected the Defence request for the witnesses in question to be recalled, so that the Defence could explore the nature of and extent of contacts between the witnesses in question.⁴⁶¹

210. Although the Trial Chamber admitted the documents concerning the witnesses,⁴⁶² the admission of these documents was not, in itself, an adequate remedy as concerns the failure of the Prosecution to disclose the relevant information in a timely manner, and as concerns the Trial Chamber's refusal to allow the Defence to recall the witnesses.

⁴⁵⁷ P-42, T-67, p.12.

⁴⁵⁸ P-42, T-67, p.13.

⁴⁵⁹ P-42, T-67, p.26: P-42 confirmed that OCODEFAD was composed exclusively of persons claiming to be victims of the Banyamalengue.

⁴⁶⁰ ICC-01/05-01/08-2872, at paras. 17-18.

⁴⁶¹ ICC-01/05-01/08-2924. The Trial Chamber also rejected the Defence request for leave to appeal: ICC-01/05-01/08-2980-Conf.

⁴⁶² EVD-T-D04-00057/CAR-OTP-0072-0504_R01; EVD-T-D04-00056/CAR-OTP-0072-0508_R01; ICC-01/05-01/2912-Conf-AnxA, ICC-01/05-01/08-2912-Conf-AnxC, and ICC-01/05-01/08-2912-Conf-AnxD.

211. Had the Trial Chamber allowed the Defence to recall the witnesses, the Defence could have used the documents to confront the witnesses and explore whether – on the basis of their apparent familiarity with each other and each other’s status as witnesses – the witnesses had also contacted each other and arranged similar meetings during the period they testified before the ICC.

212. The Defence should have also been given the opportunity to cross-examine P-178 in relation to the question of how he obtained access to the contact details of 21 protected witnesses, and whether, in light of his close links to P-169, he interacted with any intelligence or government services in relation to the ongoing trial against Mr. Bemba. The resulting prejudice was aggravated by the failure by the Prosecution to discharge its duty under article 54(1) by conducting independent investigations in relation to the reliability and credibility of the witnesses concerned, in light of the information that it had received concerning multiple contacts between the witnesses on financial matters.

213. The Prosecution filing to the Trial Chamber addressed the issue solely as one that impacted on the protection of the witnesses concerned, and not their credibility.⁴⁶³ Although the Prosecution was aware of the history of contacts between P-178 and P-169 during the time period of their testimony, the Prosecution does not appear to have conducted any follow up investigation in relation to the real likelihood of contacts between P-169 and P-178 and other Prosecution witnesses.

214. Where the Defence has been denied the opportunity to explore the credibility and reliability of these witnesses in an effective manner, and the

⁴⁶³ ICC-01/05-01/08-2827-Conf-Red.

Prosecution has failed to do so itself, the exclusion of all their testimony from the Trial Chamber's consideration of the evidence is a reasonable remedy.⁴⁶⁴

(b) The selection and presentation of victim evidence by the Bozizé regime

215. The untruth at the heart of this case is that Bozizé's troops committed no offences against the civilian population. It is an untruth that has been carefully nurtured by Bozizé's government since it unlawfully and violently seized power in March 2003.

216. Through a series of steps the evidence presented to this Chamber has been carefully filtered and refined to ensure that a distorted view of history is presented in which all the crimes committed in a five month civil war are attributed only to one alien faction.

217. Nothing could be further from the truth. However, the sanitization of Bozizé's rebellion has demanded that witnesses (especially victims) be found, induced and trained to chant the official mantra. Bozizé's troops were welcomed by the people,⁴⁶⁵ Bozizé's troops only fired their guns into the air,⁴⁶⁶ Bozizé's troops didn't go into the towns,⁴⁶⁷ Bozizé's troops never harmed the population.⁴⁶⁸

218. The Trial Chamber should recognise this for what it is – propaganda and dishonest testimony which calls into question the reliability of the evidence of anyone who would advance it as true. Of course, some of those people may indeed have suffered at the hands of MLC soldiers, but that is not sufficient for a conviction. Moreover, it may be difficult not to feel some sympathy for those who

⁴⁶⁴ See *Orić*, Decision on Ongoing Complaints, para. 35; *Ndindiliyimana et al.* TJ, fn. 310, 3627.

⁴⁶⁵ P-42, T-68, pp.19-21; P-73, T-70, pp.10, 13; P-38, T-35, pp.22-23.

⁴⁶⁶ P-22, T-40, pp.14-15; T-41, p.4.

⁴⁶⁷ P-63, T-112, p.7.

⁴⁶⁸ P-68, T-49, p.11; P-80, T-61, p.17; T-63, p.44 (acknowledging but minimising offending by Bozizé's men); P-119, T-82, pp.25-26; T-87, pp.30-33 (refusing to talk about Bozizé's troops behaviour). P-178, T-157, p.19; P-80, T-61, p.17; P-V20, T-225, p.46.

fell into this trap which had two massive compulsive components – the inducement of material benefit as well as the promise of enormous future gain, and the threat of the possible consequences of non-compliance in a dictatorial state.⁴⁶⁹

The Inquiry in Bangui

219. The first step in the creation of the myth of Bozizé's troops saintly behaviour was the inquiry into crimes conducted by Findiro and Oradimo.⁴⁷⁰ For all the witnesses interviewed in pursuit of this, one thing was clear, no complaint against the behaviour of Bozizé's troops would be entertained.⁴⁷¹ Accordingly, those who might have suffered at their hands had a simple choice to make: suffer in silence or accuse the other side.

OCODEFAD

220. OCODEFAD has misleadingly been referred to throughout this trial as an NGO, when it quite plainly was an organization completely within the control of the Bozizé' regime. Two central characters controlled OCODEFAD, the enigmatic Bernadette Sayo,⁴⁷² Minister for Social Affairs in Bozizé's government,⁴⁷³ and Ngoungaye Wanfiyo, victim's lawyer and legal representative of the Bozizé government.⁴⁷⁴

221. Together, they promoted the benefits of membership of an organization, which represented the interests only of those alleged victims of the crimes of the

⁴⁶⁹ P-42, T-67, pp.26-27.

⁴⁷⁰ P-9, T-102, p.38; P-6, T-95, p.67.

⁴⁷¹ P-9, T-102, p.46; T-104, p.4; P-119, T-87, pp.30-33, P-6, T-95, p.67; V-02, T-225, p.46.

⁴⁷² P-6, T-95, pp.7-9; P-69, T-193, p.16 ; T-195, p.7; P-23, T-52, pp.26-27, 32; T-54, p.24-30.

⁴⁷³ P-229, T-101, pp.13-23; P-81, T-55, pp.28-30, 52-54; T-56, p.7; P-29, T-80, pp.41-44; P-68, T-49, pp.3-5; T-50, pp.28-30; P-23, T-52, pp.26-27, 32; T-54, p.24-30; P-42, T-65, pp.41-47.

⁴⁷⁴ ICC-01/05-5-Conf-Anx1, 28 September 2006; P-87, T-45, pp.18-19; P-9, T-102, pp.33-34; P-22, T-42, p.43; P-68, T-49, p.49; P-23, T-52, p.32.

MLC, and concurrently, as the CAR's lawyer, Wanfiyo pressured the ICC to bring charges against Patassé, Bemba and Miskine.⁴⁷⁵

222. The evidence shows that OCODEFAD subsequently made direct contacts with the Prosecutor of the ICC himself,⁴⁷⁶ and coached potential witnesses in how to give statements and evidence.⁴⁷⁷ The evidence shows, furthermore, that there were material benefits to belonging to the organisation,⁴⁷⁸ and there was abundant sharing of information at OCODEFAD meetings.⁴⁷⁹ The mantra was thus learned by repetition of recital.

The Intermediaries

223. Several witnesses have described the industrial scale on which victim's application forms were filled in through the intermediaries.⁴⁸⁰ Equally clear is that alleged victims were lured with the promise of massive financial rewards and encouraged to exaggerate and make up claims.⁴⁸¹ Alleged victims paid the intermediaries to fill in forms for them.⁴⁸² The inference that is underlying this case is huge mass of wholly dishonest claims for losses by people who never suffered. Even less palatable is the indication of substantial profiteering by intermediaries on the ground.

⁴⁷⁵ ICC-01/05-5-Conf-Anx1, 28 September 2006.

⁴⁷⁶ P-73, T-76, pp.25-29; P-119, T-83, pp.16-17; P-42, T-67, pp.31-35; P-82, T-59, pp.15-16; P-29, T-81, pp.43-44.

⁴⁷⁷ P-82, T-59, p.15; T-60, p.31-41; P-79, T-77, pp.31-34; P-69, T-192, p.40; P-80, T-61, p.27.

⁴⁷⁸ P-42, T-65, pp.41-47; P-79, T-77, pp.31-34.

⁴⁷⁹ P-29, T-80, pp.41-44; P-68, T-50, pp.33-36; P-79, T-77, p.28.

⁴⁸⁰ V-02, T-225, pp.45-47; P-42, T-68, p.59.

⁴⁸¹ P-69, T-195, p.14; P-73, T-71, pp.7-16; T-72, pp.8-13; T-73, pp.18-35; T-76, p.13; P-81, T-55, pp.28-30, 52-54; T-56, p.7.

⁴⁸² P-42, T-68, p.59; T-69, pp.4-5, P-73, T-76, pp.16-17.

224. The victim witnesses who have given evidence in this case remarkably hail only from three areas: PK4,⁴⁸³ PK12⁴⁸⁴ and Mongoumba.⁴⁸⁵ Each is a member of OCODEFAD,⁴⁸⁶ [REDACTED],⁴⁸⁷ and there are many links between them.⁴⁸⁸ In a number of cases they knew of the status of others as witnesses,⁴⁸⁹ notwithstanding their protected status, knew that others were coming to the Hague to give evidence,⁴⁹⁰ and had been in contact before, during and after their testimony.⁴⁹¹

225. There is plain evidence of collusion between them over material aspects of their evidence, including the dates on which events took place.⁴⁹² One thing about which every single one of them is clear, whether they knew it at the time or learned it subsequently, it was the Banyamulengue that attacked them.

226. Even since their attendance as witnesses, the victims have maintained a cohesive and united body prepared collectively to bargain with the Prosecution and Registry of the ICC over their perceived entitlements to financial compensation for their participation as witnesses.⁴⁹³

227. The involvement of the Bozizé government, substantially through the vehicle OCODEFAD, in the sourcing, coaching and provision of witnesses, exclusively against the MLC, is a significant factor in assessing the credibility of victim testimony in the case, militating strongly against accepting it at face value.

⁴⁸³ P-87, P-68, P-75, P-119.

⁴⁸⁴ P-22; P-23; P-81; P-82, P-80, P-42, P-73; P-79; P-110.

⁴⁸⁵ P-69.

⁴⁸⁶ See for example, P-68, T-49, pp.3-5; T-50, pp.28-30; P-81, T-55, pp.28-30; P-79, T-77, pp.31-34.

⁴⁸⁷ P-23, T-52, pp.26-27, 32; T-54, pp.24-30; P-42, T-65, pp.41-47; P-69, T-195, p.14.

⁴⁸⁸ P-80, T-63, p.7; P-38, T-35, p.14; P-80, T-63, p.7; P-73, T-71, p.30, 41-42; P-110, T-125, p.8; P-112, T-131, p.5, P-69, T-195, pp.8-11; P-42, T-64, p.60; V-02, T-225, p.48.

⁴⁸⁹ P-87, T-46, pp.8-9, 14, 18.

⁴⁹⁰ P-42, T-65, p.47; T-66, pp.32-35, 39, 47-49.

⁴⁹¹ P-80, T-63, p.7, P-38, T-35, p.14, P-73, T-71, p.29, 41-42; T-72, p.20; P-110, T-125, p.8; P-112, T-131, p.5; P-69, T-195, pp.8-11; P-42, T-64, p.60.

⁴⁹² P-42, T-64, pp.12-13; P-73, T-72, p.20.

⁴⁹³ See Chapter II, Section F1.

(c) The evidential effect of victim participation

228. An unprecedented number of victims are participating in this case.⁴⁹⁴

229. Apart from limited victim-witnesses, the participating victims were anonymous. The Defence had no opportunity to verify or contest the claims set out in their applications. This anonymity also means that the Defence has been unable to assess the full extent to which victims colluded with each other or other witnesses.

230. The purpose of victim participation is to allow their views and concerns considered by the Trial Chamber; it is not a vehicle for victims to supplement or supplant the role of the Prosecution. In rejecting the admission of victim applications forms – even as a means of testing the credibility of victims who have chosen to testify – the Trial Chamber has confirmed that it cannot base its judgment on the information set out therein, even as to the fact of the complaint.⁴⁹⁵ The Appeals Chamber has also ruled that victim participation must take place within the confirmed framework of the case against the defendant.⁴⁹⁶ The Prosecution cannot, therefore, rely upon or invoke allegations pertaining to victims in order to enlarge the scope of the confirmed case.

231. Ultimately, as the burden of proof rests with the Prosecution,⁴⁹⁷ the Chamber must focus its inquiry on whether the Prosecution has adduced sufficient evidence and argumentation in relation to the specific facts and circumstances confirmed by the Pre-Trial Chamber. Although victims may, in exceptional circumstances, tender evidence, they must do so through the formal channels for introducing evidence

⁴⁹⁴ 5229 in total <http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf>

⁴⁹⁵ ICC-01/05-01/08-2012.

⁴⁹⁶ ICC-01/04-01/06-1432, para. 62.

⁴⁹⁷ ICC-01/04-01/06-1432, para. 93.

into the case set out in article 69 (in particular, article 69(3)).⁴⁹⁸ The Trial Chamber must also take measures to ensure that the admission of such evidence through article 69(3)) is not prejudicial to the right to a fair and impartial trial.⁴⁹⁹

232. The victim participation process cannot be used to evade these formal requirements and related safeguards (such as the duty to give evidence under oath, and the prohibition on submitting false evidence to the Court).

233. The cumulative effect of the applications cannot be to create a presumption that the crimes occurred, or that given the sheer volume of persons claiming to have suffered harm at the hands of the MLC, the contextual elements of war crimes or crimes against humanity must be met. Indeed, given the Chamber's ruling as to the admissibility of the application forms,⁵⁰⁰ they have no evidential effect at all. There simply is no evidence before the Chamber of the number of victims claims there are, or what they complain of.

234. The Closing Brief filed by the LRV is peppered with factual and legal observations that fall outside the scope of the confirmed charges.⁵⁰¹ It is emblematic of the very real prejudice that arises from victim participation. At the same time that the Defence is required to respond to the Prosecution case, as charged by the Pre-Trial Chamber, it is inundated with entirely novel, and extraneous accusations, which exhaust Defence time and resources, and violate Mr. Bemba's right to receive timely notice of the case brought against him.

⁴⁹⁸ ICC-01/04-01/06-1432, para 99; ICC-01/04-01/07-2288, para.48.

⁴⁹⁹ ICC-01/04-01/07-2288, para. 40.

⁵⁰⁰ ICC-01/05-01/08-2012

⁵⁰¹ LRV Closing Brief, paras. 324, 339, 346-351.

III. A CHRONOLOGY OF EVENTS

*The Prosecution also stresses that during its presentation on the contextual elements common to all war crimes, slides 21 and 23 on the flash presentation wrongly presented the date of 30 November 2002 instead of **30 October 2002**.*⁵⁰²

Luis Moreno Ocampo

A. The MLC was a legitimate political movement

235. By October 2002, the MLC⁵⁰³ was a fully-fledged political party with governmental responsibilities for a defined area of the DRC,⁵⁰⁴ approximately the size of France.⁵⁰⁵ Those responsibilities included, not just the military defence of the area from hostile attack, but extended to health, education, transport and justice.⁵⁰⁶

236. The movement was created on 28 September 1998⁵⁰⁷ in Kisangani,⁵⁰⁸ in the Province Orientale of the DRC.⁵⁰⁹ The headquarters were later moved to Gbadolite.⁵¹⁰

The main purpose of the MLC was to establish a movement that would effectively oppose the illegal government of the DRC⁵¹¹ with a view to compelling the commencement of a democratic process within the country which the incumbent regimes had systematically denied the people.⁵¹²

⁵⁰² ICC-01/05-01/08-368 (emphasis added); CAR-ICC-0001-0007.

⁵⁰³ P-45, T-201, p.11; P-33, T-157, p.69.

⁵⁰⁴ P-15, T-207, pp.28-29.

⁵⁰⁵ Prosecution Closing Brief, p.3.

⁵⁰⁶ P-15, T-207, p.21; P-33, T-158, pp.8, 9-11, 15, 18; D-48, T-267, p.9; D-21, T-301, pp.23-24, 28.

⁵⁰⁷ P-45, T-201, p.11.

⁵⁰⁸ P-33, T-158, p.5.

⁵⁰⁹ P-33, T-158, p.6; P-33, T-157, p.69.

⁵¹⁰ P-15, T-207, pp.25, 45; P-44, T-205, p.13.

⁵¹¹ As is well known, following the death of Laurent Desiré Kabila in 2001, who had seized power in a coup d'état, his son Joseph assumed the Presidency. See for example P-33, T-162, p.12; P-45, T-202, pp.49-50; D-59, T-236, p.27.

⁵¹² P-33, T-157, p.69; T-158, p.4; T-160, p.41; P-44, T-205, p.14; P-45, T-201, pp.11-12; T-202, pp.47-48.

237. Created by Olivier Kamitatu, Dieudonné Amuli, Valentin Senga, General Mongapa, General Alongaboni, Jean-Pierre Singo, Samuel Simene and Alain Munanga,⁵¹³ the MLC was headed by Jean-Pierre Bemba.⁵¹⁴

238. The organisation is governed by constitution, which was drafted by its founding members and adopted by the whole membership of the movement.⁵¹⁵ Its armed forces are subject to a code of conduct⁵¹⁶ and the area under its governmental control was subject to the same judicial system as the rest of the DRC.⁵¹⁷ The ideals of the movement were promoted through political commissioners⁵¹⁸ to its soldiers and the people living within the area it governed.⁵¹⁹

239. Following the Lusaka Agreements in 1999, dealt with more particularly below, each of the stakeholders had to comply with a timeline for ceasefire and peace in the various armed conflicts within the DRC, to dismantle its military capability and become a political organization. To that end, the MLC adopted its constitution and created the Conseil Politico-Militaire.⁵²⁰ As a political movement with governmental responsibilities, the MLC was recognised by a number of domestic and international treaties and agreements.⁵²¹

B. The Background to the MLC intervention

1. Patassé's Government was Legitimate

⁵¹³ P-33, T-158, p.7; P-15, T-207, p.37; P-44, T-205, p.13.

⁵¹⁴ P-33, T-157, p.70; P-45, T-202, p.18.

⁵¹⁵ P-33, T-158, pp.12, 13; P-44, T-205, pp.14-16.

⁵¹⁶ P-15, T-207, pp.37, 38; P-36, T-213, p.52.

⁵¹⁷ P-33, T-159, p.3.

⁵¹⁸ D-21, T-304, p.29; P-15, T-207, p.41.

⁵¹⁹ P-33, T-159, p.62; P-33, T-163, pp.50-51.

⁵²⁰ P-36, T-213, pp.17-18; P-44, T-205, p.17.

⁵²¹ P-33, T-158, pp.8, 13, 17.

240. For all the violence and tragedy of its history, the election of President Patassé in the country's first democratic elections marked a significant step towards peace and democracy for the CAR. The 1993 elections, organised by General Kolingba were contested and involved a second round run-off between Patassé and another candidate, former President Gomba.⁵²² General Bozizé stood for elections in 1993 but he attracted only one per cent of the votes cast.⁵²³

241. The results of the election were above suspicion of malpractice or manipulation.⁵²⁴ It is a central irony to the case that, for all the criticism levelled against him in death, to this day he remains the only democratically elected leader the country has ever had.⁵²⁵

242. Patassé represented a majority of the population of the country.⁵²⁶ His Presidential Palace was in the centre of Bangui⁵²⁷ and he was supported strongly in both Bangui and the outskirts of the capital.⁵²⁸

243. Without doubt, he faced a difficult task, and his terms of office were not greatly successful. Nonetheless, many Central Africans believed he had the right and duty to fulfil his mandate and complete his second term of office,⁵²⁹ which, according to the constitution of the CAR, would mean that 2005 would mark the end of his mandate.⁵³⁰

⁵²² D-36, T-338, pp.78-79.

⁵²³ D-36, T-338, pp.78-79; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

⁵²⁴ P-38, T-35, p.10.

⁵²⁵ D-59, T-237, pp.8-9.

⁵²⁶ EVD-T-OTP-00440/CAR-OTP-0011-0422 at 0449; EVD-T-OTP-00410/CAR-OTP-0004-0977 at 0995.

⁵²⁷ D-65, T-246, p.4.

⁵²⁸ EVD-T-OTP-00400/CAR-OTP-0004-0345 at 0347; P-9, T-107, p.37; EVD-T-OTP-00410/CAR-OTP-0004-0977 at 0995; P-31, T-183, pp.37-38.

⁵²⁹ D-36, T-338, pp.78-79.

⁵³⁰ EVD-T-OTP-00410/CAR-OTP-0004-0977; EVD-T-OTP-00410/CAR-OTP-0004-0977 at 0990; EVD-T-OTP-00411/CAR-OTP-0004-1096 at 1128.

244. As the Head of State it was not only his right but his duty to protect the people and to defend the institutions of the state with all available means.⁵³¹ Those means included appealing to foreign nation states and other signatories of international agreements for cooperation to assist in the defence of the realm.⁵³² Patassé was internationally recognised as the legitimate Head of State.⁵³³ By contrast, Bozizé's coup d'état was repeatedly condemned by the international community and the United Nations.⁵³⁴

245. Ange Félix Patassé died on 5 April 2011.⁵³⁵

2. The CAR had a long history of violent internal conflict involving crimes against humanity committed by its citizens upon one another

246. One particular myth, which has been floated disingenuously during the course of the evidence,⁵³⁶ needs to be debunked once and forever. The commission of crimes against humanity in the CAR did not occur uniquely between October 2002 and March 2003.⁵³⁷

247. The history of the CAR since 1996 is a sorry tale of civil war and violence against its people.⁵³⁸ Each civil war has been marked by inter-ethnic abuses.⁵³⁹ Each successive government and coup d'état has drawn its political support from an ethnic and tribal base, and utilised hatred and the right to revenge as a catalyst for

⁵³¹ D-57, T-258, p.48; P-6, T-96, p.46; D-59, T-237, p.40.

⁵³² P151, T-172, pp.21-23.

⁵³³ P151, T-172, pp.21-23.

⁵³⁴ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0477; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0669; EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0085; D-59, T-237, pp.17-19; D-65, T-254, p.31.

⁵³⁵ P-6, T-96, p.14.

⁵³⁶ P-151, T-173, p.7; P-6, T-96, pp.51-52; P-229, T-100, pp.4-5.

⁵³⁷ EVD-T-OTP-00401/CAR-OTP-0004-0409; EVD-T-OTP-00831/CAR-OTP-0069-0148; EVD-T-OTP-00404/CAR-OTP-0004-0577, CHM-1, T-356, pp.58-59.

⁵³⁸ ICC-01/05-01/08-128-Conf-AnxA, para. 7.

⁵³⁹ EVD-T-OTP 00404/CAR-OTP-0004-0577.

supposed political reform through the use of force.⁵⁴⁰ The history of the country for the last 20 years can only be seen as a perpetual cycle of revenge, one faction against another, which is continuing to this day.⁵⁴¹

248. Whilst each faction to these conflicts has drawn upon military assistance from friendly neighbouring and European regimes, the principal motivation for the commission of crimes against the population has undoubtedly been domestic in nature, borne of the country's tribal or ethnic divisions and the preceding history of violence.⁵⁴²

249. The suggestion that rapes, murders and looting only occurred during the 2002-2003 conflict, and moreover, only at the hands of MLC soldiers is unrealistic and unsustainable. Central Africans, whether armed or not, have shown a preponderance for committing crimes in times of conflict, whether purely as opportunism or as recompense for their victims being perceived collaborators of the enemy, or just because they were members of a different tribe.⁵⁴³ It is a telling feature of the case that, for all the oral evidence of alleged abuses, the sole examples of crimes against the population being contemporaneously recorded on video are those graphic images of Central African civilians gratefully carrying away the household goods of their own compatriots at PK4 in the videos [REDACTED].⁵⁴⁴

3. Bozizé established a rebel force between November 2001 and October 2002

⁵⁴⁰ D-59, T-236, pp.52-53; T-238, pp.59-60.

⁵⁴¹ Bozizé's regime was overthrown by a rebel group: CHM-1, T-356, pp.59-60.

⁵⁴² D-59, T-236, pp.52, 53-55; T-238, pp.59-60; EVD-T-OTP-00404/CAR-OTP-0004-0577 at 0580; EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0471; D-7, T-248, pp.48-49, 54-55.

⁵⁴³ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0459; ICC-01/05-01/08-128-Conf-AnxA, para. 7.

⁵⁴⁴ EVD-T-OTP-00345/CAR-OTP-0039-0058.

250. Whilst, of course, it is established fact that in March 2003 Bozizé installed himself as President, following the taking of Bangui,⁵⁴⁵ the intentions of the rebel militia which descended upon the capital city 5 months earlier are rather less clear. The forces which arrived in Bangui on 25 October 2002 were substantially fewer in number than those who subsequently successfully took the town, and significantly less well-armed.⁵⁴⁶ Unlike in March 2003,⁵⁴⁷ Bozizé himself was not amongst them, preferring to observe events from a distance in Paris.⁵⁴⁸ That fact alone undermines the suggestion that the purpose of the attack was to seize political power. Indeed following the resounding rejection of him by the electorate at the ballot box,⁵⁴⁹ Bozizé could hardly have considered himself to be the people's choice.⁵⁵⁰

251. More to the point, the rebel forces occupied downtown Bangui for five or six days without delivering the *coup de grâce* which would have toppled Patassé.⁵⁵¹ There are several possible inferences: that Bozizé despatched a force incapable of taking the town – a fact which he must have been aware of as a former FACA Chief of Staff; that the taking of Bangui was never part of the plan; or, more importantly that he was unaware that soldiers loyal to him would decide to attack the capital on their own initiative.⁵⁵²

⁵⁴⁵ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0418, 0435; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0166.

⁵⁴⁶ EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0168.

⁵⁴⁷ P-79, T-77, p.61; P-73, T-70, pp.9-13.

⁵⁴⁸ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0429; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0168 and 0188; EVD-T-OTP-00438/CAR-OTP-0011-0293 at 0294; D-56, T-315, pp.21-22; Prosecution Closing Brief, para. 169.

⁵⁴⁹ P-73, T-70, p.10; D-59, T-237, p.38; D-36, T-338, pp.78-79; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

⁵⁵⁰ D-36, T-338, pp.78-79; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

⁵⁵¹ EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0670.

⁵⁵² EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

252. There is more than a suggestion in the evidence that the latter was the case, and that any ancillary motive for the attack in October was thus rather less altruistic than has been advanced in this case, and rather more basic.

253. François Bozizé was born in 1946⁵⁵³ and was thus 56 years of age in October 2002. He rose in his military career to the prestigious title of head of the Army in 1997,⁵⁵⁴ appointed by Patassé, to the rank of General, and in August 2001 was Chef d'Etat Major when an attempted coup was carried out by General Kolingba. The coup was successfully defeated with the aid of a unit from the MLC.⁵⁵⁵ Although the repulsion of the attempt took only a few days, it is safe to infer that Bozizé's experiences during that campaign acquainted him with certain salient facts about the MLC, not least their fighting abilities, their leader's allegiance to President Patassé, the rapidity with which a unit of their soldiers could be deployed within the CAR, the nickname that they were known by, and the languages they spoke.⁵⁵⁶

254. He must have expected that President Patassé would call upon them, and that they would answer, in October 2002. Furthermore, the information he had at his disposal equipped him perfectly to employ the counter-intelligence and propaganda tactics which his militia men did. Armed with the term "Banyamulengue", and a handful of basic words in Lingala, it would in due course be easy for them to demonise the enemy and reapportion blame for the excesses they visited upon a disoriented civilian population.⁵⁵⁷

255. However, Bozizé's allegiance to President Patassé in 2001 did not serve him entirely well. Within a couple of months of Kolingba's defeat, he was removed from

⁵⁵³ EVD-T-OTP-00831/CAR-OTP-0004-0069-0148 at 0164.

⁵⁵⁴ EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

⁵⁵⁵ EVD-T-OTP-00831/CAR-OTP-0004-0069-0148 at 0164.

⁵⁵⁶ D-56, T-313, pp.33, 43-45, 47; T-314, pp.27-29; D-65, T-246, p.33-34.

⁵⁵⁷ D-56, T-313, pp.44-45; D-65, T-246, pp.33-34.

his post, and he narrowly escaped arrest.⁵⁵⁸ He fled his house at PK11⁵⁵⁹ together with his personal guard and withdrew to Sido, near the Chadian border, the base for his rebel forces for the period from November 2001 to October 2002.⁵⁶⁰ It may or may not be significant that the date of his removal from office was 26 October 2001.⁵⁶¹ On the first anniversary of that date, a rebel army/group notionally commanded by him would retake possession of his old home, as well as that of President Patassé.⁵⁶²

256. The motives for the assault on Bangui in October 2002 are mysterious. One theory that has been shared in international reports was that François Bozizé wanted to gain access to the abundant natural resources of his country, namely the diamonds, gold and uranium reserves.⁵⁶³ Certainly, members of the public in the CAR at the time assumed or believed that his interests, or those of his men, lay principally in diamonds rather than democracy.⁵⁶⁴

257. Whatever his motivations were, Bozizé's coup resulted in an urban guerrilla warfare putting the defenceless civilian population at risk.⁵⁶⁵ The suggestion that he was at any way in control of this by telephone from Paris is unsustainable.⁵⁶⁶ It is an irony that Bozizé remained unable to control his troops, up until his removal from power.⁵⁶⁷

258. The nucleus of Bozizé's militia were the elements of the FACA which had deserted with him at the time of his removal from office as Chief of Staff. There

⁵⁵⁸ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0417; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

⁵⁵⁹ D-56, T-313, p.16.

⁵⁶⁰ EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

⁵⁶¹ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0417; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

⁵⁶² EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

⁵⁶³ EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0672.

⁵⁶⁴ P-119, T-82, pp.22-23.

⁵⁶⁵ D-56, T-313, pp.32-34, 36-37, 40; T-314, pp.12-13.

⁵⁶⁶ Prosecution's Closing Brief, para. 169; EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0138.

⁵⁶⁷ EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0138-0139.

were approximately 500 FACA deserters, 150 men that they captured and some recruits from the different villages through which Bozizé's rebels passed en route to Sido.⁵⁶⁸

259. The 500 FACA deserters were inevitably clothed in FACA uniforms, carried Kalashnikovs and wore standard issue Ranger boots.⁵⁶⁹ The Prosecution led no evidence as part of its case from soldiers who had fought under Bozizé, and the assertions it makes in its brief about the equipment, training, discipline and organization of these men are not only unsupported by evidence,⁵⁷⁰ they are unsupportable and unrealistic. There is precious little evidence of the precise numbers of FACA officers who defected in 2001, or of the rank, experience, calibre or training of those men either.⁵⁷¹ Certainly, as deserters or mutineers the soldiers and officers stand to be judged as the absolute manifestation of military indiscipline itself, and representing, as they did, the splintered defecting factions of former army units, they lacked the cohesion of a structured army.⁵⁷² Their equipment and uniforms, moreover, by October 2002, a year away from maintenance, repair or even laundry, must have been shabby and disorganized at best, if even still existent.

260. There is no evidence that Bozizé's troops were re-equipped with uniforms and boots, only weaponry, communication equipment and transport.⁵⁷³ It is little surprise that they had the appearance of rebels,⁵⁷⁴ that is, ultimately, exactly what they were.⁵⁷⁵

⁵⁶⁸ D-56, T-313, p.20.

⁵⁶⁹ EVD-T-OTP-00014/CAR-OTP-0008-0033_R04 at 0047; D56, T-313, pp.21-22; T-316, pp.23-24.

⁵⁷⁰ Prosecution Closing Brief, paras. 162, 164.

⁵⁷¹ EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0670.

⁵⁷² EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0117, 0223.

⁵⁷³ Prosecution Closing Brief, fn. 506-510; D-56, T-313, p.21.

⁵⁷⁴ EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0164; EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0422; P-87, T-46, p.46; P-68, T-49, pp.10-11; P-80, T-61, pp.40-41; P-73, T-70, pp.11-13.

⁵⁷⁵ D-56, T-313, p.21.

261. The significant other component of Bozizé's rebel forces were the recruits drawn from the Central African population.⁵⁷⁶ The evidence suggests that they were not supplied with military uniforms, weapons or boots.⁵⁷⁷ The Prosecution euphemistically describes these recruits as being the beneficiaries of "accelerated training".⁵⁷⁸ In truth, that training was little more than a basic lesson in weapon handling. As such, "there was really no discipline." They "behaved badly" and committed a number of abuses.⁵⁷⁹

262. Certainly they had no code of conduct, nor training in the laws of war or the Geneva Conventions.⁵⁸⁰ They were unpaid⁵⁸¹, and once they had left the base at Sido, there is no evidence that they had any logistical support network at all. They had no food, no bedding, no tents or other protection from the elements, a limited number of vehicles and no fuel supply.⁵⁸² One is driven to question how a unit of 600 men⁵⁸³ could have survived for five to six days in the northern districts of Bangui,⁵⁸⁴ six weeks in Damara, and several months in other towns of the CAR in such conditions without recourse to the resources more locally available to them. The answer of course is that they did not. They took what they wanted when they wanted regardless of whether it was offered.⁵⁸⁵

263. Another non-negligible force which joined Bozizé's rebellion were the Chadian mercenaries. According to one former Bozizé fighter, they were not more

⁵⁷⁶ EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0117.

⁵⁷⁷ D-56, T-313, p.21.

⁵⁷⁸ Prosecution Closing Brief, para. 170, fn. 517.

⁵⁷⁹ D-56, T-313, p.22, 32.

⁵⁸⁰ D-56, T-313, p.22.

⁵⁸¹ D-56, T-313, p.21.

⁵⁸² D-56, T-313, p.37.

⁵⁸³ Prosecution Closing Brief, para. 166, fn. 495.

⁵⁸⁴ D-56, T-313, pp.28, 30-31, 36.

⁵⁸⁵ D-56, T-313, pp.25, 28, 37.

than a battalion.⁵⁸⁶ They would smoke hemp and were known as “killing machines”.⁵⁸⁷ In addition to the mercenaries from Chad, Bozizé appears to have received support from the Chadian government itself, in the form of both men and equipment. The soldiers took the lead in operations. They had vehicles and communication devices.⁵⁸⁸

264. The fighting capabilities of Bozizé’s militia have been significantly overstated. They met little or no resistance in the north of the country en route to Bangui.⁵⁸⁹ They failed, if indeed that was their intention, to dislodge the FACA in the capital for a period of five-to six days, despite all their heavy weaponry⁵⁹⁰ and the oft-alleged fragility of Patassé’s demoralised forces. Thereafter they were defeated in every town from PK12 back to the Chadian border really without putting up much of a fight. Their ultimate taking of Bangui can be attributed not to their military excellence, but rather to three extraneous factors: firstly, massive reinforcement of their numbers from Chad;⁵⁹¹ secondly, Patassé’s being lulled into a false sense of security by Bozizé’s apparent offer of a cease fire and peace talks;⁵⁹² and thirdly, the withdrawal of the MLC, leaving Bangui virtually undefended.⁵⁹³ In the final analysis, the loyalist forces weren’t so much defeated militarily as tricked out of power.

4. Bozizé’s rebels arrived on the outskirts of Bangui on 25 October

⁵⁸⁶ D56, T-313, p.23.

⁵⁸⁷ EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0260.

⁵⁸⁸ D56, T-313, pp.27-28.

⁵⁸⁹ D-56, T-313, p.28; T-314, p.43.

⁵⁹⁰ See Prosecution’s Closing Brief, para. 168.

⁵⁹¹ EVD-T-OTP-00717/CAR-OTP-0036-0055 at 0062; D-56, T-313, pp.21-23, 28; D-53, T-233, p.13.

⁵⁹² EVD-T-OTP-00717/CAR-OTP-0036-0055 at 0060-0061; EVD-T-CHM-00042/CAR-OTP-0057-0243 at 0245-0246; EVD-T-OTP-00579/CAR-OTP-0031-0116 minute 16.08-22.14; D-53, T-234, pp.47-48.

⁵⁹³ P-213, T-188, pp.24-25; D-19, T-291, p.13; D-53, T-231, p.37; D-49, T-271, pp.21-22.

265. The evidence is loud and unambiguous that Bozizé's rebels arrived in Bangui on 25 October 2002.⁵⁹⁴ However, the assault on the capital was not widely telegraphed, and probably not even planned. It began, not as an overt act of aggression, but rather as defensive action.

266. The chain of events began in Sido, a city in the extreme north, approximately 450 km from Bangui.⁵⁹⁵ The military action was provoked by an attack on the rebel base in Sido by forces commanded by Paul Barril and Abdoulaye Miskine.⁵⁹⁶ This battle lasted for about 48 hours until the rebels, reinforced by a company of Chadians, repulsed the opposing forces as far back as Damara.⁵⁹⁷ There was then a period of effective stalemate between 1 and 25 October 2002.⁵⁹⁸ However, on 25 October 2002 the rebel militias broke through at Damara and proceeded all the way to the capital.⁵⁹⁹ Damara was substantially deserted when Bozizé's troops entered the town, as many of the inhabitants had run away from the war.⁶⁰⁰

267. Once in Bangui, the rebels set up a base at PK12, and occupied the districts of Gobongo, Boy-Rabe, PK10, PK11, and 36 Villas.⁶⁰¹ The limit of their objectives was to take the Defence Office.⁶⁰²

268. The arrival of Bozizé's militia in Bangui took the FACA command completely by surprise. As an illustration of the lack of preparedness for an attack from the north, the Minister of Defence had despatched the then head of the CCOP, Colonel Thierry Lengbe, on a mission to Monkey Island to quell an apparent

⁵⁹⁴ See Chapter III, Section D1.

⁵⁹⁵ D-65, T-246, pp. 6-7.

⁵⁹⁶ D-56, T-313, p.23.

⁵⁹⁷ D-56, T-313, p.23.

⁵⁹⁸ D-56, T-313, p.24.

⁵⁹⁹ P-9, T-107, pp.19-20.

⁶⁰⁰ D-56, T-313, p.28.

⁶⁰¹ D-56, T-313, p.30; P-151, T-175, p.30; Prosecution's Closing Brief, paras. 3, 9; EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0163.

⁶⁰² D-56, T-313, p.30.

mutiny the night before the arrival of the troops.⁶⁰³ The small command post from which the defence of the capital was coordinated was only established upon his urgent return to Bangui.⁶⁰⁴ Bozizé's troops arrived at about three in the afternoon.⁶⁰⁵ This would have been about two or three hours before nightfall in Bangui at that time of year.⁶⁰⁶

5. The deployment of international forces

269. The first resolution to send a peace-keeping force to the Central African Republic was taken on 4 December 2001, by a summit meeting of the CEN-SAD countries in Khartoum.⁶⁰⁷ The decision to send CEN-SAD troops was ratified at a session of African Union's central organ for the prevention, management and resolution of conflicts held in Tripoli on 27 January 2002. At a CEMAC summit held in Libreville on 2 October 2002, it was decided that the CEN-SAD force should be replaced by a CEMAC one.⁶⁰⁸

270. As has been described above, the arrival of Bozizé's forces in the capital on 25 October 2002 was almost completely unexpected, even locally.⁶⁰⁹ It follows that the earliest point at which the Central African authorities could even have called for external assistance was probably the late afternoon of 25 October 2002.

271. In the urgent circumstances, it would not have been possible to assemble a further multi-national CEN-SAD or CEMAC force before the government was toppled, and the existing forces in Bangui were not sufficient to resist Bozizé's

⁶⁰³ P-31, T-182, pp.12-13.

⁶⁰⁴ P-31, T-182, p.12.

⁶⁰⁵ P-31, T-182, p.15.

⁶⁰⁶ P-23, T-51, p.9; P-110, T-127, p.36; P-112; T-129, p.13; P-108, T-135, p.19; P-47, T-177, p.21; T-181, pp.29-31.

⁶⁰⁷ EVD-T-D04-00049/CAR-DEF-0001-0102.

⁶⁰⁸ EVD-T-D04-00049/CAR-DEF-0001-0102; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0669.

⁶⁰⁹ See Chapter III, Section B3 above.

rebels. More to the point, there were serious geographical and logistical difficulties: the rebels held the airport,⁶¹⁰ making the arrival by air of any troops or equipment too dangerous. Bangui's proximity to Zongo, and the possibility of landing a force by river crossing, made the insertion of troops from the DRC the only viable response, if the democratically elected government of Ange-Félix Patassé was to be upheld.

272. The town of Zongo and the province of Equateur, in which it lay, fell under the control of the MLC, pursuant to the Lusaka Accord which partitioned the DRC at the time.⁶¹¹ Notwithstanding this proximity, dispatching a sufficient force to protect the Presidency was not something that could be achieved overnight. Zongo is not a garrison town, soldiers would have to be transported there and then across the river. In any event, the MLC would have to decide whether it could or wished to assist. Even that process could not have begun until late in the day of 25 October.

C. The Process Leading to the MLC insertion

1. Patassé requested help

273. The insertion of foreign troops to protect the democratic institutions of the CAR had begun in 2001, shortly after Bozizé had withdrawn to Sido with a contingent of FACA deserters.⁶¹² Those peacekeeping forces had remained within the country for some time.⁶¹³ The Libyans were already in Bangui on 25 October when the rebel forces arrived.⁶¹⁴

⁶¹⁰ D-56, T-313, pp.28, 14; D-50, T-254, pp.21-22; EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0083.

⁶¹¹ EVD-T-D04-00048/CAR-D04-0003-0527.

⁶¹² See Chapter III, Section B3.

⁶¹³ See Chapter III, Section B5.

⁶¹⁴ P-38, T-35, pp.20-21; T-37, pp.9-10; P-87, T-46, p.38; P-169, T-139, p.43; P-31, T-183, p.39; P-36, T-214, pp.43-44.

274. What persuaded President Patassé to ask for further military assistance is the subject of no direct evidence at all. Lengbe, the commander of the CCOP, was non-plussed when he learnt of the potential arrival of MLC forces to defend the capital, believing that the existing loyalist forces were perfectly capable of securing the capital and repelling the rebels.⁶¹⁵ Indeed he maintains that they did so for several days before the MLC arrived.⁶¹⁶ Prior and subsequent events would suggest that it is inevitable that Colonel Gaddafi, at least, was a party to the decision: he already had soldiers in the city whose lives would have been at risk had Bozizés rebel forces taken Bangui. Subsequently his logistical support would be called upon to supply the loyalist forces in the CAR through airlifted supplies to Bangui via Gbadolite and Zongo.⁶¹⁷

275. Given their existent commitment to securing the institutions of democracy within the CAR, the governments of the other signatories of the CEN-SAD and CEMAC agreements must have tacitly approved the MLC insertion and Libyan logistical support, if they were not indeed specifically consulted.⁶¹⁸

276. The characterisation of this request as self-serving and based on the personal relationship between Mr. Bemba and President Patassé ⁶¹⁹ is not justified. There were genuine security concerns for the region in relation to which the MLC had legal obligations.⁶²⁰ The insertion would have been a logistical disaster without the support of the Libyans, and the international community raised no complaint about

⁶¹⁵ P-31, T-182, pp.19-21, 23.

⁶¹⁶ P-31, T-182, p.23.

⁶¹⁷ P-36, T-213, p.66; D-49, T-271, p.11; CHM-01, T-357, p.64; D-66, T-279, pp.46-47; D-53, T-230, p.26.

⁶¹⁸ EVD-T-D04-00049/CAR-DEF-0001-0102 at 0103; EVD-T-D04- 00050/CAR-DEF-0001-0096, at 0097.

⁶¹⁹ Prosecution Closing Brief, paras. 9, 10, 123, 171, 521; LRV Closing Brief, paras. 17, 229.

⁶²⁰ EVD-T-D04-00049/CAR-DEF-0001-0102 at 0103; EVD-T-D04- 00050/CAR-DEF-0001-0096 at 0097; D-59, T-237, pp.33-38; EVD-T-D04-00048/CAR-D04-0003-0527 at 0533.

the MLC support for a legitimate government in the CAR, whilst continuing to condemn the actions of the rebel forces.⁶²¹

2. The decision to send troops to the CAR was not taken alone by Jean-Pierre Bemba.

277. However enthusiastic Mr. Bemba might have been to assist in the CAR in 2002 (and there is little evidence of that) he would have appreciated the need to receive advice about the wisdom and practicalities of sending two or three battalions over the river to Bangui.

278. Specifically, he would have to have considered the MLC's legal obligations under the various local accords and agreements,⁶²² the legality of any insertion of MLC troops, the effect that the removal of units of this size would have had on the MLC's ability to defend its own area of responsibility, the efficacy of getting involved (in other words could the intervention be achieved before Patassé was toppled?), the logistics of moving units of this size to and across the river Ubangui, the security of the landing zone in Bangui, and the logistical arrangements for the operation itself.⁶²³

279. This sort of information was self-evidently not at his fingertips, and of necessity he would have to have consulted with his General Staff at least before giving any order for troops to cross over to the CAR.⁶²⁴ The decision had political and diplomatic implications, and could not have been taken without reference to the leaders of the MLC's political movement. As has been previously outlined,⁶²⁵ he

⁶²¹ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0477; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0669; D59, T-237, pp.17-19.

⁶²² EVD-T-D04-00049/CAR-DEF-0001-0102; EVD-T-D04- 00050/CAR-DEF-0001-0096.

⁶²³ P-36, T-217, pp.35, 37, 40.

⁶²⁴ P-213, T-186, pp.30-35; T-190, p.25.

⁶²⁵ EVD-T-D04-00049/CAR-DEF-0001-0102 at 0103; EVD-T-D04- 00050/CAR-DEF-0001-0096, at 0097.

almost certainly consulted with Colonel Gaddafi and possibly other CEN-SAD leaders as well. This level of consultation and collaboration is borne out by the evidence.⁶²⁶

3. The MLC sent a reconnaissance party on 26 October

280. Once the strategic decision to send a force been taken, operational obstacles had to be explored. The only viable method of doing this was to send military commanders of an appropriate rank to inspect the theatre of combat, the proposed landing site and the existing loyalist forces, and to discuss with them the commanders in Bangui the logistics of conducting a joint operation.⁶²⁷ The suggestion that the MLC forces simply departed in “waves” from Zongo and commenced fighting the enemy in a completely uncoordinated fashion is neither consistent with the evidence, nor borne of any practical or military reality.⁶²⁸

281. The MLC had no existing military or intelligence presence in Bangui sufficient to provide it with such information,⁶²⁹ neither was there an effective communication bridge between the ALC and the FACA.⁶³⁰ Although it possessed a helicopter and some Antonov transporter planes, the MLC had no aerial surveillance capability,⁶³¹ and perhaps most importantly of all, however Jean-Pierre Bemba and Ange-Felix Patassé might have been able to communicate, neither was a military tactician.⁶³² This was ultimately an operation which had to be coordinated by their military commanders.⁶³³

⁶²⁶ P-45, T-202, pp.25-26; D-19, T-284, p.17; P-213, T-186, pp.27, 30; D-39, T-308, p.33.

⁶²⁷ P-36, T-218, pp.45-47; P-219, T-197, pp.48-49, 60; T-199, pp.27, 41; P-31, T-182, pp.12-13, 26; T-183, p.6; D-19, T-284, pp.34, 47; T-285, pp.2-5, 11-12; D-53, T-229, pp.9, 54-55; T-230, p.60; T-231, p.31.

⁶²⁸ Prosecution Closing Brief, paras. 44, 126, 140.

⁶²⁹ P-31, T-182, pp.12-13, 45; D-19, T-285, pp.2-5; D-53, T-231, p.35.

⁶³⁰ P-219, T-199, pp.45-47, 50-51.

⁶³¹ D-19, T-285, p.4.

⁶³² P-36, T-217, p.31.

⁶³³ D-53, T-229, pp.10, 21, 28.

282. On 26 October a contingent of MLC officers and bodyguards, numbering about 150 men crossed over from Zongo to Bangui. This is contemporaneously recorded by a message in the cahier,⁶³⁴ and corroborated by Lengbe who recalls 120 MLC officers arriving the day after Bozizé's forces arrived in the capital.⁶³⁵ General Ferdinand Bombayake, one of the other central figures in the organization of the defence of Bangui, was not called. Nonetheless, he reported to Findiro that the MLC came twice, and that he, Bombayake, met them.⁶³⁶ A number of witnesses testified that the contingent went on a fact-finding mission and returned the same day.⁶³⁷

283. A unit of that size would have had literally no impact even had it been used militarily. There were a greater number of forces already available to Patassé,⁶³⁸ and those forces, according to Lengbe, were capable of holding their own against Bozizé's rebels. Indeed they were doing so, and in any event, there was an effective cease-fire during 26 and 27 October.⁶³⁹

284. The nearest available MLC forces were situated in Libenge and Imese.⁶⁴⁰ That was a 2-3 day march from the river crossing point at Zongo.⁶⁴¹ The possibility of moving forces from that area was under discussion in the afternoon of 25 October, but the logistics had not been agreed.⁶⁴² The MLC would not have moved significant numbers of fighting men from the front at Libenge or Imese without first

⁶³⁴ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1631.

⁶³⁵ P-31, T-182, p.25.

⁶³⁶ P-6, T-96, p.19, 27.

⁶³⁷ See for example, P-65, T-170, p.52; D-19, T-282, pp.19, 24-25; T-286, p.8.

⁶³⁸ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0419; P-31, T-183, p.12.

⁶³⁹ P-31, T-182, p.43.

⁶⁴⁰ See for example, D-19, T-284, pp.50-51; D-45, T-293, pp.45-50; T-294, pp.6-7.

⁶⁴¹ D-19, T-282, pp.25-26.

⁶⁴² EVD-T-OTP-00702/CAR-D04-0002-0514 at 1628.

investigating the viability of inserting them into the conflict in Bangui.⁶⁴³ Even the logistics of the river crossing were completely unknown prior to 26 October.⁶⁴⁴ The movement of troops from Imese and Libenge did not begin until late on 26 October or 27 October.⁶⁴⁵

4. The MLC forces did not engage the rebel forces until 30 October

285. Lengbe told the Chamber that the MLC first interacted with rebel forces in combat five days after Bozizé's forces arrived in Bangui. Although he puts the date as 27 October,⁶⁴⁶ it is unanimously accepted that he is incorrect when he stated for the first time during his oral evidence that Bozizé's forces arrived on 22 October.⁶⁴⁷ He recalls in some detail how he was told by General Yangongo two days after Bozizé's troops arrived in Bangui that the MLC would be coming, and that after that he was aware of them arriving in single boatloads, and that once, five days after the first attack by the rebels, there was a sizeable body of them, they joined the combat. Accordingly, the effect of his evidence must be that the first combat between loyalist forces, including the MLC, and the rebel forces was 30 October.⁶⁴⁸

286. Lengbe's evidence is critical: as the coordinating commander of the loyalist forces at the time⁶⁴⁹ he is uniquely placed to testify as to the timeline of events during the first few days of the conflict in Bangui. He was not disposed to give evidence favourable to the Accused. Indeed his belated and curious attempt to shift the date forwards by three days indicates quite the contrary.⁶⁵⁰

⁶⁴³ The exact purpose of the "reconnaissance" mission: EVD-T-OTP-00702/CAR-D04-0002-0514 at 1631; P-65, T-169, pp.35-36; D-19, T-284, p.22; D-49, T-270, pp.47-51.

⁶⁴⁴ EVD-T-OTP-00702/CAR-D04-0002-0514 at 1628. P-36, T-218, p.13.

⁶⁴⁵ D-19, T-284, p.25; D-45, T-294, p.7.

⁶⁴⁶ P-31, T-182, p.26.

⁶⁴⁷ P-31, T-182, pp.13-14, 21.

⁶⁴⁸ P-31, T-182, p.26.

⁶⁴⁹ P-31, T-182, pp.19-21.

⁶⁵⁰ P-31, T-182, pp.13-14.

287. His timeline of events is corroborated by a wealth of evidence, not least the mountain of evidence which suggests that Bozizé's forces occupied all the northern areas of Bangui between 25 and 30 October,⁶⁵¹ and the impossibility of the MLC assembling a meaningful fighting force in the city prior to the latter of those dates.⁶⁵² The Prosecution's theory that the MLC arrived in waves and engaged in periodic combat with the rebels between 26 and 30 October,⁶⁵³ is inconsistent with the evidence, and irreconcilable with certain of Prosecution other submissions.⁶⁵⁴

288. More to the point, even if such a possibility is entertained, any elements of the MLC fighting in the CAR during that time could only have done so under the direct orders of the FACA.⁶⁵⁵ It is striking that, other than two anodyne SitReps on 27 and 29 October,⁶⁵⁶ there is no entry in the MLC's contemporaneous record of Etat Major communications (the cahier), of a communication from Ops Bangui between 26 and 30 October.⁶⁵⁷ It is accepted that the unit commander, Mustapha, did not arrive until the 30th,⁶⁵⁸ and the ability of any elements to communicate with Gbadolite by any other means did not exist: the evidence is clear that a limited number of satellite telephones were only provided to MLC commanders once they ventured beyond PK12 some weeks later.⁶⁵⁹

289. The absence of entries in the cahier concerning the arrival and/or deployment of MLC forces supports the inference that they were not there and/or they were not fighting (and the Defence only has to demonstrate one possible

⁶⁵¹ Prosecution Closing Brief, para.3.

⁶⁵² D-56, T-313, pp.28, 30-31, 36; P-151, T-175, p.30; EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0176, 0179, 0182.

⁶⁵³ Prosecution Closing Brief, paras. 44, 126, 140.

⁶⁵⁴ CAR-ICC-0001-0007; ICC-01/05-01/08-368; ICC-01/05-01/08-377.

⁶⁵⁵ P-6, T-96, p.19, 27; P-31, T-182, pp.12-13, 45.

⁶⁵⁶ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1632.

⁶⁵⁷ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1631-1637.

⁶⁵⁸ EVD-T-OTP-00702/CAR-D04-0002-01514 at 1637.

⁶⁵⁹ D-19, T-284, p.39.

inference to rebut the Prosecution case in this or any regard). The only communications from Ops Bangui – “Situation – Calme” on 27 and 29 October would suggest the same.⁶⁶⁰

290. It was not possible for the MLC forces even to arrive before 29 October. Yangongo only told Lengbe on 27 October that the MLC troops were coming.⁶⁶¹ Two battalions had then to be transported from Imese and Libenge to Zongo,⁶⁶² and to cross into the CAR. Each of those processes consumed a great deal of time.⁶⁶³ It was not possible to airlift the troops from Libenge, and so the two battalions marched together to Zongo. This march of 150 km took two days.⁶⁶⁴ At the earliest the expeditionary force was present in Zongo on 29 October.

291. The river crossing itself was not the work of a moment. There was only one boat. Its capacity, according to Lengbe was 30-50 persons, and the crossing was done in successive trips.⁶⁶⁵ Whatever the true capacity of the vessel, on the evidence it is clear that the landing of the MLC troops in Bangui involved a minimum of 16 crossings and a maximum of about 60, assuming two battalions to number approximately 1,000 men. Taking into account the crossing time and the embarkation and disembarkation processes, this would have not been achieved in merely a few hours.⁶⁶⁶ The boat captain, whose evidence was in many ways fantastic, testified that it took 19 days’ work.⁶⁶⁷ Lengbe believed it took from 27 to 30 October.⁶⁶⁸ The evidence of those who actually crossed that it took two days is not just realistic, it is probably conservative.

⁶⁶⁰ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1632, 1633, 1635.

⁶⁶¹ P-31, T-182, p.21.

⁶⁶² D-19, T-284, p.25; D-45, T-294, p.7.

⁶⁶³ D-19, T-284, pp.25-26.

⁶⁶⁴ D-19, T-284, pp.25-26; EVD-T-OTP-00702/CAR-D04-0002-1514 at 1623.

⁶⁶⁵ P-31, T-182, p.25; D-49, T-274, p.54.

⁶⁶⁶ Each crossing would take approximately 20 minutes. P-6, T-94, pp.18-19.

⁶⁶⁷ P-47, T-179, pp.35-36.

⁶⁶⁸ P-31, T-182, p.26.

292. The period from 26 until 30 October is a significant one in terms of the crimes alleged in the DCC. Given the legal requirement to prove firstly, that the crimes alleged were committed by Accused's subordinates, the evidence presents the Prosecution with significant difficulties, because it has not shown beyond reasonable doubt that any unit of MLC soldiers ventured beyond the confines of the Support Battalion's barracks during that period and into the areas where those crimes are alleged to have taken place, and certainly not in the sort of numbers alleged by those who purport to be victims of those crimes.⁶⁶⁹

293. However, secondly, given the legal requirement to establish that the Accused had temporally coincident effective control over the perpetrators of those crimes, the evidence presents a further problem: even if one accepts that there were some elements of the MLC in Bangui between 26 and 30 October, there were no communications with those disparate units, nor even the ability to communicate.

5. The alleged speech by Mr. Bemba to the troops at Zongo did not happen

294. The weight of the evidence prevents a finding that Mr. Bemba addressed the departing troops at Zongo. In truth the allegation is just another example of the distortion and exaggeration which characterised the whole of P-213's evidence, and render him incredible on any salient point.⁶⁷⁰

295. Contrary to the assertion in the Prosecution brief, the allegation is not corroborated by an "interlocking" account from P-47;⁶⁷¹ it is rather contradicted by it, since P-47 does not describe Mr. Bemba as delivering the speech, but rather an army officer, who was addressing a boatload of (presumably 30-50) men.⁶⁷²

⁶⁶⁹ See Chapter III, Section D5.

⁶⁷⁰ Prosecution Closing Brief, para. 695; P-213, T-186, pp.38, 41-42.

⁶⁷¹ Prosecution Closing Brief, para. 696.

⁶⁷² P-47, T-176, p.33.

296. P-213's account is plainly untrue,⁶⁷³ as are his allegations regarding trips to various towns in the CAR [REDACTED] during the course of the conflict.⁶⁷⁴ This uncorroborated testimony is contradicted by other witnesses [REDACTED]. [REDACTED]. [REDACTED].⁶⁷⁵ [REDACTED]. When asked directly whether Mr. Bemba was in Zongo before the crossing, he said "I did not see him".⁶⁷⁶ D-45 [REDACTED]⁶⁷⁷ confirmed that Mr. Bemba did not give a speech to his troops.⁶⁷⁸ Nor was [REDACTED]⁶⁷⁹ aware of any such speech.⁶⁸⁰ D-66 said he did not hear that Mr. Bemba made a speech to the soldiers in Zongo.⁶⁸¹

297. The witnesses cited above were all called by the Defence, nonetheless, their evidence about events at Zongo went, in each case, unchallenged by the Prosecution.⁶⁸²

298. The alleged address makes no sense in practical terms. The imperative was to get the troops across the river as quickly as possible. Holding them at an airfield for a speech from the President represents an unnecessary delay.⁶⁸³ Moreover, in order to deliver the address, Mr. Bemba would have to have flown from Gbadolite and say to the troops the precise opposite of what he was to say to them a few days later in PK12.⁶⁸⁴ The Prosecution has given no plausible explanation for this inconsistency.

⁶⁷³ P-213, T-186, pp.41-43.

⁶⁷⁴ P-213, T-186, pp.63-65; T-187, p.12; See also Chapter II.

⁶⁷⁵ D-19, T-284, p.28.

⁶⁷⁶ D-19, T-286, p.18.

⁶⁷⁷ D-45, T-293, p.44.

⁶⁷⁸ D-45, T-294, p.11.

⁶⁷⁹ D-21, T-306, p.3.

⁶⁸⁰ D-21, T-306, p.69.

⁶⁸¹ D-66, T-281, p.4.

⁶⁸² D-45, T-294, p.11.

⁶⁸³ P-213, T-186, p.42.

⁶⁸⁴ P-36, T-215, p.20.

D. The Development of events

1. 25 October

299. On 25 October 2002, the rebel militia forces collated by General Bozizé advanced from Damara to the capital Bangui.⁶⁸⁵ The furthest point north about which the Chamber has heard evidence of fighting that day was PK-18, where FACA troops were attacked.⁶⁸⁶ Very soon however, they arrived in PK-12 where they set up their headquarters.⁶⁸⁷ There was fighting at PK-12 on 25 October.⁶⁸⁸ Shots were fired and there were bodies in the streets.⁶⁸⁹ There were crimes committed against the population too in PK-12; the rebels pillaged private houses as they took control of the area.⁶⁹⁰

300. After that, they moved towards and occupied the city centre of Bangui.⁶⁹¹ [REDACTED].⁶⁹² [REDACTED].⁶⁹³ [REDACTED].⁶⁹⁴ [REDACTED].⁶⁹⁵

301. The rebels took control of all of the northern suburbs of the city including PK12, PK11, Gobongo, Fouh, Boy-Rabe, the 4th Arrondissement, 8th Avenue, Marabena, Combattant and Miskine.⁶⁹⁶ A detachment went to take the airport.⁶⁹⁷

⁶⁸⁵ D-9, T-322bis, p.16; D-51, T-261, pp.28, 32; D-56, T-313, p.28; T-314, p.43; D-65, T-245, pp.35-36; T-247, p.42; D-50, T-254, p.60; D-7, T-248, p.10; D-36, T-338, p.63.

⁶⁸⁶ D-57, T-256, p.23.

⁶⁸⁷ D-56, T-313, pp.28-30; D-45, T-295, p. 9.

⁶⁸⁸ EVD-T-OTP-00446/CAR-OTP-0013-0082.

⁶⁸⁹ D-51, T-261, p.31.

⁶⁹⁰ D-36, T-338, p.11.

⁶⁹¹ D-9, T-322bis, p.16; D-51, T-261, p.28, 32; D-56, T-313, p.28; T-314, p.43; D-65, T-245, pp.35-36; T-247, p.42; D-50, T-254, p.60; D-7, T-248, p.10.

⁶⁹² D-56, T-313, pp.30-31; P-23, T-51, pp.8-9; D-50, T-254, pp.17-19.

⁶⁹³ [REDACTED].

⁶⁹⁴ [REDACTED].

⁶⁹⁵ [REDACTED].

⁶⁹⁶ EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0084; EVD-T-OTP-00849/CAR-OTP-0013-0320 at 0327.

⁶⁹⁷ D-56, T-313, pp.14, 28; D-50, T-254, p.17; EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0083.

They occupied houses in Marabena,⁶⁹⁸ and a transmission team occupied the Presidency.⁶⁹⁹

302. The rebels murdered and kidnapped members of the population. Two brothers of [REDACTED] were killed in Bangui, as well as two brothers and the cousin of [REDACTED].⁷⁰⁰ [REDACTED].⁷⁰¹ Prosper N'Douba, President Patassé's spokesman, was abducted at the Lycée Boganda, while he was returning home from a meeting with President Patassé⁷⁰² and the director of the security services of the President of the National Assembly was kidnapped from Boy-Rabé.⁷⁰³

303. The crimes against the population commenced almost immediately upon the arrival of Bozizé's troops in the capital. An act of pillage was [REDACTED].⁷⁰⁴ [REDACTED]:⁷⁰⁵

[REDACTED].

304. The population of Bangui was terrorized and hid.⁷⁰⁶ Flights in and out of Bangui airport were suspended.⁷⁰⁷

305. The Presidential palace came under attack, but was being defended by loyalist forces which comprised FACA, USP and SCPS forces of Ndoubade

⁶⁹⁸ D-51, T-261, p.28.

⁶⁹⁹ D-56, T-313, p.28.

⁷⁰⁰ D-65, T-245, pp.41-42.

⁷⁰¹ [REDACTED].

⁷⁰² EVD-T-OTP-00827/CAR-OTP-0002-0108 at 0156; D-65, T-245, pp.27-28.

⁷⁰³ D-65, T-245, pp.41-43.

⁷⁰⁴ [REDACTED].

⁷⁰⁵ [REDACTED].

⁷⁰⁶ D-65, T-245, pp.35-36.

⁷⁰⁷ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0077.

Victor.⁷⁰⁸ Together with the Sarawi, led by Miskine and Paul Barril's forces, they managed to push Bozizé's militia back from the palace.⁷⁰⁹

306. Lengbe came from Monkey Island during the afternoon of 25 October and set up a command post.⁷¹⁰ General Bombayake ordered troops at the TV station at Lenele, to go to CEMAC.⁷¹¹ In Gbadolite, preliminary steps were being taken to mobilise a unit to cross over to the CAR. Mustapha received an order from the Chief of Staff of the ALC to ready his men to go to the CAR.⁷¹² A preliminary order to the same effect was given to the [REDACTED].⁷¹³ Mustapha was asked about the viability of transporting units from Libenge to Zongo by riverboat. He replied by radio message that the process would take too long.⁷¹⁴ Coincidentally, Colonel Romain Mondonga, on his way to Libenge via Zongo on the 24 October 2002, would arrive the next day to conduct an inspection of the sector.⁷¹⁵

2. 26 October

307. There was a lull in activity on 26 October, as each side dug-in to positions close to the Presidential Palace, making for an effective stand-off.⁷¹⁶ The cahier for that day records the situation as being "calme".⁷¹⁷

308. [REDACTED] video recording shows only the nervous movement of soldiers and civilians.⁷¹⁸ Whether any safe inference can be drawn from the speaker to

⁷⁰⁸ D-7, T-248, p.37.

⁷⁰⁹ D-51, T-261, p.32; D-7, T-248, p.10.

⁷¹⁰ P-31, T-182, p.13.

⁷¹¹ D-51, T-261, p.32.

⁷¹² D-19, T-284, p.17.

⁷¹³ D-45, T-298, p.52.

⁷¹⁴ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1628.

⁷¹⁵ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1625.

⁷¹⁶ P-31, T-182, p.16.

⁷¹⁷ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1630.

camera's assertion that [REDACTED] is debatable.⁷¹⁹ It might refer to the [REDACTED].

309. A company of between 120 and 150⁷²⁰ men crossed from Zongo to Bangui on 26 October under the command of Captain René Abongo.⁷²¹ The company was comprised of about 10 officers, each of whom had a detachment of bodyguards.⁷²² The purpose of the mission was to see that the conditions for landing a brigade of soldiers were suitable.⁷²³

310. After making contact with the Central African authorities they returned to the DRC,⁷²⁴ where René and Willy Bomengo reported to battalion commander Seguin Temo in Libenge.⁷²⁵ Their report to him was delivered at 4.00 am on 27 October and he reported on at 6.00.⁷²⁶

311. D-30 was raped by three men in PK12 on 26 October as she went to get water in the morning.⁷²⁷ Her identification of her attackers as being elements of Bozizé's forces is underlined by her having seen one of her attackers after the end of the war driving a military vehicle in PK5 as part of the armed forces.⁷²⁸ Her attackers were

⁷¹⁸ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0171.

⁷¹⁹ EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0170.

⁷²⁰ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1631; P-31, T-182, pp.25-26.

⁷²¹ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1631; P-31, T-182, p.27; D-45, T-298, p.18; P-65, T-170, p.52.

⁷²² [REDACTED].

⁷²³ P-65, T-169, pp.35-36; D-19, T-284, p.22; D-49, T-270, pp.48-49.

⁷²⁴ D-19, T-284, p.22.

⁷²⁵ P-65, T-169, pp.35-36; D-45, T-294, pp.6-7.

⁷²⁶ [REDACTED].

⁷²⁷ D-30, T-340, p.11.

⁷²⁸ D-30, T-340, p.15; T-341, p.6.

Central Africans, but they spoke both Sango and Lingala.⁷²⁹ They wore military uniforms.⁷³⁰ The men also abducted a young girl, called [REDACTED].⁷³¹

312. There is no possibility that any MLC troops were in PK12 in the early morning of 26 October. Although a contingent of officers and bodyguards did cross to meet with the Central African authorities, their mission did not take them to PK12. In any event, as both the evidence of those who took part in this mission and the report in the cahier reveal, they had not even arrived in Bangui by the time these offences were being committed.⁷³² The episode places a completely different complexion on the rebel forces' five day occupation of PK12 and the northern districts of Bangui from that which the Prosecution and several of its victim-witnesses have sought to mislead the Chamber.

313. P-22 was raped by two men in her home at PK12. The house was also ransacked and pillaged.⁷³³ She was adamant that the date of her attack was 26 October, but recalls that it was a Friday because she had been to prayers that day. Her house had a calendar in it,⁷³⁴ and she was clear that was date when interviewed by the Prosecution in 2008.⁷³⁵ Ultimately her evidence was that Bozizé's troops arrived on a Friday, and that the rapes took place on 26 October.⁷³⁶ In fact that would be correct because 25 October was the last Friday in October 2002.

⁷²⁹ D-30, T-341, p.3.

⁷³⁰ D-30, T-340, p.15.

⁷³¹ D-30, T-341, p.11.

⁷³² EVD-T-OTP-00702/CAR-D04-0002-1514 at 1531: the message is sent at 06.30am prior to the crossing. 151 men needed to cross. This would have taken some time.

⁷³³ P-22, T-40, pp.19-21; T-41, pp.13-14, 18-19.

⁷³⁴ P-22, T-42, p.37.

⁷³⁵ P-22, T-40, p.15.

⁷³⁶ P-22, T-42, p.42.

314. The soldiers who raped her wore uniforms which all bore the insignia of the “Garde Présidentielle” and they were malodorous.⁷³⁷ Apart from the fact that one of them uttered the word “yaka”, no other indicia points to the perpetrators of these offences being Lingala speakers, let alone Congolese or Mr. Bemba’s subordinates. P-22 is equally clear that her family fled PK12 on 26 October and she gives no direct evidence either of the withdrawal of Bozizé’s troops nor the arrival of the loyalist forces, only of the entry of Bozizé’s troops on Friday (25 October) and the entry of the soldiers into her home on 26 October.

315. Although the MLC may have worn the uniforms of the USP, these uniforms did not bear the insignia of the “Garde Présidentielle”.⁷³⁸ No reasonable Trial Chamber could conclude that these offences were committed by persons with whom Mr. Bemba had a superior-subordinate relationship.

3. 27 October

316. There was an effective ceasefire between the loyalist and rebel forces during the two days following the arrival of the rebels in Bangui.⁷³⁹ Lengbe’s evidence that the FACA forces were concentrated in their barracks is corroborated by D-9 who testified that they were at Camp Kasai on 27 October.⁷⁴⁰

⁷³⁷ P-22, T-42, p.39.

⁷³⁸ As a general rule, they all say the Banyamulengue did not have any insignia on their military uniforms: P-38, T-33, p.22; P-29, T-80, p.53; P-31, T-182, p.34; P-6, T-94, p.49; P-9, T-102, p.48; V-01, T-220, p.22; P-112, T-129, pp.52-53; P-108, T-132, p.23; D-53, T-230, p.27.

⁷³⁹ P-31, T-182, p.43.

⁷⁴⁰ D-9, T-322bis, p.18.

317. The CAR government issued calls for assistance on 27 October, according to the information Lengbe received from General Yangongo,⁷⁴¹ and D-56 recalled that it was on that day that rebel positions were bombarded from an aeroplane.⁷⁴²

318. [REDACTED] Bozizé's militiamen marauding in the 8th Arrondissement of Bangui.⁷⁴³ [REDACTED], but it is not clear whether these were fired in combat rather than in the commission of crimes.⁷⁴⁴ [REDACTED].⁷⁴⁵ [REDACTED].⁷⁴⁶ [REDACTED].⁷⁴⁷

319. [REDACTED] corroborate the testimony of a number of Defence witnesses who confirm the continued occupation of this area on the 27 October.⁷⁴⁸ According to D-56, the rebel forces committed crimes against the civilian population in those areas at that time, including the rape of a woman at 36 Villas.⁷⁴⁹ This offence was reported to a commander, [REDACTED], but he took no action.⁷⁵⁰

320. P-68 recalls that she was raped on 27 October in a compound in Fouh, near the Lycée Miskine,⁷⁵¹ four to five kilometres from the centre of Bangui, and one of the quartiers of the city held by the rebel forces at that time.⁷⁵² She recalls the date of her ordeal, because, to use here words "that's what happened to me, and I had to remember it. To keep that date in my mind, in a jealous way."⁷⁵³ That the date was 27 October is further corroborated by three significant aspects of her recollection:

⁷⁴¹ P-31, T-182, p.21.

⁷⁴² D-56, T-313, p.31.

⁷⁴³ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0171.

⁷⁴⁴ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED].

⁷⁴⁵ [REDACTED].

⁷⁴⁶ [REDACTED].

⁷⁴⁷ [REDACTED].

⁷⁴⁸ D-51, T-261, p.28; D-56, T-313, p.28; D-50, T-254, p.17; D-7, T-248, p.10.

⁷⁴⁹ D-56, T-313, p.35.

⁷⁵⁰ D-56, T-313, p.35.

⁷⁵¹ P-68, T-48, pp.18-19.

⁷⁵² D-51, T-261, p.28; D-56, T-313, p.28; D-50, T-254, p.17; D-7, T-248, p.10.

⁷⁵³ P-68, T-48, pp.18-19.

firstly, that the offences took place during the period when things had calmed down after the initial fighting in the capital;⁷⁵⁴ and secondly, that it was the date of a radio broadcast in which President Patassé announced that MLC troops would be coming to fight with the loyalist forces.⁷⁵⁵ Thirdly, of course is her consistent averment that the incident occurred two days after the rebel forces arrived in the capital.⁷⁵⁶

321. After the incident, she fled from Bangui, but returned within a month.⁷⁵⁷ The rest of her family had fled two days previously when Bozizé's militia had arrived.⁷⁵⁸ She identified the perpetrators of her rape as MLC soldiers by reason of their allegedly speaking Lingala, however, she could not recall one word that they said,⁷⁵⁹ and did not herself know a single word of Lingala.⁷⁶⁰ She offers no distinctive description of their clothing. She had not ventured from her home in two days,⁷⁶¹ and thus can make no assessment of which forces were controlling the area at one time or another.⁷⁶² There is no feature of her evidence which could lead to a finding that the men who raped her were MLC soldiers. Indeed all the other indicia would suggest that they must have been Bozizé's troops, given their vice-like grip on the area where the offence occurred on 27 October.

322. Further away from the capital, there is evidence of Bozizé's troops having a presence in Damara on 27 October.⁷⁶³ On the road from Damara to PK12, at PK22, P-75 was raped vaginally and anally and forced to perform fellatio on 3 soldiers.⁷⁶⁴

⁷⁵⁴ P-68, T-48, p.11.

⁷⁵⁵ P-68, T-48, p.14.

⁷⁵⁶ P-68, T-48, p.10.

⁷⁵⁷ P-68, T-49, p.25.

⁷⁵⁸ P-68, T-49, p.23.

⁷⁵⁹ P-68, T-49, p.49.

⁷⁶⁰ P-68, T-50, p.5.

⁷⁶¹ P-68, T-49, p.26.

⁷⁶² P-68, T-49, p.29.

⁷⁶³ P-209, T-117, p.16.

⁷⁶⁴ P-75, T-92, p.9.

She recalls that the attack took place on a Sunday,⁷⁶⁵ the day she fled from the fighting, and that Bozizé's rebels arrived at Fohou on 26 October, which was the immediately previous Friday.⁷⁶⁶ In fact, having regard to the calendar for 2002, she is one day out – Friday was the 25th. Either way, there is no possibility of any MLC units having advanced 22 km north from Bangui by the second afternoon⁷⁶⁷ after Bozizé's troops arrived there. The submission of the Prosecution that this witness did not recall the date of her attack should be disregarded.⁷⁶⁸ Her evidence on this point was perfectly clear. In any event, the MLC troops did not arrive in PK22 until 5 December.⁷⁶⁹

323. The men were wearing the uniforms of the FACA and Ranger boots.⁷⁷⁰ She could not understand what they were saying, but recalls that when she first came across a group of soldiers in the bush, they said "yaka" to her. She could not recognise the language that they were speaking,⁷⁷¹ even though as a resident of Bangui she had been regularly exposed to Lingala.⁷⁷² No reasonable Trial Chamber could find that the perpetrators of these offences were the subordinates of Mr. Bemba.

4. 28 October

324. Only sporadic activity took place on 28 October. Ops Bangui did not even trouble itself to submit a SitRep to the ALC General Staff.⁷⁷³ Neither, apparently

⁷⁶⁵ P-75, T-92, p.15.

⁷⁶⁶ P-75, T-92, p.35.

⁷⁶⁷ P-75, T-92, p.29.

⁷⁶⁸ Prosecution Closing Brief, para. 202.

⁷⁶⁹ EVD-T-OTP-00576/CAR-OTP-0031-0099; EVD-T-CHM-00019/CAR-OTP-0056-0278 at 0292.

⁷⁷⁰ P-75, T-92, p.39.

⁷⁷¹ P-75, T-93, p.19.

⁷⁷² P-75, T-93, p.14.

⁷⁷³ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1631-1637.

[REDACTED].⁷⁷⁴ Bangui Airport remained closed, according to the flight logs, indicating that the rebel forces retained control.⁷⁷⁵

325. There is other evidence demonstrating that Bozizé's militia continued to occupy and control other districts of the downtown area and the northern suburbs of the capital. Prosper N'Douba, the spokesman of President Patassé was being held by rebel soldiers near the Begoua school at PK13.⁷⁷⁶ From his place of detention he could see Toyota vehicles and lorries, which the rebels were driving, parked at the school, which they were plainly using as their base.⁷⁷⁷ He also recalls that the Libyans were bombing rebel positions from the air.⁷⁷⁸

326. In the centre of Bangui, FACA troops were deployed near to the National Assembly.⁷⁷⁹ The only inference from their presence is that they remained in defensive positions in the city centre and had not advanced to push the rebels back to PK4 and beyond at that time. This is corroborated by Lengbe, who testified for a period of five days, following the rebels' arrival in the capital, the FACA forces held their own, before the complete arrival of the MLC troops enabled them to commence a counter-offensive.⁷⁸⁰

327. Across the river Ubangui in Zongo, the first units of MLC troops were arriving for transportation to Bangui from Dongo.⁷⁸¹ There were about 240-250 of them.⁷⁸²

⁷⁷⁴ EVD-T-OTP-00682/CAR-OTP-0058-0167 at 171-172.

⁷⁷⁵ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0077.

⁷⁷⁶ D-65, T-245, pp.34-35.

⁷⁷⁷ D-65, T-245, p.35.

⁷⁷⁸ EVD-T-OTP-00827/CAR-DEF-0002-0108 at 0179.

⁷⁷⁹ P-169, T-139, p.42.

⁷⁸⁰ P-31, T-182, pp.15-17, 23.

⁷⁸¹ D-45, T-293, p.44.

⁷⁸² D-9, T-323, p.34; D-45, T-293, pp.44-45.

328. Witness P-119 describes widespread offending by the Banyamulengue in the 4th Arrondissement on 28 October, including pillage, murder and the gang rape of two women in a ditch. Her identification of them as Banyamulengue turns on them speaking a language that she didn't understand, which she was later told was Lingala.⁷⁸³

329. In reality the whole of her evidence is a montage, largely based on hearsay and urban myths.⁷⁸⁴ It is uncorroborated and lacking in detail, such as the names of victims or perpetrators.⁷⁸⁵ It is also a work of fantasy, as evidenced by her claim that she was able to stop "blood thirsty" rapists from continuing to assault women, merely by protesting about what they were doing, without coming to any harm herself.⁷⁸⁶ It is moreover, incapable of belief that she would go to the aid of these alleged victims, without discovering their names.⁷⁸⁷ P-119 was [REDACTED] meetings between alleged victims and the corrupt lawyer, Ngoungaye Wanfiyo.⁷⁸⁸

330. Even, however, if some credit is afforded to her evidence, it is not sufficient for the Chamber to conclude that the perpetrators of the offences she describes were subordinates of Mr. Bemba. The evidence of identification is almost non-existent, and the fact that, according to her, the rebel forces that had been occupying the immediate vicinity had withdrawn earlier that day does not lead to an irresistible inference that those who came later were MLC troops. They could just as easily have been rebel forces who were withdrawing through 4th Arrondissement to other neighbourhoods of Bangui, or other elements of the

⁷⁸³ P-119, T-82, p.29.

⁷⁸⁴ P-119, T-82, p.54; T-84, p.5.

⁷⁸⁵ P-119, T-83, pp.3-9, 11-14.

⁷⁸⁶ P-119, T-82, pp.39-46.

⁷⁸⁷ P-119, T-84, p.28.

⁷⁸⁸ P-119, T-82, p.54, T-83, pp.14-15; T-87, pp.30-31.

loyalist forces. The fact that they spoke a language she didn't understand and they wore the uniforms of the FACA⁷⁸⁹ is indeterminate.

331. She states, moreover, that the aerial bombardment of the area occurred on 28 October,⁷⁹⁰ which according to all the evidence was indeed carried out on that day by the Libyans. Just as an example, Prosper N'Douba details the fighting on 28 October with Marchetti planes, owned by the Libyans and Bozizé's rebels.⁷⁹¹ Bombs were being dropped by Libyan aeroplanes on Bozizé' controlled neighbourhoods.⁷⁹² This was, at least by 28 October, a coordinated operation on the part of the loyalist forces. It is inconceivable that Libyan air strikes would have been ordered against areas under loyalist control.

