Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/05-01/08**
Date: **28/09/2016**

THE APPEALS CHAMBER

Before: **Judge Christine Van den Wyngaert, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

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

Public with Public Annexes A and B

Public Redacted Version of Appellant's document in support of the appeal

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

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

The Office of the Prosecutor
Fatou Bensouda
James Stewart
Helen Brady

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo
Peter Haynes, QC
Kate Gibson
Kai Ambos
Michael A. Newton

Legal Representatives of the Victims
Marie-Edith Douzima-Lawson

The Office of Public Counsel for Victims
Paolina Massidda

The Office of Public Counsel for the Defence
Xavier-Jean Keita

REGISTRY

Registrar
Herman von Hebel

I. INTRODUCTION 6

II. THIS WAS A MISTRIAL 9

A. Sequence of relevant events 10

B. The extent, timing and content of the prosecution's *ex parte* submissions violated mr. bemba's right to a fair trial 21

1. *Ex parte* submissions are antithetical to the fairness of an adversarial trial 21

2. The Trial Chamber permitted extensive *ex parte* submissions affecting the credibility of Defence evidence to which there was no opportunity to respond 25

C. The Prosecution should have preserved trial fairness by revealing the basis of its suspicions to the Defence within a reasonable time 34

D. Privileged and otherwise confidential defence information was shared with the prosecution trial team during trial proceedings 41

E. The *ex parte* submissions, non-disclosure and invasion of privilege and confidentiality caused prejudice 48

III. THE CONVICTION EXCEEDED THE CHARGES 52

A. The conviction was based on unconfirmed underlying acts 52

B. V1 and V2's evidence cannot form the basis of a conviction 54

C. The conviction was based on acts improperly included in the Amended DCC 55

IV. MR. BEMBA IS NOT LIABLE AS A SUPERIOR 57

A. Mr. Bemba did not have effective control over the MLC troops in CAR 57

1. Mr. Bemba did not have operational control 57

2. The Trial Chamber conflates the concept of "effective control" with the concept of overall "command" 71

3. The findings on the remaining indicia of effective control are also flawed 74

4. Conclusion 85

B. The evidence dismissed or ignored 86

1. The 2001 intervention 87

2. The FACA documents 88

3. General Jacques Seara 98

4. [REDACTED]'s evidence on command 100

5. [REDACTED] 103

C. Mr. Bemba did not have actual knowledge of the alleged crimes 106

1. The Trial Chamber conflates the "actual knowledge" with the "constructive knowledge" (should have known) standard 108

2. The facts as found by the Trial Chamber do not support a finding of actual knowledge 113
D. Mr. Bemba took necessary and reasonable measures 120
1. The Trial Chamber failed to assess Mr. Bemba's conduct against the correct legal standard 124
2. The Trial Chamber misappreciated the limitations on the MLC's jurisdiction and competence to investigate 126
3. The Trial Chamber ignored that Mr. Bemba asked the Central African Prime Minister to investigate the allegations 130
4. The Trial Chamber erred by taking into account irrelevant considerations 132
5. The findings on the measures taken are unreasonable, misstate the evidence and ignore relevant evidence 133
E. The finding on causation is invalid 138
1. The Trial Chamber failed to define the applicable legal standard 138
2. The Trial Chamber conflated the "measures" and "causation" requirements 140
3. The Trial Chamber misstated the evidence and its findings 141
V. THE CONTEXTUAL ELEMENTS WERE NOT ESTABLISHED 149
A. The Trial Chamber failed to make the requisite *mens rea* finding 149
B. There was no organiSational policy to commit an attack directed against the civilian population 151
1. The Trial Chamber fails to establish a link between any policy and the MLC 152
2. There was no evidential basis for a *modus operandi* 153
3. The Trial Chamber erred in relying on general motives 155
4. The reliance on pillage is infected by legal error and irrelevant considerations 156
5. The significance of orders to exercise vigilance or use force against civilians are misrepresented 157
6. The Trial Chamber relies on factors which, as discussed elsewhere, are not available on the evidence 158
C. The Trial Chamber erred in its application of the law of pillage 159
1. Pillage is the "unlawful appropriation of property in armed conflict" 160
2. The Trial Chamber took an erroneous approach to "military necessity" 161
3. The error materially affected the findings on pillage 163
4. The Trial Chamber misapplied the concept of "private or personal use" 165

VI. THE TRIAL CHAMBER ERRED IN ITS APPROACH TO IDENTIFICATION EVIDENCE 165

A. The Chamber failed to deliver a reasoned judgment as to the identities of the perpetrators of rape and pillage 166

B. The Chamber failed to deliver a reasoned judgment as to the identities of the perpetrators of murder 172

C. The Chamber altered dates to fit the MLC's movements 173

1. P68 and her sister-in-law 173

2. The woman in the bush outside PK22 175

3. Two unidentified girls aged 12 or 13 in Bangui 175

VII. OTHER PROCEDURAL ERRORS INVALIDATE THE CONVICTION ... 177

A. No reliance should have been placed on the evidence of P169, P178 and 19 protected witnesses 177

1. Relevant Background 177

2. No reasonable Trial Chamber would have ascribed any weight to the testimony of P169 or P178 181

3. The Trial Chamber's error undermines its reliance on the 19 witnesses 185

B. The scope of LRV involvement lead to an unbalanced and unfair trial 187

1. LRV questioning was unconstrained 187

2. Defence witnesses were cross-examined three times 190

3. Mr. Bemba suffered prejudice 193

VIII. CONCLUSION 195

I. INTRODUCTION

1. Whilst no two trials are ever exactly alike, it is no exaggeration to say that there has never been a trial quite like the *Bemba* case. In straightforward historical terms, of course, it will always be the first command responsibility case at the International Criminal Court, as well as the Court's first case involving allegations of sexual violence. For a time, Mr. Bemba was (and arguably, still is) the highest profile Accused held in custody at the Detention Unit by the ICC. It is objectively an important case.

2. Its importance to the ICC was heightened by its place in the Institution's history. In the 13 years since the passage of the Statute of Rome, the Court had only recorded two prior convictions. For much of the proceedings, Mr. Bemba was the only accused on trial. He quite simply was the focus of the Institution.

3. The novelty of the *Bemba* case, however, does not end with the Accused's status, the mode of liability with which he was charged, nor the substance of his charges. It was to become the longest single case in the history of the court in every respect. The Appellant was in custody for just shy of eight years before his Judgment was handed down. Sixteen months of that period encompassed the time from closing oral arguments to Judgment.

4. It was also the first case in international criminal law in which the Accused's Counsel was arrested and imprisoned during the course of the trial, in which the President of any international tribunal lifted the immunities and privileges of defence lawyers, permitting their arrests and their offices to be searched, and in which the Prosecution was permitted to intercept and listen to telephone conversations between the Accused and his lawyers, between the lawyers themselves, and between the lawyers and Defence witnesses. It is also unique in the amount of *ex parte* access to the Trial Chamber enjoyed by the Prosecution to

discuss matters directly relevant to the Judgment itself, namely, the credibility of the Defence case.

5. The effect of these unprecedented incursions into an accused's rights is explored in greater detail herein. That they had some effect on the trial is self-evident; the Trial Chamber was appraised of secret information, there was further delay, and Mr. Bemba had to reorganise his defence team, just for a start. Whether the effects were such as to destroy the fairness of the process is, however, now the issue at hand. 'How could they not?', the Appellant asks rhetorically. In allowing the Prosecution to make *ex parte* submissions, such as are set out hereafter, the Trial Chamber let the policeman into the jury room.

6. After such an extended period of deliberation, one could hardly accuse the Trial Chamber of rushing to Judgment in a case in which a solitary accused was charged under a single mode of liability. A great deal of care was surely taken during that time properly to weigh the evidence, and record the basis of the convictions in a sufficiently reasoned way, such that not just the Accused but jurists, historians and the public would always have an accurate record of the facts.

7. On the contrary, the Judgment is littered with mistakes. The ensuing chapters will highlight the principal legal and factual errors which, in the Appellant's submission, are fatal to its conclusions. However, it is error-strewn on a far more basic level. Its very fabric, namely the connection between its factual findings and the allegedly supporting evidence is negligently woven. The number of errors in the footnotes in the *Bemba* case would likely eclipse the total of all the other judgments in international criminal law which preceded it.

8. Where, for example, the Chamber found that command of MLC units in the CAR remained with its hierarchy during the 2002-2003 conflict,[1] the supporting testimony of P178 reads: "Court Officer: Just for the record of the case the document being shown on your screens is a public document". This is not a typographical error. The same passage of transcript is cited four times in the Judgment.[2]

9. Similarly, the Chamber apparently found the manner of dress of Bozizé's troops and the fact that P69 had left PK12 for three weeks both to be supported by the Chamber announcing that it would take a recess.[3] There is insufficient space in this document to detail the typos, miscitations and misrepresentations of the evidence contained in the footnotes to this Judgment, but they are legion.[4] Whilst the few cited examples may appear risible, they are not a source of amusement to the Appellant, and nor should they be to an Appeals Chamber.

10. Such inaccuracy in the citation of evidence is not a matter to be taken lightly. It necessarily impacts directly on the deference to be accorded to the Trial Chamber's factual findings and serves as a totemic indicator to the care afforded to other considerations in the Judgment. The ensuing arguments, moreover, have a common theme, namely, the Trial Chamber's systemic dismissal, misconstruction or wilful blindness to evidence helpful to the Appellant. Unapologetically the Appellant submits that this is a case where the Appeals Chamber will have to scrutinise the Trial Chamber's factual findings with care.

11. This case remains important, although six years after its commencement as a trial, for rather different reasons; reasons that are more prospective than retrospective. The commanders of the future need to know where the boundaries of

[1] Judgment, para. 427, citing T-151, 68:5-8.
[2] *See* Judgment, fns. 1152, 1182, 1183, 1185.
[3] Judgment, para. 450, fn. 1259 citing T-151, 22:16; and Judgment, para. 497, fn. 1458, citing T-192, 38:8-9.
[4] An analysis of the 1009 evidence citations in the facts section of the Judgment revealed errors in 84 or 8.3% of them.

their responsibilities lie. Trial Chambers need to know what latitude to give to the Legal Representative of Victims in the courtroom, and how, faced with suggestions of malfeasance by lawyers, to protect the integrity of the trial process. Prosecutors need to know what is required of them at the confirmation phase of proceedings and when disclosure of material to the Defence is mandatory.

12. All these matters will necessarily have to be addressed in the Appeal Judgment in this case. The Appellant is confident that the Chamber will do so fearlessly, regardless of the consequences of the outcome to him. The enunciation by the Appeals Chamber of proper principles of law and procedure on the issues that arise in this appeal are, for this Institution and the future of international criminal and humanitarian justice, more important than the objective end result or any anticipated public perception of it. Properly enunciated and applied, the Appellant submits, those principles will dictate that the convictions recorded by the Trial Chamber must necessarily be overturned.

II. THIS WAS A MISTRIAL

13. Mr. Bemba's right to a fair trial was violated by the manner in which the Trial Chamber and the Prosecution dealt with suspicions of offences against the administration of justice. The Prosecution, instead of prioritising and preserving the fairness of the trial by concluding its investigations as rapidly as possible so that they could be revealed to the Defence for a response and/or remedial action, used these suspicions to offer substantial *ex parte* submissions to the Trial Chamber, followed by an extended period of surveillance of Mr. Bemba and members of his Defence team. Recordings of telephone calls between Mr. Bemba and his Defence, and amongst members of his Defence team, were revealed to the Prosecution STA in the trial against Mr. Bemba ("Main Case") while the trial was ongoing.

14. The fairness of the trial was negatively impacted in three ways. First, the Defence had no contemporaneous or timely opportunity to respond to the *ex parte* submissions, which could not have failed to colour the Trial Chamber's perception of the Defence and its evidence. The manner and timing of the eventual disclosure of these allegations deprived the Defence of any realistic opportunity to respond, and to root out this prejudice. Second, the extensive delay in disclosing the allegations constituted a serious violation of Rule 77 for which no justification was sought by the Prosecution. This disclosure violation had major and obvious prejudicial consequences for the presentation of Defence evidence. Third, at least some of the communications obtained by the STA in the Main Case constituted privileged and other confidential Defence communications during the trial itself. These communications included, as the Pre-Trial Chamber acknowledged, discussions about Defence strategy, prospective witnesses, and the Defence's perception of the strength of its case.

15. These measures destroyed the substance and appearance of the fairness of the Main Case. No adversarial system of justice would countenance such serious violations of its most basic principles. There are numerous indications of concrete prejudice; but even if there were no such indications, the burden must still rest, given the circumstances, on the Prosecution to demonstrate lack of prejudice. The only appropriate remedy for the unfairness of the trial, given the extraordinary delays that a second trial would occasion, combined with the fault that must be attributed to the Prosecution, is a permanent stay of proceedings.

A. SEQUENCE OF RELEVANT EVENTS

16. The Prosecution asserts that on 14 June 2012, two months before the start of the presentation of Mr. Bemba's defence, it received an anonymous tip that "four Defence witnesses would provide false testimony" after a CAR citizen in France

had paid them money.[5] The anonymous informant revealed that these payments would or had come from a certain [REDACTED]; that "the 'Congolese' lawyer of the Accused was behind the payments"; and that those payments were being made through Western Union.[6] [REDACTED] was at that time listed as a Defence witness, although never called to testify.

17. The Prosecution has claimed in previous filings that this information was "corroborated" by three "independent sources":[7] first, "subsequent news reports, [REDACTED] and [REDACTED], and the Defence disclosure on 13 July 2012" corresponded to the informant's information about the "travel itineraries of one Defence witness – [REDACTED]";[8] second, information that a Defence witness had "received a phone call from someone in The Hague who promised him relocation to Europe […] and referred to [REDACTED] as the one helping/facilitating all these contacts with the person in The Hague";[9] and third, the Prosecution had "noted (1) evidence of false documents included on the exhibit list of the Defence, (2) that the witness who may have played a role in forging those documents – Narcisse Arido (D04-11) – failed to travel to The Hague, and (3) that witness [REDACTED] (D04-07) disappeared from The Hague in the middle of his testimony."[10]

18. On the basis of the anonymous information and the alleged corroboration just mentioned, a Prosecution investigator [REDACTED]:

> [REDACTED].[11]

[5] ICC-01/05-01/08-2548-Red2-Conf, para. 7; ICC-01/05-44-Conf-Red2, para. 9.
[6] ICC-01/05-01/08-2548-Red2-Conf, para. 8; ICC-01/05-44-Conf-Red2, para. 10.
[7] ICC-01/05-01/08-2548-Red2-Conf, para. 8.
[8] ICC-01/05-01/08-2548-Red2-Conf, para. 8; ICC-01/05-44-Conf-Red2, para. 10.
[9] ICC-01/05-01/08-2548-Red2-Conf, para. 9; CAR-OTP-0072-0476 at 0479; ICC-01/05-44-Conf-Red2, para. 11.
[10] ICC-01/05-01/08-2548-Red2-Conf, para. 10.
[11] CAR-OTP-0092-0021-R01.

No judicial authorisation was obtained for this request. The information was provided, again without judicial authorisation having been sought or provided, on [REDACTED].[12]

19. On 19 and 20 October 2012, a Prosecution investigator visited [REDACTED].[13] No judicial authorisation, either from [REDACTED] or the ICC, was obtained or sought prior to this visit. The [REDACTED], was informed of the visit, but without any explanation of the purpose of the visit or measures to be taken other than [REDACTED]."[14] [REDACTED]".

20. On 2 November 2012, the Prosecution sent [REDACTED].[15] Before the issuance of any such order, the Prosecution again visited [REDACTED] and obtained the [REDACTED] information of the remaining [REDACTED].[16]

21. On 15 November 2012, an order to obtain [REDACTED] (which had already been obtained) was issued by [REDACTED].[17] [REDACTED]."[18] [REDACTED]."[19] ([REDACTED]).[20]

22. On 15 November 2012, the Prosecution revealed the existence of these investigations to the Trial Chamber *ex parte*; explained that they concerned offences under Article 70; and that its investigation concerned "potential payments to Defence witnesses".[21] An order was sought requiring the Registry to provide the

[12] CAR-OTP-0092-0022-R01 at 0023; CAR-OTP-0092-0024.
[13] CAR-OTP-0092-0018.
[14] CAR-OTP-0092-0892-R01.
[15] CAR-OTP-0091-0351.
[16] CAR-OTP-0092-0018. *See also* CAR-OTP-0092-0028-R02 [REDACTED].
[17] CAR-D24-0002-1363.
[18] CAR-D24-0002-1363.
[19] CAR-D24-0002-1363.
[20] CAR-D24-0005-0045 (French translation).
[21] ICC-01/05-01/08-2412, para. 1.