332. Ultimately, P-119's narration of crimes and rapes and pillage, occurring in her neighbourhood on 28 October,⁷⁹³ as having been committed by the Banyamulengue, is completely implausible, by reason of its lack of basic credibility, its internal temporal inconsistencies, and its temporal incompatibility with the evidence heretofore set out concerning the movement of MLC troops.

5. 29 October

333. On 29 October 2002, the movement of MLC troops commenced.⁷⁹⁴ That morning, soldiers travelled by foot from Libenge and Imese to Zongo and crossed over by ferry to Bangui on the same day.⁷⁹⁵ D-49 estimated the distance between

⁷⁸⁹ P-119, T-82, p.17; T-84, p.19.

⁷⁹⁰ P-119, T-82, p.24.

⁷⁹¹ EVD-T-D04-00049/CAR-DEF-0001-0102 at 0179.

⁷⁹² EVD-T-OTP-00446/CAR-OTP-0013-0082; EVD-T-OTP-00849/CAR-OTP-0013-0320 at 0327.

⁷⁹³ P-119, T-82, pp.33-52.

⁷⁹⁴ D-56, T-313, p.31; D-19, T-284, pp.19, 22; D-45, T-294, pp.8-9; T-298, p.8.

⁷⁹⁵ D-49, T-270, pp.54-55.

Imese to Zongo to be of 150 to 180 km.⁷⁹⁶ The movement of approximately 1000 soldiers could not have realistically taken less than a day.

334. As a battalion commander, Seguin travelled with his troops on that day.⁷⁹⁷ D-49 states that the brigade that went to the CAR was an organic one; comprising of the S1, S2, S3 and S4.⁷⁹⁸ Willy Bomengo was the S2.⁷⁹⁹ The only inference that can be made from these facts taken together is that Willy Bomengo crossed over on 29 October.

335. René Abongo, who led the “reconnaissance mission” on the 26 October, crossed over with the battalions on 29 October 2002.⁸⁰⁰ Mustapha went from Imese⁸⁰¹ with some of the troops. Half walked to Zongo, and the tired ones went by vehicle.⁸⁰²

336. The MLC troops crossed over to the CAR on a ferryboat,⁸⁰³ provided by the Central African government. There is an message in the cahier on 29 October, reporting at 22.45 that 60 submachine guns (“SMG”) and 120 chargers had been received at Zongo at 4.30 that day.⁸⁰⁴ Accepting the obvious logic (which the Prosecution has argued),⁸⁰⁵ that these weapons were for the use of the troops going to Bangui, it is inevitable that the weapons were part of the same transport. Accordingly, the crossings had either not begun or were at least still in progress

⁷⁹⁶ D-49, T-270, pp.54-55.

⁷⁹⁷ D-19, T-284, p.22; D-45, T-294, p.9.

⁷⁹⁸ D-49, T-271, p.16.

⁷⁹⁹ D-49, T-271, p.17 ; D-19, T-287, p.16.

⁸⁰⁰ D-19, T-284, p.22.

⁸⁰¹ [REDACTED].

⁸⁰² [REDACTED].

⁸⁰³ P-33, T-159, p.33.

⁸⁰⁴ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1635.

⁸⁰⁵ Prosecution Closing Brief, para. 153.

after 4.30pm on 29 October. This would seem to fit with Lengbe's recollection that they took place substantially at night.⁸⁰⁶

337. When the soldiers crossed (in groups as small as 30 to 50 men)⁸⁰⁷ they arrived at Port Beach.⁸⁰⁸ They were taken in charge by General Dandito⁸⁰⁹ who met them there.⁸¹⁰ They were then brought to the support regiment,⁸¹¹ approximately 200 meters from Camp Béal.⁸¹²

338. The Prosecution aver in their brief that more than 500 MLC soldiers deployed to CAR territory on 26 October⁸¹³. It is further asserted that the MLC "[t]ogether with Libyan forces...launched their first counter-offensive against the Bozizé rebels in Bangui on 27 October."⁸¹⁴ The averments depend entirely on an apparent summary of an RFI report from 30 October 2002, first retrieved from the internet in July 2007.⁸¹⁵ There is no corresponding broadcast apparently available.

339. No reasonable Trial Chamber could make such a finding on the basis of such evidence, not least because in what purports to be a detailed summary of RFI's broadcasts for the preceding day 29 October, which in turn reports events of 28 October, no single mention of the presence of MLC troops is made.⁸¹⁶ The same is true for the record of the broadcast from 27 October.⁸¹⁷

⁸⁰⁶ P-31, T-182, p.24.

⁸⁰⁷ P-31, p.24.

⁸⁰⁸ P-169, T-139, p.40.

⁸⁰⁹ P-31, T-182, p.22.

⁸¹⁰ P-6, T-94, pp.30-31.

⁸¹¹ P-31, T-182, p.22; D-53, T-250, p.39.

⁸¹² P-31, T-183, pp.22-23; P-6, T-96, pp.13-15.

⁸¹³ Prosecution Closing Brief, para. 11.

⁸¹⁴ Prosecution Closing Brief, para. 14.

⁸¹⁵ EVD-T-OTP-00822/CAR-OTP-0005-0129.

⁸¹⁶ EVD-T-CHM-00024/CAR-OTP-0005-0127.

⁸¹⁷ EVD-T-CHM-00023/CAR-OTP-0005-0125.

340. What therefore is the Chamber to accept? That the reporter didn't notice the presence of 500 troops on 26, 27, 28 or 29 October, or the fact that they were conducting a counter-offensive, only to record it for the first time four days later?

341. The snippet of a copy of *Le Citoyen* published on 5 November 2002, cited later,⁸¹⁸ cannot corroborate the RFI report since it amounts in the main to a mere reprinting of what RFI had broadcast.⁸¹⁹

342. In a desperate attempt to put the MLC troops near crimes the Prosecution knows were being committed on 27 and 28 October, it resorts to the twin submissions that the troops were moved to Camp Béal, which in turn is near the 4th Arrondissement.⁸²⁰ These submissions are astonishing. The more so, due to the evidential sources to which the Prosecution resorts: P-63, who had never been in the army, and incredibly, D-6, a citation to whose testimony can be found nowhere else in the brief, unsurprisingly given the concurrent litigation in ICC-01/05-01/13.

343. Lengbe was not even told about the arrival of MLC forces until two days after Bozizé's arrival (i.e. 27 October) and they did not start fighting until five days later (i.e. 30 October). According to all the evidence, the MLC troops were billeted at the Support Regiment,⁸²¹ Camp de Roux,⁸²² and Camp Kasai.⁸²³ The MLC troops were provided with new uniforms by the CAR authorities.⁸²⁴ They were also provided with Ranger boots in some cases, and arms.⁸²⁵

⁸¹⁸ EVD-T-OTP-00446/CAR-OTP-0013-0082; Prosecution Closing Brief, fn. 29 and 33.

⁸¹⁹ EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0083.

⁸²⁰ Prosecution Closing Brief, para. 11.

⁸²¹ P-31, T-182, p.26.

⁸²² D-7, T-249, p.23.

⁸²³ D-7, T-248, p.27.

⁸²⁴ P-9, T-105, pp.46-47; P-38, T-33, p.43; P-119, T-82, p.28; P-69, T-192, p.25; D-7, T-248, p.13; D-50, T-254, p.23; T-255, pp.16-17; D-51, T-261, pp.34-35; D-49, T-271, p.13; D-19, T-284, p.34.

⁸²⁵ P-38, T-33, p.43; P-119, T-82, p.28; P-69, T-192, p.25; D-7, T-248, p.13; D-50, T-254, p.23; T-255, pp.16-17; D-51, T-261, pp.34-35; D-49, T-271, p.13; D-19, T-284, p.34.

344. By 29 October the command of Bozizé's forces knew that the MLC were at least about to arrive, and there is evidence of them beginning to withdraw from the centre of Bangui,⁸²⁶ at 36 Villas,⁸²⁷ and PK12 on that date.⁸²⁸ Although they still retained a presence in Begoua, at PK12.⁸²⁹

345. P-119 describes the murder of a boy named [REDACTED] on 29 October in PK12.⁸³⁰ Observations have already been made as to the fantastic nature of her evidence generally.⁸³¹ In relation to this allegation, however, her evidence is little more than hearsay or gossip,⁸³² and that, placing the murder as she does on the morning of 29 October, at a time well before the MLC had embarked in meaningful numbers from Zongo, she must be describing an event for which neither they nor Mr. Bemba can be held responsible, even if there is found to be sufficient evidence that a murder actually took place at all.

6. 30 October

346. Mustapha together with further MLC units arrived at Port Beach⁸³³ at 9.00 am⁸³⁴ in Bangui on 30 October 2002,⁸³⁵ and commenced combat operations against the rebels.⁸³⁶ He reported to the MLC General Staff at 13.45, in the following terms:

"Extremely urgent". "From: OPS Command Bangui to Chief AMG/ALC. Info: To the Chairman. Number: 001, Command Headquarters, OPS Bangui 2002:⁸³⁷ I am honoured to report the

⁸²⁶ D-56, T-313 pp.30-31.

⁸²⁷ D-56, T-313, p.43.

⁸²⁸ D-56, T-313, p.43.

⁸²⁹ D-65, T-246, p.24

⁸³⁰ P-119, T-82, p.50.

⁸³¹ See Chapter III, Section D4.

⁸³² P-119, T-82, p.50.

⁸³³ D-57, T-256, p.30; D-51, T-261, p.35; T-262, p.48; D-50, T-254, pp.22, 60-62.

⁸³⁴ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1637.

⁸³⁵ D-45, T-298, p.8; D-50, T-254, p.22, p.50; T-285, p.30; D-19, T-286, p.16.

⁸³⁶ D-45, T-294, p.13; T-295, p.5; T-297, p.3.

⁸³⁷ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1637; D-19, T-284, p.20.

following. I have arrived in the field at 9 a.m. after a co-ordination meeting with the officers. The operation to begin at 1300 Alpha.”

347. This is the first report from Bangui which describes any operation by the MLC whatsoever, or deals with the situation on the ground, other than to describe it as “calme”. The units which arrived on 30 October were the elements of Poudrier B battalion.⁸³⁸ This message further undermines the suggestion that MLC troops had engaged in combat prior to the arrival of Mustapha. It simply makes no sense if that were the case, for him to be delayed almost five hours after his arrival to start fighting with the units himself.

348. The various accounts of the MLC first engaging in combat five days after the arrival of Bozizé’s troops in Bangui is entirely corroborative of the recollection of the Lengbe.⁸³⁹ MLC troops were welcomed on 30 October by Dandito,⁸⁴⁰ the Deputy Chief of Staff, General Mazi, as well as General Bombayake, and Lengbe.⁸⁴¹

349. [REDACTED].⁸⁴² The MLC was billeted at the support regiment.⁸⁴³ The MLC soldiers received equipment and ammunitions next to the residence of the Head of State.⁸⁴⁴ Tasks were distributed to soldiers.⁸⁴⁵ Two hours later they were split in groups of 100 each.⁸⁴⁶

⁸³⁸ D-45, T-298, p.8.

⁸³⁹ P-31, T-182, p.26. Lengbe says that the attack by Bozizé’s forces in Bangui was on 22 October and he remembers that the whole of the MLC troops arriving on 27 October, so five days later.

⁸⁴⁰ D-19, T-293, p.51

⁸⁴¹ D-19, T-284, pp.23, 30; T-285, p.3; T-292, pp.4, 23; P-31, T-182, pp.21-22.

⁸⁴² [REDACTED].

⁸⁴³ D-57, T-256, p.30; D-51, T-261, p.35.

⁸⁴⁴ D-19, T-284, p.36.

⁸⁴⁵ D-9, T-322bis, p.21.

⁸⁴⁶ D-9, T-322bis, p.23

350. It was raining heavily on 30 October and [REDACTED] the civilian population fleeing in the 4th Arrondissement.⁸⁴⁷ Bozizé's troops continued to withdraw from all areas, including Bangui.⁸⁴⁸ There is evidence that they only withdrew initially as far as PK12, but that subsequently they were ordered to withdraw from PK12 as well on 30 October.⁸⁴⁹ Elsewhere, elements of the rebels reached Damara at around 8:00pm on 30 October and left on the same day at around 8:30pm.⁸⁵⁰ Some elements of Bozizé's forces had moreover, reached Sibut by 11:00pm,⁸⁵¹ and were in Dekoua, Kaga Bandoro and Sido by the early hours of the following morning.⁸⁵²

351. The speed of the withdrawal of some of the units is worth noting. Damara is 76 kilometres from PK12.⁸⁵³ It seems a reasonable inference that even elements of rebel forces that withdrew to Damara would still have been in PK12 perhaps as late as 6:00 or 7:00pm on 30 October.

352. P-110 describes pillaging in PK12 at about 4:00-5:00pm on 30 October.⁸⁵⁴ The perpetrators wore mismatching combinations of military and civilian clothes and footwear,⁸⁵⁵ and she had no ability to identify their language.⁸⁵⁶ She was told subsequently that they came from "the other side of the river".⁸⁵⁷ She describes no armed forces present in PK12 prior to the soldiers who committed the offences and she describes the same group of soldiers subsequently shooting a woman; these

⁸⁴⁷ EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0174; EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED].

⁸⁴⁸ D-56, T-313, pp.30-31.

⁸⁴⁹ D-56, T-314, p.17; T-316, p.10.

⁸⁵⁰ D-56, T-314, p.16; T-316, pp.10,12; D-65, T-246, p.7.

⁸⁵¹ D-56, T-314, p.17; T-316, pp.10, 12; D-65, T-246, p.7.

⁸⁵² D-65, T-246, p.7.

⁸⁵³ EVD-T-D04-00011/CAR-D04-0002-1286.

⁸⁵⁴ P-110, T-126, p.19.

⁸⁵⁵ P-110, T-125, pp.12, 14.

⁸⁵⁶ P-110, T-125, p.13.

⁸⁵⁷ P-110, T-125, p.14.

soldiers spoke Sango.⁸⁵⁸ The evidence cannot support a finding that MLC troops were in PK12 on the afternoon of 30 October, and the description of the perpetrators given by this witness cannot prove to the requisite standard that they were subordinates of the Accused, as opposed to just armed men. Indeed their identified tongue, dress and the date and time of the offence point to the probability that they were Bozizé's troops.

7. 31 October

353. The most compelling piece of evidence in the whole case as to the movement of MLC troops is [REDACTED] their arrival in the 4th Arrondissement on 31 October 2002.⁸⁵⁹ There can be no doubt that it was that date on which [REDACTED] date-stamped;⁸⁶⁰ [REDACTED].⁸⁶¹

354. Moreover, such is the strategic significance of the road junction where the arrival of the MLC [REDACTED],⁸⁶² having regard to the geography of Bangui and the northern routes out of the city,⁸⁶³ no sensible suggestion can be maintained that MLC troops ventured further north of this point prior to the date of their arrival there.

355. [REDACTED] confirms the Defence case as to the date of arrival of the troops (as well of course as the one advanced by the Prosecution at confirmation)⁸⁶⁴ and is corroborative of Defence evidence as to the date of arrival of the MLC. Even taken on its own, however, it calls into question the reliability of extraneous other

⁸⁵⁸ P-110, T-125, p.33.

⁸⁵⁹ EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0173.

⁸⁶⁰ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0173.

⁸⁶¹ [REDACTED].

⁸⁶² EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED].

⁸⁶³ CAR-D04-0002-1081: [REDACTED].

⁸⁶⁴ ICC-01/05-01/08-368; CAR-ICC-0001-0007.

sources of evidence, such as Willy Bomengo's protestations to his interrogators in Zongo,⁸⁶⁵ Mr. Bemba's letter to Cissé,⁸⁶⁶ and assorted allegedly contemporaneous newspaper articles, which suggest the MLC might have been in the northern suburbs of Bangui at a date prior to 31 October.⁸⁶⁷ None of those pieces of evidence bear any reliance in the face of CAR-OTP-0039-0058 at 0060; and CAR-OTP-0058-0167.

356. More than that, it completely changes the narrative as to who were regarded in October 2002 by the local population as liberators and who as oppressors. [REDACTED] that it was the Congolese who filled the former role and the Chadians the latter.⁸⁶⁸

[REDACTED].⁸⁶⁹

357. [REDACTED]⁸⁷⁰ [REDACTED]. It also gave the Chamber a little insight into the opportunist looting at which the inhabitants of Bangui were plainly adept,⁸⁷¹ and gave the lie to the implicit suggestion that it was only the Banyamulengue who looted.⁸⁷²

358. The occupation of the 4th Arrondissement was careful and measured.⁸⁷³ [REDACTED] nobody was on the road to PK12,⁸⁷⁴ and that the MLC troops were

⁸⁶⁵ EVD-T-OTP-00393/CAR-DEF-0002-0001.

⁸⁶⁶ EVD-T-OTP-00584/CAR-OTP-0033-0209 at 0210.

⁸⁶⁷ EVD-T-OTP-00846/CAR-OTP-0004-0874; EVD-T-OTP-00446/CAR-OTP-0013-0082 at 0086.

⁸⁶⁸ EVD-T-OTP-00345/CAR-OTP-0039-0058 at [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0191; see also P-63, T-114, p.42: Bozizé's rebels "ransacked everything everywhere...for sure".

⁸⁶⁹ [REDACTED].

⁸⁷⁰ [REDACTED].

⁸⁷¹ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0190.

⁸⁷² [REDACTED].

⁸⁷³ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED].

mindful that the enemy may still have positions in the quarter.⁸⁷⁵ That had to be the case. There is no way that the loyalists could have moved safely onto PK12 without first ensuring that the critical road junction, and the surrounding district were secure behind them. It is plain from any [REDACTED] that this took some time.

359. [REDACTED] the Central African components of the loyalist forces were working to restore normal life for the civilian population, including the return of electrical power.⁸⁷⁶ [REDACTED], efforts were also being made at this time to ensure that goods looted by Bozizé's troops but abandoned, should be returned to their owners.⁸⁷⁷ Indeed it is evident that no such scheme could have been implemented before 31 October. Willy Bomengo was tasked to assist in this.⁸⁷⁸ However, on 31 October he was arrested for stealing goods.⁸⁷⁹

8. 1-2 November

360. Elements of Bozizé's forces had reached Sibut⁸⁸⁰ and Sido by 2 November.⁸⁸¹ It has been suggested that Mr. Bemba visited PK12 on 2 November.⁸⁸² Whilst there is no dispute about the fact of such a trip being made, the date of 2 November does seem an unlikely one, given that Bangui airport was still closed,⁸⁸³ and the fact that the weight of the evidence supports an arrival at the airport⁸⁸⁴ with vehicle transport to, firstly, the Presidential residence, and then onwards to PK12.⁸⁸⁵

⁸⁷⁴ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0059-0167 at 0182.

⁸⁷⁵ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED].

⁸⁷⁶ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED].

⁸⁷⁷ D-19, T-285, p.33; T-287, pp.24, 26.

⁸⁷⁸ D-45, T-298 pp.51-52.

⁸⁷⁹ D-45, T-297, pp.3, 38; T-298, p.52.

⁸⁸⁰ D-56, T-314, p.18; T-316, p.12.

⁸⁸¹ D-56, T-316, p.12.

⁸⁸² Prosecution Closing Brief, paras. 699-700.

⁸⁸³ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0077.

⁸⁸⁴ P-44-T-205, pp.40-41; P-36, T-215, p.19; D-50, T-254, pp.39-40; D-51, T-261, p.55; D-19, T-285, pp.5-6.

⁸⁸⁵ P-38, T-34, pp.35-36; P-42, T-65, pp.11-13; T-66, p.7; P-63, T-113, pp.25-27.

9. 3 November

361. On 3 November, Bangui airport reopened.⁸⁸⁶ In fact only three flights landed that day.⁸⁸⁷ D-50 was a member of the USP which was tasked with liberating the airport from rebel control.⁸⁸⁸ After this was done, they had to clear the area up to PK12.⁸⁸⁹ He didn't encounter any MLC soldiers, because they took a different route to PK12.⁸⁹⁰ His USP unit plainly took the sweep of Avenue des Martyrs to the airport, then a route through the 8th Arrondissement to PK12.⁸⁹¹ This would not have brought them into contact with the soldiers [REDACTED], who had obviously proceeded due north on the Avenue de l'Indépendance. Indeed it is plain that D-50's evidence is informative in two major respects: firstly, there was a very high level of coordination of the loyalist forces – the USP unit of which D-50 was a member was effectively one half of a pincer movement being orchestrated with MLC soldiers in the 4th Arrondissement towards PK12. Secondly, there were areas of Bangui through which MLC soldiers did not pass, including Miskine, Combattant and the 8th Arrondissement. This accords with the evidence of [REDACTED] forces did not pass through these areas.⁸⁹²

362. D-50's evidence as to the date of this offensive is not specifically clear. Three factors however suggest it was 31 October: firstly, the action occurred after Bozizé's troops had been occupying districts of Bangui for five days;⁸⁹³ secondly, he recalls heavy rain at the start of the operation;⁸⁹⁴ and thirdly, he recalls that the loyalist

⁸⁸⁶ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0077.

⁸⁸⁷ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0078.

⁸⁸⁸ D-50, T-254, p.26.

⁸⁸⁹ D-50, T-254, p.26.

⁸⁹⁰ D-50, T-254, p.42.

⁸⁹¹ D-50, T-254, pp.26-27.

⁸⁹² D-45, T-295, p.10; D-19, T-286, p.11; See also CHM-01, T-353, p.56.

⁸⁹³ D-50, T-254, p.18.

⁸⁹⁴ D-50, T-254, p.26; see also EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]

forces “gave themselves the night” after the arrival of the MLC troops in the afternoon of 30 October⁸⁹⁵ before commencing their attack.⁸⁹⁶

363. Flights into and out of Bangui airport did not commence immediately upon its liberation.⁸⁹⁷ In the Defence submission, however, it is extremely unlikely that the airport remained closed for more than, say a couple of days after its retaking by loyalist forces.

10. 4-8 November

364. The Prosecution has not established with any clarity the date on which the loyalist forces took control of PK12. Similarly unclear is whether the withdrawal of Bozizé’s troops from the area was followed by a period of return. Three of the [REDACTED] from the area suggest that Bozizé’s troops remained in and around PK12 well into November.⁸⁹⁸ P-73 says Bozizé’s troops withdrew from PK12 on 31 October 2002,⁸⁹⁹ but some elements returned on 4 November, driving the same vehicles they had taken with them 4 days earlier.⁹⁰⁰

365. There is of course evidence from other sources which indicates that Bozizé’s troops returned to PK12 in the days after their withdrawal.⁹⁰¹ Judge Aluoch asked Defence witness D-56 additional questions regarding the identity of “unruly perpetrators”:

JUDGE ALUOCH: ... Who were they, these unruly soldiers? Were they part of Bozizé's soldiers or part of FACA? That's what I want to know.

⁸⁹⁵ D-50, T-254, p.22.

⁸⁹⁶ D-50, T-254, p.25.

⁸⁹⁷ D-50, T-254, p.37.

⁸⁹⁸ P-23, T-53, pp.26-27.

⁸⁹⁹ P-110, T-73, p.53.

⁹⁰⁰ P-110, T-73, p.54.

⁹⁰¹ D-56, T-314, pp.12-13.

THE WITNESS: I'm talking about our soldiers, members of the rebel movement that I was within.

JUDGE ALUOCH: And by that answer, can I take it that these unruly soldiers were not part of the rebel group?

THE WITNESS: I said those unruly soldiers were part of the rebel movement. They were lacking in discipline, and they went back to places that we had already been to commit acts of violence and abuse.

366. P-42 says Bozizé's troops withdrew from PK12 to PK22 on 6 November.⁹⁰² P-23, places their departure from PK12 on 7 November. He maintains that there were no MLC troops in PK12 before that date.⁹⁰³ P-69 said the MLC troops arrived on 8 November 2002.⁹⁰⁴ P-23 recalls that it was on that date that the MLC troops, having arrived at PK12 on foot, were given 4x4 vehicles.⁹⁰⁵

11. December 2002 to March 2003

367. On 7 December 2002, loyalist forces recaptured Damara.⁹⁰⁶ Shortly afterwards, the then Chef d'Etat Major, died.⁹⁰⁷ Prior to General Mbeti-Bangui's death, his replacement General Gambi, had written to Mr. Bemba to ask whether the MLC could send another battalion of troops as reinforcements.⁹⁰⁸ Prosecution witness, P-36, [REDACTED], recalls the request.⁹⁰⁹

368. General Gambi visited Mr. Bemba in Gbadolite sometime in January 2003 to further plead his case. Even though [REDACTED] could not be more specific than January to March regarding the visit, the arrival of the troops at the end of January narrows the time bracket. [REDACTED] remembers clearly that it was in January.⁹¹⁰

⁹⁰² P-42, T-64, p.13.

⁹⁰³ P-23, T-53, p.27.

⁹⁰⁴ P-69, T-192, p.22.

⁹⁰⁵ P-23, T-51, p.13.

⁹⁰⁶ Prosecution Closing Brief, para. 83.

⁹⁰⁷ D-19, T-292, p.23; P-31, T-183, p.50; P-9, T-106, pp.15-17; D-53, T-229, p.30; D-50, T-254, p.49.

⁹⁰⁸ EVD-T-D04-00065/CAR-D04-0003-0136.

⁹⁰⁹ P-36, T-215, pp.18-19.

⁹¹⁰ [REDACTED].

Mr. Bemba was with several members of his General Staff, but was not able to make a decision as to whether to send further troops at the time of the visit. He needed to discuss the matter further with his staff.⁹¹¹

369. This reinforcement troops arrived around about 20 January 2003.⁹¹² A whole battalion came as reinforcement.⁹¹³ The battalion was composed for the most part of Central Africans and MLC soldiers.⁹¹⁴ The battalion commander was Congolese and his deputy was Central African.⁹¹⁵ CHM-01 said that the reinforcements didn't stay in PK12, they went directly north.⁹¹⁶ They wouldn't stay in PK12 where there was no threat.⁹¹⁷ They were sent to Bozoum.⁹¹⁸

370. One of the difficult aspects of the decision to reinforce the numbers of troops in the CAR for Mr. Bemba must have been balancing the need to protect his men and fulfil his commitment to President Patassé, with the growing international pressure which was being applied to President Patassé.⁹¹⁹ Accordingly, on 16 January, the MLC committed to withdraw from the CAR.⁹²⁰ There was a press release which sanctioned the decision, and it was also communicated to the media.⁹²¹ Mr. Bemba was aware that an immediate retreat could put the MLC at risk in terms of what it had experienced in the past with the CAR.⁹²²

⁹¹¹ [REDACTED].

⁹¹² CHM-01, T-357, pp.51-53; EVD-T-D04-00063/CAR-D04-0003-0133; EVD-T-D04-00067/CAR-D04-0003-0138; EVD-T-D04-00068/CAR-D04-0003-0139; EVD-T-OTP-00703/CAR-D04-0002-1641 at 1726; P-169, T-137, p.6.

⁹¹³ D-19, T-288, p.42; T-295, p.36; CHM-01, T-357, pp.47-48, 51-53.

⁹¹⁴ D-19, T-295, p.37.

⁹¹⁵ D-19, T-295, p.37.

⁹¹⁶ CHM-01, T-357, pp.51-53.

⁹¹⁷ CHM-01, T-357, pp.51-53.

⁹¹⁸ D-19, T-295, p.36.

⁹¹⁹ D-53, T-234, pp.47-48.

⁹²⁰ P-15, T-209, p.19.

⁹²¹ P-15, T-209, pp.33-34; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0687.

⁹²² P-15, T-209, pp.33-34.

371. The order to retreat was given by President Patassé. He issued an order to the Ministry of Defence and General Bombayake who passed the order to Mustapha.⁹²³ When Mustapha arrived in Bossangoa, he received a call at 2:00am from President Bongo of Gabon asking him to do his best to leave the country by the 15th of this month.⁹²⁴ This call was received on the same day Commander René died.⁹²⁵ When Mustapha reported this piece of information to Mr. Bemba he asked him whether his senior authorities had given him the order to retreat, and if so, he should do it.⁹²⁶ Mr. Bemba said he couldn't give him the order to retreat because he hadn't given him the order to advance in the first place.⁹²⁷

372. The next day, Mustapha received a phone call from General Bombayake saying that Ange-Félix Patassé had requested them to withdraw.⁹²⁸ This call came two days after Bossangoa was captured⁹²⁹ and Mustapha received no order from Mr. Bemba to withdraw.⁹³⁰ Mustapha gave his soldiers the instructions to withdraw by 6 March 2003.⁹³¹ He informed Yves who was in Bossembélé as well as Seguin.⁹³² Yves's battalion left on 7 or 8 of March.⁹³³

373. The withdrawal of the troops was complicated and disorganised.⁹³⁴ The three battalions of the MLC were supposed to have vehicles to reach PK12 where they would be replaced by the FACA soldiers at various positions, and transportation was supposed to be provided at Port Beach in order for them to cross.⁹³⁵ However,

⁹²³ D-53, T-231, pp.37-38.

⁹²⁴ D-19, T-285, pp.9-10; T-291, p.13.

⁹²⁵ D-19, T-292, p.16. This was towards the end of the operation in February; D-19, T-292, p.45.

⁹²⁶ D-19, T-292, p.16.

⁹²⁷ [REDACTED].

⁹²⁸ [REDACTED].

⁹²⁹ [REDACTED].

⁹³⁰ D-19, T-291, p.11.

⁹³¹ P-169, T-137, p.12.

⁹³² P-169, T-137, p.12.

⁹³³ P-169, T-137, p.30.

⁹³⁴ D-53, T-230, p.62; T-231, p.36; D-49, T-271, pp.21-22; P-213, T-188, p.25; D-19, T-291, p.13.

⁹³⁵ D-53, T-231, p.36.

it did not happen as planned.⁹³⁶ The MLC soldiers were relieved at Sibut, Bozoum and Bossangoa by Central African troops and started going home very slowly.⁹³⁷ One detachment was able to return under acceptable conditions, the other two encountered difficulties.⁹³⁸ The units travelled in three lorries to Bossembélé. The transfer took a whole day.⁹³⁹ From Bossembélé to Bangui, the transport took two days by lorry.⁹⁴⁰ The withdrawal led to a counter-offensive by General François Bozizé's troops⁹⁴¹ and it was in PK30 or PK25 that they met the MLC troops.⁹⁴²

374. From then, there was no safe way to cross over.⁹⁴³ The soldiers who were in Bangui crossed to Zongo, others who were in the north crossed at different points.⁹⁴⁴ The troops were being pursued and chased by the enemy, some died and drowned.⁹⁴⁵ Some were not all able to get back to the DRC, some took the road to Cameroon.⁹⁴⁶ [REDACTED]. [REDACTED].⁹⁴⁷ [REDACTED], the whole city was in chaos.⁹⁴⁸ The crossing of this battalion took two or three weeks, but even after a month many had not returned.⁹⁴⁹ During the course of the withdrawal, no MLC unit went 200km south of the capital,⁹⁵⁰ to the city of Mongoumba.⁹⁵¹ On the day the MLC contingent left, Bozizé's rebels captured Bangui.⁹⁵² According to CHM-01,⁹⁵³ Bozizé's troops looted the capital for three days after they arrived.

⁹³⁶ D-53, T-231, p.36.

⁹³⁷ D-19, T-285, pp.9-10.

⁹³⁸ D-53, T-230, p.62.

⁹³⁹ D-45, T-295, p.38.

⁹⁴⁰ D-45, T-295, p.39.

⁹⁴¹ D-53, T-231, p.37; D19, T-291, p.13; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0687.

⁹⁴² D-19, T-285, p.9.

⁹⁴³ D-49, T-271, pp.21-22.

⁹⁴⁴ D-49, T-271, pp.20-21.

⁹⁴⁵ D-49, T-271, pp.21-22; P213, T-188, pp.24-25.

⁹⁴⁶ P-213, T-188, pp.24-25.

⁹⁴⁷ [REDACTED].

⁹⁴⁸ D-19, T-285, pp.9-10.

⁹⁴⁹ D-19, T-285, pp.9-10.

⁹⁵⁰ EVD-T-D04-00011/CAR-D04-0002-1286.

⁹⁵¹ D-45, T-295, pp.40-41; D-19, T-289, pp.14-15; even P-213 didn't understand why the MLC would have been in Mongoumba when their initial mission was to progress to Chad, P-213, T-209, pp.23-24.

⁹⁵² D-19, T-291, p.13.

IV. THE ELEMENTS OF THE CRIMES HAVE NOT BEEN ESTABLISHED

*All witnesses stated categorically that Bozizé's forces had retreated before MLC troops arrived and took control of their areas. They testified that upon the MLC's arrival, no armed group was present in their areas.*⁹⁵⁴

Fatou Bensouda

A. Introduction

375. The Prosecution must prove, beyond reasonable doubt, all elements of its case, including contextual elements.⁹⁵⁵

376. In its drive to convict Mr. Bemba on the basis of rumours, speculation, and incentivised finger-pointing, the Prosecution failed to establish the basic elements of its case, namely the existence of an armed conflict throughout the charged time period, and the existence of a wide-spread attack as concerns the crimes against humanity of rape and murder.

377. The Prosecution Closing Brief claims that the MLC were the only troops present at the time that the alleged crimes occurred. If that is the case, then the requisite nexus between the alleged commission of crimes, and the non-international armed conflict (NIAC) has not been established.

378. The Prosecution case is also plagued by systematic ambiguity concerning dates, locations and the identity of perpetrators. Whilst some level of imprecision is permissible, the extent of it in this case has rendered it impossible for the Defence to meaningfully defend Mr. Bemba.

⁹⁵³ CHM-01, T-357, pp.87-88.

⁹⁵⁴ Prosecution Closing Brief, para. 188.

⁹⁵⁵ ICC-02/11-01/11-572, paras. 36-47.

379. The Prosecution failed to establish that the elements of individual offences are satisfied in relation to each confirmed incident. The Prosecution also cannot fill evidentiary lacunae as concerns the confirmed material facts by relying on evidence of facts and incidents that fall outside the confirmed case.

380. Moreover, the Prosecution failed to dispel the reasonable possibility that the crimes were committed by persons other than members of the MLC falling under the effective control of Mr. Bemba.

B. The Prosecution case is defective due to lack of specificity

381. The Prosecution case violates article 67(1) through its failure to provide sufficient specificity concerning either the dates on which the alleged crimes occurred,⁹⁵⁶ or the dates on which the MLC were alleged to be present in the location in question.⁹⁵⁷ The burden falls on the Prosecution to demonstrate that the ability of the Accused to prepare his defence was not materially impaired due to lack of specificity.⁹⁵⁸

382. Regulation 52(b) provides that the DCC shall include “a statement of facts, including the time and place of the alleged crimes [...]”. The jurisprudence of the *ad hoc* Tribunals underscores that a date may be considered to be a material fact if it is necessary to inform a defendant clearly of the charges so that he may prepare his defence.⁹⁵⁹ If a date is a material fact, it must be pleaded with sufficient specificity, avoiding “broad date ranges”.⁹⁶⁰

⁹⁵⁶ Prosecution Closing Brief, paras. 202, 210-211, 222, 235, 297, 364, 371, 408-409.

⁹⁵⁷ Prosecution Closing Brief, paras. 201, 222, 235, 295, 364, 371.

⁹⁵⁸ *Nahimana* AJ, para. 327.

⁹⁵⁹ *Tadić* TJ, para. 534; AJ, para. 88; *Ntakirutimana* AJ, para. 25 ; *Ndindabahizi* AJ, para. 19.

⁹⁶⁰ *Kvočka* et al. AJ, para. 31.

383. This deficiency, which is evident in both Prosecution pleadings and evidence, has prevented the Defence from contesting whether MLC were in fact present at the time of the alleged crimes. This is a key issue due to the Prosecution's attempt to attribute responsibility to unidentified members of the MLC through their alleged control over certain areas on certain dates.⁹⁶¹

384. In such circumstances, the specificity of the dates is not an issue of peripheral importance, but goes to the heart of the Defence ability to contest the liability of the MLC for the acts in question.

385. The prejudicial impact on the Defence is aggravated by the plethora of evidence concerning crimes committed by pro-Bozizé forces in the same locations,⁹⁶² which the Prosecution completely ignored in its wilful attempt to construct an artificial version of reality, in which crimes were – according to the Prosecution – only committed by the MLC.

386. The Prosecution's position that crimes were only committed by the MLC⁹⁶³ evidences a 'wilful blindness' on their part to contemplate the possibility that civilian crimes could have been attributed to forces other than the MLC. This approach contaminated their investigative approach to the case, and the resultant testimony adduced by witnesses. The Prosecution never explored the possibility with witnesses that pro-Bozizé forces could have been present in the area at the time, and could have been responsible for crimes.⁹⁶⁴

387. This vagueness is not cured by the existence of more specific dates, which have been provided by some witnesses. Firstly, the witnesses in question colluded

⁹⁶¹ See for example, Prosecution Closing Brief, paras. 241, 261, 271, 297, 317, 358, 364, 371, 381, 387.

⁹⁶² P-151, T-175, pp.27-28; D-30, T-340, p.15; T-341, p.3.

⁹⁶³ Prosecution Closing Brief, paras. 18, 19, 34, 49, 86, 90, 146, 188, 200.

⁹⁶⁴ EVD-T-OTP-00057/CAR-OTP-0057-0107_R01; EVD-T-OTP-00029/CAR-OTP-0039-0341_R01.

on dates with a view to ensuring that responsibility would fall on the MLC, and secondly, the witnesses were affiliated to OCODEFAD, which restricted membership and material benefits to ‘victims’ of the MLC.⁹⁶⁵

388. As will be elaborated in Chapter V, the Prosecution case is defective due to its failure to adduce sufficiently detailed information concerning the identity of the perpetrators of the alleged crimes, which has rendered it impossible to ascertain firstly, whether the perpetrators were, in fact, members of the MLC, and secondly, whether the particular perpetrators fell under the effective control of Mr. Bemba.

389. Apart from limited examples referring to (fictitious) pseudonyms, the Prosecution has not adduced the names of any physical perpetrators, nor has it called any physical perpetrators as witnesses. The Defence has therefore had no mechanism to investigate this aspect of the Prosecution case.

390. Although the *ad hoc* Tribunals have accorded the Prosecution a degree of latitude regarding the obligation to provide the name of each and every perpetrator, there has never been a case in which the Prosecution has failed to provide the names of any physical perpetrators. Investigative difficulties should not be relied upon to completely deprive the Defence of any ability to contest the Prosecution case.

391. In the specific context of command responsibility, the *ad hoc* Tribunals have confirmed that the following is a material fact: “that the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of the material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible”.⁹⁶⁶ Neither the Second Revised DCC, nor the

⁹⁶⁵ See Chapter II.

⁹⁶⁶ *Renzaho* AJ, para. 54.

evidence, nor the Prosecution Brief provide sufficient information to establish that the persons - who committed the specific confirmed crimes – were the subordinates of Mr. Bemba and that he exercised effective control over these specific persons at the time the alleged crimes occurred.

392. This lacuna in the Prosecution case is underscored by their failure to call any physical perpetrators to testify as witnesses, notwithstanding that such persons would be best placed to give evidence if they were indeed subordinated to Mr. Bemba or under his effective control at the time of the alleged crimes.

393. Conversely, the Prosecution's failure to provide names of physical perpetrators has rendered it impossible for the Defence to question or call such persons as witnesses in order to establish that they were not Mr. Bemba's subordinates or under his effective control at the time the alleged crimes occurred.

394. An accused is not responsible for the crimes of physical perpetrators if the link between the accused and the perpetrator is too remote. This is a question of fact and evidence.⁹⁶⁷ It is, however, impossible for the Defence to contest the issue of remoteness in the absence of information, which enables the Defence to establish key factual matters, such as the hierarchy of the physical perpetrators within the MLC, and from whom they received orders or sanctions.

395. The absence of information concerning the perpetrator's identity is aggravated by the lack of detail concerning dates and specific locations of the alleged crimes. Without the identity of the perpetrator, the Defence cannot challenge the assertion that he was a member of the MLC. However, without sufficiently specific information concerning dates, locations, and troop movements, the Defence also cannot challenge the potential involvement of the MLC as a group.

⁹⁶⁷ *Orić* AJ, para. 20.

This is of crucial importance given that the case record is replete with examples of allegations of crimes committed by pro-Bozizé forces, which were falsely attributed to the MLC (as discussed below). It is equally possible that the crimes could have been committed by bandits or civilians, which seems to have been the case with P-29, who testified that the perpetrators did not have weapons.⁹⁶⁸

396. This lack of specificity and detail in either the Prosecution charges or the evidence itself also vitiates the allegation that Mr. Bemba knew or should have known that subordinates, falling under his effective control, had committed crimes or would commit crimes.

397. Finally, as elaborated in Chapter V, the Prosecution evidence concerning the perpetrators' identity is lacking in probative value, and based on fallacious assumptions regarding identification through language and clothing. Even if it were sufficient to identify physical perpetrators through their alleged membership of the MLC, the Prosecution evidence failed to do so.

C. The Contextual Elements were not proved

1. The contextual elements of crimes against humanity

398. The Pre-Trial Chamber confirmed the following:

- An attack against the civilian population from on or about 26 October 2002 to 15 March 2003,⁹⁶⁹ in locations including but not limited to Bangui - PK 12, Boy-Rabé, Fou (also written as Fouh) - Mongoumba, Bossangoa, Damara, Bossembélé, Sibut, Bozoum and Bossempaté;⁹⁷⁰
- That the attack was comprised of murder, rape and pillage;

⁹⁶⁸ Prosecution Closing Brief, para. 264.

⁹⁶⁹ ICC-01/05-01/08-424, para. 91.

⁹⁷⁰ ICC-01/05-01/08-856-AnxA-Red, para. 36.

- That the attack was committed in furtherance of an organisational policy;⁹⁷¹
- That the MLC perpetrators, under the effective control of Mr. Bemba, were aware at all relevant times that their conduct was part of a widespread attack on the civilian population; and
- That at all relevant times, Mr. Bemba knew that his conduct was part of such a widespread attack.⁹⁷²

399. The Trial Chamber is required to consider whether the Prosecution has established these elements, irrespective of whether the Defence raises specific argumentation on these points.

400. Crucially, the Prosecution had failed to adduce any argumentation regarding the material allegation that Mr. Bemba knew, at all relevant times, that his conduct was part of a wide-spread attack on the civilian population.

401. Article 30(1) of the Statute stipulates that unless otherwise specified, a person will only be criminally liable for crimes committed under the jurisdiction of the Court if all material elements are committed with intent and knowledge. Contextual elements of a crime are considered to fall within the elements, which are relevant to an accused's *mens rea*.⁹⁷³ Article 7 also differs from precedents in that it explicitly states the requirement that the accused must be aware of the attack. The general view was that this requirement would have been inferred in any event, given the jurisprudence, the requirements of article 30, and the general principles of

⁹⁷¹ ICC-01/05-01/08-856-AnxA-Red, para. 39.

⁹⁷² ICC-01/05-01/08-856-AnxA-Red, para. 41.

⁹⁷³ *Martinović and Naletilić* AJ, para. 113; *Kordić and Čerkez* AJ, paras. 99-100; *Kunarac* AJ, para. 102; *Popović et al.* TJ, paras. 1185, 1323-1324, 1417-1419, 2067-2069.

international criminal law. It was nonetheless included to accommodate those delegations that wanted no ambiguity on the point.⁹⁷⁴

402. Section 8 of the General Introduction to the Elements of Crimes further specifies that “the appropriate mental elements, apply *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute”.

403. In its Second Amended DCC, the Prosecution pleaded that Mr. Bemba knew that his conduct was part of a widespread attack on the civilian population.⁹⁷⁵ The contents of this DCC were vetted by the Trial Chamber, and as such, the Defence was entitled to rely on it as concerns the contours of the Prosecution’s obligation to prove its case.

404. Although the Prosecution is not required to establish that Mr. Bemba was aware of all aspects of the attack, it must establish that Mr. Bemba was aware that his conduct took place within the general contours of such a widespread attack at all relevant times. In particular, to substantiate an allegation that Mr. Bemba’s conduct is comprised of a failure to prevent crimes, the Prosecution must establish that such omissions occurred at a time when Mr. Bemba possessed actual knowledge concerning the existence of an armed attack against the civilian population in CAR, as of 26 October 2002 onwards.

405. The Prosecution asserts at footnote 374 that Mr. Bemba’s awareness of such an attack is demonstrated in its mode of liability section. It is not. The evidence regarding ‘knowledge’ is unreliable, lacks specificity regarding dates and proof of actual awareness of the existence of a widespread attack against the civilian

⁹⁷⁴ D. Robinson, ‘The Elements of Crimes Against Humanity’ in R. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) p.64.

⁹⁷⁵ ICC-01/05-01/08-856-AnxA-Red, para. 41.

population, and does not meet the requisite beyond reasonable doubt threshold. Allegations concerning knowledge of pillage do not fulfil this element.⁹⁷⁶

406. The Prosecution has also attempted to establish knowledge of the attack through the allegation that “MLC troops were given license to commit crimes by their hierarchy”.⁹⁷⁷ This alleged fact was excluded from the ambit of the charges.⁹⁷⁸ The Trial Chamber further confirmed that the Prosecution could not rely on assertions that MLC troops operated in a permissive environment.⁹⁷⁹ The Prosecution cannot evade this ruling by replacing the words ‘*carte blanche*’ with ‘license’.

407. The Prosecution evidence concerning the involvement of MLC commanders in the commission of crimes is also predicated on the entirely unreliable evidence of P-47 and P-213.⁹⁸⁰ The latter is, for the reasons set out in Chapter II, incapable of belief. The allegation of P-47 on this point (to the effect that a ‘Commander’ on the ferry told the soldiers that they have no children and no family and should kill all they find),⁹⁸¹ was also rejected by the Pre-Trial Chamber and excluded from the charges.⁹⁸²

408. The Prosecution failed to substantiate that the attack against the civilian population occurred pursuant to an organisational policy of the MLC, and that Mr. Bemba was aware of such. The existence of an organisational policy is a separate,

⁹⁷⁶ Article 7, Introduction, para. 3, ‘Elements of Crimes’. The Prosecution has failed to plead that the ‘pillage’ was a coercive act that triggered a forcible displacement of the population (ICC-01/09-01/11-373, para. 277) or otherwise satisfied Article 7(1). See also ICC-01/05-01/08-836, para. 94.

⁹⁷⁷ Prosecution Closing Brief, paras. 40, 119.

⁹⁷⁸ ICC-01/05-01/08-424, paras. 387-389.

⁹⁷⁹ ICC-01/05-01/08-836, para. 49.

⁹⁸⁰ The futility of attempting to use P-47 to corroborate P-213 is underscored by the fact that if P-47 were to be believed, P-213 either doesn’t exist or is Libyan, P-47, T-176, pp.64-65.

⁹⁸¹ Prosecution Closing Brief, fn. 380.

⁹⁸² ICC-01/05-01/08-424, para. 390; ICC-01/05-01/08-836, para. 53.

cumulative element of an "attack directed against any civilian population".⁹⁸³ The Prosecution must establish that the organisation (as an entity) either actively promoted or encouraged the attack in question, or at the very least (and in exceptional circumstances), engaged in deliberate inaction, which was consciously intended to encourage the attack.⁹⁸⁴

409. The Second Revised DCC pleaded that this element can be inferred through a series of acts, which the Prosecution fails to replicate or substantiate. No evidence is cited in relation to the allegation that MLC troops organised themselves into small groups and committed rape and pillage during house to house searches.⁹⁸⁵ The Prosecution has abandoned the allegation that women were raped because they were rebel sympathisers, or that men were raped in front of their families to humiliate them.

410. The Prosecution's attempt to rely on 'directives' issued by the MLC hierarchy⁹⁸⁶ introduces a new material fact, which falls outside the scope of the confirmed material facts, and must therefore be disregarded by the Chamber. As noted above, both the specific assertion that MLC troops were given license to commit crimes, and the allegation that MLC troops were given direct instructions to kill and destroy because they had no wives, children and relatives in the CAR falls outside the ambit of the confirmed case.

411. None of the allegations or evidence establish that Mr. Bemba was aware of the existence of an organisational policy by the MLC.

⁹⁸³ ICC-01/05-01/08-424, paras. 80, 94.

⁹⁸⁴ Elements of Crimes, Article 7, fn. 6. See also D Robinson, 'The Elements of Crimes Against Humanity' in R Lee (ed) The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2001) p.69.

⁹⁸⁵ Prosecution Closing Brief, para. 39.

⁹⁸⁶ Prosecution Closing Brief, para. 40.

412. Both the paucity and unreliability of the evidence relied upon by the Prosecution to establish the existence of a widespread attack is discussed below in relation to the alleged crimes pertaining to the different localities.

2. The contextual elements of War Crimes

413. The Trial Chamber's assessment as to the existence of a NIAC must be based on the matrix of 'conflict' that pertains specifically to engagement between the MLC and pro-Bozizé forces comprised of soldiers from the CAR. The participation of the MLC inheres from the requirement that the charged crimes must take place in the context of, and be associated with, the armed conflict in question.⁹⁸⁷ The involvement of any non-CAR armed groups on the pro-Bozizé side would also transform the conflict into an uncharged international armed conflict,⁹⁸⁸ for which no Regulation 55 notice has been provided.

414. In the same manner that there can be different types of armed conflicts occurring in the same time in the same country,⁹⁸⁹ it is possible that the threshold for a NIAC might be met for certain specific military engagements in particular localities at particular times, and not others.

415. A NIAC only exists when the requisite level of intensity is met, that is, there is a "protracted armed conflict" between the groups in question.⁹⁹⁰ The threshold ceases to be met if the conflict devolves to the level of riots, internal disturbances or tensions, or isolated or sporadic acts of violence,⁹⁹¹ or if the conflict ceases to be between organised armed groups. The fact that the violence might, at a certain

⁹⁸⁷ As applied in ICC-01/04-01/06-2842, paras. 561, 563, and critically, 564. See also Article 1(1) of Additional Protocol II.

⁹⁸⁸ D. Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", Wilmshurst (ed.) International Law and the Classification of Conflicts (OUP, 2012), p.39.

⁹⁸⁹ ICC-01/04-01/06-2842, paras. 540, 543.

⁹⁹⁰ Article 8(2)(f).

⁹⁹¹ Article 8(2)(f).

point, intensify to a sufficient extent to trigger the threshold does not retrospectively transform the preceding violence into a NIAC.⁹⁹²

416. The Prosecution case was confirmed on the basis that there was a “protracted armed conflict between Bozizé troops, on one side, and Patassé troops and the MLC on the other side”, during all relevant times concerning the charges.⁹⁹³ The Prosecution alleged that the fighting continued throughout the five-month period in different locations including, but not limited to Bangui, PK12, Fouh, Mongoumba, Bossangoa, Damara, Bossembélé, Sibut, Bozoum and Bossemptélé as the MLC advanced to various areas previously occupied by Bozizé’s forces.⁹⁹⁴

417. The Prosecution has nonetheless failed to specify, or prove that there were direct and protracted engagements between pro-Bozizé forces (composed of CAR nationals) and the MLC from the date of the charges. In term of actual ‘clashes’ between such specific forces, the Prosecution Closing Brief is limited to the following evidential allegations: that the MLC engaged in hostilities in PK12 on 30 October 2002;⁹⁹⁵ on 7 December 2012, MLC forces attacked Bozizé’s forces in Damara;⁹⁹⁶ the MLC captured Bossembélé from Bozizé’s forces on 26 December 2002; and the MLC clashed with Bozizé’s forces in Sibut on 14 February 2003.⁹⁹⁷

418. The Prosecution also puts forward the contradictory position that in PK12 and Mongoumba, “MLC troops did not engage in direct military combat with Bozizé rebel forces”.⁹⁹⁸ In contrast to their assertion that the MLC engaged in

⁹⁹² D. Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, Wilmshurst (ed.) *International Law and the Classification of Conflicts* (OUP, 2012), p.30.

⁹⁹³ ICC-01/05-01/08-856-AnxA-Red, para. 42.

⁹⁹⁴ ICC-01/05-01/08-856-AnxA-Red, para. 44.

⁹⁹⁵ Prosecution Closing Brief, para. 126. The Closing Brief further asserts that the first casualties were not reported until 30 October 2002 (para. 145).

⁹⁹⁶ Prosecution Closing Brief, para. 130.

⁹⁹⁷ Prosecution Closing Brief, para. 131.

⁹⁹⁸ Prosecution Closing Brief, para. 35.

hostilities in PK12 on 30 October, the Prosecution also asserts that Bozizé forces had already withdrawn prior to the arrival of the MLC in PK12, due to shelling and bombing from Patassé's forces.⁹⁹⁹ Similarly, the Prosecution claims that when the MLC troops entered Damara and Sibut, they were the only troops present.¹⁰⁰⁰

419. In its attempt to assert that crimes in the CAR were only committed by MLC troops, the Prosecution alleges that "[a]ll witnesses stated categorically that Bozizé's forces had retreated before MLC troops arrived and took control of their areas. They testified that upon the MLC's arrival, no armed group was present in their areas."¹⁰⁰¹

420. The Prosecution has thus conceded that the elements for a NIAC involving the MLC would not have been met in relation to the events pertaining to these areas: the Prosecution cannot have its cake and eat it too.

421. Moreover, the Prosecution does not specifically plead or substantiate that the MLC 'takeover' of Bozoum, and Bossangoa involved clashes or engagement with pro-Bozizé forces.¹⁰⁰²

422. The Prosecution refers to an attack against the civilian population in Mongoumba on 3 March 2003,¹⁰⁰³ and in PK12,¹⁰⁰⁴ but, by its very description, a civilian population cannot be considered as an "organised armed group" for the purpose of article 8(2)(f) of the Statute.

⁹⁹⁹ Prosecution Closing Brief, para. 49.

¹⁰⁰⁰ Prosecution Closing Brief, paras. 86, 90, 101.

¹⁰⁰¹ Prosecution Closing Brief, para. 188.

¹⁰⁰² Prosecution Closing Brief, paras. 124-137.

¹⁰⁰³ Prosecution Closing Brief, para. 135.

¹⁰⁰⁴ Prosecution Closing Brief, para. 35.

423. The Prosecution also failed to substantiate the existence of protracted hostilities between MLC and pro-Bozizé forces throughout the charged time-period. As set out in Chapters III and V, the evidence does not establish that the MLC, as an organised group, were present in Bangui before 30 October 2002, the existence of protracted hostilities between organised armed groups at this point in time,¹⁰⁰⁵ or the participation of the MLC, as an organised group, in such.

424. As concerns alleged hostilities accompanying the departure of the MLC, the Prosecution relies only on P-42's uncorroborated testimony, which lacks any specificity concerning dates or locations.¹⁰⁰⁶ P-42 also does not specify the source of his knowledge: given the fact that a CAR resident in PK12 would not have any first-hand knowledge of MLC casualties, his testimony on this point is either pure conjecture, which has no evidential weight,¹⁰⁰⁷ or likely to have been obtained through his OCODEFAD interactions.¹⁰⁰⁸ As elaborated in Chapter II, P-42's testimony is completely unreliable and must be excluded from the Trial Chamber's consideration.

D. The charged incidents of rape were not proved

425. The allegations of rape are comprised of the following confirmed incidents:

- The rape of [REDACTED] and [REDACTED] in Fou on 26 October or 27 October;¹⁰⁰⁹
- The rape of [REDACTED] near PK 12 on 26 October;¹⁰¹⁰
- The rape of [REDACTED] in Boy-Rabé, Bangui, on 30 October;¹⁰¹¹

¹⁰⁰⁵ *Haradinaj et al.* TJ, para. 49.

¹⁰⁰⁶ P-42, T-64, p.14.

¹⁰⁰⁷ ICC-01/09-01/11-1334-Anx-Corr, paras. 12, 80.

¹⁰⁰⁸ P-42, T-65, pp.41-47.

¹⁰⁰⁹ ICC-01/05-01/08-856-AnxA, para. 46.

¹⁰¹⁰ ICC-01/05-01/08-856-AnxA, para. 47.

- The rape of [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] on or about 8 November, in or near PK12;¹⁰¹²
- The rape of [REDACTED] on or about 8 November, in or near PK12;¹⁰¹³
- The rape of eight unidentified victims between 26 October and 31 December near Bangui;¹⁰¹⁴
- The rape of 22 unidentified women between October and 31 December near Bangui;¹⁰¹⁵
- The rape of five unidentified victims between October and 31 December near Bangui;¹⁰¹⁶ and
- The rape of [REDACTED] on or about 5 March 2003 near Mongoumba.¹⁰¹⁷

426. The judgement cannot be based on incidents falling outside the above facts and circumstances; the Trial Chamber must therefore exclude all evidence concerning the alleged rapes of [REDACTED],¹⁰¹⁸ [REDACTED] (P-82),¹⁰¹⁹ [REDACTED] (P-69) and his wife, [REDACTED],¹⁰²⁰ Pulchérie Makiandakama (V-01)¹⁰²¹ [REDACTED] (P-79) and her daughter,¹⁰²² and rapes witnesses by [REDACTED] (P-119).¹⁰²³

¹⁰¹¹ ICC-01/05-01/08-856-AnxA, para. 48.

¹⁰¹² ICC-01/05-01/08-856-AnxA, para. 49.

¹⁰¹³ ICC-01/05-01/08-856-AnxA, para. 50.

¹⁰¹⁴ ICC-01/05-01/08-856-AnxA, para. 51.

¹⁰¹⁵ ICC-01/05-01/08-856-AnxA, para. 52.

¹⁰¹⁶ ICC-01/05-01/08-856-AnxA, para. 53.

¹⁰¹⁷ ICC-01/05-01/08-856-AnxA, para. 54.

¹⁰¹⁸ Prosecution Closing Brief, paras. 201-208.

¹⁰¹⁹ Prosecution Closing Brief, paras. 219, 228-233.

¹⁰²⁰ Prosecution Closing Brief, paras. 247-258.

¹⁰²¹ Prosecution Closing Brief, paras. 268-286.

¹⁰²² Prosecution Closing Brief, paras. 294-300.

¹⁰²³ Prosecution Closing Brief, para. 310.

427. The Prosecution cannot attempt to introduce evidence of these unconfirmed incidents through the broad reference to ‘unidentified victims’ in the Second revised DCC. The Pre-Trial Chamber explicitly refused to confirm any unidentified incidents of rape in the charge of rape.¹⁰²⁴ The Chamber also underscored that it was not permissible for the Prosecution to plead its case in a vague manner with a view to moulding the case against the Accused during the proceedings.¹⁰²⁵

428. The Prosecution failed to apply to amend the charges prior to the commencement of the trial,¹⁰²⁶ and it would now be *ultra vires* to consider these incidents. The Defence’s right to be informed in specific detail of the nature of the charges against it should also not be prejudiced by the Prosecution’s failures.

429. Irrespective as to whether the Prosecution established that the alleged rapes occurred,¹⁰²⁷ the rape charges must be dismissed due to the Prosecution’s failure to establish, beyond reasonable doubt, that the actual perpetrators were MLC troops falling under the effective control of Mr. Bemba.

E. The charged incidents of pillage were not proved

430. The confirmed pillage charges are comprised of the following incidents:

- Pillage of the house of [REDACTED]’s uncle on or about 26 October near PK12;¹⁰²⁸
- Pillage of livestock in Bossongoa belonging to [REDACTED];¹⁰²⁹

¹⁰²⁴ ICC-01/05-01/08-424, para. 169, where the Pre-Trial Chamber concludes that the allegations of rape included in the statement of witness 47 would not be included in the charge of rape confirmed by the Chamber.

¹⁰²⁵ ICC-01/05-01/08-424, para. 208, citing to *Kupreškić* AJ, para. 92.

¹⁰²⁶ Article 61(9), ICC-01/04-01/07-1547-tENG, para. 19.

¹⁰²⁷ See submissions concerning each locality below.

¹⁰²⁸ ICC-01/05-01/08-856-AnxA, para. 47.

¹⁰²⁹ ICC-01/05-01/08-856AnxA, para. 47.

- Pillage of [REDACTED]'s house on or about 30 October, in Boy-Rabé, Bangui;¹⁰³⁰
- Pillage at the [REDACTED] compound on or about 8 November at, or near PK12;¹⁰³¹ and
- Pillage at the [REDACTED] house on or about 8 November at, or near PK12.¹⁰³²

431. The following allegations fall outside the scope of the above incidents, and must be disregarded:

- The pillage of Mbata's house in Nguinda neighbourhood on 1 November;¹⁰³³
- The pillage of [REDACTED]'s house in Boy-Rabé, at Boy-Rabé's market on 28 October;¹⁰³⁴
- The pillage of [REDACTED]'s house and her sister in law in the 4th arrondissement on 27 October;¹⁰³⁵
- The pillage of [REDACTED]'s house in PK12 on an unspecified date;¹⁰³⁶
- The pillage of [REDACTED]'s house in PK12 on 22 November;¹⁰³⁷ and
- The pillage of [REDACTED]'s house and other incidents of pillage [REDACTED].¹⁰³⁸

¹⁰³⁰ ICC-01/05-01/08-856AnxA, para. 48.

¹⁰³¹ ICC-01/05-01/08-856AnxA, para. 49.

¹⁰³² ICC-01/05-01/08-856AnxA, para. 50.

¹⁰³³ Prosecution Closing Brief, paras. 356-363.

¹⁰³⁴ Prosecution Closing Brief, paras. 380-385.

¹⁰³⁵ Prosecution Closing Brief, paras. 391-394.

¹⁰³⁶ Prosecution Closing Brief, paras. 408-411.

¹⁰³⁷ Prosecution Closing Brief, paras. 439-442.

¹⁰³⁸ Prosecution Closing Brief, paras. 395-401.

432. Items referred to by witnesses fall within the purview of items required for military necessity.¹⁰³⁹ These include, but are not limited to, communication devices (such as radios, televisions, and telephones),¹⁰⁴⁰ food items and animals,¹⁰⁴¹ means of transport,¹⁰⁴² and money.¹⁰⁴³ The Prosecution has nonetheless ignored, and thus failed to fulfil, its obligation to establish, beyond reasonable doubt, that the allegedly seized items were not appropriated for military necessity. This burden falls on the Prosecution, given that “international humanitarian law allows the taking of war booty without the need for justification”.¹⁰⁴⁴

433. The Prosecution has also failed to recognise the distinction between pillage and “booty”, “plunder”, or other lawful forms of requisitioning. The right of requisition and seizure, as traditionally understood, is not restricted by the confines military necessity,¹⁰⁴⁵ and encompasses a broader range of property. Moreover, although the *ad hoc* Tribunals penalise plunder, this prohibition falls outside of the scope of the Rome Statute.¹⁰⁴⁶

¹⁰³⁹ Article 53 of the Hague Regulations provides that “All appliances, whether on land, at sea or in the air, adapted for the transmission of news, as for the transport of person or things, ... depots of arms, and generally, all kinds of munitions of war, may be seized even if they belong to private individuals [...]”, http://www.icrc.org/customary-ihl-eng/docs/v1_rul_rule51.

¹⁰⁴⁰ See for example, Prosecution Closing Brief paras. 388, 403.

¹⁰⁴¹ See for example, Prosecution Closing Brief, paras. 403, 419; *Orić*, 98bis Oral Decision, pp.9026-9031.

¹⁰⁴² See for example, Prosecution Closing Brief, para. 413.

¹⁰⁴³ See for example, Prosecution Closing Brief, para. 388.

¹⁰⁴⁴ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), p.272. Seizure of material obviously related to the conduct of military operations, though restricted, are lawful in principle, see The Hague Regulations, Article 53 (2), quoted in *Naletilić* TJ, para. 616. See also *Martić* TJ, para. 102.

¹⁰⁴⁵ O. Triffterer, Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article 2nd ed., (C.H. Beck Hart Nomos, 2008), p.409-410. See also Article 53 of Hague Regulations which provides for the seizure of property for use by the military, without reference to a threshold requirement that such use must be necessary.

¹⁰⁴⁶ The Rome Statute definition of pillage derives from The Hague Regulations of 1907, and not the later Geneva Conventions and treaties, which formed the basis for prosecution at the *ad hoc* Tribunals. Triffterer, p.288.

434. As an example, when P-213 was questioned in relation to an alleged “first day booty rule”, the Prosecution failed to explain to the witness the difference between “booty” and “pillage”, nor did the Prosecution seek clarification as to whether P-213’s understanding of the notion of “booty” accords with the specific elements of pillage under the Rome Statute.¹⁰⁴⁷

435. The Prosecution’s failure to attribute concrete evidence of pillage, as opposed to other lawful or non-prohibited conduct, is exemplified by its reference to the MLC Chief of Staff allegedly using a ‘pillaged’ vehicle from the Moroccan Embassy.¹⁰⁴⁸ If a soldier is utilising a vehicle in his official functions, then the vehicle has not been appropriated for ‘private or personal use’. Similarly, vehicles belonging to an Embassy are ‘public’ property, which can be appropriated for the use of the loyalist forces.

436. The Prosecution assertion that the alleged victims of pillage were never compensated for the property taken from them is also contradicted by Prosecution evidence.¹⁰⁴⁹ Prosecution witnesses testified that they received compensation in connection with their status as victims of the MLC, in the form of food, forms of transport, and money *inter alia*.¹⁰⁵⁰ As some of these witnesses were only victims of pillage, the compensation was obviously intended as a form of restitution.¹⁰⁵¹

¹⁰⁴⁷ Prosecution Closing Brief, para. 540; P-213, T-187, pp.55-57. The testimony was also elicited from the witness *via* highly leading and suggestive questions (see for example, P-213, T-187, p.57 where the Prosecution firstly informs the witness of the existence of such a rule, and then suggests that it may have been presented to the soldiers orally).

¹⁰⁴⁸ Prosecution Closing Brief, para. 562; P169, T-137, p.51. The testimony of P-169 is, in any case, based on second-hand anonymous hearsay, tainted by the witness’s own lack of credibility, and riddled with inconsistencies (for example, P-169, T-137, pp.49, 51). P-36 also testified that war booty was never authorised (P-36, T-214, pp.56-57).

¹⁰⁴⁹ Prosecution Closing Brief, paras. 361, 370, 377, 379, 384, 409, and 413.

¹⁰⁵⁰ P-68, T-49, p.4; P-23, T-52, p.26; T-54, p.26; P-81, T-55, p.28; P-80, T-61, p.26; P-42, T-65, p.41; P-110, T-128, pp.3-4.

¹⁰⁵¹ P-42, P-73, P-119, P-110 are all victims of looting and/or beating as well as members of OCODEFAD. See P-42, T-65, pp.41-47; P-73, T-71, pp.55-58; P110, T-128, pp.3-4; P-119, T-82, pp.46-47; T-87, pp.29-30; P-110, T-125, pp.23-24.

437. Although this compensation was distributed by OCODEFAD, OCODEFAD was itself, funded by the CAR Government.¹⁰⁵² The CAR Government also awarded compensation to victims independently of OCODEFAD.¹⁰⁵³

438. The CAR Government's payment of compensation is consistent with the fact that the Patassé Government had overall control over the forces deployed in the CAR, and was the ultimate beneficiary of any items taken during the course of events. When Bozizé replaced Patassé as President, he assumed responsibility for any legal obligations of his predecessor. Neither Patassé nor Bozizé requested Mr. Bemba to make any contributory payments, nor put him on notice of the need to do so. The grant of compensation to victims in the CAR thus displaced and/or satisfied any putative duty on the part of Mr. Bemba to take such measures.

439. The intrinsic link between pillage allegations and future reparations has also undermined the credibility of Prosecution witnesses. The central conflict caused between a witness' duty to tell the truth, and the prospect of a significant monetary reward for either fabricating or exaggerating claims of pillage was succinctly demonstrated by the testimony of P-73. P-73 testified that a person purporting to be an ICC representative was collecting victim applications "for the purpose of reparations".¹⁰⁵⁴ When P-73 attempted to explain the items which had been taken from him, which would normally have fallen outside of the definition of pillage,¹⁰⁵⁵ he said he received the following rebuke:¹⁰⁵⁶

¹⁰⁵² P-29, T-81, p.38; P-229, T-101, pp.15-16; P-68, T-50, pp.27-28; P-23, T-54, pp.24-26; P-81, T-55, pp.53-54; P-42, T-65, p.47; P-6, T-95, pp.8-9; P-82, T-60, pp.33-36.

¹⁰⁵³ P-82, T-59, p.15; T-60, pp.31-41.

¹⁰⁵⁴ P-73, T-73, p.19.

¹⁰⁵⁵ Food items obtained on credit, and a radio, none of which were taken by force.

¹⁰⁵⁶ P-73, T-73, p.19.

People are mentioning large sums of money, and you, you are mentioning just small amounts of money. You don't want to eat of the cake?

440. Other applicants were also pressured to submit false allegations to the ICC on this point.¹⁰⁵⁷

441. Falsification and exaggeration regarding the existence of pillage has significant implications for the Trial Chamber's ability to ascertain whether the gravity threshold for pillage has been met, and the reliability and probative value of the evidence concerning the gravity of the individual cases of pillage.

442. Although the Chamber ordered VPRS to request the affected persons to resubmit their application forms,¹⁰⁵⁸ such a measure was patently inadequate and would have forced the persons to incriminate themselves as concerns their initial attempt to defraud the ICC. Most of the victims maintained their previous (grossly exaggerated) claims,¹⁰⁵⁹ and some increased the amount of damages claimed.¹⁰⁶⁰ There is no indication that any victim-witnesses were cautioned of the consequences of submitting false evidence or testimony to the Court.

¹⁰⁵⁷ P-73, T-73, pp.20-21.

¹⁰⁵⁸ ICC-01/05-01/08-1593-Conf-Exp.

¹⁰⁵⁹ ICC-01/05-01/08-1957-Conf-Anx70-Red; ICC-01/05-01/08-2185-Conf-Anx38-Red; ICC-01/05-01/08-1957-Conf-Anx137-Red; ICC-01/05-01/08-1957-Conf-Anx140-Red; ICC-01/05-01/08-1957-Conf-Anx141-Red; ICC-01/05-01/08-1957-Conf-Anx174-Red; ICC-01/05-01/08-2185-Conf-Anx72-Red; ICC-01/05-01/08-1957-Conf-Anx4-Red; ICC-01/05-01/08-1957-Conf-Anx6-Red; ICC-01/05-01/08-2185-Conf-Anx3 -Red; ICC-01/05-01/08-1957-Conf-Anx10-Red; ICC-01/05-01/08-1957-Conf-Anx11-Red; ICC-01/05-01/08-1957-Conf-Anx13-Red; ICC-01/05-01/08-1957-Conf-Anx14-Red; ICC-01/05-01/08-2185-Conf-Anx4 -Red; ICC-01/05-01/08-1957-Conf-Anx17-Red; ICC-01/05-01/08-1957-Conf-Anx19-Red; ICC-01/05-01/08-1957-Conf-Anx21-Red; ICC-01/05-01/08-1957-Conf-Anx22-Red; ICC-01/05-01/08-1957-Conf-Anx24-Red; ICC-01/05-01/08-1957-Conf-Anx26-Red; ICC-01/05-01/08-1957-Conf-Anx27-Red; ICC-01/05-01/08-1957-Conf-Anx28-Red; ICC-01/05-01/08-1957-Conf-Anx29-Red; ICC-01/05-01/08-1957-Conf-Anx31-Red; ICC-01/05-01/08-1957-Conf-Anx34-Red; ICC-01/05-01/08-1957-Conf-Anx36-Red; ICC-01/05-01/08-1957-Conf-Anx37-Red.

¹⁰⁶⁰ ICC-01/05-01/08-1957-Conf-Anx3-Red; ICC-01/05-01/08-1957-Conf-Anx8-Red; ICC-01/05-01/08-1957-Conf-Anx9-Red; ICC-01/05-01/08-1957-Conf-Anx23-Red; ICC-01/05-01/08-1957-Conf-Anx25-Red; ICC-01/05-01/08-1957-Conf-Anx32-Red; ICC-01/05-01/08-1957-Conf-Anx35-Red.

443. Notwithstanding indicia of false information being submitted to the ICC in this case, the Prosecution failed to conduct any investigation into the matter, in violation of its positive obligation to investigate issues impacting on the credibility of victims and witnesses, and its specific Article 70 responsibilities.

444. In such circumstances, the Chamber cannot rely on the trial record to find that the Prosecution has established that there is credible and reliable evidence concerning the existence of pillage, and the nature of the items allegedly taken.

F. The charged incidents of murder were not proved

445. The confirmed charges of murder are comprised of the following incidents:

- The murder of the cousin of witness 22 in Bossangoa and the brother of witness 87, 30 October, in Boy-Rabé.¹⁰⁶¹

446. In limiting the charges to the above incidents, the Pre-Trial Chamber emphasised that the information provided by the Prosecution in the charges must, at the very least, “specify, to the extent possible, inter alia, the location of the alleged murder, its approximate date, the means by which the act was committed with enough precision, the circumstances of the incident and the perpetrator's link to the crime”.¹⁰⁶²

447. In line with this finding, vague references to murders that occurred in unidentified areas in the CAR from 26 October 2002 until 15 March 2003 would not have sufficed to put the Defence on notice concerning the specific allegations against the Accused. The Trial Chamber also confirmed that any broad/vague

¹⁰⁶¹ ICC-01/05-01/08-856-AnxA, pp.34-35.

¹⁰⁶² ICC-01/05-01/08-424, para. 133.

reference to “murders” in the confirmation decision did not give the Prosecution licence to introduce specific incidents of murder that had not been confirmed by the Pre-Trial Chamber.¹⁰⁶³ The Trial Chamber must therefore exclude from its consideration the evidence and allegations set out at pages 194-202 of the Prosecution Brief.

448. The Prosecution failed to establish, with sufficiently credible and relevant evidence, that the alleged murders of the cousin of P-22 and the brother of P-87 were committed by the MLC. As discussed below in relation to the Bangui evidence, P-87’s attribution of the crime to the MLC was influenced by the Prosecution, and tainted by inconsistencies.

449. The Prosecution evidence concerning the alleged murder of P-22’s cousin is also based entirely on extremely vague, remote hearsay: P-22 was informed of the murder through her aunt, who does not appear to have been present when the alleged murder took place.¹⁰⁶⁴ The unreliability of the evidence is reflected by the fact that the Prosecution has not placed any reliance on it for the purposes of substantiating the charge of murder in its Closing Brief.

450. Finally, the Prosecution failed to establish the existence of the contextual elements of murder to the threshold of beyond reasonable doubt. The Prosecution’s evidence concerning alleged nexus of the incidents of murder to the existence of a widespread attack against the civilian population is based exclusively on NGO reports,¹⁰⁶⁵ which constitute anonymous hearsay, and other unreliable forms of evidence.

¹⁰⁶³ ICC-01/05-01/08-836, para. 112.

¹⁰⁶⁴ P-22, T-41, pp.36-37.

¹⁰⁶⁵ Prosecution Closing Brief, para. 463.

451. In the Gbagbo case, the Pre-Trial Chamber found that the standard of substantial grounds to believe had not been met on the basis of the Prosecution's reliance on NGO reports to prove the contextual elements of the crimes, due to the inherent difficulty of ascertaining the reliability and original source of the information reported therein.¹⁰⁶⁶ If this lower threshold cannot be met on the basis of NGO and press reports, then the higher standard required for conviction certainly is not fulfilled in the current case.

452. The particular evidential and methodological failings of the AI and FIDH reports have been addressed in Chapter II, as have the evidential weight and credibility of press reports.

G. The evidence by locality

1. Bangui

453. Little credence can be given to the content of the apparent 30 October, RFI broadcast to the effect that 500 soldiers had arrived four days previously,¹⁰⁶⁷ nor is the accuracy of the information in the report in anyway supported by its subsequent repetition six days later in Le Citoyen newspaper.¹⁰⁶⁸ RFI first reported their presence on 30 October, because that is when they first entered into the conflict.

454. Further independent support can be derived from the IRIN report of 31 October 2002 which reads:

Calm returned to the capital of the Central African Republic on Thursday after government sources backed by rebels from the neighbouring Democratic Republic of Congo (DRC) launched a

¹⁰⁶⁶ ICC-02/11-01/11-432, paras. 30-31.

¹⁰⁶⁷ EVD-T-OTP-00822/CAR-OTP-0005-0129.

¹⁰⁶⁸ EVD-T-OTP-00446/CAR-OTP-0013-0082.

massive counter-offensive around noon on Wednesday against dissident forces allied to the former army chief of staff, General François Bozizé.¹⁰⁶⁹

455. The first Wednesday after 25 October was 30 October. [REDACTED] the cahier both confirm that fighting commenced not long after noon that day.¹⁰⁷⁰

456. Le Citoyen is a lone voice in this story in suggesting that the MLC committed crimes against the civilian population on 27 October, an allegation it first published on November 5, ten days later.¹⁰⁷¹ Nor can any sensible suggestion be supported that the MLC pushed onto PK12 that day,¹⁰⁷² when [REDACTED] only has them entering the critical road junction at 4th Arrondissement on 31 October,¹⁰⁷³ and Bozizé's rebels continuing to patrol the area on 27 October.¹⁰⁷⁴ Contrary to what is alleged in paragraph 47 of the Prosecution Closing Brief, the only people who were [REDACTED] in the act of looting goods were Bozizé's men¹⁰⁷⁵ and the local population of Bangui.¹⁰⁷⁶ Whilst there might have been complaints about looting [REDACTED], there is no indication of how those people differentiated the soldiers fighting on either side in the conflict.

457. No reasonable Trial Chamber could conclude that any subordinate of Mr. Bemba committed any crime against the civilian population in Bangui before 30

¹⁰⁶⁹ EVD-T-OTP-00438/CAR-OTP-0011-0293.

¹⁰⁷⁰ D-45, T-298, pp.8-9 ; D-50, T-254, p.22; D-19, T-284, pp.18-21.

¹⁰⁷¹ EVD-T-OTP-00446/CAR-OTP-0013-0082.

¹⁰⁷² Prosecution Closing Brief, para. 45.

¹⁰⁷³ EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0173, EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, minute 06:50; P-63, T-118, p.26.

¹⁰⁷⁴ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; 04:52. EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0171, 0172.

¹⁰⁷⁵ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0170.

¹⁰⁷⁶ P-63, T-114, p.41; EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0190.

October. The findings of P-6 are significant in this regard. He imputed all crimes committed on 29, 30, 31 October and 1 November to Miskine's forces.¹⁰⁷⁷

458. The Prosecution Closing Brief does not address the commission of rapes in Bangui, as opposed to PK12. A series of offences alleged to have been committed prior to 31 October cannot be attributed to subordinates of Mr. Bemba.

459. P-22 alleges she was raped in PK12 on 26 October.¹⁰⁷⁸ On no version of events could an MLC soldier have been responsible for her rape.¹⁰⁷⁹ Her description of her attackers is devoid of any sufficient detail enabling their identification, even as to which faction of the conflict they were from,¹⁰⁸⁰ and there is no basis to assume that she was a victim of MLC soldiers and therefore must be wrong about the date.

460. P-68 says that she was raped on 27 October in the Miskine area of Fohi in 4th Arrondissement.¹⁰⁸¹ She is clear about the date.¹⁰⁸² It is an area which Bozizé's troops occupied that day¹⁰⁸³ and one through which the MLC never passed.¹⁰⁸⁴

¹⁰⁷⁷ EVD-T-D04-00016/CAR-OTP-0004-0065 at 0081-0084.

¹⁰⁷⁸ P-22, T-42, p.42.

¹⁰⁷⁹ See Prosecution Closing Brief, paras. 45-47.

¹⁰⁸⁰ P-22, T-42, p.39.

¹⁰⁸¹ P-68, T-48, pp.18-19.

¹⁰⁸² P-68, T-48, pp.18-19.

¹⁰⁸³ D-50, T-254, pp.26-27; D-45, T-295, p.10; D-19, T-286, p.11; CHM-01, T-353, p.56; P-178, T-152, pp.55-56; T-155, pp.9-10: Bozizé's rebels were positioned in Fohi, Gobongo, Boy-Rabé. See the crimes committed in these neighbourhoods during the retreat: "Subsequently some soldiers who were lacking in discipline did go to Boy-Rabé and the Fohi neighbourhood to loot P-31, T-183, pp.10-11; D-7 says that there were rapes and cases of looting and killing after they went by PK12 and drove out. D-7, T-248, p.51. D-19 is positive that none [REDACTED] soldiers enters the Boy-Rabé neighbourhood. It must have been Miskine's. D-19, T-286, p.9.

¹⁰⁸⁴ D-50, T-254, pp.26-27, 42; D-45, T-295, p.10; D-19, T-286, pp.11-12; CHM-01, T-353, p.56; P-178, T-152, pp.55-56; T-155, pp.9-10: Bozizé's rebels were positioned in Fohi, Gobongo, Boy-Rabé. See the crimes committed in these neighbourhoods during the retreat: "Subsequently some soldiers who were lacking in discipline did go to Boy-Rabé and the Fohi neighbourhood to loot P-31, T-183, pp.10-11; D-7 says that there were rapes and cases of looting and killing after they went by PK12 and drove out. D-7, T-248, p.51. D-19 is positive that none [REDACTED] soldiers enters the Boy-Rabé neighbourhood. It must have been Miskine's. D-19, T-286, p.9.

461. P-87 alleges that she was raped on 30 October in Boy-Rabé. The men who raped her were part of a unit which arrived at 9:00am on that day.¹⁰⁸⁵ Of course that is at least four hours before the MLC units commenced fighting.¹⁰⁸⁶ Her description of her attackers are insufficiently detailed for any Trial Chamber to safely determine which military unit they were part of, let alone their identities,¹⁰⁸⁷ and the offence took place in an area through which the MLC did not pass.¹⁰⁸⁸

462. P-87 was one of those victims who was clear that the Prosecution wanted her to blame the Banyamulengue and nobody else.¹⁰⁸⁹ Her evidence about the murder of her brother is implausible,¹⁰⁹⁰ and inconsistent with that of P-119.¹⁰⁹¹ The omission of any reference of her rape in a previous report to the family lawyer¹⁰⁹² ought to cause the Chamber pause for thought as to the veracity of her whole account.

2. PK12

463. The only evidence offered by the Prosecution in support of paragraphs 49 and 50 of its Brief, concerning the date of the arrival of MLC troops in PK12, derives from a portion of a copy of *Le Citoyen* newspaper.¹⁰⁹³ Citation to victims' accounts in a FIDH report rather presupposes that the victims have correctly identified their attackers as opposed to the date of their ordeal.

¹⁰⁸⁵ P-87, T-44, p.28; T-47, pp.10-11, 37.

¹⁰⁸⁶ D-45, T-298, pp.8-9 ; D-50, T-254, p.22; D-19, T-284, pp.18-21

¹⁰⁸⁷ P-87, T-44, pp.22, 25-26.

¹⁰⁸⁸ D-50, T-254, pp.26-27, 42; D-45, T-295, p.10; D-19, T-286, pp.11-12; CHM-01, T-353, p.56, P-178, T-152, pp.55-56; T-155, pp.9-10: Bozizé's rebels were positioned in Fouh, Gobongo, Boy-Rabé. See the crimes committed in these neighbourhoods during the retreat: "Subsequently some soldiers who were lacking in discipline did go to Boy-Rabé and the Fouh neighbourhood to loot P-31, T-183, pp.10-11; D-7 says that there were rapes and cases of looting and killing after they went by PK12 and drove out. D-7, T-248, p.51. D-19 is positive that none [REDACTED] soldiers enters the Boy-Rabé neighbourhood. It must have been Miskine's. D-19, T-286, p.9.

¹⁰⁸⁹ P-87, T-45, p.22.

¹⁰⁹⁰ P-87, T-44, pp.49-51; T-46, pp.48-51.

¹⁰⁹¹ P-119, T-82, p.50.

¹⁰⁹² P-87, T-45, pp.18-20.

¹⁰⁹³ Prosecution Closing Brief, paras. 49-50; EVD-T-OTP-0849/CAR-OTP-013-0320-at-0328.

464. This publication creates difficulties for the timeline which the Prosecution now seeks to advance. Assuming Le Citoyen to have been in a position to publish current information, it makes no sense that it should not record the presence of MLC troops in PK12 on 30 October until 8 November, when it patently could have done in several earlier publications, not least that of 5 November, so heavily relied upon.¹⁰⁹⁴ Moreover, this publication tends to undermine the suggestion in the earlier edition that the MLC had taken part in the counter-offensive of 27 October, when it records:

Cela a duré jusqu'au 27 Octobre date à laquelle l'ancien Chef d'Etat Major [...] François Bozizé [...] a revendiqué la paternité de l'attaque. Ce même jour [...] en riposte à cette attaque les forces loyalistes, appuyées par les forces libyennes, **suivies quelques temps plus tard** par les éléments du MLC [...] sont entrées en action.¹⁰⁹⁵

465. Accordingly, there must be serious doubt as to whether the report of 5 November that the MLC had been part of a counter offensive on 27 October remains credible in the light, not just of the direct evidence, but also this later publication from the same source. All the same, it seems an inevitable conclusion from the evidence that the loyalist forces arrived in PK12 sometime between 31 October¹⁰⁹⁶ and 8 November.¹⁰⁹⁷

466. The submission at paragraph 51 that the MLC “maintained a continuous presence at [...] PK12 throughout the five months intervention period” is not consistent with the evidence. The MLC were involved in taking over the occupation of all the towns north of Bangui in the period from November to February, before

¹⁰⁹⁴ EVD-T-OTP-0046/CAR-OTP-0013-0082.

¹⁰⁹⁵ EVD-T-OTP-00849/CAR-OTP-0013-0320 at 0327.

¹⁰⁹⁶ D-45, T-295, pp.7-9, D-50, T-254, pp.18, 22.

¹⁰⁹⁷ P-42, T-64, pp.12-13; P-23, T-51, p.13; T-53, p.27; P-69, T-192, p.22.

falling back all the way to the river Ubangi in March.¹⁰⁹⁸ They were not in the CAR to patrol towns hundreds of kilometres behind the frontline. That was the work of the domestic police force and the FACA.¹⁰⁹⁹ P-38's assertions as to the number of complaints [REDACTED] received¹¹⁰⁰ interestingly resulted in no confirmed charges for the period after November 8. P-38's [REDACTED] connection with all the other witnesses from PK12, moreover, raises the possibility that his evidence is unreliable on the question of the overall situation in PK12.

467. By contrast, in properly assessing the behaviour of the MLC troops towards the civilian population upon their arrival in any location, the Defence prays in aid [REDACTED]. [REDACTED] their arrival in the 8th arrondissement.¹¹⁰¹ Careful, deliberate and mindful of the sensitivities of the local population,¹¹⁰² wanting them all to return to their homes,¹¹⁰³ this image is a million miles from what the Prosecution seeks to advance in its hyperbolic presentation of the evidence. [REDACTED] images of the way in which the MLC interacted with the local population can be seen in the video filmed in Sibut later in the conflict.¹¹⁰⁴ No suggestion can be made that the behaviour of the MLC troops [REDACTED] video was "staged" as they did not know the film was being made.

468. Of the charges of rape that have been confirmed in relation to PK12, the [REDACTED] and [REDACTED] stories are interlinked in many ways. The characters are all closely associated with one another, as family members, within the community and within OCODEFAD. The stories are replete with fatal

¹⁰⁹⁸ P-209, T-117, pp.27-28; P-169, T-137, p.12.

¹⁰⁹⁹ D-53, T-231, p.37; D-19, T-285, pp.9-10.

¹¹⁰⁰ P-38, T-34, p.39.

¹¹⁰¹ EVD-T-OTP-00345/CAR-OTP-0039-0058.

¹¹⁰² EVD-T-OTP-00345/CAR-OTP-0039-0058 [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 [REDACTED].

¹¹⁰³ EVD-T-OTP-00345/CAR-OTP-0039-0058 [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 [REDACTED].

¹¹⁰⁴ EVD-D01-00042/CAR-DEF-0001-0832.

inconsistencies, both internally and between one another, were delivered in bitter and exaggerated terms and were the subject of much collusion both before and during the testimony of the alleged victims. All of the witnesses involved have benefitted from their membership of OCODEFAD,¹¹⁰⁵ have benefitted to the tune of thousands of euros already from participating as witnesses,¹¹⁰⁶ and anticipate benefitting even more in the event that Mr. Bemba is convicted.¹¹⁰⁷

469. All the PK12 witnesses, including alleged victims, [REDACTED]. [REDACTED],¹¹⁰⁸ [REDACTED],¹¹⁰⁹ [REDACTED].¹¹¹⁰ [REDACTED].¹¹¹¹ All PK12 victims immensely benefitted from their membership by receiving food,¹¹¹² money¹¹¹³ and material benefits.¹¹¹⁴ Furthermore, being told during OCODEFAD meetings that once the perpetrators would be identified, they would be paid compensation,¹¹¹⁵ created an incentive to exaggerate their claims.¹¹¹⁶ P-42 testified that his claim was greedy, acknowledging he had claimed to have 180,000 CFA stolen, whereas his testimony says 90,000.¹¹¹⁷

470. The inconsistencies between the members of the [REDACTED] family are significant and incapable of simply being explained away by failure of recollection. There is no consistency between them as to the date on which the Banyamulengue

¹¹⁰⁵ P-68, T-49, pp.3-5; T-50, pp.28-30; P-81, T-55, pp.28-30, 52-54; P-82, T-60, pp.32-41; P-80, T-61, pp.26-27; P-79, T-77, pp.31-34; P-23, T-52, pp.26-27, 32; T-54, pp.24-30; P-42, T-67, pp.12-15.

¹¹⁰⁶ ICC-01/05-01/08-2912-AnxA.

¹¹⁰⁷ P-81, T-56, pp.7-8; P-42, T-69, pp.4-7.

¹¹⁰⁸ [REDACTED].

¹¹⁰⁹ [REDACTED].

¹¹¹⁰ [REDACTED].

¹¹¹¹ [REDACTED].

¹¹¹² P-68, T-49, pp.3-5; T-50, pp.28-30; P-81, T-55, pp.28-30, 52-54; P-82, T-60, pp.32-41; P-80, T-61, pp.26-27; P-79, T-77, pp.31-34.

¹¹¹³ P-23, T-52, pp.26-27, 32; T-54, pp.24-30; P-82, T-60, pp.32-35.

¹¹¹⁴ P-42, T-67, pp.12-15.

¹¹¹⁵ P-81, T-56, p.7.

¹¹¹⁶ P-73, T-76, pp.12-13; P-42, T-69, pp.4-7.

¹¹¹⁷ ICC-01/05-01/08-328-Anx6; P-42, T-69, pp.4-7.

arrived,¹¹¹⁸ being as much as a month apart from each other, the time of day at which the attack on them took place,¹¹¹⁹ the date on which they were raped,¹¹²⁰ who was raped,¹¹²¹ who was present at each rape,¹¹²² what goods were looted,¹¹²³ the date on which the family left for [REDACTED],¹¹²⁴ the circumstances of their relative [REDACTED]'s death,¹¹²⁵ or the cause and date of the grandmother, [REDACTED]'s death.¹¹²⁶

471. There are further difficulties for the accounts of these witnesses taken together. [REDACTED], for example, says that the whole family fled the day that the MLC arrived, and only P-23 remained in the area.¹¹²⁷

472. Similarly, the [REDACTED] story is beset with inconsistencies. [REDACTED], and are intended to provide mutual corroboration, they give completely different accounts [REDACTED],¹¹²⁸ [REDACTED],¹¹²⁹ [REDACTED],¹¹³⁰ [REDACTED].¹¹³¹ Clear evidence of collusion and contact in violation of protective measures between P-42 and P-23 exists. P-42 has been caught lying about how he

¹¹¹⁸ P-23, T-51, p.9; T-53, p.27; P-81, T-56, pp.12-13; P-82, T-58, p.14; P-80, T-61, p.6.

¹¹¹⁹ P-23, T-51, p.38 (09.00-14.00); P-81, T-56, pp.13-14 (06.00); P-82, T-58, p.14 (04.00); P-80, T-62, pp.22-23 (04.00-05.00 having been told what the others had said).

¹¹²⁰ P-23, T-52, p.16 (8 November); P-82, T-58, p. 14 (7 October); P-80, T-61, p.6; T-62, p. 21 (17 October or November).

¹¹²¹ P-23, T-51, p.43; T-52, p.44 (everyone); P-81, T-55, pp.14, 34 (her dad, [REDACTED], [REDACTED], [REDACTED]); P-82, T-58, pp.19-21 (not her dad); P-80; T-61, p.9 (her, her husband and her daughters [REDACTED], [REDACTED] and [REDACTED]).

¹¹²² P-23, T-51, pp.36-40; P-81, T-55, pp.8-15; T-56, p.17; P-82, T-60, pp.10-12; P-80, T-61, pp.15-16, 29; T-62, pp.30-33.

¹¹²³ In particular, [REDACTED] his car was stolen. Others say it had broken down. See P-23, T-52, p.3; P-82, T-59, pp.33-34; P-80, T-63, p.18.

¹¹²⁴ P-23, T-52, p.39 (four days after the rape); P-81, T-59, p.35 (before the rape occurred); P-80, T-63, pp.17-18 (two days after the rape).

¹¹²⁵ P-23, T-54, pp.7-8 (beaten and died in Miskine hospital); P-81, T-56, pp.20-21 (shot in PK12); P-82, T-60, p.9 (died after vomiting blood in their home); P-80, T-63, p.10 (died in hospital).

¹¹²⁶ P-23, T-54, p.11 (4 years later); P-81, T-56, p.16 (two months later).

¹¹²⁷ [REDACTED].

¹¹²⁸ P-42, T-63, p.61; T-64, p.26 (7 November) ; [REDACTED].

¹¹²⁹ P-42, T-64, p.48; T-68, p.55 (inside the house); [REDACTED].

¹¹³⁰ P-42, T-64, p.26 (came to steal from him); [REDACTED].

¹¹³¹ P-42, T-64, pp.41-42; [REDACTED].

acquired the knowledge that that P-23 had testified and returned to [REDACTED], saying he had seen and spoken with him in [REDACTED] airport, when he was en route to The Hague.¹¹³² VWU confirmed that this was impossible.¹¹³³ It appears that he was in contact with P-23 while he was testifying and when P-23 was back in [REDACTED]. Such an intricate and deliberate lie should not easily be dismissed as having no impact upon the credibility of a witness. Even confronted with the accepted truth, P-42 persisted in his perjury.¹¹³⁴

473. The same suspicions of coaching and collusion run through all of the evidence called by the Prosecution from PK12. P-69, an alleged overview witness from PK12, confirmed he had been coached in his evidence by Bernadette Sayo.¹¹³⁵ A neighbour [REDACTED], he knew of their experiences and knew [REDACTED],¹¹³⁶ [REDACTED]¹¹³⁷ [REDACTED].¹¹³⁸ He also knew of the situations of [REDACTED].¹¹³⁹ [REDACTED], was similarly connected to the stories of others in the area.¹¹⁴⁰

474. As a body of evidence, the witnesses from PK12 ought to give any trier of fact cause for concern. They are inter-connected, have colluded throughout a period of years, are instrumental in an organisation dedicated to seeking compensation from Mr. Bemba, and have shown themselves capable of lying even on their oath. Notwithstanding that, their stories are implausibly inconsistent.

3. Damara and PK22

¹¹³² P-42, T-66, pp.53-54.

¹¹³³ Email from VWU on 17 February 2011.

¹¹³⁴ P-42, T-66, pp.57-60.

¹¹³⁵ P-69, T-192, pp.39-40.

¹¹³⁶ P-69, T-193, p.25.

¹¹³⁷ P-69, T-193, p.43.

¹¹³⁸ P-69, T-194, p.5

¹¹³⁹ P-69, T-195, pp.9-10.

¹¹⁴⁰ [REDACTED].

475. No confirmed charge relates to Damara or PK22. Paragraphs 76-89 of the Prosecution Closing Brief, accordingly, falls outside the legitimate ambit of consideration for the Chamber. Neither, amazingly, has a single victim been called to give evidence from Damara either by the Prosecution or the LRVs despite eight years of investigation and the apparently widespread abuses committed in the town, and only one from PK22.

476. It is inappropriate, moreover to conflate Damara with PK22. Whilst the two locations might be on the same road or even military axis, they are almost 60km apart from one another, and the relevant alleged incidents relied upon occurred several weeks apart. Whether there was a widespread attack or an armed conflict in one of these places will not determine that there was in the other. The evidence relating to Damara and relied upon by the Prosecution in its Final Brief is, moreover, amongst the least credible heard by this or any chamber.

477. The documentary evidence is both suspect and weak: CAR-OTP-0004-0343¹¹⁴¹ is an alleged portion of Le Citoyen newspaper, dated 13 November, which quite specifically does not nor could not refer to Damara, given that it would still be held by the rebels for another three weeks after that date. The Prosecution base its submission in paragraph 76 of its Final Brief on the content of what appears to be a letter to the newspaper in which the correspondent reports what unidentified MLC soldiers are alleged in general terms to have said. Le Citoyen was throughout the conflict blatantly pro-Bozizé, and the source of the document itself was the corrupt victims' lawyer, Ngoungaye Wanfiyo, whose stock in trade practice was the production of false documents. No reasonable Trial Chamber could rely on this document for the truth of its contents.

¹¹⁴¹ EVD-T-OTP-00399.

478. The FIDH report documents no report of any crime against humanity in Damara at all. The fact that it records 37 rapes in PK22 without attributing alleged responsibility to any party is of little or no weight whatsoever.¹¹⁴²

479. The figure of 32 unidentified rape victims in PK22 was apparently provided to AI by the Catholic Church.¹¹⁴³ The AI investigation was conducted in September 2003,¹¹⁴⁴ when Bozizé was in power, and the report published in November 2004. The accounts of alleged rape victims include those who claim to have been attacked in PK22¹¹⁴⁵ and PK26¹¹⁴⁶ on 31 October, at Boy-Rabé on 28 October,¹¹⁴⁷ and in Damara on 18 November.¹¹⁴⁸ All, of course, allege that their attackers were Banyamulengue.¹¹⁴⁹

480. The central witness is P-209, [REDACTED], whose partiality to Bozizé was the central feature of his evidence. He was determined to exonerate or minimise his involvement in any offending,¹¹⁵⁰ most notably by claiming that Bozizé's men only stole from the houses of government officials,¹¹⁵¹ and only had consensual sex with the local women,¹¹⁵² despite what he might have said on an earlier occasion.¹¹⁵³ This, despite the fact that he, together with the whole population fled in terror¹¹⁵⁴ when Bozizé's men arrived and only returned three days after the MLC occupied the town.¹¹⁵⁵ In that respect, his evidence is wholly consistent with the evidence of D-56,

¹¹⁴² EVD-T-OTP-00395/CAR-OTP-0001-0034.

¹¹⁴³ EVD-TOTP-00442/CAR-OTP-0011-0503 at 0511.

¹¹⁴⁴ EVD-TOTP-00442/CAR-OTP-0011-0503, at 0508.

¹¹⁴⁵ EVD-TOTP-00442/CAR-OTP-0011-0503, at 0513, 0514, 0516.

¹¹⁴⁶ EVD-TOTP-00442/CAR-OTP-0011-0503, at 0515, 0516.

¹¹⁴⁷ EVD-TOTP-00442/CAR-OTP-0011-0503 at 0514.

¹¹⁴⁸ EVD-TOTP-00442/CAR-OTP-0011-0503 at 0514-0515.

¹¹⁴⁹ EVD-TOTP-00442/CAR-OTP-0011-0503, at 0508-0516.

¹¹⁵⁰ P-209, T-117, p.17.

¹¹⁵¹ P-209, T-121, pp.43-45.

¹¹⁵² P-209, T-122, pp.14-16.

¹¹⁵³ P-209, T-122, p.3.

¹¹⁵⁴ P-209, T-122, p.18.

¹¹⁵⁵ P-209, T-121, pp.35-37.

one of Bozizé's officers, who confirmed that the town was virtually empty of civilians when they took it on 25 October.

481. Perhaps the most incredulous aspect of his evidence, however, is his uncorroborated account of seeing Mr. Bemba arrive by cargo plane (green in colour),¹¹⁵⁶ which landed and took off on the N3 highway,¹¹⁵⁷ to take some generators back to Bangui.¹¹⁵⁸ During the course of this visit he was apparently close enough to him and Mustapha to overhear the giving of orders by one to the other.¹¹⁵⁹ The story is an invention and renders it impossible to accept any of his evidence as reliable.

482. Leaving aside his obvious lack of objectivity as a witness, his evidence, in any event, contradicts any suggestion that there were murders of civilians in Damara,¹¹⁶⁰ save for one who was probably mistaken for a combatant,¹¹⁶¹ and he has no direct evidence of rape, only of seeing a naked girl.¹¹⁶² He acknowledged, moreover, the commission of opportunist offences (pillage and rape) by Central African civilians.¹¹⁶³ He describes no armed conflict prior to or during the MLC occupation of the town.

483. Some support for his evidence is said to come from P-63, P-173 and P-178, again, some of the most unreliable witnesses imaginable.

¹¹⁵⁶ P-209, T-119, pp.40-43; T-124, pp.3, 7, 18.

¹¹⁵⁷ P-209, T-124, p.27.

¹¹⁵⁸ P-209, T-124, pp.13-17.

¹¹⁵⁹ P-209, T-120, pp.35-36.

¹¹⁶⁰ P-209, T-117, p.31.

¹¹⁶¹ P-209, T-118, p.7.

¹¹⁶² P-209, T-118, p.8.

¹¹⁶³ P-209, T-122, p.29.

484. P-63's evidence bears all the same hallmarks as P-209's; a blatant partiality to the Bozizé regime,¹¹⁶⁴ a refusal to accept the reality of [REDACTED] and previous interviews with the OTP, a preparedness to advance opinion and hyperbole as fact,¹¹⁶⁵ and an unwillingness to answer even the most straightforward questions from Defence counsel.

485. Most significantly in relation to Damara, however, bearing in mind the submissions of the Prosecution at paragraph 81 of its Final Brief, is the obvious series of lies he has told the Chamber about the identities of those [REDACTED].

486. P-63 told the Chamber that he [REDACTED] MLC soldiers in Damara.¹¹⁶⁶ He confirmed that [REDACTED].¹¹⁶⁷ The date borne [REDACTED] is either 5 or 12 November 2002, a month or so before the MLC entered Damara. Accordingly, his evidence is palpably untrue, and that the strong likelihood is that these are not [REDACTED] MLC soldiers at all.

487. Leaving that aside, despite being in close contact, according to him, with MLC troops for two months, P-63 gives no direct evidence of any crime whatsoever.¹¹⁶⁸

488. P-68 and P-81 give accounts of events in the area which they have heard about. This is not, however, hearsay; it is little more than gossip or urban myth. It is also difficult to determine when they came to hear these stories; at the time, shortly after the events or years later. Both are [REDACTED] who have given wildly different accounts of the same events, they became members of OCODEFAD, from

¹¹⁶⁴ For example, P-63, T-114, pp.41-42.

¹¹⁶⁵ P-63, T-112, p.43.

¹¹⁶⁶ P-63, T-111, p.8.

¹¹⁶⁷ P-63, T-111, p.15.

¹¹⁶⁸ P-63, T-113, pp.20-21; T-114, pp.15-16; T-115, pp.11-17, 28.

which they benefitted.¹¹⁶⁹ They both made false claims in their applications to participate as victims.¹¹⁷⁰

489. The credibility of P-173 and P-178 barely needs further amplification. Both were central to the scheme which involved 22 Prosecution witnesses seeking to demand further sums of money from the ICC to compensate them for testifying (having already received many thousands of dollars each already).¹¹⁷¹ All the witnesses cited under this section are tainted by association with that scheme.¹¹⁷² One of the curious features of the scheme is that the apparent architects and leaders of it, P-169 and P-178, are both Congolese and [REDACTED],¹¹⁷³ and yet the majority of those seeking more money are Central African. There are plain inferences to draw from that, given the possession by P-169 of the contact details of all the Prosecution's Central African protected witnesses. There are equally plain inferences to be drawn from P-173's central role with the other two.

490. The evidence of both is incredulous. It is inconceivable that the loyalist command, let alone the MLC operational command, would have allowed two such mundane individuals such privileged access to its higher echelons and communications. Neither witness gives any direct evidence of crimes in Damara or elsewhere,¹¹⁷⁴ and no reasonable Trial Chamber could conclude that the crimes or the chapeau elements were proven on the basis of their evidence.

4. Sibut

¹¹⁶⁹ P-81, T-55, pp.28-30; P-80, T-61, p.26; P-68, T-49, p.4.

¹¹⁷⁰ P-73, T-76, pp.12-13; P-42, T-69, pp.4-7.

¹¹⁷¹ EVD-T-D04-00057/CAR-OTP-0072-0504_R01; EVD-T-D04-00056/CAR-OTP-0072-0508_R01.

¹¹⁷² EVD-T-D04-00057/CAR-OTP-0072-0504_R01; EVD-T-D04-00056/CAR-OTP-0072-0508_R01.

¹¹⁷³ P-173, T-144, p.9; P-169, T-137, p.36; T-139, pp.7-9, 13, 15-16.

¹¹⁷⁴ P-173, T-147, pp.21, 22-23, 27-28; T-149, pp.31-32, 39, 42, 52; P-178, T-157, pp.4, 36-38.

491. No charge has been confirmed in relation to Sibut, neither is there any direct or credible evidence upon which the Trial Chamber could find that either that crimes had been committed or that the contextual elements of crimes were proven.

492. No single witness has been called from the Sibut area by the Prosecution. The Prosecution Final Trial Brief cites only to RFI radio reports and a solitary witness called by the LRV.¹¹⁷⁵ That witness claimed to have lost two sewing machines, though in evidence conceded that he only owned one.¹¹⁷⁶

493. It is surprising given the submissions the Prosecution and the LRV both now make,¹¹⁷⁷ that the only direct evidence they have called of crimes against humanity in Sibut concerns a low-level theft. It provides no basis for the Trial Chamber to find beyond a reasonable doubt that there was wide-scale rape, murder and pillaging in the area. Nonetheless, as to the existence of an armed conflict, V-02's evidence is instructive. He says the rebels had withdrawn before the MLC got there.¹¹⁷⁸ Indeed, they withdrew to Dekoua as soon as they knew the MLC were heading for Damara.¹¹⁷⁹ That would have been early December, almost three months before the MLC arrived.

494. V-02 said that the MLC arrived in Sibut on 24 February 2003,¹¹⁸⁰ and stayed for two weeks (which would take us to the 10 March). He said (gratuitously and plainly untruthfully) that there were more women than men amongst the MLC,¹¹⁸¹ and that they were short people.¹¹⁸² Although they were unarmed when they

¹¹⁷⁵ Prosecution Closing Brief, paras. 90-93.

¹¹⁷⁶ V-02, T-223, p.53.

¹¹⁷⁷ Prosecution Closing Brief, paras 90-93; LRV Closing Brief, para. 138.

¹¹⁷⁸ V-02, T-222, pp.49-50.

¹¹⁷⁹ V-02, T-222, p.50.

¹¹⁸⁰ V-02, T-224, p.49.

¹¹⁸¹ V-02, T-222, p.48.

¹¹⁸² V-02, T-222, p.47.

arrived,¹¹⁸³ he ran away as soon as they did.¹¹⁸⁴ He hid in the bush for three days.¹¹⁸⁵ On the fourth day there was a meeting (the one on the videotape and photographs) at which he believes Mr. Bemba attended (but of course it was Senga not Mr. Bemba).

495. What is striking about the video¹¹⁸⁶ is not just the spontaneity of the joy expressed throughout, but the normality of life in Sibut at that time (e.g. “Mr. Bemba” stopping to buy a galette in the market). The idea that this is staged is wishful thinking on the part of the Prosecution. Having failed to call a single witness from Sibut, and knowing that the presence of Gabriel Khan, the RFI reporter, on this open-day visit completely undermines the credibility of the RFI reports in relation to the town, it is lame and impertinent for the Prosecution to seek to piggy back V-02 in order to impeach the contents of the video and photographs produced by the Defence.

496. Given that V-02 continues to insist that Mr. Bemba visited Sibut (when he palpably did not) and that the lady mayor of the town, pictured in the video, left with the MLC officers and pressmen at the end of the interview on tape (which she plainly did not), and suggests that she was not there during the conflict (which she plainly was),¹¹⁸⁷ the Chamber must have cause to doubt whether he was present at the helicopter visit at all.

497. Certainly, V-02 is in no position to impugn the genuineness of the joy of anyone depicted on the tape or photographs. He was, at the end of the day, a mere tailor seeking dishonestly to claim compensation for two sewing machines. He was not the mayor, nor was he a priest. He did not speak for the people of Sibut.

¹¹⁸³ V-02, T-223, p.9.

¹¹⁸⁴ V-02, T-223, p.7.

¹¹⁸⁵ The transcript reads that he hid, the next day the attackers asked him to come out of his hiding place. V-02, T-222, p.49.

¹¹⁸⁶ EVD-T-D04-00008/CAR-DEF-0001-0832.

¹¹⁸⁷ V-02, T-223, p.43.

498. All the same, his evidence in relation both to the occurrence of crimes or the existence of a widespread attack on the civilian population is illuminating. He said the Banyamulenge provided the authority in the town,¹¹⁸⁸ that they even resolved civil and matrimonial disputes.¹¹⁸⁹ He specifically refutes the idea that anyone was murdered in Sibut.¹¹⁹⁰ Moreover, during the period that the Banyamulenge were there, there were no complaints against them.¹¹⁹¹

499. Throughout its Closing Brief allegations regarding the contextual elements of crimes, the Prosecution has systematically misrepresented the contents of RFI reports. At paragraph 86, citations are made to the same transmission three times,¹¹⁹² however no reference to Commander Golf or even Damara is contained in the broadcast.¹¹⁹³ At paragraph 91, the cited transmission refers only to the retaking of Bozoum and Sibut by loyalist soldiers and in no way supports the submission made by the Prosecution.¹¹⁹⁴

500. At various points the Prosecution conflates the concepts of loyalist and MLC forces.¹¹⁹⁵ Elsewhere, citations are made to non-existent transcripts and excerpts which bear no relation to the allegation pleaded in the text of the brief.¹¹⁹⁶

5. Bossangoa

501. No charge has been confirmed in relation to Bossangoa. No witness has been called from that area by either the Prosecution or the LRVs.¹¹⁹⁷

¹¹⁸⁸ V-02, T-223, p.23.

¹¹⁸⁹ V-02, T-223, p.22.

¹¹⁹⁰ V-02, T-225, p.49.

¹¹⁹¹ V-02, T-223, p.25.

¹¹⁹² Prosecution Closing Brief, fn. 274-276.

¹¹⁹³ EVD-T-OTP-00576/CAR-OTP-0031-0099.

¹¹⁹⁴ Prosecution Closing Brief, fn. 293.

¹¹⁹⁵ Prosecution Closing Brief, fn. 416, 425.

¹¹⁹⁶ Prosecution Closing Brief, fn. 293-294, 338-339.

502. There is no credible evidence on which the Trial Chamber could find either that crimes had been committed in that area or that the contextual elements had been proven. The Prosecution cites the evidence of P-169, P-178, P-209 and P-22 in support of its submissions at paragraphs 94-96 of its Closing Brief. None of these witnesses can give direct evidence of any crime in Bossangoa, indeed none of them has ever been there.

503. Contrary to paragraph 95 of the Prosecution Closing Brief, P-22 did not say that many civilians were murdered in Bossangoa, only that her aunt had told her that her [cousin] had been killed there,¹¹⁹⁸ but there is insufficient evidence for the Trial Chamber to conclude even as to the perpetrators of that single murder, there being no evidence as to date, location, or description.

504. The citation at footnotes 305 and 306¹¹⁹⁹ simply do not support the submission made as to the occurrence of widespread murders, rapes and pillaging. There is no evidence upon which a reasonable Trial Chamber could conclude that there was a widespread attack in Bossangoa, that there was an armed conflict, or that crimes were committed by the MLC.

6. Bossembélé

505. No charge has been confirmed in relation to Bossembélé, and no charge of extortion¹²⁰⁰ was confirmed in any location (nor even falls within the jurisdiction of the ICC). P-6's evidence of an incident at a checkpoint in Bossembélé does not establish that there was a killing, merely that shots were fired. Nor does it establish

¹¹⁹⁷ ICC-01/05-01/08-856-AnxA, paras 18-21.

¹¹⁹⁸ P-22, T-41, pp.36-37.

¹¹⁹⁹ The Prosecution Closing Brief relies on EVD-T-OTP-00582/CAR-OTP-0031-0124 at 10.50–12:00 and CAR-OTP-0057-0403 at 0405.

¹²⁰⁰ Prosecution Closing Brief, para. 97.

the identity or status of any person involved. The person taken from the car could have been an enemy intelligence agent, or even an MLC soldier returning from having abandoned his post. It is evidence of no confirmed charge at all.

506. According to the weight of the evidence, the MLC entered the town of Bossembélé on or about 14 December 2002.¹²⁰¹ Complaints from lorry drivers prior to 5 December,¹²⁰² and reports to the Tribunal concerning allegations in November at Bossembélé¹²⁰³ cannot safely be attributed to subordinates of Mr. Bemba. This must be the case, especially given the serious caveats which P-6 applied to the value and credibility of the complaints (procès-verbaux) lodged before him.¹²⁰⁴

507. The evidence of P-169, P-173, and P-178 is worthless in establishing whether crimes were committed, or whether the chapeau elements of crimes have been established. P-213's evidence is simply incapable of belief on any topic.

7. Bozoum

508. No charge has been confirmed in relation to Bozoum. No witness has been called from the town or surrounding area to give direct evidence of events there.

509. The sole evidence, in the Defence submission, of any crimes in Bozoum, comes from the RFI reports. P-119 only gave evidence of what she heard on the radio ("the communiqués")¹²⁰⁵, not what she had seen or heard from any other

¹²⁰¹ CAR-ICC-0001-0007; EVD-T-OTP-00703/CAR-D04-0002-1641 at 1654; EVD-T-OTP-00703/CAR-D04-0002-1641 at 1665; EVD-T-OTP-00703/CAR-D04-0002-1641-at-1679.

¹²⁰² Prosecution Closing Brief, para. 100.

¹²⁰³ Prosecution Closing Brief, para. 98.

¹²⁰⁴ He failed to conduct any sort of investigation on the field (P-6, T-94, pp.36-37), he is a man chosen by Bozizé (P-6, T-94, pp.23-24; T-95, p.67; T-96, p.49; T-99, p.11) and quite naturally he did not investigate any crimes committed by Bozizé's troops (P-6, T-94, p.29; T-95, pp.66-67).

¹²⁰⁵ P-119, T-83, p.13; Prosecution Closing Brief, fn. 337.

source, and then, only in relation to a murder, not any other crime.¹²⁰⁶ The same is true of P-79 (although she did reveal the extent at which information was subsequently shared at OCODEFAD).¹²⁰⁷ P-69, did not include Bozoum in the list of towns he had heard about.¹²⁰⁸

510. There simply is no basis upon the evidence which would justify the Trial Chamber in finding that “[w]itnesses testified that MLC troops committed rape, murder and pillaging in Bozoum”.¹²⁰⁹

8. Mongoumba

511. One charge of rape, that of P-29, has been confirmed in relation to Mongoumba, but no allegation of murder or pillage. The allegations concerning Mongoumba are the most incongruous in the whole case, fitting neither with the Prosecution’s case theory nor geographical reality.

512. Mongoumba lies 180 km due south of Bangui (200 km if one takes the only serviceable road via Mbaiki).¹²¹⁰ It would likely take four days to march there. It takes seven to eight hours by motor vehicle.¹²¹¹ Bozizé’s attack came exclusively from the north of the country, and all the towns described above are to the north of Bangui. The MLC retreat was via PK12 and the river Ubangi to Zongo.¹²¹² The evidence shows that those who were unable to cross the river fled north-west to Cameroon, not south.¹²¹³

¹²⁰⁶ P-119, T-83, p.12.

¹²⁰⁷ P-79, T-77, p.29.

¹²⁰⁸ P-69, T-193, p.29.

¹²⁰⁹ Prosecution Closing Brief, para. 105.

¹²¹⁰ EVD-T-D04-00011/CAR-D04-0002-1286.

¹²¹¹ V-01, T-221, pp.29-30.

¹²¹² D-45, T-295, pp.38-40; D-19, T-285, pp.9-10 ; D-49, T-271, pp.21-22 ; EVD-T-D04-00011/CAR-D04-0002-1286.

¹²¹³ P-213, T-188, pp.24-25.

513. According to P-29 the attack on her took place on 5 March. At that time, the MLC troops were in Bossangoa,¹²¹⁴ probably 500-600km away, or already back in the DRC.¹²¹⁵ The soldiers who attacked her spoke a language which she didn't understand, and couldn't identify, but it was **not** Lingala.¹²¹⁶ They were wearing military uniform, but some of them did not have boots.¹²¹⁷ After the attack, she fled to the bush.¹²¹⁸

514. V-01's complaint has identical details to that of P-69, including the precise time and date¹²¹⁹ of the morning of the arrival of the armed men, and the prior warning to flee.¹²²⁰ Both, of course, had been members of OCODEFAD.¹²²¹ There were about 20 soldiers, she encountered them in a hospital and they spoke Lingala.¹²²² Some wore masks over their faces like Sara and had darkened their skin.¹²²³ They asked her to show them where the military base was and where the border was with the DRC.¹²²⁴ The soldiers were concerned about "loyalist forces" discovering the dead body of one of their colleagues,¹²²⁵ and were concerned she might betray them.¹²²⁶

¹²¹⁴ P-169, T-136, p.33; D-19, T-291, p.13 ; T-292, p.45.

¹²¹⁵ P-169, T-136, p.28; P-173, T-144, pp.15-16; P-178, T-150, pp.36-37, D-19, T-289, pp.16-17; T-291, pp.13-15.

¹²¹⁶ P-29, T-80, pp.21, 39.

¹²¹⁷ P-29, T-80, p.34.

¹²¹⁸ P-29, T-80, p.35.

¹²¹⁹ V-01, T-220, p.12.

¹²²⁰ V-01, T-220, p.14.

¹²²¹ P-69, T-192, pp.39-40; V-01 says that there was no victims association in Mongoumba and that her application was filled with representatives of the ICC. V-01, T-220, pp.46-47.

¹²²² V-01, T-220, p.18.

¹²²³ V-01, T-221, p.40.

¹²²⁴ V-01, T-221, p.42.

¹²²⁵ V-01, T-221, pp.43-44.

¹²²⁶ V-01, T-221, p.49.

515. According to her, she became an unwilling accomplice in the looting that then took place.¹²²⁷ Like P-69, she was raped by three men, but even after her ordeal, she continued to translate for them, and was an eye witness to two murders and more pillaging. Her evidence, however, became far-fetched, when she later claimed that she had been raped after, and not before the second murder, that her clothes had been cut off with a knife on the second occasion, then that she had remained naked throughout,¹²²⁸ and then that she had been raped by 12 (or perhaps 14) men.¹²²⁹ She was, moreover, unclear whether the woman who was murdered was also raped.¹²³⁰

516. She described the murder of a Muslim man, who she claimed had been shot four times at point blank range, not only without dying, but without falling prone.¹²³¹ The soldiers then killed him with a knife.¹²³² Many of the things she described in evidence had not been included in her earlier formal statements of complaint.¹²³³ Her evidence was ultimately incapable of belief, both as to the scale of what she described and the identity of the perpetrators.

517. V-01 confirmed that Mr. Bemba had never visited Mongoumba and that no helicopter had landed there during the conflict.¹²³⁴ Nonetheless, according to V-01, the FACA forces left on 4 March.¹²³⁵ Both P-69 and V-01 aver that all the events of Mongoumba were finished in the same day.¹²³⁶

¹²²⁷ V-01, T-220, p.27.

¹²²⁸ V-01, T-220, p.35.

¹²²⁹ V-01, T-220, p.36.

¹²³⁰ V-01, T-220, p.35.

¹²³¹ V-01, T-222, pp.32-33.

¹²³² V-01, T-220, p.33.

¹²³³ V-01, T-221, pp.21-24; T-222, p.26.

¹²³⁴ V-01, T-221, p.17.

¹²³⁵ V-01, T-221, p.24.

¹²³⁶ V-01, T-220, pp.34-35.

518. The copy of the single page of *Le Citoyen* cited as support of these accounts¹²³⁷ is dated Thursday, 6 March 2003, and alleges that the events took place on Tuesday, which would have been 4 March, when, according to V-01, the FACA were still present. The report mentions neither murders, nor rapes, but it does attribute the offending to the “Nyamamulengue”, which is a phrase championed by *Le Citoyen* in many of its reports.¹²³⁸ Although the newspaper simultaneously attributes the actions in Mongoumba to Mr. Bemba’s men, elsewhere and just a few days previously it describes the “Nyamamulenge” as English, Arabic and Portuguese speaking.¹²³⁹

519. There were of course other armed elements close to Mongoumba at that time. The cahier de communication records a report from Ops Bangui to the MLC General Staff warning that a force commanded by Kolingba and taking refuge in Congo Brazzaville was planning to attack Mongoumba by boat.¹²⁴⁰ It seems reasonable to assume that whatever other languages they had mastered, men who had been refugees in Brazzaville for almost two years might speak a bit of Lingala.

520. The evidence of P-169, P-173, and P-178, [REDACTED] is worthless in relation to events in Mongoumba. The forces alleged by P-169 to be responsible for the assault were already back in the DRC by 5 March¹²⁴¹ (and P-169 was in Bossangoa),¹²⁴² and no others could have had any direct knowledge of those events because they were concerned with withdrawing from the north back home through

¹²³⁷ EVD-T-OTP-00820/CAR-OTP-0013-0114.

¹²³⁸ EVD-T-OTP-00854/CAR-OTP-0013-0113; EVD-T-OTP-00852/CAR-OTP-0013-0052; EVD-T-CHM-00049/CAR-OTP-0013-0098.

¹²³⁹ EVD-T-OTP-00854/CAR-OTP-0013-0113.

¹²⁴⁰ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1687.

¹²⁴¹ P-169, T-136, p.28; P-173, T-144, pp.15-16; P-178, T-150, pp.36-37; D-19, T-289, pp.16-17; T-291, pp.13-15.

¹²⁴² P-169, T-136, p.40.

Bangui.¹²⁴³ Neither would they have had any opportunity to talk to any of these witnesses after the events and before their return.

¹²⁴³ D-49, T-271, pp.21-22.

V. WHO WERE THE PERPETRATORS?

I pose this question because at page 39 of the same transcript you said the following, and I quote you, Mr Witness, "The loyalist forces only came in to occupy areas from which we had withdrawn." So if the loyalist forces came to occupy the areas you had withdrawn from, your unruly soldiers you say went back to those places, how can we tell then who was committing atrocities, Mr Witness? [...] So there was confusion, Mr Witness, would you agree with that, as to who was doing what?¹²⁴⁴

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521. Of all the areas of the evidence in the case where it is important for the Chamber to remind itself of the burden and standard of proof, the most significant is the question of whether the prosecution has proved that the perpetrators of any or all of the crimes confirmed in the DCC were subordinates of Mr. Bemba.

522. Throughout the course of the case there has been a tendency on the part of the Prosecution, the Legal Representatives of Victims and, with respect, the Chamber to adopt a presumption to the effect that unless proved otherwise, perpetrators were assumed to be MLC soldiers.

523. No such presumption exists in law or evidentially, and such an approach involves a complete reversal of the burden of proof. In each case, the Prosecution must prove beyond a reasonable doubt not just that a perpetrator spoke Lingala, or that he might have been Congolese, but that he was a subordinate of Jean-Pierre Bemba. Anything less than that and the charge must fall at the first hurdle.

524. The evidence in each case reaches nowhere near that standard. The Prosecution's submissions in its brief are a mere repetition of its opening position

¹²⁴⁴ D-56, T-316, pp.38-39.

and would involve the Chamber either perverting or completely ignoring the huge body of evidence it has heard *inter alia* about the languages used by the various fighting factions, the dates on which offences occurred, and the similarity of the dress of the soldiers in each component force. Most importantly, the Chamber has now heard a huge body of evidence about the commission of crimes by other participating factions in the conflict, including rape, kidnap, pillage and murder.

525. It is inconceivable that the Chamber could not find that crimes were committed in the same areas as those confirmed by Bozizé's troops, the FACA, Miskine's forces, the USP and the Central African civilian population. In that context the tools offered by the Prosecution as a means of identifying perpetrators are woefully inadequate.

526. The Prosecution's attempt to attribute responsibility to the MLC is largely, if not exclusively, predicated on witnesses' identification of soldiers as "MLC" or "Banyamulengue" by virtue of their appearance (uniform), language (as Lingala speaking), or their alleged control over the area in question at the specific point in time.

527. The Prosecution's case on the latter aspect is flawed by its failure to provide specific dates as concerns either the alleged crimes, or the alleged occupation by the MLC of certain geographic areas in the CAR. Where the date of a particular allegation is used by the Prosecution to attribute responsibility to the defendant, it must be considered to be a material fact.

528. In such circumstances of specific and corroborated proof that the MLC weren't in fact present at the time that alleged event occurred, the ambiguity in dates must be interpreted to the benefit of the defendant.

529. For example, if a witness has asserted that an alleged incident occurred on or around 27 October 2002, and the evidence demonstrates that the earliest that the MLC could have been present was 30 October 2002, then the ambiguity in dates must be interpreted in the manner most favourable to the Defence. Although “on or around 27 October” could mean 30 October or later, it could also mean 25 October or earlier and thus predate the alleged entry of any MLC soldiers in CAR.

530. The evidential requirement of beyond reasonable doubt, when interpreted in accordance with the principle of *in dubio pro reo*, would require the Trial Chamber to rule that the Prosecution had failed to attribute responsibility to the MLC in such circumstances. In terms of the issue of language and uniforms, apart from the fact that such arguments are factually misconceived and unsupported by the evidence, the Prosecution has failed to address the inherent unreliability of identification evidence.

531. Both domestic law, and international criminal law recognise that unless appropriate safeguards are followed, the identification of a perpetrator by visual or auditory means will be unreliable, and incapable of sustaining a conviction. In the ICTY *Kunarac* case, the Trial Chamber made the follow observations concerning identification evidence:¹²⁴⁵

The Trial Chamber has made a careful evaluation of the evidence of identification adduced during the trial, exercising particular caution in relation to it. The Trial Chamber accepts that identification evidence involves inherent uncertainties. This is because of the many difficulties inherent in the identification process, resulting from the vagaries of human perception and recollection. It is insufficient that the evidence of identification given by the witnesses has been honestly given; the true issue in relation to identification evidence is not whether it has been honestly given but rather whether it is reliable. In the turbulent and often traumatising circumstances in which these witnesses found themselves, the Trial

¹²⁴⁵ *Kunarac et al.* TJ, para. 561.

Chamber is acutely aware of the possibility of error in making identification later of a person previously unknown to the witness. The Trial Chamber also recognises the possibility that men other than the accused may falsely have used the name of the accused, or that what they said to the witnesses may have been misunderstood.

532. Apart from the general obligation to treat any identification evidence with caution, the presence of any of the following factors would further militate against its admission:

identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable witness testimonies; and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others."¹²⁴⁶

533. The above principles apply to any testimony concerning the ability of a witness to identify a perpetrator by visual or auditory characteristics, including identification by uniform or language.

534. As concerns visual identification, the *ad hoc* Tribunals have found unless adequately tested (for instance, through the use of photo-boards with different exemplars of varying similarity), visual identification should be accorded no weight.¹²⁴⁷ It is also incumbent on the Prosecution to verify that the witness's visual memory has not been influenced through pre-trial publicity or media reports.¹²⁴⁸ In

¹²⁴⁶ *Kupreškić et al.* AJ, paras. 40, 134.

¹²⁴⁷ *Tadić* TJ, paras 548-552. See also, R. May and M. Wierda, 'International Criminal Evidence', Ardsley, New York, 2002, pp.178-179. *Limaj et al.* AJ, para. 27; *Kunarac et al.* TJ, para. 562; *Kunarac et al.* AJ, para 320; *Kamuhanda* AJ, para. 243.

¹²⁴⁸ *Haradinaj et al.* TJ, para. 31.

terms of the particular context of identification by uniforms, an ICTY Trial Chamber refused to accept it as a reliable form of identification in circumstances in which the uniforms in question were not unique to the perpetrators, or were not readily differentiated from other uniforms.¹²⁴⁹

535. The Prosecution failed to establish any such safeguards in the present case. Not only did the Prosecution fail to ask the witnesses to identify the uniform based on different possibilities or variations, the Prosecution also failed to explore the possible adverse and contaminating influence of media reports, NGO reports, and interaction with other victims and intermediaries.

536. Witnesses also provided inconsistent descriptions concerning the identification of MLC “uniforms”,¹²⁵⁰ amended their testimony concerning their ability to identify the MLC after this became a live issue at trial,¹²⁵¹ and were present at OCODEFAD and victim participation meetings when other victims/witnesses both attributed responsibility to the MLC and cited language and/or uniform as a factor for doing so.¹²⁵² In terms of the assertion that the witnesses (including those who did not speak Lingala) were able to identify the MLC through language, in the *Boškoski* case, the Trial Chamber found that:¹²⁵³

there were residents who thought they could identify a few of the police as local men of Macedonian ethnicity, but for this purpose those residents could only rely on the sound of voices they heard, which is not a sufficiently reliable identification.

¹²⁴⁹ *Boškoski et al.* TJ, paras. 58 and 61.

¹²⁵⁰ See Chapter V, Section C.

¹²⁵¹ P-80, T-62, pp.37-39; P-23, T-53, pp.37-40, 42-44; P-79, T-78, p.21.

¹²⁵² P-42, T-68, p.59; T-69, pp.4-5; P-29, T-80, pp.41-44; P-73, T-71, pp.7-16, 55-58; T-72, pp.6-13; T-73, pp.18-35; T-76, pp.25-29; P-68, T-49, pp.3-5; T-50, pp.28-30; P-23, T-52, pp.26-27, 32; T-54, pp.24-30; P-81, T-55, pp.28-30; T-55, pp.52-54; T-56, p.7; P-82, T-59, pp.15-18; T-60, pp.31-41; P-80, T-61, pp.26-27; T-63, pp.7; P-79, T-77, p.28, 31-34; P-75, T-92, pp.32-34; P-69, T-192, pp.39-40; T-195, pp.8-11, 14.

¹²⁵³ *Boškoski et al.* TJ, para. 546.

537. Domestic case law has also underscored that auditory means of identification are more unreliable than visual forms, and must in any case, be treated with caution.¹²⁵⁴ In the 2008 United Kingdom case of *R v Flynn and St John*, the Court of Appeal observed that voice identification was more difficult than visual identification.¹²⁵⁵ In terms of the weight of such evidence, the Court emphasised the need to treat it with caution due to the “the danger of mistakes in such cases.”¹²⁵⁶

A. Dates and Location of the confirmed crimes

538. In establishing the identity of the perpetrators of any crime, evidence of the date and location of the offence are an essential first requirement. It is axiomatic that evidence of crimes committed either before the arrival or after the departure of the MLC from the CAR, or evidence of crimes committed in areas where MLC forces were never deployed, is incapable of forming the basis of any conviction of the Accused, however strongly the alleged victim might aver that her attackers were “Banyamulengue” and however persuasively she might insist that, despite her own ignorance of the language, they spoke Lingala.

539. Evidence of date is highly significant, and it should not lightly be fudged to make it fit with other circumstantial evidence, especially on the facts of this case. Victims of crime have every reason to remember the date that their ordeal took place,¹²⁵⁷ and conversely no reason to forget it.

540. P-68 testified:¹²⁵⁸

¹²⁵⁴ Australia, Evidence Act 1995, section 116; *Bulejck v R* [1996] HCA 50; (1996) 185 CLR 375 (17 April 1996) High Court of Australia, para 8; New Zealand Evidence Act 2006, section 46.

¹²⁵⁵ *R v Flynn and St John* [2008] Crim LR 799.

¹²⁵⁶ *R v Flynn and St John* [2008] Crim LR 799, para. 46.

¹²⁵⁷ P-22, T-40, p.15; T-42, pp.26, 39-42.

¹²⁵⁸ P-68, T-48, pp.18-19.

Q. On which day did that happen?

A. It was on the 27th.

Q. Can you please also provide the month and the year?

A. It was on 27 October 2002.

Q. Is there a reason why you remember that date?

A. That's what happened to me and I had to remember it and to keep that date in my mind, in a jealous way.

Q. Do you recall what time of the day it was?

A. It was around 1 in the afternoon. Between 1 and 2 in the afternoon.

541. The Prosecution psychologist stated:¹²⁵⁹

Q. Now specifically with regard to the victims of the CAR conflict and I'm now referring only to the witness statements that you reviewed which were provided by the Prosecution did you find that they were able these victims were able to recollect their rape, sexual violence, with sufficient detail?

A. The ones that I read that you sent to me had a range of detail in what they were able to recollect. Some of them just spoke about what happened. Some of them gave more detail. It varied. But I think as I mentioned in my report, I think 12 of the women or so did mention at some point some form of sexual violence and a few of the men too.

542. It is moreover, no less than condescension to assume that the victims from whom the Chamber has heard in this case are under some disability to remember such important dates. In each case they would have had access to calendars, clocks, cell phones, radio and TV reports, as well as contact with other human beings to assist them with the dates of events.¹²⁶⁰

543. Their evidence of those dates was not some attempt to recall the events of nine years previously; most, if not all had given PVs to the inquiry of 2003,¹²⁶¹ taken

¹²⁵⁹ P-221, T-39, p.7.

¹²⁶⁰ See for example, P-22, T-42, p. 37; P-42, T-68, p.11: he kept a diary; P-75, T-93, p.3: it was a church day.

¹²⁶¹ P-6, T-95, pp.7-9.

part in OCODEFAD meetings from 2005,¹²⁶² filled in victim application forms¹²⁶³ and been interviewed by the Prosecution.¹²⁶⁴ They had the opportunity to refresh their memories over many days of their earlier statements before testifying.¹²⁶⁵ It doesn't wash to say that witnesses forgot the date of their ordeals because events were such a long time ago.¹²⁶⁶ In point of fact, most victims and witnesses of crime gave evidence of dates and days with complete confidence.¹²⁶⁷ If they were unsure, or had forgotten, they could simply have said so.¹²⁶⁸

544. The question of dates has been fiercely contested by the Prosecution. It has insisted that entry of MLC units into the CAR was before 30 October 2002,¹²⁶⁹ in flagrant disregard for the evidential record. As set out in Chapter III, no MLC unit engaged in active combat prior to 30 October.¹²⁷⁰ No MLC unit entered PK4 or the northern suburbs of Bangui before 31 October,¹²⁷¹ and that the date of their arrival in PK12 was sometime between 31 October and 8 November.¹²⁷²

545. Evidence of location is equally important. The MLC was a small unit, initially two battalions of about 1,000 men, rising to a full brigade of 1,500 plus in January 2003. The MLC was not deployed on all fronts simultaneously and did not go to every town in the conflict. The unchallenged evidence is that during the initial

¹²⁶² P-68, T-49, pp.3-5; T-50, pp.28-30; P-23, T-52, pp.26-27, 32; T-54, pp.24-30; P-81, T-55, pp.28-30, 52-54; T-56, p.7; P-82, T-59, pp.15-18; T-60, pp.31-41; P-80, T-61, pp.26-27; P-42, T-68, p.59; T-69, pp.4-5; P-73, T-71, pp.55-58; T-76, pp.25-29; P-79, T-77, pp.28, 31-34; P-29, T-80, pp.41-44; P-75, T-92, pp.32-34; P-69, T-192, pp.39-40; T-195, pp.8-11, 14.

¹²⁶³ See for example, P-42, T-68, p.59; T-69, pp.4-5; P-73, T-71, pp.55-58.

¹²⁶⁴ P-22, T-40, p.23; P-87, T-44, p.10; P-68, T-48, p.6; P-23, T-54, p.7; P-81, T-57, p.32; P-82, T-58, p.38; P-80, T-61, p.35; P-42, T-65, p.54; P-73, T-71, p.57; P-79, T-77, p. 41; P-29, T-80, p.51.

¹²⁶⁵ P-22, T-40, p.7; P-87, T-44, p.7; P-68, T-48, p.6; P-23, T-50, p.51; P-81, T-54, p.51; P-82, T-58, p.6; P-80, T-60, p.55; P-42, T-63, p.54; P-73, T-70, p.3; P-79, T-76, p.43; P-29, T-80, p.5.

¹²⁶⁶ Prosecution Closing Brief, paras. 242 and 344.

¹²⁶⁷ P-22, T-42, pp.26, 39-42; D-30, T-340, pp.9-10.

¹²⁶⁸ See for example P-81, T-59, p.31.

¹²⁶⁹ Prosecution Closing Brief, paras. 11-14.

¹²⁷⁰ See Chapter III, Section D6.

¹²⁷¹ See Chapter III, Section D7,

¹²⁷² See Chapter III, Section D7-8.

combat in Bangui, its units did not pass through the districts of Fouh, or Miskine, as this was the axis taken by the USP.¹²⁷³

546. The MLC did not take Damara and Boali until 7 December 2002,¹²⁷⁴ did not reach Sibut until 14 March 2003,¹²⁷⁵ Bossangoa until 19 February 2003¹²⁷⁶ and Bossembélé until 26 December 2002.¹²⁷⁷ The units returning from Bossembélé in March 2003, moreover, were transported to PK12 by the FACA, then made their way to the river. They did not venture south of the capital to Mongoumba.¹²⁷⁸

547. The Prosecution's submissions concerning the identification of perpetrators by reference to MLC control of an area are both misguided and misleading. It is false to suggest that "[a]ll witnesses stated categorically that Bozizé's rebels had retreated before MLC troops arrived and took control of their areas".¹²⁷⁹ How would that square [REDACTED], the report in the cahier of 30 October,¹²⁸⁰ and the myriad evidence which the Chamber has heard from soldiers on all sides about the bitter fighting, deaths and casualties which occurred in PK4, Bossembélé and Bossangoa to name but three areas? That is, moreover, without mentioning the evidence which shows that Bozizé's forces returned to PK12 after withdrawing in order to commit crimes.¹²⁸¹

548. More to the point, the submission appears to be based on the evidence of only two witnesses, P-80 and P-87.¹²⁸² There were many more witnesses who were

¹²⁷³ D-45, T-295, pp.8-9; T-300, p.19.

¹²⁷⁴ P-209, T-123, p.13; EVD-T-CHM-00060/CAR-D04-0002-1380.

¹²⁷⁵ P-173, T-149, p.13; EVD-T-OTP-00580/CAR-OTP-0031-0120, track 1, at minutes 01:20-01:58.

¹²⁷⁶ P-169, T-136, p.33 (he does not know the exact date, he just says February); EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0687.

¹²⁷⁷ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1665; EVD-T-OTP-00703/CAR-D04-0002-1641 at 1679.

¹²⁷⁸ D-45, T-295, pp.40-41; D-49, T-271, pp.21-22.

¹²⁷⁹ Prosecution Closing Brief, para. 188.

¹²⁸⁰ EVD-T-OTP-00702/CAR-D04-0002-1514 at 1637.

¹²⁸¹ D-56, T-313, pp.32-33, 36; P-23, T-51, pp.8-9.

¹²⁸² Prosecution Closing Brief, fn. 553.

unable to make the distinction between the occupying forces, often because they fled after their ordeals.¹²⁸³ Such weaknesses in the testimony of victims are conspicuous in cases where the dates of offences make it unlikely or even impossible for the perpetrators to have been MLC soldiers.¹²⁸⁴

549. There is a further weakness with this theoretical means of identification; even if the perpetrators can be shown to have belonged to the second occupying force, it does not identify them as subordinates of Mr. Bemba. At best, it would enable the Chamber to only conclude that they were loyalists.

B. Training and Discipline

550. At paragraph 200 of its brief, the Prosecution effectively invite a presumption that evidence of a crime committed leads to an inference as to the identity of the perpetrator. It is a circular and impermissible submission and can only be treated with incredulity, at the end of a case when there has been direct evidence of widespread offending by Bozizé's troops against the Central African population in all areas of the conflict.

551. Not only did victims come forward and describe their mistreatment at the hands of the rebel militia, both Central African and MLC soldiers described the situations they encountered upon taking towns from Bozizé's troops; members of his militia described how, where, and why they offended; newspaper and radio

¹²⁸³ P-22, T-43, p.27; P-80, T-61, p.19; P-75, T-92, p.20.

¹²⁸⁴ See Chapter III, Section D1,2,3,4,5.

reports of their cruelty have been admitted into evidence;¹²⁸⁵ and contemporaneous video footage of their looting has been seen.¹²⁸⁶

552. The examples of their crimes of which the Chamber has heard include, but are not limited to:

- Killing the President's nephew;¹²⁸⁷
- Propser Ndouba was abducted in the 4th Arrondissement;¹²⁸⁸
- In Sido, the population came to complain about lootings by rebels;¹²⁸⁹
- Looting drugstore for medicine at hospital Kaga Bandoro;¹²⁹⁰
- Crimes at PK12: looting, torture of the younger brothers of [REDACTED] and [REDACTED], alleged killing of [REDACTED];¹²⁹¹
- Crimes in Sibut: pillaging, men slaughtered, house torced, pillaging of fuel filing station;¹²⁹²
- Crimes in Damara;¹²⁹³
- Crimes committed in Bossangoa: cotton company looted, complaints from the population;¹²⁹⁴
- Crimes committed by Lieutenant Dogo;¹²⁹⁵
- Crimes committed by Lieutenant Kapita;¹²⁹⁶
- Crimes committed by Colonel Ngayikwese;¹²⁹⁷

¹²⁸⁵ Contemporaneous media reports attributed crimes to Bozizé's rebels. See, for example EVD-T-CHM-00034/CAR-D04-0004-0030; EVD-T-D04-00008/CAR-DEF-0001-0832; EVD-T-CHM-00004/CAR-DEF-0001-0205; EVD-T-CHM-00035/CAR-D04-0004-0032.

¹²⁸⁶ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, minute 01.41; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0170.

¹²⁸⁷ D-65, T-245, p.42.

¹²⁸⁸ D-65, T-245, p.28.

¹²⁸⁹ D-65, T-245, pp.47-48.

¹²⁹⁰ D-65, T-245, pp.46-47.

¹²⁹¹ D-65, T-245, pp.36-37.

¹²⁹² D-45, T-295, pp.9-10; D-65, T-245, pp.39-41.

¹²⁹³ D-7, T-248, p.47.

¹²⁹⁴ D-45, T-295, pp.35-36.

¹²⁹⁵ D-7, T-248, p.49.

¹²⁹⁶ D-7, T-248, pp.49-50.

¹²⁹⁷ D-7, T-248, p.50.

- Looting of the CFAO French car company;¹²⁹⁸
- Crimes in Boy-Rabé: corpses doors broken down, population fled, [REDACTED], this person was abducted in the residence;¹²⁹⁹
- Crimes in Ngola II neighbourhood;¹³⁰⁰
- Lemese Mangeli (CAR soldiers) and his men looting in PK12 and stored looted goods in a shop, rape of a girl [REDACTED] in PK12;¹³⁰¹
- Looting of a Chinese farm at PK26.¹³⁰²

553. Bozizé's troops were untrained,¹³⁰³ ill-disciplined,¹³⁰⁴ unpaid,¹³⁰⁵ poorly clothed,¹³⁰⁶ and almost entirely motivated by greed.¹³⁰⁷ Virtually every characteristic alleged by the Prosecution explains that the behaviour of soldiers in the CAR in fact belonged to Bozizé's militia rather than the MLC, which would make them, according to the Prosecution's logic, the more likely perpetrators of crime. Given especially that Bozizé was not with them in Bangui in October 2002,¹³⁰⁸ and probably didn't even intend that they should go there,¹³⁰⁹ it is difficult to see how they could have been "more interested in seizing power."¹³¹⁰ Interestingly, of course, there is evidence that they were more interested in seizing diamonds.¹³¹¹

¹²⁹⁸ D-7, T-248, p.51.

¹²⁹⁹ D-9, T-323, pp.5-6; D-65, T-245, pp.41-43.

¹³⁰⁰ D-30, T-340, p.15; T-341, p.3.

¹³⁰¹ D-36, T-338, pp.10, 14.

¹³⁰² D-65, T-245, p.39.

¹³⁰³ D-56, T-313, p.22; P-73, T-70, pp.11-13.

¹³⁰⁴ D-56, T-313, p.22.

¹³⁰⁵ D-56, T-313, p.32.

¹³⁰⁶ D-56, T-313, p.21; P-73, T-70, pp.11-13.

¹³⁰⁷ EVD-T-OTP-00580/CAR-OTP-0031-0124, track 1, at minutes 15.49-17.49.

¹³⁰⁸ EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0429; EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0168, 0188; EVD-T-OTP-00438/CAR-OTP-0011-0293 at 0294; D-56, T-315, pp.21-22; Prosecution Closing Brief, para. 169.

¹³⁰⁹ EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

¹³¹⁰ Prosecution Closing Brief, para. 200 and fn. 613.

¹³¹¹ See for example, P-119, T-82, p.22.

554. By contrast, as discussed in Chapter VI, the MLC were trained, effectively commanded, had a code of conduct, disciplinary procedures and courts-martial. They were fed well and paid in the CAR (indeed better paid than their FACA colleagues).¹³¹² Advancing north on an almost daily basis, they had nowhere to take stolen goods, save with them.

555. Neither did it make sense for President Patassé to cause or permit forces under his control to commit offences, and thereby de-stabilise the community. He was the elected Head of State.¹³¹³ To retain the reins of power, he was the one whose interests lay in asserting and supporting the rule of law. The traditional interests of rebel forces lie, it is submitted, in creating a climate of fear.

556. Fear seems to have been a central theme to Bozizé's regime right up until it was ended in 2013. His troops ransacked Bangui in March 2003, and committed offences against the population in the months thereafter.¹³¹⁴ They were still committing crimes against humanity near the Chadian border in 2006.¹³¹⁵ Fear too, the Defence submits, is the reason why certain Central African witnesses felt compelled whilst giving evidence during the period of his rule to attempt to completely subvert their evidence to exonerate at all costs General Bozizé.¹³¹⁶ This is particularly so of the victims who painted the naïve and disingenuous picture of

¹³¹² D-19, T-289, p.13; P-38, T-35, p.53; P-23, T-53, p.9; P-9, T-106, pp.50-53; P-63, T-116, pp.30-31; P-110, T-126, pp.6-7; P-173, T-144, p.14; P-173, T-144, pp.66-67; P-178, T-154, pp.4-5; P-31, T-182, pp.29-30; T-183, p.44; T-184, p.9.

¹³¹³ T-11, p.75; T-12, p.51; D-59, T-237, pp.8-9; EVD-T-OTP-00404/CAR-OTP-0004-0577 at 0580; EVD-T-OTP-00440/CAR-OTP-0001-0422 at 0425; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0670; EVD-T-OTP-00411/CAR-OTP-0004-1096 at 1128-1129.

¹³¹⁴ P-80, T-63, p.44; EVD-T-OTP-00717/CAR-OTP-0036-0055 at 0060.

¹³¹⁵ CHM-01, T-357, pp.91-94.

¹³¹⁶ P-38, T-35, pp.22-23, 40-42; P-22, T-41, pp.4-5; P-68, T-49, p.11; P-82, T-59, pp.25-27; T-60, pp.31-41; P-80, T-61, p.17; P-119, T-87, pp.28-30; P-9, T-108, p.15; P-209, T-120, pp.34-35; T-122, pp.16-17; P-151, T-173, p.34; P-69, T-192, pp.55-56.

the behaviour of Bozizé's militia,¹³¹⁷ as well, perhaps most markedly P-63, who would not accept at any price the irresistible truth of [REDACTED], because to do so would have meant accusing his current head of state.¹³¹⁸ He further argues that he cannot remember the dates because he is illiterate.¹³¹⁹

557. It is ridiculous to suggest that only the MLC committed offences on the totality of the evidence, particularly in light of evidence that Miskine's men shot every man they thought were Chadians at the cattle market in PK13.¹³²⁰ P-6, who conducted an inquiry, attributed all crimes between 29 October and 1 November to Miskine's men.¹³²¹

C. The Prosecution has not established identification by dress

558. No reasonable Trial Chamber could conclude that it was possible to identify a soldier as a subordinate of Jean-Pierre Bemba from the clothes he was wearing. Indeed such is the state of the evidence that the Defence would submit further that, other than in the cases of members of the Central African Presidential Guard (USP) and certain Chadian soldiers who wore turbans (and these two groups were numerically very small), it was quite simply impossible in this war to distinguish the soldiers of any one unit from the soldiers of any other.

559. The principal reason for this is that each of the units in the conflict appears to have had as their nucleus a substantial contingent of soldiers who wore the

¹³¹⁷ P-22, T-41, pp.4-5; P-68, T-49, p.11; P-82, T-59, pp.25-27; P-80, T-61, p.17; P-42, T-65, pp.37-38; P-73, T-70, pp.10, 13; P-119, T-82, pp.25-26; P-6, T-95, p.67; T-99, pp.11-12; P-209, T-121, pp.35-38; P-151, T-173, p.34.

¹³¹⁸ P-63, T-114, pp.26-28, 31, 33-35, 38, 40-45.

¹³¹⁹ P-63, T-114, pp.27-28, 31.

¹³²⁰ P-38, T-36, pp.5-6; P-6, T-95, pp.33-34; P-31, T-183, pp.11-12.

¹³²¹ EVD-T-D04-00016/CAR-OTP-0004-0065 at 0084.

standard uniform of the FACA.¹³²² Similarly each unit was augmented by numbers of fighting men who were less formally dressed and/or shod.¹³²³ There is nowhere in the evidence any suggestion that the civilian dress of one faction could be distinguished from that of another.¹³²⁴ As previously mentioned, what might have helped distinguish one side from the other, would have been the presence of the more distinctive elements, namely turban wearing Chadians or those bearing the badge of the USP or GP, but the evidence of the commission of crimes in the case seldom, if ever benefitted from that feature.

560. The problem of identification of loyalist soldiers by dress is the more acute because the evidence shows that the vast majority of FACA and MLC soldiers were similarly dressed, and moreover, fought in mixed units.¹³²⁵

561. It is for the Prosecution to satisfy the Chamber beyond a reasonable doubt as to the identity of the perpetrator of any alleged crime. Accordingly, it is for the Prosecution to prove that the MLC's clothing was sufficiently distinctive for an individual soldier to be identified by it. The evidence reaches nowhere near that point.

562. In making its submissions on the clothes worn by the MLC soldiers, the Prosecution relies exclusively on the evidence of victims.¹³²⁶ Again the Defence notes that this invites an effective presumption contrary to the burden of proof, for,

¹³²² P-81, T-55, p.25; P-82, T-59, pp.23-25, 43; P-119, T-82, p.28; P-75, T-92, pp.19-21; P-112, T-128, pp.48-50; D-19, T-292, p.44; D-56, T-313, pp.21-22; T-314, pp.29, 48; T-316, pp.36-37; D-36, T-338, pp.22-23; P-110, T-127, pp.7-8; CHM-01, T-357, p.80.

¹³²³ P-38, T-33, pp.21-22, 42; P-87, T-46, p.46; P-23, T-51, pp.7-8, 11-13; P-42, T-63, pp.62, 65; P-73, T-70, pp.11-13, 17; T-72, p.5; P-15, T-207, pp.55, 57; P-209, T-121, p.23; D-56, T-313, pp.21-22; T-314, pp.29, 48; T-316, pp.36-37.

¹³²⁴ P-42, T-63, pp.62, 65; P-73, T-70, p.11-13, 17; T-72, p.5; P-75, T-92, pp.19-21; P-209, T-118, p.5; P-6, T-94, p.49; T-95, pp.38-39, 62-64; T-97, p.58; P-9, T-102, p.44; P-63, T-110, pp.23-32; P-110, T-125, pp.10, 13-15; P-112, T-128, pp.48-50; P-108, T-132, pp.23-25; P-87, T-46, p.46; P-68, T-49, pp.10-11; P-23, T-51, pp.7-8; P-80, T-61, pp.41-42; P-119, T-82, p.26; P-178, T-156, p.26; D-53, T-231, p.28; D-65, T-245, pp.32-33; T-247, p.31; T-250, p.50; D-36, T-338, pp.6-7.

¹³²⁵ P-81, T-55, p.25; P-82, T-59, pp.23-25, 43; P-119, T-82, pp.28-31; P-75, T-92, pp.19-21; P-112, T-128, pp.48-50; D-19, T-292, p.44; D-56, T-316, pp.36-37; D-36, T-338, pp.22-23.

¹³²⁶ Prosecution Closing Brief, paras. 189-192.

in relying on only its victims to describe the clothing worn by the MLC generally, the Chamber has to assume that they have correctly identified the perpetrators of crimes against them in the first place. This places the cart before the horse.

563. There has been a great deal of evidence in the case about the clothing worn by the MLC in the conflict which emanated from more objective and reliable sources, such as those who provided them with uniforms in Bangui,¹³²⁷ those who [REDACTED] them,¹³²⁸ those who were members of the units¹³²⁹ and those who fought alongside them.¹³³⁰ None of the aforementioned witnesses were challenged on their descriptions of the dress of the MLC, or had put to them the description of the dress of the MLC set out in paragraph 190 of the brief, and apparently now relied upon.¹³³¹ The Prosecution ought, by reason of its failure to put its case in this material respect, be deemed to have abandoned the case advanced by its victim witnesses, and be estopped from advancing it now.

564. Leaving that to one side, the Prosecution's case does not bear any sensible empirical analysis. The distinction between the dress of the MLC and that of the FACA is said to be that the FACA wore military uniforms whereas the MLC wore mixed dress.¹³³² However, of the 20 victims called by the Prosecution as part of its case, 11 described their assailants as wearing military attire.¹³³³ Moreover, given that the evidence unanimously records the fact that the FACA and the MLC wore the

¹³²⁷ P-6 and P-9 confirming General Bombayake's procès-verbal: P-6, T-98, p.12; P-9, T-105, p.40.

¹³²⁸ D-51, T-261, pp.34-35, 66; T-263, p.41.

¹³²⁹ D-19, T-292, p.44.

¹³³⁰ P-31, T-182, pp.32-33; D-50, T-254, p.23; CHM-01, T-353, p.53; T-355, p.68; T-357, pp.82-83.

¹³³¹ The OTP has relied on P-169, P-178 and P-173 on every aspect of their testimony throughout their brief, except maybe for the most interesting one: the uniforms of the MLC. Despite [REDACTED], it is interestingly odd that the OTP avoid referring to them when dealing with this central piece of evidence.

¹³³² Prosecution Closing Brief, para. 190.

¹³³³ P-38, T-33, pp.21-22, 42; P-22, T-41, pp.16-17; P-87, T-44, p.21; P-68, T-48, p.20; T-49, p.13; P-23, T-51, pp.11-13; P-81, T-55, p.25; P-82, T-59, p.25; P-79, T-77, p.6; P-29, T-80, p.34; P-119, T-82, p.28; P-69, T-192, p.25.

same military uniforms,¹³³⁴ how is there any basis for identifying the perpetrators of these alleged crimes as subordinates of Mr. Bemba by reference to their dress?

565. The Prosecution's submissions as to ancillary aspects of clothing style do not bear up to any examination. The evidence of footwear presents no identifiable pattern: several victims describe their assailants as wearing Ranger boots,¹³³⁵ four did not describe the footwear at all,¹³³⁶ while eight describe the soldiers as being variously clad in Ranger boots and non-military footwear, with no indication of the footwear of the actual perpetrators.¹³³⁷

566. Sensing perhaps an obvious corollary between the **alleged** dress of the MLC units and the **actual** dress of Bozizé's men, the Prosecution reaches in paragraph 192 for the somewhat desperate distinction between them that the casually dressed men in Bozizé's units had turbans or yellow armbands. This will not hold up either, firstly because only the Chadians wore turbans.¹³³⁸ Secondly, because it is obvious from [REDACTED] video [REDACTED] that the turban wearing Chadian soldiers were also in military not casual attire.¹³³⁹ Thirdly, according to CHM-01, MLC and FACA soldiers wore yellow and red armbands too,¹³⁴⁰ and lastly, because two Prosecution victim-witnesses, P-42¹³⁴¹ and P-73,¹³⁴² describe their assailants as wearing scarfs wrapped around their heads, presumably, according to the Prosecution, indicating they were Bozizé's men.

¹³³⁴ P-38, T-33, pp.21-22, 42; P-22, T-41, pp.16-17; P-87, T-44, p.21; P-68, T-48, p.20; T-49, p.13; P-23, T-51, pp.11-13; P-81, T-55, p.25; P-82, T-59, pp.25, 43; P-79, T-77, p.6; P-29, T-80, p.34; P-119, T-82, p.28; P-47, T-177, p.40; P-69, T-192, p.25.

¹³³⁵ See for example, P-22, T-41, pp.16-17; [REDACTED]; P-73, T-70, p.17.

¹³³⁶ P-68, T-48, p.20; T-49, p.13; P-81, T-55, p.25; P-82, T-59, pp.25, 43; P-79, T-77, pp.5-6.

¹³³⁷ P-38, T-33, pp.21-22, 42; P-73, T-70, p.17; T-72, p.5; P-119, T-82, p.28; P-209, T-118, p.5; T-121, p.23; P-110, T-125, pp.10, 13-15; P-112, T-128, pp.48-50; P-108, T-132, pp.23-25.

¹³³⁸ P-22, T-40, p.16; P-68, T-49, p.11; P-23, T-51, pp.7-8; P-79, T-78, p.15.

¹³³⁹ EVD-T-OTP-00345/CAR-OTP-0039-0058 at 0060, [REDACTED]; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0169.

¹³⁴⁰ CHM-01, T-353, p.53; T-355, p.68.

¹³⁴¹ P-42, T-63, p.65.

¹³⁴² P-73, T-70, p.17; T-72, p.5.

567. Neither does the question of the absence of insignia from the uniform of soldiers assist in their identification. Of the 20 relevant witnesses, five testified that they had not seen insignia.¹³⁴³ In those cases, the evidence is no better than neutral. In the other 15 cases, the evidence positively undermines the Prosecution's submission.¹³⁴⁴ In the particular cases where the witnesses noticed the initials GP on the uniforms of their assailants, the Chamber can actually rule out MLC soldiers as potential perpetrators.¹³⁴⁵

568. No sensible assessment has been made by the Prosecution of the dress worn by Bozizé's militia, nor any attempt to draw a distinction between their appearance and the MLC. On the totality of the evidence, the case theory now advanced in paragraphs 190 and 192 of the Prosecution's brief would better support a prosecution of Bozizé than Mr. Bemba. To that end, the Defence draws the Chamber's attention to a conspicuous omission from the Prosecution's submissions in this regard.

569. P-63 gave evidence for several days about photographs and videos [REDACTED].¹³⁴⁶ The purpose, it might have been thought, [REDACTED], was to give it a visual aid as to the appearance of some or all of the fighting factions in the conflict. It comes as some surprise therefore, to see that his evidence merits barely a footnote in the Prosecution brief, and no reference at all in the section on identification by uniform.

¹³⁴³ P-38, T-33, pp.21-22, 42; P-29, T-80, p.34; P-110, T-125, pp.10, 13-15; P-112, T-128, pp.48-50; P-108, T-132, pp.23-25.

¹³⁴⁴ P-22, T-41, pp.16-17; P-87, T-44, p.21; T-46, p.46; P-68, T-48, p.20; T-49, p.13; P-23, T-51, pp.7-8, 11-13; P-81, T-55, p.25; P-82, T-59, pp.23-25, 43; P-42, T-63, pp.62, 65; P-73, T-70, p.17; T-72, p.5; P-79, T-77, p.6; P-119, T-82, pp.28; P-29, T-80, p.34; P-75, T-92, pp.19-21; P-209, T-118, p.5; P-110, T-125, pp.10, 13-15; P-112, T-128, pp.48-50; P-108, T-132, pp.23-25.

¹³⁴⁵ P-22, T-41, p.16.

¹³⁴⁶ P-63 gave evidence from 11 May 2011 to 25 May 2011.

570. P-63 was an unreliable witness. His answers were evasive on many issues, but he was particularly anxious to avoid any criticism of Bozizé, who may have been a rebel leader when [REDACTED], but who by 2011, when he was giving evidence, was his President.¹³⁴⁷

571. However, P-63's evidence will assist the Chamber in determining how concrete the Prosecution's case on identification by uniform remains. P-63 testified that [REDACTED]. These begin with CAR-OTP-0035-0185¹³⁴⁸ [REDACTED]. [REDACTED]. [REDACTED].¹³⁴⁹ [REDACTED].¹³⁵⁰

572. The difficulty with P-63's evidence is that the date [REDACTED]. [REDACTED], in particular, CAR-OTP-0035-0178¹³⁵¹ and CAR-OTP-0035-0175.¹³⁵² [REDACTED] bear the date of 12 November 2002. It is universally accepted that the MLC did not arrive at Damara until 7 December 2002.¹³⁵³ Accordingly, the possibility that these are photographs of Bozizé's troops cannot be dismissed.

573. Unsurprisingly, the Prosecution do not seek to rely on P-63 to support their theory about the style of dress of the MLC, as it is rather more likely to pour yet more confusion on the issue of identifying the perpetrators of crimes, especially by means of their clothing.

D. Evidence that a perpetrator spoke Lingala does not establish that he was an MLC soldier

¹³⁴⁷ P-63, T-114, pp.26-28, 31, 33-35, 38, 40-45; T-115, pp.14-16.

¹³⁴⁸ EVD-T-OTP-00625.

¹³⁴⁹ [REDACTED].

¹³⁵⁰ [REDACTED].

¹³⁵¹ EVD-T-OTP-00624; P-63, T-111, p.8.

¹³⁵² EVD-T-OTP-00622; P-63, T-111, p.6.

¹³⁵³ CAR-ICC-0001-0007.

574. The mere fact that a person uses a few phrases in a particular language is no indication of his country of origin, let alone of the army he is fighting for. Anybody can learn a language sufficiently well to use a few words or phrases or even to communicate effectively in it, but somebody who does that will not betray his ethnic origins to anybody else, save perhaps a linguistic expert in both the speaker's mother tongue and the language he is using.¹³⁵⁴

575. This observation is particularly pertinent in relation to less widely spoken languages of the world, such as Lingala, as there will be a smaller knowledge base regarding the intonation of persons from such regions.

576. Secondly, even assuming, for the sake of argument that the speaker can be presumed to be using his native tongue, the use of Lingala only gives an indication of the broad geographical area he might hail from.