Prosecution "with the record of the payments effected by the Registry to Defence witnesses who have testified or who are testifying in the future."[22]

23. On 19 November 2012, the Trial Chamber sought observations from the Registry on the Prosecution's request.[23] On 26 November 2012, the Registry, apparently interpreting the Trial Chamber's request as a direction to provide the information, filed submissions that revealed to the Prosecution the information sought.[24]

24. On 20 March 2013, the Prosecution filed an *ex parte* motion before the Trial Chamber offering lengthy submissions that Lead Counsel, and "possibly the Accused himself," were involved in a scheme to procure false testimony.[25] In particular, the Prosecution asserted that Defence witnesses already heard by the Trial Chamber had lied.[26]

25. On 9 April 2013, an *ex parte* hearing, lasting about one-and-a-half hours, was held with the attendance of all three judges of the Trial Chamber, and the Main Case STA. The Prosecution elaborated further on the allegations in its 20 March 2013 *ex parte* motion.[27]

26. On 26 April 2013, the Trial Chamber rejected the Prosecution's motion on the basis that the Statute required any such investigations to be supervised by a Pre-Trial, rather than a Trial Chamber.[28]

[22] ICC-01/05-01/08-2412, para. 5(a).
[23] ICC-01/05-01/08-2421.
[24] ICC-01/05-01/08-2441.
[25] ICC-01/05-01/08-2548-Red2-Conf, para. 1.
[26] ICC-01/05-01/08-2548-Red2-Conf, para. 17.
[27] ICC-01/05-01/08-T-303-Conf-Red2.
[28] ICC-01/05-01/08-2606-Conf, para. 16.

27. On 3 May 2013, the Prosecution filed an *ex parte* motion before Pre-Trial Chamber II making the same allegations and seeking the same relief.[29] One additional measure was included, namely, to modify the Trial Chamber's witness contact decision "to allow the Prosecution to conduct interviews with Defence witnesses who received payments as set forth in the Western Union records without prior notice to the Defence."[30] The representatives of the Office of the Prosecutor listed on the filing are the Prosecutor, Deputy Prosecutor, and an attorney who would later be appointed as the STA for the Article 70 proceedings.

28. On 8 May 2013, a Single Judge of the Pre-Trial Chamber ordered, *inter alia*: (i) the disclosure to the Prosecution recordings of **all** of Mr. Bemba's non-privileged telephone calls; (ii) dispensed with the need for the appointment of any "independent counsel" to review these recordings before being provided to the Prosecution;[31] and (iii) authorised contact with Defence witnesses notwithstanding any limitations imposed by the Trial Chamber's witness contact protocol.[32] No submissions were heard from the Defence, in particular, concerning the potential implications of such measures on the fairness of the Main Case. This, in turn, immunised the decisions from any appellate review.

29. After the Registry raised concerns about the implementation of the 8 May 2013 decision,[33] the Singe Judge re-affirmed his earlier order and rejected the Registry's suggestion that there might be a need for the appointment of an "*ad hoc*" or independent counsel to protect the interests of the Defence;[34] asserted that the proceedings relating to the Prosecution's request must be regarded "as separate and autonomous" *vis-à-vis* those relating to the Main Case;[35] and affirmed that his

[29] ICC-01/05-44-Conf-Red2.
[30] ICC-01/05-44-Conf-Red2, para. 41(d).
[31] ICC-01/05-46, para. 4.
[32] ICC-01/05-46, p. 8.
[33] ICC-01/05-48-Conf-Exp cited at ICC-01/05-50, pp. 4-5.
[34] ICC-01/05-50, paras. 2, 10.
[35] ICC-01/05-50, para. 9.

previous order had created "an exception to the operation" of the Trial Chamber witness contact protocol.[36]

30. Starting from 3 June 2013, the audio-recordings were made available by the Registry to the Prosecution. The conversations included those between Mr. Bemba and the Case Manager,[37] although the Prosecution submitted in December 2013 that it had not yet listened to these audio-recordings because of a concern that they might be privileged.[38]

31. The Defence case continued to be presented during the period of audio-recording. Between the *ex parte* hearing on 9 April 2013 and the judicial summer recess, the Trial Chamber heard D21, D39, D56, D18, D2, D9, D3, D4 and D6.

32. On 19 July 2013, the Prosecution requested, *ex parte*, the Single Judge's permission to request the Belgian and Dutch authorities to surveil and record telephone calls from or to Mr. Kilolo's and Mr. Mangenda's telephones.[39] The Prosecution proposed "contracting with an independent counsel" to identify any privileged calls, which would only be provided to the Prosecution if he deemed them "relevant to this investigation."[40] The Prosecution justified the request on the basis that Mr. Bemba's telephone logs and recordings "indicate that the Accused is orchestrating" a scheme to "bribe witnesses in exchange for false testimony and false documents" and "employing Aime KILOLO, Jean-Jacques MANGENDA, Fidele BABALA, and [REDACTED] to facilitate the scheme."[41] The name of the Main Case STA appears on this filing.[42]

[36] ICC-01/05-50, para. 11.
[37] ICC-01/05-01/13-33, para. 4.
[38] ICC-01/05-01/13-48, para. 1.
[39] ICC-01/05-51-Red, para. 32.
[40] ICC-01/05-51-Red, para. 28.
[41] ICC-01/05-51-Red, para. 2.
[42] ICC-01/05-51, p. 2.

33. No contemporaneous opportunity was provided to Mr. Bemba or the Defence to address the merits of these submissions, or the potential impact, given the continuing involvement of the Main Case STA in the Article 70 investigation, of these measures on the fairness of the Main Case. The Defence was accordingly deprived of the opportunity to correct the Prosecution's mistaken submission that Mr. Bemba's Defence was being funded in accordance with the Court's legal aid scheme, which had major implications for the manner in which investigation-related witness expenses had to be met.[43] The Defence was also given no opportunity to justify the reasonableness of specific witness-related expenses, or to insist that the products of any such investigation not be shared with the Main Case prosecution team.

34. On 29 July 2013, the Single Judge authorised the Prosecution to seise the Belgian and Dutch authorities with the request for telephonic surveillance of Defence team members, including Lead Counsel.[44] An independent counsel was appointed to provide the Prosecution with "the relevant portions of any and all such calls which might be of relevance for the purposes of the investigation."[45]

35. Recordings of Mr. Kilolo and Mr. Mangenda's telephone calls by the Dutch authorities began on or around 15 August 2013.[46] The conversations included privileged telephone calls between Mr. Kilolo and Mr. Bemba. The Registry had refused to record these very same calls on the Detention Centre end on the basis

[43] Internal correspondence illustrating the expenses of mission costs supported by the defence team: CAR-D20-0005-0270; CAR-D20-0005-0280; CAR-D20-0005-0281. Mr. Bemba's assets have been frozen since 2008: ICC-01/05-01/08-8. The Trial Chamber ordered the Registry to front the costs of Mr. Bemba's Defence: ICC-01/05-01/08-567-Red; ICC-01/05-01/08-568-Conf; ICC-01/05-01/08-1007-Conf.
[44] ICC-01/05-52-Red2, p. 7.
[45] ICC-01/05-52-Red2, pp. 7-8.
[46] ICC-01/05-T-2-CONF-ENG, 10:5 ("[REDACTED]."); ICC-01/05-52-Red2, p. 7, the Single Judge "authorises the Prosecutor to seize the relevant authorities of Belgium and of the Netherlands with a view to collecting logs and recordings of telephone calls placed of received by Mr. Aime Kilolo and Mr. Jean-Jacques Mangenda".

that they were privileged. The Belgian authorities likewise denied the Prosecution's requests to record Mr. Kilolo's telephone calls.[47]

36. On 30 August 2013, an *ex parte* status conference was held between the Single Judge, the independent counsel, and the Main Case STA. The latter expressed particular interest in continued monitoring of Lead Counsel in relation to the remaining Defence witnesses, and already appeared to demonstrate knowledge of the content of the audio-recordings:[48]

"[REDACTED]"

37. The Prosecution sought on 7 October 2013,[49] and obtained on 10 October 2013,[50] an order from the Single Judge to VWU for disclosure of all telephone contact information of Defence witnesses, to verify whether Mr. Kilolo had been in contact with the witnesses after the cut-off deadline.

38. On 10 October 2013, an *ex parte* Status Conference was held with the Single Judge, Independent Counsel and the Main Case STA.[51] The STA confirmed that [REDACTED]."[52] [REDACTED].[53] The Single Judge granted, that same day, a Prosecution request for the telephone numbers of all Defence witnesses.[54]

39. On 25 October 2013, while the Defence case was ongoing, the Independent Counsel produced his First Report summarising, transcribing and translating conversations recorded on telephones attributed to Mr. Kilolo and Mr. Mangenda.[55] Three days later, the Single Judge ordered this report, and the associated transcriptions, to be made available to the Prosecution on an *ex parte* basis. This was

[47] ICC-01/05-T-2-CONF-ENG, 14:2-4: "[REDACTED]"; ICC-01/05-T-4-CONF-ENG, 16:21-17:15.
[48] ICC-01/05-T-2-CONF-ENG, 20:13-21 (emphasis added).
[49] ICC-01/05-60-Red.
[50] ICC-01/05-62-Red.
[51] ICC-01/05-T-4-CONF-ENG.
[52] ICC-01/05-T-4-CONF-ENG, 20:7-17 (emphasis added).
[53] ICC-01/05-T-4-CONF-ENG, 21:21-22:4.
[54] ICC-01/05-62-Red, p. 5.
[55] ICC-01/05-64-Conf.

prior to the testimony of the penultimate witness, D54 (whose testimony commenced on 30 October 2013), and the last witness, D13 (whose testimony commenced on 12 November 2013).

40. On 14 November 2013, the Independent Counsel produced his Second Report summarising, transcribing and translating conversations recorded on telephones attributed to Mr. Kilolo and Mr. Mangenda.[56] These included conversations between Lead Counsel and Mr. Bemba. The next day, the Single Judge made these documents available to the Prosecution on an *ex parte* basis.

41. On 20 November 2013, the Presidency lifted the immunity of Lead Counsel and the Case Manager.[57] The same day, a warrant for their arrest was issued.[58] It was executed on 23 November 2013.

42. On 5 December 2013, the Prosecution requested that Registry's UNDU telephone recordings of conversations between Mr. Bemba and the Case Manager be referred to an independent counsel prior to Prosecution access.[59] The Single Judge rejected this request on 17 December 2013 for a reason that had received no consideration up until the time of the arrest warrants, when the Prosecution finally announced that the Main Case team would be segregated from the Article 70 case information:[60]

> As regards the need to preserve the integrity of the Main Case, the Single Judge takes the view that this need is adequately taken care of by the fact that the prosecution teams respectively in charge of the Main Case and of the present proceedings are composed by different lawyers and professional staff.

[56] ICC-01/05-66-Conf.
[57] ICC-01/05-68.
[58] ICC-01/05-01/13-1-Red2-tEng.
[59] ICC-01/05-01/13-33.
[60] ICC-01/05-01/13-48, para. 7.

43. On 3 April 2014, the Prosecution in the Article 70 case requested that an independent counsel be appointed to review the content of email accounts belonging to Mr. Kilolo and Mr. Mangenda.[61] The motion was granted on 25 April 2014.[62]

44. In response to a motion alleging that the Prosecution's investigations in the Article 70 case were tainted by a conflict of interest, the Prosecution indicated on 4 April 2014 that the lawyers working on the two cases had changed, and justifying the previous involvement of the Main Case lawyers on the basis that it:

> was a practical and logical use of lawyers and staff […] and creates no conflict of interest for them [….] During the investigations which led to the Article 70 Case, the Prosecution took all necessary precautions to avoid real conflicts, which could have arisen if Prosecution staff have been exposed to information that may be privileged pursuant to Rule 73(1).[63]

45. In the same filing, the Prosecution indicated that, subsequent to the Single Judge's Decision of 17 December 2013, it had reviewed the Registry's UNDU recordings of telephone conversations between Mr. Bemba and Mr. Mangenda.[64] The Prosecution also indicated, however, that "staff members working in the Main Case do not access the Mangenda's conversation audio recorded by the Registry."[65]

46. On 2 June 2014, the Prosecution submitted its Main Case Closing Brief, and its Response Brief on 15 September 2014.[66]

47. On 21 October 2014, the Appeals Chamber held in response to Mr. Kilolo's conflict of interest motion that:

---

[61] ICC-01/05-01/13-310-Red.
[62] ICC-01/05-01/13-366-Red.
[63] ICC-01/05-01/13-314-Red, paras. 31-32.
[64] ICC-01/05-01/13-314-Red, para. 43.
[65] ICC-01/05-01/13-314-Red, para. 43.
[66] ICC-01/05-01/08-3079-Conf-Corr; ICC-01/05-01/08-3141-Conf.

> The fact that staff members of the OTP who were already familiar with the Bemba case also carried out the initial phases of article 70 proceedings arising from that case does not, on its own, give rise to reasonable doubts as to the Prosecutor's impartiality. However, despite the above finding, the Appeals Chamber wishes to underline that, notwithstanding any potential advantages of familiarity, it considers that it is **generally preferable that staff members involved in a case are not assigned to related article 70 proceedings of this kind**.[67]

48. The Main Case was reopened on 22 October 2014 to recall P169. The Prosecution, on its list of documents for potential use during his examination, listed a document containing extracts of the Independent Counsel's Third Report. By being so listed, the extracts were made available to the Trial Chamber. The Prosecution offered no explanation as to the potential relevance of this extract from a conversation between Lead Counsel and the Case Manager discussing, [REDACTED].[68]

49. On 11 November 2014, the Defence filed its "Request for Relief for Abuse of Process."[69] The Defence argued that the Article 70 investigations had irremediably damaged the fairness of proceedings against Mr. Bemba, and requested a stay of proceedings.[70]

50. Closing arguments in the Main Case were heard on 12 and 13 November 2014.

[67] ICC-01/05-01/13-648-Red3, para. 40 (emphasis added).
[68] T-361-CONF-ENG-ET, 3:8-10.
[69] ICC-01/05-01/08-3217-Conf (as re-filed on 16 December 2014 as per the Trial Chamber's order).
[70] ICC-01/05-01/08-3217-Conf, paras. 6, 143.

B. THE EXTENT, TIMING AND CONTENT OF THE PROSECUTION'S *EX PARTE* SUBMISSIONS VIOLATED MR. BEMBA'S RIGHT TO A FAIR TRIAL

51. Few procedures could be more antithetical to an adversarial trial than denying one party the opportunity to comment on submissions by the other party to the decider of fact. The Prosecution's *ex parte* submissions accused Defence witnesses of lying, and Mr. Bemba and his Defence of having procured those lies. Those allegations could not have failed to impact the way in which the Judges viewed Defence witnesses. Indeed, the records of proceedings immediately following these *ex parte* submissions indicate that there was an immediate prejudicial impact. The failure promptly to disclose these allegations deprived the Defence of the opportunity to refute these allegations in a timely manner, and to dispel the cloud of impropriety that would otherwise settle over the Defence. Most importantly, the Defence was deprived of the opportunity to explain the Prosecution's mistaken premise that Mr. Bemba was receiving Legal Aid from the Registry and, accordingly, to refute the suggestion that any non-Registry payments to witnesses were circumstantial evidence of an improper purpose.

1. *Ex parte* submissions are antithetical to the fairness of an adversarial trial

52. Article 67(1) provides an accused with a right to:

> […] **a fair hearing conducted impartially**, and to the following minimum guarantees, in full equality: […]
>
> (d) Subject to article 63, paragraph 2, **to be present at the trial** […];
>
> (e) […] to obtain the attendance and examination of witnesses on his or her behalf **under the same conditions as witnesses against him or her**.

53. *Ex parte* submissions on the substance of the issues under adjudication, or that may otherwise colour the decider of fact's assessment of the evidence, are antithetical to the fairness of the proceedings. As stated in *Lubanga*:[71]

> Although Rule 83 of the Rules permits the prosecution to request a hearing on an *ex parte* basis for a determination of whether evidence in its possession is exculpatory under Article 67(2) of the Statute, excluding the defence from all of these stages, save for the last, would be unfair to the accused and would undermine the fundamental principle that the trial should be held in his presence (Article 63 of the Statute). The Chamber would be investigating substantive and complicated factual issues that cannot properly be resolved without the participation of the accused and his representatives. […] This would involve the Chamber conducting part of the trial, on a highly contentious and potentially important matter, in the absence of the accused […] this suggested step would be incompatible with the accused's fair-trial rights.

54. Canadian courts insist in the context of criminal proceedings that:[72]

> Counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case […] this rule is virtually absolute in order to preserve the confidence of the public in the impartiality of the judiciary and thereby in the administration of justice because *ex parte* communication between judge and counsel will almost invariably raise a reasonable apprehension of bias.

55. The Code of Conduct for United States Judges prohibits *ex parte* communications except when specifically authorised by law and, even then, only if there is prompt *post facto* notification of the communication to the other party:[73]

> a judge should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made

[71] ICC-01/04-01/06-2434-Red2, para. 137.
[72] *R v Deleary*, 2007 ONSC, [2007] at paras. 22-23.
[73] http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

> outside the presence of the parties or their lawyers. If a judge receives an unauthorized *ex parte* communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.