577. Lingala is spoken over a wide area of Africa.¹³⁵⁵ Although the primary zone is Congo-Brazzaville and the DRC, it is spoken in the CAR, northwestern Angola, parts of Gabon, southwest Sudan, Zambia, Rwanda and Burundi. There are around 86,000 speakers of Lingala in Angola,¹³⁵⁶ and an estimated 9,000 and 10,000 in the CAR.¹³⁵⁷

578. The DRC has four national languages: Swahili, Tshiluba, Lingala and Kikongo, a DRC national would not necessarily use Lingala as their primary language.¹³⁵⁸ It is widely heard and understood across Africa. It has spread because

¹³⁵⁴ P-222, T-90, pp.43-44; D-60, T-243, p.31; D-66, T-279, p.64.

¹³⁵⁵ D-60, T-243, p.40.

¹³⁵⁶ D-60, T-243, pp.6-7.

¹³⁵⁷ D-60, T-243, p.7.

¹³⁵⁸ P-178, T-152, p.25.

of trading activities, the colonists who send workers and soldiers across countries, and Congolese music.¹³⁵⁹

1. Lingala is widely spoken and understood by inhabitants of the CAR

579. It is a striking feature of this case that a significant number of witnesses from the CAR were Lingala speakers. There are a number of reasons for this: firstly, there is a Lingala-speaking immigrant population in the CAR: [REDACTED];¹³⁶⁰ P-173, [REDACTED] and P-169 for example¹³⁶¹ and all also spoke Sango.¹³⁶²

580. Other Congolese nationals came to live and work in the CAR, usually doing petty jobs: P-79 employed a domestic who spoke Lingala¹³⁶³ as did P-110.¹³⁶⁴ P-68, P-75 and D-7 all testified about Congolese doing odd jobs such as shoe-shining, shoe-mending, house-serving, washing dishes and emptying the septic tanks, etc.¹³⁶⁵ D-36 had a house-help who was Mono and spoke Lingala.¹³⁶⁶

581. These Lingala speakers became integrated into CAR society. They married Central African citizens,¹³⁶⁷ settled in large numbers in certain areas,¹³⁶⁸ did business with the local population,¹³⁶⁹ and even appeared before the courts there.¹³⁷⁰ As a consequence, many Central Africans have been exposed to Lingala and developed an ability both to understand the language, and to speak it.¹³⁷¹ Their level of

¹³⁵⁹ D-60, T-242, pp.31-32.

¹³⁶⁰ D-60, T-243, pp.9-11.

¹³⁶¹ P-173, T-144, p.9; [REDACTED]; P-169, T-136, p.15.

¹³⁶² P-173, T-144, p.8; [REDACTED]; P-169, T-136, p.14.

¹³⁶³ P-79, T-77, pp.15-16.

¹³⁶⁴ P-110, T-125, p.13.

¹³⁶⁵ P-68, T-50, p.5; P-75, T-93, pp.13-14; P-178, T-150, p.51; P-23, T-52, p.42; P-79, T-77, pp.15-16; D-7, T-248, pp.44-45.

¹³⁶⁶ D-36, T-338, p.35.

¹³⁶⁷ P-81, T-55, p.7; P-209, T-120, p.43; D-36, T-338, p.35.

¹³⁶⁸ P-209, T-120, p.43.

¹³⁶⁹ P-63, T-115, pp.24-25; D-36, T-338, p.35.

¹³⁷⁰ P-108, T-132, p.26.

¹³⁷¹ P-42, T-64, p.28; T-66, p.13; P-173, T-144, p.61; P-38, T-33, p.46; P-9, T-102, pp.43-44.

competence ranges from recognizing the language,¹³⁷² through understanding it,¹³⁷³ to speaking it fluently.¹³⁷⁴

582. An ability to speak a few words of Lingala therefore is no indication that a person is not, for example, Central African.

2. MLC soldiers spoke other languages

583. Not all MLC soldiers in the CAR spoke Lingala. P-63 testified that only those belonging to the Yakoma and the Ngbaka ethnic groups spoke Lingala.¹³⁷⁵ P-178 said that about 50% of the MLC soldiers were able to speak Sango. They also spoke Mbaka,¹³⁷⁶ Swahili,¹³⁷⁷ Mandja, French,¹³⁷⁸ Banda, Ngbaka, and several other languages,¹³⁷⁹ including their local Congolese language.¹³⁸⁰ Many of them, including Mustapha¹³⁸¹ and some of the other officers actually spoke no Lingala.¹³⁸²

584. Finally, in [REDACTED] video, [REDACTED] the MLC soldiers would chat with the civilian population,¹³⁸³ suggesting not just an ability, but indeed, a desire to communicate with the population.

3. FACA soldiers and Bozize's militia spoke Lingala

¹³⁷² P-68, T-50, p.5; P-80, T-62, p.33; P-82, T-58, p.30; D-65, T-246, p.34; P-79, T-77, pp.15-16; P-42, T-64, pp.27-30.

¹³⁷³ P-47, T-176, pp.14-15; D-56, T-313, p.45.

¹³⁷⁴ D-56, T-313, pp.7, 14. [REDACTED], he gave evidence in Lingala, D-30, T-340, p.18; D-7, T-248, pp.44-45.

¹³⁷⁵ P-63, T-115, pp.24-25.

¹³⁷⁶ P-178, T-150, pp.50-51, 55.

¹³⁷⁷ P-178, T-152, p.25.

¹³⁷⁸ P-63, T-111, p.31.

¹³⁷⁹ P-209, T-117, p.26; P-222, T-90, pp.43-44.

¹³⁸⁰ P-9, T-102, pp.43-44.

¹³⁸¹ P-63, T-110, p.52.

¹³⁸² P-178, T-152, p.26.

¹³⁸³ EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0178.

585. The ability to speak Lingala was not unique to MLC soldiers. CHM-01 stated that Central African troops received training in Zaire in the 1980s.¹³⁸⁴ This was confirmed by the linguistic expert, D-60, who explained that during the 70s and 80s soldiers from the CAR were trained under Mobutu's army at Kota-Koli, and that the training was in Lingala.¹³⁸⁵

586. D-19 testified that in the mixed MLC/CAR companies, they often spoke in Lingala because there were many Central African soldiers who understood Lingala and others spoke Lingala.¹³⁸⁶

587. CHM-01 also explained that at the time of the first events, there was a "Central African" force in Bangui comprised of troops from Chad, Cameroon, Gabon, Congo Brazzaville,¹³⁸⁷ the soldiers from Congo speaking in Lingala and the language of communication between all of them being French. P-6 pointed out that during the events of 28 May 2001 the MLC soldiers already conducted operations with the FACA,¹³⁸⁸ information which was confirmed by P-9.¹³⁸⁹ Plainly, communication was not a problem at that time.

588. Lingala was used by elements of Bozizé's troops. This was in part a deliberate tactic to cause confusion, as D-65 and D-56 explained. D-65 was taken hostage by Bozizé's rebels and testified that some of them spoke Lingala among themselves.¹³⁹⁰ He added that that a few did so in order not to be spotted. They had been in the first intervention in 2001. Some of the rebels remembered that language and wanted to go unnoticed, so they started to make up Lingala or broken Lingala

¹³⁸⁴ CHM-01, T-354, p.53.

¹³⁸⁵ D-60, T-243, pp.9-11.

¹³⁸⁶ D-19, T-286, pp.3-4.

¹³⁸⁷ CHM-01, T-355, p.70.

¹³⁸⁸ P-6, T-98, pp.8-9.

¹³⁸⁹ P-9, T-105, pp.39-40.

¹³⁹⁰ D-65, T-246, p.33.

so they would pass for MLC troops.¹³⁹¹ D-56, a rebel militiaman, confirmed that some of Bozizé's troops spoke Sango, others spoke French or Lingala. The troops used Lingala in order to commit extortions. That was their *modus operandi*. He explained that if they used Lingala, the CAR population would give up or comply much more easily. According to him, Bozizé designed this scheme in order to cause prejudice to those who would replace them.¹³⁹² He added that he himself extorted goods from a CAR tradesman speaking Lingala and that the civilian complied.¹³⁹³ He explained that Lingala was a language that frightened people and that it was used to confuse them.¹³⁹⁴ Bozizé's troops also recruited Lingala speaking shoe-shiners to carry their war booty.¹³⁹⁵ D-30 and D-36 confirmed that Bozizé's soldiers spoke Sango but also Lingala.¹³⁹⁶

4. The evidence of the language spoken is not sufficient for the Chamber safely to identify the nationality or allegiance of perpetrators

589. In many cases, the perpetrators either used no Lingala at all, or used it among other languages. P-23, said that the Banyamulengue said to him "mbana alingbi na mbana", which is Sango,¹³⁹⁷ P-110 recalled that before shooting a woman some soldiers spoke in Lingala, some in Sango, and some in French.¹³⁹⁸ One of the perpetrators who looted P-112's house was called [REDACTED] and he spoke Lingala and Sango,¹³⁹⁹ D-30 was raped by people who spoke Sango and one of them in Lingala,¹⁴⁰⁰ D-36 [REDACTED] shop looted by soldiers speaking Lingala and Sango,¹⁴⁰¹ P-63 spoke to women carrying looted goods and some spoke Lingala and

¹³⁹¹ D-65, T-246, pp.33-34

¹³⁹² D-56, T-313, pp.43-45.

¹³⁹³ D-56, T-314, pp.27-29.

¹³⁹⁴ D-56, T-313, p.47.

¹³⁹⁵ D-56, T-313, p.33.

¹³⁹⁶ D-36, T-338, pp.6-7; D-30, T-340, pp.9-18; T-341, p.3.

¹³⁹⁷ P-23, T-53, pp.38-39.

¹³⁹⁸ P-110, T-125, p.33.

¹³⁹⁹ P-112, T-129, p.8

¹⁴⁰⁰ D-30, T-340, pp.9-18; T-341, p.3.

¹⁴⁰¹ D-36, T-338, pp.6-7.

others Sango,¹⁴⁰² P-29 is sure that the perpetrators weren't speaking French or Sango but did not think they were speaking Lingala.¹⁴⁰³

590. Secondly, the evidence of person's claiming to speak Lingala is extremely weak and would not support even an inference that they would have been capable of identifying a person on this basis. Despite their exposure to Lingala, the witnesses were able to pick up only a few basic simple Lingala words meaning either "come" or "give me money": P-23 recognized only "yaka, yaka",¹⁴⁰⁴ P-42 heard Pesa ngai mbongo",¹⁴⁰⁵ P-69 picked up "yaka wa, yaka wa",¹⁴⁰⁶ P-22, P-79 and [REDACTED] also reported only "yaka yaka".¹⁴⁰⁷

591. D-60 said that hearing those short trite expressions wouldn't be sufficient to identify where the person came from or his ethnic group.¹⁴⁰⁸ With respect, the statement is so obviously valid, it scarcely needed an expert to utter it.

592. Thirdly and lastly, the evidence of language heard by the Chamber is in almost all cases inherently unreliable. Whilst some witnesses purported to recognise Lingala as a language during their evidence, it is scarcely credible that witnesses who purport to have been regularly exposed to Lingala in their lives can only recall one word, namely "yaka".¹⁴⁰⁹ Some of the witnesses admitted that they had never heard Lingala before the arrival of the so-called Banyamulengue,¹⁴¹⁰ or assumed that the language spoken was Lingala simply because it was not Sango.¹⁴¹¹ It is difficult to accept that such evidence carries much if any weight.

¹⁴⁰² P-63, T-110, p.12.

¹⁴⁰³ P-29, T-80, pp.38-39.

¹⁴⁰⁴ P-23, T-51, p.14.

¹⁴⁰⁵ P-42, T-65, pp.33-35.

¹⁴⁰⁶ P-69, T-193, p.15.

¹⁴⁰⁷ P-22, T-40, p.19; P-79, T-77, pp.6-7; [REDACTED].

¹⁴⁰⁸ D-60, T-243, p.31.

¹⁴⁰⁹ See for example, P-79, T-77, pp.6-7, 15-16.

¹⁴¹⁰ P-23, T-51, p.14; P-87, T-44, p.22.

¹⁴¹¹ P-110, T-128, p.50; P-112, T-128, p.50.

593. Furthermore, some witnesses acknowledged that they were told afterwards that the perpetrators were speaking Lingala. Often, information they received was not specific to their ordeal but rather no more than that the Banyamulengue or Zairians speak Lingala.¹⁴¹² In terms of language being a significant feature in the identification of perpetrators, it is respectfully submitted that such evidence is effectively worthless.

¹⁴¹² P-119, T-82, pp.29-30; P-75, T-93, pp.13-14; P-110, T-125, p.13; P-69, T-192, p.28.

VI. SUPERIOR RESPONSIBILITY

*[Mustapha] obeyed orders that were given to him. I do not see how he could have proceeded otherwise because they would not have had any other role to play in the Central African Republic. They would have been thrown out. If they had carried out their own war or prosecuted their own war what would the goal have been? What would they have achieved? What would they have been doing there?*¹⁴¹³

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594. Following years of investigations, the Prosecution submitted in 2008 that there were reasonable grounds to believe that President Patassé coordinated the forces of, and provided direct orders to, the MLC contingent in the Central African Republic.¹⁴¹⁴ This submission is fatal to a charge of superior responsibility against Mr. Bemba. If the Central African authorities were commanding the MLC troops as part of a loyalist coalition, they were not receiving operational orders from Gbadolite.

595. The Prosecution's investigations did not indicate that Mr. Bemba - with his limited military training - was giving orders to his troops in a third state, in areas in which he had never set foot, despite the operation of a functioning Central African command and coordination centre. This was a case imposed upon the Prosecution through the confirmation process.¹⁴¹⁵

596. It is perhaps for this reason that the Prosecution's case looks the way it does. The Chamber was entitled to expect that the Prosecution's list of witnesses would draw heavily on those who played key roles in the 2002-2003 conflict, and who had knowledge of the realities of command. The commander of the MLC contingent, for

¹⁴¹³ D-53, T-229, pp.36-37.

¹⁴¹⁴ [REDACTED].

¹⁴¹⁵ ICC-01/05-01/08-388.

example, other MLC officers, members of the FACA Etat Major, FACA commanders, loyalist soldiers, members of Bozizé's troops, key Central African ministers or politicians. In short, a varied mix of key stakeholders who lived the events from positions of influence.

597. The Prosecution deliberately kept these witnesses from the Chamber. Their absence from the courtroom was not because of lack of access. [REDACTED] an impressive array of the Central African military and political hierarchy: General Ferdinand Bombayake, the Director General of the USP and a key player in the military command structure during the events; Colonel Albert Ouandane the Assistant Director-General of the USP and Bombayake's deputy; General Xavier-Sylvestre Yangongo, the Deputy Defence Minister; Colonel Alain-José Bemondombi, who replaced Colonel Thierry Lengbe as the commander of the CCOP; Bruno Barsin, in charge of "materiel" for the FACA, and Zéphirin Mamadou, head of transmissions within the Ministry of Defence. Also [REDACTED] was General André Mazi, the deputy Chef d'Etat Major in 2002. General Mazi died in November 2011, after Mr. Bemba had been held in custody for 3.5 years, but before the Prosecution started its case.

598. These officers and ministers, who represent the core of the Central African hierarchy during the relevant events, have direct knowledge about the exercise of effective control over the MLC troops. Despite their obvious relevance to the case, they could not give truthful testimony that aligned with the Prosecution's theory of command. They were never brought before the Chamber.

599. Instead, the Prosecution's case relies heavily on the evidence of a small number of civilian witnesses of compromised credibility who claim to have insight into military operations around which they were peripherally involved. The credibility of P-169, P-178, P-173, P-213 and P-33 has been discussed in detail in

Chapter II. These are not witnesses upon whom the Chamber can safely rely for incriminating findings of fact. However, these are the witnesses upon whom the Prosecution's command case substantially hangs.¹⁴¹⁶ The Chamber can, and should, draw an adverse inference from the Prosecution's failure to call witnesses who could meaningfully assist in an assessment of effective control.

600. The second central flaw in the Prosecution's command responsibility case is a consistent failure to distinguish between Mr. Bemba's powers and responsibilities in the DRC, and his alleged control over those troops who crossed into the CAR in 2002. The doctrine of command responsibility attributes liability to superiors who exercise effective control over perpetrators *at the time the crimes were committed*.¹⁴¹⁷ The Prosecution's extensive submissions concerning Mr. Bemba's acts and control over MLC troops in the Congo do not assist the Chamber in its determination of the central issue in this case.

601. The third overarching flaw is the lack of evidence of operational orders emanating from Mr. Bemba, which were followed by the troops in the CAR. Because of this evidentiary lacuna, the Prosecution abandons its original case, submitting, for example, "[r]egardless of whether Bemba exercised operational command during the conflict..."¹⁴¹⁸ Mr. Bemba's operational command forms the core of the case confirmed by the Pre-Trial Chamber.¹⁴¹⁹ The central question is whether Mr. Bemba was the operational commander of the troops in the CAR. The Trial Chamber is precluded from considering a case other than one whereby Mr. Bemba is giving operational orders to troops in the CAR. This has not been established.

¹⁴¹⁶ Prosecution Closing Brief, paras. 519-520, 537, 539, 541, 555, 560, 564-566, 585, 593, 603, 605, 609, 701.

¹⁴¹⁷ ICC-01/05-01/08-424, Confirmation Decision, para. 418, citing *Halilović* AJ, para. 59; *Bagosora* TJ, para. 2012. See also *Hadžihasanović*, Article 7(3) Decision, paras. 37-51; *Kunarac* TJ, paras. 399, 626-628; *Naleitić* TJ, para. 160; *Hadžihasanović* TJ, para. 1485.

¹⁴¹⁸ Prosecution Closing Brief, para. 528.

¹⁴¹⁹ ICC-01/05-01/08-424, Confirmation Decision, paras. 446-477.

602. The fourth fundamental flaw is the legal disconnect between Colonel Mustapha's alleged command of MLC troops in the CAR, and Mr. Bemba's liability for any misconduct on their part. The Prosecution asserts that "the brigade of two MLC battalions (Poudrier B and the 28th Battalion) to Bangui in October 2002 [were] under Colonel Mustapha Mukiza Gabby's (Colonel Mustapha) command."¹⁴²⁰

603. This allegation underscores a fundamental flaw in the Prosecution case. The case as confirmed by the Pre-Trial Chamber, and as charged in the DCC, is that Mr. Bemba is liable as a commander for failing to prevent or repress crimes committed by the MLC troops,¹⁴²¹ the actual foot soldiers on the ground who were alleged to be murdering, raping and pillaging as they moved through the CAR. This, in fact, stands in contrast with the Prosecution's position that Mustapha commanded the MLC troops *in situ*, and thus exercised effective control over them. This displaces any effective control that Mr. Bemba could have exercised, and constitutes a break in any chain of influence that Mr. Bemba could have exerted over them. The Prosecution has completely failed to address this elephant in the room. They have not established or even argued that the troops ignored the orders of their *in situ* commanders, nor have they established that Mr. Bemba succeeded or even attempted to displace the authority of the commanders on the ground.

604. Even if it were legally and factually possible for liability to attach to a commander because of a subordinate's liability as a commander ("double command"),¹⁴²² the Prosecution has never argued, nor has Mr. Bemba been charged with a failure to prevent or repress Colonel Mustapha because he failed to prevent

¹⁴²⁰ Prosecution Closing Brief, para. 10 (emphasis added).

¹⁴²¹ ICC-01/05-01/08-424, Confirmation Decision, paras. 444, 446, 501; ICC-01/05-01/08-856-Conf-AnxA, paras. 55, 57, 60, 68, 78, 87-90.

¹⁴²² *Orić* AJ, para. 39: "Moreover the Trial Chamber, in its legal findings, did not consider whether a superior could possibly be held responsible under Article 7(3) in relation to his subordinate's criminal responsibility under the same article."

or repress the troops under his command. The Prosecution's case is clear: Mr. Bemba is liable as the superior of the troops on the ground.¹⁴²³ This cannot be reconciled with its simultaneous position that Colonel Mustapha is the undisputed commander of the alleged perpetrators, despite the fact that they have never been sufficiently identified. The Prosecution has missed its chance to charge, plead and prove that Mr. Bemba is liable for failing to prevent or repress the failure of Colonel Mustapha to prevent or repress the alleged crimes committed by the troops on the ground. This is a fundamental flaw in the Prosecution's command responsibility case; one with no legal or evidential remedy, and which precludes a finding of liability on the part of Mr. Bemba.

605. In *Orić*, the ICTY Appeals Chamber overturned a conviction on the basis that the Trial Chamber failed to specify how Orić's only identified subordinate was criminally responsible. Although the Trial Chamber had found that members of the Military Police had been committing crimes against detainees, the Appeals Chamber was unable to conclude "on what basis the Trial Chamber found Orić's only identified culpable subordinate criminally responsible. Such a finding would have been required to determine Orić's guilt."¹⁴²⁴ To draw a parallel with the present case, the Prosecution was required to establish beyond reasonable doubt that Colonel Mustapha was an identified subordinate of Mr. Bemba's during the relevant period, and that he himself was responsible for the charged crimes in the DCC, in order for liability to attach to Mr. Bemba. Rather, the Prosecution's case focused entirely on the criminal liability of the MLC troops themselves, despite their concession that the troops were under Mustapha's command.

¹⁴²³ Confirmation Decision, ICC-01/05-01/08-424, paras. 444, 446, 501; ICC-01/05-01/08-856-Conf-AnxA, paras. 55, 57, 60, 68, 78, 87-90,

¹⁴²⁴ *Orić* AJ, para. 47.

606. This fundamental flaw in the Prosecution's command responsibility case has no legal or evidential remedy, and precludes a finding of liability on the part of Mr. Bemba. In reality, the Prosecution has failed to establish any of the five constituent elements of command responsibility.¹⁴²⁵ Without prejudice to these initial submissions, each will be discussed below.

A. Mr. Bemba was not effectively acting as a military commander to the MLC Contingent in the CAR

607. By relying on the fact that Mr. Bemba wore a military uniform in the DRC,¹⁴²⁶ issued decrees as MLC President in the DRC,¹⁴²⁷ carried a baton in the DRC as "a symbol of authority and power",¹⁴²⁸ and attained a military rank,¹⁴²⁹ the Prosecution has based its submissions almost entirely on events and practices in the Congo. This ignores the issue at hand; what was the command structure over the 1,500-plus MLC troops who fought amongst the loyalists during this four month conflict?

1. Unity of Command is an essential component of a multinational military structure

608. The Prosecution requires the Chamber to accept two essential propositions; (1) that Mr. Bemba, who had limited military training and never directed tactical operations, was able to issue operational orders to troops located in a foreign state, in areas in which he had never set foot, with no realtime knowledge of the development of the military situation; and (2) that a war could be waged by a multinational coalition of loyalist troops with one contingent falling under a separate command chain and being directed remotely, in violation of the military

¹⁴²⁵ ICC-01/05-01/08-424, Confirmation Decision, para. 407.

¹⁴²⁶ Prosecution Closing Brief, paras. 510, 518.

¹⁴²⁷ Prosecution Closing Brief, para. 517.

¹⁴²⁸ Prosecution Closing Brief, para. 518.

¹⁴²⁹ Prosecution Closing Brief, para. 518.

principle of unity of command. This theory is a military impossibility, and inconsistent with the evidence.

609. The Prosecution and Defence military experts agreed that single command, or “unity of command” is an established military principle central to any military operation. There can only be one structure giving orders to a military body at any one time.¹⁴³⁰ The UN, in its function as the umbrella body of multinational operations, has outlined the importance of this principle as a basic and necessary element. National contingents do not maintain a separate line of command with their national military hierarchy, but remain at all times under one single command.¹⁴³¹ The Prosecution’s military expert was asked:¹⁴³²

Q. Witness, can one and the same unit receive military orders from two separate commands about one and the same operation?

A. It is absolutely unusual, one individual to receive two orders on the same operation. Absolutely unusual.

610. This makes sense. If the separate contingents of a coalition of troops were following different operational orders, this would lead to anarchy, and risk the lives of the troops. As explained by General Seara:¹⁴³³

¹⁴³⁰ P-219, T-199, p.55: “Single command is command that is exercised by one particular, you know, military organisation, under one command.”; See also P-219, T-197, pp.35-36; D-53, T-229, p.32: “what you need is a single and co-ordinated command, which makes it possible to use all the forces most effectively in order to achieve the objectives that have been set by the command, by the High Command.”

¹⁴³¹ ‘Another important principle is unity of command. The experience in Somalia has underlined again the necessity for a peace-keeping operation to function as an integrated whole. That necessity is all the more imperative when the mission is operating in dangerous conditions. There must be no opening for the parties to undermine its cohesion by singling out some contingents for favourable and others for unfavourable treatment. Nor must there be any attempt by troop-contributing Governments to provide guidance, let alone give orders, to their contingents on operational matters. To do so creates division within the force, adds to the difficulties already inherent in a multinational operation and increases the risk of casualties.’ (‘Supplement to an Agenda for Peace: Position paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations’, paras. 41-42).

¹⁴³² P-221, T-200, p.2.

¹⁴³³ D-53, T-229, p.32.

One cannot imagine several units of those working as free electrons, whereas other forces would be pursuing the objectives that would have been set. This would lead to chaos and possibly incidents of friendly fire because when you have such a unit, such a situation, you may lose your friends and your neighbours and then you end up not knowing who is where. So what you need is a single and co-ordinated command, which makes it possible to use all the forces most effectively in order to achieve the objectives that have been set by the command, by the High Command.

611. The Prosecution's military expert agreed, testifying that it would be "chaos" or "disaster" if forces on the same side were not communicating.¹⁴³⁴

You don't deploy without, you know, having that co-ordination, because if you are going to work with other forces, either you're supporting them or they're supporting you or they are independently, you know, doing what they are supposed to do, but within your area of responsibility, or close to your area of responsibility, it is absolutely important that you co-ordinate with them because you could have friendly fire casualties.

612. D-21, [REDACTED],¹⁴³⁵ gave a similar account of the "catastrophic results"¹⁴³⁶ which would have resulted from the MLC contingent receiving operational orders from Gbadolite.¹⁴³⁷

[Mustapha] could only receive such orders from the Central African authorities. Now, if we were to take the contrary scenario and think that Mustapha were to receive orders from elsewhere, he may be going down a road or an axis without being aware of the possibility that some enemy troop or some friendly troops may be on the same axis or road and that might lead to clashes between him and enemy troops or between him and friendly troops because of such lack of co-ordination. To this date, I am not aware that the ALC forces mistakenly engaged combat with some units that had come to support them and for that reason I therefore believe that there was some co-ordination of those operations at a certain level.

¹⁴³⁴ P-219, T-197, p.49.

¹⁴³⁵ D-21, T-301, p.16.

¹⁴³⁶ D-21, T-302, p.11.

¹⁴³⁷ D-21, T-302, p.11.

613. There were no such catastrophic results because the MLC troops were not receiving operational orders from Gbadolite. Nor were they receiving orders from two simultaneous command chains stemming from Gbadolite and Bangui. The Prosecution and Defence evidence demonstrates that the MLC contingent was subordinated to the hierarchy of the FACA, in accordance with the principle of unity of command.

614. The best evidence of the re-subordination of the MLC troops to the Central African authorities comes from D-19, [REDACTED]. He confirmed “[w]hen I was placed under the command of the Central African authorities, I was totally under their command. All the orders, all the military operational orders came from them.”¹⁴³⁸ He testified that:¹⁴³⁹

you want to know why I received orders from them? Well, it was because it was their war. We only went to support them. We didn't go there to order what was going on in Central African Republic. That's why we were placed under the command of the Central African Republic Army. It wasn't my authorities at Gbadolite that was ordering the operations because it wasn't on the ground and it wasn't the Gbadolite authorities that attacked. If the war had been organised by my authorities in Gbadolite, then it would be us who -- it would be us and then receiving orders from them, but we were there and we were placed under the orders of the Central African authorities.

615. The re-subordination to the Central African hierarchy accords with the instructions [REDACTED] from Mr. Bemba prior to crossing. [REDACTED].¹⁴⁴⁰

616. The Prosecution military expert was asked how he understood this call between Mustapha and Mr. Bemba. He responded:¹⁴⁴¹

¹⁴³⁸ D-19, T-285, p.29.

¹⁴³⁹ D-19, T-285, p.29.

¹⁴⁴⁰ [REDACTED].

¹⁴⁴¹ P-219, T-199, p.27.

[w]hat that means is that they will relinquish their normal chain of command and be attached to another chain of command. They are no longer under the chain of command of home country.

617. Mr. Bemba explicitly reiterated this message of re-subordination when he visited the MLC contingent at PK12: the troops should respect the Central African hierarchy because it was the Central Africans who were leading them.¹⁴⁴²

618. The FACA and MLC high command both understood the arrangement the same way. CHM-01, [REDACTED],¹⁴⁴³ stated that MLC troops “were placed at the disposal of the government”.¹⁴⁴⁴ D-39, [REDACTED],¹⁴⁴⁵ testified that Mr. Bemba had “delegated his power of command to the Central African Republic who had requested this”¹⁴⁴⁶ and that “it was up to the Central African authorities to set objectives and establish missions for them.”¹⁴⁴⁷ D-49, [REDACTED],¹⁴⁴⁸ confirmed that “the unit was being called upon to operate on a territory that was different from our territory, a territory which we were not familiar with, we did not know it, so we therefore had to hand over that unit and place them under the orders or the operational control of the Central African authorities, if I do recollect properly.”¹⁴⁴⁹ [REDACTED]¹⁴⁵⁰ agreed.¹⁴⁵¹

619. The realities on the ground bears this out. P-65, [REDACTED]¹⁴⁵² confirmed that “it wasn’t necessary to send messages to Mustapha, because Mustapha wouldn’t receive orders from General Amuli, but rather from the Central African

¹⁴⁴² P-65, T-170, p.61; D-19, T-285, p.5; D-51, T-261, p.56.

¹⁴⁴³ CHM-01, T-353, p.15.

¹⁴⁴⁴ CHM-01, T-357, p.55.

¹⁴⁴⁵ D-39, T-308, p.11.

¹⁴⁴⁶ D-39, T-308, p.47.

¹⁴⁴⁷ D-39, T-308, p.48.

¹⁴⁴⁸ D-49, T-270, p.13.

¹⁴⁴⁹ D-49, T-270, p.53.

¹⁴⁵⁰ D-21, T-306, p.3.

¹⁴⁵¹ D-21, T-302, p.11.

¹⁴⁵² P-65, T-168, p.14.

authorities".¹⁴⁵³ This statement is corroborated by P-36 [REDACTED]. [REDACTED].¹⁴⁵⁴ The cahier corroborates that [REDACTED] never gave an operational order to MLC troops in the CAR.¹⁴⁵⁵ The question of whether Mr. Bemba was bypassing the normal command chain to give operational orders directly to MLC commanders was quashed by P-36, who conceded that Mr. Bemba had never directed a tactical operation.¹⁴⁵⁶

Q. Now, when you earlier described Mr Bemba as a strategist, and not a tactician, what did you mean?

A. Yes. He gave the orders, and in accordance with his orders the commanders could do their best to find a solution to put into action the orders that were given. He would say, for example, Mr such and such a commander, you have to get to such and such locality, and the way in which it was done, well, that was up to the commander, given that he had to get to the locality named by the commander in chief. And once the locality had been reached within the envisaged time frame, envisaged by the commander, okay, that s fine.

Q. Thank you very much indeed. I think you'd also agree that Mr Bemba never directed any tactical operation, do you?

A. Yes. Tactical operations, I want to say quite honestly, no. That is to say, he doesn't co ordinate the activities, the manoeuvres which a battalion undertakes in order to reach the objective. To put a particular commander on the let, on the right, somebody else in the middle, put weapons in whatever place, no, but he follows the situation very closely so that his objectives are achieved.

620. Mr. Bemba did not direct tactical operations. Nor did the MLC contingent receive operational orders from General Amuli. Their orders came from the Central African hierarchy into which they had been subsumed. P-36's testimony that Mr. Bemba would have general intentions which would then have to be transformed into military plans is corroborated by D-49, [REDACTED],¹⁴⁵⁷ [REDACTED]:¹⁴⁵⁸

[REDACTED]

¹⁴⁵³ P-65, T-168, p.63.

¹⁴⁵⁴ P-36, T-218, p.21.

¹⁴⁵⁵ EVD-T-OTP-00702/CAR-D04-0002-1514; EVD-T-OTP-00703/CAR-D04-0002-1641.

¹⁴⁵⁶ P-36, T-217, p.31.

¹⁴⁵⁷ D-49, T-270, p.13.

¹⁴⁵⁸ D-49, T-270, p.52.

621. Firmin Findiro was the Prosecutor of the Republic at the *Tribunal de Grande Instance* of Bangui¹⁴⁵⁹ and conducted an investigation into these events.¹⁴⁶⁰ He took a statement from the Director-General of the USP, General Bombayake, who stated “[o]nce they had crossed, the Banyamulengue were grouped with the force naval, the navy, so as to be taken to the support regiment under the command of General Mazi and Colonel Lengbe.”¹⁴⁶¹ Pamphile Oradimo, the investigation’s Senior Judge,¹⁴⁶² confirmed that General Bombayake had told him that “[t]he Banyamulengue were operating under the command of the Assistant Chief of Staff General Mazi and Colonel Lengbe.”¹⁴⁶³

622. This Prosecution and Defence testimonial evidence is corroborated by contemporaneous FACA internal documents. The numerous “Message Porté” and “Autorisations Gouvernementales” in evidence demonstrate that the MLC contingent had been placed under the control of the Central African Army. A “Message Porté” dated 20 November 2002 from the FACA Etat Major¹⁴⁶⁴ seeks to provide information of the effective engagement of the MLC and FACA troops, and demonstrates that “the detachment of the ALC that is in the Central African Republic is under the command and the control of the Central African forces.”¹⁴⁶⁵ Similarly an “Autorisation Gouvernementale” from the Central African Ministry of Defence, signed by General Yangongo following a resolution of the crisis committee,¹⁴⁶⁶ authorizes the provision of military logistics to the MLC troops, and addresses the establishment of a “joint and integrated command”.¹⁴⁶⁷ This

¹⁴⁵⁹ P-6, T-94, p.9.

¹⁴⁶⁰ P-6, T-94, pp.23-24.

¹⁴⁶¹ P-6, T-98, p.9.

¹⁴⁶² P-9, T-102, pp.13-14.

¹⁴⁶³ P-9, T-106, p.19.

¹⁴⁶⁴ EVD-T-D04-00065/CAR-D04-0003-0136.

¹⁴⁶⁵ D-53, T-229, pp.59-60.

¹⁴⁶⁶ EVD-T-D04-00058/CAR-D04-0003-0128.

¹⁴⁶⁷ D-53, T-230, p.3.

confirmed “the integration of the MLC forces within the Central African forces and their allies.”¹⁴⁶⁸

623. D-19 provided concrete examples of orders [REDACTED]:¹⁴⁶⁹

During the war -- during a war, there may be a decision or an order. For example, to leave PK12 and go take Damara, that was an order, and most of those orders were verbal. [REDACTED]. [REDACTED], and he would meet with us, and he would say, "Get ready for a battle that will happen tomorrow morning." Those were all orders... All the orders that he gave were orders relating to operations. When we took Damara, for example, he said, "Don't move forward. Stay where you are," and we would obey. When he said, "Okay, in a particular place there is a particular situation. Go ahead," we would receive the order. There you have it.

624. Mr. Bemba is simply not in the picture.

625. The re-subordination of a contingent of troops into a foreign state's effective control is not a phenomenon unique to the MLC in the CAR. The Prosecution's military expert explained that there are situations where an entire military structure is re-subordinated (either permanently or temporarily) to another chain of command. During that time, the chain of command over the actions of these troops has been “moved” to another structure.¹⁴⁷⁰

626. International criminal law also recognizes that troops which have previously fallen under the hierarchical command of the accused can be re-subordinated to a different command structure, eliminating the effective control of the original commander. In *Taylor*, the Trial Chamber found that even if Mr. Taylor had sent his “Liberian fighters” to Sierra Leone, they did not remain under the authority or effective control of the accused once fighting amongst the mixed troops in Sierra

¹⁴⁶⁸ D-53, T-230, p.4.

¹⁴⁶⁹ D-19, T-285, p.18.

¹⁴⁷⁰ P-219, T-199, pp.55-59.

Leone.¹⁴⁷¹ Similarly, the ICTY has held that a superior may be held responsible for crimes committed by individuals temporarily subordinated to him, once he assumes effective control over them.¹⁴⁷² The Defence military expert confirmed that the assumption of command by the Central African authorities conforms with the standards in this type of engagement.¹⁴⁷³

627. The re-subordination of the MLC contingent mirrored previous practice. In 2001, forces loyal to former President Kolingba attempted to seize power from President Patassé.¹⁴⁷⁴ A contingent of 450 MLC troops¹⁴⁷⁵ were sent Bangui to assist the regime in place. [REDACTED], D-18, testified that [REDACTED] Mr. Bemba who at the time “was in Beni, about 2,000 kilometres from Gbadolite.”¹⁴⁷⁶ [REDACTED]. [REDACTED] “direct superior in Bangui during the operations in 2001 was General Bozizé, who was the Chief of Staff of the FACA. [REDACTED].¹⁴⁷⁷ [REDACTED].¹⁴⁷⁸ Logistics were provided by the Central Africans.¹⁴⁷⁹ The decision to withdraw the MLC troops was made by the Central Africans.¹⁴⁸⁰ The 2002 intervention mirrored what had happened the year before. The Prosecution did not suggest any basis for a change in practice as between 2001 and 2002.

628. From the moment the MLC troops stepped onto Central African soil, they were moved from their original chain of command, and re-subordinated. Rather than the “catastrophic results” or “chaos” which would result from one contingent of a coalition of troops acting on its own, the loyalist forces coordinated successfully to push Bozizé’s fighters out of Bangui, and back through the north of

¹⁴⁷¹ *Taylor* TJ, para. 6984. See also *AFRC* TJ, para. 786.

¹⁴⁷² *Halilović* TJ, paras. 61-61; *Kunarac* TJ, para. 399; *Orić* TJ, para. 313; *Aleksovski*, TJ, para. 109.

¹⁴⁷³ EVD-T-D04-00070/CAR-D04-0003-0342 at 0395.

¹⁴⁷⁴ D-18, T-267, pp.37-38.

¹⁴⁷⁵ D-18, T-267, p.41.

¹⁴⁷⁶ D-18, T-267, p.38.

¹⁴⁷⁷ D-18, T-267, p.46.

¹⁴⁷⁸ D-18, T-267, p.45.

¹⁴⁷⁹ D-18, T-267, pp.44, 46.

¹⁴⁸⁰ D-18, T-267, pp.46-47.

the country. The Prosecution does little more than insist that Mr. Bemba exercised operational command, but has not established beyond a reasonable doubt that he did.

2. The re-subordination in practice undermines the Prosecution case of command and control

629. The Prosecution's case is that Mr. Bemba exercised operational command over the MLC contingent in the CAR, from his living room in Gbadolite. However, the Prosecution is only able to cite two alleged examples of Mr. Bemba issuing operational orders.¹⁴⁸¹ The first is the secondhand hearsay testimony of P-178 that Mr. Bemba gave the order to attack Damara.¹⁴⁸² P-178's credibility is discussed in Chapter II, and his testimony, in the Defence submission, cannot safely be relied upon, and certainly not without corroboration.¹⁴⁸³ The Prosecution has failed to reconcile P-178's allegations with the fact that he also testified that it was President Patassé who ordered Mustapha "to fall back or withdraw after the attack on Bossangoa, Bossempaté and Bozoum."¹⁴⁸⁴

630. The second is an alleged order from Mr. Bemba to withdraw the MLC troops from the Central African Republic.¹⁴⁸⁵ This decision was made by President Patassé,¹⁴⁸⁶ and the order passed to Mustapha by General Bombayake.¹⁴⁸⁷

¹⁴⁸¹ Prosecution Closing Brief, paras. 510-524, 558-568.

¹⁴⁸² Prosecution Closing Brief, para. 560.

¹⁴⁸³ Prosecution Closing Brief, para. 560. Although hearsay evidence is not *per se* inadmissible, the Chamber is nonetheless obliged to consider whether there are sufficiently reliable indicia to admit it, and, if second-hand, should treat it with circumspection (*Haradinaj*, AJ, para. 86; *Kupreškić et al.*, TJ, para. 507, where the Trial Chamber refused to take into consideration a conversation overheard by a witness, on the grounds that it was 'double hearsay' lacking in reliability). P-178 provides contradictory testimony concerning the contents and nature of the alleged conversation ("At PK-12—I don't know how this happened. Was it President Patassé who had called Mr. Bemba, or Mr. Bemba? I don't know [...]". (P-178, T-151, p.53), [REDACTED]). The accuracy of P-178's testimony is also undermined by the fact the Prosecution explicitly directed P-178 to testify in relation to the alleged contents of conversations without clarifying whether P-178 was actually present at the time, or heard it from a second hand source (P-178, T-151, p.58).

¹⁴⁸⁴ P-178, T-154, pp.19-21.

¹⁴⁸⁵ Prosecution Closing Brief, para. 561.

631. The Prosecution points to no other evidence of a written or oral operational order from Mr. Bemba to the MLC troops between October 2002 and March 2003. No other witness is able to say "I heard Mr. Bemba direct the MLC troops to move to location X or Y". D-19, [REDACTED], was explicit that they came from the Central African authorities.¹⁴⁸⁸ [REDACTED], a Prosecution witness, [REDACTED], said the same.¹⁴⁸⁹ Responding to a hypothetical question from the Presiding Judge, D-19 explained that had Mr. Bemba attempted to give [REDACTED] an operational order, "[REDACTED] would have told him to go via the Central African hierarchy and [REDACTED] would have said that we were supposed to help. That's what [REDACTED] would have said, in all honesty, and by virtue of the respect - the level of respect - that [REDACTED] owed him."¹⁴⁹⁰

632. The Prosecution does not address this evidence. To claim that "Bemba ordered the troops to advance to Bozoum, Bossembélé and Damara"¹⁴⁹¹ it relies on the testimony of [REDACTED]. He has no direct evidence of orders being passed from Mr. Bemba to Mustapha. His evidence suggests the opposite.¹⁴⁹² The cahier

¹⁴⁸⁶ D-65, T-247, pp.32-34, describing the international pressure placed on President Patassé which influenced his decision to order the withdrawal of the MLC troops; See also EVD-T-OTP-00443/CAR-OTP-0013-0005 at 0006; D-53, T-231, pp.37-38: "To begin with, this was a decision made by President Patassé. Based on what I learned, there was some international pressure exerted on him and he then issued an order to the Minister of Defence and General Bombayake, who was still commanding the forces on the ground, to ask General Mustapha to withdraw his forces." See also D-53, T-233, p.29 (unchallenged): "However, what is clear is that the decision to withdraw and to return to the DRC of the ALC forces was a decision made by President Patassé which was then transmitted to Colonel Mustapha." D-53, T-234, p.47: "If the decision had been taken, that is because certainly there was external pressure exercised on him in order to ensure that the ALC forces did go to the Democratic Republic of Congo. This wasn't just decided because he just wanted to do that. He must have undergone pressure in order to take such a decision and that it be done at that time, at that particular given moment when Bozizé decided to do that, have the counter-offensive."

¹⁴⁸⁷ D-19, T-292, p.38.

¹⁴⁸⁸ D-19, T-285, p.29.

¹⁴⁸⁹ P-65, T-168, p.63.

¹⁴⁹⁰ D-19, T-292, p.40.

¹⁴⁹¹ Prosecution Closing Brief, para. 563.

¹⁴⁹² P-36, T-218, p.58.

messages relied upon give no indication that any advance by the MLC troops was done on the orders of Mr. Bemba.¹⁴⁹³

633. The Prosecution's claim that "P-15 testified... that Colonel Mustapha was always under the orders of Bemba and reported directly to him"¹⁴⁹⁴ misrepresents his evidence. P-15 made a distinction between the situation in the DRC and the CAR, saying that the MLC's responsibility in the DRC was "complete, full and total", and the two situations were not comparable.¹⁴⁹⁵ When asked to describe the relationship between Mustapha and Mr. Bemba, he was unequivocal that "I cannot say what the nature of their relationship was". All I can say, it was a hierarchical relationship between the president of the movement and one of his senior officers. Beyond that these will be matters that I cannot offer any guesses on as to [...] the nature of the relationship", adding "I am not very versed in military matters".¹⁴⁹⁶ Far from being definitive, his testimony concerning command was qualified with the following:¹⁴⁹⁷

I do wish to be careful here. I don't know if he received orders from President Patasse with whom Commander Mustapha has special dealings, so I don't really have an answer for you. [REDACTED] and I wasn't present when orders were being given to MLC soldiers in Bangui.

634. The manipulation of his evidence in the Prosecution's Brief is alarming.

635. The written record of operational orders emanating from the MLC during the relevant period exists. These hundreds of pages of the cahier record no operational order passing from Mr. Bemba (nor any other member of the MLC

¹⁴⁹³ Prosecution Closing Brief, para. 563, fn. 1821.

¹⁴⁹⁴ Prosecution Closing Brief, para. 522.

¹⁴⁹⁵ P-15, T-208, pp.31-32.

¹⁴⁹⁶ P-15, T-208, p.32.

¹⁴⁹⁷ P-15, T-208, p.49.

High Command) to the MLC troops in the CAR.¹⁴⁹⁸ The Chamber can safely conclude that there is no evidence of operational orders because Mr. Bemba was not issuing them.

636. This is consistent with the Prosecution's military expert's testimony that once a particular group of troops has been re-subordinated, the new hierarchy then assumes responsibility for operational orders:¹⁴⁹⁹

The deployment orders - the initial deployment orders for the troops you are going to send out, even the logistic orders, the intelligence that they need to have will be issued first of all from their own country. There will be successive operational orders, logistics orders, once they are deployed. Those will be issued by the headquarters that is going to co-ordinate or to oversee the operation on a day to day basis, month to month basis, a year to year basis, however long that operation is going to take.

3. Command was coordinated through the CCOP, and not Mr. Bemba

637. In October 2002, the operations of the loyalist troops were co-ordinated through the CCOP, the command centre for operations,¹⁵⁰⁰ located at Camp Béal.¹⁵⁰¹ Also known as the "CCO" or "PCO", this unit was established in 2001,¹⁵⁰² and by October 2002 functioned well in all areas.¹⁵⁰³ The Chamber heard testimony from the FACA's Colonel Lengbe who commanded the centre in October 2002,¹⁵⁰⁴ and who explained that the CCOP was composed of five separate cells: operations, intelligence, communications, logistics and "future maneuvers".¹⁵⁰⁵ The heads of

¹⁴⁹⁸ EVD-T-OTP-00702/CAR-D04-0002-1514; EVD-T-OTP-00703/CAR-D04-0002-1641.

¹⁴⁹⁹ P-219, T-199, p.60.

¹⁵⁰⁰ P-31, T-182, p.12: "The CCOP is the Centre for the Command of the Operations. Initially it was called the CCOP, or the command centre, or the command post. There were various ways of referring to this unit."

¹⁵⁰¹ P-6, T-97, p.45; D-49, T-271, p.15.

¹⁵⁰² D-53, T-233, p.32.

¹⁵⁰³ D-53, T-233, p.32.

¹⁵⁰⁴ P-31, T-182, p.12. See also P-151, T-172, p.43.

¹⁵⁰⁵ See CAR-ICC-0001-0076; P-31, T-182, p.18.

these units were not chosen at random, but were expert specialists in these areas.¹⁵⁰⁶

The centre, unsurprisingly, operated 24 hours a day during the crisis.¹⁵⁰⁷

638. P-151 was a FACA company commander,¹⁵⁰⁸ who was sent in 2002 to work at the CCOP,¹⁵⁰⁹ and was therefore well placed to describe its functioning and importance. He testified that¹⁵¹⁰

the CCOP is a command centre led by a senior officer. This unit is responsible for all the movement of troops throughout the country, in particular responsible for logistics, food services, supplies, replacing troops in the field. This unit co-ordinates all these activities. It represents the command. It gathers information, various sources of information, and sends on the information to the chain of command so that decisions, the most appropriate decisions, can be taken to ensure the safety of the population... this centre prepares for the various movements of troops and also prepares the material. It's also the unit that allows for the gathering of all information, intelligence, from various units in the field with a view to passing on that information to the hierarchy, to the chain of command. So everything went to that unit, and the unit was responsible for studying the intelligence, looking at it before passing it on to the chain of command so that decisions could be taken.

639. CHM-01 [REDACTED] testified that the unit:¹⁵¹¹

followed the situation in the field, and in particular in terms of the rebel positions, enemy positions, and the friendly positions, where there were problems [REDACTED], for example, of the position of rebels in the north centre, by Bossangoa, Bozoum... and others. And in particular, with regards to the allies or friends, the USP, MLC, in the counter-attack, in operations whether it's Bossembélé or Bossangoa, et cetera. [REDACTED].

¹⁵⁰⁶ P-31, T-182, p.20.

¹⁵⁰⁷ P-31, T-182, p.21.

¹⁵⁰⁸ P-151, T-172, p.9.

¹⁵⁰⁹ P-151, T-172, pp.9-12.

¹⁵¹⁰ P-151, T-172, pp.16-17.

¹⁵¹¹ CHM-01, T-357, p.30. See also P-6, T-96, p.15: Findiro confirmed that the CCOP "was a cell which was there to manage the troops in the field and to plan operations to be carried out and to do coordination work in the field with all the men there, or available."

640. So what would happen at the CCOP? The Chamber heard from several witnesses about regular planning sessions or meetings where intelligence was coordinated and operational plans were formulated.¹⁵¹² CHM-01 testified that “each day, each morning, mid-day, and evening, the officers of the centre would meet in order to look at the situation, to assess the status of the day.”¹⁵¹³ Once information was received from the field, “working sessions”¹⁵¹⁴ would be convened and the officers would come together “and endeavour to define a strategy corresponding to the situation as it was observed in the field.”¹⁵¹⁵ The contemporaneous “Note de Service” which confirms that “placed under the direct authority of the commander in chief of the armed forces, the operations centre (CCOP) shall mainly prepare, plan and conduct military operations throughout the national territory.”¹⁵¹⁶

641. D-19’s understanding corroborates his Central African counterparts:¹⁵¹⁷

Before launching an operation, this particular body, this -- was responsible for gathering all the information relating to the enemy. After running an analysis on the enemy, the operational order would be sent. After this train of analysis, the order was sent to the broadcast, or to the transmission structure, about where the enemy was located. The enemy is made up of one battalion, let's say or is equipped with such-and-such a weaponry. This was the analysis that was run on all the available information. The enemy, let's say, is made up of one battalion, therefore we need to attack that battalion with two battalions. This is what we mean by conception or devising something. So the order is sent to Mr Mazi to say: "We have decided this and now you need to ready such-and-such a body of troops that needs to attack such-and-such a town or such-and-such a location," where the enemy was positioned. Mazi then had to come to us - we were the people on the ground - in order to transmit to us the order, to say that "Military hierarchy has decided this and therefore you need to execute the order that has been given, based on the decision that was taken.

¹⁵¹² D-53, T-229, p.35.

¹⁵¹³ CHM-01, T-353, p.30.

¹⁵¹⁴ P-151, T-174, pp.22-24.

¹⁵¹⁵ P-151, T-174, p.22.

¹⁵¹⁶ EVD-T-D04-00019/CAR-OTP-0042-0237 ; D-53, T-229, p.43.

¹⁵¹⁷ D-19, T-285, pp.25-26.

642. The CCOP was the heart of the military operation. It was the receptacle for all information and intelligence coming from the field. It brought together a team of trained specialists who were able to collate, verify and analyse this information and intelligence, and transform it into operational orders. It then had the logistical capacity to send these orders back to the field to the troops who were fighting on behalf of President Patassé. P-151 confirmed that “[t]he PCO would gather the information from the friendly troops in the field and would give a report to the High Command. The High Command made decisions and passed them on to the commander of the PCO, who then sent them on -- sent on these decisions to the troops who were in the field.”¹⁵¹⁸

643. It is incredible that the Prosecution’s brief does not contain one reference to the CCOP. Despite leading witnesses who testified as to its significance to the command of the loyalist troops, and two witnesses who worked in the centre itself, the Prosecution deliberately ignores its existence. The operation of a functioning command centre through which intelligence and information were funneled, and operational plans were devised, cannot be reconciled with the Prosecution’s case, namely, that Mr. Bemba was directing the operation alone, from the Congo. In reality, Mr. Bemba did not have contact with the CCOP, and as such would have been “groping in the dark”.¹⁵¹⁹ The Prosecution’s failure to address this central aspect of the evidence as to command of the loyalist forces vitiates its entire submission on effective control.

644. The liaison between the MLC troops and the CCOP was described as being on “an ongoing basis, 24/7”¹⁵²⁰ and Mustapha “was in touch with the operational

¹⁵¹⁸ P-151, T-174, pp.48-49.

¹⁵¹⁹ D-53, T-229, p.58.

¹⁵²⁰ D-53, T-230, p.14.

centre on a constant basis.”¹⁵²¹ Consistent with the MLC’s role and re-subordination into the command chain, no MLC representative attended CCOP meetings, which were reserved for members of the Central African military and political establishment.¹⁵²² Instead, “those officers who were with the MLC soldiers, [REDACTED] reports on the situation, the positions where the fighting men actually were and so on and so forth.”¹⁵²³ Significantly, there was no evidence that the MLC set such a command centre of its own in Gbadolite or elsewhere for the purposes of this operation.

645. P-31, Colonel Lengbe, who commanded the CCOP until he fled the CAR on 22 November 2002,¹⁵²⁴ drew a sketch of the command chain in operation.¹⁵²⁵ His sketch places President Patassé at the head of the chain of command, followed by the Ministry of Defence, followed by the Chef d’Etat Major, followed by the “PCO”, which sits above the various loyalist troops, being those of Miskine, the FACA, the MLC, the USP and CENSAD. The arrow drawn from the “PCO” to the “MLC” contingent denotes the orders being given from the coordination cell to the MLC troops in the CAR. His testimony, and sketch, could not have been clearer.¹⁵²⁶

¹⁵²¹ D-53, T-230, p.15.

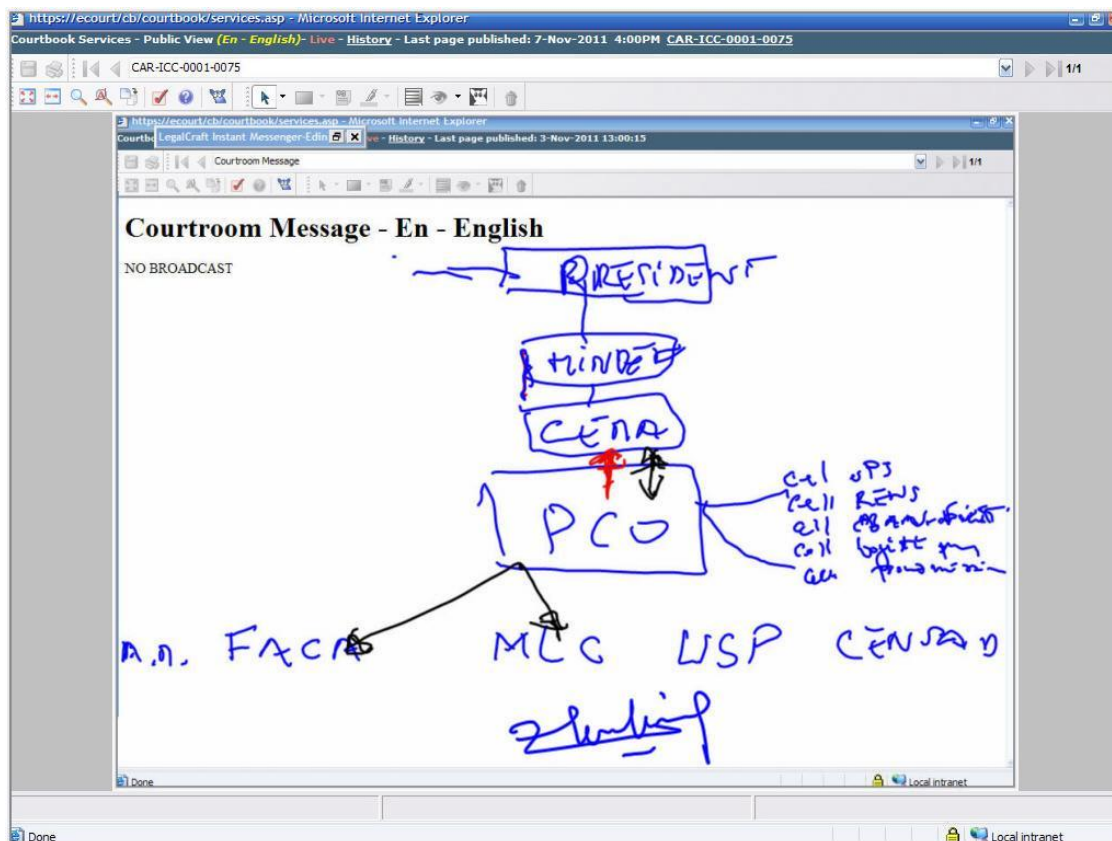
¹⁵²² CHM-01, T-357, p.69.

¹⁵²³ CHM-01, T-357, p.69.

¹⁵²⁴ P-31, T-182, p.10; P-151, T-173, pp.59-60.

¹⁵²⁵ EVD-T-D04-00034/CAR-ICC-0001-0076.

¹⁵²⁶ P-31, T-183, pp.62-68.



4. The command chain in place demonstrates that Mr. Bemba did not exercise effective command and control

646. There were two phases of command between October and March. In 2001, the FACA Chef d'Etat Major was General François Bozizé. After his failed coup attempt in late 2001, Bozizé fled Bangui¹⁵²⁷ and withdrew to Sido, near the Chadian border.¹⁵²⁸ General Mbeti-Bangui was appointed as his replacement.¹⁵²⁹ However, described as being “in poor health”,¹⁵³⁰ General Mbeti-Bangui had in fact sought refuge in the Chinese embassy, and was nothing more than a “puppet”.¹⁵³¹ It was his deputy, General André Mazi, who was directing the operations in his stead.¹⁵³²

¹⁵²⁷ P-119, T-82, pp.22-23; CHM-01, T-353, p.52.

¹⁵²⁸ EVD-T-OTP-00831/CAR-OTP-0069-0148 at 0164.

¹⁵²⁹ P-151, T-174, pp.32-33.

¹⁵³⁰ D-53, T-229, p.26.

¹⁵³¹ P-31, T-183, p.65.

¹⁵³² P-31, T-183, p.60; D-19, T-285, p.26; D-53, T-299, p.26.

647. Mbeti-Bangui in fact died soon after the arrival of the MLC troops, either in November or December 2002.¹⁵³³ Colonel Lengbe, also fled to Cameroon on 25 November 2002,¹⁵³⁴ to join up with Bozizé.¹⁵³⁵ This represented the start of the second phase of command. General Gambi was appointed as Chef d'Etat Major to replace the deceased Mbeti-Bangui.¹⁵³⁶ However, President Patassé was distrustful of both General Mazi and the newly-appointed General Gambi.¹⁵³⁷ He did, however, have a trusted subordinate in General Bombayake, Director-General of the USP. During the second phase of operations, it was Bombayake who commanded the loyalist troops.¹⁵³⁸

648. [REDACTED]. [REDACTED] told the Chamber that: "[i]t was the Chief of General Staff [Bozizé] who had gone into rebellion, and soldiers followed him. From that moment on, the head of state distrusted the FACA. It is for this reason that after the attack of October, and the reinforcements by the MLC troops, it was the USP which was the president's guard unit, that was leading the operations, together with the MLC forces."¹⁵³⁹

649. Oradimo confirmed that Mazi had described the two phases as follows:¹⁵⁴⁰

The attitude of General Bombayake towards us led to there being a loss of trust between ourselves and the Head of State. Indeed, that was the reason for which Lieutenant-Colonel Lengbe decided to withdraw from the Central African territory and join General Bozizé, whereas initially that was not his intention. Starting from that moment onwards, all the operation, both in Bangui and in the provinces, were organised and led by General Bombayake, who acted practically as if he was Chief of Staff.

¹⁵³³ D-19, T-292, p.23: "Mbeti-Ti-Bangui died just after visiting Damara. I no longer recall which month it was, whether it was in November or December." P-31, T-183, p.50.

¹⁵³⁴ P-31, T-182, p.10; P-151, T-173, pp.59-60.

¹⁵³⁵ P-9, T-106, p.27.

¹⁵³⁶ D-53, T-229, pp.29-30.

¹⁵³⁷ D-19, T-290, p.70; CHM-01, T-353, p.52; D-53, T-229, p.30.

¹⁵³⁸ P-9, T-106, p.27; P-6, T-98, pp.46-47; CHM-01, T-353, p.52; D-53, T-229, p.30.

¹⁵³⁹ CHM-01, T-353, p.52.

¹⁵⁴⁰ P-9, T-106, p.27. See also P-6, T-98, pp.46-47.

650. The Defence military expert described the two phases in similar terms.¹⁵⁴¹ D-19 spoke of trust having been “broken” between President Patassé and [REDACTED] troops,¹⁵⁴² and confirmed that [REDACTED] received [REDACTED] orders from General Bombayake.¹⁵⁴³ P-65, [REDACTED], confirmed the same:¹⁵⁴⁴

A. According to the messages [REDACTED], Mustapha and his troops received orders from General Bombayake.

Q. Do you remember what type of orders Mustapha received from General Bombayake?

A. Well, it’s difficult to say what kind of orders, but I know that he received operational orders.

651. There is no evidence that Mr. Bemba played any role in the organisation of this significant shift in the chain of command in operation in the CAR, nor that he was even consulted. Nor is there evidence that Mr. Bemba either had the legal or material ability to give orders to either General Mazi or General Bombayake, and certainly no evidence of this having occurred.

652. [REDACTED].”¹⁵⁴⁵Oradimo gave corroborative testimony, confirming that his investigations revealed:¹⁵⁴⁶

as soon as the City of Damara was taken, General André Mazi arrived on site in order to have an after-action report given to him from Colonel Mustapha and, further, each time a city was taken, Colonel Mustapha would contact each of the Central African authorities in order to provide them with an after-action report as immediately as possible.

¹⁵⁴¹ D-53, T-229, p.30.

¹⁵⁴² D-19, T-290, p.70.

¹⁵⁴³ D-53, T-229, p.30; CHM-01, T-353, p.52; P-6, T-97, p.52.

¹⁵⁴⁴ P-65, T-168, p.59.

¹⁵⁴⁵ D-19, T-285, p.28.

¹⁵⁴⁶ P-9, T-107, p.55.

653. Mustapha was operating at the “tactical level”,¹⁵⁴⁷ where his responsibilities were circumscribed to implementing the operational orders received from the Central African authorities.¹⁵⁴⁸

654. Throughout these two phases, President Patassé stayed in place as the “supreme commander” and the head of the hierarchical chain.¹⁵⁴⁹ CHM-01 confirmed that while all operational decisions were taken by the Chef d’Etat Major,¹⁵⁵⁰ the supreme commander of the armed forces in Central Africa was “the head of state”.¹⁵⁵¹ Notably, the Central African authorities charged Patassé for alleged crimes committed by the MLC members given his position at the top of this chain of command. This charge implicitly recognises his formal responsibility for the conduct of these troops given their re-subordination into the chain of command of which he was the head.¹⁵⁵²

655. Again, the Prosecution’s Brief ignores the Central African military apparatus, and the command chain in place. No attempt is made to explain or discredit this evidence, it is simply ignored in favour of repeated assertions that Mr. Bemba was in command. Given the evidence above, no reasonable Trial Chamber could accept that the Prosecution has established their “lone commander” theory beyond a reasonable doubt.

5. MLC troops were integrated, and conducted joint operations

656. Operational control on the part of the Central African hierarchy is corroborative of another significant swathe of evidence concerning joint operations

¹⁵⁴⁷ D-53, T-229, p.34.

¹⁵⁴⁸ D-19, T-285, pp.16-18; D-53, T-229, pp.35-37; D-53, T-229, pp.35-37; D-53, T-231, pp.35-36; D-21, T-302, p.11; P-65, T-168, p.63.

¹⁵⁴⁹ CHM-01, T-356, pp.65-66; D-19, T-292, p.25; EVD-T-D04-00034/CAR-ICC-0001-0076; P-9, T-107, p.9. EVD-T-D04-00016/CAR-OTP-0004-0065, p.14.

¹⁵⁵⁰ CHM-01, T-356, p.66.

¹⁵⁵¹ CHM-01, T-356, p.65.

¹⁵⁵² EVD-T-D04-00016/ CAR-OTP-0004-0065. See also P-6, T-96, p.47.

by MLC and Central African troops. [REDACTED]. CHM-01 testified, “[a]s I have already stated before, the MLC forces and the USP were fighting together to repulse the rebels who had advanced right to Bangui.”¹⁵⁵³

657. This was also the understanding of [REDACTED]. D-39, [REDACTED], confirmed that “the soldiers of the Central African Republic had to be integrated or mixed with MLC soldiers, or merged with them.”¹⁵⁵⁴ P-36 testified that: “the MLC and FACA did fight together. They had weapons. Alongside an ALC company would be a FACA section. They were in a position to fight, they were soldiers. So for an ALC company of 150 troops, there would be a section of a maximum of 30 FACA troops”.¹⁵⁵⁵ The Prosecution’s theory requires an acceptance that within such a mixed group, the MLC troops were acting under orders from Mr. Bemba in Gbadolite, while the 30 FACA troops were moving in accordance with orders from their own hierarchy in the CAR. This is implausible, and would lead to the “disaster” and “chaos” described by the Prosecution military expert.¹⁵⁵⁶

658. Witnesses on the ground confirmed that the troops were mixed. D-19, [REDACTED], testified that there were no operations in which the Congolese were involved “without enjoying the assistance of the CAR army.”¹⁵⁵⁷ He explained, corroborating P-36,¹⁵⁵⁸ that because the Congolese were greater in number, [REDACTED] each battalion to give them a company, and all operations were run in a hybrid fashion.¹⁵⁵⁹ In Bozoum, there was an entire battalion of Congolese and a company of Central Africans, as well as other Central Africans who had fled from the Chadians and joined the loyalists on their arrival. On the day that Bossangoa was captured, Seguin’s 28th battalion was on the ground, and an entire company of

¹⁵⁵³ CHM-01, T-353, p.48.

¹⁵⁵⁴ P-39, T-308, p.41.

¹⁵⁵⁵ P-36, T-214, p.46.

¹⁵⁵⁶ P-219, T-197, p.49.

¹⁵⁵⁷ D-19, T-285, p.14.

¹⁵⁵⁸ P-36, T-214, p.46.

¹⁵⁵⁹ D-19, T-285, pp.13-14.

Central Africans as well as a few bodyguards, other Central Africans from the gendarmerie and the police. In Damara, Major Kamisi's Poudrier B battalion was present, and a company of Central Africans, while in Sibut three companies had been sent, only two of which were made up of Congolese troops.¹⁵⁶⁰

659. P-173 confirmed that on the Bossembélé-Bossangoa-Bozoum-Bossemptélé axis, "the Presidential Guard was also present; those are the troops of Ange-Félix Patassé, President Patassé, who were supporting the MLC on the Bossembélé-Bozoum axis."¹⁵⁶¹ It was not just battalions which were mixed; integration occurred even at the level of a company. An [REDACTED] confirmed to D-53 that his company was reinforced by a section from the FACA.¹⁵⁶²

660. This is logical. Without the integration of troops, the MLC soldiers would have been lost. P-173 testified that the MLC had several axes and they needed to be guided through the unfamiliar roads and country.¹⁵⁶³ D-49 confirmed that "this was a joint operation. [The MLC] could not know that if they were to cross here, you would go to such-and-such a place, or if you crossed over there you would go to another place. They needed people by their side to tell them this is the way to go."¹⁵⁶⁴ This, of course, was the Prosecution's case in 2008. The Prosecution submitted that "the MLC troops who arrived in the CAR were deployed in coordination with the USP, which were first in line when the MLC troops did not know the battlefield. **The coordination was done by Patassé who gave orders**".¹⁵⁶⁵

661. Secondly, a contingent of 1,500 MLC troops was not sufficient to secure the whole of the CAR. [REDACTED] explained that from a tactical perspective, a brigade can only control a physical area of about five km in breadth and three km

¹⁵⁶⁰ D-19, T-292, pp.30-32.

¹⁵⁶¹ P-173, T-144, p.17.

¹⁵⁶² D-53, T-233, p.8.

¹⁵⁶³ P-173, T-146, p.3.

¹⁵⁶⁴ D-49, T-272, p.24.

¹⁵⁶⁵ ICC-01/05-01/08-128-Conf-AnxA, para. 73.

in depth.¹⁵⁶⁶ The MLC could not have enjoyed the military success of the first four months of the operation without assistance from the national army.

662. Thirdly, integration had a moral aspect. The FACA High Command wanted to avoid the perception that the MLC had restored the rule of law in their country. It was a matter of national pride that the operations were done together, with a Central African presence.¹⁵⁶⁷

663. Contemporaneous photographs show this integration. Major Tutu Kwese, also known as [REDACTED]¹⁵⁶⁸ was a FACA officer,¹⁵⁶⁹ who commanded Central African soldiers fighting alongside the MLC.¹⁵⁷⁰ He was side by side with Mustapha throughout the conflict.¹⁵⁷¹ The two men were the heads of their units.¹⁵⁷² He was identified in photographs, most notably depicted amongst MLC commanders in Sibut,¹⁵⁷³ linking arms with Major Kamisi.¹⁵⁷⁴ Tutu Kwese was a commander. He would not have been in Sibut without his troops. The MLC was not acting alone. Indeed, a contemporaneous video of Sibut recorded interviews with the local population. An interviewee confirmed that: "Jean-Pierre Bemba's soldiers, acting alongside the loyalist forces, pushed back the rebel forces beyond Sibut and beyond Begoua."¹⁵⁷⁵

664. Contemporaneous documents show the same. An AFP report dated "Bangui, 8 December, AFP, 6.09 p.m." reported that:

¹⁵⁶⁶ D-49, T-271, pp.12-13.

¹⁵⁶⁷ D-53, T-229, p.41.

¹⁵⁶⁸ D-19, T-293, p.6.

¹⁵⁶⁹ D-19, T-284, p.32.

¹⁵⁷⁰ D-19, T285, p.21; T-293, p.6.

¹⁵⁷¹ D-19, T-289, p.5; T-290, p.64-65; T-292, p.25, p.32, p.33, p.37, p.59.

¹⁵⁷² D-19, T-290, pp.66-67.

¹⁵⁷³ EVD-T-CHM-00026/CAR-OTP-0046-0218 ; D-21, T-304, pp.56-60.

¹⁵⁷⁴ D-21, T-304, p.60-61.

¹⁵⁷⁵ EVD-T-D04-00008/CAR-DEF-0001-0832, at 38.20 to 42.18 minutes. See also D-21, T-302, p.40.

Forces loyal to President Patassé launched an assault against the locality of Damara on Saturday at 1 p.m; that is 12 hours GMT, and Damara was retaken from the assailants who were currently fleeing, according to a Central African military source speaking to AFP. Those forces were made up mainly of elements of the Central African Armed Forces, FACA, of the Presidential Security Unit, USP, with the assistance of Congolese rebels of the Mouvement de Libération of Congo, MLC, of Jean-Pierre Bemba, and two Libyan aircrafts, according to the same source.

665. Other documents paint the same picture. A “Message Porté” from 20 November 2002 speaks of the engagement of the MLC and FACA troops in a counter-offensive operation under the command and control of the FACA Chief of Staff.¹⁵⁷⁶ A similar document from 25 November 2002 from the FACA Chief of Staff to the MLC Commander bears the title “total engagement of the MLC forces alongside the armed forces of the CAR in counter-offensive operations”, and concerns a request for a MLC battalion to be made available to the General Staff for counter-offensive operations.¹⁵⁷⁷ A 20 January 2003 message concerns the change and allocation of new operational communication frequencies for operational cohesion among the FACA, USP, MLC, and Libyans.¹⁵⁷⁸

666. The Prosecution’s theory that Mr. Bemba had operational control over one part of a larger group of mixed troops is unsustainable. The Prosecution has not advanced evidence or submissions that Mr. Bemba was also giving operational orders to FACA troops, or any of the other groups which comprised the loyalist forces. The Prosecution needs the Chamber to accept beyond a reasonable doubt that Mr. Bemba was controlling one “free electron” of troops, and the FACA soldiers standing by their side, fighting against the same enemy, in the same battles, were receiving operational orders from Bangui. This is not only implausible, it is not what the evidence shows.

¹⁵⁷⁶EVD-T-D04-00065/CAR-D04-0003-0136.

¹⁵⁷⁷ EVD-T-D04-00066/CAR-D04-0003-0137.

¹⁵⁷⁸ EVD-T-D04-00060/CAR-D04-0003-0130.

6. There were numerous forces fighting as part of the loyalist coalition

667. Remarkably, the Prosecution's brief disregards the other troops fighting as part of the loyalist coalition. Apart from the passing acknowledgement that:¹⁵⁷⁹

Patassé's loyalist forces that took part in the conflict were FACA, USP, MLC, Miskine troops, Sarawi, Karakos, Société Centrafricaine de Protection de Surveillance (SCPS) and the Lutte Contre le Terrorisme International (LCTI) led by Frenchmercenary Paul Barril

668. Their presence is otherwise ignored. The existence of these groups is not fact insignificant. Oradimo put the number of Miskine's men alone at between 600 and 700,¹⁵⁸⁰ over a third of the strength of the MLC. There is no evidence that Mr. Bemba was giving operational orders to these disparate groups. In fact, the evidence suggests that he was not even aware of their existence.¹⁵⁸¹ For his part, P-36 testified he had never heard of the Abdoulaye Miskine, Paul Barill or the "Karawa" militia.¹⁵⁸²

669. These groups would have needed coordination. The Prosecution submitted in 2008 that Patassé gathered these various groups together who were then "assigned different tasks and whose military operations in the field were coordinated as a single unified force"¹⁵⁸³ Mr. Bemba could not have been commanding the MLC troops in ignorance of their existence. To this end, [REDACTED]'s testimony is worth recalling in some detail:¹⁵⁸⁴

...[REDACTED] would it have been necessary to co-ordinate all those disparate forces in [Patassé's] defence?

¹⁵⁷⁹ Prosecution Closing Brief, para. 125.

¹⁵⁸⁰ P-9, T-107, p.4; See also P-6, T-95, p.34.

¹⁵⁸¹ [REDACTED].

¹⁵⁸² P-36, T-218, p.44.

¹⁵⁸³ ICC-01/05-01/08-14-tENG, para. 50 (evidence accepted by the Pre-Trial Chamber at para. 53). See also para. 74.

¹⁵⁸⁴ P-36, T-218, pp.45-46.

A.... If all these forces were at the disposal of President Patassé, unfortunately I wasn't aware of that, then there was then there had to be co-ordination. If not, they would be working in disorder.

Q. Yes. I mean, just to state the obvious, co-ordination would have been necessary to stop death by friendly fire, wouldn't it?

A. Of course.

Q. Each of the components of the force loyal to President Patassé had to know who was fighting on their side and where they were as a bare minimum. Do you agree with that?

A. Yes. Well, that's a problem of co-ordination. If there was, I didn't hear about these forces, but if they were there, well, then absolutely there needed to be co-ordination of them. If not, how are they going to fight? Who's going to shoot at whom? In what direction are they going to shoot in? It's complicated that. I don't know. I didn't know that there were these forces.

Q. Would it have been necessary to have a co-ordination centre for operations?

A. Yes, that would have been necessary.

Q. And a communications plan?

A. Yes, when he complained about a lack of communication with the others.

Q. It would have been necessary for intelligence to be shared, so there would have to be an intelligence plan, wouldn't there?

A. Yes, indeed, in this co-ordination they would deal with all these issues.

Q. And a logistics plan too?

A. Well, a logistics plan, normally in a co-ordination centre you have to find the representatives of all the different parties, and in this co-ordination centre you have to speak about everything in order to avoid there being a misunderstanding above all in this operational field in order to avoid a group firing on the other while they are partners instead of supporting each other mutually in order to avoid the supplies of one group, for example, being attacked by another, instead of being protected. So you have to speak about everything everything in the co-ordination centre.

Q. Where would the co-ordination centre have to have been situated?

A. Normally in the General Staff HQ.

Q. Of which force in this case?

A. The Central African Army, or the Central African Army, or the Central African authorities, would find a place. If it wasn't within their staff HQ, then somewhere where they saw fit they could establish such a co-ordination centre.

Q. And who would have to have been in command of the combined co-ordination centre?

A. For this case here, well, it would have had to have been the responsibility of the Central Africans. It was they who knew the

field and they knew the main enemy. It was they also who knew what roads to take. It was they who also knew about the MLC troops made available to them.

670. This paints a picture of an operation in which Mr. Bemba was simply not a player. A year-long investigation conducted by the Central African authorities concluded:¹⁵⁸⁵

to date, no evidence can prove his direct involvement in the commission of the offences perpetrated by these men. And while the fact that he sent his troops in at the request of Mr Ange-Félix Patassé, this fact has not been challenged but he has not been shown to be involved in their use on the field and it is therefore fitting to exclude him.

671. Mr. Bemba was not effectively acting as a military commander to the MLC contingent, and as such no liability arises under the doctrine of command responsibility. The Prosecution's case falls at the first hurdle.

7. Mr. Bemba did not have effective control over the alleged perpetrators

672. The Pre-Trial Chamber held that to establish effective control, the Prosecution must prove that Mr. Bemba had the "material ability to prevent offences or punish the principal offenders."¹⁵⁸⁶ The Pre-Trial Chamber stressed that there must be a temporal coincidence between the "effective control" and the criminal conduct, noting that "effective control must have existed at the time of the commission of the crime".¹⁵⁸⁷ The Pre-Trial Chamber considered the following five elements in determining whether Mr. Bemba exercised effective control:¹⁵⁸⁸

- i. Mr Jean-Pierre Bemba's official position within the MLC structure;
- ii. Mr Jean-Pierre Bemba had the power to issue orders that were complied with;
- iii. Mr Jean-Pierre Bemba had the power to appoint, promote, demote, dismiss as well as arrest, detain and release MLC commanders;

¹⁵⁸⁵ P-6, T-97, p.44.

¹⁵⁸⁶ ICC-01/05-01/08-424, Confirmation Decision, para. 415.

¹⁵⁸⁷ ICC-01/05-01/08-424, Confirmation Decision, para. 418.

¹⁵⁸⁸ ICC-01/05-01/08-424, Confirmation Decision, paras. 466-477.

- iv. Mr Jean-Pierre Bemba had the power to prevent and repress the commission of crimes; and
- v. Mr Jean-Pierre Bemba retained his effective authority and control over the MLC troops.

673. These are the facts and circumstances confirmed for trial. The Prosecution's Brief strays outside these confirmed categories, and lists a number of other factors purportedly demonstrating Mr. Bemba's effective control. For example, the Prosecution relies on Mr. Bemba's "use of communication devices to control his troops".¹⁵⁸⁹ The Prosecution case, as set out in the Second Revised DCC, does not refer to this as a factor relevant to effective control.

674. Allegations falling outside the facts and circumstances confirmed should form no part of the Chamber's deliberations. For the purposes of article 74(2) of the Statute, there is no distinction between material facts and subsidiary or collateral facts.¹⁵⁹⁰ The Trial Chamber is restricted to the facts and circumstances confirmed by the Pre-Trial Chamber: "its precise factual findings".¹⁵⁹¹ This is not merely an issue of evidence: at no point in time was the Defence put on notice that this issue of communication devices, for example, was relevant to the question of control. The Defence was deprived of the opportunity to either examine witnesses from this angle, or to present its own case on this point in return.

675. Effective control must be established at the time when the crimes were alleged to have been committed.¹⁵⁹² When troops have been re-subordinated, the commander under whose command they fall at the time is responsible for their acts, to the exclusion of their commander prior to re-subordination.¹⁵⁹³ In this case, the MLC contingent had been re-subordinated to a different chain of command for

¹⁵⁸⁹ Prosecution Closing Brief, paras. 569-594.

¹⁵⁹⁰ ICC-01/04-01/07-3363, para. 50.

¹⁵⁹¹ ICC-01/05-01/08-836, para. 35.

¹⁵⁹² *Hadžihasanović* Article 7(3) Decision, para. 51; *Bagilishema* AJ, para. 34; *Kunarac* TJ, para. 339.

¹⁵⁹³ *Kunarac* TJ, paras. 399, 626-628; *Hadžihasanović* Article 7(3) Decision, para. 51; *Hadžihasanović* TJ, para. 1485.

all operational purposes, and Mr. Bemba had no ability to intervene in the CAR without prior authorisation from the CAR authorities. These factors preclude a finding of effective control over the alleged perpetrators at the time the crimes were committed. The Defence repeats and relies on the submissions made above concerning the re-subordination of troops, which show that Mr. Bemba was not in a position to exercise effective control of the contingent which crossed into the CAR. For completeness, however, the factors relied upon by the Pre-Trial Chamber in its consideration of effective control will be analysed below.