The existence of some other legitimate purpose offers no justification for the *ex parte* communication if it touches upon the substance of the matter pending before the judge.[74]

56. England,[75] South Africa,[76] New Zealand,[77] Singapore,[78] Italy,[79] and Moldova,[80] all reflect the same prohibition on *ex parte* communications in adversarial proceedings. The WTO Rules are even more categorical: "[t]here shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body."[81] The ECHR has held that depriving one party of access to all the submissions of the other party violates the principle of equality of arms.[82]

57. Convictions may be overturned upon a showing of prejudice arising from *ex parte* contacts. Where the judge is not the decider of fact, as in the case of convictions by jury, an applicant may be required to demonstrate prejudice. Where, however, the *ex parte* submissions relate to a matter in respect of which the judge is

---

[74] *See, e.g., Haller,* (5th Cir 1969) 409 F.2d 857 (1969), p. 859: "it is improper for the prosecutor to convey information or to discuss any matter relating to the merits of the case or sentence with the judge in the absence of counsel"; *State v. Lotter,* 586 N.W.2d 591 (1998), pp. 609-610.

[75] *R. v. Agar*, 90 Cr.App.R. 318, CA; *R. v. Preston* [1994] 2 A.C. 130, HL; *Edwards and Lewis v. U.K.* (2005) 40 E.H.R.R. 24, paras. 37-38.

[76] Rule 55 (3) of the Magistrates' Court Act; http://www.saflii.org/za/cases/ZARMC/2011/1.pdf, p.62.

[77] Guidelines for Judicial Conduct, section (G)(a).

[78] The Subordinate Courts of the Republic of Singapore Practice Directions, Section 21. https://www.statecourts.gov.sg/Lawyer/Documents/PD%20Amendment%20No%202%20of%202014.pdf.

[79] Article 13 of the ethical code of the National Judges' Association, http://www.associazionemagistrati.it/codice-etico. *See also* Article 3.11 of the "Bologna and Milan Global Code of Judicial Ethics".

[80] https://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/Ethics/Paper1_en.asp.

[81] Article 18(1) of the WTO Rules (https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm).

[82] *Lanz v. Austria*, 24430/94, 31 January 2002, paras. 62-63.

the decider of fact, prejudice should be presumed.[83] A compelling and relevant illustration of prejudice is provided by the case of *US v. Minsky*, in which a judge presiding over a jury trial held an *ex parte* conference with the Prosecution concerning potentially disclosable exculpatory material. The appeals court reversed the conviction:[84]

> *Ex parte* proceedings "can only be justified and allowed by compelling state interests." "[N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure." ("The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte* because the court does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties may participate."). Although there are circumstances where an *ex parte* communication might be "overlooked," "the burden of proving lack of prejudice is on the [government], and it is a heavy one." The *ex parte* conference in the instant case occurred at a time when the defense was arguing that the [statements] were subject to disclosure [….] The government has proffered no explanation why the defense was denied an opportunity to participate in a conference at such a critical stage of the proceedings. We refuse to condone conduct that "undermines confidence in the impartiality of the court."

58. The *ex parte* communications were not necessary to preserve the integrity of the Article 70 investigation, for two reasons. First, the Trial Chamber itself subsequently determined that the submissions should have been made to a Pre-Trial Chamber. Second, the submissions were not revealed to the Defence as soon as reasonably practicable.

---

[83] *See, e.g., US v. Reese, 775 F.2d 1066*, p. 12; *State v. Lotter,* 586 N.W.2d 591 (1998), pp. 609-610 ("[…] threat to the judge's impartiality") (citations omitted); *US v. Wolfson*, 634 F2d 1217 (9th Cir 1980), p. 1221.

[84] *US v. Minsky*, 963 F2d 870 (6th Cir 1992) p. 874 (citations omitted).

2. The Trial Chamber permitted extensive *ex parte* submissions affecting the credibility of Defence evidence to which there was no opportunity to respond

59. The Trial Chamber recognised, on 26 April 2013, that allegations concerning offences against the administration of justice had been improperly brought before it.[85] By then, however, the Chamber had already heard extensive *ex parte* submissions that Defence witnesses were lying, and that those lies had been procured by the Defence and (probably) Mr. Bemba. The Prosecution's subsequent cross-examinations are replete with thinly-veiled references to those allegations,[86] and there are ample indications that the *ex parte* submissions influenced the Trial Chamber. Meanwhile, the Defence remained blissfully unaware of these allegations.

60. The Prosecution made formal *ex parte* allegations of criminality on 15 November 2012; between the appearance of the 11th and 12th Defence witnesses.[87] The Prosecution advised the Trial Chamber that pursuant to Article 70 of the Rome Statute it was "conducting an investigation into potential payments to Defence witnesses […] including the three expert witnesses".[88] The Prosecution requested an order requiring the Registry to provide the Prosecution with a record of **all** payments by the Registry to Defence witnesses.

61. The Trial Chamber sought submissions from the Registry "in order to issue an informed decision on the matter."[89] The Registry, however, simply provided the records as part of its submissions.[90] The Trial Chamber, rather than ordering the return of the information or otherwise suggesting that the information had been

[85] ICC-01/05-01/08-2606-Conf.
[86] T-322-CONF-ENG, 26:6–27:9; T-323bis-CONF-ENG, 21:22-23; T-334-CONF-ENG, 17:23-25; T-335-CONF-ENG, 19:8-13; T-337-CONF-ENG, 40:3-6 ;13-20; T-339-CONF-ENG, 41:18-19; T-342-CONF-ENG, 13:1-10; T-345-CONF-ENG, 12:4-15:6; T-328-CONF-ENG, 28:25-29:2 (questions to Defence witnesses about whether they had received payments from the Defence).
[87] The Defence does not appear to have a complete record of *ex parte* communications. To this day, portions of the Prosecution's submissions to the Trial Chamber remain redacted from the Defence. *See, e.g.,* ICC-01/05-01/08-2548-Red2-Conf, paras. 2, 5, 7, 8-9, 16, 20-21, 36, 38.
[88] ICC-01/05-01/08-2412, para. 1.
[89] ICC-01/05-01/08-2421, para. 2.
[90] ICC-01/05-01/08-2441, pp. 1-7, and with associated annexes.

provided in error, ruled "that a decision on the prosecution's Request is no longer required."[91]

62. On 20 March 2013, in the middle of the testimony of the 16th Defence witness, the Prosecution filed an 18-page *ex parte* submission containing further serious allegations:

- "the available evidence so far would indicate that close associates of Jean-Pierre Bemba Gombo ("Accused"), members of the Defence team, and possibly the Accused himself are involved in a scheme to provide benefits to Defence witnesses in exchange for false testimony";[92]
- a "successful request for information from Western Union" had been made, and showed "several high-dollar payments from Aime KILOLO MUSAMBA, Fidele BABALA […] and other close Accused associates to Defence witnesses";[93]
- "The Prosecution has so far been unable to establish any legitimate explanation for the payments";[94]
- an anonymous informant had told the Prosecution that "four Defence witnesses would provide false testimony", that this would be in exchange for money paid through Western Union, and that the " 'Congolese' lawyer of the Accused was behind the payments";[95]
- that this information was being received "[a]t the same time" that there was: "(1) evidence of false documents included on the exhibit list of the Defence" – and then citing to its own motion challenging the authenticity of certain documents; and that "the witness who may have played a role in forging those documents – Narcisse Arido (D04-11) – failed to travel to The Hague";[96]

[91] ICC-01/05-01/08-2461, para. 5.
[92] ICC-01/05-01/08-2548-Red2-Conf, para. 1.
[93] ICC-01/05-01/08-2548-Red2-Conf, para. 3.
[94] ICC-01/05-01/08-2548-Red2-Conf, para. 4.
[95] ICC-01/05-01/08-2548-Red2Conf, paras. 7-8.
[96] ICC-01/05-01/08-2548-Red2-Conf, para. 10.

- some witnesses who had received money had, during their testimony, "lied in response to questions about payments from the Defence";[97]
- Defence team members were also receiving payments through Western Union "possibly on behalf of the Accused, which would belie his official status as indigent";[98] and
- a host of submissions leading to the allegation that Mr. Bemba "may be directing the payments to the witnesses".[99]

These submissions were for the ostensible purpose of substantiating a request to order the Registry to: verify whether it had any information about three telephone numbers; produce audio-recordings of all telephone calls between Mr. Bemba and Mr. Babala; and to produce telephone logs of Mr. Bemba.

63. On 9 April 2013, the Trial Chamber convened a status conference, *ex parte* Prosecution and Registry only, to gather information related to the Prosecution filing.[100] This "status conference" was scheduled during a break in the testimony of the Defence's 17th witness. During this hearing, the Main Case STA suggested that Defence witnesses had lied;[101] asserted that "[w]e asked for authorisation from an Austrian Judge and that is how we came about this information" from Western Union;[102] and asserted that huge sums had been paid to witnesses that could only be for an improper purpose.[103] The Prosecution announced its intention to [REDACTED].[104]

64. Much could have been said in response to these allegations, if only the Defence had been given the opportunity. First, none of the payments to any of the witnesses-of-fact who had actually **testified**, [REDACTED], were suspiciously

[97] ICC-01/05-01/08-2548-Red2-Conf, para. 17.
[98] ICC-01/05-01/08-2548-Red2-Conf, para. 19.
[99] ICC-01/05-01/08-2548-Red2-Conf, paras. 20-26.
[100] T-303-CONF-RED2-ENG, 1:12-13.
[101] T-303-CONF-RED2-ENG, 26:19-25.
[102] T-303-CONF-RED2-ENG, 5:11-12.
[103] T-303-CONF-RED2-ENG, 26:23-25; 28:15-28:18; 29:5-20.
[104] T-303-CONF-RED2-ENG, 7:11-18.

large.[105] Second, Prosecution witnesses had also falsely denied receiving payments without triggering any declaration from the Prosecution that the statement was false, let alone an investigation under Article 70.[106] While denials by a witness even in respect of small payments cannot be condoned, they are not uncommon and, in respect of these amounts, could not reasonably have been understood as a basis for suspecting a scheme of bribery to tell lies. The Prosecution STA's *ex parte* submissions, however, created an entirely different impression:[107]

> Some witnesses received large sums of money, and some of them, when they were asked here in a neutral manner, "Did you accept the least amount of money?" And you will recall, Madam President, all those witnesses stated that they never received any money from the Defence, even in repayment for travel costs, but in this annex we have six pages of money transfers to those witnesses. So if those transfers were innocent, the witness would have said, "Look, I was given €20 to pay for my bus fare and to have a drink" but this is not the case. For certain witnesses we are talking about 8,000, 10,000, €12,000. I believe that this is very serious and that is the basis for our application. That is why we felt it was important to bring this to the attention of the Chamber.

The implication that any witness who had received $8000 had denied receiving any money was incorrect and could not have failed to create an impression on the Chamber.

---

[105] ICC-01/05-01/08-2548-Red2-ConfAnxA, p. 2 ([REDACTED]).

[106] P169 testified that "[n]obody gave me money" in response to a question about whether he had received money from the Prosecution: T-138-CONF-ENG, 52:23. The Prosecution did not correct this statement, and resisted requests for disclosure of any Prosecution payments to the witness: ICC-01/05-01/08-2897-Conf, paras. 5, 16. P169 testified upon being recalled that he "did not receive a single dime from the Prosecutor, nothing at all": T-361-CONF-ENG, 32:24. The Prosecution failed to correct or seek qualification of that incorrect testimony. In its final submissions on P169's testimony, the Prosecution stated that "P-169 was provided with reimbursement of ordinary expenses, such as transportation, meals, and communication means as necessary": ICC-01/05-01/08-3182-Conf-Corr, para. 5. The Prosecution did not acknowledge the conflict with P169's 2011 and 2014 testimony, and argued that neither this incorrect statement nor the witness's other conduct undermined his credibility, (ICC-01/05-01/08-3182-Conf-Corr, paras. 24-26).

[107] T-303-CONF-RED2-ENG, 26:17-27:1.

65. Third, there were legitimate explanations for these payments that Defence, either contemporaneously or subsequently, had no opportunity to provide to the Trial Chamber. The Prosecution failed to mention that [REDACTED]'s payment of [REDACTED][108] was reasonable and appropriate given his role as an expert; that D11's payment of [REDACTED][109] was reasonable given his role as a potential (but as yet undeclared) expert witness and intermediary;[110] and that [REDACTED]'s payment of around [REDACTED][111] was not unreasonable given his role as an intermediary. In any event, neither D11 nor [REDACTED] had yet testified and, accordingly, had not denied any such payments. The Defence was given no opportunity to correct the Prosecution's misstatements or provide an explanation for the payments. In particular, the Defence had no opportunity to explain the particular financial arrangements with the Registry, which had refused to reimburse investigative expenses, that could have explained these amounts. In the absence of these explanations, these allegations could not have failed to have a prejudicial impact on the perception of the Defence as a whole and its witnesses.

66. Fourth, the *ex parte* submissions did not put the practice of party-provided expenses before the ICC in its proper context, thus creating a false impression of impropriety that could not have failed to prejudice the Trial Chamber against defence evidence. For example, the Prosecution did not explain that it had paid much larger sums to its own witnesses (over and above those paid by the Registry) for such expenses as: (i) reasonable loss of income; (ii) care of dependents; (iii) out-of-pocket expenses such as copying documents; (iv) accommodation; (v) phone credit; (vi) moderate medical expenses; and (vii) related reasonable travel costs of individuals.[112] P169 and P178, for example, received [REDACTED] and [REDACTED] respectively from the Prosecution in relation to their testimony in this

[108] ICC-01/05-01/08-2548-Red2-ConfAnxA, p. 2.
[109] ICC-01/05-01/08-2548-Red2-Conf-AnxA, pp. 1-2.
[110] *See* 01/05-01/08-3217-Conf-Exp, para. 44.
[111] ICC-01/05-01/08-2548-Red2-Conf-AnxA, p. 1.
[112] ICC-01/04-02/06-822-Red, para. 39

case.[113] The Prosecution's own position, accordingly, is that such payments are proper; are not circumstantially indicative of impropriety; are irrelevant to witness credibility; and are not disclosable as they fall within "the ordinary requirements of subsistence."[114] This information was not provided to the Trial Chamber in the context of the *ex parte* submissions which, again, could not have failed to create a prejudicial impression about the propriety of the Defence's conduct and the evidence it was presenting.

67. These allegations made in the 9 April status conference went to the heart of the credibility of Defence witnesses and the Defence itself. The Trial Chamber was keenly interested, as reflected in suggestions as to how the investigation could be conducted.[115] The submissions, regardless of whether they constituted a sound basis for proceeding with an Article 70 investigation, damaged the fairness of proceedings by prejudicing the Main Case Trial Chamber against the Defence and its evidence. Indeed, these *ex parte* submissions are part of a pattern of *ex parte* submissions to which the Defence has never been granted access.[116]

68. The fairness of the trial was not incompatible with the needs of any legitimate investigation under Article 70. At least two avenues were available to avoid prejudicing the proceedings against Mr. Bemba. First, the Prosecution could have addressed its *ex parte* submissions to a Pre-Trial Chamber.[117] Second, the Trial Chamber could have, as was the consistent practice at the ICTY and ICTR, insisted that the *ex parte* submissions that had been made to the Trial Chamber be revealed within a definite and short time-period.

---

[113] ICC-01/05-01/08-2912-Conf-AnxD, pp. 2-3.
[114] *See, e.g.*, ICC-01/05-01/08-1857-Conf, para. 13; ICC-01/05-01/08-3167, para. 33.
[115] T-303-CONF-RED2-ENG, 24:8-10 "Maitre Badibanga, for instance, would be a good start for the Prosecution investigation just to check the log-book that Detention Centre's – nodding does not help. I need your answer."
[116] Filings 2325, 2430, 2515 (filed prior to the Prosecution's 20 March 2013 submission) and 2563, 2587, 2589, 2730, 2849, 2871 and 2875 (filed after the 20 March 2013 submission).
[117] ICC-01/05-01/08-2606-Conf, paras. 21-22.

69. Indeed, the Prosecution intimated during its *ex parte* submissions that this is the course it would follow. When the bench asked whether "the Prosecution is seeking *carte blanche* [REDACTED]," the Prosecution responded that the "way we understood things at this point is that we will work with the existing information, the initial evidence, so that would be applicable to the individuals involved in the scheme and who are named in the annex and who received payments."[118] The Prosecution estimated that it needed "two to three weeks" to listen to the audio-recordings [REDACTED] and that, thereafter, "[REDACTED]."[119] This would have been almost three weeks to the day after the 9 April status conference.

70. Instead, these highly damaging submissions remained *ex parte* for an extended period. They remained unrefuted, and irrefutable, throughout the hearing of the remainder of the Defence case. When they ultimately did come to light, it was too late to re-create the Trial Chamber's first impression of those Defence witnesses, and too late comprehensively to address the merits of the allegations of misconduct. In short, the Defence was deprived of the opportunity to refute these allegations before the Main Case Trial Chamber, which could not have failed to prejudice its assessment of Defence evidence.