(a) Mr. Bemba's official position within the MLC structure does not demonstrate effective control

676. Mr. Bemba was the President of the MLC. Article 12 of the MLC Statute provides that the President of the MLC is the head of the political wing, and the Commander-in-Chief of the ALC.¹⁵⁹⁴ This is not, however, determinative of whether Mr. Bemba had effective control of the MLC contingent in the CAR in October 2002.

677. The Chamber must satisfy itself that all acts upon which the Prosecution seeks to rely to establish effective control are "unequivocal exercises of superior authority."¹⁵⁹⁵ Again, the evidence relied upon by the Prosecution primarily concerns the level of Mr. Bemba's involvement in the MLC's activities in the DRC: Mr. Bemba led the MLC politically and militarily,¹⁵⁹⁶ he appointed people to positions in the Congo,¹⁵⁹⁷ kept a tight control over the MLC's funds and material,¹⁵⁹⁸ he would contact the troops in the field,¹⁵⁹⁹ he liked his decisions to be

¹⁵⁹⁴ EVD-T-OTP-00808/CAR-OTP-0069-0363.

¹⁵⁹⁵ *Čelebići* TJ, para. 669.

¹⁵⁹⁶ Prosecution Closing Brief, paras. 529-530, 537.

¹⁵⁹⁷ Prosecution Closing Brief, para. 531.

¹⁵⁹⁸ Prosecution Closing Brief, paras. 532-533.

¹⁵⁹⁹ Prosecution Closing Brief, para. 534.

implemented,¹⁶⁰⁰ that he has not been replaced,¹⁶⁰¹ and that he was allegedly feared by his troops.¹⁶⁰² The elements cited by the Prosecution concern the DRC.

678. Leadership cannot be equated to command. “The former is a legal status, an authoritative position recognized under the law. The latter is the skills and techniques necessary to influence soldiers to submit to the orders issued by those holding the lawful status of command”.¹⁶⁰³ Even had the Prosecution established that Mr. Bemba was the most involved or engaged leader in the DRC’s history, this does not assist in establishing his command over the contingent in the CAR.

679. Nor is proof of *de jure* leadership sufficient to trigger the application of the doctrine of command responsibility.¹⁶⁰⁴ Mr. Bemba’s *de jure* position as President of the MLC provides no evidence of a material ability to prevent or punish the alleged perpetrators following their departure to the CAR, at the time when the crimes were allegedly committed. It is merely an indication of the existence, at a different time, of a formal relationship of authority which did not provide him with any demonstrable ability to control them once they were subsumed as part of the loyalist forces.

680. The Prosecution cites P-178’s claim that the soldier guarding the Thuraya would run it to Mustapha when the “supreme commander” called, and that Mr. Bemba’s calls would prompt Mustapha to panic.¹⁶⁰⁵ For reasons explored in Chapter II, P-178 is not a witness who can safely be relied upon by the Chamber, particularly when the evidence he gives is uncorroborated hearsay. The entirety of

¹⁶⁰⁰ Prosecution Closing Brief, para. 535.

¹⁶⁰¹ Prosecution Closing Brief, para. 536.

¹⁶⁰² Prosecution Closing Brief, para. 538.

¹⁶⁰³ M. Smidt, ‘Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations’, 164 *Military Law Review* 155, 164 (2000).

¹⁶⁰⁴ *Media A*J, para. 787: “[de jure authority] is not a decisive factor for the issue of effective control.”

¹⁶⁰⁵ Prosecution Closing Brief, paras. 538-539.

his evidence regarding Mr. Bemba allegedly calling Mustapha is second-hand, and implausible.¹⁶⁰⁶

681. Even if this evidence could safely be relied upon, the Prosecution places a mistaken emphasis on Mr. Bemba's influence, and the fact that he was allegedly able to instill fear.¹⁶⁰⁷ Effective control cannot be equated to an ability to convince, prompt or influence.¹⁶⁰⁸ Powers of persuasion or influence alone are not a sufficient basis on which to base a finding of command responsibility¹⁶⁰⁹ Even a "highly influential individual" whose role or personality gives him great authority is not necessarily in effective control of those over whom he is able to exercise influence.¹⁶¹⁰ The Prosecution is required to establish more than the fact that Mr. Bemba was influential, or that his troops or commanders would rush to take his call. The Prosecution evidence demonstrates nothing more.

682. Even if it could be safely determined that P-178, or indeed other Prosecution witnesses, *believed* Mr. Bemba to have the ability to exercise effective control over the troops in the CAR this does not assist the Prosecution. The *belief*, even if held in good faith, that an accused was a superior or that he had effective control over troops does not make it so, unless that belief is supported by concrete evidence that he in fact held such position or possessed such control.¹⁶¹¹ The same is true of the appearance of authority which the conduct of the accused or his personality may have created. If not backed with concrete evidence of actual power, that appearance is insufficient for a finding that the accused was a superior to the perpetrators or

¹⁶⁰⁶ P-178 is [REDACTED] with no military background, who consistently failed to provide a credible and consistent explanation as to the basis of his alleged intimate knowledge of the alleged military operations of the MLC. [REDACTED]

¹⁶⁰⁷ Prosecution Closing Brief, para. 538.

¹⁶⁰⁸ *Brdjanin* TJ, paras. 276, 281: A showing that the superior merely was an influential person will not be sufficient.

¹⁶⁰⁹ *Čelebići* AJ, para. 263.

¹⁶¹⁰ *Čelebići* AJ, para. 267-268.

¹⁶¹¹ *Halilović* TJ, paras. 342 *et seq* and 743-752.

that he exercised effective control.¹⁶¹² Before entering a finding, the Chamber will be required to examine “the reality of the authority of the accused”. None of the evidence relied upon by the Prosecution, of which only evidence coming from P-178 has any relevance to the events in question, establishes that Mr. Bemba exercised effective control over the MLC contingent in the CAR.

(b) The Prosecution has not established Mr. Bemba’s power to issue orders that were complied with

683. For this element, the Prosecution places significant reliance on evidence describing the situation in the DRC. This evidence, if accepted, is irrelevant to the question of his effective control of the MLC contingent in the CAR.

684. The Prosecution’s assertion that “at all times” Mr. Bemba’s orders were carried out is based on a distortion of P-213’s evidence.¹⁶¹³ In his response to a leading question concerning the fabricated allegation of Mr. Bemba’s “causerie morale” in Zongo (which he did not in fact give),¹⁶¹⁴ P-213 states that “the soldiers were to comply with these orders”.¹⁶¹⁵ He gives no indication whether or not they did. The Prosecution cherry-picks six words from P-213’s testimony: “All the orders were carried out”.¹⁶¹⁶ In fact, P-213 specifically limited his testimony to the period prior to the intervention in Bangui, and refers to occasions on which orders were not obeyed:¹⁶¹⁷

From the time when we started our operations in the DRC up to the time the troops were sent to Bangui, well, when he issued orders and the orders weren’t carried out there would be sanctions.

¹⁶¹² *Kvočka* TJ, paras. 368-372 and 410-412. *Hadžihasanović* AJ, para. 220.

¹⁶¹³ Prosecution Closing Brief, para. 555.

¹⁶¹⁴ P-65, T-171, p.8; D-19, T-286, p.18; T-292, p.49.

¹⁶¹⁵ P-213, T-188, p.54.

¹⁶¹⁶ Prosecution Closing Brief, para. 555.

¹⁶¹⁷ P-213, T-188, p.13.

685. His evidence does not support the Prosecution's claim that "all" orders were "at all times" carried out.

686. The Prosecution gives only one concrete example of an alleged order from Mr. Bemba with which the MLC troops complied; the order to withdraw from the CAR. The sole witness cited in support is again P-213 whose evidence is hearsay; there is no indication that he was present when the alleged order was given, nor does he give a source for his knowledge.¹⁶¹⁸ Given that anonymous hearsay deprives the Defence of the opportunity to challenge its probative value, Chambers of the ICC have refused to rely this evidence when uncorroborated.¹⁶¹⁹

687. The weight of the evidence indicates that the decision to withdraw the troops was made by President Patassé,¹⁶²⁰ and the order was given to Mustapha by General Bombayake.¹⁶²¹ Prosper N'douba was the spokesman of President Patassé, and gave direct evidence of the international pressure being exerted on President Patassé leading to his decision to withdraw the MLC troops. After summarizing a

¹⁶¹⁸ Prosecution Closing Brief, para. 557.

¹⁶¹⁹ ICC-01/04-01/06-803, para. 106; ICC-01/04-01/07-717, paras. 119, 140, 160; ICC-02/05-02/09-243-Red, paras. 52, 176, 196-197; ICC-01/05-01/08-424, para 50 and fn. 65; ICC-01/04-01/10-465-Red, para. 49: anonymous hearsay contained in witness statements will be used only for the purposes of corroborating other evidence, while second degree and more remote anonymous hearsay contained in witness statements will be used with caution, even as a means of corroborating other evidence.

¹⁶²⁰ D-65, T-247, pp.32-34. See also D-53, T-231, pp.37-38: "To begin with, this was a decision made by President Patassé. Based on what I learned, there was some international pressure exerted on him and he then issued an order to the Minister of Defence and General Bombayake, who was still commanding the forces on the ground, to ask General Mustapha to withdraw his forces." See also D-53, T-233, p.29 (unchallenged): However, what is clear is that the decision to withdraw and to return to the DRC of the ALC forces was a decision made by President Patassé which was then transmitted to Colonel Mustapha." D-53, T-234, p.47: If the decision had been taken, that is because certainly there was external pressure exercised on him in order to ensure that the ALC forces did go to the Democratic Republic of Congo. This wasn't just decided because he just wanted to do that. He must have undergone pressure in order to take such a decision and that it be done at that time, at that particular given moment when Bozizé decided to do that, have the counter-offensive."

¹⁶²¹ D-19, T-292, p.38.

number of decisions taken at the international level concerning the potential exile of General Bozizé and Abdoulaye Miskine, Mr. Ndouba testified that:¹⁶²²

I think all of these actions were what led to the decision being taken at the Libreville summit, i.e., to ask President Patassé to withdraw the MLC troops from the Central African Republic. I remember that when we reached Libreville, before the meeting behind closed doors of the Heads of State, the foreign affairs minister for Gabon, Jean Ping at the time, informed me that Ali Triki, the Libyan Minister for Foreign Affairs, had called him the day before to say to him that we must seriously consider withdrawing the Libyan troops in the first place, and the withdrawal of the MLC troops was something that President Patassé himself had already no doubt begun, because after this summit the community of the States of Central Africa decided to send troops to Bangui, soldiers from the various countries of Central Africa, to ensure the security of President Patassé, and I do believe that that is how it came about that he himself ordered that the MLC troops should withdraw.

688. D-19 confirmed that: “[REDACTED] did not receive any order from Jean-Pierre Bemba to leave. Bombayake gave [REDACTED] the order and this order came from their presidents, and [REDACTED] informed Mr. Bemba that [REDACTED] had been told to go home and he said, ‘Do as you were told.’”¹⁶²³

689. President Patassé confirmed in a contemporaneous interview that the decision as to when the MLC should leave concerned only him, as Head of State, and Supreme Commander of the Armies. This was not a decision that someone else could take in his stead.¹⁶²⁴

M.M.: Alors, M. le président justement cette présence des troupes de Bemba, vous la reconnaissez ?

A.F.P. : C’est moi qui leur ai fait appel !

M.M. : Pourquoi ils ne doivent pas partir ?

A.F.P. : Pourquoi ils doivent partir ?

GA: Mais parce qu’ils l’ont déclaré !

¹⁶²² D-65, T-247, p.34.

¹⁶²³ D-19, T-292, p.38.

¹⁶²⁴ EVD-T-OTP-00443/CAR-OTP-0013-0005 at 0006.

AFP: Cela c'est un problème militaire. Ça ne regarde, moi, en tant que chef d'Etat, chef suprême des armées. Ce n'est pas à quelqu'un de venir me l'imposer. Ca je regrette.

690. This corroborated and direct evidence from key players in the withdrawal should be accepted over the uncorroborated hearsay of P-213. P213's testimony concerning the withdrawal of the troops is the only example to which the Prosecution points to show that Mr. Bemba's orders were complied with. It is impossible for the Prosecution to establish that Mr. Bemba's orders were obeyed when he was not, in reality, issuing any.

691. Effective control must be established at the time the crimes were carried out. An order to withdraw is of no evidential significance to this question. Nor would any such order have been of practical effect in the absence of assistance of Central Africans to transport the troops from the Chadian border,¹⁶²⁵ and then across the river to Zongo.¹⁶²⁶

692. The MLC contingent maintained its organic link with its original hierarchy in Gbadolite, in the same manner that a Nepalese, Kenyan, or a French contingent sent to a UN multilateral operation maintains its link with its national army. While states retain the right to withdraw their contingent from a multilateral operation, this is not illustrative of command during the operation.¹⁶²⁷ The decision to

¹⁶²⁵ P-36, T-215, p.32.

¹⁶²⁶ P-9, T-108, pp.13-14; D-53, T-229, p.33; T-231, p.36. See also P-31, T-182, pp.21-22 concerning the original crossing from Zongo organized by the FACA naval forces.

¹⁶²⁷ United Nations Peacekeeping Operations, Principles and Guidelines, p.68: "In the field, the Head of Mission (HOM) exercises operational authority over the United Nations peacekeeping operation's activities, including military, police and civilian resources. In the case of military personnel provided by Member States, these personnel are placed under the operational control of the United Nations Force Commander or head of military component, but not under United Nations command. However, once assigned under United Nations operational control, contingent commanders and their personnel report to the Force Commander and they should not act on national direction, particularly if those actions might adversely affect implementation of the mission mandate or run contrary to United Nations policies applicable to the mission. Member States may withdraw their contributed personnel from the mission through advice to United Nations Headquarters."

withdraw troops is not, in fact, an operational decision. It is a political decision which is then implemented on an operational level. An order for withdrawal provides no support to a finding of effective control during the relevant period.

(c) The Prosecution has not established Mr. Bemba's power to appoint, promote, demote, dismiss as well as arrest, detain and release MLC commander

693. The Prosecution's scant submissions paint a picture of Mr. Bemba as the sole receptacle of power within the MLC. A leader who made all decisions on his own, appointing, dismissing, promoting soldiers on his own whim and without consultation.

694. Credible evidence demonstrates otherwise. The most convincing comes from an outsider. With no need to give self-serving testimony or minimise his own role within the MLC, CHM-01 recalled [REDACTED]. He described [REDACTED],¹⁶²⁸ and testified that any decision taken by the MLC was a collaborative one taken in consultation with the relevant MLC personnel.¹⁶²⁹

[REDACTED]

695. The Prosecution's assertion that "Bemba had the authority to appoint, promote, replace, remove" cites only to the testimony of P-45. The cited passage makes no mention of this prerogative being solely in the hands of Mr. Bemba.¹⁶³⁰ The Prosecution submits that: "the Chief of Staff proposed that Bemba should replace the battalion commanders and certain company commanders. However, Bemba did not take that measure." This misrepresents [REDACTED] evidence, who in fact testified that [REDACTED] Mr. Bemba:¹⁶³¹

¹⁶²⁸ CHM-01, T-356, p.20.

¹⁶²⁹ CHM-01, T-356, pp.18-19.

¹⁶³⁰ Prosecution Closing Brief, para. 160, fn. 1953, citing "P45-T201-ENG-CT-p46-L15".

¹⁶³¹ P-36, T-216, p.9.

[REDACTED]

696. There is no evidence that the intelligence services provided [REDACTED] or Mr. Bemba with concrete information which implicated battalion commanders or company commanders. As will be discussed below, the results of investigations indicated the opposite. The caution which should be ascribed to [REDACTED] as regards the CAR events has been discussed in Chapter II above. [REDACTED].¹⁶³²

697. The only other concrete example given by the Prosecution of Mr. Bemba's alleged power to appoint, promote, demote, dismiss is that "a few months prior to the CAR operation, Bemba issued decrees promoting dozens of MLC officers, including the Chief of Staff Amuli to the rank of Division General, and Mustapha to the rank of Colonel."¹⁶³³ The Prosecution relies solely on the evidence of P-15.

698. In fact, P-15 confirmed that military promotions were decided within the General Staff on the basis of proposals made to the Chef d'Etat Major:¹⁶³⁴

...who would have provided the lists of names of 419 men to be made sub-lieutenants, 164 to be made lieutenants and 57 to be made captains?

A. This decision should have been taken by the General Staff, or the military headquarters. The structures within the General Staff were such that they could make proposals to the Chief of Staff and that is what would have obtained in an army which is well-disciplined and whose troops were all well-known.

699. This accords with the testimony of [REDACTED]. He testified that the procedure for nominations started with the Chief of General Staff and the Defence Secretary who made their proposals, which were then put to the party leaders, assisted by a committee. Ultimately, this committee decided:¹⁶³⁵

¹⁶³² EVD-T-OTP-00702/CAR-D04-0002-1514 at 1561.

¹⁶³³ Prosecution Closing Brief, para. 612.

¹⁶³⁴ P-15, T-211, p.21.

¹⁶³⁵ D-19, T-286, pp.23-24.

It was not a decision taken just by one person. No, this was a decision which was collegial, a decision of the political committee in collaboration with the army, as is currently the case in Kinshasa.

700. P-33, [REDACTED]¹⁶³⁶ agreed that the decision to promote soldiers within the ALC was made by a commission convened for that purpose to determine the promotions and ranks which should be given.¹⁶³⁷ The decision was not made by one person.

701. D-18 was also [REDACTED], and testified that:¹⁶³⁸

[Mr. Bemba] chaired the political/military committee. He took action only if something went up to his level. If some issue rose to his particular level, he would take action. After consulting the political/military committee, after a proper debate, a decision would be made and then he would promulgate the decision on behalf of the military/political committee. He did this for the army and also within the political sphere, because you see this political/military committee was a very high organ within the organisation.

702. Even had Mr. Bemba taken decisions without consultation, there is no evidence that he promoted or appointed any of the alleged perpetrators, or that he had any such power to appoint, promote, demote or dismiss any members of the contingent in the CAR at the time of the alleged crimes. There is no evidence that Mr. Bemba knew the identity of any of the perpetrators to either demote or dismiss them.

703. Mr. Bemba did not, in law, possess the power to arrest, detain and release. D-48, [REDACTED],¹⁶³⁹ drew a distinction between Mr. Bemba's powers as

¹⁶³⁶ P-33, T-158, p.7.

¹⁶³⁷ P-33, T-160, pp.51-53.

¹⁶³⁸ D-18, T-317, p.30.

¹⁶³⁹ D-48, T-267, p.8.

concerns the establishment of judicial institutions, and his personal ability to arrest or determine who would be prosecuted:¹⁶⁴⁰

when it came to prosecuting suspects, it was not Mr Bemba who decided when someone would be prosecuted. He had the powers to set up jurisdictions. When I said that [REDACTED]. [REDACTED]. So, creating or setting up a jurisdiction can be within his powers but to organise a jurisdiction and to determine how it should function is not in his powers, so he's not the one who would say, "Prosecute this person" or not.

704. The Prosecution distorts the testimony of P-33 to allege that Mr. Bemba had the power to arrest. In fact, P-33's secondhand hearsay testimony is nothing more than Commander Alongaboni openly contesting that Mr. Bemba had such a power.¹⁶⁴¹ The Prosecution then relies on the uncorroborated testimony of P-33 concerning a stolen camera to assert that Mr. Bemba ordered arrests in the Congo.¹⁶⁴² Given the credibility of this witness discussed in Chapter II, these allegations should not be accepted without corroboration, particularly as the other key character in his testimony, P-15, was not asked about, nor did he volunteer testimony concerning such a memorable tale.

705. Even if this version of events was accepted, the Prosecution again ignores the crucial distinction between the situation in the Congo, and Mr. Bemba's capacity over the troops in question. [REDACTED] explained:¹⁶⁴³

Q. But Mr Bemba had the capacity to address these crimes himself. He had a functioning justice system; is that right?

A. Well, I don't know if we're speaking the same language here. I'm saying that where it concerns the crimes that happened in the Central African Republic, Mr Bemba -- well, I think there's an exaggeration here and you're exaggerating the power of Mr Bemba. Mr Bemba had no power to go into the Central African Republic to

¹⁶⁴⁰ D-48, T-268, pp.9-10.

¹⁶⁴¹ Prosecution Closing Brief, para. 544, citing P-33, T-158, p.36.

¹⁶⁴² Prosecution Closing Brief, para. 545. Fn. 1781 is an incorrect reference.

¹⁶⁴³ D-48, T-268, pp.61-62. See also D-19, T-285, pp.38-39.

say, "Okay, well, I'll set up my institutions here and I'll have investigations there." No. What was necessary was that they be called. If the Central African authorities thought that they didn't have the possibility to try and investigate with regards to all the different crimes that happened in their territory, they could ask for co-operation. What was the power that he had to go into the Central African Republic to say that I want to investigate; I want to see all the victims; I want to see the persons guilty; I want to sanction them. If he did have that power then there was no reason why he would have addressed the Secretary-General of the United Nations in order to carry out such investigations, because he was unable to investigate with regards to all these different crimes that he had to go to the Secretary-General of the United Nations.

706. The only other evidence relied upon by the Prosecution is Mr. Bemba's "letter to the Special Representative to [sic] the United Nations Secretary General in the Central African Republic, General Lamine [sic] Cissé on 4 January 2003"¹⁶⁴⁴ concerning the arrest of eight MLC soldiers. In accordance with the chain of command in place, and given the location in which the crimes were committed, the eight MLC troops in question were arrested by Central African gendarmes. They were not arrested by Mr. Bemba. The Chamber heard firsthand and unchallenged evidence from D-19:¹⁶⁴⁵

The second case that [REDACTED] occurred when [REDACTED] some soldiers and sent [REDACTED] to the Congo, to Gemena, and from Gemena they were sent to Gbadolite. That was at the very beginning of the war. [REDACTED] because they had stolen television sets and radios. At that time, we were at Camp Béal. [REDACTED] Bombayake, he came and [REDACTED] sent them to the head of the gendarmerie... Well, regarding the commander of the gendarmerie, [REDACTED] to arrest these people before sending them back to the Congo. As for Bombayake, [REDACTED] those who had been arrested, well, there were also some CAR soldiers amongst those who had been arrested. All of them were handed over to these two authorities that I've just mentioned.

¹⁶⁴⁴ Prosecution Closing Brief, para. 546.

¹⁶⁴⁵ D-19, T-285, pp.33-34.

707. This testimony reflects the fact that the soldiers were caught “red-handed” or “en flagrante”.¹⁶⁴⁶ They were arrested on the spot, rather than waiting for reports to be transmitted to Gbadolite and orders for their arrest eventually to return.

708. [REDACTED] corroborated D-19’s testimony, confirming that Mr. Bemba did not possess the necessary authority to issue orders for the arrest of MLC soldiers in the CAR.¹⁶⁴⁷ In fact, no MLC soldiers on Central African soil had been arrested on Mr. Bemba’s orders, and “if soldiers had been arrested for possible crimes in the CAR, it would have been ordered by the head of the command in the Central African Republic.”¹⁶⁴⁸

709. Mr. Bemba neither ordered the arrest of the eight soldiers in question, nor their transfer, nor their prosecution, nor their release. The MLC had functioning systems in place.¹⁶⁴⁹ The troops in question served their sentences.¹⁶⁵⁰

(d) The Prosecution has not established Mr. Bemba had the power to prevent or repress the commission of crimes

710. Incumbent in the “power to prevent or repress the commission of crimes” is the practical ability to do so. No specific information that crimes were about to be committed, or any specific information concerning the alleged identity of perpetrators was provided to Gbadolite¹⁶⁵¹ despite direct appeals to international

¹⁶⁴⁶ D-16, T-278, p.16; D-48, T-268, p.74.

¹⁶⁴⁷ D-39, T-310, p.6.

¹⁶⁴⁸ D-39, T-310, pp.6-7.

¹⁶⁴⁹ D-48, T-267, pp.13, 15-16; D-16, T-275, pp.15-17, 20-22, 26-28.

¹⁶⁵⁰ D-48, T-267, pp.66-67, referring to EVD-T-OTP-00393/CAR-DEF-0002-0001 at p.91; See also P-36, T-215, p.14.

¹⁶⁵¹ D-21, T-302, pp.19-20.

organisations with the ability to investigate.¹⁶⁵² This accords with the fact that crimes were not reported contemporaneously.¹⁶⁵³

711. In fact, disciplinary responsibility rested with the Central African authorities. Perhaps [REDACTED] to describe the Central African responsibilities for disciplining or sanctioning the MLC troops is [REDACTED], who testified as follows:¹⁶⁵⁴

Q. And why was it that anybody who had a complaint of rape to make against an MLC soldier should have complained to the Central African government?

A. Counsel, they are Central Africans. They complain to their government, the Central African troops as I said. They came to support the Central African government. This population complained to the government with regard to the abuses and rapes that had been committed on them during that period.

Q. And was it the responsibility of the Central African government to investigate allegations of crime during that period?

A. Certainly, because there were associations and victims' associations, rape association, pillaging, and there were abuses which were committed.

Q. And it is specifically your view that it was not the responsibility of the MLC to do that?

A. The people complained to their government which was in place and who had made the MLC troops come.

712. The [REDACTED] shared this view. When asked who had responsibility for preventing crimes, the [REDACTED],¹⁶⁵⁵ testified that it "was the Central African Republic authorities to whom the troops had been made available."¹⁶⁵⁶ D-49 testified that if the MLC soldiers were within a joint operation and under the command of the CCOP, any issues of misconduct would be sanctioned by the

¹⁶⁵² D-49, T-272, p.24; D-21, T-302, pp.20-21; D-19, T-285, pp.40-42, 43-45.

¹⁶⁵³ P-38, T-34, p.52; P-38, T-36, pp.35-37; P-81, T-55, p.25; P-82, T-58, p.23; P-79, T-77, p.18; P-79, T-77, pp.57-58; P-29, T-80, p.6; P-119, T-85, pp.30-31; [REDACTED]; P-63, T-115, pp.16-17; P-110, T-126, p.6.

¹⁶⁵⁴ CHM-01, T-357, p.8.

¹⁶⁵⁵ D-21, T-301, pp.16-17.

¹⁶⁵⁶ P-21, T-302, p.10.

Central African authorities.¹⁶⁵⁷ The Defence military expert explained that responsibility for discipline of the MLC contingent in the Central African Republic would ultimately have rested with “the Joint Services Chief of Staff, or in one of the phases the responsibility of General Bombayake, since he was the commander of the forces.”¹⁶⁵⁸ D-19 confirmed that this mirrored the situation on the ground, namely that “the CCO had the authority to punish soldiers, be they Congolese or Central African”.¹⁶⁵⁹ Findiro, the Central African prosecutor¹⁶⁶⁰ who directed the CAR investigation into these events¹⁶⁶¹ placed the responsibility to take measures at the feet of the Central Africans, and ultimately Patassé.¹⁶⁶²

713. This makes sense. The Central African authorities were on the ground, were privy to the relevant circumstances and information, and physically able to investigate, and enforce appropriation sanctions. While Mustapha retained disciplinary prerogatives over members of the contingent, ultimate responsibility for discipline rested with the Central African Chef d’Etat Major.¹⁶⁶³ The Zongo investigation remained stuck in Congolese territory;¹⁶⁶⁴ the joint commission of which Colonel Mondonga formed a part was only given access on the basis of authorization by the Central African authorities,¹⁶⁶⁵ while the Sibut mission also required prior authorization,¹⁶⁶⁶ and was supervised at all times by a FACA captain.¹⁶⁶⁷

¹⁶⁵⁷ D-49, T-274, p.43.

¹⁶⁵⁸ D-53, T-231, pp.39-40.

¹⁶⁵⁹ D-19, T-285, p.40.

¹⁶⁶⁰ P-6, T-94, p.9.

¹⁶⁶¹ P-6, T-94, pp.23-24.

¹⁶⁶² P-6, T-96, p.47.

¹⁶⁶³ See EVD-T-D04-00070/CAR-D04-0003-0342 at 0391, para. 272.

¹⁶⁶⁴ D-48, T-267, pp.47-48; EVD-T-D04-00070/CAR-D04-0003-0342 at 0390: “Les autorités centrafricaines en assuraient donc le pilotage (visite des lieux, audition des victimes) puisque le MLC n’était pas compétent pour conduire une enquête autonome en territoire étranger et qu’en plus il aurait rencontré des problèmes linguistiques lors de l’audition des témoins.”

¹⁶⁶⁵ P-31, T-184, p.19; D-53, T-233, pp.11-12.

¹⁶⁶⁶ D-21, T-302, p.26: “people were not going to go about on a foreign territory under such circumstances without the approval or the agreement of the local authorities.”

¹⁶⁶⁷ D-21, T-302, p.23.

714. There is no evidential basis for a finding that, once aware of the rumours of crimes, Mr. Bemba could have prevented or repressed any future crimes from occurring by withdrawing the troops. There is no evidence that Mr. Bemba was able to do so without the agreement of the Central African hierarchy into whose chain of command they had been integrated. To the contrary, as explained by [REDACTED],¹⁶⁶⁸ the MLC did not have the capacity to withdraw the troops unilaterally:¹⁶⁶⁹

withdrawing 1,500 men from a theatre of operations presupposes a certain -- certain logistical situation and a certain co-ordination that Mr Bemba alone in Gbadolite could not set in place, or put into play. I believe that this was to be done in collaboration or conjunction with the Central African authorities.

715. The MLC would have required both transport from the north of the country to Bangui,¹⁶⁷⁰ and then transport over the river to Zongo.¹⁶⁷¹ Both of these steps required assistance from the Central African forces, even if such assistance was ultimately insufficient.¹⁶⁷² [REDACTED] the transport minister to make a ferry available to take the MLC troops back across the river.¹⁶⁷³ Arrangements were required for replacement troops.¹⁶⁷⁴ This was not an undertaking that Mr. Bemba could attempt on his own.

8. Mr. Bemba did not retain effective authority over the MLC troops.

¹⁶⁶⁸ EVD-T-OTP-00391/CAR-DEF-0001-0152; EVD-T-OTP-00690/CAR-DEF- 0001-0154; EVD-T- OTP-00453/CAR-OTP-0017-0363; EVD-T-OTP-00584/CAR-OTP-0033-0209; EVD-T-OTP-00705/CAR-D04-0002-1462; D-21, T-301, pp.16-17.

¹⁶⁶⁹ D-21, T-302, p.15.

¹⁶⁷⁰ P-36, T-215, p.32.

¹⁶⁷¹ D-53, T-229, p.33; D-53, T-231, p.36; P-9, T-108, pp.13-14. See also P-31, T-182, pp.21-22 concerning the original crossing from Zongo organised by the FACA naval forces.

¹⁶⁷² D-53, T-230, p.62.

¹⁶⁷³ D-19, T-285, p.26; D-53: T-231, p.36.

¹⁶⁷⁴ P-45, T-204, p.70; D-53, T-230, p.62.

716. Mr. Bemba's authority and control over his troops has been analysed above. From the time they entered the CAR, the MLC troops were placed under the operational command of the Central African military hierarchy.

717. The Prosecution military expert, in spontaneous testimony not reflective of his report, advanced a theory of "parallel command" over the MLC contingent in the CAR. Having been apprised of evidence of which he had previously been unaware concerning Mustapha receiving orders from Bombayake,¹⁶⁷⁵ the Prosecution military expert submitted that Mustapha was receiving instructions from both the Central African chain of command, and from his original chain of command in Gbadolite.¹⁶⁷⁶ No evidence has been tendered about what would have happened if the first chain of command had said "advance left" to the troops, while the second chain of command contemporaneously ordered them to "advance right". Unsurprisingly, the Prosecution has not sought to rely on this theory. The Defence military expert testified as to its credibility:¹⁶⁷⁷

From all the documents that I reviewed and from everything that I heard, there was never any parallel command of the ALC troops. The ALC troops had been placed at the disposal of the Central African Republic. They were integrated into the loyalist forces and they were commanded by the commander on the ground, through the operational centre, and this applied both while they were involved in Bangui, or engaged in the offensive towards the north. So there was also the order for the troops to retreat from the CAR and return to Congo. This was an order that was issued by the Central African authorities, so as far as I know there was never any parallel command. The ALC forces were always under the command of the Central African Republic.

718. It is not the Defence position that the MLC troops immediately cut all ties with Gbadolite upon landing in Bangui. Mustapha retained an organic,

¹⁶⁷⁵ P-219, T-199, p.44: "And the response from Captain Lembi is as follows: According to the messages, these are the messages received from Mustapha's operator in the CAR, Mustapha and his troops would receive orders from General Bombayake."

¹⁶⁷⁶ P-219, T-199, p.45.

¹⁶⁷⁷ D-53, T-231, p.38.

administrative link with the MLC General Staff.¹⁶⁷⁸ In this context, he sent messages informing about the general state of troop strength and morale, and the general use that was being made of the contingent. P-65, [REDACTED],¹⁶⁷⁹ spoke about Gbadolite always being a few days behind in terms of what was happening in the Central African Republic:¹⁶⁸⁰

[REDACTED]. [REDACTED] not know what was happening in the field, because they received orders down there. Nevertheless, the information -- [REDACTED] find out that an attack had taken place at such-and-such a place and [REDACTED] about the situation. [REDACTED] information that they provided [REDACTED] two days after the events concerned.

719. This is a realistic description of the timing and detail of information coming back from a contingent which had been incorporated into another army's chain of command. The MLC was only receiving information after the fact because they did not need it earlier.

720. The Pre-Trial Chamber considered six factors in determining whether Mr. Bemba's alleged effective authority and control over the troops, namely that (a) Mr. Bemba took the decision to send the MLC troops to the Central African Republic; (b) Mr. Bemba selected the battalions to be deployed; (c) Mr. Bemba resorted to his powers to investigate and punish; (d) Mr. Bemba's material ability to contact his Commander of Operations; and (e) Mr. Bemba took the decision to withdraw his troops from the CAR. None of these factors relied upon to confirm the charges against Mr. Bemba have been borne out by the reality of the events in question.

(a) The decision to send the MLC troops to the Central African Republic is not reflective of effective control

¹⁶⁷⁸ EVD-T-D04-00070/CAR-D04-0003-0342 at 0370; D-53, T-229, p.36.

¹⁶⁷⁹ [REDACTED].

¹⁶⁸⁰ P-65, T-168, p.61.

721. The Prosecution's case is that Mr. Bemba "unilaterally" took the decision to engage 1,500 of his troops in a foreign conflict.¹⁶⁸¹ It defies logic that two battalions of MLC troops, actively engaged in other parts of Équateur, would have been taken out of duty in the Congo without consultation with the MLC Etat Major. P-45 testified that "[o]bviously, he discussed with the commanders".¹⁶⁸² [REDACTED].¹⁶⁸³ As explained by D-19, "[o]ne cannot engage forces without communicating with the expert of the chief, the Chief of General Staff"¹⁶⁸⁴ This corroborates CHM-01's testimony that the decision [REDACTED].¹⁶⁸⁵ The only witnesses who assert that the decision was Mr. Bemba's alone have a vested interest, [REDACTED].¹⁶⁸⁶

722. The MLC was obliged to act given the terms of not only the Lusaka Accords,¹⁶⁸⁷ but its own constitution, which provides that "[i]n order to ensure that there is peace and political stability, that the Congo needs in order to develop, the Congo must contribute to reinforcing the political stability of its neighbours."¹⁶⁸⁸ D-49 explained that:¹⁶⁸⁹

in the same manner as the former DRC, the former Government of Kinshasa, we also enjoyed some prerogatives which enabled us to undertake this kind of mission. You see, the Lusaka Agreements recognised that we had that kind of jurisdiction, namely to ensure

¹⁶⁸¹ Prosecution Closing Brief, para. 558.

¹⁶⁸² P-45, T-202, p.25.

¹⁶⁸³ D-39, T-308, p.33.

¹⁶⁸⁴ D-19, T-287, p.32.

¹⁶⁸⁵ CHM-01, T-356, pp.18-19.

¹⁶⁸⁶ Prosecution Closing Brief, para. 558, citing P-36, [REDACTED] and P-33, [REDACTED]. The citations to P-213 do not support the Prosecution's submission.

¹⁶⁸⁷ EVD-T-D04-00048/CAR-D04-0003-0527 at 0532: "Immediately upon the coming into force of this agreement, the signatories commit immediately to finding solutions to the security concerns of the DRC and neighbouring countries"; and EVD-T-D04-00048/CAR-D04-0003-0527 at 0541: Article 3, paragraph 7: "The parties to this agreement must take all the necessary measures for the normalization of the situation along the international frontiers of the DRC including controlling the illicit traffic of weapons and infiltration of armed groups.

¹⁶⁸⁸ P-33, T-161, p.45.

¹⁶⁸⁹ D-49, T-270, p.54.

that security prevails between and among neighbouring countries, as well as to take care of the administration of our territory, which by the way was recognised as a state.

These accords and obligations make any argument that Mr. Bemba was acting unilaterally even more difficult to accept.

723. Even if it is accepted Mr. Bemba had made the decision without consultation, this is not demonstrative of effective control at the time the crimes were allegedly committed. The decision to send the troops was not a tactical or an operational decision”, it was “an entirely political one”.¹⁶⁹⁰ This decision taken by the political wing was then implemented by General Amuli and the Etat Major.¹⁶⁹¹ Moreover, to the extent that Mr. Bemba could be said to have effective control over the deployed contingent, this ceased upon the contingent’s arrival in the CAR and its re-subordination to the command of that hierarchy. A commander cannot be said to be in effective control of troops if they were re-subordinated to another command structure at the time of the crimes.¹⁶⁹²

(b) Mr. Bemba did not select the battalions to be deployed

724. The only evidence that Mr. Bemba selected which battalions to deploy came from P-36.¹⁶⁹³ His testimony must be viewed with caution, given that it serves to [REDACTED], the lack of corroboration and his current [REDACTED].¹⁶⁹⁴

¹⁶⁹⁰ D-53, T-230, p.64.

¹⁶⁹¹ D-53, T-230, p.64; P-32, T-167, p.30.

¹⁶⁹² *Kunarac* TJ, para. 399: “The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an ad hoc or temporary basis, it must be shown that, at the time when the acts charged in the Indictment were committed, these persons were under the effective control of that particular individual.” See also paras. 626-628.

¹⁶⁹³ Prosecution Closing Brief, para. 558.

¹⁶⁹⁴ P-36, T-213 p.12

725. A more realistic and detailed overview of this process was given by D-49, [REDACTED].¹⁶⁹⁵ He described [REDACTED], after a company of MLC soldiers had crossed from Zongo into Bangui on 26 October and returned the same day:¹⁶⁹⁶

[REDACTED]

Q. [REDACTED]

A. [REDACTED]

Q. Who did select the units that were to go to Bangui?

A. What I remember is that we were experts, but there was a clash, or there were clashes in Bangui, a neighbouring city. We were aware of the distances and therefore we didn't need to take a unit that was too far away, which might require transportation by air. So we took into account the issue of distance, mobility, counter-mobility and so on and so forth. These considerations led us to work through the Chief of General Staff to propose that the closest brigade should be assigned that mission.

726. D-39, [REDACTED].¹⁶⁹⁷ Although his testimony is second-hand, it is logical [REDACTED]. He gives directly corroborative testimony and confirms that the decision as to which units to send was a collaborative one. [REDACTED], after the company had crossed and returned on 26 October,¹⁶⁹⁸ stating:¹⁶⁹⁹

The selection or designation of two battalions who crossed over to the CAR was done during that meeting. I believe that the people who attended the meeting would be in a position to know who truly designated the two battalions, but in terms of their operational positions, I can tell you that it was obvious that the two battalions that were designated, the 28th Battalion, to be precise, and the Poudrier Battalion, they were battalions from the Echo Brigade along the... Imese road -- which bordered the CAR. So they deployed a battalion to Zongo some time before the crossing over to Bangui. In relation to proximity, it was obvious that those would be the two battalions, in terms of the organisation of those two units. It was entirely normal for those two battalions to be designated, but the person who was leading the two battalions on a day-to-day basis

¹⁶⁹⁵ D-49, T-270, p.13.

¹⁶⁹⁶ D-49, T-270, pp.50-54.

¹⁶⁹⁷ D-39, T-308, p.33.

¹⁶⁹⁸ D-39, T-308, p.33.

¹⁶⁹⁹ D-39, T-308, pp.35-36.

was the Chief of General Staff. I do believe it must have been a suggestion from the Chief of General Staff.

727. P-36's [REDACTED] insistence that it was Mr. Bemba's decision is not supported by the evidence. In any event, involvement in the selection of troops prior to their deployment to the CAR is insufficient to demonstrate that necessary temporal coincidence; it does not assist in establishing effective control over the troops at the time the crimes were committed.¹⁷⁰⁰ Nor does involvement in the selection of troops demonstrate effective control at the time the alleged crimes were committed.¹⁷⁰¹

(c) The power to investigate and punish rested with the competent organs

728. Once his troops had crossed over into the CAR, Mr. Bemba's ability to investigate alleged misconduct or punish any established abuses was dramatically reduced.

729. Not only did the MLC not have jurisdiction to enter into foreign territory to investigate,¹⁷⁰² (demonstrated by Mr. Bemba's pleas to international organisations for information,¹⁷⁰³ and the fact that MLC members sent to investigate required Central African authorization to do so),¹⁷⁰⁴ but Mr. Bemba did not have the power to arrest or otherwise discipline troops who were not only physically removed, but also legally re-subordinated to a foreign command.

730. The Pre-Trial Chamber relied on the arrest and trial of the eight MLC soldiers as illustrative of Mr. Bemba's power to arrest.¹⁷⁰⁵ The soldiers in question

¹⁷⁰⁰ *Kunarać* TJ, paras. 399, 626-628.

¹⁷⁰¹ *Halilović* TJ, paras. 240, 244, 279-281, 363, 741, 752.

¹⁷⁰² D-21, T-302, p.26.

¹⁷⁰³ EVD-T-D04-00034/CAR-DEF-0001-0076; EVD-T-OTP-00391/CAR-DEF-0001-0152.

¹⁷⁰⁴ D-53, T-231, p.52; D-19, T-285, pp. 41-42 ; D-21, T-302, pp. 23,26.

¹⁷⁰⁵ ICC-01/05-01/08-424, Confirmation Decision, para. 472.

were arrested by Central African gendarmes, consistent with the jurisdictional reality and the command structure in place at the time.¹⁷⁰⁶

731. In the same way, informing FIDH of the arrest and subsequent charging of the eight soldiers in question does not mean that Mr. Bemba exercised effective control over the MLC contingent at the time the crimes were committed.¹⁷⁰⁷ Mr. Bemba's letter to FIDH confirms the existence of a joint commission of enquiry. However, this commission was subject to the agreement and approval of the Central African authorities, and was lead by Central Africans.¹⁷⁰⁸ The MLC had no jurisdiction to conduct an independent investigation in foreign territory, and would have encountered language and other logistical problems; they did not know their way around the country.¹⁷⁰⁹ Colonel Mondonga was the only Congolese involved.¹⁷¹⁰ It was not an MLC enquiry. Similarly, the later mission to Sibut required prior authorization to enter Central African territory,¹⁷¹¹ and had a FACA captain supervising at all times.¹⁷¹²

732. The inquiry conducted without the assistance of the Central Africans was limited to Congolese territory. D-48, [REDACTED],¹⁷¹³ confirmed that [REDACTED] commission did not have jurisdiction to enter into the CAR, testifying that: "everything happened in the CAR, [REDACTED] - to go over and conduct investigations in the CAR."¹⁷¹⁴ This limited measure is no indication of effective control, but is rather demonstrative of the opposite.

¹⁷⁰⁶ D-19, T-285, pp.33-34.

¹⁷⁰⁷ ICC-01/05-01/08-424, Confirmation Decision, para. 469.

¹⁷⁰⁸ D-53, T-231, p.52; D-19, T-285, p.41; P-36, T-214, p.53; P-36, T-215, p.6.

¹⁷⁰⁹ EVD-T-D04-00070/CAR-D04-0003-0342 at 0390, para. 265.

¹⁷¹⁰ D-19, T-285, p.41.

¹⁷¹¹ D-21, T-302, p.26.

¹⁷¹² D-21, T-302, p.23.

¹⁷¹³ D-48, T-267, p.49.

¹⁷¹⁴ D-48, T-267, pp.47-48.

733. Also telling is the fact that only upon their return from Bangui, and their return into the original command structure of the MLC, were the MLC soldiers who had been sent back from Bangui themselves interviewed.¹⁷¹⁵ It had simply not been possible before. The limits of Mr. Bemba's "powers" in this respect were explained by the Defence military expert":¹⁷¹⁶

He had the power to give such orders requiring that those matters be addressed, but once again he was not on the ground and those who therefore had to promptly address those issues were those who were on the ground. Now, he may have been subsequently informed of a number of acts of violence in respect of which he may have taken some decisions and that would have been normal. However, he was not on the ground himself to take note or acknowledge the facts as they occurred. He could only subsequently have been in a position to court-martial those who were responsible for those acts of violence, pursuant to his own powers and his responsibilities.

734. It is in this context that Mr. Bemba's alleged statements on RFI radio that his troops would face consequences should be understood. This was another factor relied upon by the Pre-Trial Chamber to conclude that Mr. Bemba had the power to investigate and punish.¹⁷¹⁷ However, the evidence heard at trial does not support this conclusion: firstly, both the RFI press release¹⁷¹⁸ and broadcast¹⁷¹⁹ are secondhand hearsay. There is no recording of Mr. Bemba allegedly saying that if his men had committed crimes they would have been tried pursuant to the MLC's military laws; this is reported by a journalist. The Prosecution did not call any journalists or members of news agencies during the trial to testify as to their conversations with Mr. Bemba or the veracity of their contemporaneous reporting. In any event, any such reported remarks, even if accurately recorded, are insufficient to establish the existence of any such power, since as discussed above,

¹⁷¹⁵ D-48, T-267, p.32.

¹⁷¹⁶ D-53, T-234, p.16.

¹⁷¹⁷ ICC-01/05-01/08-424, Confirmation Decision, para. 470.

¹⁷¹⁸ EVD-T-OTP-00413/CAR-OTP-0005-0133.

¹⁷¹⁹ EVD-T-OTP-00575/CAR-OTP-0031-0093.

Mr. Bemba was not on the ground, and was in fact hamstrung until his troops returned to the DRC and were assimilated back into their original hierarchy.

735. Nor is Mr. Bemba's trip to Bangui an indication of effective control over the troops. D-19 [REDACTED], testified that Mr. Bemba admonished them "to respect the CAR hierarchy because this -- the Central Africans were leading us."¹⁷²⁰ This testimony went unchallenged. [REDACTED] attendee confirmed that Mr. Bemba:¹⁷²¹

firstly presented General Bombayake, and it was to him that you should listen. He's the person who will be giving you orders. You have to listen to him. And he also said, he also told his troops, that they had to have respect for the command and also for the population." "You're going to work with the person who's behind me, General Bombayake, he will be -- directly be giving you instructions through Commander Moustapha.

736. The Defence military expert confirmed that it was normal for Mr. Bemba to visit the forces in PK12 despite their continued re-subordination to a foreign command structure:¹⁷²²

this is nothing exceptional. All you have to do is read newspapers or listen to the radio and you will see that Heads of State visit their national contingent in places where they are involved with multinational forces. So the fact that Mr Bemba should travel to the CAR, with the authorisation of President Patassé, to visit his forces is not unusual.

737. The Prosecution military expert agreed.¹⁷²³ A visit to troops involved in a multinational coalition in a foreign state is no indication of the assumption of operational command.

¹⁷²⁰ D-19, T-285, p.5.

¹⁷²¹ D-51, T-261, p.56.

¹⁷²² D-53, T-231, p.42.

¹⁷²³ P-219, T-119, p.18.

(d) Contact with the commander of operations in the CAR is not indicative of command

738. For all of its submissions as to phone numbers in a diary, email exchanges concerning unpaid phone bills, and unsubstantiated assertions that Mr. Bemba could have contacted his commanders in the CAR, the Prosecution failed to produce any credible evidence of a command order from Mr. Bemba being received and acted upon by his contingent in the CAR. Given the centrality of this issue to Mr. Bemba's alleged command, this failure is significant.

739. The Prosecution's claim that "[f]rom 4 February to 15 March 2003, Bemba called Mustapha 126 times"¹⁷²⁴ would require the Chamber to impermissibly draw inferences from circumstantial evidence which are not the only reasonable inferences available.

740. The "phone records",¹⁷²⁵ admitted by Majority,¹⁷²⁶ were not authenticated by a witness. The Prosecution could have called [REDACTED] who was the alleged source for the records, or an employee from the Thuraya phone company on the question of whether the records are a copy of Mr. Bemba's phone calls during the time period alleged. They did not. Nor are the records accompanied by any sworn statement to that effect. There is no indication on the face of the document that the phone number to which the calls are allegedly attributed was used by Mr. Bemba, or even the MLC. The "phone records" are incomplete, starting only on 4 February 2003, three months after the conflict began. Phone records are electronically stored data which can be accessed in their complete form. No explanation has been given

¹⁷²⁴ Prosecution Closing Brief, para. 570.

¹⁷²⁵ EVD-T-OTP-00591/CAR-OTP-0055-0893.

¹⁷²⁶ ICC-01/05-01/08-2300, Partly Dissenting Opinion of Judge Ozaki on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 69(4) of the Rome Statute, para. 18: "[t]his document contains no indication of its source or other indicia of reliability and has not been authenticated by a witness. As a result, in my view the probative value of this document is very low and in any event is insufficient to outweigh the prejudice to the defence if it is admitted."

for their incomplete nature. In such circumstances, the Chamber is not only entitled to draw adverse inferences from the Prosecution's failure to produce complete phone records, but should treat these documents with caution.

741. The Prosecution tries to authenticate the "phone records" through an email exchange concerning an unpaid phone bill for invoices incurred after the events.¹⁷²⁷ Again, none of the authors of these emails were called to testify, nor were the documents authenticated by a witness.¹⁷²⁸ No explanation was offered as to why the Prosecution did not produce the original phone bills; nor that the accused has even held an account in the name attributed to him; nor why [REDACTED] threatened legal action for a sum of [REDACTED] apparently outstanding for over two years, through an informal email.

742. The Chamber accepted that that document had sufficient probative value for admission because "it is dated, and contains e-mail addresses".¹⁷²⁹ Provenance was not discussed.¹⁷³⁰ The Defence submits that, given the inherent anomalies of the email exchange, any reliance on this document to authenticate the incomplete and un-authenticated "phone records" is unsafe. Notwithstanding the lower evidential record that applies at the confirmation stage, Pre-Trial Chamber I ruled that emails could only be used to corroborate other forms of evidence.¹⁷³¹ Notably, in *Lubanga*,

¹⁷²⁷ EVD-T-CHM-0018/CAR-OTP-0048-0383.

¹⁷²⁸ As to the probative value of emails see: *Commonwealth v. Purdy*, 459 Mass. 442, 945 N.E.2d 372 (2011): "Evidence that the defendant's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant.... There must be some 'confirming circumstances' sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails."

¹⁷²⁹ ICC-01/05-01/08-3034, para. 84.

¹⁷³⁰ ICC-01/05-01/08-3034, para. 84.

¹⁷³¹ ICC-01/04-01/06-803, para. 106. At the trial stage, Trial Chambers I and II have required the party tendering correspondence to establish that the signature of the alleged author of the letter is authentic and that the author in fact drafted its contents. By analogy, emails would require proof of the identity of the person to whom the accounts in question belonged: ICC-01/04-01/07-T-244, pp.17-

the Prosecution conceded that a handwritten letter from Bosco Ntaganda concerning the payment of a bill would not meet the criteria for admission into the case.¹⁷³²

743. There is of course clear evidence of the satellite telephone number in use by Mr. Bemba during the relevant period. His contact details are listed in the footers of his contemporaneous correspondence.¹⁷³³ None of the numbers so listed corresponds to the number in the email exchange or the alleged call records. In the submission of the Defence, the evidence is manifestly insufficient to establish that the call records are referable to any device owned or used by Mr. Bemba

744. The attribution of the number frequently dialled by this phone as being that in use by Mustapha in the CAR is even more difficult to accept. The sole evidence, again, comes from P-178. A witness who [REDACTED],¹⁷³⁴ who knowingly and repeatedly breached witness protective measures of this Chamber, and who has organized meetings of Central African witnesses in an attempt to get more money from the Court,¹⁷³⁵ happened to have a diary in which a number which features on the “phone records” is attributed to “Whisky”.¹⁷³⁶ P-178’s testimony on the identity of “Whisky” is unclear:¹⁷³⁷

A. Well, it’s a diary, but it doesn’t correspond to the year when the Banyamulengue soldiers came to the Central African Republic. [REDACTED]. [REDACTED]. [REDACTED]. And you can see on

20; ICC-01/04-01/06-1981-Anx, p.2. The ICTY has also rejected minutes or notes of conversation in the absence of proof as to the person who generated the note, and a reasonable explanation as to why it was not tendered through the testimony of the alleged participants in the conversation: *Milutinović et al*, “Decision on Lukić Defence Motions for Admission of Documents from Bar Table”, 11 June 2008, paras. 35, 37-38.

¹⁷³² ICC-01/04-01/06-1981-Anx, p. 4.

¹⁷³³ EVD-T-OTP-00453/CAR-OTP-0017-0363.

¹⁷³⁴ [REDACTED].

¹⁷³⁵ ICC-01/05-01/08-2827, para. 15.

¹⁷³⁶ P-178, T-150, pp.43-45.

¹⁷³⁷ P-178, T-150, p.43.

this page that is open there is a name [REDACTED] with a number below it, and this is circled. That is the Thuraya number. [REDACTED], among the list of people I quoted I'd forgotten this one, so you should add this name, [REDACTED]. He was one of them too. He was one of the players that played a role in the events pertaining to the Banyamulengue in the Central African Republic. So that is the Thuraya number for Mustapha.

745. Upon further examination P-178 testified that Whisky gave him Mustapha's phone number because "Whisky [REDACTED]." ¹⁷³⁸ As such, an acceptance of this testimony requires an acceptance not only of the fact that [REDACTED] was able to memorize and give out his 13-digit telephone number (presumably, having never had cause to dial it) but also that the Thuraya being used by the commander of 1,500 troops during an ongoing military conflict could be commandeered by [REDACTED] to confirm details of [REDACTED]. This is the central plank in the Prosecution's case that Mr. Bemba was contacting Mustapha in the CAR. Given the circumstances surrounding this witness, this evidence is manifestly insufficient for an incriminating finding of fact on a key issue in this case.

746. Nor, even ignoring the implausibility of all the above, does the assertion that the "phone records" show 126 phone calls between Mr. Bemba and Mustapha stand up to scrutiny. ¹⁷³⁹ Firstly, it cannot reasonably be excluded that it was not Mr. Bemba who was using this phone number, but rather someone else within the Etat Major or the MLC at large. There is simply no direct evidence on this point. Secondly, of the times "Whisky" number is called, the "phone records" indicate that on 44 occasions there was extremely limited contact or the call failed to connect. For longer calls, given that the "phone records" give no indication as to content, it cannot reasonably be excluded that the records demonstrate nothing more than the time taken for whoever answered to attempt to locate Mustapha, and come back and report that he was engaged in battle or otherwise occupied or

¹⁷³⁸ P-178, T-151, p.57.

¹⁷³⁹ Prosecution Closing Brief, para. 570.

unavailable. Again, there is no evidence on this point. The Prosecution is asking the Chamber to draw an inference of guilt from circumstantial evidence, but its conclusion is not the only reasonable inference available.

747. The Prosecution also attempts to speculate as to the meaning of the increased frequency of calls on certain dates. It provides no explanation as to why the calls to the number it attributes to Mustapha continued at the same frequency after 15 March 2003. Nor does it explain why the “phone records” start on 4 February 2002, yet the first indication of contact with the number attributed to Mustapha is on 10 February 2002. Accordingly, the Chamber must accept that a commander directing his troops through every single kilometre of terrain,¹⁷⁴⁰ spent six days without news from his contingent.

748. The assertion that “the ALC battalion commanders in the CAR also had Thuraya phones through which Bemba issued them [*sic*] military orders”¹⁷⁴¹ has no evidential basis and should be dismissed. The Prosecution cites only to the evidence of P-169, a witness of problematic credibility, whose evidence on this point is specifically limited to MLC battalion commanders communicating “amongst themselves” and has nothing to do with alleged contact by Mr. Bemba.¹⁷⁴²

749. The Prosecution then attempts to bolster its evidence on phone contact between Mr. Bemba and Mustapha by asserting that eight witnesses have “personal knowledge” that “Bemba’s calls to Mustapha were to give orders and obtain information”.¹⁷⁴³ A review of the cited transcripts demonstrates that this is not the case.

¹⁷⁴⁰ Prosecution Closing Brief, para. 571, fn.1853 citing P-36, T-213, p.71; T-215, pp.28-29.

¹⁷⁴¹ Prosecution Closing Brief, para. 570.

¹⁷⁴² Prosecution Closing Brief, fn. 1848, citing P-169, T-173, p.41.

¹⁷⁴³ Prosecution Closing Brief, para. 571.

750. P-169, P-178 and P-173 [REDACTED]. None of them heard Mr. Bemba at the other end of the line.¹⁷⁴⁴ Nor did they hear Mustapha use Bemba's name.¹⁷⁴⁵ An acceptance of their testimony also requires acceptance that in the context of an ongoing military conflict, [REDACTED],¹⁷⁴⁶ [REDACTED]¹⁷⁴⁷ [REDACTED]¹⁷⁴⁸ spent sufficient time in the presence of the commander of the MLC contingent to gather information of the utmost military sensitivity such as the source of operational orders. This is inherently implausible.

751. In any event, P-173 in fact testified that Mustapha provided Mr. Bemba with "information on the situation at the battle-front, developments within the troops, he reported on the cases of wounded persons and deaths and also talked about logistics".¹⁷⁴⁹ He was explicit, however, that operational orders came "from Patassé".¹⁷⁵⁰ For his part, P-169 conceded:¹⁷⁵¹

For the most part, [REDACTED], when he wanted to communicate with Mr Jean Pierre Bemba, he went off by himself because he didn't want anyone to be aware of the content of their discussion. Now, as regards the orders he receive during those conversations, no one had any way of knowing what they were because [REDACTED] he had spoken to his superior. [REDACTED].

752. P-178's testimony is similarly unhelpful to the Prosecution. After testifying Mustapha would indicate that "the Chairman" had called,¹⁷⁵² he then gave an example of a particular phone call, stating:¹⁷⁵³

¹⁷⁴⁴ P-169, T-136, p.37; P173, T-145, p.7.

¹⁷⁴⁵ P-169, T-141, p.12; P-178, T-151, pp. 52-53.

¹⁷⁴⁶ [REDACTED].

¹⁷⁴⁷ [REDACTED].

¹⁷⁴⁸ [REDACTED].

¹⁷⁴⁹ P-173, T-145, p.6.

¹⁷⁵⁰ P-173, T-146, pp.26-27.

¹⁷⁵¹ P-169, T-136, p.37.

¹⁷⁵² T-178, T-151, p.52.

¹⁷⁵³ T-178, T-151, p.53.

Was it President Patassé who had called Mr Bemba, or Mr Bemba? I don't know, but he told his soldiers, his officers," The chairman just called. We have to attack. We have to advance. We have to attack," and I was there.

753. The evidence of these witnesses does not stand for the Prosecution's proposition that "Bemba's calls to Mustapha were to give orders".¹⁷⁵⁴

754. Concerning P-15, the testimony cited by the Prosecution concerns Mr. Bemba speaking with [REDACTED] discussing the withdrawal of troops,¹⁷⁵⁵ which is not demonstrative of command. P-15 was explicit in his testimony that apart from one anecdote, "I don't have any idea about the content of any other conversations [Bemba] may have had with Colonel Mustapha."¹⁷⁵⁶ The testimony cited concerning P-45 concerns contact with commanders in the DRC, not the CAR.¹⁷⁵⁷

755. For his part, P-36's efforts to ensure that all responsibility for the MLC intervention was placed squarely on Mr. Bemba's shoulders resulted in him giving exaggerated and unconvincing testimony that "it took a clear order in the commander in chief for any troops to move, even a single kilometer".¹⁷⁵⁸ This proposition was put to [REDACTED]. He confirmed that [REDACTED] did not need to seek approval before carrying out an order from General Mazi or any Central African authority. Moreover, he was not at liberty to do so.¹⁷⁵⁹ Nor did the Chamber hear any evidence of pauses the fighting while Mustapha attempted to make contact with his hierarchy in Gbadolite to relay orders, ask for permission to follow them, and then wait for approval to move his troops through a particular battle.

¹⁷⁵⁴ Prosecution Closing Brief, para. 571.

¹⁷⁵⁵ Prosecution Closing Brief, para. 571, fn. 1853 citing P-15, T-209, p.22,

¹⁷⁵⁶ P-15, T-211, p.37.

¹⁷⁵⁷ Prosecution Closing Brief, para. 571, fn. 1853 citing P-45, T-201, pp.33-34.

¹⁷⁵⁸ Prosecution Closing Brief, para. 571, fn. 1853 citing P-36, T-213, p.71; T-215, pp.28-29.

¹⁷⁵⁹ [REDACTED].

756. P-33's evidence is of little weight, depending entirely on [REDACTED].¹⁷⁶⁰ However, P-65 was explicit that Mr. Bemba was not giving operational orders to Mustapha, his orders were coming from Bombayake.¹⁷⁶¹ Finally, the Prosecution relies on P-213's attempt to put Mr. Bemba in charge of the entire operation in the CAR, most notably by putting Mr. Bemba physically in the CAR "in order to control the situation, he was onsite".¹⁷⁶² P-213 testified that [REDACTED] Mr. Bemba to PK22, Bossembélé, Mongoumba and other cities during the events.¹⁷⁶³ He was unable even approximate the distance between these towns, nor was he able to say how far they were from Bangui,¹⁷⁶⁴ nor give any details as to their topography.¹⁷⁶⁵ When caught in a lie about the time taken to move between them, he claimed [REDACTED] Mr. Bemba had flown by helicopter, having previously been insistent that [REDACTED] travelled by car.¹⁷⁶⁶ This is the only evidence heard in the case of Mr. Bemba's presence in these areas. The Prosecution's reliance on this witness, and in particular this aspect of his testimony, cannot be reconciled with its duty critically to assess the evidence it presents and to make all reasonable efforts to ensure that the evidence put forward is reliable.

757. The Prosecution also assumes that contact was technologically possible at all times between Gbadolite and even the northern reaches of the CAR. The Prosecution ignores its own evidence that the MLC's communication equipment was "second-hand", "would break down very easily" and the long-range equipment did "not work very well in poor weather".¹⁷⁶⁷ The evidence cited concerning "an array" of communication instruments, again concerns the DRC.¹⁷⁶⁸

¹⁷⁶⁰ Prosecution Closing Brief, para. 571, fn. 1853 citing [REDACTED].

¹⁷⁶¹ P-65, T-168, pp.59; 63.

¹⁷⁶² Prosecution Closing Brief, para. 571, fn. 1853 citing T-188, pp.5-6. See also para. 591.

¹⁷⁶³ P-213, T-186, pp.63-64.

¹⁷⁶⁴ P-213, T-191, p.19.

¹⁷⁶⁵ P-213, T-191, pp.19-23.

¹⁷⁶⁶ P-213, T-191, pp.34-35.

¹⁷⁶⁷ P-33, T-161, pp.34-35.

¹⁷⁶⁸ Prosecution Closing Brief, para. 584, fn.1880.

758. The Prosecution also ignores the expert evidence that contact between Mustapha and Mr. Bemba via radio communication was “illogical and very unlikely”,¹⁷⁶⁹ and would have required knowledge by Gbadolite of the frequencies on which the loyalist forces were operating on FACA-issued phonies in the CAR. The disclosure of these frequencies would have been “extremely dangerous” in the context of former officers of the FACA eavesdropping during this period.¹⁷⁷⁰ P-65 confirmed that even though Mr. Bemba had a phonie in his residence, he would need to go through the transmissions centre to get the frequency or codes. “[REDACTED].”¹⁷⁷¹

759. The MLC contingent maintained its organic link with its original hierarchy in Gbadolite. In this context Mustapha was entitled, if not required, to report back to his Etat Major on personnel management, losses, morale, and general progression of the operation.¹⁷⁷² Perhaps the best evidence of this communication comes from P-65, [REDACTED],¹⁷⁷³ who confirmed that Mustapha would send reports of a general nature:¹⁷⁷⁴

For example, he received an order to move. He attacked a certain place. He often spoke about certain details. He'd provide a report about the enemy attack, about the attack launched by one's own forces, about the number of wounded. There'd be information on equipment that had been seized and so on and so forth. There were also pieces of information about localisation.

760. He explained that:¹⁷⁷⁵

¹⁷⁶⁹ D-53, T-231, p.7.

¹⁷⁷⁰ D-53, T-231, pp.6-7.

¹⁷⁷¹ [REDACTED].

¹⁷⁷² D-53, T-229, pp.52-53.

¹⁷⁷³ P-65, T-168, p.14.

¹⁷⁷⁴ P-65, T-168, pp.59-60.

¹⁷⁷⁵ P-65, T-168, p.59.

there was no permanent contact. Days could pass and in the evening the operator would inform [REDACTED]. [REDACTED], if you asked him why you aren't often on the network, he would say that they had received an order to advance and for this reason he couldn't be on the network.

761. This evidence is borne out by the MLC cahier. A typical message has Mustapha informing Amuli about morale, an accident, the location of troops, and when they are returning from Damara.¹⁷⁷⁶ Other messages are of a similar nature.¹⁷⁷⁷ These messages conformed with "normal practice".¹⁷⁷⁸

762. None of the messages upon which the Prosecution relies show operational orders coming from Gbadolite to Mustapha.¹⁷⁷⁹ The Prosecution resorts to the fact that Mustapha employs the commonplace military salutation "at your command" to General Amuli as an attempt to demonstrate operational control.¹⁷⁸⁰ This falls far below the standard of proof necessary to impute criminal liability to Mr. Bemba.

763. In mid-January 2003, ten weeks after the MLC contingent arrived in Bangui, the cahier documents the first request from the MLC Chef d'Etat Major for information concerning, among other things, enemy strength and enemy troop positions.¹⁷⁸¹ There is no indication that this information was ever forthcoming. It is inconceivable that if operational orders were in fact coming from Gbadolite, the Etat Major would be requesting information about the strength of the enemy ten weeks into the operation. If the Prosecution's theory is correct and Mr. Bemba had a realtime knowledge of the situation on the ground throughout the conflict, General Amuli would have been much more likely to seek this information from Mr. Bemba

¹⁷⁷⁶ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1642.

¹⁷⁷⁷ P-65, T-171, pp.5-8.

¹⁷⁷⁸ P-219, T-199, p.45.

¹⁷⁷⁹ Prosecution Closing Brief, paras. 574-579.

¹⁷⁸⁰ Prosecution Closing Brief, para. 582.

¹⁷⁸¹ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1702. See also D-49, T-273, pp.61-62.

rather than request it from troops engaged in a battle via a communication to which Mr. Bemba was himself copied. D-49 explained that¹⁷⁸²

asking for this type of information means that the Chief of General Staff who was there did not have that information, he did not know what was happening. So he probably woke up at that point in time, for administrative purposes, to request that type of information.

764. The Prosecution then asserts that Mustapha went to Gbadolite twice during the events.¹⁷⁸³ P-36 claims that Mustapha came with “the Chief of General Staff of the CAR”,¹⁷⁸⁴ although [REDACTED] no mention of Mustapha’s presence.¹⁷⁸⁵ The statement that Mustapha “again went to Gbadolite a second time to meet with Bemba for René’s burial” has no footnote.¹⁷⁸⁶ Regardless, the ability of Mr. Bemba to speak with Mustapha after he had crossed into the CAR does not assist in demonstrating operational control over the MLC contingent. Nor do MLC flights in and out of Bangui, or alleged MLC “liaison officers.”¹⁷⁸⁷ If Mr. Bemba was commanding the MLC contingent, where is the evidence of operational orders? Why does the Prosecution resort to relying on an alleged “air bridge” between Gbadolite and Bangui?¹⁷⁸⁸

765. Finally, the Prosecution relies on the existence of an intelligence gathering office, the *Bureau de Renseignement Militaire* that “enabled Bemba to lead operations on the ground effectively”.¹⁷⁸⁹ None of the evidence to which the Prosecution points concerning “informants” in the CAR or an “outpost” in Zongo supports the view that Mr. Bemba was receiving sufficient information on a realtime basis to allow him to make decisions for command.

¹⁷⁸² D-49, T-274, p.63.

¹⁷⁸³ Prosecution Closing Brief, para. 592.

¹⁷⁸⁴ Prosecution Closing Brief, para. 592, fn.1905, citing P-36, T-215, pp.25, 31.

¹⁷⁸⁵ [REDACTED].

¹⁷⁸⁶ Prosecution Closing Brief, para. 592.

¹⁷⁸⁷ Prosecution Closing Brief, paras. 593-594.

¹⁷⁸⁸ Prosecution Closing Brief, para. 594.

¹⁷⁸⁹ Prosecution Closing Brief, para. 589.

766. In order to be in a position to give operational orders, a commander would need to be informed in realtime of (a) the orders given at the tactical level; (b) the development of the situation; (c) missions received by allied troops and their positions in the field; (d) the volume, nature, behaviour, means and military actions of the rebels; (e) the logistical situation of his forces; and (c) the behavior of the civilian population.¹⁷⁹⁰

767. P-33, [REDACTED],¹⁷⁹¹ [REDACTED]. [REDACTED].¹⁷⁹² [REDACTED]¹⁷⁹³ [REDACTED].¹⁷⁹⁴ However, the Chamber heard unchallenged expert evidence that intelligence coming from the local population could not safely be relied upon, it would need to be analysed and cross-checked at the operational and tactical level because a terrorized population might give false information.¹⁷⁹⁵ It is certainly not the kind of information that would allow Mr. Bemba to “lead the operations on the ground effectively”.¹⁷⁹⁶

768. The Chamber also heard from [REDACTED],¹⁷⁹⁷ who [REDACTED] explain [REDACTED] capabilities of the MLC in the CAR in 2002-2003:¹⁷⁹⁸

[REDACTED].

769. As such, the picture that P-33 attempted to paint of a very [REDACTED] does not stand up under scrutiny. When asked if “[REDACTED]” concerning the CAR contained [REDACTED], he eventually conceded that:¹⁷⁹⁹

¹⁷⁹⁰ Unofficial translation from the original and authoritative French version of EVD-T-D04-00070/CAR-D04-0003-0342 at 0393.

¹⁷⁹¹ P-33, T-157, p.67.

¹⁷⁹² P-33, T-162, pp.29-30.

¹⁷⁹³ P-33, T-162, p.30.

¹⁷⁹⁴ P-33, T-162, pp.30-31.

¹⁷⁹⁵ D-53, T-229, pp.55-56; EVD-T-D04-00070/CAR-D04-0003-0342 at 0380, para. 119.

¹⁷⁹⁶ Prosecution Closing Brief, para. 590.

¹⁷⁹⁷ [REDACTED].

¹⁷⁹⁸ [REDACTED].

Well, I can't remember it very well now. I don't know Central African Republic. I've never been to Bangui. It would be very difficult for me to do this. These were names that were [REDACTED] of the territory and [REDACTED]. That's it.

Under further examination he conceded that:¹⁸⁰⁰

...Bangui was not part of [REDACTED] on military operations, as far as I'm concerned. So everything that [REDACTED] was an add-on, if you like. [REDACTED] the situation in Bangui.

770. The Prosecution makes no suggestion that the MLC troops themselves were providing Gbadolite with intelligence. General Amuli's message ten weeks into the conflict asking for basic information about the strength and position of the enemy would undermine any such suggestion.¹⁸⁰¹ [REDACTED] testified that intelligence gathered by the MLC contingent would have been handed to the commander, who would then have shared it with the CAR authorities via the CCOP. He was incredulous at the suggestion that information such as the fact that the enemy was lurking behind a particular building, would have been sent to Gbadolite "a thousand kilometres away, [REDACTED]"¹⁸⁰²

771. Mustapha would forward any intelligence to the CCOP, in line with normal practice for a brigade under foreign command.¹⁸⁰³ [REDACTED].¹⁸⁰⁴ The suggestion that Mr. Bemba received sufficient intelligence to lead operations on the ground is not borne out by the evidence.

772. The Prosecution's theory has another significant flaw. If it were the case that Mr. Bemba was giving operational orders to Mustapha over the telephone, these

¹⁷⁹⁹ P-33, T-162, p.50.

¹⁸⁰⁰ P-33, T-163, p.13.

¹⁸⁰¹ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1702. See also D-49, T-274, p.63.

¹⁸⁰² D-49, T-271, pp.17-18.

¹⁸⁰³ D-53, T-229, p.57.

¹⁸⁰⁴ [REDACTED].

orders could have been intercepted, given that Thuraya communications are unencrypted.¹⁸⁰⁵ Such communication would have been putting lives of the MLC troops at risk. There is no evidence to suggest that either (or both) Mr. Bemba and Mustapha would have been willing to do so.

773. Regardless, even the most convincing evidence of regular contact between Mr. Bemba and Mustapha would have fallen short, in the absence of evidence concerning the content of these discussions, from being sufficient to trigger criminal responsibility of Mr. Bemba. The Prosecution points to a wealth of evidence in an attempt to make its case, but the key element of operational orders passing between Gbadolite and Bangui remains missing.

(e) The withdraw of troops from the CAR is not demonstrative of command at the time the crimes were committed

774. The withdrawal of troops has been discussed above, and the Defence repeats and relies on these submissions. The order to withdraw the troops came not from Mr. Bemba, but from President Patassé. The Chamber heard from Patassé's spokesman who was with the President when the withdrawal of troops was being discussed;¹⁸⁰⁶ [REDACTED];¹⁸⁰⁷ which corroborates a contemporaneous interview with Patassé.¹⁸⁰⁸ This corroborated evidence from key players in the withdrawal demonstrates that the decision was made by President Patassé.

775. The implementation of the MLC's decision to send troops to the CAR took a matter of days. A decision that they should be withdrawn was taken in mid-February.¹⁸⁰⁹ The MLC troops did not start to arrive back in the DRC until a month

¹⁸⁰⁵ D-53, T-231, p.7.

¹⁸⁰⁶ D-65, T-247, pp.32-34:.

¹⁸⁰⁷ D-19, T-292, p.38: [REDACTED] not receive any order from Jean-Pierre Bemba to leave. Bombayake gave [REDACTED] the order and this order came from their presidents, [REDACTED]."

¹⁸⁰⁸ EVD-T-OTP-00443/CAR-OTP-0013-0005 at 0006.

¹⁸⁰⁹ EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0682, 0687.

later. This delay shows the disjunct between Mr. Bemba's political initiatives, and the reality of operational command. The MLC could only come home when Patassé said they could. He publicly owned this decision.¹⁸¹⁰

776. President Patassé's decision to order the withdrawal of the MLC troops must be seen against the backdrop of the ongoing national dialogue, and representatives from both sides of the 2002-2003 conflict meeting in Paris in order to attempt to work towards a peaceful resolution.¹⁸¹¹ Incumbent in that national dialogue was the retreat of all non-conventional forces present in the CAR in order to create a favourable atmosphere for the negotiations.¹⁸¹² In April 2014, the Defence sought the admission of a number of media articles detailing this national dialogue, and provided contemporaneous and corroborated reports of decisions by Patassé to reduce the intensity of fighting on the part of the loyalists as part of the negotiations.¹⁸¹³ The Chamber refused to admit these contemporaneous media reports on the basis that, *inter alia*, "an essential part of the information contained in the Documents is also provided in other documents which were previously admitted into evidence by the Chamber."¹⁸¹⁴ In such circumstances, the Defence relies on the information already in evidence as corroborative of the testimonial evidence that the decision to withdraw the MLC troops was given by Patassé, against the backdrop of a national dialogue.

(f) Logistics were provided by the Central African authorities

777. Mr. Bemba's alleged authority over logistics was not a factor confirmed by the Pre-Trial Chamber as being relevant to the exercise of effective control.¹⁸¹⁵ The Prosecution is impermissibly stepping outside the confirmed facts and

¹⁸¹⁰ EVD-T-OTP-00443/CAR-OTP-0013-0005 at 0006.

¹⁸¹¹ EVD-T-CHM-00042/CAR-OTP-0057-0243.

¹⁸¹² D-65, T-247, pp.32-34.

¹⁸¹³ ICC-01/05-01/08-3045-Conf, paras. 39-54.

¹⁸¹⁴ ICC-01/05-01/08-3075, para. 29.

¹⁸¹⁵ ICC-01/05-01/08-424, Confirmation Decision, paras. 466-477.

circumstances in asserting its relevance to this question. None of the Prosecution's submissions on this point should be taken into consideration by the Chamber.¹⁸¹⁶

778. Regardless, in asserting that "Bemba was the only source of weapons, ammunition and supplies",¹⁸¹⁷ the Prosecution is asking the Chamber to disbelieve the testimony of nearly half its witnesses, who provided corroborated testimony as to the supply of logistics to the MLC by the Central African government and military authorities.

779. The claim that all logistics were provided by Mr. Bemba is contradicted, firstly, in other sections of the Prosecution's own brief. The Prosecution asserts that the MLC troops were provided with new uniforms, at Camp Beal, by the "CAR authorities".¹⁸¹⁸ Elsewhere, the Prosecution asserts that "the CAR authorities supplied the MLC troops in the CAR with vehicles which facilitated their movements in the CAR."¹⁸¹⁹

780. Gbadolite was hundreds of kilometres from the front. The idea that daily food rations, for example, were flown or transported by boat over this distance is unrealistic. The FACA Colonel who was the head of the CCOP confirmed that the MLC troops were given some money, and they would be fed fish and rice.¹⁸²⁰ Oradimo, the Judge assigned to investigate the events of 2002-2003¹⁸²¹ confirmed that witnesses told him that money was distributed from the Central African treasury to cover the MLC expenses, and "for the food for Bemba's men."¹⁸²² It did

¹⁸¹⁶ Prosecution Closing Brief, paras. 595-597.

¹⁸¹⁷ Prosecution Closing Brief, para. 595.

¹⁸¹⁸ Prosecution Closing Brief, para. 13. See also para. 191.

¹⁸¹⁹ Prosecution Closing Brief, para. 153.

¹⁸²⁰ P-31, T-182, pp.29-30.

¹⁸²¹ P-9, T-102, pp.13-14.

¹⁸²² P-9, T-106, p.50. See also T-108, p.14.

not come from the Congo.¹⁸²³ Central African citizens on the ground witnessed the same thing. P-38 told the Chamber that the Banyamulenge “had fish from the sea. It couldn’t have come from the Congo.”¹⁸²⁴ P-23 confirmed that “it was President Patassé for whom they were fighting who was giving them food to fight.”¹⁸²⁵ P-63 said the same,¹⁸²⁶ as did P-173.¹⁸²⁷ The MLC in Gbadolite had the same understanding; that the Central African authorities were responsible for feeding their troops.¹⁸²⁸ [REDACTED] was explicit that “food came from the Central African Republic”.¹⁸²⁹ He testified that the MLC received beans, Thompson fish, rice, oil, cassava flour and beef, and that the food was brought using large trucks, driven by soldiers. They would receive rations on a weekly basis and the vehicles were provided by the headquarters.¹⁸³⁰ The Defence military expert confirmed the provision of food from the Central African side.¹⁸³¹ Even CHM-01 testified that “[t]he USP in the CAR was responsible for providing food to the MLC troops.”¹⁸³² The Chamber heard [REDACTED] evidence [REDACTED] sold to the MLC, bought with a *per diem* provided by the Central African authorities.¹⁸³³

781. The same evidence exists in relation to the supply of weapons and ammunition. Although some MLC crossed with individual weapons, they received their arms and ammunition from the Central African authorities. Findiro testified that “General Bombayake confirmed to us, when he was questioned, that he provided weapons to the MLC rebel troops so that they could conduct their

¹⁸²³ P-9, T-108, p.20.

¹⁸²⁴ P-38, T-33, p.43.

¹⁸²⁵ P-23, T-53, p.9.

¹⁸²⁶ P-63, T-116, pp.30-31.

¹⁸²⁷ P-173, T-146, p.9.

¹⁸²⁸ See, for example, P-65, T-168, p.60.

¹⁸²⁹ D-19, T-284, p.34.

¹⁸³⁰ D-19, T-284, pp.44-45.

¹⁸³¹ D-53, T-230, p.32.

¹⁸³² CHM-01, T-354, p.45.

¹⁸³³ D-66, T-279, p.55.

operations with those weapons.”¹⁸³⁴ Central African civilians on the ground confirmed this to be the case.¹⁸³⁵ P-151 a FACA company commander¹⁸³⁶ who worked at the CCOP¹⁸³⁷ characterized it as “normal” for Mustapha to go through the hierarchy of the CAR and ask for everything that he needed for his troops.¹⁸³⁸ [REDACTED] confirmed that the Central Africans provided the MLC with weapons and ammunition.¹⁸³⁹

782. D-19 explained the logic behind weapons coming from the Central African side, namely that: “you can’t know what kind of weaponry you need until you see what the enemy is using. You can’t “take a tank to fight somebody who’s just got a pistol.”¹⁸⁴⁰ The first information the MLC received about the weapons used by the enemy came on the first day of operations. The MLC learnt that they were “outgunned”, and artillery was accordingly then supplied by the Central Africans.¹⁸⁴¹

783. This is consistent with the evidence of the MLC’s limited resources, which would not have permitted a supply of ammunition and weapons to fight a foreign war. Amongst the belligerents in the DRC, “the MLC was thought of as the weakest movement, it didn’t have financial resources, it did not control major towns or cities within the DRC, it was located in the poorest part of the republic”.¹⁸⁴² Troops it could spare. Logistics it could not.