71. The damage was exacerbated by the Prosecution's reminders to the Trial Chamber about the allegations even after it had ruled that the submissions were not properly before it. Eight of the 17 Defence witnesses who testified after the *ex parte* allegations were cross-examined about payments by the Defence.[120] The Defence, on the other hand, had been reprimanded for putting similar questions to Prosecution witnesses:[121]

---

[118] T-303-CONF-RED2-ENG, 7:3-18.
[119] T-303-CONF-RED2-ENG, 6:17, 21-23.
[120] T-322-CONF-ENG, 26:6–27:9; T-323bis-CONF-ENG, 21:22-23; T-334-CONF-ENG, 17:23-25; T-335-CONF-ENG, 19:8-13; T-337-CONF-ENG, 40:3-6, 13-20; T-339-CONF-ENG, 41:18-19; T-342-CONF-ENG, 13:1-10; T-345-CONF-ENG, 12:4-15:6.
[121] T-157-CONF-ENG, 53:11-54:5 (emphasis added).

> Q. … How much money, if applicable, did you get or do you expect to get in the context of your testimony?
> PRESIDING JUDGE STEINER: Maître Badibanga, you have the floor, but I have already the answer to this question.
> MR BADIBANGA: (Interpretation) Your Honour, yes. Of course we do object to these particularly insulting questions first of all in respect of the witness, whose integrity is being questioned on an imaginary basis and I really don't see any element that could possibly justify the position of the Defence. It is also very insulting towards the Office of the Prosecution, whose integrity is being questioned, and we can under no circumstances whatsoever accept that.
> PRESIDING JUDGE STEINER: Maître Badibanga, if there is any system to compensate the witness for the days the witness spent in The Hague, this is an issue that relates only to VWU and will be the same that will apply for the Defence witnesses when the Defence witnesses come. **So the tone in which the question was posed to the witness is offensive and the Chamber does not accept this kind of question**. Have you finished your questioning, or do you have something else?
> MR KILOLO: (Interpretation) I have finished, your Honour, and I have already provided the reference number for the document that we used to base our last question on, which of course do not seek to offend the Office of the Prosecutor.[122]

The Trial Chamber subsequently purported to explain the disparate treatment of such questioning on the basis of "tone" rather than content;[123] yet nothing in the transcripts reveal any difference in tone. In fact, the Trial Chamber's ruling reflects the mistaken belief that only the VWU is permitted to make payments to Prosecution witnesses. The Defence could have shown that this was incorrect if only it had been entitled to the same disclosure as the Prosecution was able to obtain through its inquiries to the Registry and Western Union.

---

[122] *Ex parte* submissions by the Prosecution during its own case may provide a further explanation for the disparate treatment of such questions. For example, the Prosecution was permitted to make *ex parte* submissions concerning alleged security concerns of P169, P173 and P178, which were disclosed only after their testimony. *See, e.g.,* T-148-CONF-RED2-ENG-ET, 3:5, 18-20.
[123] ICC-01/05-01/08-3255, para. 110.

72. The eventual disclosure of the *ex parte* allegations was too late to remedy the prejudice. First, the Trial Chamber's first impression of 23 of the Defence's 34 witnesses was formed under the cloud of these allegations of which the Defence had no knowledge, let alone any contemporaneous opportunity to respond. Second, once the allegations did come to light, the Trial Chamber itself found that litigating the merits of those allegations was no longer practicable,[124] and that it could not "make findings relating" to the merits of the Article 70 case.[125] At the same time, however, the Trial Chamber was perfectly aware of the identity of each witness implicated in the Article 70 allegations, who were listed in the Judgment.[126]

73. The Trial Chamber, rather than evaluating the extent to which the Prosecution's allegations had affected its assessment of the credibility of those witnesses, chose to attempt an impossible feat: purporting to assess the credibility of the affected Defence witnesses without openly considering the *ex parte* allegations or the Article 70 case. The Trial Chamber did not find a single one of the 14 witnesses to be reliable on any issue at all. The general credibility of seven was rejected because their demeanour "was evasive"[127] or "evasive and defensive",[128] and that their testimony was "illogical, improbable or contradictory",[129] "confusing, illogical and inconsistent",[130] "exaggerated, inconsistent and evasive",[131] "evasive and illogical",[132] "incoherent and unclear,"[133] "illogical, improbable and the basis of his assertions unclear,"[134] and "illogical and confusing."[135]

[124] ICC-01/05-01/08-3029, para. 26.
[125] ICC-01/05-01/08-3029, para. 31.
[126] Judgment, para. 253.
[127] Judgment, para. 348 (D2).
[128] Judgment, para. 352 (D3).
[129] Judgment, para. 348 (D2).
[130] Judgment, para. 352 (D3).
[131] Judgment, para. 357 (D15).
[132] Judgment, para. 370 (D54).
[133] Judgment, para. 361 (D25).
[134] Judgment, para. 377 (D64).
[135] Judgment, para. 375 (D57).

74. These credibility assessments were vital to key factual findings: of the 14 Defence witnesses identified by the Trial Chamber as having given testimony showing that Mr. Bemba did not have "operational control" of the MLC troops,[136] 10 were implicated in the Article 70 Case;[137] seven of those received negative general credibility assessments;[138] and the testimony of the other three was rejected as not reliable in respect of this specific issue.[139] The Trial Chamber was fully aware that these witnesses had been implicated in the Article 70 case, and had received an *ex parte* submission in March 2013 accusing two of them of lying under oath.[140]

75. The facial propriety of the reasoning does not remedy the improprieties that could not have failed to impact, consciously or unconsciously, the Trial Chamber's view of those witnesses' credibility. No trial could be considered fair, whether by a jurist or a reasonably informed observer, when *ex parte* submissions about witness credibility have been entertained by the Trial Chamber; allowed to linger in secret throughout the duration of the Defence case; and when the Defence was never given an opportunity to address the Trial Chamber on their validity.

C. THE PROSECUTION SHOULD HAVE PRESERVED TRIAL FAIRNESS BY REVEALING THE BASIS OF ITS SUSPICIONS TO THE DEFENCE WITHIN A REASONABLE TIME

76. As of the date of the first *ex parte* submissions, only three witnesses had testified who were subsequently alleged to have testified falsely.[141] The Prosecution and the Trial Chamber, upon receiving what it considered to be credible information of offences against the administration of justice, had an obligation

[136] Judgment, para. 428.
[137] D2, D3, D4, D6, D13, D15, D25, D54, D57, D64.
[138] D2, D3, D15, D25, D54, D57, D64.
[139] Judgment, paras. 429-446. Moreover, the Trial Chamber gave no reasons for rejecting the testimony of D4 and D6, neither of whom received a negative general credibility assessment, and neither of whose testimony in respect of this specific issue is addressed.
[140] 01/05-01/08-2548-Red2-Conf, para. 17 ("it seems likely that each witness, testifying under oath and under Prosecution questioning, lied").
[141] D57, D64 and D55.

promptly to disclose this information to the Defence. This obligation arose from at least two sources: the Trial Chamber's obligation under Article 64(2) to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused"; and the obligation under Rule 77 to disclose information "material to the preparation of the defence." Neither the unconfirmed suspicion that Mr. Bemba might be involved in such offences, nor the Prosecution's duty to investigate Article 70 offences, justified imperilling the fairness and integrity of the trial or failing to fulfil mandatory disclosure obligations.

77. The Prosecution's *ex parte* submissions to the Trial Chamber of 20 March 2013 indicate that "members of the Defence team, and **possibly** the Accused himself" are involved in "a scheme to provide benefits to Defence witnesses in exchange for false testimony."[142] Six of the witnesses the Prosecution claimed were involved had already testified (D7, D64, D57, D59, D55 and D45); three had not yet testified (D11, D38 and D52).[143] The Prosecution also expressed a suspicion that D52 had a particular role in the scheme.

78. The Prosecution had information that, in its view, suggested misconduct that, if true, would affect the integrity of Mr. Bemba's defence. The Prosecution cannot argue that disclosure would have been futile because the Defence itself was suspected of involvement. The Prosecution's own submissions concede that it had only "indications of misconduct";[144] that the Prosecution only "suspect[ed]" Mr. Bemba of being involved;[145] and that these indications were "sufficient to warrant" additional investigative steps,[146] but apparently not more concrete measures such as seeking the issuance of an arrest warrant. In these circumstances, and even assuming that the Prosecution's suspicion that Mr. Bemba or some members of the Defence might have been involved was not manifestly unreasonable, it was still

[142] ICC-01/05-01/08-2548-Red2-Conf, para. 1 (emphasis added).
[143] ICC-01/05-01/08-2548-Red2-Conf, para. 13.
[144] ICC-01/05-01/08-2548-Red2-Conf, para. 2.
[145] ICC-01/05-01/08-2548-Red2-Conf, para. 20.
[146] ICC-01/05-01/08-2548-Red2-Conf, para. 26.

incumbent upon the Trial Chamber and the Prosecution to disclose those allegations as quickly as possible to the Defence so that either: (i) an explanation could be provided; or (ii) corrective measures could be taken to ensure greater transparency or to otherwise prevent future damage to the integrity of the trial.

79. The factual circumstances are indistinguishable from numerous ICTY and ICTR cases when an accused, lawyer or investigator has been accused of bribing witnesses to tell lies. In none of those cases did the Trial Chamber allow the allegations to remain *ex parte* for anything more than a very short period. In none of these cases did the alleged involvement of the accused or the Defence justify non-disclosure on the altar of further investigations.

80. In *Simić,* an accused and his counsel were accused of having "knowingly and willfully" interfered with the administration of justice by attempting to bribe a potential Defence witness to lie.[147] Counsel of a co-accused, Igor Pantelić, was also alleged to have been involved.[148] The Prosecution presented these allegations to the Trial Chamber in an *ex parte* written submission on 25 May 1999, followed by a closed session *ex parte* hearing on 8 June 1999 which the Trial Chamber explained was for the purpose of hearing "the Prosecution as to the procedure to be followed for permitting the Defence to be notified of and respond to the allegations."[149] On that same day, the individuals alleged to have engaged in this conduct were informed of these allegations.

81. On 7 July 1999, having heard the explanations of the co-accused's lawyer, the Trial Chamber found that "it does not have good reason to believe that Mr. Igor Pantelić may be in contempt".[150] The other two individuals were then tried for

[147] *Simić et al*., Judgement in the matter of contempt allegations against an accused and his Counsel, 30 June 2000, paras. 1-2.
[148] *Ibid*, para. 3.
[149] *Ibid*, para. 3.
[150] *Simić et al*., Scheduling order in the matter of allegations against Accused Milan Simić and his Counsel.

contempt, and commencement of the "main case" was postponed.[151] On 30 June 2000, both accused were acquitted,[152] and the trial proceeded thereafter.

82. Shortly after trial had commenced in the *Nyiramasuhuko* case, the Prosecution filed an *ex parte* motion alleging contempt against Defence team members for having, *inter alia*, induced or attempted to induce seven witnesses to give false testimony.[153] Six days later, and considering the gravity of the allegations made, the Trial Chamber rendered an *inter partes* order requiring the Prosecutor to serve the Defence with the motion "as soon as possible and in any case before Thursday, 26 July 2001."[154] The Trial Chamber dismissed a Defence objection to the original *ex parte* filing, noting that the motion had been promptly disclosed to the Defence, which had been accorded the right to respond.[155] The Trial Chamber, having heard submissions from both parties, dismissed the allegations.

83. While the *Lukić & Lukić* case was ongoing, the Prosecution made *ex parte* allegations to the Trial Chamber that the Defence had bribed witnesses.[156] These submissions, which were made between 4 and 24 September 2008, were disclosed to the Defence on 6 November 2008[157] **before** the start of the Defence case.[158] The Trial Chamber ensured that "following the receipt of investigation reports from the Prosecution, and with a view to assessing whether the alleged witness interference had had an impact on the reliability of the evidence in these proceedings, the Trial Chamber permitted the parties to make applications to introduce evidence or call

---

[151] *Simić et al*., Judgement in the matter of contempt allegations against an accused and his Counsel, para. 4.
[152] *Ibid*, para. 101.
[153] *Nyiramasuhuko et al*., Decision on the Prosecutor's further allegations of contempt, para. 1, 17-22. *See also Nyiramasuhuko* TJ, paras. 74, 6347.
[154] *Nyiramasuhuko et al*., Order in the matter of the Prosecutor's *ex parte* further allegations of contempt, p. 1.
[155] *Nyiramasuhuko et al*., Decision on the Prosecutor's further allegations of contempt, para. 10.
[156] *Lukić & Lukić* TJ, para. 21.
[157] *Lukić & Lukić*, Report of Presiding Judge of Trial Chamber III to Vice-President of Tribunal pursuant to Rule 15(B)(i), para. 16.
[158] *Lukić & Lukić* TJ, para. 1151.

witnesses relevant to the allegations."[159] The Trial Chamber ultimately denied the requests to proceed with contempt allegations against counsel.[160] Both parties were fully informed of the allegations, given an opportunity to respond promptly, and were permitted to adduce additional evidence to address any potential reliability issues arising from the allegations.[161]

84. The routine practice at the ICTR, following the (not infrequent) allegations by witnesses of misconduct by the Defence or an accused, is *inter partes* submissions followed by a decision as to whether the matter should be investigated further.[162] Such *amicus curiae* reports are often made available for *inter partes* comment before a Trial Chamber decides whether to make further orders.[163] In no case of which the Defence is aware did the Prosecution make ongoing *ex parte* submissions to the Trial Chamber seized of a trial, let alone use such allegations as a basis for secret monitoring of the Defence team during the presentation of its case. The foregoing cases involved allegations just as serious as those in this case.

85. The practice adopted by the Tribunals finds support in the Prosecution's disclosure obligations. Rule 77 obliges the Prosecution to disclose information "material to the preparation of the defence." "Information that undermines or supports the evidence, or the credibility, of proposed Defence witnesses falls within the scope of Rule 77."[164] The ICTR Appeals Chamber and ICC Chambers[165] have

[159] *Lukić & Lukić* TJ, para. 21.
[160] *Rasić*, Indictment. *See Lukić & Lukić* TJ.
[161] *Lukić & Lukić*, Prosecution Final Trial Brief, paras. 489, 571; *Lukić & Lukić*, Milan Lukić's Final Trial Brief and Submissions, paras. 505-507; *Lukić & Lukić* TJ, para. 169.
[162] *Ngirabatware*, Decision on Prosecution oral motion for amendment of the Chambers Decision on allegations of contempt; *Ngirabatware*, Decision on allegations of contempt; *Nzabonimana*, Decision on the Prosecution's urgent motion alleging contempt of the Tribunal; *Ngeze*, Order directing the Prosecution to investigate possible contempt and false testimony; *Ntakirutimana*, Decision on Prosecution motion for contempt of Court and on two Defence motions for disclosure etc.
[163] *Nzabonimana*, Order to disclose *amicus curiae* report with respect to allegations made by Witnesses CNAL and CNAE to the parties and request for submissions, p. 4.
[164] ICC-01/04-01/06-2624, para. 18.
[165] *Bizimungu*, Decision on Defendant Bicamumpaka's motion for reconsideration of oral decision regarding violation of Prosecutor's obligations pursuant to Rule 66 (B), para. 5; *Bagasora*, Decision on

underscored that Rule 77 aims to "improve [the Defence's] assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence."[166]

86. Information that prospective Defence witnesses may have been bribed was "material to the preparation of the Defence". The Prosecution has no discretion under Rule 77 to withhold disclosure, except in accordance with Rule 81(2). The Trial Chamber held, correctly, that the Prosecution had made no such application.[167]

87. The Trial Chamber, rather than granting a remedy, found that the non-disclosure had caused no prejudice because:

> the Prosecution put only open-ended questions to Defence witnesses regarding issues affecting credibility – without particularising allegations or presenting or referring to the undisclosed information – on which the Defence was not precluded from following up by a lack of information. Indeed the material referred to by the Defence was neither submitted nor admitted into evidence in the *Bemba* case.[168]

88. This reasoning reflects a profound misunderstanding of the far-reaching prejudice caused by the Prosecution's non-disclosure of information highly germane to the choice of witnesses. This information was withheld from the Defence for 16 months, including during the crucial period that Defence witnesses were being chosen and presented. The purpose of Rule 77, as stated in *Lubanga*, is "not least because it will enable the accused to decide whether or not to call them."[169] The prejudice arising from the non-disclosure is not the trivial concern mentioned by the Trial Chamber in the passage above, but the catastrophic consequence of having been deprived of the opportunity to select witnesses with

---

interlocutory appeal relating to disclosure under Rule 66(B), para. 9; ICC-01/04-01/06-2624, para. 18; ICC-01/04-01/06-1433, paras. 76-82.

[166] *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Decision on interlocutory appeal relating to disclosure under Rule 66(B), para. 9.

[167] ICC-01/05-01/08-3255, para. 83.

[168] ICC-01/05-01/08-3255, para. 87.

[169] ICC-01/04-01/06-2624, para. 18.

the benefit of information of capital relevance to their credibility. In particular, the undisclosed information included information that the Prosecution interpreted as showing that prospective Defence witnesses (D11 and D38) were being bribed or might (D52) be bribing others, and that this was part of a broader "scheme".[170] It is hard to imagine information more "material to the preparation of the Defence" and more relevant to the selection of witnesses.

89. The Prosecution cannot argue that there is no prejudice because the most that the Defence could have done with the information would be to withdraw the tainted witnesses. On the contrary, numerous other measures were available, including: implementing a more transparent regime for disclosing and approving witness expenses that would exclude any suspicions of impropriety; replacing any witness whose credibility might legitimately have been placed in doubt by certain payments; squarely addressing the issue of payments during testimony; explaining the payments to the Trial Chamber; and/or re-calling the three witnesses who had allegedly been procured to give false testimony as of the date of the Prosecution's first allegations of misconduct to get to the bottom of the allegations (as the Prosecution was given the opportunity to do in respect of P169).[171] The Defence was deprived of the opportunity of pursuing any of these courses of action. The course of the trial was irremediably and pervasively damaged.

90. Nor did the needs of the Article 70 investigation require or justify sacrificing the fairness of the Main Case.[172] As the STA indicated on 9 April 2013, those investigations could have been completed by 1 May 2013.[173] The Prosecution already had the Western Union payment records, and the Registry payment records

[170] ICC-01/05-01/08-2548-Red2-Conf, para. 7.
[171] ICC-01/05-01/08-3167; ICC-01/05-01/08-3154-Conf; ICC-01/05-01/08-T-361-CONF-ENG; ICC-01/05-01/08-T-362-CONF-ENG; ICC-01/05-01/08-T-363-CONF-ENG.
[172] *See contra* 01/05-01/08-3229-Conf-Exp, para. 54: "[T]he Defence's view of the proper implementation of rule 77 would frustrate any article 70 investigation connected to the conduct of a Defence team or an accused, requiring disclosure of the material triggering the Prosecution's suspicions before appropriate measures could be implemented to secure relevant evidence."
[173] T-303-CONF-RED2-ENG, 6:10-24.

and recordings of Mr. Bemba's non-privileged telephone calls were already in existence and available. All that remained, according to the STA, was to organise simultaneous interviews of the protagonists. This would have been an ample basis upon which to prove (or otherwise) the allegations arising from the disclosable information. Instead, the Prosecution withheld the information and embarked on an eight-month investigative odyssey. Even assuming that these measures were not, in themselves, improper or illegal, they were disproportionate to the damage being caused to the fairness of the trial. This would have been obvious at the time to anyone in possession of the information.

91. Had the Prosecution conducted its investigation as initially foreseen by the STA, disclosure would have been delayed for the presentation of a single Defence witness, D39. Instead, the Defence presented 16 witnesses without the benefit of this vital disclosure, 11 of whom became the object of Article 70 allegations, and five of whose testimony was rejected in concluding that Mr. Bemba "had operational control over the MLC contingent in the CAR throughout the 2002-2003 CAR Operation."[174]

92. Meanwhile, the Prosecution failed to disclose Rule 77 material, and failed to seek authorisation from the Trial Chamber under Rule 81(2) for withholding such disclosure.

D. PRIVILEGED AND OTHERWISE CONFIDENTIAL DEFENCE INFORMATION WAS SHARED WITH THE PROSECUTION TRIAL TEAM DURING TRIAL PROCEEDINGS

93. The Prosecution position before the Trial Chamber was that it never accessed privileged information during the trial. The basis for this position was not that it did not *receive* privileged information, but rather that any such material (such as

[174] Judgment, paras. 445-446.

conversations between Mr. Bemba and his Lead Counsel or Case Manager) contained evidence of crimes or fraud and none contained "legitimately privileged information."[175] On the basis of this reasoning, the Prosecution informed the Trial Chamber that it "is not privy to any information that is protected by *legitimate* professional privilege."[176] The Prosecution's claim that it did not invade attorney-client privilege rests, therefore, on the validity of the claim that all accessed material fell within the so-called "crime-fraud exception".[177]

94. Trial Chamber VII has found that the Independent Counsel erred in the scope of the crime-fraud exception. For example, the Prosecution received, on 21 November 2013,[178] the entire telephone conversation between two members of Mr. Bemba's Defence that took place on 14 September 2013.[179] The conversation included [REDACTED].[180] [REDACTED]."[181]

95. The full bench of the Pre-Trial Chamber found that this conversation contained no evidence of crime or fraud,[182] and "decline[d] to confirm the charges brought by the Prosecution in connection with the Documents."[183] The conversations were nevertheless provided to the Main Case STA. The first conversation was disclosed to him between Defence's 32nd and 33rd witness; the second conversation was disclosed long before the Prosecution's final submissions

---

[175] ICC-01/05-01/08-2984, para. 3. *See also,* ICC-01/05-01/08-3229-Conf-Exp, para. 29: "[t]he material for which the Defence purports to claim privilege includes material within the crime-fraud exception".
[176] ICC-01/05-01/08-2965-Conf, para. 2 (emphasis added).
[177] ICC-01/05-01/08-3229-Conf-Exp, paras. 27-28.
[178] ICC-01/05-66-Conf-Exp-Anx-Corr (Independent Counsel's Second Report). This report appears to have been filed with the Single Judge by the Independent Counsel on 15 November 2013. A notation at the top of the annex indicates that "[P]ursuant to Pre-Trial Chamber II's instruction dated 15-11-2013, this document is reclassified as Confidential *Ex Parte*, only available to the Independent Counsel and OTP." It therefore appears that the Prosecution obtained this extract on 15 November 2013.
[179] The basis for disclosing this conversation to the Prosecution is set out in the annex to the Independent Counsel's Second Report: ICC-01/05-66-Conf-Exp-Anx-Corr, p. 29. The transcript of the conversation is at CAR-OTP-0080-1402 (between Lead Defence Counsel and the Case Manager).
[180] CAR-OTP-0080-1402, at lines 7, 20, 26.
[181] ICC-01/05-66-Conf-Exp-Anx-Corr, p. 29.
[182] ICC-01/05-01/13-749, paras. 47-48.
[183] ICC-01/05-01/13-749, para. 50.

were filed. These were privileged conversations. They concerned, as stated by the Pre-Trial Chamber, "defence strategies", and yet they were in the possession of the Main Case STA during the Defence case.

96. The defective nature of the procedure is unsurprising considering that it was put in place based on *ex parte* and one-sided submissions with no opportunity for appellate review. Neither the OPCD nor an *amicus curiae*, let alone the Defence, were given an opportunity to make submissions on the procedure, which was authorised by a Single Judge rather than a full bench.

97. The Single Judge was purportedly responsible for supervising the Independent Counsel's decisions as to which telephone conversations between the Lead Counsel and the Case Manager[184] should be disclosed to the Prosecution.[185] [REDACTED],[186] [REDACTED].[187] Furthermore, the Independent Counsel, unlike *amicus curiae* appointed to investigate allegations of contempt at the ICTY and ICTR, was not permitted to reach his own conclusion as to whether there was a reasonable basis to believe that any offence had been committed. Instead, he was merely tasked with "transmitting to the Prosecution the relevant portions of any and all such calls which **might be** of relevance for the purposes of the investigation."[188] At the subsequent *ex parte* status conference attended by the Main Case STA (but not the Defence or OPCD), the Single Judge again instructed the Independent Counsel to identify "what is relevant to the case".[189]

98. The "crime-fraud exception" was not properly or strictly applied. The Independent Counsel did not verify whether the premise of the Prosecution's

[184] ICC-01/05-52-Red2, p. 8.
[185] ICC-01/05-52-Red2, para. 7.
[186] ICC-01/05-T-2-Conf-ENG, 1:25-2:1.
[187] The Single Judge released the First IC Report (which encompassed 31 telephone calls) to the Prosecution three days after it had been submitted by the Independent Counsel; the Second IC Report (which encompassed 41 telephone calls) one day after it had been submitted.
[188] ICC-01/05-52-Red2, p. 8 (emphasis added).
[189] ICC-01/05-T-2-CONF-ENG, 17:12-14.

suspicions were correct; he was instructed to apply only a "might be of relevance" standard; and he was not subject to any meaningful judicial supervision. Thus, the Prosecution were given audio-conversations between Lead Counsel and the Case Manager concerning "alleged false" documents that the Pre-Trial Chamber subsequently determined were not evidence of any offence.

99. The error found by the Pre-Trial Chamber in respect of the allegation of "false documents" is merely the most obvious tip of a very large iceberg. First, the Article 70 Judgment(s) may likewise reject components of the Prosecution case. This would mean that other (or all) of the intercepted communications were not properly transmitted to the Prosecution. Even a partial acquittal would substantially enlarge the privileged information in the Prosecution's possession during the Main Case. Second, this does not only affect privileged information, but **confidential** information, such as conversations between Counsel and actual or prospective witnesses.[190] Third, contrary to the Single Judge's initial instruction that any exceptions to privilege be "determined in light of, and limited by, the specific reasons warranting such exception,"[191] the Independent Counsel in practice almost always disclosed conversations in their entirety. For example, a conversation [REDACTED] between Mr. Bemba and Lead Counsel was disclosed on the basis that it allegedly revealed that "*[REDACTED]*."[192] The subject-matter is not evidence of the commission of any offence. Even assuming that it was, this provided no justification for disclosure to the Prosecution of the remainder of a case-related conversation between Mr. Bemba and his Lead Counsel.

100. While the ICC Statute and Rules do not expressly regulate this issue, *Lubanga* had already highlighted the need for segregation in such situations:[193]

---

[190] *See, e.g.*, CAR-OTP-0077-1407; CAR-OTP-0077-1414; CAR-OTP-0082-0663; CAR-OTP-0080-1369; CAR-OTP-0080-1370.

[191] ICC-01/05-52-Red2, para. 6.

[192] ICC-01/05-64-Conf-Exp-Anx, p. 15, transmitting intercept CAR-OTP-0074-0986.

[193] ICC-01/04-01/06-T-350-Red2-ENG, 16:11-19. The Prosecution seems to occasionally express support for this view. As stated by one lawyer appearing in the Article 70 case: "Mr. President, I

> Given the extent to which this scheme has been regulated in the Rome Statute framework, it is clear that the Judges have not been given power to remove responsibility from the Prosecution by appointing an independent investigator. Clearly, if a team prosecuting a case were to find itself placed in a position of conflict when investigating or prosecuting alleged Article 70 offences, it would then be necessary to refer the issue either to members of the OTP who were uninvolved with the proceedings or, in an extreme situation, to an independent investigator.

101. This principle is applied consistently by other international courts. The ICTY and ICTR Rules give Trial Chambers the authority to "appoint an *amicus curiae* to investigate the matter" where "the Prosecutor, in the view of the Chamber, has a conflict of interest."[194] *Amicus* investigators and prosecutors have been appointed for this purpose at the ICTR and ICTY. Such appointments have been made on the basis that: the alleged contemnor is a Prosecution witness;[195] the Prosecution is the party that proposed the prosecution;[196] there is "uncertain surrounding the authenticity" of the information that is the basis for the request and that "the appointment of an *amicus curiae* will enhance [the Chamber's] ability to impartially determine the authenticity of the source of the letter";[197] and the "individuals who may have been involved in the alleged contempt of court could be linked to the Tribunal".[198] The SCSL Rules did not allow the Prosecution to prosecute contempt,

---

don't see any conflict of my participating in the main case as a trial lawyer during the Prosecution case. I would think the conflict would arise if I participated in the investigation in this case, which is something I did not do." (T-46, 17:11-19).

[194] Rule 91 of the ICTY Rules, Rule 77(C)(ii) of the ICTR Rules.

[195] *Karemera et al*., Decision on Prosecution's confidential motion to investigate BTH for false testimony, 14 May 2008, para. 6; *Nyiramasuhuko et al*., Decision on Ntahobali's motion for an investigation relative to false testimony and contempt of Court, paras. 13, 27.

[196] *Karemera et al*., Decision on remand following Appeal Chamber's decision of 16 February 2010, para. 6.

[197] *Ndindiliyimana et al*, Decision on Ndindiliyimana's motion requesting a remedy for possible witness recantation, para. 10.

[198] *Nyiramasuhuko et al*., Decision on Ntahobali's motion for an investigation into false testimony and Kanyabashi's motion for an investigation into contempt of Court relative to Prosecution Witnesses QY and SJ, para. 17.

requiring the appointment of an *amicus* prosecutor, referral to national authorities, or summary proceedings by the Chamber itself.[199]

102. The Prosecution's claim that it was compelled to retain control of the investigation in order "to preserve the integrity of proceedings in the Main Case"[200] is unpersuasive. Had the integrity of the Main Case been a concern, the Prosecution would have completed its investigations as rapidly as possible to allow its suspicions to be addressed promptly. The Prosecution's acknowledged uncertainty in April 2013 as to whether Mr. Bemba was involved made this even more imperative to the protection of Mr. Bemba's rights. Instead, the Prosecution's investigations were protracted, and employed the most intrusive monitoring possible of two Defence team members and Mr. Bemba during the presentation of the Defence case. The Prosecution's actions did not preserve the integrity of the Main Case; they undermined the fairness of the entire trial.

103. The approach adopted by the Main Case STA may be usefully contrasted with that adopted in *Ongwen*. The Prosecution came into possession of information suggesting that Mr. Ongwen, possibly with the assistance of his counsel, had paid money to Prosecution and Defence witnesses.[201] Instead of initiating a secret parallel investigation, the Prosecution filed an *inter partes* request seeking an explanation, disclosure of any and all payments that had been made, and an order prohibiting future payments.[202] The Defence filed a response,[203] and the Trial Chamber partially granted the request.[204]

104. Mr. Bemba's alleged involvement in these offences does not justify the violation of his rights. Mr. Bemba insists, as throughout the Article 70 proceedings,

[199] Rule 77(C)(iii) of the SCSL Rules.
[200] ICC-01/05-01/13-314-Red, para. 24.
[201] ICC-02/04-01/15-482-Red, para. 7.
[202] ICC-02/04-01/15-482-Red, paras. 7-8.
[203] ICC-02/04-01/15-490-Red.
[204] ICC-02/04-01/15-521, p. 10.

that he did not commit offences against the administration of justice.[205] Regardless, he was still entitled to a fair trial. The commission of an offence did not justify the Prosecution's possession of telephone conversations between Mr. Bemba and his Defence team that were confidential, if not privileged. Regardless of whether the needs of the Article 70 investigation, viewed in isolation from the Main Case, justified such intrusive measures, the transmission of such information vitiated the fairness of the trial proceedings.

105. The Prosecution has tacitly acknowledged that it was inappropriate for the members of the Main Case trial team to have accessed confidential and privileged information. The Prosecution has admitted that, in December 2013, the Registry gave them audio-recordings of conversations between Mr. Bemba and the Case Manager. In the context of a request for disqualification of the Prosecutor in the context of the Article 70 case, the Prosecution insisted that this information, even that which was viewed as subject to the crime-fraud exception, had been segregated from the Main Case team.[206]

106. Worryingly, however, the Prosecution: (i) reveals that it exercised its own discretion to determine what portions should be deemed privileged; (ii) fails to address whether there is any overlapping membership between the members of the Article 70 and Main Case teams;[207] and (iii) fails to affirm that no information has been shared amongst the Prosecution teams about the content of those files. On the contrary, it is likely that the Main Case and Article 70 trial teams collaborated closely and probably, consciously or not, shared aspects of this information.

[205] ICC-01/05-01/13-1902-Corr2-Red2.
[206] ICC-01/05-01/13-314-Red, para. 43 (citation omitted).
[207] ICC-01/05-01/13-648-Red3, paras. 35, 40.

E. THE *EX PARTE* SUBMISSIONS, NON-DISCLOSURE AND INVASION OF PRIVILEGE AND CONFIDENTIALITY CAUSED PREJUDICE

107. The conduct of the trial would have been substantially different if the foregoing violations to the right to a fair trial had not occurred. Amongst the consequences were:

- the Defence was deprived of the opportunity to offer explanations about the *ex parte* allegations that had been made, given that the Trial Chamber recognised that it had become impossible to litigate the merits of the Article 70 case within the context of the Main Case;
- the allegations could have been brought forward at a time when the testimony of only three – not 14 – witnesses had been allegedly compromised;[208]
- the Defence could have assessed whether it was necessary for Lead Counsel to step aside or to take other measures pending resolution of the allegations;
- the Defence could have assessed whether it was necessary to cease all cooperation with D52 and D11, who were alleged of having been involved in the scheme; and/or
- the Defence could have sought witnesses to replace those who were allegedly tainted by the allegations, and whose testimony was rejected by the Trial Chamber in respect of its crucial finding that Mr. Bemba had operational control over MLC forces during the relevant time-period.

108. In addition, the Prosecution had possession, during the Defence case, of conversations between Mr. Bemba and his Defence team, and amongst members of the Defence team, that the Pre-Trial Chamber characterised as concerning "defense strategies."[209] These conversations included discussions of perceived weaknesses

[208] The Senior Trial Attorney indicated during the 19 April 2013 Status Conference that the investigation could be completed by 1 May 2013. As of that date, only three witnesses allegedly affected by the scheme had testified. If the Prosecution had brought forward its allegations according to its original time-frame, the alleged scheme could have been prevented in respect of 11 witnesses.