¹⁸³⁴ P-6, T-95, p.40. See also T-97, p.47.

¹⁸³⁵ P-173, T-146, p.11; P-38, T-33, p.45.

¹⁸³⁶ P-151, T-172, p. 9.

¹⁸³⁷ P-151, T-172, pp.9-12.

¹⁸³⁸ P-151, T-173, pp.58-59.

¹⁸³⁹ D-49, T-271, p.13.

¹⁸⁴⁰ D-19, T-284, p.35.

¹⁸⁴¹ D-19, T-284, p.35.

¹⁸⁴² P-15, T-210, pp.49-50.

784. The Prosecution asserts that “Bemba secured weapon supplies from Tripoli, which were transported by plane to Gbadolite and then to Bangui for the ALC troops on the ground.”¹⁸⁴³ Libyan troops were present in the CAR prior to and during the conflict, and were on the side of the loyalist forces.¹⁸⁴⁴ D-49, [REDACTED],¹⁸⁴⁵ explained that because Bangui Airport had fallen, flights from Libya that were to bring supplies to the CAR were unable to land. These flights would land in Gbadolite and the supplies would be taken to Zongo and then transported across the river.¹⁸⁴⁶ This was not MLC material, nor is there any evidence that it was “secured” by Mr. Bemba. Gbadolite and its airport were being used as a transit point for the Libyans. CHM-01’s testimony corroborates that of D-49. He confirmed that he was aware of the provision of arms by Libyans, and that this was a “secret issue” between the Libyans and Patassé.¹⁸⁴⁷ Mr. Bemba was not involved. D-66 confirmed that during the periods in which Bangui airport was open, Libyan planes would land and offload ammunition and weapons for “resupply”.¹⁸⁴⁸ The Chamber heard testimony that:¹⁸⁴⁹

the [CAR] was fully responsible for providing the equipment and other materials necessary to the MLC which had come to reinforce its army. The interpretation that we can give to the weapons and ammunition coming from Libya is that it was in fact not intended for the ALC. These were not supplies intended for the ALC *per se*, but supplies provided to the [CAR]. So what came through the DRC from Libya was intended not specifically for the ALC forces, but generally speaking to the Central African forces. And why did these supplies transit through the DRC? This was probably because there was not enough security for the transport aircraft to land directly in Bangui, so there was the solution of the planes from Libya landing in Gbadolite and the weapons and ammunition taken through the DRC territory to Zongo and then to Port Beach in Bangui. This was

¹⁸⁴³ Prosecution Closing Brief, para. 595.

¹⁸⁴⁴ P-45, T-204, pp.70-71; P-36, T-213, pp.67-68; P-31, T-183, p.39; P-173, T-145, p.30; P-73, T-70, pp.14-16; D-19, T-285, p.4; D-49, T-271, p.10.

¹⁸⁴⁵ D-49, T-270, p.13.

¹⁸⁴⁶ D-49, T-271, p.11.

¹⁸⁴⁷ CHM-01, T-357, p.64.

¹⁸⁴⁸ D-66, T-279, pp.46-47.

¹⁸⁴⁹ D-53, T-230, p.26.

the responsibility of the 4th bureau of the [CAR] forces, and this 4th bureau had to distribute these equipment and materials to the various units of the loyalist forces.

785. The Prosecution then asserts that “[t]he communications logbooks clearly show Mustpaha’s requests to Amuli and Bemba for these supplies”.¹⁸⁵⁰ It cites to only one message, dated 20 January, in which Mustapha writes to General Amuli, and asks to be provided with arms, ammunition, and a microphone for communication.¹⁸⁵¹ This message was explained by [REDACTED]. D-19 testified that in January 2003, cooperation with General Mazi had started to wane.¹⁸⁵² [REDACTED] a request to the CCOP for a Kenwood microphone, but received no answer.¹⁸⁵³ [REDACTED].¹⁸⁵⁴

786. On this point, it is important to remember that the conflict spanned from October 2002 until March 2003. As explained by CHM-01, the MLC was sent to the front:¹⁸⁵⁵

and when you are sent to the front, you don't keep the same amount of ammunition because you come in contact with the enemy and there is fighting. The numbers of ammunition reduces and you have to resupply so that the soldiers in the field should not be short of ammunition, because if they are short of ammunition they will not be in a position to continue the operations.

787. Had Mr. Bemba been “the only source” of weapons and ammunition, it would be logical that the cahier would be full of messages from Mustapha to his hierarchy in Gbadolite, requesting re-supplies of ammunition and weapons to sustain the 1,500 troops through months of fighting. It is not. The MLC was receiving its supplies of ammunition and weapons from the hierarchy to which it

¹⁸⁵⁰ Prosecution Closing Brief, para. 595.

¹⁸⁵¹ Prosecution Closing Brief, para. 595, fn.1911; EVD-T-OTP-00703/CAR-D04-0002-1641 at 1726.

¹⁸⁵² D-19, T-285, p.31.

¹⁸⁵³ D-19, T-284, p.53.

¹⁸⁵⁴ D-19, T-285, pp.31-32.

¹⁸⁵⁵ CHM-01, T-357, p.68.

had been re-subordinated. The provision of weapons by the FACA to the MLC is rendered even more likely by the fact that this had also been done so in 2001.¹⁸⁵⁶

788. The Prosecution's submissions concerning the flight logs are nothing more than speculation. The Prosecution's first attempt to have the logs admitted was rejected by the Chamber on the following grounds:¹⁸⁵⁷

The Chamber finds therefore that this document is only of limited relevance and might only assist the Chamber's determination of the facts relevant to the case in a limited manner. In relation to its probative value, the Chamber notes that, contrary to its submissions, the prosecution has provided no information regarding the origin and reliability of these documents. Indeed, according to the record, these documents were provided to the prosecution by a witness who was not called to testify. Further, there is nothing in the logbooks indicating that the records actually originate from Bangui Airport or that they were created by operators or officials of that airport. Contrary to what the prosecution submits, the documents are not self-explanatory, particularly not with regard to their origin and whether they in fact originate from Bangui Airport. Without a proper explanation as to the meaning of the information in the logbooks or their origin, the Chamber finds no probative value in their contents. Considering the insufficient relevance and probative value of these documents, the Chamber is of the view that admitting them would cause unfair prejudice to the accused.

789. While not seeking to circumvent the Chamber's decision to admit these documents,¹⁸⁵⁸ the Defence notes that none of the subsequent witnesses to whom the documents were shown had authored the documents, had seen them before, or were questioned about their authenticity.¹⁸⁵⁹ As such, while the documents now form part of the casefile, the Defence refers to the Chamber's original concerns as to their probative value in terms of the weight they should be ascribed

¹⁸⁵⁶ D-18, T-267, p.44.

¹⁸⁵⁷ ICC-01/05-01/08-2299, paras. 155-156.

¹⁸⁵⁸ ICC-01/05-01/08-2974, para. 21.

¹⁸⁵⁹ ICC-01/05-01/08-2974-, para. 20.

790. Given that the Prosecution failed to call any witnesses with any knowledge of the flight logs, the Prosecution's assertions that the relevant planes were owned by the MLC are nothing more than that; mere assertions. In any event, far from supporting any suggestion that the MLC was moving material into the CAR by air, the logs show the opposite. The total number of flights per month into and out of Bangui was consistently around 30 throughout the period for which records are available.¹⁸⁶⁰ There were two spikes: in August 2002 when there were 49 flights,¹⁸⁶¹ and February 2003 when there were 44.¹⁸⁶² On each occasion the increase was substantially explained by a large number of flights by a single aircraft; in August the Anotonov-26 tail number 9TALC which either took off or landed 15 times,¹⁸⁶³ and in February by the Antonov-26 tail number ERAWN, which accounted for half the flights that month.¹⁸⁶⁴

791. There is no evidence linking the Anotonv-26 ERAWN to the MLC. As for the second Antonov-26 with tail number 9TALC, this plane flew in and out of Bangui Airport 39 times in the eight months until September 2002 (about five flights per month), but only 15 times in the six months prior to April 2003 – half as frequently during the events.¹⁸⁶⁵

792. The Prosecution points to an increase in helicopter flights during the conflict period.¹⁸⁶⁶ Given the lack of evidence concerning its alleged cargo, the Prosecution has failed to rule out other reasonable explanations for its appearance in the flight logs, including ferrying the wounded from the ongoing conflict, or carrying fuel from Bangui to Gbadolite. There is no basis for the Prosecution's statement that

¹⁸⁶⁰ EVD-T-OTP-00585/CAR-OTP-0045-0002; EVD-T-OTP-00586/CAR-OTP-0045-0228.

¹⁸⁶¹ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0002-0030.

¹⁸⁶² EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0174-0207.

¹⁸⁶³ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0002-0030.

¹⁸⁶⁴ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0174-0207.

¹⁸⁶⁵ EVD-T-OTP-00586/CAR-OTP-0045-0228 at 0228-0242.

¹⁸⁶⁶ Prosecution Closing Brief, para. 596.

there were at least 74 MLC flights into the Bangui Airport between 4 November 2002 and 13 March 2003.¹⁸⁶⁷ This figure is only achieved by a misattribution of aircraft to the MLC. This applies particularly to the Antonov-26 ERAWN, but also to an Antonov-8 3CQQE.

793. Moreover, if the flight logs were demonstrative of the supply of weapons and ammunition by the MLC, the Chamber could have expected to hear evidence from witnesses about these planes landing, weapons and ammunition being unloaded, and then transported to and distributed to the MLC troops at the front. No such evidence was heard.

794. In reality, the purpose behind any MLC flights in and out of Bangui during the conflict was the supply of fuel. [REDACTED].¹⁸⁶⁸ [REDACTED]. [REDACTED]. [REDACTED].¹⁸⁶⁹ This evidence further undermines the Prosecution's speculative submissions as to what the flight logs demonstrate.

795. As for communications equipment, Mustapha [REDACTED] had left the Congo with one communication device, a Kenwood radio provided by the Echo brigade. This worked for a period, then broke.¹⁸⁷⁰ All other communication devices were provided by Bombayake. They were given "Kodan" devices and cellular devices when they were still within range of Bangui. When they left PK12 and went towards Damara these devices no longer provided coverage, and so Mustapha was given a Thuraya.¹⁸⁷¹ P-65 confirmed that the MLC commanders who went to the CAR had not been issued with walkie-talkies.¹⁸⁷² Lengbe confirmed that the

¹⁸⁶⁷ Prosecution Closing Brief, para. 596.

¹⁸⁶⁸ D-66, T-279, pp.49-50.

¹⁸⁶⁹ D-66, T-279, pp.43-47.

¹⁸⁷⁰ D-19, T-284, pp.37-39.

¹⁸⁷¹ D-19, T-284, pp.39-40. See also D-53, T-230, pp.16-17.

¹⁸⁷² P-65, T-170, pp.20-21.

Ministry provided walkie-talkies and mobile phones to the MLC troops for liaison purposes.¹⁸⁷³

796. Similar evidence was heard by the Chamber concerning all logistics. P-65 confirmed that “I can say that the logistics were provided by the Central African authorities, that is to say even military rations and uniforms were provided by the Central African authorities. I am quite sure about this.”¹⁸⁷⁴ [REDACTED] testified that it was the Central Africans who took responsibility for logistics. D-49, [REDACTED],¹⁸⁷⁵ confirmed that it was “the Central Africans who provided them with weapons, ammunitions, logistics, uniforms.”¹⁸⁷⁶ This was the Prosecution’s case in 2008. The Prosecution submitted to the Chamber that Patassé provided base camps, uniforms, transport, finance, additional orders, additional troops, vehicles, and food.¹⁸⁷⁷

797. The contemporaneous documents also show that the CAR authorities took full responsibility for the MLC logistics. CAR-D04-0003-0140 is a Message Porté from the FACA Chef d’Etat Major in November 2002, asking that all necessary measures be taken to ensure that electricity, arms and ammunition and health related facilities are made available to the MLC.¹⁸⁷⁸ CAR-D04-0003-0128 is a Memo from the Ministry of Defence of the [CAR], which provides “[t]he Minister of National Defence, following the resolution of the Interministerial Crisis Committee, authorises the provision of military effects or logistics to the allied forces, MLC; arms and identical uniforms, attribution of operational radio frequencies, tactical frequencies, and a setting up of a joint command, joint and integrated command,

¹⁸⁷³ P-31, T-182, p.31.

¹⁸⁷⁴ P-65, T-168, p.60.

¹⁸⁷⁵ D-49, T-270, p.13.

¹⁸⁷⁶ D-49, T-271, p.13.

¹⁸⁷⁷ ICC-01/05-01/08-128-Conf-AnxA, para. 14.

¹⁸⁷⁸ D-53, T-229, pp.62-63.

FACA, USP and the allied forces MLC.”¹⁸⁷⁹ CAR-D04-0003-0134 is a Message Porté from the Ministry of Defence, requesting the director general of logistics to cover the comprehensive allowance to be provided to MLC troops.¹⁸⁸⁰ CAR-D04-0003-0138 is a Governmental Authorisation of 9 January 2003, signed by the Minister of Defence on the instructions of President Patassé, which provides for the crossing of the river by the MLC reinforcements by the amphibian battalion of the FACA, and also that temporary housing be organized.¹⁸⁸¹ CAR-D04-0003-0133 is a Message Porté from the Chief of Staff dated 17 January 2003, which informs the G4 that the MLC troops are to be provided with logistical resources and fuel, as well as six troop transport vehicles and ten jeeps. It also states that fuel and maintenance for those vehicles should be provided.¹⁸⁸²

798. Rather than being demonstrative of Mr. Bemba’s alleged effective control, the supply of logistics by the Central African hierarchies is a further illustration of the re-subordination of the MLC troops into the FACA-led loyalist coalition.

(g) The Prosecution has not established that “Bemba did not relinquish his effective control over the MLC in the 2002-2003 CAR operation”

799. The factors confirmed by the Pre-Trial Chamber as forming part of the case concerning Mr. Bemba’s “effective control” have been discussed above.¹⁸⁸³ The Prosecution then inserts another heading, that “Bemba did not relinquish his effective control over the MLC in the 2002-2003 CAR operation”,¹⁸⁸⁴ which appears to be a “catch-all” for evidence falling outside the case as confirmed.

¹⁸⁷⁹ D-53, T-230, pp.3-5.

¹⁸⁸⁰ D-53, T-230, p.51.

¹⁸⁸¹ D-53, T-230, pp.33-34.

¹⁸⁸² D-53, T-230, p.25.

¹⁸⁸³ ICC-01/05-01/08-424, Confirmation Decision, paras. 446-477.

¹⁸⁸⁴ Prosecution Closing Brief, paras. 598-609.

800. In addition to impermissibly falling outside the case, these submissions do not establish effective control. The Prosecution appears to suggest that the fact that the Central African authorities had to ask the MLC for reinforcements, is demonstrative of the fact that they did not have “control of the ALC”.¹⁸⁸⁵ It is not the position of the Defence that the FACA had control over the entire ALC, nor is a request for reinforcements relevant to the operational structure of the troops already dispatched. The Prosecution puts forward P-36’s second-hand testimony of discussions between General Gambi and Mr. Bemba to allege that Gambi asked for “authorization” for MLC troops to advance north,¹⁸⁸⁶ not acknowledging that it was contradicted by [REDACTED].¹⁸⁸⁷

801. The Prosecution points to examples of alleged weakness of the FACA, and submits it did not have the capacity to command a contingent of foreign troops.¹⁸⁸⁸ The wealth of evidence concerning the functioning CCOP and a concerted loyalist effort in the first four months of the campaign against the rebels demonstrates otherwise. The claim that the Central African forces feared the MLC is again based solely on the testimony of P-178,¹⁸⁸⁹ whose credibility is discussed in Chapter II. The Prosecution again resorts to reliance on a civilian of dubious credibility while ignoring swathes of direct evidence concerning the command chain in place.

802. The alleged incident in Mongoumba is not part of the charges confirmed and as such should not form part of the Chamber’s deliberations.¹⁸⁹⁰ Regardless, the assertion that the Central African authorities had no power to arrest or punish MLC forces has been discussed above, and is both factually and legally incorrect.¹⁸⁹¹

¹⁸⁸⁵ Prosecution Closing Brief, paras. 600, 603.

¹⁸⁸⁶ Prosecution Closing Brief, para. 600.

¹⁸⁸⁷ CHM-01, T-356, pp.13-14.

¹⁸⁸⁸ Prosecution Closing Brief, para. 602.

¹⁸⁸⁹ Prosecution Closing Brief, para. 603.

¹⁸⁹⁰ Prosecution Closing Brief, para. 607.

¹⁸⁹¹ Prosecution Closing Brief, paras. 601, 606-607.

803. President Patassé was not required to report misconduct to Mr. Bemba.¹⁸⁹² The assertion that “Patassé specifically complained to Bemba about the crimes of ALC troops in the CAR”¹⁸⁹³ is, again, based only on the testimony of P-213, who claims [REDACTED]”. His version of events, which involves [REDACTED], is difficult to accept.¹⁸⁹⁴ P-31 confirmed that Mr. Bemba was not accompanied by a bodyguard, undermining [REDACTED].¹⁸⁹⁵ P-36, [REDACTED],¹⁸⁹⁶ [REDACTED];¹⁸⁹⁷ [REDACTED].

9. Conclusion on effective control

804. Two aspects are missing from the Prosecution’s submissions. The first is any explanation of how Mr. Bemba had sufficient information allowing him to give specific operational orders resulting in a successful military offensive in a third state over a period of four months. Mr. Bemba’s military experience was “rudimentary”;¹⁸⁹⁸ his military training at La Forestiere in Kisangani had lasted one week.¹⁸⁹⁹ Photos depicting Mr. Bemba in military uniform or at the front are nothing more than propaganda.¹⁹⁰⁰ The Defence military expert testified:¹⁹⁰¹

I remember in the statement of [REDACTED] he says that Mr Bemba had no military competence, no military training, so I think we can have confidence in that. If you have no military training, it s difficult to command troops, isn t it? On the other hand, the same [REDACTED] recognises that Mr Bemba did go on several occasions to the Democratic Republic of Congo to areas conflict areas and on those occasions he did speak to people, but when he showed valour, showing valour is one thing, but that s different from having the

¹⁸⁹² Prosecution Closing Brief, para. 604.

¹⁸⁹³ Prosecution Closing Brief, para. 604.

¹⁸⁹⁴ P-213, T-190, p.58.

¹⁸⁹⁵ P-31, T-184, p.19.

¹⁸⁹⁶ P-36, T-218, pp.26-27.

¹⁸⁹⁷ P-36, T-218, pp.26-27.

¹⁸⁹⁸ D-53, T-233, p.23; D-21, T-301, p.33.

¹⁸⁹⁹ D-21, T-304, p.22.

¹⁹⁰⁰ D-21, T-304, p.25; D-18, T-320, pp.14-16.

¹⁹⁰¹ D-53, T-233, p.21.

capacity and experience and training to command the different operations.

805. In addition to this handicap, Mr. Bemba would have been operating in the dark. The Prosecution has never suggested that a commander of a military operation does not need real-time knowledge of the evolving situation on the ground. Despite [REDACTED]'s self-serving testimony that Mr. Bemba had better knowledge of the conflict than the Central African high command, he did not explain how Mr. Bemba would have known about the terrain, vegetation, logistics, the roads and buildings in place, or been able to synchronize the different units operating as part of the loyalist coalition. D-39, [REDACTED], explained the impossibility of the Prosecution's theory as follows:¹⁹⁰²

In order to be able to command units out in the field, first of all one must have real-time intelligence and one must have the capacity to react as fast as possible. One must have intelligence of what is going on out in the field in order to be able to ascertain the vegetation, the field of observation, the field of fire, the terrain, the progress, roads in place, and there's a lot of information that one needs and one must be able to react to this information. One needs to be able to synchronise all the units in time. One must also have specific information on the enemy in real-time. One also requires command over all the units that are operational out in the field and, once you have ascertained these conditions, when sending the troops with our units in the CAR, Mr Jean-Pierre Bemba did not have command over the other units who were moving side by side with the MLC units, which meant that he was not in a position to be able to command operations in the Central African Republic.

806. Even the Prosecution's purported "phone records" show a six-day silence during a critical period in the fighting.¹⁹⁰³ Even accepting the Prosecution's evidence at its absolute highest, Mr. Bemba did not have the requisite experience, tools or

¹⁹⁰² D-39, T-310, p.37.

¹⁹⁰³ EVD-T-OTP-00591/CAR-OTP-0055-0893 demonstrates no contact as between 4 February and 10 February 2003.

information at his disposal to direct operations. The Chamber heard unchallenged expert evidence that:¹⁹⁰⁴

commanding 1,500 people on the ground, from a distance of 1,000 kilometres, in a situation of which one is not properly informed, such as enemy troops, friendly troops, situation on the ground, situation of the people, ammunitions, details relating to the operational centre and cohesion relating to the missions given to the other forces, well, I don't -- I don't see how it is possible for one to command under such circumstances particularly when one needs to be informed about the situation and location of the force, what it is doing and so on and so forth. You see, yesterday -- from yesterday we have been talking about the system that enables one to command, and Mr Bemba did not have such a system in place. In order to be able to command, the commander must have a tool known as a staff headquarters, which is under the command of a Chief of Staff. That headquarters collects all information and issues orders, so I really do not see how Mr Bemba could have been fully informed, or could have been as informed as the operational centre in Bangui, of what was transpiring. In any event, any information that he could share with Colonel Moustapha was general, open information, and I think that General Bozizé also had a Thuraya telephone and maybe he could have been in a position to listen to such discussions, or call in pretending to be someone else. As far as I am concerned, it would not have been possible under the circumstances as we know them for Mr Bemba to command Colonel Moustapha using a Thuraya telephone.

807. The second unexplored aspect in the Prosecution's submissions is why it was in Mr. Bemba's interests to assume operational control over MLC troops fighting in a foreign conflict. It was undoubtedly a full-time job. [REDACTED],¹⁹⁰⁵ (which is borne out by the MLC cahier)¹⁹⁰⁶ nor any evidence of any members of the MLC Etat Major providing operational or other support, it must be presumed that it was a one-man-show. Mr. Bemba would be required to have carried out the work of an entire Etat Major, by himself, from his house in Gbadolite. The Prosecution has painted a picture of Mr. Bemba as a man on a "quest for ultimate power in the

¹⁹⁰⁴ D-53, T-230, p.19.

¹⁹⁰⁵ P-36, T-215, pp.39-41.

¹⁹⁰⁶ EVD-T-OTP-00702/CAR-D04-0002-1514; EVD-T-OTP-00703/CAR-D04-0002-1641.

Democratic Republic of Congo”¹⁹⁰⁷, who raised an army of 20,000 troops for that purpose.¹⁹⁰⁸ It gives no explanation as to why he would dedicate months of his time, at such a critical juncture in the history of the DRC,¹⁹⁰⁹ to directing military operations which involved less than ten percent of his troops, in a foreign state.

808. This is indeed the Prosecution’s case. It is not only implausible, it is not supported by the evidentiary record. In reality Prosecution has failed to establish a relationship of subordination, either *de jure* or *de facto*, between Mr. Bemba and the alleged perpetrators during the relevant period which would have allowed him to exercise effective control. As such, he cannot incur criminal responsibility as a commander.

B. THE PROSECUTION HAS NOT ESTABLISHED MR. BEMBA’S ACTUAL KNOWLEDGE

809. During the course of the conflict in the CAR, rumours began circulating that crimes were being committed against the civilian population. Media reports gave mixed messages concerning the identity of the perpetrators.¹⁹¹⁰ Those reports which blamed the “Banyamulenge” were vague,¹⁹¹¹ providing only “rudimentary” information.¹⁹¹² The Prosecution does not dispute that, on the basis of these vague rumours, Mr. Bemba took active steps to try to determine whether the allegations were, as they had been in the past, the result of political manipulation,¹⁹¹³ or were based in truth.

¹⁹⁰⁷ Prosecution Closing Brief, p.3.

¹⁹⁰⁸ Prosecution Closing Brief, para. 148.

¹⁹⁰⁹ The Sun City II negotiations were being conducted simultaneously with the CAR intervention: [REDACTED].

¹⁹¹⁰ Contemporaneous media reports attributed crimes to Bozize’s rebels. See, for example EVD-T-CHM-00034/CAR-D04-0004-0030; EVD-T-D04-00008/CAR-DEF-0001-0832; EVD-T-CHM-00004/CAR-DEF-0001-0205; EVD-T-CHM-00035/CAR-D04-0004-0032; EVD-T-OTP-00416/ CAR-OTP-0005-0147.

¹⁹¹¹ D-21, T-302, pp.19-20; D-49, T-272, p.24; P-15, T-209, pp.17-18.

¹⁹¹² D-21, T-302, p.18.

¹⁹¹³ D-18, T-319, p.28; P-15, T-209, p.36; P-15, T-210, p.53; D-48, T-267, pp.70-71; D-49, T-272, pp.60-63; D-21, T-306, p.83.

810. Despite these efforts, Mr. Bemba received no concrete information concerning the identity of victims, the identity of perpetrators, the date and place of the alleged offences, or the circumstances of the event in question sufficient to warrant a finding that he “knew” that members of the MLC contingent in the CAR were committing or were about to commit crimes. The Prosecution has not demonstrated otherwise.

1. The case, as confirmed by the Pre-Trial Chamber

811. The Pre-Trial Chamber confirmed a case that Mr. Bemba **knew** that MLC troops were committing or were about to commit crimes.¹⁹¹⁴ It did not confirm the alternative allegation that Mr. Bemba should have known of these allegations. Its finding that Mr. Bemba knew of the underlying crimes is based on the following factors:

- (i) Mr. Bemba’s visit(s) to the Central African Republic;¹⁹¹⁵
- (ii) Mr. Bemba’s suspension of two officers after his visit;¹⁹¹⁶
- (iii) Mr. Bemba’s words of caution during that visit;¹⁹¹⁷
- (iv) The duration and extensive nature of the attack against the civilian population as well as the widespread nature of the illegal acts committed by MLC members;¹⁹¹⁸
- (v) Broadcasts in the press and Mr. Bemba’s review of that media;¹⁹¹⁹
- (vi) Direct information from his political circle and intelligence advisors about the alleged murders/rapes/pillage committed by the troops at least three months before withdrawal;¹⁹²⁰

¹⁹¹⁴ Confirmation Decision, ICC-01/05-01/08-424, paras. 478 *et seq.*

¹⁹¹⁵ Confirmation Decision, ICC-01/05-01/08-424, para. 485.

¹⁹¹⁶ Confirmation Decision, ICC-01/05-01/08-424, para. 485.

¹⁹¹⁷ Confirmation Decision, ICC-01/05-01/08-424, para. 485.

¹⁹¹⁸ Confirmation Decision, ICC-01/05-01/08-424, paras. 486, 489.

¹⁹¹⁹ Confirmation Decision, ICC-01/05-01/08-424, para. 486.

¹⁹²⁰ Confirmation Decision, ICC-01/05-01/08-424, paras. 487, 489.

- (vii) Mr. Bemba's letter to the Special Representative of the UN Secretary General in Central African Republic refuting allegations of crimes;¹⁹²¹
- (viii) Mr. Bemba's means of communication which, the Pre-Trial Chamber appears to have said, would have allowed Mr. Bemba to verify the information by contacting the commanders in the field.¹⁹²²

812. On that basis, the Pre-Trial Chamber concluded that Mr. Bemba possessed the requisite knowledge "as of the beginning of the operations and throughout the entire period of interventions".¹⁹²³ The Pre-Trial Chamber suggested that a "genuine will" to take the necessary measures to protect the civilian population by preventing crimes or even repressing their commission was lacking.¹⁹²⁴ This element underlined the need to establish a volitional element; an intention on the part of the commander not to fulfill his duties in full awareness of his duty to act.¹⁹²⁵

813. Again, the Prosecution strays outside these confirmed categories, and relies on other factors such as the investigative missions to Zongo¹⁹²⁶ and Sibut,¹⁹²⁷ and the Gbadolite trials.¹⁹²⁸ These fall outside the case as confirmed, and should form no part of the Chamber's deliberations. In any event, none of these measures provided Mr. Bemba with information sufficient to warrant a finding that he had actual knowledge that crimes had been or were about to be committed.

2. Legal standard concerning knowledge

814. The law concerning a commander's knowledge requires much more than an awareness of the general and unsubstantiated rumours the Prosecution contends

¹⁹²¹ Confirmation Decision, ICC-01/05-01/08-424, para. 487.

¹⁹²² Confirmation Decision, ICC-01/05-01/08-424, para. 488.

¹⁹²³ Confirmation Decision, ICC-01/05-01/08-424, para. 489.

¹⁹²⁴ Confirmation Decision, ICC-01/05-01/08-424, para. 501.

¹⁹²⁵ *Bagilishema* AJ, para 35; High Command Case, Volume X, at 543-545.

¹⁹²⁶ Prosecution Closing Brief, paras. 617(i), 645, 648-649.

¹⁹²⁷ Prosecution Closing Brief, para. 617(o).

¹⁹²⁸ EVD-T-OTP-00393/CAR-DEF-0002-0001; D-16, T-275, pp.41-45.

were circulating during the relevant events. In order to impute criminal liability to a commander, the Prosecution must prove beyond reasonable doubt that he had actual knowledge; an awareness not just of the commission of any crimes by subordinates, but the commission of the crime charged against him.¹⁹²⁹

815. In this regard, the ICTY Appeals Chamber in *Orić* held that the existence of crimes in general cannot serve to put the defendant on notice in the absence of specific information identifying the perpetrators as persons falling under the effective control of the defendant;¹⁹³⁰ “knowledge of a crime and knowledge of a person’s criminal conduct are, in law and in fact, distinct matters”.¹⁹³¹ It is not enough for a superior to have known of the commission of crimes generally. Moreover, knowledge of a general matrix of events and conduct does not suffice to constitute knowledge under the doctrine of superior responsibility.¹⁹³² Nor does a general awareness of criminal propensities among some subordinates.¹⁹³³ Actual knowledge cannot be “presumed”.¹⁹³⁴

816. Concerning knowledge that troops “were about to commit” crimes, “the knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law.”¹⁹³⁵ It is not sufficient that the information known to Mr. Bemba at the time of the offence would have indicated the possibility that such offences *might* occur, but it is required that the information indicated that such crimes *would* occur.”¹⁹³⁶

¹⁹²⁹ *Strugar* TJ, paras. 416-417; *Krnojelac* AJ, paras. 155, 178-179; *Hadžihasanović* TJ, para. 106.

¹⁹³⁰ Article 30; See also *Orić* AJ, paras. 35; 52; 55-60; 169-174.

¹⁹³¹ *Orić* AJ, para. 59.

¹⁹³² *Bagilishema* AJ, para. 42.

¹⁹³³ *Hadžihasanović* TJ paras. 115-117 and references therein.

¹⁹³⁴ *Delić* TJ, para. 64; *Brdjanin* TJ, para. 278.

¹⁹³⁵ See *Blaškić* AJ, para. 41.

¹⁹³⁶ *Halilović* TJ, p.29, fn. 164, citing with approval *Strugar* TJ, paras. 417-419, 420.

817. Of particular relevance to this case is the requirement that a superior who receives information suggesting improper conduct on the part of subordinates is entitled, and is in fact expected, to try to verify that information or to have that information verified, before taking any further steps. An awareness of general rumours of crimes would not suffice to conclude that an accused had acquired sufficient notice as to trigger his criminal responsibility.¹⁹³⁷ US Supreme Court Judge Rutledge held in his *Yamashita* opinion that “conviction shall not rest in any essential part upon unchecked rumor [...], but shall stand on proven fact”.¹⁹³⁸

818. Consideration must be had to the accused’s knowledge at the time the crimes were alleged to have been committed, and not what appears reasonable with hindsight: “Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight”.¹⁹³⁹

3. The Prosecution has failed to establish that Mr. Bemba had knowledge of the chapeau elements of crimes charged

819. As discussed in Chapter V, the Prosecution is required to prove that Mr. Bemba not only had knowledge that his subordinates were committing or were about to commit crimes, but also that he had knowledge of the chapeau elements of the crimes charged; war crimes and crimes against humanity.¹⁹⁴⁰ The Prosecution has failed to do so. No submissions have been made on this point by the Prosecution, and no evidential basis exists for a finding beyond reasonable doubt that Mr. Bemba possessed the requisite *mens rea* at all times during the relevant period. In particular, no basis exists for a finding that throughout the entirety of the relevant period, Mr. Bemba was aware of (i) the existence of an armed conflict and

¹⁹³⁷ See *Hadžihasanović* TJ, paras. 1222-1223.

¹⁹³⁸ *Yamashita* case (US Supreme Court judgment), Dissenting Judgment of Mr. Justice Rutledge.

¹⁹³⁹ United States: Department of Defence Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War, 10 April 1992, re-printed in 31 *ILM* 612 (1992).

¹⁹⁴⁰ *Krnojelac* AJ, paras. 155, 178-179; *Naletilić* AJ, paras. 114, 118, 121.

the nature thereof; (ii) the fact that the underlying crimes were part of it; (iii) the existence of a widespread attack¹⁹⁴¹ against a civilian population and (iv) the fact that the underlying crimes were part of that. Without Mr. Bemba's knowledge of the chapeau elements being established beyond a reasonable doubt, no liability can arise under Article 28(a) of the Statute.

4. Mr. Bemba did not have actual knowledge that his troops were committing or were about to commit crimes

(a) Were the crimes foreseeable?

820. For a superior to engage his command responsibility, it must be shown that he knew that a crime had occurred or would occur in the ordinary course of events. The evidence heard provides no basis for a finding that Mr. Bemba knew that members of the Echo battalion, under the command of Colonel Mustapha, would commit crimes in the CAR.

821. The support of the civilian population was a key plank in the MLC's strategy. The MLC was guided by the Ugandan authorities who were "very mindful of the need for civilians to be closely linked with the life of a military movement".¹⁹⁴² It was thought that the MLC could not be a liberation movement if the civilians didn't have a shared interest in the destiny of the soldiers, so it was important that the ideals of the movement became common to all.¹⁹⁴³ It was "crucial to have the support of the population" during an asymmetrical war, where the rebellion is not as strong as the government.¹⁹⁴⁴ D-39, [REDACTED], testified that:¹⁹⁴⁵

¹⁹⁴¹ Confirmation Decision, ICC-01/05-01/08-424, paras. 72, 82.

¹⁹⁴² P-15, T-210, p.36.

¹⁹⁴³ P-15, T-210, p.37.

¹⁹⁴⁴ D-21, T-301, p.34.

¹⁹⁴⁵ D-39, T-308, p.50.

when you are conducting a revolution or a war of revolution, then of course one of the main weapons of a revolution is to have the support of the population. So it was necessary for us to have the civilian support and it was necessary for us to entertain good relations with the civilian population.

822. As to whether the MLC succeeded in this quest, the results of the 2006 elections are telling. Of the three belligerents, the MLC was the only group to be elected in its former territory, demonstrating the regard with which the civilian population held the movement.¹⁹⁴⁶ The population felt more secure under the control of the MLC than under the control of any other force.¹⁹⁴⁷ The Prosecution did not challenge this evidence.

823. The importance of the link between the movement and the population meant, in practice, that the discipline of the army was of key importance. [REDACTED] stressed discipline was “very basic. That’s the first thing, discipline. The soldiers would be trained and a great deal of emphasis would be put on discipline, and we would stress that the army is based on military discipline.”¹⁹⁴⁸ Unlike their eventual adversaries in the CAR,¹⁹⁴⁹ the training of new MLC recruits took four months, sometimes five.¹⁹⁵⁰ Another witness put the training at between six and nine months.¹⁹⁵¹ There were two training centres set up, at Kota-Koli and Basankusu.¹⁹⁵² At first, training was provided by Ugandan officers, and then by Congolese after the Ugandans withdrew.¹⁹⁵³ Recruits “were taught this Code of Conduct in the training centres for the purpose of familiarising them with the principles of discipline, but this training was reinforced during the time when the

¹⁹⁴⁶ D-21, T-301, pp.34-35; D-49, T-308, p.50.

¹⁹⁴⁷ P-15, T-210, p.44.

¹⁹⁴⁸ P-36, T-213, p.51.

¹⁹⁴⁹ D-56, T-313, pp.20-22; D-53, T-231, pp.27-28; P-73, T-70, pp.11-13.

¹⁹⁵⁰ P-36, T-213, p.50.

¹⁹⁵¹ D-53, T-231, pp.42-43.

¹⁹⁵² D-53, T-231, p.42.

¹⁹⁵³ P-15, T-207, p.48; P-36, T-213, pp.50-51.

soldiers were in their various units.”¹⁹⁵⁴ Those soldiers who were “very disciplined” would receive leadership training and go on to be officers.¹⁹⁵⁵

824. Accordingly, the MLC troops were “very well trained”, including in the area of discipline,¹⁹⁵⁶ which was regarded as being “crucial”.¹⁹⁵⁷ [REDACTED],¹⁹⁵⁸ referred to isolated incidents of indiscipline, but testified that in general discipline in the MLC was “good, even very good”.¹⁹⁵⁹

825. It was the discipline of its soldiers that led to the MLC being respected.¹⁹⁶⁰ P-15 testified that “it was understood that the discipline of the MLC troops was recognised by all the other movements, all the other liberation movements”¹⁹⁶¹ and that “the MLC made every effort to maintain discipline among its troops.”¹⁹⁶² It was the discipline of the army that gave the MLC a strong foothold in the Sun City negotiations.¹⁹⁶³

[REDACTED] within the MLC there was an army, an army that was recognised as being strong and disciplined, and that allowed throughout the entire course of the negotiations, despite the fact that the MLC was thought of as the weakest movement, it didn’t have financial resources, it did not control major towns or cities within the DRC, it was located in the poorest part of the republic, and yet it did have one advantage. It had an army with a good reputation, a disciplined army that could fight, [REDACTED].

826. The Prosecution has not established that either Echo Brigade or its commander Colonel Mustapha had a reputation for committing crimes or flouting

¹⁹⁵⁴ D-53, T-231, p.43.

¹⁹⁵⁵ P-36, T-213, pp.50-51.

¹⁹⁵⁶ D-49, T-270, p.41.

¹⁹⁵⁷ P-15, T-210, p.44.

¹⁹⁵⁸ D-16, T-275, p.14.

¹⁹⁵⁹ D-16, T-275, p.24.

¹⁹⁶⁰ D-48, T-267, p.35.

¹⁹⁶¹ P-15, T-208, p.3.

¹⁹⁶² P-15, T-208, p.32.

¹⁹⁶³ P-15, T-210, pp.49-50.

the code of conduct. The evidence, in fact, demonstrates otherwise.¹⁹⁶⁴ They were well-trained soldiers who followed orders given to them.¹⁹⁶⁵

827. Moreover, this was not the MLC's first intervention in the CAR. The first, conducted in 2001, was without incident. P-31, who was the head of the CCOP, testified that during the first intervention in 2001 "things had gone smoothly".¹⁹⁶⁶ The Chamber heard from [REDACTED], who gave candid testimony about two cases of indiscipline of the MLC troops in the Central African Republic in 2001 (neither of which were reported to Gbadolite, but rather dealt with at the level of the unit),¹⁹⁶⁷ but otherwise testified that the MLC troops did not commit crimes.¹⁹⁶⁸

828. In such circumstances, no reasonable trier of fact could conclude that the underlying crimes for which Mr. Bemba now stands accused were foreseeable or that he, at any time during the relevant period, had notice that any of the crimes charged against him were about to be committed, and intentionally refrained from acting.

5. Mr. Bemba did not have actual knowledge that the crimes with which he is charged would occur

829. As if unconstrained by the jurisprudential limits of superior responsibility, the Prosecution attempts to impute criminal liability on the basis of general rumours and vague reports of alleged criminal activity circulating during the events, rather than concrete information on the basis of which specific steps could have been taken.

¹⁹⁶⁴ P-36, T-217, p.48; D-19, T-285, pp. 34-35; P-15, T-210, p.49.

¹⁹⁶⁵ D-53, T-233, pp.8-9.

¹⁹⁶⁶ P-31, T-183, p.19.

¹⁹⁶⁷ D-18, T-319, pp.20-24.

¹⁹⁶⁸ D-18, T-317, pp.47-48.

830. There is no evidence that Mr. Bemba knew of the individual incidents with which he is now charged. Knowledge of the crimes with which a superior is charged may not be replaced by an awareness of general (but unspecific) allegations of criminal conduct among subordinates.¹⁹⁶⁹ This is not the state of international law, and would arguably fall foul of the presumption of innocence.

831. Mindful of the requirement that a superior's level of knowledge be assessed at the relevant time, rather than with hindsight, there is overwhelming evidence that crimes alleged in the CAR were not reported contemporaneously. P-38, who was [REDACTED] in Begoua¹⁹⁷⁰ confirmed that rapes were not reported because it was a question of honour.¹⁹⁷¹ [REDACTED], and in fact was unable to give the name of any rape victims.¹⁹⁷² P-81 did not report her alleged attack. Although she told her father, she is not aware that he reported it to anyone, and only saw a doctor after the ICC became involved.¹⁹⁷³ P-82 did not report her alleged rape to anyone.¹⁹⁷⁴ Nor did P-80. Although her husband went to a police station, he did not make an official complaint in writing.¹⁹⁷⁵ P-79 never filed a complaint about her daughter's alleged rape.¹⁹⁷⁶ She also confirmed that she never brought alleged looting to the attention of Banyamulengue officers, nor did she hear of anyone who did.¹⁹⁷⁷ P-119 told a similar story, that there was no opportunity to report alleged crimes.¹⁹⁷⁸

832. [REDACTED].¹⁹⁷⁹ P-63 never saw a member of the population make a complaint to a member of the MLC.¹⁹⁸⁰ P-110 did not inform the authorities about

¹⁹⁶⁹ *Bagilishema* AJ, para. 42; *Orić* AJ, paras. 35; 52; 55-60, 169-174.

¹⁹⁷⁰ P-38, T-33, p.10.

¹⁹⁷¹ P-38, T-34, p.52.

¹⁹⁷² P-38, T-36, pp.35-37.

¹⁹⁷³ P-81, T-55, p.32; T-57, pp.14-15.

¹⁹⁷⁴ P-82, T-58, p.23.

¹⁹⁷⁵ P-80, T-63, pp.27-28.

¹⁹⁷⁶ P-79, T-79, pp.6-7.

¹⁹⁷⁷ P-79, T-77, pp.57-58.

¹⁹⁷⁸ P-119, T-85, pp.30-31.

¹⁹⁷⁹ [REDACTED].

the alleged looting of her house.¹⁹⁸¹ She testified she spoke to some gendarmes in 2008, although there is no mention of this looting in her statement.¹⁹⁸² P-108 was a magistrate who claimed his house had been looted. Even he saw no point in making a contemporaneous police report, and only reported the crimes in September 2008,¹⁹⁸³ after Mr. Bemba's arrest in May. Moreover, in his role as Senior Instructing Judge at the *Tribunal de Grande Instance* in Bangui until August 2003, he was never seized with any complaints concerning alleged crimes committed by MLC soldiers.¹⁹⁸⁴ P-169 testified about an alleged killing which he confirms he did not report to the authorities.¹⁹⁸⁵ P-173 confirmed that at no time did he denounce the perpetrators of crimes to the Central African authorities.¹⁹⁸⁶ Nor did P-178.¹⁹⁸⁷ P-47 claimed to have been a witness to multiple rapes. He did not report any of these acts to the authorities, and again spoke up only once the ICC became involved. He spoke to Mr. Ngoungaye, who was going to charge him 50,000 CFA for the privilege; money he did not have.¹⁹⁸⁸ P-69 confirmed that it was impossible to make a complaint during this period, as there were no authorities left.¹⁹⁸⁹ If the alleged victims were staying silent, how could this information have reached Gbadolite?

833. Concerning the rumours that did reach Gbadolite, no actionable information was provided. Rather than concrete reports of crimes committed in particular areas against members of the Central African civilian population, the information coming back to Gbadolite was nothing more than unverified rumours of general allegations of criminal activity by "Banyamulengue". The information in the MLC's possession

¹⁹⁸⁰ P-63, T-115, pp.16-17.

¹⁹⁸¹ P-110, T-126, p.6.

¹⁹⁸² P-110, T-126, p.27.

¹⁹⁸³ P-108, T-132, p.30.

¹⁹⁸⁴ P-108, T-134, pp.2-4.

¹⁹⁸⁵ P-169, T-142, pp.16-17.

¹⁹⁸⁶ P-173, T-147, p.4.

¹⁹⁸⁷ P-178, T-154, pp.42-44.

¹⁹⁸⁸ P-47, T-181, pp.34-35.

¹⁹⁸⁹ P-69, T-193, p.28; T-196, pp.38-39.

was “rudimentary”.¹⁹⁹⁰ The rumours they were hearing were not precise enough to constitute “information”.¹⁹⁹¹ [REDACTED].”¹⁹⁹² This was corroborated by [REDACTED]: “to our knowledge, where we were at the time, we did not hear any specific information to do with these allegations.”¹⁹⁹³ This is of particular significance given the obligation for the Prosecution to establish an awareness not just of the commission of any crimes by subordinates, but the commission of the crimes with which Mr. Bemba has been charged.¹⁹⁹⁴

834. Attempts at verification proved fruitless. Armed with vague rumours, Mr. Bemba contacted the MLC Commander in the CAR directly, and informed him of RFI’s reporting. [REDACTED].”¹⁹⁹⁵ The Prosecution has provided no basis for asserting that [REDACTED] should not have been accepted at face value. This is particularly so given that direct appeals for concrete information to the Special Representative of the UN Secretary General, and FIDH similarly produced no concrete or actionable information.¹⁹⁹⁶

835. President Patassé made a public statement that the Central African population lived in harmony with the soldiers of Jean-Pierre Bemba.¹⁹⁹⁷ Again, no basis has been provided for someone outside of the country to doubt the veracity of this statement. P-36 confirmed that members of the Central African population

¹⁹⁹⁰ D-21, T-302, p.18.

¹⁹⁹¹ D-21, T-302, p.20.

¹⁹⁹² D-21, T-302, p.19.

¹⁹⁹³ D-49, T-272, p.24.

¹⁹⁹⁴ *Strugar* TJ, paras. 416-417; *Krnojelac* AJ, paras. 155, 178-179; *Hadžihasanović* TJ, para. 106.

¹⁹⁹⁵ [REDACTED].

¹⁹⁹⁶ EVD-T-OTP-00453/CAR-OTP-0017-0363 Letter from Mr. Bemba to General Cissé dated 4 January 2003; EVD-T-OTP-00584/CAR-OTP-0033-0209 Letter from General Cissé to Mr. Bemba dated 27 January 2003; EVD-T-OTP-00704/ CAR-D04-0002-1455 Letter to the United Nations dated 21 April 2011; EVD-T-OTP-00705/ CAR-D04-0002-1462 Letter from the United Nations dated 25 July 2011; EVD-T-OTP-00391/ CAR-DEF-0001-0152 Letter from Mr. Bemba to FIDH dated 20 February 2003; EVD-T-OTP-00690/CAR-DEF-0001-0154 Letter from FIDH’s President Kaba to Mr. Bemba dated 26 February 2003.

¹⁹⁹⁷ EVD-T-OTP-00576/CAR-OTP-0031-0099, minute 03.15-03.29; P-6, T-96, p.4.

were present during Mr. Bemba's speech to his troops, and rather that protesting about the alleged widespread criminal activity, they were "indifferent".¹⁹⁹⁸

836. The three investigative commissions or missions undertaken during the events provided Mr. Bemba with no concrete information of any criminal activity on the part of his troops.¹⁹⁹⁹ Reports came back to Mr. Bemba that either the alleged crimes had not occurred,²⁰⁰⁰ or that crimes had occurred but had been committed by Bozizé's troops.²⁰⁰¹

837. Vague reports of criminal activity must be viewed against the backdrop, discussed in Chapter V, of the general confusion which existed as to the identity of perpetrators; confusion as to language, uniform, and affiliation. If the general population was unclear or actively misled as to the identity of the perpetrators of crimes, Mr. Bemba certainly had no means to verify that it was indeed the "Banyamulengue" members of the loyalist coalition committing crimes, and not other loyalist troops, or rebels.

838. [REDACTED]'s assertions that rumours of crimes were baseless must also be viewed against the practice within the MLC for misconduct to be reported. P-65, [REDACTED],²⁰⁰² confirmed that if crimes had been committed, this would have been noted in the cahier.²⁰⁰³ A review of the cahier demonstrates that misconduct in the DRC was reported by the relevant commander and, as such, recorded in the cahier.²⁰⁰⁴ Mr. Bemba therefore had a reasonable expectation that the same would

¹⁹⁹⁸ P-36, T-215, p.22.

¹⁹⁹⁹ Mondonga Commission: D-19, T-285, pp.40-42; P-36, T-215, p.6; Zongo Enquiry: EVD-T-OTP-00392/CAR-DEF-0001-0155; D-48, T-267, pp.31-32; Mission to Sibut: D-21, T-302, pp.23-30.

²⁰⁰⁰ D-48, T-267, pp.31-32.

²⁰⁰¹ D-21, T-302, pp.23-30.

²⁰⁰² P-65, T-168, p.14.

²⁰⁰³ P-65, T-170, p.30.

²⁰⁰⁴ See, for example, (unofficial translations): EVD-T-OTP-00703/CAR-D04-0002-1641 at 1642: From commander section south Ubangui to chef EMG ALC (C/MAN copied) reporting on the court martial cases of Didanga who killed one civilian and a robbery case; at 1643-44: From General Bde BULE to Chef EMG ALC (C/MAN copied): report about the advancement of those cases; at 1646

occur if any crimes were being committed in the CAR. No evidentiary basis was provided for crimes suddenly being hidden from the Etat Major because they were allegedly occurring in a third state.

839. Moreover, Mr. Bemba was aware that in cases where actionable information was available, namely with Willy Bomengo and his cohort, disciplinary measures had been taken.²⁰⁰⁵ In no other instances was information provided concerning the location of the alleged crime, the identity of the alleged victim, the circumstances in which the crime was allegedly committed, the identity of the perpetrators or the reliability of the account. P-36, [REDACTED], confirmed that to his knowledge the arrest of the eight soldiers for pillage was the sole case about which they were informed.²⁰⁰⁶

So after the arrest of these soldiers, did the pillaging stop to the best of your knowledge?

A. Yes, I think that it stopped because we didn't continue arresting other people.

840. The CAR never provided an extradition request for any of the troops who fought in the MLC contingent, or even any information sufficient to arrest or

From General BULE to C/MAN: report on court martial prosecution of two men who robbed and killed a man; at 1648-49: From commander section south Ubangui to chef EMG ALC (C/MAN copied): on a soldier having stolen money from a civilian, which was then returned; at 1675: From Commander sector Sud EQ to "commander Bole Charlie" (C/MAN copied) a major is suspended; at 1680: From the G3 EMG in mission to Chef EMG ALC (C/MAN copied) reports about the disciplinary council dealing with a case of a soldier convicted for robbery, the case of a civilian being stabbed (he says that the council is not competent to sentence to the death penalty so he will refer the case to the court martial); at 1696: From Commander section south Ubangui to Chef EMG ALC (C/MAN copied): he reports about an incident where a soldier hit a civilian with a stick, he was injured and went to the hospital. It has been investigated; at 1702: From commander section OPS Isiro to C/MAN: he reports about investigating allegations of cannibalism of pygmies; at 1703: From commander OPS Isiro to Chef EMG ALC (C/MAN copied): he reports on arrest of nine soldiers who had fled; at 1709: From commander section Buta to Chef EMG ALC (C/MAN copied): he reports about the arrest of deserters; 1711: From Colonel Willy to Commander Konanda (C/MAN copied): he complains about the commander's troops robbing civilians. He wants to transmit the case to the court martial.

²⁰⁰⁵ D-19, T-285, pp.33-34.

²⁰⁰⁶ P-36, T-214, p.54.

interview any soldier.²⁰⁰⁷ On the basis of this evidence, it is impossible to accept that the Prosecution has established beyond reasonable doubt that Mr. Bemba had sufficient knowledge of crimes being committed by his subordinates to meet the legal threshold. Regardless, each of the factors confirmed by the Pre-Trial Chamber as being relevant to Mr. Bemba's knowledge will be examined below.

(a) Mr. Bemba's visit to CAR does not demonstrate actual knowledge

841. Mr. Bemba's visit to the CAR lasted a matter of hours.²⁰⁰⁸ There is no credible evidence that he received any information concerning alleged crimes during this visit.

842. As noted above, P-213's account is implausible. [REDACTED] President Patassé and Mr. Bemba where the latter cried to Mr. Bemba as they sped past corpses on the road.²⁰⁰⁹ P-36 [REDACTED],²⁰¹⁰ [REDACTED].²⁰¹¹ P-31 confirmed that Mr. Bemba was not accompanied by a bodyguard; [REDACTED].²⁰¹²

843. Nor was information given to Mr. Bemba directly by the population. P-36 confirmed that the Central African population was present during Mr. Bemba's speech to his troops, and rather than protesting about the alleged widespread criminal activity, they were "indifferent".²⁰¹³ Nothing concerning this visit to the CAR provides any basis for a finding that Mr. Bemba had actual knowledge of the alleged crimes.

²⁰⁰⁷ D-48, T-269, p.59.

²⁰⁰⁸ P-31, T-183, pp.33-35.

²⁰⁰⁹ P-213, T-187, pp.19-20.

²⁰¹⁰ P-36, T-218, p.26-27.

²⁰¹¹ P-36, T-218, p.26-27.

²⁰¹² P-31, T-184, p.19.

²⁰¹³ P-36, T-215, p.22.

844. Although the Pre-Trial Chamber only confirmed Mr. Bemba's visit in November 2002 as being relevant to his knowledge, the Prosecution again strays out of the confirmed confines of the case and suggests that the MLC's "fleet of aircraft enabled Bemba to travel to the CAR many times."²⁰¹⁴ The Prosecution cites only to a section of P-36's transcript where he actually states "I really don't know how many visits he made, but I know that he visited that country on other occasions."²⁰¹⁵ The Prosecution's submission is a stretch. On this point, ICTY jurisprudence is settled that:²⁰¹⁶

the more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary to prove that he knew of them. On the other hand, if the crimes were committed next to the superior's duty-station this suffices as an important indicium that the superior had knowledge of the crimes, and even more so if the crimes were repeatedly committed.

(b) Mr. Bemba's suspension of two commanders after his visit has not been established on the evidence

845. The Pre-Trial Chamber relied on the evidence of P-31 and considered that Mr. Bemba suspended "two commanders after his visit" to Bangui.²⁰¹⁷ The Prosecution does not rely on this allegation, and as such the Defence presumes it is no longer part of its case.

846. In any event, the allegation that Mr. Bemba suspended two commanders after his visit is uncorroborated secondhand hearsay told to the Chamber in the following vague terms:²⁰¹⁸

²⁰¹⁴ Prosecution Closing Brief, para. 620 (emphasis added).

²⁰¹⁵ Prosecution Closing Brief, para. 620, fn. 1987.

²⁰¹⁶ *Stakić* TJ, para. 460, citing *Alekovski* TJ, para. 80.

²⁰¹⁷ Confirmation Decision, ICC-01/05-01/08-424, paras. 485, 489.

²⁰¹⁸ P-31, T-184, p.41.

...we were told that Senator Bemba was beyond himself and that there were two of those leaders, I do not know whom, were brought back to Gbadolite in order to be punished. We heard this from soldiers. I wasn't there in order to know precisely what happened. These are suppositions. This is what was being said at the time, Counsel.

847. No other witness in the case spoke about Mr. Bemba's suspension of two commanders. It appears most likely that P-31 heard a second-hand (and incorrect) version of the arrests of Willy Bomengo and others. As discussed above, Mr. Bemba had nothing to do with these arrests, which were effected by Central African gendarmes.²⁰¹⁹ Even if this evidence was direct, corroborated and reliable, it would be demonstrative of nothing more than concrete steps being taken to address isolated cases of misconduct. It is certainly not a basis to find that Mr. Bemba knew anything more.

(c) Mr. Bemba's words of caution during that visit do not demonstrate his actual knowledge

848. There is no recording of Mr. Bemba's speech to the troops during his visit to the Central African Republic. P-65 heard second-hand about the content of the speech, but testified that the message "was one of courage and wishing them luck and that they were under the authority of the Central African Republic authorities."²⁰²⁰ D-19, who had been present, testified that:²⁰²¹

[REDACTED], he inspected the troops and he was told that the troops' morale was good. He reminded us what our mission was in the Central African Republic; namely to protect the population and their property, to wage war as if it were our war and also to respect the CAR hierarchy because this -- the Central Africans were leading us. After that gathering, he left.

²⁰¹⁹ D-19, T-285, pp.33-34.

²⁰²⁰ P-65, T-170, p.61.

²⁰²¹ D-19, T-285, pp.5-6.

849. There was nothing abnormal in Mr. Bemba visiting his troops and reiterating principles of discipline.²⁰²² P-36 had also been present and agreed that Mr. Bemba asked the troops to behave well, collaborate closely with the population, and to cooperate with the Central African soldiers.²⁰²³ In response to a leading question, P-36 provided uncorroborated testimony that Mr. Bemba referred to prior misconduct of the troops.²⁰²⁴ Even if this were the case, the content of Mr. Bemba's speech is demonstrative of nothing more than the leader of a movement who, out of an abundance of caution, acts on the basis of rumors to ensure they do not turn into reality.

850. As discussed above, there is no evidence that Mr. Bemba received any additional information on this trip to verify or corroborate vague allegations circling in the media.

(d) The duration and "extensive nature of the attack" and "widespread" crimes has not been established

851. As set out above in Chapter IV, the evidence heard does not support a finding of an extensive attack against the civilian population, nor widespread acts by alleged MLC members.

852. Even if such a finding was available on the evidence, subsequent findings as to the duration or nature of the attack cannot assist in determining the state of Mr. Bemba's knowledge: what is relevant is the information reasonably available to the Accused, rather than what has been determined with hindsight.²⁰²⁵ A plain reading

²⁰²² D-53, T-231, pp.41-42.

²⁰²³ P-36, T-215, p.20.

²⁰²⁴ P-36, T-215, p.21.

²⁰²⁵ United States: Department of Defence Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War, 10 April 1992, re-printed in 31 *ILM* 612 (1992).

of article 28 demonstrates that the superior must have knowledge of the subordinates' crimes "before or during their commission."²⁰²⁶

853. Mr. Bemba was receiving active denials of the commission of crimes from multiple sources. These were the sources best placed to give reliable information as to whether atrocities were being committed, such as President Patassé;²⁰²⁷ the MLC Commander in the CAR,²⁰²⁸ and trusted advisors²⁰²⁹ sent to the CAR to determine the truth of the allegations.²⁰³⁰ Even P-45, whose credibility on the issue of rumours of crimes will be discussed further below, testified that the MLC's inner circle were conflicted as to the scope of alleged crimes committed.²⁰³¹

Some people claimed that the problems were not widespread, they were limited, that there are people whose interests were undermined by that incursion and that they exaggerated the responsibility of the MLC, but other people accept that there were widespread acts of violence that can be considered as crimes against humanity.

854. In light of the information being received by Mr. Bemba that the rumours of MLC crimes were nothing more than unsubstantiated allegations, the Prosecution has failed to establish that the alleged widespread or extensive nature of the attack forms a basis for concluding that Mr. Bemba "knew" that his troops were committing those crimes with which he has been charged.

(e) Media reports were mixed and vague

²⁰²⁶ A. Cassese, 'International Criminal Law', (OUP), (2013) p.187.

²⁰²⁷ EVD-T-OTP-00576/CAR-OTP-0031-0099, minute 03.15-03.29; P-6, T-96, p.4.

²⁰²⁸ [REDACTED].

²⁰²⁹ P-15, T-209, p.5.

²⁰³⁰ Mondonga Commision: D-19, T-285, pp.40-42; P-36, T-215, p.6; Zongo Enquiry: EVD-T-OTP-00392/CAR-DEF-0001-0155; D-48, T-267, pp.31-32; Mission to Sibut: D-21, T-302, pp.23-30.

²⁰³¹ P-45, T-202, pp.41-42.

855. Despite the impression given by the Prosecution submissions,²⁰³² the contemporaneous press reports did not definitively lay the blame for crimes at the feet of the MLC. Media reports not only documented the crimes committed by Bozizé's rebels, but also reported that the Central African population welcomed the MLC troops with delight and relief.

856. On 14 December, the Bishop of Bossangoa was interviewed by Carine Franck, and confirmed that the population had fled from Bozizé's rebels, hospitals had been looted, public buildings ransacked, and he had been told about cases of rape.²⁰³³ In contemporaneous video filmed in Sibut, in which RFI's Gabriel Kahn is featured,²⁰³⁴ the mayor described Bozizé's rebels as behaving like animals.²⁰³⁵ The local vicar talks about the MLC liberating the population from the oppressive situation of the rebels.²⁰³⁶ A woman explains that the cries of joy are from children because they have been liberated by Bemba's men.²⁰³⁷ A civil servant explains that the abuses started when Sibut fell to the rebels, with the arrival of the Chadians, and contrasts their behavior with that of the MLC.²⁰³⁸

857. In a report on 31 December 2002, the Central African press reported that Bozizé's troops were looting hospitals, raping girls, and killing clergy.²⁰³⁹ An AFP press release on 25 February 2003 tells the same story; violence and destruction caused by Bozizé's rebels, and the relief of the population on being liberated by the loyalists: "Each time we saw a vehicle go by, we had to hide in the bush. Thanks to

²⁰³² Prosecution Closing Brief, paras. 650-660.

²⁰³³ EVD-T-CHM-00034/ CAR-D04-0004-0030. See also D-56, T-316, pp.46-47.

²⁰³⁴ P-173, T-149, p.3; P-15, T-201, p.5.

²⁰³⁵ EVD-T-D04-00008/CAR-DEF-0001-0832 from 12.00 to 22.5 minutes. See also D-21, T-302, pp.31-32.

²⁰³⁶ EVD-T-D04-00008/CAR-DEF-0001-0832 at 22.26 to 27.29 minutes. See also D-21, T-302, p.34.

²⁰³⁷ EVD-T-D04-00008/CAR-DEF-0001-0832 at 27.32 to 31.1 minutes. See also D-21, T-302, p.35.

²⁰³⁸ EVD-T-D04-00008/CAR-DEF-0001-0832 at 38.20 to 42.18 minutes. See also D-21, T-302, p.37.

²⁰³⁹ EVD-T-CHM-00004/CAR-DEF-0001-0205. See also EVD-T-D04-00008/CAR-DEF-0001-0832.

the attacks of the loyalists. We are now saved,' stated one young man." The report continues:²⁰⁴⁰

At Galafonfo, a few kilometres from Sibut, a young girl shows her arms showing various wounds and stitches. She said, 'The rebels did this to me. Their leader, Emi, went and snatched me from the house and tortured me because I refused to join up with them,' she said. "They beat me for long periods of time and they raped the daughter of the chief of the subdivision of public works, who was barely out of her diapers, and the wife of the N'Géréngou pastor,' said Lucien Maléyombo, the former mayor of Sibut."

858. Of course, these consistent media reports of the MLC being greeted with joy found further corroboration in the MLC troops on the ground. D-19 testified that "I realised one thing: Wherever we went, the local inhabitants were happy about us, and they sang, they sang songs of liberation."²⁰⁴¹

859. The Prosecution's brief ignores those press reports which detail the crimes committed by Bozizé's rebels, and the resultant confusion they would have caused as to who was responsible. If, as the Prosecution asserts, Mr. Bemba was a voracious follower of the media, he would have been hearing conflicting reports as to the perpetrators.²⁰⁴² These press reports are incompatible with a finding beyond reasonable doubt that Mr. Bemba had the requisite knowledge. Rather, they corroborated the information he was receiving from the MLC commander on the ground; the rumours of MLC crimes were not in fact correct.

860. Also relevant is the evidence of other untruthful reporting on behalf of RFI, accusing MLC troops of crimes. [REDACTED] testified that RFI had made false

²⁰⁴⁰ EVD-T-CHM-00035/ CAR-D04-0004 0032.

²⁰⁴¹ D-19, T-285, p.7.

²⁰⁴² Prosecution Closing Brief, para. 656.

allegations against members of [REDACTED] contingent in 2001, which they had later retracted.²⁰⁴³

I heard that in 2001 the ALC soldiers had stolen and looted in Bangui, [REDACTED] those allegations were false and the fact is RFI had the courage to contradict what they had first announced. At the end of the hostilities, they said that in fact the ALC had gone home with their hands clean and that the initial information that had been published was ill-founded and I appreciated their courage to say that.

861. The members of MLC's [REDACTED] who were listening to the radio "had a lot of suspicions with regards to the impartiality of RFI. The [MLC] operating outside of the Congo was a situation which was, well, very particular and certainly wouldn't be something which would please everybody, and in this sense sometimes we doubted the truth of what was said on RFI."²⁰⁴⁴

862. P-15 explained that RFI in general had a tendency for sensationalism, and had reported on allegations of cannibalism by MLC troops that were not established, and were the result of manipulation by the leaders of the RDC K/ML who used the media for political purposes.²⁰⁴⁵ Contemporaneous messages in the cahier report the commander in Isiro being "surprised" to hear of RFI's cannibalism allegations, having absolutely no knowledge of its occurrence and putting it down to meddling by Kabila's government.²⁰⁴⁶ D-48 explained that, in fact, the people who were alleged to have been eaten were alive and well, and were produced publicly in a hotel in Kinshasa, which forced RFI to retract.²⁰⁴⁷ This incident is recorded in the cahier.²⁰⁴⁸

²⁰⁴³ D-18, T-319, p.28.

²⁰⁴⁴ P-15, T-209, p.36.

²⁰⁴⁵ P-15, T-210, p.53.

²⁰⁴⁶ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1702.

²⁰⁴⁷ D-48, T-267, pp.70-71.

²⁰⁴⁸ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1736 (unofficial translation): 25 January 2003, Pygmies met, in the presence of MONUC; totally denying mistreatment or killing.

863. D-49 explained the same story, attributing it to “dirty politics”,²⁰⁴⁹ and D-21 [REDACTED] testified that “today, it is common public knowledge in our country that the so-called allegations of cannibalism were fabrications, lies designed for political reasons, and that they are completely baseless.”²⁰⁵⁰ This is the information Mr. Bemba was receiving. P-33 agreed that:²⁰⁵¹

although this was not true one can understand that it was political warfare, so to speak. So the issue of cannibalism was raised in order to tarnish the image of the movement.

864. These false cannibalism allegations were being made at the same time RFI was also impugning the MLC’s contingent in the CAR.²⁰⁵² Significantly, RFI’s Gabriel Khan accompanied the MLC’s mission to Sibut on 20 January 2003. Following this, RFI did a turnaround and its subsequent reporting was “of an entirely different register”.²⁰⁵³ 6 days after the mission, Gabriel Khan wrote an article describing the violence committed by Bozizé’s rebels in Sibut and the fact that the population only emerged from the bush following Sibut’s liberation by the MLC.²⁰⁵⁴

865. In such circumstances, RFI broadcasts reporting allegations of crimes cannot provide a basis for a finding that Mr. Bemba **knew** that crimes were being committed. As stated by P-36 concerning allegations in the media, even if the MLC were not committing crimes, there were people who were not “in agreement” with the MLC troops being in Bangui, and as such would have “continued to cause a fuss”.²⁰⁵⁵

²⁰⁴⁹ D-49, T-272, pp.60-63.

²⁰⁵⁰ D-21, T-306, p.83.

²⁰⁵¹ P-33, T-162, p.6.

²⁰⁵² P-33, T-162, pp.6-7; P-15, T-208, pp.3-4.

²⁰⁵³ D-21, T-306, p.82.

²⁰⁵⁴ EVD-T-OTP-00416/CAR-OTP-0005-0147.

²⁰⁵⁵ P-36, T-214, pp.54-55.

866. The “lies” of RFI were also being contemporaneously reported. In an interview filmed in Sibut, a civil servant recounted:²⁰⁵⁶

Let me tell you, first of all, Mr Journalist, that the clear distinction between what we hear over radio, be it RFI or other international radio stations, is quite different from the excesses that have often been mentioned on the airwaves as having been committed by Jean-Pierre Bemba's troops including looting, rape, and what have you, since the 14th of February, since they arrived at 2 p.m. I believe that you yourself have had opportunity to go around the city and you will see for yourself that there is no dilapidated house; there is no destroyed, nor burnt down building. And, as you can see, even today the inhabitants have gathered massively around here. So this simply means that the Jean-Pierre Bemba's troops and the loyalist forces together have worked to drive out the rebels who have now fled to Begoua. So we feel that, yes, there is indeed a lot of lies that have been told... We who are members of the population of Sibut, who were not victims of any excesses by Jean-Pierre Bemba's troops, it is our wish that they remain with us.

867. Even had the media reports been one-sided, they provided no actionable or concrete information which would have provided a basis for a finding that Mr. Bemba had actual knowledge of criminal activity on the part of his troops. P-15 explained:²⁰⁵⁷

from October to January RFI had broadcast a number of reports and so what I said is that there were no specific facts and incidents that were brought to my attention with details such as number of victims and types of demonstrations, or types of actions, or what have you. What we were dealing with was a picture painted by a radio station, which we could have questioned and wondered whether the information had not been manipulated.

868. The Prosecution can only point to one broadcast where an alleged victim is identified by name: “Patricia” in “Begoua”.²⁰⁵⁸ They produced no evidence that this broadcast was actually heard by anyone in the MLC in Gbadolite, let alone Mr.

²⁰⁵⁶ EVD-T-D04-00008/CAR-DEF-0001-0832 at 32.20 to 42.18 minutes.

²⁰⁵⁷ P-15, T-209, pp.17-18.

²⁰⁵⁸ Prosecution Closing Brief, para. 652.

Bemba. The alleged perpetrator(s) are not identified, apart from a reference to “Banyamulengue”. There are no details given as to the date or time of the alleged attack. The report was broadcast by RFI. This kind of information is certainly not sufficient for a basis that he knew that his troops were committing crimes, particularly given the objectively reasonable basis to treat such reports from RFI with suspicion.

869. Moreover, Mr. Bemba took steps to verify the rumours and allegations circulating in the media; [REDACTED];²⁰⁵⁹ Mondonga was dispatched to investigate together with the Central African authorities;²⁰⁶⁰ [REDACTED];²⁰⁶¹ [REDACTED] to Zongo [REDACTED] to investigate claims of pillage;²⁰⁶² and a separate mission was undertaken to Sibut in the presence of international journalists to determine whether there was any truth to the rumours of crimes in that locality.²⁰⁶³ Letters were written to independent international organisations, the UN²⁰⁶⁴ and FIDH²⁰⁶⁵ asking for information and investigation. Mr. Bemba wrote to the Prime Minister of the CAR asking for an international commission of enquiry to verify whether the rumours of crimes were true.²⁰⁶⁶ None of these steps resulted in a single concrete example of an MLC soldier involved in a crime. In fact, the reports which came back to Gbadolite demonstrated the opposite.²⁰⁶⁷

²⁰⁵⁹ D-19, T-292, pp.53-54.

²⁰⁶⁰ D-19, T-285, pp.40-42.

²⁰⁶¹ [REDACTED].

²⁰⁶² D-48, T-267, pp.31-32.

²⁰⁶³ D-21, T-302, pp.23-30.

²⁰⁶⁴ EVD-T-OTP-00453/CAR-OTP-0017-0363 Letter from Mr. Bemba to General Cissé dated 4 January 2003; EVD-T-OTP-00584/CAR-OTP-0033-0209 Letter from General Cissé to Mr. Bemba dated 27 January 2003; EVD-T-OTP-00704/ CAR-D04-0002-1455 - Letter to the United Nations dated 21 April 2011; EVD-T-OTP-00705/ CAR-D04-0002-1462 Letter from the United Nations dated 25 July 2011.

²⁰⁶⁵ EVD-T-OTP-00391/CAR-DEF-0001-0152 Letter from Mr. Bemba to FIDH dated 20 February 2003; EVD-T-OTP-00690/CAR-DEF-0001-0154 Letter from FIDH's President Kaba to Mr. Bemba dated 26 February 2003.

²⁰⁶⁶ D-48, T-267, pp.50-51.

²⁰⁶⁷ D-19, T-292, pp.53-54; D-48, T-267, pp.31-32; D-21, T-302, pp.23-30.

870. The Prosecution also highlights a press report from the BBC on 1 November 2002, wherein Bemba is denying allegations of crimes by his troops in the “northern suburbs” of Bangui. As discussed elsewhere, the MLC troops were not in the northern quarters prior to 1 November, and as such no crimes were attributable to them. The report is second-hand hearsay, with the journalist reporting what Mr. Bemba allegedly said to a reporter on a different program. The Prosecution did not produce the original interview. Regardless, even if the Prosecution had produced a reliable copy of the original interview, with Mr. Bemba placing his troops “more than 20 kilometres outside Bangui” it is demonstrative of nothing more than the fact that on 1 November 2002 Mr. Bemba had been misinformed about the location of his troops. His knowledge of any alleged actions on their behalf is accordingly rendered even more unlikely.

(f) The Prosecution has not established that Mr. Bemba received direct information from his political circle and intelligence advisors

871. The Prosecution asserts that Mr. Bemba received information concerning the conduct of troops from P-36, P-45 and P-15.

872. No footnote is provided for the Prosecution’s assertion that “[REDACTED].”²⁰⁶⁸ The alleged [REDACTED] concerning the replacement of the battalion commanders and company commanders has been discussed elsewhere, and the Prosecution has misrepresented the content of this conversation.²⁰⁶⁹ There is no evidence [REDACTED] with any concrete information to implicate the battalion or company commanders. The results of all investigative efforts indicated the opposite. P-36’s evidence demonstrates that Mr. Bemba [REDACTED].²⁰⁷⁰ There is no basis for the Prosecution’s suggestion that [REDACTED].”²⁰⁷¹

²⁰⁶⁸ Prosecution Closing Brief, para. 623.

²⁰⁶⁹ Prosecution Closing Brief, para. 623.

²⁰⁷⁰ P-36, T-216, p.9.

²⁰⁷¹ Prosecution Closing Brief, para. 623.

873. As for P-45, his claim that [REDACTED] the Central African population was unhappy about the MLC's intervention must be viewed in the following light: P-45, whose lack of credibility is discussed in Chapter II, was questioned at length about [REDACTED], his level of knowledge of crimes, the truth of rumours, and what Mr. Bemba knew. Not once did he reveal that, in fact, he had been [REDACTED].²⁰⁷²

874. There is no doubt that P-45 [REDACTED]. [REDACTED].²⁰⁷³ [REDACTED].²⁰⁷⁴ D-21, [REDACTED], confirmed [REDACTED].²⁰⁷⁵ The Prosecution itself later put to D-21 that P-45 [REDACTED], with the Senior Trial Attorney asserting:²⁰⁷⁶

[REDACTED].

875. [REDACTED]."²⁰⁷⁷

876. This mission revealed that "the assertions made over Radio France Internationale were baseless."²⁰⁷⁸ D-21 [REDACTED]:²⁰⁷⁹

the information was that no abuses or atrocities were perpetrated by ALC soldiers on the civilian population in Sibut. The abuses and atrocities committed were attributed to Bozizé's rebels. Secondly the ALC had very good relations with the population of Sibut, and thirdly the population wished that the ALC soldiers should stay put for some time because the rebels "were not far away.

²⁰⁷² [REDACTED].

²⁰⁷³ [REDACTED].

²⁰⁷⁴ [REDACTED].

²⁰⁷⁵ [REDACTED].

²⁰⁷⁶ [REDACTED].

²⁰⁷⁷ [REDACTED]

²⁰⁷⁸ P-15, T-208, p.31.

²⁰⁷⁹ D-21, T-302, p.41.

877. [REDACTED]!" Of course, he sat silently. He hid from the Chamber that [REDACTED] nothing except the local population joyously welcoming the MLC troops.

878. As discussed in Chapter II, his evidence about his movements during the conflict in the CAR destroy any remaining credibility which could attach to this story. P-45's testimony as to his whereabouts during the relevant period is so contradictory as to be almost incomprehensible. It cannot be attributed to problems with memory. He was repeatedly caught out, and adapted his testimony in an attempt to make his story stick. Space does not permit a full chronology of inconsistencies, but P-45's first asserted that [REDACTED];²⁰⁸⁰ he then asserted he was present in January 2003 for the Gbadolite trial (whereas the trial was held in December 2002), at a time he was [REDACTED].²⁰⁸¹ He is absolutely sure that the Mambasa trial was held before the Bangui one, yet, the Mambasa trial was 18 January.²⁰⁸² He said he was present for the Mambasa trial, whereas it happened in fact in February 2002, when he was not in Gbadolite.²⁰⁸³ The Chamber cannot safely accept that he was present in Gbadolite to have the alleged discussion with Mr. Bemba upon which the Prosecution seeks to rely.²⁰⁸⁴

879. In any event, even if he had given credible evidence on this point, the information he received in Bangui was nothing new. The Prosecution asserts that "P-45 told Bemba that the population was unhappy about the MLC's intervention, and was complaining about the conduct of the troops accused of committing

²⁰⁸⁰ P-45, T-203, pp.53-55.

²⁰⁸¹ P-45, T-203, p.69.

²⁰⁸² P-45, T-204, p.48.

²⁰⁸³ P-45, T-204, pp.49-50.

²⁰⁸⁴ Prosecution Closing Brief, para. 626.

numerous acts of violence, such as rape, murder and pillage”.²⁰⁸⁵ His actual testimony on this point reveals that this was not the case:²⁰⁸⁶

Q. Tell me, sir, what exactly did you tell Mr Bemba about what you had heard?

A. What I told Mr Bemba simply is that we had a problem in the CAR. The intervention was not very welcome by the people, the population, but he was already fully aware of the situation.

880. P-45 saw none of the alleged crimes himself, nor any evidence of criminal activity.²⁰⁸⁷ The people with whom he allegedly interacted spoke of “looting”. Concerning other crimes they were “more reserved”.²⁰⁸⁸ No-one gave him the name of an alleged perpetrator, victim, or even location in which a crime had been committed by an MLC soldier.²⁰⁸⁹ When pushed, he could not identify any information he learnt from his alleged trip to Bangui that he could not have already known from the radio.²⁰⁹⁰ Any reliance on his testimony as demonstrating that Mr. Bemba “knew” of crimes committed by MLC troops is misplaced.

881. P-15’s interview concerning Mongoumba similarly provides no basis to assert that Mr. Bemba knew the MLC troops had committed atrocities. In fact, P-15 testified in relation to Mongoumba that Mr. Bemba’s account was more credible than RFI’s allegations.²⁰⁹¹

882. The Prosecution also relies on the existence of the Gbadolite trials as a basis that Mr. Bemba knew that his troops were committing crimes. The Prosecution cites again to P-45 for the proposition that Mr. Bemba was informed by virtue of an

²⁰⁸⁵ Prosecution Closing Brief, para. 626.

²⁰⁸⁶ P-45, T-204, p.16.

²⁰⁸⁷ P-45, T-201, p.63.

²⁰⁸⁸ P-45, T-204, p.13.

²⁰⁸⁹ P-45, T-204, p.13.

²⁰⁹⁰ P-45, T-204, pp.15-16.

²⁰⁹¹ P-15, T-210, p.58.

“official transcript”²⁰⁹². In fact, P-45 testified that Mr. Bemba was being informed by the President of the Court or the person acting as the public prosecutor. The Chamber heard subsequent testimony [REDACTED], who confirmed that this was untrue.²⁰⁹³

[REDACTED]. When the court martial had reached the end of proceedings it would suspend its hearings and withdraw in order to deliberate, after which it would then return with a view to handing down a verdict via the President of the Martial Court. In view of the fact that the hearings were public, any individual could follow what was going on, either over the radio or over the television, and at that moment in time people could follow the verdict live. There was no other means of reporting on the matter, or reporting the findings, because the court martial was an entirely independent body.

883. There is no basis for the Prosecution’s assertion that “Bemba knew that the accused had denied the charges against them and that they instead had incriminated Colonel Mustapha.”²⁰⁹⁴ Even had Mr. Bemba attended every minute of the trial (and the Prosecution concedes he was not present),²⁰⁹⁵ the trial would only have alerted him to the fact that any verifiable instances of misconduct by his troops in the CAR had, in line with MLC practice, been immediately addressed.

884. The alleged “regular, reliable information” coming from P-33’s [REDACTED] produced no concrete information to substantiate a finding beyond reasonable doubt that Mr. Bemba “knew” of purported criminal conduct. P-33 conceded that “[REDACTED] did not give details of a specific battalion”²⁰⁹⁶

885. The head of the intelligence post in Zongo, Papy Bokoula, was interviewed as part of the Zongo commission. He rejected the allegations of crimes, saying it

²⁰⁹² Prosecution Closing Brief, para. 628, fn. 2011.

²⁰⁹³ D-16, T-276, p.4.

²⁰⁹⁴ Prosecution Closing Brief, para. 628.

²⁰⁹⁵ Prosecution Closing Brief, para. 628.

²⁰⁹⁶ P-33, T-162, pp.50-51.

would not have been possible for pillaged goods to have crossed the river, for the following reasons (a) as soon as the foreign radios talked about alleged pillage, a mixed FACA and ALC commission was created in order to retrieve the goods; (b) the pillaged goods were retrieved and returned to the alleged victims; (c) some of the goods had already been sold in Bangui by Central African looters; (d) the naval force had established a control system in Bangui that operated day and night and systematically searched the soldiers that were coming from the front to Zongo.²⁰⁹⁷ P-33 [REDACTED],²⁰⁹⁸ confirmed that Papy Bokoula was “very well qualified”, and when asked if he was reliable and honest, testified.²⁰⁹⁹

A. You know, [REDACTED], when [REDACTED]. If he was kept on his post, it must be because he did his job well.

Q. Let me put two particular hypotheses to you. [REDACTED]?

A. Why would I do such a thing?

Q. Shall I take that as a “no”?

A. I would not do such a thing...

886. It was reported back to Mr. Bemba²¹⁰⁰ that the “Chef de Poste Principale BSI” in Zongo²¹⁰¹ confirmed that the allegations of crimes were false. This corroborated the information Mr. Bemba was receiving from [REDACTED],²¹⁰² from press reports placing responsibility for the crimes with Bozizé’s troops,²¹⁰³ from the joint investigative commission of which Colonel Mondonga was a part.²¹⁰⁴ It would later be corroborated by the investigative mission to Sibut.²¹⁰⁵ Not one member of Mr. Bemba’s political circle or intelligence advisors gave him the name of a single MLC soldier involved in misconduct or provided him with a concrete example of crimes

²⁰⁹⁷EVD-T-OTP-00392/ CAR-DEF-0001-0155 at 0157-0158.

²⁰⁹⁸ P-33, T-157, p.67.

²⁰⁹⁹ P-33, T-162, p.33.

²¹⁰⁰ D-48, T-267, p.32.

²¹⁰¹ EVD-T-OTP-00392/ CAR-DEF-0001-0155 at 0157.

²¹⁰² D-19, T-292, pp.53-54.

²¹⁰³ See, for example EVD-T-CHM-00034/CAR-D04-0004-0030; EVD-T-D04-00008/CAR-DEF-0001-0832; EVD-T-CHM-00004/CAR-DEF-0001-0205; EVD-T-CHM-00035/CAR-D04-0004-0032; EVD-T-OTP-00416/ CAR-OTP-0005-0147.

²¹⁰⁴ D-19, T-285, pp.40-42.

²¹⁰⁵ D-21, T-302, pp.23-30.

having been committed, apart from the eight soldiers who were arrested, returned to Gbadolite, tried, convicted, and imprisoned.²¹⁰⁶ There is no basis for a finding that he knew.

(g) Mr. Bemba's letter to the Special Representative of the UN Secretary-General does not demonstrate knowledge

887. On 4 January 2003, Mr. Bemba wrote to General Cissé, the Special Representative of the UN Secretary General. This letter is a plea for information. Building on the lack of the specific information in his possession, and the inherent distrust the MLC felt for RFI, this letter asked the UN to investigate allegations of crimes. Had Mr. Bemba been in possession of specific and concrete examples of massacres, murders, or any incidents involving his troops, this letter would have been an invitation for the UN to create a public paper trail of MLC crimes. It is not a letter written by someone with knowledge of widespread criminal activity on the part of his troops. It is a letter of someone who is seeking concrete information, should it exist, in order to ensure that appropriate measures are taken.²¹⁰⁷ As will be elaborated below, Mr. Bemba's transmission of this letter to General Cissé reflects both the limited nature of Mr. Bemba's power to conduct his own investigations as concerns matters in CAR, and compliance with the duty to take all reasonable measures within his power and practical ability.

888. The Prosecution did not produce any credible evidence to suggest that this letter's content cannot be accepted on its face. As explained by [REDACTED]:²¹⁰⁸

...someone who wanted to be objectively informed would not have addressed themselves only to the ALC contingent, because most of the rumours made allegations against them. So there was no suspicion of impartiality on the part of the Representative of the UN

²¹⁰⁶ EVD-T-OTP-00393/CAR-DEF-0002-0001 at 0002.

²¹⁰⁷ EVD-T-OTP-00453/CAR-OTP-0017-0363; D-21, T-302, p.17.

²¹⁰⁸ D-21, T-302, pp.20-21.

Secretary-General, so that would have been the person who would have been considered the most objective and it was on the basis of this that Mr Bemba contacted this neutral witness to obtain the most objective information possible.

889. No information was forthcoming.²¹⁰⁹ In 2011, the UN confirmed that it “had not found any records indicating that the United Nations provided any assistance to Mr. Bemba for the purpose of investigating crimes alleged to have been committed by the MLC in the CAR.”²¹¹⁰

890. The correspondence between Mr. Bemba and FIDH illustrates the same plea for information, and the same failure to provide any concrete examples of specific incidents involving MLC troops.²¹¹¹ The FIDH report provides the same kind of vague allegations reported by RFI, but no concrete or actionable information.²¹¹²

891. The Prosecution also places extensive reliance on a report from “Le Citoyen” which provides second-hand uncorroborated hearsay of an alleged conversation between General Cissé and Mr. Bemba during his visit to Bangui in November 2002.²¹¹³ Lamine Cissé, still working within the UN system, was not called by the Prosecution to testify.

892. This alleged exchange between Mr. Bemba and General Cissé was not part of the case as confirmed,²¹¹⁴ nor does it form part of the recitation of factors relevant to “knowledge” in the DCC.²¹¹⁵ The newspaper article produced by the Prosecution is both a copy and an extract; neither the original nor an entire copy was ever produced. The extract was provided to the Prosecution by the French Embassy in

²¹⁰⁹ EVD-T-OTP-00584/CAR-OTP-0033-0209.

²¹¹⁰ EVD-T-OTP-00705/ CAR-D04-0002-1462 at 1463.

²¹¹¹ EVD-T-OTP-00391/ CAR-DEF-0001-0152; EVD-T-OTP-00690/CAR-DEF-0001-0154.

²¹¹² EVD-T-OTP-00395/CAR-OTP-0001-0034.

²¹¹³ EVD-T-OTP-00444/CAR-OTP-0013-0053 at 0054.

²¹¹⁴ Confirmation Decision, ICC-01/05-01/08-424, paras. 478-489.

²¹¹⁵ ICC-01/05-01/08-856-Conf-AnxA, paras. 79-86.

Bangui.²¹¹⁶ The alleged conversation between the two men is second-hand hearsay, is reported only through the press (and not, for example through sworn testimony), and is uncorroborated. There is no other evidence in this case to support the fact that this conversation occurred, or that it occurred in these terms. In such circumstances, it should not be relied upon to support an incriminating finding.

893. In any event, a number of aspects throw significant doubt as to its contents. The Chamber heard a wealth of evidence about Mr. Bemba's visit to Bangui, which the newspaper reports as being on 2 November 2002.²¹¹⁷ This date is unlikely given that Bangui airport was still closed.²¹¹⁸ It is even more unlikely that had the visit occurred on 2 November, *Le Citoyen* would have taken 12 days to write about it, rather than in any of the publications from 5 November onwards.²¹¹⁹ Not one witness testified that General Cissé and Mr. Bemba had the conversation as recounted in this extracted document. The article alleges Mr. Bemba was with a "Libyan General" and participated in a "working session" with President Patassé;²¹²⁰ also new information. P-36, [REDACTED], testified that Mr. Bemba and President Patassé met privately, after which they went to see the MLC soldiers at PK12. There was no "Libyan General", no "working sessions" and no General Cissé.²¹²¹ The article then asserts that General Cissé and Mr. Bemba discussed the withdrawal of the MLC troops, and that "Mr. Bemba undertook to have [the withdrawal] done progressively in a staggered manner, in an ordered manner".²¹²² The MLC troops had arrived days earlier. The idea that Mr. Bemba was agreeing to

²¹¹⁶ The chain of custody given by the Prosecution is: 2008-01-31: from DESLAMES, Michel, Embassy of France.

²¹¹⁷ EVD-T-OTP-00444/CAR-OTP-0013-0053 at 0054.

²¹¹⁸ EVD-T-OTP-00585/CAR-OTP-0045-0002 at 0077.

²¹¹⁹ EVD-T-OTP-00446/CAR-OTP-0013-0082; EVD-T-OTP-00849/CAR-OTP-0013-0320; EVD-T-OTP-00399/CAR-OTP-0004-0343.

²¹²⁰ EVD-T-OTP-00444/CAR-OTP-0013-0053.

²¹²¹ P-36, T-215, p.19.

²¹²² EVD-T-OTP-00444/CAR-OTP-0013-053.

their departure is not only illogical, but is contradicted by the evidence concerning the real circumstances of the withdrawal.

894. Moreover, Mr. Bemba's letter to General Cissé, the authenticity of which neither party disputes, makes no reference to this alleged meeting in November 2002. To the contrary, the introductory and background detail given in the letter would make no sense had the two previously met to discuss this situation.²¹²³ Similarly, General Cissé's response is also silent to the fact that the two had previously met to discuss this very same topic.²¹²⁴ The Chamber can safely assume that they had not.

(h) The means of communication available to Mr. Bemba do not establish he had actual knowledge

895. The Prosecution's submissions concerning Mr. Bemba's alleged "passion" for telephones, and the inventory of communication devices they claim were available to him²¹²⁵ cannot get around the fact the [REDACTED] nothing of that sort had happened."²¹²⁶

896. Mr. Bemba was stuck in a cycle of rumours and denials. He received general information about rumours of crimes from a media source which had been forced to retract false allegations against the MLC. He sought further information, and received denials from [REDACTED], silence from the UN, no specific information from FIDH, and conflicting media reports. If, for example, he heard a radio report about "Patricia" being raped in PK12, with no further information, what could he do? Go and speak to his troops and remind them of the code of conduct? Dispatch MLC representatives to investigate the allegations? Write to "neutral" international

²¹²³ EVD-T-OTP-00453/CAR-OTP-0017-0363.

²¹²⁴ EVD-T-OTP-00584/CAR-OTP-0033-0209.

²¹²⁵ Prosecution Closing Brief, paras. 661-667.

²¹²⁶ D-19, T-292, pp.53-54.

organisations and request independent investigations? All of these things, he did. None of them provided him with the name of an MLC soldier who had committed crimes, or the details of any specific incidents in which they had been involved.

6. The Prosecution has not established that Mr. Bemba “should have known” of the alleged crimes

897. From the time the Chamber first indicated that it was considering a re-characterisation of the charges under regulation 55, the Defence has tried, without success, to obtain clarity as to the material facts underlying a case that Mr. Bemba “should have known” that members of the MLC contingent were committing crimes.²¹²⁷

898. No such clarity is provided in the Prosecution brief. Its submissions consist of four paragraphs,²¹²⁸ and do little more than argue that “[t]he same evidence alternatively proves that Bemba should have known that his forces were committing or were about to commit these crimes”.²¹²⁹ The Prosecution asserts that:²¹³⁰

[Mr. Bemba’s] **failure to acquire knowledge** of his subordinates’ crimes was unjustifiable, given all of the means to obtain information at his disposal.

899. This submission stands in direct contradiction with the Prosecution’s principal submission that, in fact, Mr. Bemba “took the necessary measures to secure his knowledge of the conduct of his troops”.²¹³¹ The Prosecution dedicates entire sections of its Brief arguing that “Bemba had reporting and monitoring

²¹²⁷ ICC-01/05-01/08-2451-Conf, para. 34; ICC-01/05-01/08-3076, para. 6.

²¹²⁸ Prosecution Closing Brief, paras. 672-675.

²¹²⁹ Prosecution Closing Brief, para. 673.

²¹³⁰ Prosecution Closing Brief, para. 673.

²¹³¹ Prosecution Closing Brief, para. 675.

systems” in place,²¹³² through which he had acquired knowledge of his troops’ crimes. It then asserts the exact opposite.

900. This contradiction arises because, in fact, the two distinct charges that Mr. Bemba “knew” and Mr. Bemba “should have known” are incapable of being based on the same material facts.

901. In response to Defence requests for notice of the material facts underlying a “should have known” charge, the Trial Chamber has held that “the only facts and circumstances relevant... are paragraphs 478 to 489 of the Confirmation Decision and paragraphs 77 to 90 of the DCC.”²¹³³ These paragraphs, however, are specific to actual knowledge. The Pre-Trial Chamber refers to Mr. Bemba being “directly told” by his political circle and intelligence advisors about crimes,²¹³⁴ that he contacted commanders “in the field directly”,²¹³⁵ and that he “actually knew about the occurrence of crimes”.²¹³⁶ The DCC similarly refers to Mr. Bemba’s “actual knowledge”,²¹³⁷ Mr. Bemba being “informed, orally and in writing about the crimes”,²¹³⁸ and that “[j]ournalists told Bemba about the abuses”,²¹³⁹ and “Bemba and other MLC commanders being specifically informed about the crimes”.²¹⁴⁰ Nowhere in these paragraphs is any indication of:

- i. The means by which it is alleged Mr. Bemba “should have known”;
- ii. On what basis it is alleged Mr. Bemba could be said to have culpably failed to obtain relevant information;

²¹³² Prosecution Closing Brief, paras. 640-649.

²¹³³ ICC-01/05-01/08-3089, para. 16.

²¹³⁴ Confirmation Decision, ICC-01/05-01/08-424, para. 487.

²¹³⁵ Confirmation Decision, ICC-01/05-01/08-424, para. 488.

²¹³⁶ Confirmation Decision, ICC-01/05-01/08-424, para. 489.

²¹³⁷ ICC-01/05-01/08-856-Conf-AnxA, para. 79.

²¹³⁸ ICC-01/05-01/08-856-Conf-AnxA, para. 80.

²¹³⁹ ICC-01/05-01/08-856-Conf-AnxA, para. 81.

²¹⁴⁰ ICC-01/05-01/08-856-Conf-AnxA, para. 82.

- iii. What is the information that is said to have been available to Mr. Bemba and which, it is said, he culpably failed to acquire; and
- iv. What evidence is said to support each of the alleged facts outlined above.

902. If the two cases were compatible, or were able to be based on the same material facts and circumstances, the Prosecution would not have been forced to undermine its submissions that Mr. Bemba “knew” by asserting that he “failed to acquire knowledge” of his subordinates’ crimes, in an attempt to cover all bases.

903. Importantly, the specific details of these “failures” should have been explicitly set out in the charges. A failure to take steps to acquire knowledge is not subsumed within allegations that Mr. Bemba possessed knowledge. It is not a lesser, included charge, as it requires the Prosecution to establish additional material facts concerning firstly, the means by which Mr. Bemba should have been deemed to have been aware of the crimes, and secondly and most critically, the specific alleged facts that establish that Mr. Bemba deliberately failed to avail himself of such means. The obligation to plead such a case rests on the Prosecution. The Chamber cannot deduce such facts or allegations from Defence submissions. To do so would violate both the requirements under article 74 that the judgment can only be based on confirmed facts, and the defendant’s right to know the case against him before he takes an informed decision as to whether to advance a positive Defence case.

904. In any event, a re-characterisation in the circumstances of the present case, where the Trial Chamber had previously held that the “should have known” case exceeded the scope of the confirmed charges,²¹⁴¹ is incompatible with the rights of

²¹⁴¹ ICC-01/05-01/08-836, para. 121.

the accused to a fair trial. The Defence repeats and relies on its previous submissions.²¹⁴² The Trial Chamber's finding is worth noting in full:

The Pre-Trial Chamber clearly deliberately chose only to rely on one part of Article 28(a)(i), in the sense that it only found mens rea on the basis of "knew" rather than "should have known". The Pre-Trial Chamber discussed these two elements at length in the Confirmation Decision, and only relied on the knowledge of the accused when confirming his responsibility with respect to this allegation pursuant to Article 28(a)(i). It did not proceed on the basis of the second element, "should have known". The Chamber finds that the allegation in paragraph 60 that Bemba "should have known" of the crimes committed by MLC soldiers therefore **exceeds the scope of the charges**, and is to be deleted.

905. This ruling precludes a re-characterisation of the charges in the present case, given that regulation 55(1) only permits a re-characterisation which does not "exceed[.] the facts and circumstances described in the charges".²¹⁴³

906. Also of manifest disadvantage to the Accused is the unsettled state of the law. The Pre-Trial Chamber's obiter statement that the "should have known" standard is different from the "had reason to know" in the ICTY and ICTR Statutes has been criticised,²¹⁴⁴ with concern raised that interpreting the ICC's standard as falling "one step below" would lead to a legal fiction of knowledge whereby a commander is attributed knowledge of a fact which he did not possess, thereby "greatly dilut[ing] the principle of personal culpability that underlies the doctrine of superior liability under customary law".²¹⁴⁵ For its part, the Prosecution appears to concede that the two standards can be aligned.²¹⁴⁶

²¹⁴² ICC-01/05-01/08-2365-Conf; ICC-01/05-01/08-2451-Conf; ICC-01/05-01/08-2483-Conf.

²¹⁴³ See also ICC-01/04-01/06 OA 15 OA 16.

²¹⁴⁴ K. Ambos, 'Treatise on International Criminal Law: Volume 1: Foundations and General Part', OUP (2013), p.226.

²¹⁴⁵ G. Mettraux, 'The Law of Command Responsibility', OUP (2009), p.210.

²¹⁴⁶ Prosecution Closing Brief, para. 674.

907. In establishing whether the standard of “should have known” under article 28(1) is similar to the “had reason to know” standard employed at the *ad hoc* Tribunals, it is necessary to consider the words preceding “should have known”, that is, the phrase “owing to the circumstances at the time”. The plain meaning of this phrase is that the defendant had a basis for knowing that crimes were being committed or would be committed.

908. The wording of the knowledge standard in article 28(1) was proposed by the United States, which also proposed the equivalent wording for command responsibility at the *ad hoc* Tribunals. As observed by Kai Ambos, it must be presumed that the US intended to maintain a similar standard of responsibility.²¹⁴⁷ Given the number of academic observers who have interpreted the article 28(1) “should have known” standard to correspond to the “reason to know standard”, Mr. Bemba would have been entitled to interpret it in the same manner.²¹⁴⁸

909. If the Trial Chamber were to consider this new, previously untested standard of *mens rea*, it would be required by article 22(2) of the Statute to interpret it strictly. It must also be applied, pursuant to article 67(1)(i) of the Statute, in such a way that it would not result in a *de facto* reversal of the onus of proof.²¹⁴⁹

910. The material facts upon which an alleged culpable failure on the part Mr. Bemba’s rests remain unknown. What is clear, however, is that it is not open to the Chamber to rely on previous alleged criminal conduct on behalf of MLC troops.

²¹⁴⁷ K. Ambos, ‘Treatise on International Criminal Law: Volume 1: Foundations and General Part’, OUP (2013), p. 224.

²¹⁴⁸ V. Nerlich, ‘Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?’ JICJ 5 (2007), 665-682, p.674; K. Ambos, ‘Treatise on International Criminal Law: Volume 1: Foundations and General Part’, OUP (2013), p. 224, footnote 414; J. Williamson, ‘Some considerations on command responsibility and criminal liability’, International Review of the Red Cross, No. 870, p. 308.

²¹⁴⁹ See W. Schabas, “Article 66”, in O. Triffterer, ‘Commentary on the Rome Statute of the International Criminal Court’ (2nd ed), at paras. 19 and 21. G. Mettraux, ‘The Law of Command Responsibility’, OUP (2009), p. 211.

The Pre-Trial Chamber was explicit that the allegation that Mr. Bemba's knowledge could be inferred from allegations of past crimes by MLC troops in 2001 was not confirmed as part of the case against him.²¹⁵⁰ After the Prosecution re-inserted this allegation into the DCC, the Trial Chamber repeated that that allegation did not form part of the charges, and instructed the Prosecution to delete it.²¹⁵¹ In June 2014 the Trial Chamber again insisted that the only facts and circumstances relevant to a potential "should have known case" were limited to those in the Confirmation Decision and the DCC.²¹⁵² In such circumstances, any "should have known" case cannot delve back into events pre-dating the October 2002 intervention, Mr. Bemba having been informed three times over the past five years that this is not an allegation against which he needs to defend.

911. As for the 2002 intervention, there is no evidence to support a finding that Mr. Bemba culpably failed to obtain information concerning the conduct of the MLC contingent. "Conscious ignorance in the sense of wilful blindness is sufficient to incur criminal responsibility."²¹⁵³ As opposed to being wilfully blind, Mr. Bemba did everything to put himself in the know; he sought information from various parties and all relevant interlocutors; [REDACTED];²¹⁵⁴ the UN,²¹⁵⁵ FIDH,²¹⁵⁶ the Central African Prime Minister,²¹⁵⁷ and three separate investigative commissions were dispatched;²¹⁵⁸ yet he still failed to secure information that was verifiable and actionable.

²¹⁵⁰ Confirmation Decision, ICC-01/05-01/08-424, para. 129.

²¹⁵¹ ICC-01/05-01/08-836, paras. 27, 201.

²¹⁵² ICC-01/05-01/08-3089, para. 16.

²¹⁵³ K. Ambos, 'Treatise on International Criminal Law: Volume 1: Foundations and General Part', OUP (2013), p.222. citing Preux, 'Commentary on Articles 86 and 87' in Sandoz, Swinarski and Zimmerman, Commentary on the Additional Protocols (1987) 3545-6.

²¹⁵⁴ D-19, T-292, pp.53-54.

²¹⁵⁵ EVD-T-OTP-00453/CAR-OTP-0017-0363.

²¹⁵⁶ EVD-T-OTP-00391/ CAR-DEF-0001-0152.

²¹⁵⁷ D-48, T-267, pp.50-51.

²¹⁵⁸ Mondonga Commission: D-19, T-285, pp.40-42; P-36, T-215, p.6; Zongo Enquiry: EVD-T-OTP-00392/CAR-DEF-0001-0155; D-48, T-267, pp.31-32; Mission to Sibut: D-21, T-302, pp.23-30.

912. Nor can the press reports assist. Some press outlets were blaming the “Banyamulengue”, others blamed Bozizé’s rebels. There is no evidence that the Central African publications, such as *Le Citoyen*, so heavily leant upon by the Prosecution, were ever contemporaneously read or available in the DRC, let alone Gbadolite. RFI, a vociferous critic of the “Banyamulengue”, had a reporter accompany the MLC mission to Sibut. Having witnessed firsthand the joy of the population open in its thanks to the MLC troops, RFI did a complete turnaround on its reporting.²¹⁵⁹ In such circumstances, contemporaneous media reports provide no support for liability on the basis that Mr. Bemba “should have known”, particularly given the wealth of credible and corroborated evidence of the media at the time spreading false rumours for political gain.

913. In reality, the Prosecution has failed to establish that Mr. Bemba was under a positive obligation to obtain information about the actions in the troops in the CAR, and that being aware of this obligation, he consciously failed to take reasonable steps to do so.

7. The Prosecution has not established an intention not to act

914. Knowledge on the part of a superior that his subordinates have committed or are about to commit crimes is not a sufficient state of *mens rea* to attract his superior responsibility. In addition, the superior must be shown to have intended not to act as he was required to, with or despite that knowledge, or to have been reckless as to the likely consequences of his failure to act.²¹⁶⁰

²¹⁵⁹ D-21, T-306, p.82.

²¹⁶⁰ See generally A. Cassese, ‘International Criminal Law’ (OUP) (2013), pp. 184-185. See also *Yoshio Tachibana et al*, concerning the requirement of an “intentional” omission to discharge a legal duty on the part of the commander for him to be held criminally responsible as commanders; See also, *Shiyoku Kou* case, where a military commission found him responsible for crimes committed by his subordinates because he ‘unlawfully and willfully’ disregarded, neglected and failed to discharge his duties as a Japanese Army officer by, in effect, ‘permitting and sanctioning’ their commission.

915. To be held liable, a superior must, therefore, have consciously failed to discharge his duties as a superior “either by deliberately failing to perform them or by culpably or willfully disregarding them”.²¹⁶¹ There must be “proof of a causative, overt act or omission from which a guilty intent can be inferred”.²¹⁶² At the very least, Mr. Bemba cannot be held to have committed the material elements of command responsibility with “knowledge and intent” if he was unaware that his failure to perform specific acts constituted a failure to “take all necessary and reasonable measures”, as required by article 28(a)(ii).

916. When determining whether it would have been reasonable for a superior to conclude that he had complied with his duties in a particular situation, a court is required to place itself in the position in which the accused found himself at the time. The assessment will be subjective in nature, taking into consideration all factors and circumstances as might have led the accused to take a particular view of his duties.²¹⁶³ Therefore, where the evidence allows for an honest error on his part

²¹⁶¹ *Bagilishema* AJ, para. 35.

²¹⁶² See for example, *Hostages* case at 1261: “[i]n determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission *from which a guilty intent can be inferred* before a verdict of guilty will be pronounced.” The Tribunal noted that in all cases, his criminal responsibility is ‘personal’ and that the act or neglect to act which form the basis of the charges must have been ‘voluntary and criminal’. The Tribunal further pointed out that ‘[t]he term “voluntary” does not exclude pressures or compulsions even to the extent of superior orders. That the choice was a difficult one does not alter either its voluntary nature or its criminality.’ See also ICRC, ‘Commentary on the Additional Protocols, concerning Article 86(2) of Additional Protocol I’, para. 3541, which takes note of the ‘difficulty of *establishing intent*’ of the commander (emphasis added). In the *Jespen* case, the Judge-Advocate noted that: “Nor can the isolated acts of individual guards, even if he were in charge of the convoy, be laid at his door so as to make him responsible unless he had knowledge of what those guards were doing and had the power to stop it *but deliberately refrained from stopping it*.” The deliberate failure of the commander to act must be akin, on the evidence, to acquiescence or approval on his part of the crimes of his subordinates. See, for example, *Strugar* TJ, para. 439; *Musema* TJ, para. 131. See also *Flick* trial in which the court said, in relation to the accused Weiss that he had had “knowledge and approval” of the acts of a subordinate and could therefore be held responsible for his acts:

²¹⁶³ *Hostages* case, Volume VIII, p.58: “[T]he situation as it appeared to him must be given the first consideration’. See also *Llandovery Castle* case: “The fact that his deed is a violation of international law must be well known to the doer, apart from acts of carelessness, in which negligent ignorance (*fahrlässige Unkenntnis*) is a sufficient excuse. In examining the question of the existence of this

as to the facts relevant to the charges, the commander is entitled to receive the benefit of the doubt.²¹⁶⁴ A proven failure on the part of a commander which is not shown to have been intentional, in the sense of being voluntary, deliberate, and informed, does not therefore attract individual criminal responsibility under international law.

917. As discussed above, there is no evidence that Mr. Bemba intentionally failed to fulfil his duties. To the contrary, he took numerous steps (explored in full in the following section) which would render unreasonable any suggestion that he intentionally failed to carry out his duty. Even if it were said that the steps he took were insufficient, the absence of an intention to ignore his duty would prevent any finding that he is liable pursuant to article 28 of the Statute. Mere negligence is not enough to trigger liability under this doctrine.²¹⁶⁵

8. Conclusion on knowledge

918. Mr. Bemba was in a different country, hundreds of kilometres from the fraction of his troops engaged in this foreign war. Communication was not simple. Being removed from the conflict, he had not witnessed firsthand any evidence of criminal activity, nor had he been provided with concrete information to suggest that crimes had occurred. Vague radio reports and unsubstantiated claims from NGOs based on the testimony of anonymous witnesses had to be weighed against conflicting news reports and the insistence by those in a position to know that the MLC were complying with the code of conduct hammered home during their training. Mr. Bemba's actual knowledge has not been established. Nor does the evidence support a finding that he "should have known".

knowledge, the ambiguity of many of the rules of international law as well as the actual circumstances of the case must be borne in mind, because in war time decisions of great importance have frequently to be made on very insufficient material."

²¹⁶⁴ *Hostages* case, Volume VIII, p.58.

²¹⁶⁵ *Halilović* TJ, para. 71; *Čelebići* AJ, para. 239; *Bagilishema* AJ, para. 35.

C. THE PROSECUTION HAS NOT ESTABLISHED THAT MR. BEMBA FAILED TO TAKE NECESSARY AND REASONABLE MEASURES

919. The measures required of the commander are limited to those which are “within his power”, meaning those which are “within his material possibility”. A commander is not obliged to perform the impossible.²¹⁶⁶

920. The Prosecution’s submissions on the measures which it asserts are reasonable and necessary invest Mr. Bemba with superhuman powers. Despite the fact that a conflict was raging, the Prosecution claims that Mr. Bemba “had the means to travel to CAR to issue orders himself via multiple aircraft, investigate and try soldiers for violations to ensure respect for IHL”;²¹⁶⁷ he was able to convene courts-martial, overturn convictions, and “find an accused guilty when the court-martial failed to do so”.²¹⁶⁸ Despite conceding that the MLC “military and civilian court systems were functioning,”²¹⁶⁹ the Prosecution then ignores their existence and asserts all powers, responsibilities and capabilities rested with Mr. Bemba.

921. It is important to perform a realistic assessment in the light of the relevant context. The Prosecution’s suggestion that the MLC could, at any time, march into foreign territory, in the middle of a conflict, and undertake investigations,²¹⁷⁰ conflicts with the evidence heard,²¹⁷¹ and all notions of state sovereignty. The

²¹⁶⁶ *Blagojević* TJ, para. 793, citing *Čelebići* TJ, para. 395, *Krstić* AJ, fn.250. See also *Strugar* TJ, para. 378: In view of the above the question whether all necessary and reasonable measures to prevent the commission of crimes or to punish the perpetrators have been taken should be considered in light of the Accused’s material powers at that time. See also *Baglishema* TJ, para. 47.

²¹⁶⁷ Prosecution Closing Brief, para. 684.

²¹⁶⁸ Prosecution Closing Brief, para. 723.

²¹⁶⁹ Prosecution Closing Brief, para. 724.

²¹⁷⁰ Prosecution Closing Brief, paras. 684, 724, fn. 2288. The Prosecution cites only the testimony of D-48 which does not support the assertion that the MLC had the ability to carry out investigations *in situ*. See also para. 739.

²¹⁷¹ D-48, T-267, pp.47-48; EVD-T-D04-00070/CAR-D04-0003-0342 at 0390: “Les autorités centrafricaines en assuraient donc le pilotage (visite des lieux, audition des victimes) puisque le MLC n’était pas compétent pour conduire une enquête autonome en territoire étranger et qu’en plus il aurait rencontré des problèmes linguistiques lors de l’audition des témoins.”

Prosecution criticizes the fact that no MLC investigator “actually took the ‘reasonable’ step to cross the Ubangui River to Bangui, which is less than a kilometer from Zongo, to investigate anything in the CAR, interview victims, visit hospitals and morgues, or interview ALC soldiers and officers.”²¹⁷² The distance between Zongo and Bangui is irrelevant. This submission ignores the reality of armed, uniformed members of a foreign rebellion coming uninvited into the territory of a third state amidst the chaos and insecurity, and walking into morgues. The MLC investigators would have been inviting armed attack, arrest, or risking an international incident.

922. Mr. Bemba’s visit to Bangui and PK12 was facilitated by the Central African authorities,²¹⁷³ as was Colonel Mondonga’s presence as part of the joint commission “under the supreme authority of Mr. Patassé”.²¹⁷⁴ The Zongo enquiry remained stuck in Congolese territory,²¹⁷⁵ while the Sibut mission required prior authorization to enter Central African territory,²¹⁷⁶ and had a FACA captain supervising at all times,²¹⁷⁷ because “people were not going to go about on a foreign territory under such circumstances without the approval or the agreement of the local authorities.”²¹⁷⁸ Mr. Bemba’s letter to the Central African Prime Minister asking for a commission of enquiry demonstrates the realities of his investigative capabilities.²¹⁷⁹ His personal involvement in investigations, given his position, would have been

²¹⁷² Prosecution Closing Brief, para. 739.

²¹⁷³ P-31, T-184, p.19; D-53, T-233, pp.11-12.

²¹⁷⁴ D-53, T-231, p.52; D-19, T-285, pp. 41-42.

²¹⁷⁵ D-48, T-267, pp.47-48; EVD-T-D04-00070/CAR-D04-0003-0342 at 0390: “Les autorités centrafricaines en assuraient donc le pilotage (visite des lieux, audition des victimes) puisque le MLC n’était pas compétent pour conduire une enquête autonome en territoire étranger et qu’en plus il aurait rencontré des problèmes linguistiques lors de l’audition des témoins.”

²¹⁷⁶ D-21, T-302, p.26.

²¹⁷⁷ D-21, T-302, p.23.

²¹⁷⁸ D-21, T-302, p.26.

²¹⁷⁹ D-48, T-267, pp.50-51.

improper.²¹⁸⁰ He could not treat, as the Prosecution suggests, the Central African territory as his own.

923. Even if Mr. Bemba had unrestricted access to this territory, the MLC had no detention facilities, no means of transport once in Central African territory, and no trained Sango interpreters or investigators. The population in many areas had fled.²¹⁸¹ There would have been very few people to interview. Evidently, after 15 March 2003, all cooperation or collaboration with the state apparatus would have also ceased.

924. The Prosecution's assertions that Mr. Bemba could have conducted investigations²¹⁸² must be viewed against the difficulties encountered in the subsequent investigations undertaken by the Central African authorities, after Bozizé had taken power. Findiro, the Prosecutor of the Republic,²¹⁸³ and Oradimo, a

²¹⁸⁰ P-15, T-209, p.5.

²¹⁸¹ P-87, T-46, p.42: "Most people [in Boy-Rabé] had fled"; P-68, T-48, p.10: "When the events began, people were fleeing [from the 4th arrondissement]"; P-68, T-49, p.24: "Many people were fleeing, going through the neighbourhood, and they were leaving heading for PK12. They were taking refuge at their farms. Many people were fleeing. Most people were headed towards PK22. Even those who didn't have farms in that area were going there to take refuge." P-119, T-82, p.48: "Most of the inhabitants of the neighbourhood had already fled."; P-63, T-114, p.35: "Q. Did people leave your area when Mr Bozizé's forces arrived? A. Many people."; P-178, T-150, p.61: "This was during the events, so the neighbourhood [PK12] was empty. There were just a very few people who stayed behind in the neighbourhoods, and they remained either indoors or on -- in their compounds. It was very unusual to meet anybody in the street"; P-47, T-178, p.33: "during those 19 days the people of the Central African Republic were not present in Bangui. Everyone had fled and I am telling you this before this Court. Everyone in the capital had fled."; D-19, T-286, p.11: "Everywhere where we fought, Counsel, there was no presence of members of the population. That's the reason why I say that the members of the population fled and when we occupied a locality the population came back, and when we set up a defensive line members of the population went back to their locality." P-73, T-71, p.20: "In the neighbourhood where I used to live, there was nobody in the neighbourhood. Out of 33 houses, only three were inhabited and the people who were living in these houses were people who were tired, they had nothing, they had decided to remain. All the others had fled." P-63, T-115, p.8: in PK12 "most of the population had deserted the area".

²¹⁸² Prosecution Closing Brief, paras. 684, 724, 739.

²¹⁸³ P-6, T-94, p.9.

Senior Judge²¹⁸⁴ were tasked with conducting an investigation into the events of 2002-2003.

925. Their investigation spanned a year.²¹⁸⁵ It not only had the backing of the government, it was conducted at the behest of the Central African Ministry of Justice. In addition to the support of the State, the United Nations Program for Development (UNDP) and the United Nations Childrens' Fund (UNICEF), in partnership with the Central African Ministry for Social affairs established a committee to assist in collecting evidence.²¹⁸⁶ This committee was instrumental in assisting the authorities conducting the overall investigation, providing the necessary financial and technical resources.²¹⁸⁷ The Central African investigation also received "a great deal" of assistance from OCODEFAD, which found victims who had not been covered by the investigations by UNDP, UNICEF and the Ministry of Social Affairs.²¹⁸⁸ They received reports every Friday, "a whole pile of reports".²¹⁸⁹

926. Oradimo was explicit that "I enjoyed the full support of my ministry, of my minister, who gave me everything I needed to carry out my work, even though the financial circumstances were rather tight."²¹⁹⁰

²¹⁸⁴ P-9, T-102, pp.13-14.

²¹⁸⁵ P-6, T-94, p.43.

²¹⁸⁶ P-6, T-94, p.22; P-9, T-102, pp.18-19.

²¹⁸⁷ P-6, T-94, p.22; pp.25-26; P-6, T-95, p.3; P-9, T-102, pp.19-20; P-6, T-99, pp.7-8: "Q. Now, this involvement of various international organisations in the inquiries, was that important? Did that ensure an effective investigation? A. Their involvement was important to my mind because the administration was not organised, the State did not have many resources and these organisations did provide assistance to the Ministry of Social Affairs, both financial had material resources, so that information could be gathered regarding the various cases that had been looked at."

²¹⁸⁸ P-6, T-95, p.8: "The association helped us a great deal as certain victims who had not been covered by the report drawn up by the committee with UNDP, UNICEF and the Ministry of Social Affairs, were sent to us then. OCODEFAD had large scale activities and that meant that the victims could be found even in remote areas."

²¹⁸⁹ P-9, T-102, p.19.

²¹⁹⁰ P-9, T-102, pp.38-39.

927. Despite this backing from the state, despite the support from two agencies of the United Nations and a NGO, despite the fact that judicial staff and investigators spoke the local language Sango, despite the fact that access would have been granted to physical sites and archives, and despite the fact that the conflict had ended, the obstacles encountered were enormous. Findiro testified: “the Prosecutor’s office had problems; we still didn’t have security in Bangui, the criminal police premises had been completely ransacked with the events from October 2002 to 2003.”²¹⁹¹ Although Oradimo was theoretically supposed to gather information from all over the country, the security situation in fact meant that they could not leave Bangui.²¹⁹² Even in Bangui they were not in a position to conduct any on-site investigations. Oradimo remained within his chambers, and “was not able to go out into the quartier, into the neighbourhoods”.²¹⁹³

928. Findiro painted the same dire picture:²¹⁹⁴

...because of the war, the criminal investigation police wasn’t really work. There was no equipment. There was nothing. The army, the gendarmerie, were completely disorganised. There were tremendous difficulties in that particular area to carry out any kind of investigation worth its salt. Moreover, the Prosecutor’s office had no means at all available in order to take people to the places where the violent acts were said to have been committed or to provide any security to the people involved.

929. The Central African investigation was unable to identify a single perpetrator.²¹⁹⁵ Its investigations, spanning one year,²¹⁹⁶ did not produce a single name. The Central African authorities ultimately declined to charge Mr. Bemba,

²¹⁹¹ P-6, T-94, pp.23-24.

²¹⁹² P-9, T-102, pp.15-16.

²¹⁹³ P-9, T-104, p.3.

²¹⁹⁴ P-6, T-94, p.37.

²¹⁹⁵ P-6, T-99, pp.5-6.

²¹⁹⁶ P-6, T-94, p.43.

finding that he had not been shown to be involved in the use of MLC troops in the field,²¹⁹⁷ and instead laying responsibility at the feet of former President Patassé.²¹⁹⁸

930. These difficulties were mirrored by those experienced by the Prosecution itself. The Defence is not in a position to make submissions as to the Prosecution's investigatory budget in the CAR, but presumes it to be millions of euros. Despite investigative efforts spanning nearly a decade,²¹⁹⁹ the Prosecution was open about the obstacles experienced by a fully resourced team of presumably trained investigators with a functioning field office *in situ*, complaining, for example:²²⁰⁰

information on the developing violence in the north of the CAR has presented special difficulties because of the lack of access to this area. Consequently confirmation of reports of alleged crimes in this area **has been extremely difficult to obtain.**

931. Despite its access, the cooperation of the Central African authorities and the resources at its disposal, the Prosecution was similarly unsuccessful in confirming reports of alleged crimes, or of identifying alleged MLC perpetrators.

932. The Prosecution therefore invest Mr. Bemba with the ability to do what neither the Central African authorities, nor the Prosecution itself were able, despite far more advantageous circumstances. Mr. Bemba was expected to perform the impossible. This is not the standard against which a commander's conduct should be measured.

²¹⁹⁷ P-6, T-97, p.44.

²¹⁹⁸ EVD-T-D04-00016/ CAR-OTP-0004-0065. See also P-6, T-96, p.47.

²¹⁹⁹ ICC-01/05-7, para. 16.

²²⁰⁰ ICC-01/05-7, para. 18 (emphasis added).

933. Also absent from the Prosecution submissions is any recognition that the MLC troops had crossed into a third state and were operating as part of a multinational coalition. As noted by one commentator:²²⁰¹

while “[e]very commander shall (...) ensure that – where crimes have been committed – an investigation is led (...), in some situations, however, a commander may have little power to intervene, beyond the possibility of referring the case to other superiors. This difficulty may arise in particular in multinational contingents, where it is important to establish who holds the authority over the perpetrators. For this reason, it is always important to assess who holds *de facto*, not *de jure*, command and not to confuse the moral obligation of a high ranking officer with his/her legal duties. The mere fact of holding a higher rank is not per se a sufficient reason to hold a person liable for everything which may have been committed by members of his/her armed forces.

934. This is not a situation comparable to many of the ICTY command responsibility cases; the troops in question had been re-subordinated to a multinational coalition operating in a third state. It is clear that “[t]he degree of the superior's effective control guides the assessment of whether the individual took reasonable measures to prevent, stop, or punish a subordinates' crime.”²²⁰²

935. The Prosecution's submissions completely ignore the existence of an overarching command structure with whom the responsibilities to repress and punish any misconduct of MLC troops rested.²²⁰³ Again, the CCOP and the Central African military hierarchy is completely overlooked in favor of a theory that everything was Mr. Bemba's fault, and everything was Mr. Bemba's responsibility. This was not the case.

²²⁰¹ O. Triffterer, 'Commentary on the Rome Statute of the International Criminal Court' Nomos Verlag: Baden-Baden, (2008), p.839.

²²⁰² *Ntagerura et al.* TJ, para. 630.

²²⁰³ CHM-01, T-357, p.8; D-21, T-301, pp.16-17; T-302, p.10, 25-26; D-49, T-274, p.43; D-53, T-231, pp.39-40; D-19, T-285, p.40.

1. The case, as confirmed by the Pre-Trial Chamber

936. The Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that Mr. Bemba failed to take necessary and reasonable measures within his power to prevent or repress the commission by the MLC troops of the underlying crimes.²²⁰⁴ In forming this view, the Pre-Trial Chamber took into consideration the following factors: (i) his ability to suspend unit commanders;²²⁰⁵ (ii) the fact that the code of conduct was not distributed to all soldiers;²²⁰⁶ (iii) Mr. Bemba's power, under the military judicial system, to initiate investigation and prosecution within the MLC structure;²²⁰⁷ (iv) Mr. Bemba's power to unilaterally arrest, detain and release soldiers;²²⁰⁸ (v) Mr. Bemba's power to issue decrees impacting on the organization of the military judicial system;²²⁰⁹ (vi) Mr. Bemba's setting up of a commission of inquiry that operated in the CAR;²²¹⁰ (vii) Mr. Bemba's suspension of two MLC commanders;²²¹¹ and (viii) the fact that Mr. Bemba's caution was only delivered to approximately 200 of the MLC troops.²²¹²

937. According to the Pre-Trial Chamber, the measures that were required were those "suitable to contain the situation", whereas Mr. Bemba had "disregarded the scale and gravity of the crimes" and opted for inadequate measures.²²¹³ The Pre-Trial Chamber suggested that a "genuine will" to take the necessary measures to protect the civilian population by preventing crimes or even repressing their commission was lacking.²²¹⁴

²²⁰⁴ Confirmation Decision, ICC-01/05-01/08-424, para. 490.

²²⁰⁵ Confirmation Decision, ICC-01/05-01/08-424, para. 491, *in fine*.

²²⁰⁶ Confirmation Decision, ICC-01/05-01/08-424, para. 492.

²²⁰⁷ Confirmation Decision, ICC-01/05-01/08-424, para. 493.

²²⁰⁸ Confirmation Decision, ICC-01/05-01/08-424, para. 493.

²²⁰⁹ Confirmation Decision, ICC-01/05-01/08-424, para. 493.

²²¹⁰ Confirmation Decision, ICC-01/05-01/08-424, para. 494.

²²¹¹ Confirmation Decision, ICC-01/05-01/08-424, para. 494.

²²¹² Confirmation Decision, ICC-01/05-01/08-424, para. 494.

²²¹³ Confirmation Decision, ICC-01/05-01/08-424, para. 495.

²²¹⁴ Confirmation Decision, ICC-01/05-01/08-424, para. 501.

938. Concerning the requirement of causation, the Pre-Trial Chamber said that Mr. Bemba's failure increased the risk of the commission of crimes.²²¹⁵ The Pre-Trial Chamber drew that conclusion on the basis of the following:²²¹⁶ (i) Mr. Bemba's material ability to prevent and repress crimes; (ii) the availability of a functional military judicial system which he could have used to punish crimes and prevent them; (iii) the absence of any measures with respect to crimes committed between November 2002 and January 2003 which increased the risk of their future occurrence; (iv) the length of time taken to announce the troops' withdrawal and to issue an order to this effect which led to the continuing commission of the crimes at least between mid-January and mid-February 2003.²²¹⁷

2. The Duty to Prevent

939. The duty to prevent arises only from the moment when the alleged superior acquires sufficient knowledge that a crime is "being prepared or planned" or when he has reasonable grounds to suspect that crimes are about to be committed.²²¹⁸ A failure to act prior to the time when the superior acquires such information could not form the basis of his responsibility. The duty to prevent presupposes that a superior has the material ability to prevent the crimes of his subordinates.²²¹⁹ The phrase "reasonable" refers to those measures which, in light of the information at the disposal of the commander at the time and in view of all relevant factual circumstances, were²²²⁰ legal;²²²¹ feasible;²²²² proportionate;²²²³ and timely.²²²⁴

²²¹⁵ Confirmation Decision, ICC-01/05-01/08-424, para. 501.

²²¹⁶ Confirmation Decision, ICC-01/05-01/08-424, para. 501.

²²¹⁷ Confirmation Decision, ICC-01/05-01/08-424, para. 501.

²²¹⁸ *Kordić* TJ, para. 445; *Kvočka* TJ, para. 317; *Hadžihasanović* Rule 98bis Decision, para. 166; See also *Hadžihasanović* TJ, paras. 1042, 1231, 1457; *Orić* TJ, para. 574, *Bagilishema* AJ, para. 33.

²²¹⁹ *Ndindiliyimana et al.* TJ, para. 1961.

²²²⁰ *Rasević and Todović* TJ, para. 158.

²²²¹ A commander is not permitted, nor is he expected, under the laws of war to commit a breach of his obligations for the purpose of enforcing compliance with the laws of war. See *United States v. Toyoda*, War Crimes Tribunal Courthouse, Tokyo, Japan, 6 September 1949, para. 5019, where a U.S. war crimes tribunal noted that full account must be taken of "his legal means of discharging [his] responsibility".

940. Most important in that context is the “discretion” which a superior enjoys in the choice of measures necessary to fulfill his duty. The Prosecution has set out a “check-list” of measures which it asserts a military commander “should” take to prevent crimes.²²²⁵ International law provides for no such list.²²²⁶ The law’s imprecision on this point may be explained by the fact that commanders in the field are generally better placed to decide what measures are likely, in a given situation, to achieve the required result.

941. In any event, the measures on the Prosecution’s “check-list” fall outside the case as confirmed. The Prosecution first alleges that Mr. Bemba failed to “adequately train his forces in IHL”.²²²⁷ The Pre-Trial Chamber acknowledged that “the MLC soldiers had been informed about the importance of respect for international humanitarian law”.²²²⁸ Mirroring this finding, the DCC states that

²²²² See, e.g., *Krnojelac* TJ, para. 95; *Čelebići* AJ, para. 226; *Kordić* TJ, para. 441; *Hadžihasanović* TJ, paras. 1884-1886; *Orić* AJ, para. 177. The Appeals Chamber has described the requirement of ‘reasonable’ measures in the following terms: “‘reasonable’ measures are those reasonably falling within the material powers of the superior” (*Halilović* AJ, para. 63). Upon ratification or signature of Additional Protocol I, a number of countries (including Italy, Canada, Germany, the Netherlands, Spain and the U.K.) expressed their understanding that the term ‘feasible’ in Article 86 of the Protocol (‘all feasible measures’) was to be understood as meaning ‘practicable or practically possible’. See generally ICRC, ‘Customary International Humanitarian Law’, Volume II: Practice, Part 2, para. 571 and Volume I: Rules, Chapter 5 Section A.

²²²³ The measure(s) should first and foremost be an appropriate response to the information in possession of the commander at the time when he is duty-bound to act and the risk or situation which he is to confront.

²²²⁴ See, generally, *Kordić* TJ, paras. 445-446; *Kvočka* TJ, para. 317; *Hadžihasanović* TJ, paras. 1449, 1473 *et seq*; *Orić* TJ, paras. 328-329. ‘Timely’ need not mean immediate, insofar as the circumstances do not make it possible – or reasonable – for the commander to act immediately.

²²²⁵ Prosecution Closing Brief, para. 681.

²²²⁶ During the negotiations of Additional Protocol I, it was suggested that in order to provide a valid legal basis for the duty of a superior to act, ‘it might be necessary to define in more detail the duties of a command with regard to the prevention and repression of possible breaches committed by his subordinates’ (Summary Record of the Fiftieth Meeting, 4 May 1976, CDDH/I/SR.50, at 116). This, regrettably, did not occur.

²²²⁷ Prosecution Closing Brief, para. 682(i). See also paras. 685-693.

²²²⁸ Confirmation Decision, ICC-01/05-01/08-424, para. 491.

“MLC soldiers had been informed about the importance of respecting international humanitarian law”.²²²⁹

942. In fact, the only factor concerning the duty to prevent confirmed by the Pre-Trial Chamber which makes its way into the Prosecution brief is the finding that the code of conduct was not distributed to all soldiers.²²³⁰ The other factors relied upon by the Prosecution fall outside the case as confirmed, and should not form part of the Chamber’s deliberations.

943. Moreover, the Prosecution fails to explain how each of these purported measures would have contributed to preventing the crimes in question. In fact, these measures are so disconnected from the alleged crime-base evidence, that none have been shown to be capable of preventing the crimes with which Mr. Bemba has been charged. Without prejudice to these primary submissions, the Defence will address each of these arguments below, demonstrating the Prosecution’s failure to establish beyond a reasonable doubt that Mr. Bemba failed to prevent.

(a) The code of conduct was popularised²²³¹

944. The Prosecution concedes that “many of the soldiers were illiterate”.²²³² In the same paragraph, it criticizes Mr. Bemba for not ordering a translation of the code of conduct into Lingala.²²³³ The physical distribution of a written code, whether in French or Lingala or even Swahili is of little use to an illiterate population of soldiers. Instead, emphasis was placed on “popularization” of the code, ensuring its provisions were known and understood by the rank and file,

²²²⁹ ICC-01/05-01/08-856-Conf-AnxA, para. 75.

²²³⁰ Confirmation Decision, ICC-01/05-01/08-424, para. 492.

²²³¹ Confirmation Decision, ICC-01/05-01/08-424, para. 492.

²²³² Prosecution Closing Brief, para. 690, fn.2180. See also P-33, T-159, p.62: “Most of the soldiers, most of the soldiers recruited in the course of work, were mainly illiterate.”

²²³³ Prosecution Closing Brief, para. 690.

rather than ensuring each soldier had a physical copy in his pocket. As a soldier, a hardcopy of the code would have been “difficult to keep”.²²³⁴

945. MLC military training included “respect or upholding of the code of conduct, which was considered to be a Bible”.²²³⁵ The MLC Etat Major included a “G5”, responsible for, *inter alia*, “moral issues”.²²³⁶ The G5 office deployed “political commissioners” to MLC brigades and battalions.²²³⁷ As well as providing education on the role and goals of the movement,²²³⁸ P-45, [REDACTED], testified that their role was to “disseminate and popularize the code of conduct.”²²³⁹ D-49 confirmed that the political commissioners:²²⁴⁰

make this kind of work more accessible in terms of code of conduct and some certain regulations, rules and regulations, and upon leaving the training institution one might forget these things, and as such the police commissioners would then go to visit the various units and repeat this information.

946. The popularization of the code was done in Lingala.²²⁴¹ Soldiers would learn its provisions by repeating them²²⁴², or singing them.²²⁴³ Every unit had a copy of the code to hand.²²⁴⁴

947. The Prosecution’s claim that [REDACTED] could not recognize the code of conduct is not a fair summation of his testimony.²²⁴⁵ When presented with two pages on a computer screen, he testified that “the one I used when I was in the ALC

²²³⁴ P-213, T-187, p.51.

²²³⁵ D-49, T-270, p.41; P-36, T-213, p. 51.

²²³⁶ P-36, T-217, p.23; D-18, T-317, p.23.

²²³⁷ P-36, T-217, p.23.

²²³⁸ P-45, T-202, p.39.

²²³⁹ P-45, T-202, p.39.

²²⁴⁰ D-49, T-270, p.43.

²²⁴¹ D-49, T-274, p.38; P-45, T-201, pp.43-44.

²²⁴² D-21, T-301, p.43.

²²⁴³ D-49, T-270, p.42.

²²⁴⁴ D-16, T-275, p.23.

²²⁴⁵ Prosecution Closing Brief, para. 692.

didn't count just two pages. It was a document with several pages.”²²⁴⁶ Even if he did not immediately recognize the copy as presented to him (and there is no evidence that the code maintained the same physical appearance), this is easily explainable by the emphasis on oral popularization. The suggestion that [REDACTED]²²⁴⁷ [REDACTED],”²²⁴⁸ is undermined by the evidence from [REDACTED],²²⁴⁹ [REDACTED]²²⁵⁰ and the fact that to this day [REDACTED].²²⁵¹

948. P-45 gave uncorroborated evidence that the “political educators” disbanded [REDACTED].²²⁵² No other witness recognized this change in structure, nor does the evidence indicate that the practice of popularization of the code of conduct, or that disciplinary training declined at any time. In asserting that the code was not adequately disseminated, the Prosecution relies on P-36, who explains that the code was given to those in positions of responsibility, but not to the rank and file because “you must realise that there were some soldiers who perhaps were barely able to read and write”.²²⁵³ Given the evidence of oral popularization, this does not mean that the code was not adequately disseminated. Indeed, P-65 testified that messages from General Amuli to the troops reinforced “the necessity of strictly respecting the code of conduct.”²²⁵⁴

949. The Prosecution also relies on P-33 who again focused on the physical distribution of copies of the code.²²⁵⁵ P-33 later conceded that in fact soldiers were punished for transgressions of the code, and agreed that it was essential for the

²²⁴⁶ D-19, T-288, p.52.

²²⁴⁷ [REDACTED].

²²⁴⁸ [REDACTED].

²²⁴⁹ [REDACTED].

²²⁵⁰ D-19, T-284, p.16.

²²⁵¹ D-19, T-284, p.10.

²²⁵² P-45, T-202, p.40.

²²⁵³ P-36, T-213, pp.52-53.

²²⁵⁴ P-65, T-168, p.62.

²²⁵⁵ P-33, T-159, p.61.

political success of the movement that the army was properly controlled.²²⁵⁶ In any event, the Prosecution had the burden of establishing beyond reasonable doubt that the particular MLC troops involved in the operation in the CAR had not received a copy of the code, and/or were not familiar with its provisions, and that this played a causal role in the commission of the particular crimes with which Mr. Bemba was charged. No evidence was lead on this point.

(b) The MLC troops received training in IHL

950. In terms of “training in IHL”, the Defence military expert explained that the relevant question was not whether the MLC soldiers were given training on each provision of the 1949 Geneva Conventions and Additional Protocols, but rather:²²⁵⁷

you have to adjust the training to the people you are dealing with. It's not a matter of convening a group of people and handing out a document and saying, "Here you go. Here are the international rules, the law of war." You have to explain each one of these rules, using words that are understandable to the people that they are intended for, if you are to reach the objective. And within a group of soldiers training is done, or is targeted rather for the lowest common denominator, the lowest level, because if the lowest level of people understand, that means that the higher levels also understand.

951. This reflects the ICC's approach to regulating or criminalizing conduct, namely that focus should be “on the alleged conduct and not its legal characterization”.²²⁵⁸ As such, the question is not whether MLC soldiers could recite the definition of a military objective under IHL. The question is whether they knew that they were prohibited from attacking civilians or their property. The evidence demonstrates that this was the case.²²⁵⁹

²²⁵⁶ P-33, T-163, p.52.

²²⁵⁷ D-53, T-234, pp.10-11.

²²⁵⁸ ICC-01/11-01/11-344-Red, paras. 85, 88.

²²⁵⁹ P-15, T-210, p.43; D-39, T-274, pp.38, 41-42; P-45, T-202, p.39; P-36, T-217, p.44.

952. The Prosecution criticizes the code on the basis that it:²²⁶⁰

does not mention the following minimal customary IHL requirements in non-international armed conflicts: proportionality in attack, precautions in attack, specifically protected persons and objects, and specific methods of warfare.

953. None of these requirements form the basis for charges in the present case. Any failings of the code would have no bearing on the question of Mr. Bemba's alleged failure to prevent the underlying crimes. The same is true of the alleged failings concerning prisoners of war.²²⁶¹

954. The Prosecution submissions fail to state why the responsibility to ensure this specific aspect of disciplinary training rested with Mr. Bemba. The MLC had a G5 office, responsible for training and popularizing the code of conduct. The Prosecution has not addressed how any alleged lacunae in the content of the training gave rise to liability on the part of Mr. Bemba.

955. The Prosecution also fails to demonstrate how any alleged inadequacies in IHL training contributed to the commission of crimes. Despite unchallenged evidence that Bozizé's troops did not receive any training in the Geneva Conventions or even how to deal with the civilian population,²²⁶² the Prosecution still paints these forces as being led by "well-trained soldiers" with the capacity to "instil [*sic*] discipline within their forces."²²⁶³ The Prosecution cannot have it both ways. In any event, the Prosecution has failed to establish that any member of the MLC contingent in the CAR had not received such training, and that this played a causal role in the commission of the particular crimes with which Mr. Bemba was charged. This burden has not been met.

²²⁶⁰ Prosecution Closing Brief, para. 688.

²²⁶¹ Prosecution Closing Brief, para. 659.

²²⁶² D-56, T-313, p.22.

²²⁶³ Prosecution Closing Brief, para. 164.

(c) The MLC troops received clear orders to ensure respect for IHL

956. Mr. Bemba did not go to Zongo and address the troops before their crossing to Bangui.²²⁶⁴ This fiction has been addressed above.²²⁶⁵ No reasonable Chamber applying the correct burden of proof could find as a fact that he did.

957. Mr. Bemba issued clear orders concerning the conduct of his troops. Firstly [REDACTED] before the troops crossed²²⁶⁶ and - if that was not sufficient – directly to the troops during a visit to PK12.²²⁶⁷ This reflected Mr. Bemba’s practice in the DRC, where he would regularly ask that the code of conduct be implemented and enforced.²²⁶⁸ No basis was given for a complete *volte face* once the MLC troops crossed a border. If, as the Prosecution asserts, Mr. Bemba was obsessed with the MLC’s reputation in the media,²²⁶⁹ it is unlikely that he would have been ambivalent towards, or even encouraged, misconduct on the basis that it was alleged to be happening in a third state.

958. The alleged order to “balayer” in Mongoumba is incapable of belief. It is based on the uncorroborated secondhand hearsay testimony of P-169, a witness who was openly “against Bemba”.²²⁷⁰ He accepted money to give information concerning “Bemba’s men”;²²⁷¹ knowingly and repeatedly breached protective orders of the Chamber,²²⁷² and submitted a complaint concerning the insufficiency of the money provided by VWU and the Prosecution.²²⁷³ [REDACTED].²²⁷⁴ He also

²²⁶⁴ Prosecution Closing Brief, paras. 694-697.

²²⁶⁵ Chapter IV Section C6.

²²⁶⁶ [REDACTED].

²²⁶⁷ P-65, T-170, p.61; D-19, T-285, pp.5-6; P-36, T-215, p.20.

²²⁶⁸ P-65, T-170, p.40.

²²⁶⁹ Prosecution Closing Brief, paras. 657, 658.

²²⁷⁰ P-169, T-139, p.17.

²²⁷¹ P-169, T-137, p.36.

²²⁷² EVD-T-D04-00057/CAR-OTP-0072-0504_R01.

²²⁷³ EVD-T-D04-00057/CAR-OTP-0072-0504_R01.

²²⁷⁴ EVD-T-D04-00074/CAR-CHM-0001-0031 at 0032.

spoke about “money promised by the Prosecutor for witnesses”.²²⁷⁵ The Prosecution’s unqualified reliance on him in these circumstances is surprising.

959. In any event, P-169 claimed that the MLC troops in Mongoumba on 5 March were under the command of “Kamisi”.²²⁷⁶ However, the first battalion to cross back into the Congo was the Poudrier B battalion under the command in Major Kamisi.²²⁷⁷ This accords with this battalion’s location in Damara.²²⁷⁸ His battalion was later described as the only battalion that was able to withdraw without fighting.²²⁷⁹ The allegation that these troops, rather than crossing back to Congo as per the order to withdraw, actually marched to Mongoumba²²⁸⁰ is, on its face, an unlikely proposition, given that Mongoumba lies 180km due south of Bangui, 200km by the only serviceable road. Taking seven to eight hours by vehicle, it would have taken Kamisi’s troops four days to walk this distance.²²⁸¹ No basis has been given for them making this significant journey.

960. P-169 was not present in Mongoumba when these events occurred; he was in Bossangoa.²²⁸² Nor did he hear Mr. Bemba give the alleged order to “balayer” Mongoumba. P-169’s story has Kamisi calling Mustapha,²²⁸³ Mustapha then calling Mr. Bemba, Mr. Bemba then giving the order to Mustapha, and Mustapha then calling Kamisi back.²²⁸⁴ P-169 was not privy to any of these conversations, he was

²²⁷⁵ EVD-T-D04-00057/CAR-OTP-0072-0504_R01.

²²⁷⁶ P-169, T-136, p.39.

²²⁷⁷ D-19, T-289, p.16.

²²⁷⁸ D-19, T-289, p.16; T-292, pp.30-32; P-169, T-136, p.28; P-173, T-144, pp.15-16; P-178, T-150, pp.36-37.

²²⁷⁹ D-19, T-291, p.13.

²²⁸⁰ EVD-T-OTP-00735/CAR-OTP-0056-0417.

²²⁸¹ V-01, T-221, pp.29-30.

²²⁸² P-169, T-136, pp.39-40.

²²⁸³ P-169, T-136, p.40.

²²⁸⁴ P-169, T-136, p.41.

told the story later by a [REDACTED].²²⁸⁵ The confused and incoherent nature of his testimony on this point only adds to its unreliability.

961. The Prosecution attempts to argue that P-169's story is "corroborated" by the "phone records" it attributes to Mr. Bemba. The unreliability of these "records" has been discussed above. They are not capable of corroborating an already shaky story from a witness of compromised credibility. In any event, of the 16 alleged phone calls between Mr. Bemba and Mustapha, 11 of them failed, lasting no more than a few seconds.²²⁸⁶ In fact, seven calls in a row failed to connect, demonstrating the quality of the connection at that time, leading to a reasonable inference that the call that immediately followed (lasting 10.38 minutes) would have been plagued by the same connection problems, even if the interlocutors managed to stay on the line. There is no evidence; direct, secondhand or anonymous hearsay as to the content of these discussions, or whether the phone calls were even between Mr. Bemba and Mustapha, as opposed to two operators attempting in vain to locate the two men. The evidence is wildly insufficient for any finding of fact.

962. Nor is the alleged attack part of the case. As discussed above in Chapter II, the Pre-Trial Chamber refused to confirm that Mr. Bemba ordered the commission of crimes.²²⁸⁷ This has never been reversed. Moreover, the Prosecution has only charged one crime in Mongoumba, the alleged rape of P-29.²²⁸⁸ Mr. Bemba is not charged with any murders committed in Mongoumba or acts of "devastation". No link has been established between the rape of P-29 and Mr. Bemba's alleged order. The Prosecution's statement that "Bemba's order to "wipe out" Mongoumba resulted in numerous rapes, murders, and pillage has no footnote.²²⁸⁹ Nor,

²²⁸⁵ P-169, T-136, p.40.

²²⁸⁶ EVD-T-OTP-00591/CAR-OTP-0055-0893-at-0915 (item numbers 167-169, 173, 176-182).

²²⁸⁷ ICC-01/05-01/08-424, paras. 388-391.

²²⁸⁸ ICC-01/05-01/08-856-Conf-AnxA, para. 54.

²²⁸⁹ Prosecution Closing Brief, para. 702.

unsurprisingly, does the statement that “Bemba knew that his order would cause this catastrophic result.”²²⁹⁰

(d) The MLC took subsequent preventative measures for previous crimes

963. MLC troops, according to the Prosecution, had “no reason to fear punishment”.²²⁹¹

964. In 2002 or 2003, a junior MLC officer murdered two civilians, following an argument about his wife. Following his trial and conviction he was executed in a stadium in Gbadolite.²²⁹² A corporal was executed in Mama Yemo cemetery in Gemena having been convicted by the court martial. A “crowd” attended, as did the members of the court which sentenced him.²²⁹³ Other MLC troops were sentenced to death “for having killed or for having committed excesses.”²²⁹⁴ This was consistent with an instruction from Mr. Bemba on 31 May 2000 to all ALC brigade commanders, demonstrating his willingness to implement the death penalty for, *inter alia*, killing of civilians, treason, rape, and abduction.²²⁹⁵

965. These were not empty threats. The Chamber has been provided with lists of [REDACTED],²²⁹⁶ [REDACTED].²²⁹⁷ The cahier demonstrates that sanctions were taken and punishments were meted out against troops who engaged in

²²⁹⁰ Prosecution Closing Brief, para. 702.

²²⁹¹ Prosecution Closing Brief, para. 711.

²²⁹² D-21, T-301, pp.38-39; P-33, T-159, p.6.

²²⁹³ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1650 (unofficial translation): from General Brigade Bule en mission to EMG ALC cc info: C/MAN 23 December 2002: informing about the execution of Corporal Binenganga Matouruna condemned to capital punishment by the court martial sitting in mobile Court hearings in Gemena. Took place this 22 (16:45) at Mama Yemo graveyard in the presence of each member of the Court-Martial and members of the security comity of the Sud-Ubangui district. In front of a crowd including the members of the family of the late Brukmanda.

²²⁹⁴ D-49, T-270, p.42; See also EVD-T-OTP-00451/CAR-OTP-0017-0351 at 0354.

²²⁹⁵ EVD-T-OTP-00691/ CAR-D04-0002-1513.

²²⁹⁶ EVD-T-OTP-00450/CAR-OTP-0017-0349; EVD-T-OTP-00451/CAR-OTP-0017-0351.

²²⁹⁷ EVD-T-OTP-00451/CAR-OTP-0017-0351 at 0354.

misconduct;²²⁹⁸ messages make specific reference to the code of conduct being applied.²²⁹⁹ The court martial acted as a mobile court, moving around the MLC territory and sitting in Gemena, Yacoma and Bumba in Équateur province, and Aketi, Bas-Uele in the Orientale province, and also held mobile hearings in Isiro, Mambasa, Epulu and Banalia.²³⁰⁰ The MLC troops had every reason to fear punishment.

966. A rebellion which intended to foster a culture of “rampant impunity” would not invest significant effort and resources to build a judicial system from scratch.²³⁰¹ Nor would it criminalise a failure to report and punish crimes,²³⁰² set up

²²⁹⁸ See, for example, (unofficial translations): EVD-T-OTP-00703/CAR-D04-0002-1641 at 1642: From commander section south Ubangui to chef EMG ALC (C/MAN copied) reporting on the court martial cases of Didanga who killed one civilian and a robbery case; at 1643-44: From General Bde BULE to Chef EMG ALC (C/MAN copied): report about the advancement of those cases; at 1646 From General BULE to C/MAN: report on court martial prosecution of two men who robbed and killed a man; at 1648-49: From commander section south Ubangui to chef EMG ALC (C/MAN copied): on a soldier having stolen money from a civilian, which was then returned; at 1675: From Commander sector Sud EQ to "commander Bole Charlie" (C/MAN copied) a major is suspended; at 1680: From the G3 EMG in mission to Chef EMG ALC (C/MAN copied) reports about the disciplinary council dealing with a case of a soldier convicted for robbery, the case of a civilian being stabbed (he says that the council is not competent to sentence to the death penalty so he will refer the case to the court martial); at 1696: From Commander section south Ubangui to Chef EMG ALC (C/MAN copied): he reports about an incident where a soldier hit a civilian with a stick, he was injured and went to the hospital. It has been investigated; at 1702: From commander section OPS Isiro to C/MAN: he reports about investigating allegations of cannibalism of pygmies; at 1703: From commander OPS Isiro to Chef EMG ALC (C/MAN copied): he reports on arrest of nine soldiers who had fled; at 1709: From commander section Buta to Chef EMG ALC (C/MAN copied): he reports about the arrest of deserters; 1711: From Colonel Willy to Commander Konanda (C/MAN copied): he complains about the commander's troops robbing civilians. He wants to transmit the case to the court martial.

²²⁹⁹ See, for example, (unofficial translation) EVD-T-OTP-00703/CAR-D04-0002-1641 at 1646: From Gen Bule to C/man, cc info EMG ALC, 22 December 2002, requiring application of article 5.5 of the code of conduct.

²³⁰⁰ D-16, T-275, p.16.

²³⁰¹ D-48, T-267, p.18.

²³⁰² EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0164: Non dénonciation des fautes commises par les officiers ou soldats. See also EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0161: Les tendances suivantes sont préjudiciables à la cohésion au sein de l'armée et sont prohibées: - La vile popularité auprès des soldats, c'est à dire tolérer certaines fautes en vue d'être estimé; - Le libéralisme entraîne la faiblesse du commandement avec conséquence la tolérance des erreurs. Car dans ce cas la personne qui dirige ne demeure pas fermement du bon côté à cause de sa conduite débile, alors qu'il sait distinguer le bien et le mal.

disciplinary councils within each unit, with reporting lines back to the General Staff;²³⁰³ appoint judges and prosecutors;²³⁰⁴ and approach various bar associations to ask for lawyers to be sent to defend suspects.²³⁰⁵ D-48 [REDACTED] testified that he “wanted the justice system to operate normally.”²³⁰⁶ It did. If an MLC soldier contravened the applicable statutes or codes, steps would be taken. Misconduct was addressed. “Cases of indiscipline were punished.”²³⁰⁷

967. The Prosecution makes a number of unsubstantiated sweeping statements such as “rape was rampant in the ALC” and refers to “hundreds of allegations of rape during Bemba’s time as commander-in-chief”.²³⁰⁸ Unsurprisingly, no footnote is provided, given that corroborated evidence demonstrates that such incidents were isolated, and in fact the MLC was renowned for its disciplined army.²³⁰⁹

968. [REDACTED].²³¹⁰ [REDACTED].²³¹¹ This is not the case. [REDACTED].²³¹² [REDACTED].²³¹³ [REDACTED]. [REDACTED].

969. The courts martial acted throughout the whole territory,²³¹⁴ travelling to remote areas to ensure that speedy justice was dispensed locally.²³¹⁵ As logic would dictate, rather than transport convicted persons by helicopter back to Gbadolite,²³¹⁶

²³⁰³ D-16, T-275, pp.22-26.

²³⁰⁴ D-48, T-267, pp.12-13, 17.

²³⁰⁵ D-48, T-267, p.17.

²³⁰⁶ D-48, T-268, p.3.

²³⁰⁷ D-16, T-275, pp.24-25.

²³⁰⁸ Prosecution Closing Brief, para. 709.

²³⁰⁹ P-36, T-213, pp.49-50; T-217, pp.44-46; P-15, T-207, pp.38-48; T-208, pp.2-3; T-210, pp.43-44, 46, 49-50, 52; P-45, T-201, p.44; P-213, T-187, pp.50-51; P-33, T-159, p.7; T-160, p.4.

²³¹⁰ EVD-T-OTP-00450/CAR-OTP-0017-0349; EVD-T-OTP-00451/CAR-OTP-0017-0351.

²³¹¹ Prosecution Closing Brief, paras. 707-709.

²³¹² [REDACTED].

²³¹³ [REDACTED].

²³¹⁴ D-16, T-275, p.16.

²³¹⁵ D-16, T-275, pp.17, 19 ; EVD-T-OTP-00703/CAR-D04-0002-1641 at 1672, EVD-T-OTP-00703/CAR-D04-0002-1641 at 1673

²³¹⁶ D-16, T-275, p.19.

they were detained *in situ*. Messages in the cahier speak of detainees being held throughout MLC-controlled territory following trial by the mobile court martial. A message from 5 January 2003 speaks of 88 detainees, detained in Gemena having been found guilty of various charges including armed robbery, theft, desertion, and murder.²³¹⁷ A message on the next page reports on a Lieutenant who was caught embezzling, who will be imprisoned in “Angenga”.²³¹⁸ These detainees did not feature on the [REDACTED] list.

970. In the absence of a complete and verified list of all disciplinary and criminal sanctions taken against MLC members during the relevant period, the Prosecution is simply not in a position to make statements such as “in October 2002, Bemba had not convened any courts-martial charging rape, pillage, or murder”,²³¹⁹ nor has this been established beyond a reasonable doubt.

971. Similarly, there is no evidential basis for the assertion that alleged rapes and other assaults reported in the cahier were “left unaddressed”.²³²⁰ There is no evidence in the record that all instances of punishment or sanction were reported through the cahier.

972. The Prosecution also errs in asserting that “Bemba had the ability to refer rape cases to courts-martial”. No footnote is given,²³²¹ and no basis provided for the assertion that this was either Mr. Bemba’s responsibility or within his legal capacity. In fact, there was a functioning judicial system in place that did not provide for the MLC Chairman to suddenly demand that a case be tried. The statutory framework for this system existed in the Code of Military Justice, the

²³¹⁷ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1672.

²³¹⁸ EVD-T-OTP-00703/CAR-D04-0002-1641 at 1673.

²³¹⁹ Prosecution Closing Brief, para. 708.

²³²⁰ Prosecution Closing Brief, para. 710.

²³²¹ Prosecution Closing Brief, para. 708.

Congolese Penal Code, and the ALC Code of Conduct.²³²² Disciplinary offenses, such as being “absent in the morning” or failing to take “good care of his weapon” were dealt with at the level of the unit.²³²³ Criminal offenses were first referred to the disciplinary council within each unit, where soldiers were given a chance to explain themselves. From the disciplinary council, the deputy commander would provide a written report to his commander, and make recommendations as to the characterization of the offence as either a disciplinary violation and/or a criminal offence in violation of a particular law. The soldier would then be questioned, before the report would be sent to the Etat Major for action. Incidents of misconduct would be noted in the cahier.²³²⁴

973. At the level of the Etat Major, the Chef d’Etat Major had staff responsible for investigating these offences, including officers who had legal backgrounds who were responsible for examining the reports. The files would then be sent to the military prosecutor who would analyse the file and could refer the matter to the court martial.²³²⁵ There was a concern to have an appellate process, so two appellate courts were created in Buta in Bas-Uele and Mbandaka, and the help of MONUC was enlisted for transportation to ensure access.²³²⁶

974. No evidence was heard that this system did not function as described. D-16, [REDACTED],²³²⁷ rejected any suggestion that Mr. Bemba could intervene at all or any level of this process and take a file directly to the court:²³²⁸

Senator Bemba was not in a position to give orders directly to soldiers. There was a structure. The Chief of General Staff and the

²³²² D-16, T-275, p.20.

²³²³ D-16, T-275, p.21.

²³²⁴ P-65, T-170, p.30.

²³²⁵ D-16, T-275, pp.21-22.

²³²⁶ D-48, T-267, p.13.

²³²⁷ D-16, T-275, p.14.

²³²⁸ D-16, T-275, p.25.

senior officer would compile reports on discipline, were the case to arise, and would report back to measures that had been taken in cases of indiscipline within the unit. So President Bemba did not have the power to convene a disciplinary council as his level. This was at the unit level as such, and it was up to the units to report back to the Chief of General Staff.

975. D-48, [REDACTED],²³²⁹ agreed:²³³⁰

...when it came to prosecuting suspects, it was not Mr Bemba who decided when someone would be prosecuted... he's not the one who would say, "Prosecute this person" or not. So, pursuant to the law, he could set up the court but he could not decide who would do what, who should be guilty or not, so he established the jurisdiction as all other jurisdictions, just like all other heads of state would do.

976. International law allows superiors to delegate tasks and duties to others, including in relation to their obligation to prevent and punish crimes of subordinates.²³³¹ A superior is not, therefore, required to involve himself personally in the process of punishing crimes of subordinates, nor is he required to investigate allegations personally.²³³² Where others are responsible for doing so, or where a superior has delegated such responsibility to subordinates, the superior is in turn entitled to assume that the assignment entrusted to that organ will be properly executed, in the absence of knowledge to the contrary.²³³³

977. In the case of the MLC, the responsibility to ensure compliance with the code of conduct rested with the Chef d'Etat Major.²³³⁴ In a 2001 "Décision" in which

²³²⁹ D-48, T-267, p.49.

²³³⁰ D-48, T-268, pp.9-10.

²³³¹ See, e.g., *Aleksovski* TJ, para. 78; *Blaškić* TJ, para. 302; See, also, ICRC, 'Commentary on the Additional Protocols', para. 3562.

²³³² See, e.g., Commentary to Article 87, Additional Protocol I, para.3563.

²³³³ High Command case, p.558: "While [the accused Von Leeb] had the right to issue orders to his subordinates concerning such matters, he also had the right to assume that the officers in command of those units would properly perform the function which had been entrusted to them by higher authorities."

²³³⁴ EVD-T-D04-00046/CAR-DEF-0001-0634, at 0635; P-65, T-168, pp.62: "whenever there was an operation in the territory of the Congo, the messages from the Chief of Staff had to do with the necessity of strictly respecting the code of conduct."; P-65, T-169, p.63; P-65, T-170, p.33.

General Amuli appointed a temporary Chef d'Etat Major, he described his job description in four points. One point was ensuring the discipline of the troops.²³³⁵ The framework of the disciplinary regime put in place was prepared at Mr. Bemba's behest and with his contribution.²³³⁶ His role, however, was legislative or quasi-legislative. The decree creating the court martial placed responsibility for its implementation on the Vice National Secretary for Defence and the National Secretary for Justice.²³³⁷ Mr. Bemba had no role and no authority in enforcing or implementing disciplinary sanctions.²³³⁸ There is nothing in the *Memo sur l'organisation de l'ALC*²³³⁹ which allows for the President of the movement to refer cases to the courts martial, nor does the cahier record any examples of Mr. Bemba having done so. Mr. Bemba was entitled in the circumstances to trust that the competent judicial authorities were capable and engaged in this effort. There is no evidence that he received any complaints or information that the competent MLC judicial authorities were failing in their duties.²³⁴⁰

978. Nor do the other factors relied upon to allege that Mr. Bemba failed to adopt subsequent measures after being aware of previous crimes bear scrutiny. The arrest of the eight soldiers was a concrete example of measures being taken, not the reverse.²³⁴¹ The allegation that President Patassé informed Mr. Bemba of crimes during his visit is based solely on the uncorroborated hearsay of P-213, whose testimony is not capable of supporting an incriminating finding of fact.²³⁴² Its reliability is further undermined by President Patassé's public statements.²³⁴³ The

²³³⁵ EVD-T-OTP-00706/CAR-DEF-0001-0127.

²³³⁶ D-48, T-268, p.3.

²³³⁷ EVD-T-OTP-00697/CAR-DEF-0002-0580 at 0581: "Article 7: Le Secrétaire National Adjoint de la Défense et le Secrétaire National à la Justice sont chargés, chacun en ce qui le concerne, de veiller à l'exécution du présent Décret.

²³³⁸ D-48, T-268, pp.9-10.

²³³⁹ EVD-T-D04-00046/CAR-DEF-0001-0634.

²³⁴⁰ P-65, T-169, p.7; P-151, T-173, pp.37-40.

²³⁴¹ Prosecution Closing Brief, para. 204.

²³⁴² Prosecution Closing Brief, para. 705.

²³⁴³ EVD-T-OTP-00576/CAR-OTP-0031-0099, minute 03.15-03.29; P-6, T-96, p.4.

alleged conversation between Mr. Bemba and General Cissé concerning 2001 crimes²³⁴⁴ has been discussed above. It is based solely on an extract from *Le Citoyen*. The allegation falls outside the case,²³⁴⁵ and the Prosecution failed to put this allegation to [REDACTED].

979. As as been set out above, the Prosecution's third attempt to argue that Mr. Bemba's knowledge of the 2001 intervention gives rise to liability as concerns 2002²³⁴⁶ is outside the scope of the DCC and must be disregarded.²³⁴⁷ In any event, to allege that Mr. Bemba had knowledge of crimes being committed in 2001, the Prosecution relies solely on an extraordinary "news report".²³⁴⁸ In fact, this is a two-page printout from the internet, purporting to be a "NewsLibrary" report of a BBC report of an RFI report.²³⁴⁹ The original recording was not offered by the Prosecution, and the Chamber has no information about the accuracy of the presumed translation from French to English. This is not an interview with Mr. Bemba, the article purports to report a conversation between Mr. Bemba and an unknown source.