[209] ICC-01/05-01/13-749, paras. 47-48.

and gaps in the Defence evidence,[210] potential Defence witnesses whose identity had not yet been revealed to the Prosecution,[211] and internal Defence assessments as to how certain Defence witnesses had performed, including the reaction of the Judges and the Prosecution's apparent strategy.[212]

109. The Trial Chamber, furthermore, heard *ex parte* submissions that could not have failed to prejudice even the most steely-minded judge in respect of the general credibility of the Defence case. Time and again the Prosecution reminded the judges of these allegations, including in respect of Defence witnesses who were not ultimately encompassed by the Article 70 case.[213] These same questions, when posed by the Defence, had been branded by the Trial Chamber as "offensive."[214]

110. The Trial Chamber also knew the identity of the 14 Defence witnesses alleged to have been part of the scheme on which it had heard *ex parte* submissions from the Prosecution. Of the ten of those witnesses who testified about whether Mr. Bemba had operational control over MLC forces, the Trial Chamber found six of them to be generally not credible, including in respect of their testimony concerning operational control.[215] The Trial Chamber did not find any of the four other witnesses' testimony to be reliable,[216] or even worthy of discussion.[217] In fact, of the 14 witnesses who were alleged to have been part of the scheme that was the object

---

[210] ICC-01/05-66-Conf-Exp-Anx-Corr, pp. 6-10, 29.
[211] ICC-01/05-66-Conf-Exp-Anx-Corr, pp. 29, 36.
[212] CAR-OTP-0079-0114, lines 15-28; CAR-OTP-0080-0228, line 33.
[213] T-249-CONF-ENG, 10:14-11:2; T-258-CONF-ENG, 2:25-3:10; T-263-CONF-ENG, 14:6-20; T-265-CONF-ENG, 15:7-18; T-268-CONF-ENG, 78:22-79:12; T-274-CONF-ENG, 34:2-14; T-277-CONF-ENG, 38:7-20; T-277-CONF-ENG, 39:4-11; T-297-CONF-ENG, 18:17-20:5; T-299-CONF-ENG, 24:11-16; T-322-CONF-ENG, 26:6-27:16; T-323bis-CONF-ENG, 21:22-23; T-335-CONF-ENG, 19:8-13; T-337-CONF-ENG, 40:3-6; 13-20; T-339-CONF-ENG, 41:18-19; T-345-CONF-ENG, 12:4-15:6.
[214] T-157-Red2-ENG, 53:25.
[215] Judgment, para. 429.
[216] Judgment, paras. 431 (rejecting D13's as unreliable because he allegedly acknowledged having no knowledge of the extent of Thuraya communications and because of his statement that "I don't know who was superior to the other"); 432 (rejecting D15's testimony as unreliable because he conceded that there might still have been "administrative control" and other grounds).
[217] The Trial Chamber lists D4's and D6's testimony as being among those "marked by various issues giving rise to further, significant doubts" (Judgment, para. 429) but then gives no reasons for this finding in the ensuring discussion (Judgment, paras. 430-445).

of the Prosecution's *ex parte* accusations, the Trial Chamber did not find a single one to be generally credible or reliable on any issue.[218] The Trial Chamber does not even address the credibility of five of those witnesses, or the reliability of their testimony.[219]

111. The uniform rejection of the 14 witnesses, five without any reasons at all, indicates that the Trial Chamber's evaluation of their credibility was affected by the Prosecution's *ex parte* allegations. The damage went far beyond the 14 witnesses, however, given that the Trial Chamber seems to have reasoned that testimony similar to that of the 14 witnesses would also undermine the credibility of other witnesses.[220] D45, who was not part of the 14, was deemed not credible, *inter alia*, because he had entered the video-link location with some hand-written notes which included information about "D-45's contact with members of the Defence team."[221]

112. The Trial Chamber rejected the Defence's motion for abuse of process on the basis that, *inter alia*, "the defence's submissions are impermissibly speculative and that the relief sought […] is not warranted."[222]

113. Prejudice should be presumed when there have been substantial *ex parte* submissions on matters of substance; no opportunity given to the Defence to respond to those submissions in anything close to a timely manner, or at all; a long-standing disclosure violation by the Prosecution in respect of information vital to the choice of Defence witnesses; and the transmission of privileged and confidential Defence information to the Prosecution trial team while the Defence case was being

[218] The Trial Chamber found eight (D2, D3, D15, D25, D54, D55, D57 and D64) to be generally not credible (Judgment, paras. 348-378), and one to be not reliable in respect of specific testimony addressed by the Trial Chamber, (D13, Judgment, para. 431).
[219] D4, D6, D23, D26 and D29 (no reasons given in the Trial Judgment in respect of any of their testimony). For D4 and D6, see paras. 429-430.
[220] *See, e.g.*, Judgment paras. 429-446.
[221] Judgment, para. 363.
[222] ICC-01/05-01/08-3255, para. 71.

presented. One court, discussing less egregious procedural violations, has captured the insidious danger to trial fairness posed by such practices:[223]

> However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case. This is illustrated in the case at bar by the fact that when the prosecutor spoke to the court he did not even know petitioner's version. It also may give the prosecutor an unfair advantage. This, too, is illustrated in the case at bar. On the sentencing day the court replied to petitioner's counsel, according to the latter's uncontradicted testimony at the post-conviction hearing, that Mrs. M's statement was inescapably true. The firmness of the court's belief may well have been due not only to the fact that the prosecutor got in his pitch first, but, even more insidiously, to the very relationship, innocent as it may have been thought to be, that permitted such disclosures. Having in mind that the prosecutor would later be permitted to make the same statement in open court, the presiding judge may well have regarded a premature disclosure as a pardonable informality. It is not. At a minimum, to permit only tardy rebuttal of a prosecutor's statement, not accurately transcribed, is a substantial impairment of the right to the effective assistance of counsel to challenge the state's presentation.

114. The only appropriate remedy is to vacate the Judgment. Mr. Bemba did not have a fair trial according to international standards, let alone the standards applicable in any civilized adversarial legal system. The *ex parte* communications, the disclosure violations, and the invasion of privilege and confidentiality violated Mr. Bemba's right to a fair trial. The degree, duration and importance of those various violations could not have failed to have a substantial impact on the fairness of the trial, the appearance of its fairness, and even its outcome and the Trial Chamber's reasoning. Although a new trial would be the usual remedy in such circumstances, the Prosecutor's fault in these violations combined with the extraordinary duration of proceedings to date should require a stay of proceedings

[223] *Haller*, (5th Cir 1969) 409 F.2d 857 (1969) pp. 859-860.

and the immediate release of Mr. Bemba. Nothing less is required to vindicate Mr. Bemba's rights to a fair trial, conducted without undue delay.

III. THE CONVICTION EXCEEDED THE CHARGES

115. The final judgment against an accused "shall not exceed the facts and circumstances described in the charges".[224] Nearly two thirds of the underlying acts for which Mr. Bemba was convicted were not included or improperly included in the Amended DCC and fall outside the scope of the charges.[225] Reliance on these acts to convict Mr. Bemba is a legal error.

A. THE CONVICTION WAS BASED ON UNCONFIRMED UNDERLYING ACTS

116. In relation to the charges an accused must face, under this Court's regime, it is the Pre-Trial Chamber which commits a person for trial "on the charges as confirmed".[226] Accordingly, "there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial."[227]

117. Underlying acts form an integral part of the charges.[228] New underlying acts can only be added via an application to amend the charges pursuant to Article 61(9)[229] of the Statute and not by *ad hoc* disclosure in auxiliary documents.[230] If an underlying act was not confirmed by the Pre-Trial Chamber, absent a successful

[224] Article 74(2) of the Rome Statute.
[225] 20 out of the total 31 incidents listed in Judgment, paras. 624, 633 and 640, which were used to support the convictions, were not confirmed by the Pre-Trial Chamber. The 20 incidents are those identified at Judgment, paras. 624(b), 624(c), 633(b), 633(d), 633(f), 633(h), 633(j), 633(l), 640(a), 640(b), 640(e), 640(f), 640(g), 640(h), 640(i), 640(k), 640(l), 640(n), 640(o), 640(p).
[226] Article 61(7)(a) of the Rome Statute.
[227] *Lubanga* AJ, para. 124.
[228] *Lubanga* AJ, para. 123. *Also*, a "charge" includes both the factual allegations (a statement of the facts and circumstances including the time and place of the alleged crimes) and their legal characterization. *See* ICC-01/04-01/07-3363, para. 100; ICC-01/04-01/07-1547-tENG, para. 10.
[229] ICC-01/04-01/07-1547-tENG, para. 21, "[u]nder…Article 61…it is the Pre-Trial Chamber, and it alone, which is competent, if so requested, to authorise the Prosecutor to modify the charges, and hence the facts and circumstances which they describe."
[230] Judgment, paras. 43-48.

Article 61(9) application, it does not form part of the charges and cannot be used to found a conviction.

118. The Trial Chamber failed to apply these principles. It found that if the Defence had adequate notice of the underlying acts through their inclusion in various auxiliary documents, and the acts were allegedly committed in the CAR between 26 October 2002 and 15 March 2003, they fell within the scope of the charges.[231] This is incorrect. Auxiliary documents may, in certain circumstances, contain "further details about the charges, as confirmed by the Pre-Trial Chamber."[232] "Further details" are necessarily those which elaborate or clarify the existing charges such as, for example, the identity of a previously unidentified victim, or corroborative evidence as to the identity of the perpetrator. To permit a Trial Chamber to add new underlying acts, which are themselves individual crimes, capable of amounting to charges, as "further details" would be to amend the charges without recourse to Article 61(9) and would "confer upon it power not bestowed by the core legal texts."[233]

119. Adding underlying acts through auxiliary documents would also render redundant a central part of the confirmation process, namely the Pre-Trial Chamber's analysis of individual incidents, the result of which is to confirm or to decline to confirm certain underlying acts. It would also allow the Prosecution to seek to rehabilitate acts, expressly rejected by the Pre-Trial Chamber, via additional disclosure in auxiliary documents. This "call[s] into question the very purpose of a pre-trial phase".[234]

120. In command responsibility cases where the accused is geographically remote, it may not be possible to plead evidential details concerning the identity or number

[231] Judgment, para. 49.
[232] *Lubanga* AJ, para. 124.
[233] ICC-01/04-01/07-1547-tENG, para. 19.
[234] ICC-01/04-01/07-1547-tENG, para. 23.

of victims, precise dates or specific locations.[235] However, at issue is not evidential detail but underlying criminal acts. It is in respect of each of these acts that the Prosecution must provide details "to the greatest degree of specificity possible".[236] Neither was this a case in which the pleading of those details in the DCC was impossible or impracticable.

121. In any system of justice, the confirmation process, dictates the parameters of the case an accused is required to meet. The Trial Chamber's approach gives the Prosecution an unlimited ability to expand the charges beyond those confirmed, undermining the confirmation procedure. Given the "strong link" between notice of the charges and the right of an accused to prepare his defence,[237] the fairness of the proceedings is also jeopardised.

B. V1 AND V2'S EVIDENCE CANNOT FORM THE BASIS OF A CONVICTION

122. Without prejudice to the foregoing, the incidents spoken to by V1 and V2 should not have been relied upon to convict Mr. Bemba.

123. A trial "must commence based on a set of clearly defined charges."[238] As such, "only information made available before the start of the trial may be taken into account."[239] The statements of V1 and V2 were provided on 1 February 2012,[240] after the start of trial, and, thus, their testimony was erroneously used to found the

[235] Judgment, para. 43. fn 127 citing, *inter alia, Kupreskić* AJ, paras. 89-90. Note, however, para. 91: "the case […] was not one that fell within the category where it would have been impracticable for the prosecution to plead, with specificity, the identity of the victims and the dates of the commission of the crimes. On the contrary, the nature of the prosecution case at trial was confined mainly to […] the killing of 6 people."
[236] Judgment, para. 43. For specificity, *see* ICC-01/09-01/11-373, para. 99; ICC-01/04-01/10-465-Red, paras. 82-83.
[237] *Lubanga* AJ, para. 129.
[238] *Ibid*.
[239] *Ibid*.
[240] Judgment, para. 50.

convictions of murder, rape and pillage.[241] The underlying acts described by V1 and V2 are not just "evidential detail as to the facts set out in the charges".[242] Such would render redundant the litigation concerning the content of the Amended DCC, the purpose of which was to ensure that the Amended DCC described the Confirmation Decision's "precise factual findings".[243]

C. THE CONVICTION WAS BASED ON ACTS IMPROPERLY INCLUDED IN THE AMENDED DCC

124. The Trial Chamber acknowledged that the Pre-Trial Chamber declined to rely upon, *inter alia*, two underlying acts; the rape of unidentified victims 1 to 35, and the pillaging of the belongings of P68 and her sister-in-law.[244] Nevertheless, the Trial Chamber relied on both incidents to convict Mr. Bemba.[245] This was an error.

125. In relation to the rape of the unidentified victims, the Pre-Trial Chamber declined to rely on witness 47's evidence. This was the basis on which it declined to confirm the killing of unidentified victim 36,[246] a fact recognised by the Trial Chamber.[247] The Pre-Trial Chamber applied the same reasoning when it declined to confirm the rape of unidentified victims 1 to 35 spoken to only by witness 47.[248] The Trial Chamber appears to have distinguished the Pre-Trial Chamber's reasoning on the basis that the Pre-Trial Chamber made an express finding of insufficiency as regards the victim 36 evidence whereas it only "attached a low probative value" to witness 47's evidence.[249] This is artificial. Both incidents were not confirmed because the source was witness 47's evidence. The Trial Chamber, therefore, erroneously

[241] Judgment, paras. 624(c), 633(l), 640(o), 640(p).
[242] Judgment, para. 50.
[243] ICC-01/05-01/08-836, para. 35
[244] Judgment, para. 45(c), (e).
[245] Judgment, paras. 633(d), 640(a). Note the eight unidentified women referred to at para. 633(d) are part of the group of women referred to as "unidentified victims 1 to 35" in ICC-01/05-01-08-424, para. 169. The group of 35 is then split into 3 in the Amended DCC at paras. 51-53.
[246] ICC-01/05-01-08-424, para. 158.
[247] ICC-01/05-01/08-836, paras. 111-112.
[248] ICC-01/05-01-08-424, para. 169.
[249] ICC-01/05-01/08-836, para. 110.

concluded that the rape incident did not exceed the scope of the confirmed charges.[250]

126. The inclusion of the pillage of P68's belongings in the Amended DCC[251] was based on the Trial Chamber's determination that the Pre-Trial Chamber generally relied on this witness' testimony.[252] However, the Pre-Trial Chamber did not confirm the act of pillage spoken to by witness 68. It only took note of the corroborative value of this witness' statement in relation to "accounts of large-scale pillaging".[253] The statement, thus, gave background to the specific incidents the Pre-Trial Chamber expressly confirmed.[254] The fact that the Pre-Trial Chamber's comment was not intended to support the inclusion of an underlying act in the charges is underlined by its recognition of the generality of the witness' evidence, *i.e.,* she did not know from where the pillaged goods were taken.[255]

127. In relation to the pillage of the belongings of P68's sister-in-law, this was not included in the Amended DCC, improperly or otherwise, but was included in auxiliary documents.[256] As the incident was unconfirmed, it falls outside the scope of the charges on the basis of the above reasoning.

128. The incidents identified above should never have been relied upon to convict Mr. Bemba. The Trial Chamber's error materially affects the Judgment.

[250] ICC-01/05-01/08-836, para. 110.
[251] No mention is made of the pillage of the belongings of P68's sister-in-law in ICC-01/05-01/08-593-Conf-AnxA, para. 50 or the Amended DCC, Count 8, p. 35.
[252] ICC-01/05-01/08-836, para. 107.
[253] ICC-01/05-01-08-424, para. 333.
[254] ICC-01/05-01-08-424, paras. 324-329
[255] ICC-01/05-01-08-424, fn. 417.
[256] ICC-01/05-01/08-669-AnxE, para. 155; ICC-01/05-01/08-595-AnxA-Red2, para. 161.

IV. MR. BEMBA IS NOT LIABLE AS A SUPERIOR

A. MR. BEMBA DID NOT HAVE EFFECTIVE CONTROL OVER THE MLC TROOPS IN CAR

129. The Trial Chamber's findings on effective control fall far outside established military doctrine and practice. Left undisturbed, these findings will isolate the Judgment from the main body of international scholarship and, critically, deprive it of precedential value in shaping the future actions of commanders.

130. Criminal responsibility flowing from a judicial finding of "effective control" derives from the commander's ability to control the troops in question, and ensure compliance with the laws of war. This should have been the specific focus of enquiry. Instead, the existence of "effective control" was assumed based on an incomplete checklist normally applied to hierarchical state forces, rather than non-linear actors operating across international boundaries, in a composite contingent composed of state forces and militia. Thus, the Trial Chamber erroneously conflated the concept of "effective control" with the concept of overall "command," thereby departing from the established legal standard.

131. With no direct or documentary evidence of orders passing from Mr. Bemba to the MLC troops, the finding of effective control is largely based on circumstantial evidence. In these circumstances, the finding is possible only if it is the sole reasonable inference from this evidence.[257] In this case, it was not.

1. Mr. Bemba did not have operational control

a) Overview

132. The Trial Chamber put Mr. Bemba at the operational heart of the MLC's incursion in the CAR. In charge of military strategy, deciding on troop movements,

[257] *Perišić* AJ, para. 114.

and issuing operational orders, Mr. Bemba was not just the hierarchical superior of the MLC contingent, he personally commanded the troops.[258] This finding is not only unsupported by the evidence, it is a military impossibility.