980. Even had this article been produced in its original form, and been properly authenticated by its author, its reliability would still be undermined by the inaccuracy of its contents. It was put to [REDACTED], who pointed out inaccuracies, disputed its contents,²³⁵⁰ [REDACTED]." ²³⁵¹ His testimony finds corroboration in the firsthand evidence Lengbe, who testified that the 2001

²³⁴⁴ Prosecution Closing Brief, paras. 617, 631.

²³⁴⁵ Confirmation Decision, ICC-01/05-01/08-424, paras. 478-489; ICC-01/05-01/08-856-Conf-AnxA, paras. 79-86.

²³⁴⁶ Prosecution Closing Brief, paras. 706-707.

²³⁴⁷ Confirmation Decision, ICC-01/05-01/08-424, para. 377, ICC-01/05-01/08-836, para. 73, ICC-01/05-01/08-856-Conf-AnxA 201,

²³⁴⁸ Prosecution Closing Brief, para. 706.

²³⁴⁹ EVD-T-OTP-00425/CAR-OTP-0008-0409.

²³⁵⁰ D-18, T-320, pp.20-24.

²³⁵¹ D-18, T-320, p.22.

intervention passed without incident.²³⁵² In fact, the “article” borders on the ridiculous. As discussed above,²³⁵³ it reports that Amuli was arrested. It is yet another example, of RFI anti-Bemba propaganda.

(e) There was no “climate of toleration of crimes” within the MLC

981. Fostering a “climate of toleration of crimes” may be an understandable allegation against a rebel movement which placed no emphasis on discipline, had no code of conduct, no real training, no system of military justice, no political commissioners, and where soldiers engaged in operations without the ever-present threat of the death penalty. In short, a rebellion like the one raised by General Bozizé in 2002.²³⁵⁴ This criticism does not fit with the evidence about the way the MLC operated.

982. The allegation of “first day looting” is, again, an invention of P-213.²³⁵⁵ As uncorroborated anonymous second-hand hearsay; it is not capable of reliance.²³⁵⁶ It is also confused, given that P-213 later clarified that “[i]n other words, if a soldier took property which belonged to civilians, the soldiers were tried before a military tribunal”.²³⁵⁷ As discussed above, the Prosecution has a duty to establish beyond reasonable doubt that any “booty” seized were not appropriate for military necessity. This has not even been attempted. The Prosecution asked P-36 directly whether MLC troops were permitted to loot on the first day of an operation. He replied that he was not aware of such a rule,²³⁵⁸ and that such a thing was “never

²³⁵² P-31, T-183, p.19.

²³⁵³ See Chapter II.

²³⁵⁴ D-65, T-245, p.38; D-56, T-313, pp.20-22.

²³⁵⁵ Prosecution Closing Brief, para. 714.

²³⁵⁶ ICC-01/04-01/06-803, para 106; ICC-01/04-01/07-717, paras. 119, 140, 160; ICC-02/05-02/09-243-Red, paras. 52, 176, 196-197; ICC-01/05-01/08-424, para. 50 and fn.65; ICC-01/04-01/10-465-Red, para. 49: anonymous hearsay contained in witness statements will be used only for the purposes of corroborating other evidence, while second degree and more remote anonymous hearsay contained in witness statements will be used with caution, even as a means of corroborating other evidence.

²³⁵⁷ P-213, T-187, p.55.

²³⁵⁸ P-36, T-213, p.57.

authorized”.²³⁵⁹ In any event, as discussed in Chapter IV, this allegation falls outside the scope of the charges, given both the Pre-Trial Chamber and Trial Chamber’s previous rejection of the allegation that Mr. Bemba gave a licence to commit crimes.

983. The alleged distribution of “pillaged” vehicles²³⁶⁰ is a complete fiction. P-33’s story in that regard was easily unraveled. He admitted that the car given to General Amuli had not in fact been looted, it had been taken from enemy forces²³⁶¹ (a fact corroborated by [REDACTED], and by [REDACTED]);²³⁶² the car driven by Colonel Bokolombe had, in fact, been a gift from President Patassé following the first intervention in 2001²³⁶³ (a fact corroborated by both [REDACTED] and [REDACTED] who confirmed this gift was delivered by Demafouth);²³⁶⁴ and that he didn’t know how Simene obtained his vehicle, but that he had brought it back by himself from the Central African Republic.²³⁶⁵ [REDACTED].²³⁶⁶ The MLC received “six or seven Hilux pick-ups” from Bangui, accompanied to Zongo by Central Africans. General Amuli asked [REDACTED] warn Zongo that these vehicles were arriving, and to greet the Central Africans who accompanied them. They were given to the MLC “before the war”.²³⁶⁷

984. Lengbe testified that the vehicles given to the MLC for the operation remained in the CAR, as the barge was incapable of supporting large vehicles, and taking vehicles would have been “too risky”.²³⁶⁸ Oradimo confirmed that in the course of his investigation “there was not a single individual citizen who came to

²³⁵⁹ P-36, T-214, pp.56-57; T-217, p.45.

²³⁶⁰ Prosecution Closing Brief, para. 715.

²³⁶¹ P-33, T-163, p.41.

²³⁶² [REDACTED].

²³⁶³ P-33, T-163, p.45.

²³⁶⁴ [REDACTED].

²³⁶⁵ P-33, T-163, p.47.

²³⁶⁶ D-19, T-286, p.23.

²³⁶⁷ P-65, T-171, p.14.

²³⁶⁸ P-31, T-183, p.43.

me to say that, "My vehicles have been taken."²³⁶⁹ There is no basis to assert that the existence of these vehicles in Gbadolite meant that Mr. Bemba condoned acts of pillage.

985. Furthermore, the Prosecution is again impermissibly stepping outside the bounds of the case as confirmed. The Pre-Trial Chamber rejected P-33's allegation concerning pillaged vehicles.²³⁷⁰ The Trial Chamber ruled, in explicit terms, that this allegation must be deleted.²³⁷¹ The Prosecution's third attempt to rely upon the allegation of pillaged vehicles must accordingly also fail.

986. Similarly, the allegation that "Bemba knew that lack of payment substantially increased the risk that his forces would commit crimes"²³⁷² also falls outside the case as confirmed.²³⁷³ The Prosecution's attempt to resurrect aspects of its original case which did not survive the confirmation process is impermissible, and raises reasonable doubt as to their reliability.

987. In any event, there is no basis to assert the lack of payment to MLC troops be equated with fostering a climate of tolerance for crimes. At that time in the DRC, the non-payment of troops was not unique to the MLC. None of the movements were able to pay a salary.²³⁷⁴ MLC soldiers, who joined the movement knowing that they would not be paid until integration into the national army in Kinshasa,²³⁷⁵ nonetheless received sufficient rations:²³⁷⁶

²³⁶⁹ P-9, T-106, p.57.

²³⁷⁰ Confirmation Decision, ICC-01/05-01/08-424, para. 386.

²³⁷¹ ICC-01/05-01/08-836, paras. 184, 215, 247.

²³⁷² Prosecution Closing Brief, para. 716.

²³⁷³ Confirmation Decision, ICC-01/05-01/08-424, para. 378.

²³⁷⁴ P-44, T-205, p.37.

²³⁷⁵ P-44, T-205, pp.37-38.

²³⁷⁶ P-36, T-216, p.11; P-44, T-205, pp.10-11.

988. Similarly, in the CAR the MLC troops “were very well fed. No one ever spent the night without eating.”²³⁷⁷ To assert otherwise, the Prosecution disingenuously relies on P-36, who was not on the ground and who, in fact, never stated that the MLC contingent received insufficient food.²³⁷⁸ [REDACTED] evidence, and confirmed that “We received beans, Thomson fish, rice, oil... cassava flour, beef. They would kill cows and bring us some beef. Those were the rations that we received... I know that the soldiers ate every day, a morning meal and an evening meal.”²³⁷⁹ The sufficiency of the MLC’s provisions in the CAR was widely corroborated.²³⁸⁰ This was not a factor that fostered “a climate of tolerance” for crimes.

989. The Prosecution then repeats its allegation that Mr. Bemba told the MLC contingent to apply “Article 15” in the CAR.²³⁸¹ The testimony relied upon,²³⁸² apart from being uncorroborated and anonymous second-hand hearsay and accordingly incapable of reliance,²³⁸³ is illogical. P-119, said that the soldiers spoke to her in Lingala, a language she didn’t understand: “When they were speaking to me, I could not understand the language. It was only later that I learned that that language was Lingala.”²³⁸⁴ The Prosecution made no mention of this allegation either during the confirmation phase, or in the subsequent DCC.²³⁸⁵ It does not form part of the charges.

²³⁷⁷ D-19, T-289, p.13.

²³⁷⁸ Prosecution Closing Brief, para. 716, fn. 2256. See also P-36, T-216, pp.14-15.

²³⁷⁹ D-19, T-284, p.44.

²³⁸⁰ P-31, T-182, pp.29-30; P-9, T-106, pp.50-53; P-63, T-116, pp.30-31; D-66, T-279, p.33; D-53, T-230, p.32.

²³⁸¹ Prosecution Closing Brief, para. 716.

²³⁸² P-119, T-82, p.34.

²³⁸³ ICC-01/04-01/06-803, para 106; ICC-01/04-01/07-717, paras. 119, 140, 160; ICC-02/05-02/09-243-Red, paras. 52, 176, 196-197; ICC-01/05-01/08-424, para. 50 and fn.65; ICC-01/04-01/10-465-Red, para. 49: anonymous hearsay contained in witness statements will be used only for the purposes of corroborating other evidence, while second degree and more remote anonymous hearsay contained in witness statements will be used with caution, even as a means of corroborating other evidence.

²³⁸⁴ P-119, T-82, pp.29-30, 33.

²³⁸⁵ ICC-01/05-01/08-856-Conf-AnxA.

990. Even if it were established that Mr. Bemba gave this order and that it had a sinister or criminal meaning (as opposed to, for example, being an instruction to adapt to a new environment), this would constitute “ordering”, a mode of liability with which he has not been charged. P-15 testified that “I stand by what I said to the effect that I cannot imagine President Bemba issuing orders for people to commit atrocities.”²³⁸⁶ In fact, the Chamber heard evidence that the expression is no more than a generic cultural expression (based on a popular song) given to many different sorts of interpretations.²³⁸⁷ Indeed it has heard no other credible interpretation of the phrase.

991. The Prosecution then suggests that withholding Mustapha’s promotion in March 2003 would have been “a reasonable measure to prevent crimes” between October 2002 and March 2003.²³⁸⁸ This is absurd. Not only does the Prosecution confound the physical distribution of ranks with the decision militarily to promote someone,²³⁸⁹ it is blind to the irony that Mustapha’s promotion is in fact consistent with the MLC High Command’s lack of concrete knowledge as to alleged criminal activity of the MLC contingent in the CAR. More to the point, the Prosecution fails to explain how denying someone a promotion in March 2003 would prevent the commission of crimes five months earlier.

992. The allegation that “crimes were committed by ALC troops in the presence of their commanders, who supported them, took no action to stop them, or on other occasions actively supported their commission” again has no footnote.²³⁹⁰ The

²³⁸⁶ P-15, T-211, p.44; See also P-44, T-205, p.40; D-19, T-286, p.17; D-53, T-235, p.6.

²³⁸⁷ See, e.g., P-45, T-203 pp.13-14.

²³⁸⁸ Prosecution Closing Brief, para. 719.

²³⁸⁹ EVD-T-OTP-00368/CAR-OTP-0032-0176 at 0168, 0172. See P-33, T-160, p.51; D-19, T-286, pp.23-24; P-15, T-211, p.21.

²³⁹⁰ Prosecution Closing Brief, para. 720.

Prosecution [REDACTED].²³⁹¹ It failed to [REDACTED]. [REDACTED].²³⁹² In such circumstances, the Prosecution is in no position to make such assertions. In any event, even if these MLC commanders were said to have culpably failed in their duties to prevent crimes, the responsibility to act would rest with the hierarchical commander, General Mazi or General Bombayake, and thus ultimately with President Patassé.

993. The Prosecution then alleges “the proceeds of pillaging were carried away by ALC troops in public and in plain (video-taped) view” and relies only on [REDACTED] video.²³⁹³ [REDACTED] video is the best contemporaneous record of events available to the Chamber. Running for over an hour, it records not only the events of crucial dates in key areas, but gives a direct portal into the contemporaneous attitude of those heard commentating. The support this video provides for the Defence case, in particular on the date of arrival of MLC troops on 30 October and their subsequent movements, has been discussed above.²³⁹⁴

994. More than that, the video records that the local population viewed the Congolese as the liberators from the attack by Bozizé’s rebels.²³⁹⁵ Rather than showing “Banyamulengue” engaged in criminal acts, the video shows members of the Central African population carrying away the household goods of their own neighbours,²³⁹⁶ [REDACTED]”.²³⁹⁷ This video exposes the Prosecution and LRV theory of crimes during the conflict as having been committed only by the “Banyamulengue” as implausible.

²³⁹¹ [REDACTED].

²³⁹² [REDACTED].

²³⁹³ Prosecution Closing Brief, para. 720.

²³⁹⁴ See Chapter IV.

²³⁹⁵ See CAR-OTP-0039-0058 [REDACTED].

²³⁹⁶ CAR-OTP-0039-0058.

²³⁹⁷ [REDACTED].

995. It is therefore unsurprising that of the hour of footage, the Prosecution seeks to rely on only two tiny fragments. The rest of the video is ignored. Neither fragment shows pillaging by MLC troops. It was arguably been filmed before the MLC's arrival in the northern quarters, where the footage is taken.²³⁹⁸ Nor is such a finding safely available to the Chamber, given the testimony – corroborated by the video - concerning the crimes inflicted by Bozizé's rebels in these areas,²³⁹⁹ and the practice of Bozizé's troops moving back into areas previously occupied in order to pillage.²⁴⁰⁰

996. The evidence relied upon by the Prosecution does not establish the existence of a climate of toleration of crimes. MLC training had soldiers singing and memorizing a code of conduct, and a G5 office existed to ensure that discipline was a priority. Trials were held, those found guilty were imprisoned and, in some instances, put to death for falling below the required standards. It was its reputation for having a disciplined army which gave the MLC a foothold during the Sun City talks.²⁴⁰¹ [REDACTED] believed that the support of the population would be its biggest asset.²⁴⁰² The fact that the movement enjoyed this support²⁴⁰³ was not challenged at trial, and makes it impossible to accept that MLC troops operated in a climate of tolerance for crimes, and there was no adequate system to prevent them.

3. The Prosecution's case represents a dramatic shift from the case as confirmed

997. The Prosecution has demonstrated its willingness to depart from the confirmed case, deliberately attempting to rely on allegations which have been

²³⁹⁸ [REDACTED]: CAR-OTP-0039-0058 [REDACTED]; CAR-OTP-0058-0167 at 0173 and 0191.

²³⁹⁹ D-56, T-313, pp.30-32.

²⁴⁰⁰ D-56, T-314, pp.12-13.

²⁴⁰¹ P-15, T-210, pp.49-50.

²⁴⁰² P-15, T-210, p.37; D-21, T-301, p.34; D-39, T-308, p.50.

²⁴⁰³ D-21, T-301, pp.34-35; D-49, T-308, p.50.

explicitly dismissed. However, it is perhaps in relation to “measures” that it strays most dramatically from the case as delineated by the Pre-Trial Chamber. The vast majority of the Prosecution’s submissions concerning the duty to prevent are simply not part of the present case. On the other side of this coin, the Prosecution appears to have abandoned the majority of the factors upon which the Pre-Trial Chamber relied. Having been discarded, they also no longer form part of the case. Regardless, none of these factors assist in demonstrating a culpable failure on the part of Mr. Bemba to prevent the crimes with which he is charged.

998. The “decrees” issued by Mr. Bemba²⁴⁰⁴ placed the responsibility for the operation of the judicial system in the hands of others,²⁴⁰⁵ nor is there any evidence that failing to issue other (unspecified) decrees concerning the organization of the MLC’s justice system would have prevented the crimes with which he is charged in the CAR. No evidence has been presented to support the allegation that Mr. Bemba’s caution was only delivered to approximately 200 of the MLC troops.²⁴⁰⁶ In fact, evidence suggests the opposite.²⁴⁰⁷ The alleged suspension of two military commanders²⁴⁰⁸ has been addressed; P-31’s evidence is vague, uncorroborated, appears to be based on a mistaken understanding of the arrest of Willy Bomengo and others, and also appears to have been abandoned. The evidence discussed above shows that Mr. Bemba did not have the power to “initiate investigation and prosecution within the MLC structure;”²⁴⁰⁹ or “unilaterally arrest, detain and release soldiers”;²⁴¹⁰ or in fact “suspend unit commanders.”²⁴¹¹ Disciplinary and penal systems were in place, and functioning. The fact that a joint commission was

²⁴⁰⁴ Confirmation Decision, ICC-01/05-01/08-424, para. 493.

²⁴⁰⁵ See, for example, EVD-T-OTP-00697/CAR-DEF-0002-0580 at 0581: “Article 7: Le Secrétaire National Adjoint de la Défense et le Secrétaire National à la Justice sont chargés, chacun en ce qui le concerne, de veiller à l’exécution du présent Décret.

²⁴⁰⁶ Confirmation Decision, ICC-01/05-01/08-424, para. 494.

²⁴⁰⁷ D-51, T-261, pp.56-57: “he brought together all his soldiers and he spoke to his troops.”

²⁴⁰⁸ Confirmation Decision, ICC-01/05-01/08-424, para. 494.

²⁴⁰⁹ Confirmation Decision, ICC-01/05-01/08-424, para. 493.

²⁴¹⁰ Confirmation Decision, ICC-01/05-01/08-424, para. 493.

²⁴¹¹ Confirmation Decision, ICC-01/05-01/08-424, para. 491, *in fine*.

established does not support a finding that he failed to prevent crimes. It is illustrative of Mr. Bemba's need to verify whether allegations were accurate.

4. The Duty to Repress

999. The Pre-Trial Chamber held that the duty to "repress" encompasses two separate duties arising at two different stages of the commission of crimes; (i) to interrupt ongoing crimes; and (ii) to punish troops after their commission.²⁴¹² As concerns the former, there is no evidence in this case that Mr. Bemba had knowledge of the commission of an ongoing crime which he could have "interrupted".

1000. Concerning the duty to punish, article 28 of the Statute recognises the customary law standard requiring that an accused be shown to have "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution".²⁴¹³

1001. A superior may not be held criminally responsible under international law for failing to adopt a particular measure or for failing to adopt a specific course of action, but only because he failed to adopt *any* measure or where the measures which he adopted could not reasonably be regarded as an adequate and proportionate response.²⁴¹⁴ Thus, the standard is not whether there were or might have been other measures out there which Mr. Bemba could have adopted

²⁴¹² Confirmation Decision, ICC-01/05-01/08-424, para. 439.

²⁴¹³ Articles 28(a)(ii) and 28(b)(iii). The jurisprudence of the ICTY Appeals Chamber reflects the same position: *Halilović* AJ, para. 182, adopting *Halilović* TJ, para. 97; *Blaškić* AJ, paras. 68-69, 499 and 511 (cited in *Halilović* AJ, fn. 505). In *Halilović*, the Appeals Chamber held that: "as the Trial Chamber correctly outlined, 'the duty to punish includes at least an obligation to investigate possible crimes or have the matter investigated, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities'" (emphasis added).

²⁴¹⁴ ICRC, 'Customary International Humanitarian Law', Volume I, pp.562-563.

(disciplinary or otherwise), but whether those which were adopted were adequate (in the sense of being “necessary and reasonable”) in the circumstances.²⁴¹⁵

1002. In this case, Mr. Bemba’s duty must be dramatically tempered by the fact that the responsibility for punishing any misconduct by the MLC contingent rested firstly with the Central African authorities.²⁴¹⁶ Prosecution and Defence witnesses were unanimous on this point. [REDACTED],²⁴¹⁷ [REDACTED],²⁴¹⁸ [REDACTED],²⁴¹⁹ [REDACTED],²⁴²⁰ [REDACTED],²⁴²¹ [REDACTED]²⁴²² the Central African Prosecutor of the Republic,²⁴²³ and the Defence military expert²⁴²⁴ all agreed that discipline was the responsibility of the Central African authorities. D-19, who was on the ground, confirmed that “the CCO had the authority to punish soldiers, be they Congolese or Central African”.²⁴²⁵

1003. Although the Prosecution ignores this evidence, it is wholly relevant to the question of Mr. Bemba’s duty to punish, given that “[t]he degree of the superior’s effective control guides the assessment of whether the individual took reasonable measures to prevent, stop, or punish a subordinates’ crime.”²⁴²⁶ Mr. Bemba was removed from the MLC troops physically, and from the perspective of command.

²⁴¹⁵ The U.S. representative to the Security Council during the adoption of the ICTY Statute put it correctly and concisely when he said that command responsibility could only be entailed where he fails “to take reasonable steps to prevent or punish” such crimes (Provisional Verbatim Record of the 3217th Meeting, 25 May 1993, S/PV.3217, p.16). *Hadžihasanović* AJ, para. 142.

²⁴¹⁶ D-49, T-272, p.24: “The units which went to Bangui was under the orders of the Central Africans. The commander of this brigade was operating in liaison with the Central African officers, and his logistic and all of his equipment had been provided by the Central Africans. So when a problem arose, he would then refer the problem to the Central Africans.”

²⁴¹⁷ [REDACTED].

²⁴¹⁸ D-21, T-302, pp.10, 25-26.

²⁴¹⁹ [REDACTED].

²⁴²⁰ D-48, T-268, p.42.

²⁴²¹ D-49, T-274, p.43.

²⁴²² D-39, T-310, pp.6-7.

²⁴²³ P-6, T-96, p.47.

²⁴²⁴ D-53, T-231, pp.39-40.

²⁴²⁵ D-19, T-285, p.40.

²⁴²⁶ *Ntagerura et al.*, TJ, para. 630.

1004. Despite the responsibility resting firstly with his Central African counterparts, concrete steps were taken by the MLC to address rumours or instances of misconduct:

- A joint investigative commission in the CAR of which the MLC's Colonel Mondonga played a part;²⁴²⁷
- The "Zongo" investigation, led by the MLC National Secretary for Justice and other magistrates to investigate on the border;²⁴²⁸
- The Sibut mission in the presence of international journalists to determine whether there was any truth to the rumours of crimes in that locality;²⁴²⁹
- Letters to the United Nations²⁴³⁰ and FIDH²⁴³¹ asking for information and investigation in order to allow for any implicated troops to be punished;
- A request to the Prime Minister of the CAR asking for an international commission of enquiry to verify whether the rumours of crimes were true;²⁴³²
- The trial of MLC soldiers accused of pillaging in the Central African Republic;²⁴³³
- Investing resources to ensure the MLC judicial system functioned as effectively as possible in the circumstances.²⁴³⁴

²⁴²⁷ D-19, T-285, pp.40-42; P-36, T-215, p.6.

²⁴²⁸ D-48, T-267, pp.31-32; EVD-T-OTP-00392/CAR-DEF-0001-0155.

²⁴²⁹ D-21, T-302, pp.23-30.

²⁴³⁰ EVD-T-OTP-00453/CAR-OTP-0017-0363 Letter from Mr. Bemba to General Cissé dated 4 January 2003; EVD-T-OTP-00584/CAR-OTP-0033-0209 Letter from General Cissé to Mr. Bemba dated 27 January 2003; EVD-T-OTP-00704/ CAR-D04-0002-1455 - Letter to the United Nations dated 21 April 2011; EVD-T-OTP-00705/ CAR-D04-0002-1462 Letter from the United Nations dated 25 July 2011.

²⁴³¹ EVD-T-OTP-00391/CAR-DEF-0001-0152 Letter from Mr. Bemba to FIDH dated 20 February 2003; EVD-T-OTP-00690/CAR-DEF-0001-0154 Letter from FIDH's President Kaba to Mr. Bemba dated 26 February 2003.

²⁴³² D-48, T-267, pp.50-51.

²⁴³³ EVD-T-OTP-00393/CAR-DEF-0002-0001.

²⁴³⁴ D-48, T-268, p.3.

1005. These steps were objectively necessary and reasonable.

(a) The joint commission of enquiry was a reasonable measure

1006. When asked about Mr. Bemba's position in relation to rumours of crimes in the Central African Republic, [REDACTED] testified that "his position was that these soldiers had to be punished, and as I told you yesterday he decided that a joint committee would be set up to investigate these abuses, and this was a joint committee that was made up of both people from the Central African Republic and people from the Congo."²⁴³⁵ In [REDACTED]'s view, this joint commission was a "good idea".²⁴³⁶

1007. Significantly, Mr. Bemba approached the Central Africans after having received denials of criminal activity [REDACTED].²⁴³⁷ He was not content with having only one source; he wanted the information cross-checked. [REDACTED] the commission "had to be mixed".²⁴³⁸ [REDACTED] agreed that "one of the purposes of having Central African Republic members on the joint commission was so they could receive complaints from people who spoke Sango."²⁴³⁹ He explained that the Central African members of the commission:²⁴⁴⁰

would have easier contact with people and they could provide guidance, or they could guide the Congolese persons within the commission with regard to addresses, the language as well, with regards to relations with the other Central Africans, their compatriots.

²⁴³⁵ P-36, T-215, p.6.

²⁴³⁶ P-36, T-218, p.40.

²⁴³⁷ D-19, T-292, pp.53-54: "[REDACTED] that nothing of that sort had happened

²⁴³⁸ P-36, T-218, p.40.

²⁴³⁹ P-36, T-218, p.39.

²⁴⁴⁰ P-36, T-218, p.39.

None of this indicates a “seriously flawed” investigation in which “no CAR victims or witnesses were interviewed.”²⁴⁴¹

1008. The assertion that “there were no investigations into the more serious crimes of rape and murder” is undermined by direct evidence of one of the interviewees:

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this commission questioned me and asked me whether I was aware of cases of looting and I told them, "No," and I was asked whether I had seen women raped or people killed and I said, "No," and I was asked whether [REDACTED] soldiers had killed -- [REDACTED] soldiers had murdered, or Central African soldiers, and I said I wasn't aware of that. [REDACTED].

1009. The Prosecution points to no evidence that the members of the mixed commission, were intent on conducting some kind of “false” or “sham” investigation, or had been instructed to do so by Mr. Bemba. Nor does any suggestion that the Congolese participant in the joint commission failed to fulfil his investigative duties provide a basis for Mr. Bemba’s liability. A superior is entitled to rely upon relevant organs to fulfil their duties and assume that they will do so competently.²⁴⁴³

1010. Any suggestion that Mr. Bemba wanted only a whitewashed report demonstrating that the MLC troops had done nothing wrong, which he could then use to exonerate his movement is undermined by (a) [REDACTED] that the commission be mixed (and its conclusions accordingly out of the MLC’s control);²⁴⁴⁴ and (b) his continuing hunt for information through two other investigations,²⁴⁴⁵

²⁴⁴¹ Prosecution Closing Brief, para. 729.

²⁴⁴² D-19, T-285, p.42.

²⁴⁴³ *Boškoski* AJ, paras. 262-258.

²⁴⁴⁴ P-36, T-218, p.40.

²⁴⁴⁵ Zongo Enquiry: EVD-T-OTP-00392/CAR-DEF-0001-0155; D-48, T-267, pp.31-32; Mission to Sibut: D-21, T-302, pp.23-30.

and an array of requests to international organisations believed to be in the know.²⁴⁴⁶

1011. Ultimately, the results of the joint investigation received by Mr. Bemba corroborated the information he was receiving [REDACTED], and from press reports placing responsibility for the crimes with Bozizé's troops.²⁴⁴⁷ It would later be corroborated by the reports received from the Zongo and Sibut missions.²⁴⁴⁸ There was no concrete evidence of MLC crimes apart from the troops arrested for pillage and no specific other information capable of further action on his part.

(b) The Gbadolite trials were legitimate

1012. In the context of a rebellion movement, actively engaged in a civil war, with finite resources to direct towards its military effort, the lengths taken to ensure that the MLC's judicial process conformed with those fair trial standards operational in the DRC is nothing short of extraordinary.

1013. When the MLC arrived in Équateur, there were no military magistrates. They had all fled.²⁴⁴⁹ The lack of trained lawyers and judges plagued the entire country.²⁴⁵⁰ Recruitment exercises were undertaken,²⁴⁵¹ and the [REDACTED] a permanent judge in a career magistrate, who had previously been appointed by the Kinshasa government. A qualified prosecutor was also found.²⁴⁵²

²⁴⁴⁶ EVD-T-OTP-00453/CAR-OTP-0017-0363 Letter from Mr. Bemba to General Cissé dated 4 January 2003; EVD-T-OTP-00391/CAR-DEF-0001-0152 Letter from Mr. Bemba to FIDH dated 20 February 2003; D-48, T-267, pp.50-51; Mr. Bemba also wrote to the Central African Prime Minister asking for an enquiry to be undertaken D-48, T-267, pp.50-51.

²⁴⁴⁷ EVD-T-CHM-00034/CAR-D04-0004-0030; EVD-T-D04-00008/CAR-DEF-0001-0832; EVD-T-CHM-00004/CAR-DEF-0001-0205; EVD-T-CHM-00035/CAR-D04-0004-0032.

²⁴⁴⁸ Zongo Enquiry: EVD-T-OTP-00392/CAR-DEF-0001-0155; D-48, T-267, pp.31-32; Mission to Sibut: D-21, T-302, pp.23-30.

²⁴⁴⁹ D-48, T-267, p.12.

²⁴⁵⁰ D-48, T-267, p.80.

²⁴⁵¹ D-48, T-267, p.80.

²⁴⁵² D-16, T-275, p.18.

1014. There were no defence counsel within the MLC's territory. Mr. Bemba agreed that requests be sent to bars around the country, that lawyers be authorized to come and defend suspects.²⁴⁵³ The system of justice applied within the MLC was the same as applied by Kinshasa.²⁴⁵⁴ Most of the magistrates who worked within the MLC system continue to work as such today. The various rulings handed down by the MLC courts remain valid within the DRC's current system of justice.²⁴⁵⁵ All resources invested in this system were resources taken away from the war effort, such was the importance ascribed to a functioning system of justice. [REDACTED]. [REDACTED]. [REDACTED]."²⁴⁵⁶

1015. Against this backdrop, the Prosecution criticizes the Gbadolite trial because "the trial date was set before the investigative report or dossier was forwarded to the prosecutor", or that "the accused were notified of their 09.00 trial the morning of trial at 06.00 hours".²⁴⁵⁷ Defence counsel is criticized for being "unlicensed", despite evidence that he was "a very experienced defence lawyer".²⁴⁵⁸ This criticism is particularly unwarranted given the evidence that the Kinshasa government had previously blocked *Avocats sans Frontières* from sending defence lawyers to Gbadolite,²⁴⁵⁹ and had again blocked the defence teams who had been poised to defend the accused in this case.²⁴⁶⁰ The criticism that "no witnesses testified" is speculative in the absence of evidence as to who the witnesses should have been. Judges sitting in a court martial will always fall under a chain of command; this cannot automatically impugn their independence in the absence of evidence

²⁴⁵³ D-48, T-267, pp.17, 80-81.

²⁴⁵⁴ D-48, T-267, p.12.

²⁴⁵⁵ D-48, T-267, p.11.

²⁴⁵⁶ D-48, T-267, p.81.

²⁴⁵⁷ Prosecution Closing Brief, para. 730.

²⁴⁵⁸ D-16, T-275, pp.37-38.

²⁴⁵⁹ P-44, T-205, pp.59-60; P-15, T-208, p.7.

²⁴⁶⁰ D-16, T-275, p.37; T-276, pp.32-33. See also P-15, T-211, pp.5-7; EVD-T-D04-00045/CAR-DEF-0001-0107; D-48, T-267, pp.80-81.

demonstrating bias. The claim that “[t]he judges were there simply to implement orders from Bemba”²⁴⁶¹ again has no footnote, and no basis in the evidence. There are no submissions as to how the “failings” identified by the Prosecution are inconsistent with the system of justice operating in the DRC at the time, or indeed rendered the trial unfair in light of international standards.

1016. In this context, the ICC Appeals Chamber has recently declined to “pass judgment generally on the internal functioning of the domestic legal systems of States in relation to individual guarantees of due process”, and ruled that the ICC “was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights”.²⁴⁶² In that case, the Appeals Chamber placed its imprimatur on domestic proceedings in which the defendant had been interrogated without counsel,²⁴⁶³ denied legal representation and access to the case file for the preliminary phase,²⁴⁶⁴ and faced the death penalty.²⁴⁶⁵ While evidently in the context of an article 17 admissibility challenge, the ICC cannot give greater leeway to States than it accords to ICC defendants who enjoy the protection of the presumption of innocence.

1017. Regardless, the weight of the evidence points to a legitimate and transparent process. P-15 spoke of “a clearly demonstrated desire on the part of the MLC to be transparent, but within the limits of what was possible at the time, the trial was in any event conducted with a view to point out that the acts of violence and abuses would not go unpunished.”²⁴⁶⁶ P-36 confirmed that although the court martial reported back to the President, it was an independent body, the hearings were

²⁴⁶¹ Prosecution Closing Brief, para. 730.

²⁴⁶² ICC-01/11-01/11-565, para. 219.

²⁴⁶³ ICC-01/11-01/11-565, paras. 191, 201.

²⁴⁶⁴ ICC-01/11-01/11-565, paras. 146-154.

²⁴⁶⁵ ICC-01/11-01/11-565, para. 254.

²⁴⁶⁶ P-15, T-208, p.7.

conducted in public, the Judgement in the Gbadolite trial was produced on an independent basis, and the sentences were quite acceptable,²⁴⁶⁷ an opinion shared by [REDACTED].²⁴⁶⁸ The drawing of the charges did not take an unusually long time,²⁴⁶⁹ nor was the time between charging and listing unusually short.²⁴⁷⁰ [REDACTED] confirmed that no-one was involved in the court's consideration of its verdict apart from the Judges. The verdict and sentences were rendered with reference to mitigating circumstances, the legal texts, and the minimum and maximum sentences prescribed. The trial was public, as was the verdict.²⁴⁷¹ There were no external influences. The court was independent and not answerable to anyone.²⁴⁷²

1018. The Prosecution does not dispute that the international media was in attendance.²⁴⁷³ Ugandan and Congolese journalists were present, as was the RFI correspondent,²⁴⁷⁴ who had demonstrated a willingness to criticize the MLC. If the trial was indeed “a sham” as alleged, why was the press invited in the first place, and why were there no reports from the international media decrying the process and denouncing the trials for what the Prosecution now says they were?

1019. The allegation that the prisoners were released early is another P-213 invention. P-36 confirmed that: “I do not remember which or what sentence each of these soldiers received, but what I do know is that they were arrested and held

²⁴⁶⁷ P-36, T-215, p.14.

²⁴⁶⁸ D-48, T-267, p.64.

²⁴⁶⁹ D-48, T-267, p.59.

²⁴⁷⁰ D-48, T-267, pp.60-61.

²⁴⁷¹ D-16, T-275, pp.41-45.

²⁴⁷² D-16, T-275, pp.46-47.

²⁴⁷³ P-15, T-208, p.7.

²⁴⁷⁴ P-15, T-208, p.7.

until we left Gbadolite for Kinshasa. They remained there.”²⁴⁷⁵ This is corroborated by the prison records.²⁴⁷⁶

(c) The Zongo Enquiry was a reasonable measure

1020. The Prosecution claims that the Zongo enquiry was also a “sham”, and intended to “whitewash” the MLC’s actions in the CAR.²⁴⁷⁷ The basis appears to be that it did not reach a conclusion with which the Prosecution agrees. Did the eight interviewees lie about their knowledge of pillage? Did the National Secretary for Justice and other investigators lie about the content of these interviews? The Prosecution points to no evidence to suggest this is the case.

1021. The investigation is impugned on the basis that those involved did not enter the CAR. They had no legal right to do so.²⁴⁷⁸ Any attempt, in the midst of a conflict, would have put them at risk of arrest, or even attack. Papy Bokula’s contribution to the enquiry is impugned on the basis of P-33’s claim that he reported on pillaged vehicles and other “blunders” in the CAR.²⁴⁷⁹ P-33 gives no indication of when [REDACTED] from Bokula, leaving open the real possibility [REDACTED] with the Zongo enquiry. Regardless, the Chamber is faced with a contemporaneous written record signed by the MLC National Secretary of Justice and the Prosecutor of the *Tribunal de Grande Instance* of Papy Bokula statement at the time,²⁴⁸⁰ versus P-33’s self-serving secondhand hearsay account given ten years later. Not only did Bokula tell the Zongo enquiry that pillaged goods had not crossed the river, he gave four

²⁴⁷⁵ P-36, T-215, p.14.

²⁴⁷⁶ D-48, T-267, pp.66-67, referring to EVD-T-OTP-00393/CAR-DEF-0002-0001 at p.91.

²⁴⁷⁷ Prosecution Closing Brief, para. 738.

²⁴⁷⁸ D-48, T-267, pp.47-48; EVD-T-D04-00070/CAR-D04-0003-0342 at 0390: “Les autorités centrafricaines en assuraient donc le pilotage (visite des lieux, audition des victimes) puisque le MLC n’était pas compétent pour conduire une enquête autonome en territoire étranger et qu’en plus il aurait rencontré des problèmes linguistiques lors de l’audition des témoins.”

²⁴⁷⁹ Prosecution Closing Brief, para. 741.

²⁴⁸⁰ EVD-T-OTP-00392/ CAR-DEF-0001-0155 at 0158.

solid reasons as to why this would have been impossible.²⁴⁸¹ This raises reasonable doubt as to P-33's testimony.

1022. The Prosecution then seems to suggest that given that the investigating magistrates Pascal Zanzu and Jean Kamba had been involved in the Gbadolite trials, they were required to find that in this instance pillage had necessarily occurred.²⁴⁸² This is the very kind of pre-judgement for which the Prosecution then criticizes the enquiry.²⁴⁸³ The claim that the enquiry was "limited to interviews with eight MLC officials"²⁴⁸⁴ is untrue. The magistrates first interviewed "the owners of boats that travelled between Zongo and Bangui".²⁴⁸⁵

1023. While unashamedly limited in terms of access, the Zongo enquiry was not a "sham". Its very existence shows ongoing efforts on the part of Mr. Bemba for verified information concerning allegations of crimes, and undermines any suggestion of acquiescence on his part. The allegations had looted goods crossing into Zongo. Investigating in Zongo was a reasonable response. Had Mr. Bemba wanted a sham investigation, there were thousands of junior officers or soldiers who could have been sent. [REDACTED],²⁴⁸⁶ [REDACTED] chose a number of "career magistrates", [REDACTED]".²⁴⁸⁷ [REDACTED].²⁴⁸⁸ [REDACTED]. [REDACTED].²⁴⁸⁹ Asked whether [REDACTED] any pressure to arrive at a particular conclusion, he replied:²⁴⁹⁰

²⁴⁸¹ EVD-T-OTP-00392/ CAR-DEF-0001-0155 at 0157-0158.

²⁴⁸² Prosecution Closing Brief, para. 741.

²⁴⁸³ Prosecution Closing Brief, para. 738.

²⁴⁸⁴ Prosecution Closing Brief, para. 738.

²⁴⁸⁵ D-48, T-267, p.37.

²⁴⁸⁶ D-48, T-267, p.35, "[REDACTED] Mr. Bemba himself, who did not tolerate impunity in the area under his control."

²⁴⁸⁷ D-48, T-267, p.31.

²⁴⁸⁸ D-48, T-267, p.32.

²⁴⁸⁹ D-48, T-268, p.43.

²⁴⁹⁰ D-48, T-267, p.46.

No, there was no pressure. In principle, you might want to note -- well, you would see, the conclusion was derived - was drawn - [REDACTED]. The investigation, I've said at the beginning we wanted the investigation to be entirely judicial in nature and so the magistrates came to do the investigation. I can put my hand on my heart and say that there was no pressure to make any particular report to the President of the MLC.

1024. In any event, the Prosecution has failed to attribute any of the alleged shortcomings of the Zongo enquiry to Mr. Bemba. It is not the mandate which has been impugned, but its execution. To this end, there is no legal obligation on commanders to carry out each step of the investigation; they "will usually have the duty only to start an investigation".²⁴⁹¹ Mr. Bemba fulfilled this duty, and there is no basis in the evidence for suspicion on his part that the enquiry and its results were not genuine. In fact, the report on which he was copied directly corroborated the information he had already received from other sources; namely the joint commission, and from the MLC commander on the ground.

(d) The Mission to Sibut was a reasonable measure

1025. If Mr. Bemba had had any knowledge of MLC troops committing crimes in Sibut, sending a delegation in the presence of international press to interview the population was an unbelievable risk.

1026. To accept the Prosecution submission that the entire mission was, again, a "sham", the Chamber must accept that the population was "intimidated" into coming out of hiding; that the interviewees were "intimidated" into giving lengthy false testimony about the horrors to which they had been subjected at the hands of

²⁴⁹¹ *Hadžihasanović* TJ, para. 174, citing *Kordić & Čerkez* TJ, para. 446, fn. 623, citing "Military commanders will only usually have the power to start an investigation. ICRC, Commentary (Additional Protocol I) para. 3562."

rebels;²⁴⁹² and that the children were “intimidated” into ensuring background cries of joy and relief for the entire duration of the visit.²⁴⁹³

1027. To stage an hour of fabricated footage would have been an undertaking of epic proportions. What of the FACA captain who supervised the entire mission?²⁴⁹⁴ Was he convinced in advance to ensure that the delegation toured the right parts of Sibut where the pre-selected members of the population were waiting to recite speeches of praise? What of the international press? The AFP, BBC²⁴⁹⁵ and Gabriel Khan from RFI,²⁴⁹⁶ the Ugandan journalist, the Congolese journalists?²⁴⁹⁷ Were they also in on the act? Did they agree to put aside all journalistic integrity, make no effort to seek or report on the truth, but simply watch the MLC propaganda machine in action? Given that it was the journalists asking questions on the video, were their questions screened in advance?²⁴⁹⁸ What of the vicar who spoke of looting by a small number of MLC soldiers (albeit prompting immediate measures by the commander)?²⁴⁹⁹ Why was he allowed to stray from the script, and why was his intervention not deleted from the tape?

1028. The Prosecution’s theory is untenable. It is undermined by the fact that the interviews were conducted by journalists, not MLC troops.²⁵⁰⁰ The interviewees give no indication of being anything other than completely at ease, and finally free to recount the horrors of the past months. The suggestion that the population was intimidated was put to D-21, and dismissed.²⁵⁰¹ Had Mr. Bemba simply wanted a

²⁴⁹² EVD-T-D04-00008/CAR-DEF-0001-0832 at 12.00 to 12.25. See also D-21, T-302, pp.31-32.

²⁴⁹³ EVD-T-D04-00008/CAR-DEF-0001-0832 at 27.32 to 31.10. See also D-21, T-302, p.35.

²⁴⁹⁴ D-21, T-302, p.23.

²⁴⁹⁵ D-21, T-302, p.24.

²⁴⁹⁶ P-15, T-210, p.55; D-21, T-302, p.24; T-304, p.53.

²⁴⁹⁷ EVD-T-OTP-00730/CAR-OTP-0046-0224; P-15, T-209, pp.4-5; D-21, T-304, pp.52-53.

²⁴⁹⁸ D-21, T-304, p.53.

²⁴⁹⁹ EVD-T-D04-00008/CAR-DEF-0001-0832 at 22.26 to 27.29. See also D-21, T-302, p.32.

²⁵⁰⁰ D-21, T-304, p.53.

²⁵⁰¹ D-21, T-306, pp.81-82.

report to exonerate the MLC, why send [REDACTED] Minister²⁵⁰² “who had the ability to report properly.”²⁵⁰³ Why ensure the presence of the international press? Why take the risk that Central African civilians would speak out?

1029. The MLC delegation was present for a matter of hours.²⁵⁰⁴ The mission was not meant to be “an investigation”. Investigative responsibility fell to the Central Africans, “in line with the spirit of the commitment and agreement between the MLC and the Central African authorities.”²⁵⁰⁵ The Sibut mission was meant to be an information gathering exercise: were rumors of MLC crimes in the CAR true? ²⁵⁰⁶ The hour of footage demonstrates that Bozizé’s rebels raped and pillaged,²⁵⁰⁷ while the MLC troops were viewed as liberators.²⁵⁰⁸ Mr. Bemba is openly thanked.²⁵⁰⁹

1030. This video is devastating to the Prosecution’s case theory that Bozizé’s disciplined troops were blameless,²⁵¹⁰ and the Banyamulengue were responsible for everything. In light of the Prosecution’s statutory obligation to investigate incriminating and exonerating circumstances equally, it is unsurprising that it launches a full-blown attack on the entire video, dismissing the genuine pleas of Central Africans terrorized by Bozizé’s rebels as being faked. Each single interviewee must be lying. The children’s cries of joys must be fake, as are the tears of joy. Were any of this true, the Prosecution would have fallen so far below its obligations as a minister of justice as to call into question the genuineness of the entire case.

²⁵⁰² D-21, T-306, p.3.

²⁵⁰³ P-15, T-209, p.5.

²⁵⁰⁴ P-15, T-208, p.51.

²⁵⁰⁵ D-21, T-302, pp.24-26.

²⁵⁰⁶ D-32, T-302, p.24.

²⁵⁰⁷ EVD-T-D04-00008/CAR-DEF-0001-0832 at 12.00 to 12.25. See also D-21, T-302, pp.31-32.

²⁵⁰⁸ EVD-T-D04-00008/CAR-DEF-0001-0832 at 27.32 to 31.10. See also D-21, T-302, p.35; EVD-T-D04-00008/CAR-DEF-0001-0832 at 22.26 to 27.29. See also D-21, T-302, p.32.

²⁵⁰⁹ EVD-T-D04-00008/CAR-DEF-0001-0832 at 27.32 to 31.10. See also D-21, T-302, p.35.

²⁵¹⁰ Prosecution Closing Brief, para. 164.

1031. Had the Prosecution wanted to assert that the video was a fake, it could have called any of the interviewees, or the journalists involved, to testify that indeed the whole exercise was staged. It did not. It beggars belief that the Prosecution now advances this argument, having declined the opportunity to question [REDACTED], who was present at the time of its filming, about its contents.

1032. In reality, the veracity of the video is supported by other contemporaneous reports. An AFP press release five days after the Sibut mission tells the same story: violence and destruction caused by Bozizé's rebels, and the relief of the population on being liberated by the loyalists: "Each time we saw a vehicle go by, we had to hide in the bush. Thanks to the attacks of the loyalists. We are now saved," stated one young man.²⁵¹¹ The former mayor of Sibut recounts rapes committed by the rebels.²⁵¹² D-56 who was amongst Bozizé's troops provides further corroboration of this conduct.²⁵¹³ Significantly, RFI did a complete turnaround on its reporting following the mission.²⁵¹⁴ An article written by RFI's Gabriel Khan on 26 January describes the violence committed by Bozizé's rebels and the liberation by the MLC.²⁵¹⁵

1033. The results of the Sibut mission showed that "the assertions made over Radio France Internationale were baseless."²⁵¹⁶ D-21 [REDACTED] Mr. Bemba that:²⁵¹⁷

no abuses or atrocities were perpetrated by ALC soldiers on the civilian population in Sibut. The abuses and atrocities committed were attributed to Bozizé's rebels. Secondly the ALC had very good relations with the population of Sibut, and thirdly the population

²⁵¹¹ EVD-T-CHM-00035/ CAR-D04-0004 0032. See also D-56, T-316, pp.48-49.

²⁵¹² EVD-T-CHM-00035/ CAR-D04-0004 0032. See also D-56, T-316, pp.48-49.

²⁵¹³ D-56, T-313, p.42; T-316, pp.48-49.

²⁵¹⁴ D-21, T-306, p.82.

²⁵¹⁵ EVD-T-OTP-00416/CAR-OTP-0005-0147.

²⁵¹⁶ P-15, T-208, p.31.

²⁵¹⁷ D-21, T-302, p.41.

wished that the ALC soldiers should stay put for some time because the rebels were not far away.

1034. Mr. Bemba, who was also handed the video,²⁵¹⁸ had no basis not to accept this report as reflective of the situation on the ground. It corroborated press reports placing responsibility for the crimes with Bozizé's troops,²⁵¹⁹ as well as the information he was receiving from his commander, and had received from the Zongo commission. Sending the mission had been a necessary and reasonable measure, and again produced information corroborative of that already in Mr. Bemba's possession.

(e) Mr. Bemba's letters to the UN and FIDH were a reasonable measure

1035. The Prosecution paints Mr. Bemba's letters a measure to "submit the matter to the competent authorities for investigation and prosecution", and then claims that the UN and FIDH were not "competent authorities under article 28(a)(ii)" as they lacked the capacity and power to investigate and prosecute.²⁵²⁰

1036. A plain reading indicates that, rather than being a submission to competent authorities, these letters are demonstrative of a genuine desire for information. Hamstrung by difficulties of access, resources, security, jurisdiction, dispersal of alleged victims, and geographical scope of the allegations, the letters ask that "the population concerned, religious communities and credible NGOs"²⁵²¹ assist in Mr. Bemba's quest for further information to assist the MLC's investigations. This was a patently reasonable measure. The UN and FIDH were both on the ground.

²⁵¹⁸ D-21, T-302, p.41.

²⁵¹⁹ EVD-T-CHM-00034/CAR-D04-0004-0030; EVD-T-D04-00008/CAR-DEF-0001-0832; EVD-T-CHM-00004/CAR-DEF-0001-0205; EVD-T-CHM-00035/CAR-D04-0004-0032.

²⁵²⁰ Prosecution Closing Brief, para. 725.

²⁵²¹ EVD-T-OTP-00453/CAR-OTP-0017-0363.

1037. If the Prosecution's arguments are accepted, and the Chamber finds that through the letters Mr. Bemba was submitting the matter to the competent authorities for investigation and prosecution, in doing so he was still complying with his duties. Referring alleged crimes to an international organization is a means through which a state may fulfill its duty to investigate and prosecute.²⁵²² In the present case, for example, the Pre-Trial Chamber, upheld on appeal,²⁵²³ confirmed that the CAR was unable to investigate itself the alleged crimes, and acknowledged the need for referral to the ICC.²⁵²⁴

1038. Not being a state, the MLC could not refer the alleged crimes to the ICC under article 12 of the Statute. Unlike the MLC Etat Major, the UN and FIDH were both in the CAR. Further underlining the reasonableness of any referral is the ICC's subsequent finding that the CAR was not in a position to investigate and try the crimes itself.²⁵²⁵ If the CAR authorities weren't able to investigate following the end of the hostilities, how was the MLC supposed to investigate in the midst of the chaos which engulfed the CAR, without access to the territory, and when the population had fled?

1039. As for the claim that the UN lacked the capacity and power to investigate and prosecute,²⁵²⁶ the hundreds of staff working for the UN-ICTR, UN-ICTY and STL would likely disagree. The UN has the ability under article 34 of its Charter, and a history of creating "commission(s) of experts" to investigate crimes which have then been prosecuted internationally.²⁵²⁷ The Prosecution's claim is further

²⁵²² ICC-01/04-01/07 OA 8, para. 85; ICC-01/05-01/08-802, paras. 245-246, upheld in ICC-01/05-01/08-962 para.109.

²⁵²³ ICC-01/05-01/08-802, paras. 245-246, upheld in ICC-01/05-01/08-962 para. 109.

²⁵²⁴ ICC-01/05-01/08-802, para. 246.

²⁵²⁵ ICC-01/05-01/08-802, para. 246.

²⁵²⁶ Prosecution Closing Brief, para. 725.

²⁵²⁷ Commission of Experts concerning Rwanda: UN Security Council, Resolution 935 (1994) Adopted by the Security Council at its 3400th meeting, on 1 July 1994, 1 July 1994, S/RES/935 (1994); Commission of Experts concerning the former Yugoslavia: UN Security Council Resolution 780

undermined by the UNDP and UNICEF's involvement in and support for the subsequent Central African investigations.²⁵²⁸

1040. Notwithstanding earlier arguments concerning the FIDH's lack of neutrality, reliance on anonymous witnesses and limited investigative scope,²⁵²⁹ the claim that FIDH had no ability or mandate to investigate is also disingenuous,²⁵³⁰ and difficult to reconcile with its publication of a 64-page report detailing its investigations on the very same allegations, which it claimed was the result of "an investigation to identify the people potentially responsible of murders, rapes and pillages against the civilians in the CAR."²⁵³¹ FIDH holds itself out as having conducted more than a thousand of international fact-finding missions, and judicial observation missions.²⁵³² The *Boškoski* appellate jurisprudence to which the Prosecution refers deems that a submission to the competent authorities will be insufficient if the "superior knows that the appropriate authorities are not functioning or if he knows that the report was likely to trigger an investigation that was a sham".²⁵³³ Neither applied in the present case.

1041. It is beyond dispute that in sending these letters, Mr. Bemba was opening himself up. He had no control over the responses the MLC would receive. The UN or FIDH, could easily have responded publicly with files providing details of (a) alleged incidents; (b) identities of alleged victims; (c) times and places of the alleged incidents; and (d) identities of the MLC perpetrators allegedly involved. Had they done so, prosecutions would have been possible within the MLC judicial system,

(Establishing a Commission of Experts to Examine and Analyse Information Submitted Pursuant to Resolution 771), S.C. res. 780, 47 U.N. SCOR at 36, U.N. Doc. S/RES/780 (1992).

²⁵²⁸ P-6, T-94, p.22; T-95, p.8; P-9, T-102, pp.18-19.

²⁵²⁹ See Chapter II.

²⁵³⁰ Prosecution Closing Brief, para. 758.

²⁵³¹ EVD-T-OTP-00395/CAR-OTP-0001-0034 at 0038-0039 (unofficial translation).

²⁵³² Créée en 1922, elle regroupe 118 organisations membres dans le monde entier. A ce jour, la FIDH a mandaté plus d'un millier de missions internationales d'enquête, d'observation judiciaire, de médiation ou de formation dans une centaine de pays." EVD-T-OTP-00395/CAR-OTP-0001-0034 at 0097.

²⁵³³ Prosecution Closing Brief, para. 752, fn. 2356.

and no suggestion could now be made that reaching out to these organisations was a futile or “perfunctory” measure. Instead of doing so, FIDH deliberately provided the information in its possession to the ICC,²⁵³⁴ rather than the MLC, in effect withholding information that would have facilitated the steps which they then criticize Mr. Bemba for having failed to take. He was being set up to fail.

1042. Neither organization came back with any concrete or actionable information. General Cissé made reference to an agreement between CAR and Chad to set up an international commission of inquiry.²⁵³⁵ Having ridiculed Mr. Bemba’s letters, the Prosecution then criticizes Mr. Bemba for failing to send a follow-up letter seeking more information on the international commission.²⁵³⁶ Impugning Mr. Bemba on the grounds that “no potential commission could have ever been possible considering the overthrow of then-President Patassé”, ignores the fact that the new regime then initiated a year-long domestic investigation. Any suggestion that sending these letters only in January rendered them unreasonable²⁵³⁷ ignores the fact that approaching international organisations was not a first resort. It was perfectly reasonable for the MLC to explore domestic avenues and attempt to exhaust possibilities with the Central Africans themselves.

1043. In any event, there is no basis for the Prosecution’s claim that, upon learning of this commission on 27 January 2003, Mr. Bemba washed his hands of the issue.²⁵³⁸ In fact, his search for information continued. He subsequently wrote to FIDH on 20 February 2003, and sent a delegation to Sibut to tell him firsthand what was happening on the ground. He also wrote to the Central African Prime Minister “asking for an international commission of inquiry to be established to look into

²⁵³⁴ EVD-T-OTP-00578/CAR-OTP-0031-0116, track 02, at 01.30-03.04.

²⁵³⁵ EVD-T-OTP-00584/CAR-OTP-0033-0209.

²⁵³⁶ Prosecution Closing Brief, para. 754.

²⁵³⁷ Confirmation Decision, ICC-01/05-01/08-424, para. 498.

²⁵³⁸ Prosecution Closing Brief, para. 753.

these possible events.”²⁵³⁹ He did not “avoid the issue altogether”.²⁵⁴⁰ He was exhausting all possible avenues.

1044. The letters were genuine, and a reasonable measure. D-21 spoke of Mr. Bemba’s desire to have a “neutral” entity in order “to obtain the most objective information possible”.²⁵⁴¹ P-15 testified that the letter was “not a banal or pointless piece of correspondence. It was prepared with the assistance of [REDACTED]”.²⁵⁴² The Prosecution’s criticisms are in reality anchored in the failure of the organisations in question to respond. Mr. Bemba was entitled to try. The letters were another reasonable step in his quest for information to allow him to take reasonable measures.

5. The Prosecution has not established that Mr. Bemba acquiesced to the alleged crimes by MLC troops

1045. As noted above, the Pre-Trial Chamber found that a “genuine will” on the part of Mr. Bemba to take the necessary measures to protect the civilian population was lacking.²⁵⁴³ To be liable, the commander must have been aware of the criminal character of his action and, with that awareness, he must have consciously decided not to fulfill his obligations.²⁵⁴⁴ Simple negligence on the part of a superior would not be sufficient to attract penal consequences pursuant to the doctrine of superior responsibility.²⁵⁴⁵ To be criminal, the dereliction of the commander, “must be so

²⁵³⁹ D-48, T-267, pp.50-51.

²⁵⁴⁰ Prosecution Closing Brief, para. 753.

²⁵⁴¹ D-21, T-302, p.20.

²⁵⁴² P-15, T-211, p.15.

²⁵⁴³ Confirmation Decision, ICC-01/05-01/08-424, para. 501.

²⁵⁴⁴ *Naletilić* AJ, para. 114.

²⁵⁴⁵ See, for example, *Bagilishema* AJ, paras. 34-35; *Blaškić* AJ, para. 63; *Rašević and Todović* TJ, para. 153. See also ICRC, ‘Advisory Service, Punishing Violations of International Humanitarian Law at the National Level’, p.53. *Kurt Meyer* case: where the judge stated that anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or *wilfully failed in his duty as a military commander to prevent, or to take such actions as the circumstances required to endeavour to prevent*, the killing of prisoners, were matters affecting the question of the accused’s responsibility. See also B. Carnahan, ‘The Law of War in the United States

serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place”.²⁵⁴⁶ In other words, the criminal negligence of the commander:²⁵⁴⁷

must be personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.

1046. In this case, it could not reasonably be concluded that Mr. Bemba acquiesced to the commission of the alleged crimes. Instead, the evidence outlined above supports a finding to the contrary, for example:

- (i) The steps taken to ensure that MLC members act in accordance with the MLC Code of Conduct;²⁵⁴⁸
- (ii) The practice of disciplinary measures being taken against members of the MLC;²⁵⁴⁹

Court of Military Appeals’, 20 (1981) *Revue de Droit Pénal Militaire et de Droit de la Guerre*, pp.343-344, where the Court noted that negligence was not universally accepted as a sufficient basis for criminal liability and that an individual may not be held responsible for a ‘war crime’ simply on the basis of ordinary negligence and concluded that negligent homicide was not universally accepted as a crime and could not therefore constitute a war crime.

²⁵⁴⁶ ICRC, ‘Commentary on the Additional Protocols’, para. 3541. The ICRC highlights the importance of that element as, like any other criminal law system, it is based on a question of intent. See also *Akayesu* TJ, para. 217, discussing superior responsibility pursuant to Article 6(3) of the ICTR Statute: “it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount or even malicious intent.”

²⁵⁴⁷ *High Command* case, pp.543-545.

²⁵⁴⁸ D-19, T-285, pp.36-37; D-21, T-301, pp.44, 52-53; D-53, T-231, p.43; D-16, T-275, pp.23-24; D-49, T-270, pp.41-43.

²⁵⁴⁹ P-36, T-213, pp.49-50; D-39, T-308, pp.50-51: “Q. And, generally speaking, what was the attitude of the MLC authorities whenever there were any misdeeds, or things involving the MLC troops with regard to the civilian population? A. Well, the policy was to punish the soldiers severely.” See EVD-D01-0007/CAR-DEF-0001-0078: Statistics on offenses and disciplinary measures imposed on soldiers in the MLC; Another indication of the MLC not acquiescing to crimes is the prosecution of crimes alleged to have been committed in Mambasa: See generally P-44, T-205, pp.60-61. See also P-15, T-208, p.7 “The clear desire of the MLC at that time was to call upon lawyers from Kinshasa to be witnesses or parties to the trial. That expressed desire on the part of the MLC was somewhat distributed or offset by the Kinshasa authorities who did not grant permission for the lawyers to travel to Gbadolite. So, in the end, it was basically people from Gbadolite who conducted the trial.

- (iii) [REDACTED],²⁵⁵⁰ and his subsequent speech at PK12 in November 2002 urging compliance with the Code of Conduct in PK12;²⁵⁵¹
- (iv) The steps taken by the MLC to investigate allegations of criminal activity on the part of troops in the CAR;²⁵⁵²
- (v) The steps taken to obtain information relevant to these alleged crimes;²⁵⁵³
- (vi) The trial in Gbadolite of members of the MLC contingent in the Central African Republic accused of pillage;²⁵⁵⁴
- (vii) The evidence by witnesses that Mr. Bemba did not accept or condone crimes within the ranks of the MLC.²⁵⁵⁵

6. The Prosecution has not established the required causal nexus

1047. The Prosecution acknowledges the requirement of causality that is built in the Statute (“as a result of”) between the culpable failure attributed to the accused and the underlying crimes with which he is charged.²⁵⁵⁶ Significantly, the Prosecution concedes that the causality requirement applies to both the alleged failure to prevent, and failure to repress.²⁵⁵⁷

However, there was a clearly demonstrated desire on the part of the MLC to be transparent, but within the limits of what was possible at the time, the trial was in any event conducted with a view to point out that the acts of violence and abuses would not go unpunished. That was the spirit behind the trials.” See generally the Cahier de Communication: EVD-T-OTP-00702/CAR-D04-0002-1514; EVD-T-OTP-00703/CAR-D04-0002-1641.

²⁵⁵⁰ [REDACTED].

²⁵⁵¹ P-65, T-170, p.61; D-19, T-285, pp.5-6; P-36, T-215, p.20.

²⁵⁵² Mondonga Commision: D-19, T-285, pp.40-42; P-36, T-215, p.6; Zongo Enquiry: EVD-T-OTP-00392/CAR-DEF-0001-0155; D-48, T-267, pp.31-32; Mission to Sibut: D-21, T-302, pp.23-30.

²⁵⁵³ EVD-T-OTP-00453/CAR-OTP-0017-0363 Letter from Mr. Bemba to General Cissé dated 4 January 2003; EVD-T-OTP-00391/ CAR-DEF-0001-0152 Letter from Mr. Bemba to FIDH dated 20 February 2003.

²⁵⁵⁴ EVD-T-OTP-00393/CAR-DEF-0002-0001; D-16, T-275, pp.41-45.

²⁵⁵⁵ P-15, T-210, p.43; D-53, T-233, p.61.

²⁵⁵⁶ Prosecution Pre-Trial Brief, paras. 765 *et seq.*, and para. 767 (acknowledging that it applies to all types of alleged failures).

²⁵⁵⁷ Prosecution Closing Brief, para. 767.

1048. It also implicitly concedes that the law on the link between the accused's failure and the underlying crime is unsettled. It argues that "the most reasonable reading of the law" is that "the Prosecution must prove that Bemba's failures *increased the risk* that the ALC troops would commit the crimes".²⁵⁵⁸ This standard is contrary to the Statute, and builds on an incorrect reading of the law by the Pre-Trial Chamber.

1049. Article 28(a) states that the underlying crime must have been committed (or remained un-punished) "as a result" of the superior's culpable failure. Proof of such causal relationship must relate not to crimes in general, but to those crimes with which the accused is being charged: their commission (or their remaining unpunished) must, therefore, be directly traceable to the conduct of the accused.²⁵⁵⁹ As held in *Tadić*, "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)".²⁵⁶⁰

1050. The nature and intensity of the necessary connection between the accused's failure and the underlying crime is apparent from relevant precedents. In *Ford v. Garcia*, for instance, it was held that the crime charged must be "a direct and reasonably foreseeable consequence" of the superior's failure to act.²⁵⁶¹ In *Schonfeld et al*, the Judge-Advocate explained that the crime had to be "the natural result of the negligence of the accused; in other words, that a direction from [the accused], given at the correct time, would have prevented any unjustifiable killing taking

²⁵⁵⁸ Prosecution Closing Brief, paras. 765, 766.

²⁵⁵⁹ See, for example, *Medina* case, requiring proof that the crimes charged "resulted from the omission of the accused in failing to exercise control over subordinates". See also Article 86(1) Additional Protocol I; Art 6 of the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind (requiring a direct or indirect contribution of the crime by the superior).

²⁵⁶⁰ *Tadić* AJ, para. 186.

²⁵⁶¹ Ex. Rel. Estate of *Ford v Garcia*, 289 F.3d 1283, at 1287. See also *Hostages* case, pp.76-77.

place”.²⁵⁶² In his Opinion at the *Tokyo* trial, Judge Bernard suggested that liability for such an omission could only be incurred if the crime was the “certain” consequence of the culpable failure of the accused.²⁵⁶³

1051. In departing from these precedents, and reducing the standard to a requirement that the superior’s conduct “increases the risk”, the Pre-Trial Chamber erroneously relied upon a finding from *Hadžihasanović*²⁵⁶⁴ that related not to the issue of causality as a discrete requirement, but to the *mens rea* standard.²⁵⁶⁵ The Pre-Trial Chamber also relied in support of its position on a law review article and an amicus brief. Neither are sources relevant to the work of the Court, pursuant to article 21 of the Statute. These documents provide no authority and no credible support for the reduced standard, nor do they address any of the relevant precedents (discussed above) which stand in contradiction. To this end, article 22(2) of the Statute demands that where the law is ambiguous, the definition shall be interpreted in favour of the accused.

1052. In any event, the Prosecution has failed to establish that the crimes charged against Mr. Bemba were committed “as a result” of his alleged omissions in the sense described above. In asserting that Mr. Bemba “increased the risk that his forces would commit crimes”, the Prosecution again resurrects allegations which were excluded from the charges.²⁵⁶⁶ It claims that Mr. Bemba sent forces “that had previously been accused of committing similar crimes”, despite the fact that both the Pre-Trial Chamber and the Trial Chamber have been explicit that this allegation

²⁵⁶² Law Reports of Trials of War Criminals, Volume XV, p.77; See also Summing-Up of the Judge-Advocate General, *Baba Masao* case, Military Court at Rabaul, Judgement of 2 June 1947, reprinted in Annual Digest 1947, p.207). Regarding more specifically the duty of a superior to prevent crimes and the requirement of causality, see references in G. Mettraux, ‘The Law of Command Responsibility’, OUP (2009), pp.88-89.

²⁵⁶³ R. Cryer and N. Boister, ‘Documents on the Tokyo International Military Tribunal’, OUP, pp.661 and seq.

²⁵⁶⁴ *Hadžihasanović* AJ, para. 31.

²⁵⁶⁵ Confirmation Decision, ICC-01/05-01/08-424, para. 425, in fine, and fn. 599.

²⁵⁶⁶ Prosecution Closing Brief, para. 769.

was not part of its case.²⁵⁶⁷ Moreover, by simply relying on all its submissions concerning measures taken by Mr. Bemba, the Prosecution fails to address “causality” as a separate element as required.

1053. In reality, the alleged failures attributed to Mr. Bemba are entirely disconnected from the actual commission of the alleged crimes and therefore incapable legally and factually of triggering his responsibility under the doctrine of command responsibility.

7. The Prosecution has not established that any dereliction of duty meets the required degree of fault

1054. A superior is not criminally responsible merely because he has breached his duties. To attract the superior’s criminal responsibility, the breach of duty in question must be of sufficient gravity. Ultimately, to engage the superior’s responsibility, the breach of duty in question must be shown to have been a ‘gross breach’ and one with grave consequences.²⁵⁶⁸ Mere negligence on the part of the superior would not be sufficient to attract his superior responsibility under international law.²⁵⁶⁹ Minor or lesser violations of duties or more serious violations which do not rise to the level of a “gross” failure on the part of a superior would not engage his individual criminal responsibility. That would be so even where the underlying offences that form the basis of the charges are serious.²⁵⁷⁰ Concerning a failure to prevent crimes, this requirement has been interpreted as meaning that “the superior failed to take *any* meaningful steps to prevent the commission of the subordinate crime”.²⁵⁷¹

1055. The Prosecution has failed to establish that the dereliction attributed to Mr. Bemba, if any, was such as to meet the requisite degree of fault. Instead, in light of

²⁵⁶⁷ Confirmation Decision, ICC-01/05-01/08-424, para. 129; ICC-01/05-01/08-836, paras. 27, 201.

²⁵⁶⁸ *Bagilishema* AJ, para. 36.

²⁵⁶⁹ See, for example, *Halilović* TJ, para. 71; *Bagilishema* AJ, paras. 35-36.

²⁵⁷⁰ *Toyoda* case, p.5019.

²⁵⁷¹ *Kordić* TJ, para. 444 (emphasis in the original).

all relevant circumstances, and in particular the good faith efforts of Mr. Bemba to elucidate this matter and his emphasis on discipline, any fault attributed to him would fall below the relevant legal standard.

8. Mr. Bemba cannot be convicted for failing to prevent or repress the underlying conduct both as a war crime and a crime against humanity

1056. It would violate the prohibition on *ne bis in idem* to penalise Mr. Bemba for his alleged failure to prevent or repress the underlying conduct of murder and rape as both war crimes or crimes against humanity: there is no obligation to prosecute them as both categories, and as such, there can be no penal obligation incurred for having failed to do so.

1057. Article 20(1) specifies that no person shall be tried before the ICC with respect to conduct for which they have been convicted or acquitted by the Court. It therefore prohibits cumulative convictions for the same underlying conduct. The Appeals Chamber has defined “conduct” as referring to the defendant, and the incidents which comprise the case against the defendant.²⁵⁷² An “incident” is in turn, described as “a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators.”²⁵⁷³

1058. The Prosecution has relied on the same historical events and circumstances in order to allege that Mr. Bemba failed to prevent or punish murder as a war crime and murder as a crime against humanity. The same applies to rape as a war crime and rape as a crime against humanity. The conduct prescribed by article 28 (to

²⁵⁷² ICC-01/11-01/11-565, para 99.

²⁵⁷³ ICC-01/11-01/11-565, para. 99. For further commentary regarding the definition of conduct by reference to “acts” rather than “offences”, see P. Wilkitzki, ‘Article 101: Rule of Speciality’, in O. Triffterer, ‘Commentary on the Rome Statute of the International Criminal Court’, Nomos Verlag: Baden-Baden, (2008), p.1638; W. Schabas, ‘The International Criminal Court: A Commentary on the Rome Statute’, OUP, (2010), p.1056.

prevent or punish the specific acts that took place within the charges events and circumstances) is the same irrespective as to whether the allegations pertain to rape and murder as war crimes, or rape and murder as crimes against humanity.

1059. Commanders are not required to address the conduct under a particular rubric: i.e. to punish or report the underlying conduct of murder as the war crime of murder, as opposed to the ordinary crime of murder. This is particularly apparent in light of the wide degree of latitude afforded by the Appeals Chamber to States in relation to the particular legal characterisation of the conduct investigated by States, who are seeking to challenge the admissibility of a case before the ICC.²⁵⁷⁴

1060. Given that the conduct which triggers responsibility under article 28 is the same as concerns a failure to prevent, punish or report murder or rape as a war crime, and murder or rape as a crime against humanity, a cumulative conduction would contravene article 20(1) of the Statute.

9. Conclusion

1061. The Prosecution starts its attack on the measures taken by Mr. Bemba by citing the ICTR Appeals Chamber in the *Media* case, stating that “it is unnecessary to list all possible necessary and reasonable measures Bemba could have taken”.²⁵⁷⁵ In fact, it is difficult to imagine what other measures could be on such a list. Had Mr. Bemba received authorization from the Central African authorities to send one commission of enquiry per week, and written 100 letters, they would all be dismissed by the Prosecution as a “sham”. Should the troops have been pulled out earlier? Elsewhere in its brief, the Prosecution criticizes the withdrawal of troops in March as being premature, a selfish move that was not in Patassé’s best interest.²⁵⁷⁶

²⁵⁷⁴ ICC-01/11-01/11-565, paras. 100-123.

²⁵⁷⁵ Prosecution Closing Brief, para. 680.

²⁵⁷⁶ Prosecution Closing Brief, paras. 561, 608.

Although the Pre-Trial Chamber drew a link between the failure to withdraw the troops and an alleged failure to prevent the crimes between mid-January and mid-February 2003,²⁵⁷⁷ the Prosecution seems to have abandoned this theory, presumably given the lack of credible evidence of crimes during this period. Should more trials have been conducted? But who should have been in the dock? Not one name came across Mr. Bemba's desk. It would have been irresponsible and in fact illegal to start arresting and trying soldiers simply to respond to rumours in the press.

1062. Underpinning all of the Prosecution's submissions is the idea that all measures taken were a "sham", "perfunctory" steps intended just to gloss over the crimes that were ongoing. Repeated *ad nauseam*, the Prosecution fails to point to any evidence in the case which demonstrates that Mr. Bemba either intended or even knew that the measures were bound to fail or were taken in bad faith. Responsibility for investigation and sanctions rested with the competent authorities in place. Mr. Bemba was entitled to assume that these were functioning properly.

1063. The Prosecution claims that "Bemba never had a genuine will to take crimes seriously and to seriously address crimes. He immediately dismissed the information about crimes almost as soon as he heard it."²⁵⁷⁸ If this were true, why the relentless hunt for information? If Mr. Bemba had only wanted to "whitewash" allegations of crimes, he would have kept everything "in-house", with MLC-only investigations, no press, and ensuring the MLC could control the process at all times. In fact, he did the opposite: a joint enquiry with the Central Africans; a mission to Sibut to investigate RFI claims that MLC soldiers were raping and killing in the presence of international press who could conduct their own enquiries; and open invitations to international organisations to use their resources to investigate

²⁵⁷⁷ Confirmation Decision, ICC-01/05-01/08-424, para. 500.

²⁵⁷⁸ Prosecution Closing Brief, para. 763.

thoroughly any concrete information of MLC crimes. These were not the actions of someone who had knowledge, beyond the general rumours of a biased media outlet, that MLC troops were falling below the standards set in their training, their code, and obligations under IHL.

1064. Ultimately, the Prosecution's command case, based in large part on the evidence of the civilian "hangers-on" and the tales of P-213, falls at each hurdle. Mr. Bemba was neither the *de jure* or *de facto* commander of the MLC contingent which crossed into the CAR, the troops were subsumed into the command structure of the Central African military authorities. He was not giving operational orders to Mustapha, and the Prosecution's reliance on P-213 and P-178 in an attempt to demonstrate effective control is only demonstrative of the weakness of its case. The Prosecution military expert, the Defence military expert, and [REDACTED] all agree. A multinational coalition of forces would require coordination.²⁵⁷⁹ The commander would have required intelligence, and have been able to "synchronise all units in realtime".²⁵⁸⁰ The CCOP existed for a reason. General Seara confirmed that "if one does not have a General Staff headquarters that summarises all the aspects of the manoeuvre, then it becomes impossible to command the operations; otherwise one would simply be groping in the dark without knowing the reasons for which orders are being given and what results can be expected therefrom."²⁵⁸¹ The suggestion that Mr. Bemba had the ability, military experience, necessary information, or even hours in the day to assume the responsibilities of a functioning coordination centre simply does not stand up.

1065. The vague rumours circulating in the press, most notably from an outlet with a proven track record of circulating false allegations against the MLC are

²⁵⁷⁹ P-219, T-197, pp.48-49; D-53, T-230, p.19; T-231, p.35; P-36, T-218, pp.44-46.

²⁵⁸⁰ D-39, T-310, p.37.

²⁵⁸¹ D-53, T-229, p.58.

insufficient for a finding that Mr. Bemba “knew” that the MLC troops were committing crimes. He was aware, however, that troops who had fallen in breach of the code of conduct had been arrested and returned to Gbadolite to face trial. This reflected the practice of the MLC in the DRC of prioritising discipline of the army, borne out by its popularity amongst the population and the bargaining power it held during Sun City. Regardless, armed only with these vague rumours, and despite the fact that disciplinary authority lay firstly with the Central Africans, and secondly with the competent organs of the MLC, Mr. Bemba took repeated and numerous measures to determine the truth of the rumours, always insisting that perpetrators would feel the full weight of the law. To this day, he has yet to receive a single name.

1066. The Prosecution’s case falls far below that necessary to establish Mr. Bemba’s superior responsibility under article 28 of the Statute. No reasonable Trial Chamber would convict on the basis of this case, carefully sculpted by the Prosecution to preclude evidence from those best positioned to tell the truth about command.

VII. CONCLUSION

*This is a very delicate topic, particularly at this stage in our proceedings. We are not dealing here with investigations; we are in the middle of a trial which may end up on appeal and these witnesses may be called back, or they might be called back during this trial phase. So this is a very delicate approach that we need to deal with very carefully, particularly given that **these seats next to me are empty**.*²⁵⁸²

Mr. Marc Dubuisson

1067. In concluding this brief, the Defence must state for the record its position that Mr. Bemba's rights under the Statute have been violated to such an extent that the constituent elements of his right to a fair trial have been ruptured irreparably.²⁵⁸³

1068. As acknowledged by the Prosecution, the question of whether there has been an abuse of process vitiating the defendant's right to a fair trial should be assessed at the close of trial in order to avoid hypothetical discussions of prejudice.²⁵⁸⁴ The Defence will therefore set out its position on these points in the coming weeks. Aside from the separate issue of whether the proceedings themselves should be stayed, when appreciating the weight and reliability of the evidence in this case, the Defence invites the Trial Chamber to have regard to the following:

- That over the last two years, the Prosecution conducted its cross-examination of Defence witnesses with the benefit of undisclosed information that was obtained in violation of Defence privileges and

²⁵⁸² ICC-01/05-01/08-T-303-CONF-Red-ENG, p.10 (emphasis added).

²⁵⁸³ ICC-01/04-01/06-1486, para. 78.

²⁵⁸⁴ ICC-01/05-01/08-3067, para. 12, citing ICC-02/05-03/09-410, para.102.

immunities, rule 73, Defence confidentiality, and related internal work product privilege;²⁵⁸⁵

- That the Prosecution contaminated the Trial Chamber by placing before it unproven allegations concerning Mr. Bemba, his lawyers and Defence witnesses, at the very time these witnesses were appearing before the Court;²⁵⁸⁶
- That the Defence was denied notice of the allegations and an opportunity to address these issues at the time the witnesses testified;²⁵⁸⁷ and
- That whereas the Prosecution conducted a comprehensive investigation of both the Defence team and its witnesses, there is no indication that it performed basic credibility checks on its own witnesses or evidence, notwithstanding evidence of collusion, false testimony, and intimidation of both Defence team members, and Defence witnesses;²⁵⁸⁸ and
- That the Prosecution refused to disclose relevant information that would have facilitated the ability of the Defence to investigate such credibility issues, and opposed Defence requests to recall Prosecution witnesses to explore whether their testimony could be safely relied upon by the Chamber.²⁵⁸⁹

1069. Both the extensive publicity and the prejudicial language employed by the Prosecution in relation to Article 70 matters that have arisen in this case will, at the very least, have impacted on the appearance of the impartiality of the proceedings.²⁵⁹⁰ In the Defence submission, the final judgment can only be based on such evidence, testimony, and arguments that were elicited or employed in a

²⁵⁸⁵ Without prejudice to its final submissions on this point, see ICC-01/05-01/08-3103-Red2, paras. 28-31, 56-57; ICC-01/05-01/08-3036; ICC-01/05-01/08-3004, paras. 15, 23; ICC-01/05-01/08-2945-Conf; ICC-01/05-01/08-3062-Red.

²⁵⁸⁶ ICC-01/05-01/08-2412-Conf-Exp; ICC-01/05-01/08-2548; ICC-01/05-01/08-T-303-Conf-Red.

²⁵⁸⁷ Cf. ICC-01/05-01/08-3029, paras. 20, 30

²⁵⁸⁸ As set out in Chapter II; See also [REDACTED]; T-241-Conf-Exp.

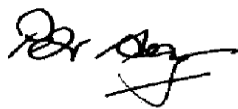
²⁵⁸⁹ ICC-01/05-01/08-3020-Red, ICC-01/01-01/08-3033-Red, ICC-01/05-01/08-2897-Conf, para. 20.

²⁵⁹⁰ ICC-01/05-01/08-2940, p.4; ICC-01/05-01/08-3039, para. 15.

manner, which fully respects the principle of equality of arms, adversarial proceedings, and the right to a fair and impartial trial.

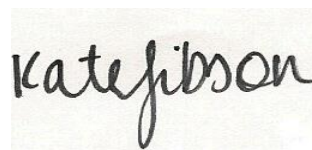
1070. Regardless, as set out comprehensively above, there is simply insufficient evidence safely to conclude that any of the crimes confirmed by the Pre-Trial Chamber were committed by subordinates of Mr. Bemba and/or that he bore superior responsibility for their actions at the time. The Prosecution has not established its case, and Mr. Bemba should accordingly be acquitted of all charges against him.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel of Mr. Jean-Pierre Bemba



Kate Gibson

Co-Counsel of Mr. Jean-Pierre Bemba



Melinda Taylor

Co-Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

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