133. Mr. Bemba did not accompany his troops to the front, nor was he stationed at a command post within the dedicated CAR CO in Bangui.[259] Rather, he was at the MLC base in Gbadolite, hundreds of kilometres from the front, in the DRC. It is from here that he purportedly issued operational orders to his troops, who were "unfamiliar with the terrain and the enemy"[260] and engaged in a foreign war.[261]

134. In cases in which the conduct of military operations is central to determining the culpability of an accused, it is commonplace to hear from military experts, who provide the finders of fact with the technical information necessary to form opinions on matters which are unfamiliar to those outside the armed forces.[262]

135. Brigadier-General Jacques Seara, with 37 years' service in the French Army and a career divided between commanding infantry units and holding positions of responsibility within the General Staff in both a national and allied force context, testified in this case.[263] Notably, he had commanded an operations centre within a French Army brigade.[264]

136. General Seara described the three levels of command. The **strategic level**, which ultimately rests with the Head of State, is normally comprised of a committee

[258] Judgment, paras. 427, 446, 700.
[259] Judgment, para. 406.
[260] Judgment, para. 699.
[261] Judgment, para. 697.
[262] *Krstić* TJ, paras. 12, 124, 266, 330, 626, 651 and fns. 917, 1376; *Šešelj* TJ, paras. 49, 76, 115, 142, 177, 239-241, 247, and fns. 32, 41, 58, 180, 256, 278; *Prlić* Vol.I TJ, para. 790; *Popović* TJ, para. 1355, and fn. 2502, *Stanišić & Simatović* TJ, paras. 1418, 1820; *Gotovina* TJ, para. 106; *Blagojević* TJ, paras. 504-505, 520, 522 and fns. 78, 1716; *Delić* TJ, para. 379; *Čelebići* TJ, para. 219; *Stakić* TJ, paras. 43, 81, 138, 152-153, 373, 474, 572, 627; *Strugar* TJ, para. 190; *Bagosora* TJ, paras. 34-35; *AFRC* TJ, paras. 236, 1798-1800, 1822, 2035, 2068.
[263] EVD-T-D04-00070/CAR-D04-0003-0342 at 0344.
[264] T-229-CONF-ENG, 10:4-9.

or "*conseil de défense*", which consists, at a minimum, of the Head of State, Prime Minister, Minister of Defence, and the Chief of General Staff. At the strategic level, directives are agreed for the limits of the theatre of operations, major objectives, the role and composition of the forces involved, the rules of engagement, and the logistics necessary to achieve these goals.[265]

137. The **operational level** consists of the commanders in the field of operations. Operational commanders have a General Staff, whose role is to translate the strategic level directives into operational orders. These orders are then submitted for approval before being transmitted to the field. Operational orders divide maneuvers into several phases, each having their own "space/time", *e.g.*, if "J" is the first day of operations, Phase 1 from J to J+2; Phase 2: J+3.[266]

138. The **tactical level** comprises the subordinates of the field commanders. At this level, military maneuvers are prepared and executed in accordance with the orders given. For each maneuver, the formulation of an order requires a tactical plan, a definition of the role of each of the different troops, and an assessment of the area. Based on the orders received from the field commander, each troop leader will then give his own orders to fulfil the particular mission, in the framework of "space/time", with each maneuver being divided into blocks of time, *e.g.*, First time: J of 0800Z to 1800Z, second time: from 1800Z to J+I 1600Z.[267]

139. The Trial Chamber's discussion of the realities of military command are non-existent. In two paragraphs of erroneous reasoning (discussed below),[268] the Chamber decided to attach "no weight" to the evidence of General Seara.[269] Absent this expert evidence, the Trial Chamber imposed its own theory of military command onto the facts of the case.

[265] EVD-T-D04-00070/CAR-D04-0003-0342 at 0351.
[266] EVD-T-D04-00070/CAR-D04-0003-0342 at 0352.
[267] EVD-T-D04-00070/CAR-D04-0003-0342 at 0353.
[268] Section IV(B)(3).
[269] Judgment, paras. 368-369.

140. This theory had Mr. Bemba assuming control of all three levels of command.[270] At the strategic level, he was the "President of the MLC, the leader of the political branch, and the Commander-in-Chief of the ALC",[271] who "had authority over strategic military decisions, such as commencing military operations".[272] At the operational level, "Mr Bemba also commanded military operations, issuing orders to the units in the field, such as to attack or to progress to a certain location, and followed the progress of operations closely".[273] At the tactical level, "[a]ll of the orders relating to the operation came from President Jean Pierre Bemba", and the MLC was unable to move "even for a single kilometre" absent his order.[274]

141. Even imagining that it was possible for an omnipresent military commander to assume responsibility for all three levels of command, it was not possible in Mr. Bemba's case. He had neither the ability nor information to do so.

142. The Trial Chamber made no findings concerning Mr. Bemba's military experience or abilities as a commander. Unchallenged evidence of Mr. Bemba's "rudimentary" military training and inability to command an operation of this scale, was ignored.[275] Findings that he "often wore military attire" and carried a "command baton or swagger stick"[276] fall far below a finding that he had a sufficient experience to command complex and protracted military operations.

143. In any event, not even a seasoned commander could have commanded the MLC troops from a distance without a dedicated center of operations providing real-time information concerning the conduct of operations, the orders given at the

[270] Judgment, paras. 384, 399, 700.
[271] Judgment, para. 384.
[272] Judgment, para. 399.
[273] Judgment, para. 399.
[274] Judgment, fn. 1184, citing T-188, 28:9-29:25; T-213, 71:15-24.
[275] ICC-01/05-01-08-3121-Conf, para. 804.
[276] Judgment, para. 389.

tactical level, the physical constraints of the area of engagement, the position and strength of the enemy, the behaviour of the civilian population, the state of logistics, and troop morale. The Trial Chamber notes only that Mr. Bemba "could contact commanders in the field."[277] Evidence that Mr. Bemba sought to retain some level of authority falls far short of establishing a basis for the inference that he exercised effective control.

144. The Trial Chamber's theory is untenable. In reality, operational control was ceded to the CAR military hierarchy, with the attendant consequence that other commanders exercised effective control over the conduct of operations.[278] Ignoring the Defence military expert,[279] the Defence witnesses,[280] contemporaneous documents presented by the Defence,[281] and the Defence submissions on established military doctrine and principles in joint operations,[282] did not entitle the Trial Chamber to close its eyes to the realities of military command. Its attempts to do so led to the following errors.

b) The finding that Mr. Bemba received help from the MLC General Staff has no evidentiary basis

145. The Trial Chamber found that Mr. Bemba had "operational control over the MLC contingent in the CAR".[283] This central factual finding is without evidentiary support.

146. Although disregarded, General Seara was compelling in his testimony as to why the "command of such operations cannot be the sole responsibility of a single

[277] Judgment, para. 397.
[278] ICC-01/05-01-08-3121-Conf, paras. 608-628.
[279] Judgment, paras. 368-369.
[280] Judgment, paras. 348-378. *See also* Judgment, paras. 414, 417, 422, 429-445, 448, 454, 457-458, 530, 544, 557-558, 572, 583-585.
[281] Judgment, paras. 273-297.
[282] *See, e.g.*, ICC-01/05-01-08-3121-Conf, para. 692, fn. 1627.
[283] Judgment, para. 446.

person".[284] Essential to an operation of this type was a coordination cell to monitor the evolution of the military situation on the ground, based on reports received from the field. This cell, generally manned by an officer from the operations office, and from the intelligence office, is then responsible for issuing the operational orders approved by the Chief of General Staff.[285]

147. Separately, the Trial Chamber relied[286] upon the testimony of [REDACTED], [REDACTED], confirming that for an operation of this kind, it would have been "necessary to have a co-ordination centre for operations",[287] which would normally have been situated "in the General Staff HQ".[288]

148. Such a coordination centre existed. The CAR CO, located at Camp Béal in Bangui, was responsible for "gathering information, co-ordinating operations, logistics, communications and intelligence".[289] It had "cells" responsible for planning, situations, conduct, information, logistics, transmission, and communication. There was a radio transmissions office that received information from radio operators in the field. Messages were forwarded to the CAR General Staff, to form the basis of decisions. It had walkie-talkies, telephones, and radios allowing communication up to 500 km outside Bangui.[290] In reality, this coordination centre was at the heart of operations, collating and synthesising real-time information.

149. No evidence was heard of any contact between Mr. Bemba and the CAR CO which was overseeing the operations.

[284] T-229-CONF-ENG, 31:5-6.
[285] EVD-T-D04-00070/CAR-D04-0003-0342 at 0356-0357. *See also* T-229-CONF-ENG, 56:16-57:4.
[286] Judgment, para. 411, fn. 1111.
[287] T-218-CONF-ENG, 45:20-21.
[288] T-218-CONF-ENG, 45:20-46:11.
[289] Judgment, para. 406.
[290] Judgment, para. 406.

150. To circumvent the unlikelihood of Mr. Bemba commanding troops in a foreign state by telephone without the assistance of the CAR CO, the Trial Chamber found that Mr. Bemba was not alone. According to the Trial Chamber, Mr. Bemba received assistance from the MLC General Staff in Gbadolite. The MLC General Staff "had a role in coordinating operations, monitoring the situation in the CAR, and reporting to Mr. Bemba, and had the ability to discuss with Mr. Bemba or make comments or observations."[291]

151. This finding has no evidential basis. The Trial Chamber heard no evidence that the MLC General Staff was engaged, presumably on some kind of part-time basis, in helping Patassé overthrow a violent coup attempt in a neighbouring state. Unsurprisingly, therefore, no evidence is cited. [REDACTED], testified that [REDACTED], and didn't even know how many of Moustapha's men had crossed into Bangui by 30 October.[292]

152. If the Trial Chamber did not accept that Mr. Bemba could direct the operations alone from Gbadolite, simply inventing a more plausible theory was not an option. A central factual finding without evidence is a legal error, and undermines the Trial Chamber's finding that Mr. Bemba "issued direct operational orders".[293]

c) The finding that the MLC operated independently of other forces in the field is inconsistent with other findings and misstates the evidence

153. Central to the Trial Chamber's theory of command is the finding that the MLC troops "operated independently of other armed forces in the field."[294] If MLC soldiers had been mixed with other CAR troops, any theory of Mr. Bemba commanding from Gbadolite becomes significantly weaker. It is untenable that some soldiers within a mixed company of troops would be receiving orders from

[291] Judgment, paras. 446, 701.
[292] Judgment, fn. 1242, citing T-218, 21:15-22:13.
[293] Judgment, para. 700.
[294] Judgment, paras. 411, 700.

one command chain, while others were following orders from elsewhere. At a minimum, the potential for friendly fire is enormous.

154. Accordingly, the Trial Chamber isolates the MLC troops from the remainder of the loyalist forces and, with the exception of the initial operation in Bangui, has them fighting independently.[295] This finding is incompatible with the evidentiary record, and is undermined by another of the Trial Chamber's findings.

155. Elsewhere, the Trial Chamber correctly finds that "[o]n 7 December 2002, the MLC, along with other forces aligned with President Patassé, seized Damara."[296] The Trial Chamber cites to, *inter alia*, a contemporaneous AFP report[297] relied upon by both parties.[298] It provides, in relevant part:[299]

> 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.

156. The finding that Damara was seized by the MLC and other forces aligned with President Patassé is not open to challenge. If Mr. Bemba was issuing operational orders to the MLC contingent, while the loyalist troops fighting alongside were following orders from Bangui, the results would have been anarchic. As described by General Seara, "[o]ne cannot imagine several units of those working as free electrons, whereas other forces would be pursuing the objectives that would have

[295] Judgment, paras. 411, 700.
[296] Judgment, para. 524.
[297] EVD-T-CHM-00060/CAR-D04-0002-1380.
[298] ICC-01/05-01-08-3079-Conf-Corr, para. 20; ICC-01/05-01-08-3121-Conf, para. 664.
[299] Translation at T-122-CONF-ENG, 42:25-43:14.

been set. This would lead to chaos and possibly incidents of friendly fire".[300] On this basis alone, the Trial Chamber's conclusion that the MLC troops acted independently is manifestly unsafe.

157. Other errors affect this finding. The Chamber elsewhere relies on a contemporaneous hour-long video taken in Sibut, after the area was taken by the loyalist troops.[301] The video records interviews with the local population.[302] One of the interviewees confirms that: "Jean-Pierre Bemba's soldiers, acting alongside the loyalist forces, pushed back the rebel forces beyond Sibut and beyond Begoua."[303]

158. This interview is corroborated by contemporaneous RFI reports, aired on 18 and 19 February 2002,[304] also relied upon elsewhere by the Chamber to make findings adverse to Mr. Bemba. These RFI broadcasts report that: "CAR forces supported by the MLC recaptured the towns of Sibut and Bozoum from General Bozizé's rebels".[305] Sibut and Bozoum are more than 400 kilometres away from each other by road.[306] The mixing of troops was pervasive, widespread, and continuous.

159. Furthermore, the Trial Chamber found that "the MLC entered Bossembélé by 24 December 2002 and maintained a presence there until, at least, February 2003."[307] It relied on evidence from P213 that the MLC troops were accompanied by FACA soldiers in Bossembélé,[308] and evidence from P173 that "Abdoulaye Miskine troops […] were together with MLC troops in Bossangoa and Bossembélé."[309] While this

[300] T-229-CONF-ENG, 32:2-4.
[301] Judgment, paras. 616-620.
[302] EVD-T-D04-00008/CAR-DEF-0001-0832.
[303] EVD-T-D04-00008/CAR-DEF-0001-0832, at 38.20-42.18 minutes. *See also* T-302-CONF-ENG, 40:19-24.
[304] EVD-T-OTP-00580/CAR-OTP-0031-0120, track 1, from 00:01:19-00:01:50, track 2, from 00:00:00-00:00:39, and from 00:02:05-00:02:34; and EVD-T-OTP-00582/CAR-OTP-0031-0124, track 1, from 00:14:00-00:14:17.
[305] Judgment, para. 612.
[306] Judgment, fn. 1922.
[307] Judgment, para. 527.
[308] Judgment, fn. 1590, citing T-191, 30:14-31:8.
[309] Judgment, fn. 1590, citing T-145, 37:8-16.

evidence was relied upon to make findings adverse to Mr. Bemba, it is absent from the reasoning on the mixing of troops, amounting to both an abuse of the Trial Chamber's discretion, and a failure to give a reasoned opinion.

160. The Trial Chamber was unable to construct the Judgment without reliance on evidence that the troops were mixed because, in reality, they were. The MLC troops fought alongside other loyalist soldiers and, together, they captured town after town from Bozizé's retreating rebels.

161. This explains, in part, the Trial Chamber's next error. In support of its finding that the MLC acted independently, the Chamber cites, inexplicably, to a wealth of evidence demonstrating the opposite. The Trial Chamber cites to [REDACTED] testifying that "the MLC forces and the USP were fighting together to repulse the rebels who had advanced right to Bangui";[310] and that the "MLC troops that were deployed to the battle front were support troops working with the USP, that is the presidential security unit forces."[311] It relies on [REDACTED]'s evidence as to "good collaboration with the FACA on the field" and "working under the orders of the Central Africans", and his explanation that "[a]ll the forces and units were pooled together."[312] The Chamber relies on D51's testimony that "[w]hen the MLC soldiers were in combat, they were fighting along with other soldiers; the FACA soldiers of the support regiment and then soldiers from the USP who provided support as well"[313] and that "[o]n the ground, they were mixed with soldiers of the FACA and the support regiment".[314]

162. It is an error for a Trial Chamber to support a finding with evidence which undermines its conclusion in the absence of any reasoning as to why its finding is nonetheless sound.

[310] Judgment, para. 411, fn. 1110, citing T-353, 48:8-20.
[311] Judgment, para. 411, fn. 1110, citing T-354, 42:16-17.
[312] Judgment, para. 411, fn. 1111, citing T-290, 64:8-65:19.
[313] Judgment, para. 411, fn. 1111, citing T-261, 37:25-38:5.
[314] Judgment, para. 411, fn. 1111, citing T-261, 65:25-66:10.

163. The Trial Chamber also relies on a message in the MLC communications log from Colonel Moustapha on 30 October 2002 after the initial operation in Bangui which reports that "we have been abandoned by the nationals", that there was "no coordination" with the Libyans, and that the MLC lacked means of communication for liaison during the operations.[315] Rather than demonstrating a lack of coordination, another reasonable inference is that this message demonstrates Colonel Moustapha's panic that the cooperation he was expecting was absent during this initial operation, and that communication was essential to future operations. Notably, after this message, the MLC communications log contains no other similar complaints, with the Chamber elsewhere relying on [REDACTED]'s evidence as to the "good collaboration with the FACA".[316] The Trial Chamber discounts a reasonable inference that, from this point onwards, liaison and coordination was restored. Indeed, the weight of evidence demonstrates that it was.

d) The finding Mr. Bemba "sometimes" issued orders has no evidentiary basis

164. The Trial Chamber portrays Mr. Bemba as an obsessive micro-manager. He was the "primary authority" of the MLC's political and military spheres.[317] He took all decisions on military and political issues, with the Politico and Military Council merely "rubber-stamping" his choices.[318] He had primary authority for appointing, promoting, and dismissing officers and high-ranking MLC members.[319] Additionally, he was responsible for military logistics, acquiring and distributing weapons and ammunition, as well as all means of transport.[320] He exercised "close control" over menial details such as paying for satellite phones, and was

[315] Judgment, para. 411, fn. 1112, citing EVD-T-OTP-00702/CAR-D04-0002-1514, at 1637.
[316] Judgment, para. 411, fn. 1111, citing T-290, 64:8-65:19.
[317] Judgment, para. 385.
[318] Judgment, para. 386.
[319] Judgment, para. 387.
[320] Judgment, para. 388.

responsible for decisions on matters such as food, and clothing.[321] Not a single bullet could be taken from the MLC warehouse without his authorisation.[322] He was also able to follow media reports from, *inter alia,* RFI, the BBC, Associated Press, IRIN and Voice of America.[323]

165. This portrayal of Mr. Bemba as fanatical and controlling in his management of the MLC in the Congo does not fit with his exercising operational control over 1,500 soldiers in the CAR for nearly five months. Perhaps for this reason, the Trial Chamber concludes that: "Mr. Bemba had authority over military operations, taking decisions on troop movements and military operations and **sometimes** issuing orders directly to the units in the field".[324] Thereby, the Trial Chamber introduces another tenet of its theory of Mr. Bemba's command; he commanded on a part-time basis.

166. The principle of "unity of command" means that "[f]or the proper functioning of an army, there can be only one individual in command of any particular unit at one time."[325] If Mr. Bemba was only "**sometimes**" issuing orders directly to the units in the field, then they were "**sometimes**" getting their orders from elsewhere.

167. The Judgment is silent as to who else was giving orders to the MLC troops at other times. This theory of "part-time" command of the CAR operation by Mr. Bemba fits with the Trial Chamber's portrayal of him as a micro-manger of the MLC in the Congo, but is unreasonable and undermined by palpably deficient reasoning.

168. The witnesses on whom the Trial Chamber relies did not qualify their testimony as to Mr. Bemba's operational orders.[326] The only witness suggesting that

[321] Judgment, para. 388.
[322] Judgment, para. 388, fn. 994, citing T-213, 69:6-11.
[323] Judgment, paras. 576, 709.
[324] Judgment, para. 427 (emphasis added).
[325] Judgment, para. 698, citing *Popović* TJ, para. 2025.
[326] Judgment, para. 427, fn. 1184.

Mr. Bemba commanded the MLC on a part-time basis was P169. His evidence was that "decisions sometimes came from Mr Jean-Pierre Bemba. Sometimes Moustapha would take the decision himself, and sometimes in collaboration with some of the members of the Government of the Central African Republic. I don't remember any more. You have the documents before your eyes, so you can refresh my memory".[327]

169. P169 is the sole witness who talks about Mr. Bemba having "part-time" command. In fact, the cited passage continues with P169 clarifying that during his Prosecution interviews, "a lot was said and I may perhaps have forgotten some details. I have forgotten many details. If I made statements to that effect, that I have now forgotten, please refresh my memory so that I can give you the clarification needed."[328] This is not solid testimony. It lacks key details, such as the identity of "some members of the Government". Most importantly, it is uncorroborated. By the Trial Chamber's own standard for the assessment of P169's credibility, (it requires "particular caution"[329]), it is unreliable. The finding that Mr. Bemba was "sometimes" giving operational orders is without an evidentiary basis.

170. It is not open to the Prosecution to try to fill these evidentiary holes, and explain (for the first time on appeal) where the MLC's operational orders were otherwise coming from. The error lies as much in the Chamber's deficient reasoning as in the absurdity of its conclusion. There is also a question of notice. For the first time in his Judgment, Mr. Bemba learnt of this alternative part-time theory. Its military and factual impossibility is certainly one which he had a right to address during the trial phase.

171. The findings that Mr. Bemba had "operational control"[330] and "issued direct operational orders to the MLC forces in the CAR"[331] have no credible evidential

[327] Judgment, para. 427, fn. 1184, citing T-140, 21:1-4.
[328] T-140-CONF-ENG, 21:9-11.
[329] Judgment, paras. 317-329.
[330] Judgment, para. 446.

basis. Central aspects of the Trial Chamber's theory lack basic analysis, are contradicted by other findings, or simply cite to nothing.

172. Perhaps aware of these weaknesses, the Trial Chamber found that Mr. Bemba's issuance of operational orders to the MLC forces in the CAR was "not determinative" of his effective control.[332] This is an extraordinary statement. As an *indicium* of effective control, "the power of the superior to issue orders is crucial".[333]

173. Removed from the troops, miles from the crime scenes, with no suggestion that he ordered, or was present at, or participated in the crimes with which he was charged, Mr. Bemba is the first commander in history to have been convicted for the actions of troops engaged in a foreign conflict, across a national border.

174. Holding Mr. Bemba criminally responsible for the actions of his troops in these circumstances, and in the absence of the operational control which formed a basis of the Prosecution's case,[334] is an error. "Effective control" must have some meaning. The doctrine of command responsibility is exceptional in law; allowing for an individual to be convicted of a crime even if he played no active role in its commission, and even if he never intended to commit the crime.[335] In this case, absent Mr. Bemba giving operational orders, the remaining alleged *indicia* of command responsibility are insufficient to meet this standard.

---

[331] Judgment, para. 700.
[332] Judgment, para. 700.
[333] *See, e.g., AFRC* TJ, para. 789.
[334] ICC-01/05-01/08-856-Conf-AnxA, paras. 60-71. *See also*, for example, ICC-01/05-01/08-781-Conf-AnxA, pp. 310, 312, 315, 318-325, 327-328, 333-334, 336-339, 341-343, 350-351, 355-357, 360-361, 370, 372-373, 375-378, 380-382, 386, 388, 394-396, 398-399, 402-408, 413, 420, 429-430, 433-434, 456, 460, 464, 471-472, 474, 477, 479-480, 483-486, 500-503, 505, 540-542; *See also*, for example, T-262-CONF-ENG, 22:1-8; T-234-CONF-ENG, 21:1-2; T-298-CONF-ENG, 58:11-12; T-309-CONF-ENG, 51:19-21; T-197-CONF-ENG, 54:16-25; EVD-T-OTP-00119/CAR-OTP-0064-0547, at 0057, para. 29.
[335] *Hadžihasanović* TJ, paras. 2075-2076.

2. The Trial Chamber conflates the concept of "effective control" with the concept of overall "command"

175. "Command" and "effective control" are distinct concepts. A commander can retain aspects of "command", even though effective control is being exercised by, for example, the operational commander on the ground.

176. The Trial Chamber's approach to these concepts belies a fundamental error. In effect, the Trial Chamber extended "effective control" to all situations in which a commander retains any residual aspects of command, such as receiving reports on activities on the ground, or retaining the overall ability to withdraw forces from the theatre of war.[336] The conflation of two distinct concepts is a legal error which infects the entirety of its reasoning.

177. As explained by General Seara, in any multinational operation, troops put at the disposition of another state, maintain an "organic link" with their national authority. The national authority is thereby informed about the general state of strength and morale (number of deaths, injuries, possible reinforcements expected, discipline), and the general use being made of its troops (for example, engaged at the front-line, or in the second wave or reserve). If the losses incurred are considered too high, or the support for the troops or their health is deemed inadequate, the national authority can intervene at the political level to express its concerns while reserving the right, in extreme situations, to withdraw its forces from the conflict zone.[337]

178. General Seara's testimony aside, this explanation is logical. Putting a contingent at the disposition of a multinational force does not cut the umbilical cord with the national hierarchy. No Commander-in-Chief would agree to commit

[336] Judgment, paras. 700-705.
[337] EVD-T-D04-00070/CAR-D04-0003-0342, at 0370-0371.

troops to a multinational force on the basis that he would receive no information and have no contact with the troops for the duration of the operation.

179. The Trial Chamber's error in the present case was its reliance on aspects of this remaining link between the MLC and its contingent of troops in the CAR to establish effective control. It fell into this error through its reliance on a "checklist" of traditional criteria, rather than focusing its enquiry on who, in this case, had the ability to control the conduct of the troops on the ground.

180. There is no definitive catalogue of factors sufficient to establish "effective control". In cases involving irregular armies and rebel groups "the traditional indicia of effective control provided in the jurisprudence may not be appropriate or useful."[338] In a case involving the temporary transfer of a contingent to assist a loyalist coalition across national boundaries, the "checklist" from other cases will not automatically, or necessarily, give rise to a finding of effective control sufficient to trigger criminal responsibility.

181. Mr. Bemba's receipt of information concerning the morale of troops, or casualties suffered, or general reports on operations, are demonstrative of nothing other than that the MLC contingent was not entirely divorced from the MLC. These actions represent the *sina qua non* of command, but do not themselves establish "effective control" over geographically remote units over whom operational control has been established by another commander who is best placed to ensure compliance with the laws of war.

182. The Trial Chamber skirts the issue by stating that "multiple superiors can be held concurrently responsible for the acts of their subordinates".[339] The cases cited

[338] *AFRC* TJ, para. 787.
[339] Judgment, paras. 185, 698.

concern multiple superiors within the same command chain.[340] Mr. Bemba was not subsumed into the command chain of the CAR army, nor did he concurrently exercise effective control with the CAR authorities.

183. The Chamber erred in dismissing the effect of the transfer of operational control on the basis that "Article 28 contains no requirement that the commander have sole or exclusive authority and control over the forces who committed the crimes".[341] Rebutting the transfer of operational control as an indicator of a lack of effective control on the basis of a substantive legal provision is incompatible with the rule that "[t]he indicators of effective control are more a matter of evidence than of substantive law".[342] Thus, even if Article 28 contains no requirement that a commander have sole authority, this does not entitle a Trial Chamber to ignore that an accused had no exclusive control, as this is an evidentiary matter. In evidentiary terms, the division of authority and control – here the transfer of operational control over the MLC troops to the CAR authorities – is relevant to the possible inferences to be drawn. By ignoring this and conflating a substantive and procedural standard, the Trial Chamber committed a legal error.

184. In practical terms, the effect of this reasoning is to force commanders to abdicate command when transferring operational control, because the ability to receive reports or monitor the progress of troops will result in criminal liability irrespective of actual authority over ongoing operations. The Trial Chamber has created an incentive for commanders to relinquish command authority which undermines efforts to increase compliance with IHL, and erodes the commander's appropriate role in monitoring the compliance of forces, even when they have been released to another commander's operational command. Given that the transfer of

[340] Judgment, para. 185.
[341] Judgment, para. 185.
[342] *Blaškić* AJ, para. 69; *Strugar* AJ, para. 254; *Perišić* AJ, para. 87; *Ndahimana* AJ, para. 53. *See also*, *Aleksovski* AJ, paras. 73-74, 76; *Čelebići* AJ, para. 206.

forces from one theatre of war to another is one of the most common forms of command in modern practice, the implications are significant.

185. By ignoring the realities of command in multinational contingents, the Trial Chamber fell into error. The conclusion that Mr. Bemba had effective control over the MLC contingent in the CAR was reached through the application of an incorrect legal standard, with a fundamental flaw at its centre; the conflation of basic military concepts. This error invalidates the decision.

3. The findings on the remaining indicia of effective control are also flawed

186. Separate from this overarching legal error, each finding on the remaining *indicia* of effective control suffers from a significant error; the Trial Chamber misstates evidence, relies on factors falling outside the case as confirmed, and incorrectly draws inferences.

187. Accordingly, operational control aside, other errors infect the "effective control" finding and warrant its reversal. Cumulatively, or individually, the striking of any or all of these *indicia* from the Trial Chamber's "checklist" is fatal to the overall finding.

a) The initial deployment of troops does not support the finding of Mr. Bemba's effective control

188. Both [REDACTED] (D49)[343] and [REDACTED] (D39) testified as to the issue of the decision to intervene in the CAR.[344] D49 [REDACTED].[345] D39 [REDACTED].[346]

189. Their evidence is corroborative.[347] D39 talks about a decision taken by MLC [REDACTED] on 26 October, [REDACTED].[348] D49 corroborates that there was

[343] T-270-CONF-ENG, 13:1-9.
[344] T-308-CONF-ENG, 11:17-22.
[345] Judgment, para. 454, fn. 1272 citing T-270, 29:23-25; 48:10-20.
[346] T-308-CONF-ENG, 33:17-21.

indeed a meeting on 26 October,[349] at which it was decided that an initial group of troops should cross and make contact with the CAR authorities.[350] Both D49 and D39 testified that the troops crossed on 26 October, and returned back [REDACTED].[351] Both testified that there was a meeting on 27 October of "people from army headquarters" and Mr. Bemba.[352] D49 testified that [REDACTED].[353] D39 [REDACTED]."[354]

190. The Trial Chamber referred to the evidence of D49. It accepted that he was "partially corroborated" by D15, who also testified that the decision to intervene was a collegial one, made at a meeting on 27 October 2002.[355] This evidence is dismissed, however, because of general concerns about D49 and D15's credibility, as well as findings that Mr. Bemba had general authority over military operations and strategy.[356] D39's corroborative testimony, a witness subject to no credibility concerns, was not discussed. It was ignored.

191. D49 and D39 [REDACTED] a number of the Prosecution witnesses upon whom the Trial Chamber relied to place the decision at Mr. Bemba's feet.[357] Their evidence cast doubt on the finding that Mr. Bemba took the decision to intervene in the CAR,[358] particularly given its corroboration by [REDACTED], who testified that the decision to send reinforcements was made in consultation with the relevant MLC personnel.[359]

---

[347] T-308- CONF-ENG, 33:14-34:7.
[348] T-308-CONF-ENG, 33:20-21.
[349] T-270-CONF-ENG, 48:6-20.
[350] T-308-CONF-ENG, 33:20-23; T-270-CONF-ENG, 48:6-20.
[351] T-308-CONF-ENG, 33:21-24; T-270-CONF-ENG, 48:22-49:3.
[352] T-270-CONF-ENG, 51:10-52:3; T-308-CONF-ENG, 33:24-35:5.
[353] T-270-CONF-ENG, 52:6-13.
[354] T-308-CONF-ENG, 34:6-7.
[355] Judgment, para. 454.
[356] Judgment, para. 454.
[357] Judgment, para. 453, fn. 1268, citing, for example, P213 and P32, [REDACTED].
[358] Judgment, para. 453.
[359] T-356-CONF-ENG, 18:18-19:1.

192. Its selective approach to evidence disentitles the Trial Chamber to the margin of deference normally afforded to the finder of fact at first instance. The finding that Mr. Bemba ordered the initial deployment of troops cannot be relied upon as an alleged *indicium* of his effective control.

b) The finding of regular and direct contact with commanders and receipt of operations and intelligence reports misstates the evidence

193. There is no physical or documentary evidence of any operational orders from Mr. Bemba to the MLC contingent. This is particularly incongruous given the admission of contemporaneous MLC communication logs, which record messages sent to and from him during the relevant period.[360]

194. The Chamber accordingly focused on information coming back from the field to Gbadolite as an indicator of effective control. This takes the form of (i) contact between Moustapha and Mr. Bemba; (ii) messages in the MLC communication logs; (iii) alleged "intelligence" reports from the field; and (iv) Mr. Bemba's visits to the CAR.[361] Even taken cumulatively, this evidence is insufficient to indicate effective control, and in fact, indicates the opposite; that effective control had been assumed by the CAR authorities.

195. The Trial Chamber concluded that Moustapha and Mr. Bemba regularly communicated by Thuraya and phonie, "with Colonel Moustapha reporting the status of operations and the situation at the front."[362] This finding is not available on the evidence.

196. Only two witnesses testified as to the alleged content of these discussions. P169 first testified that Moustapha would "report on the events of the previous

[360] EVD-T-OTP-00702/CAR-D04-0002-1514 entitled "Messages in c/man" contains messages sent and received between 4 September 2002 and 1 November 2002; EVD-T-OTP-00703/CAR-D04-0002-1641 covers communications sent and received between 21 December 2002 and 7 February 2003.
[361] Judgment, paras. 419-426, 700.
[362] Judgment, paras. 420, 700.

night".[363] However, he ultimately conceded that [REDACTED]. [REDACTED]",[364] [REDACTED].[365]

197. The sole witness remaining is P173, whose testimony must be viewed with "particular caution".[366] Elsewhere, the Trial Chamber relies on P173's testimony only when corroborated by other, credible, evidence. Where his claims are uncorroborated, they are deemed unreliable.[367] The Trial Chamber's failure to apply the same caution in respect of this evidence is an error. As such, there is an insufficient evidentiary basis for any finding as to the content of discussions between Mr. Bemba and Moustapha.

198. In any event, even taken at its highest, P173's evidence only has Moustapha informing on the situation at the battle-front, developments with the troops, wounded persons and deaths, and logistics. In short, how things were "transpiring".[368] This accords with the kind of overarching information provided by a contingent to its national authority, when operational and effective control has been temporarily transferred elsewhere. Again, the conflation of "command" and "effective control" directs the Trial Chamber to legally erroneous conclusions.

199. The "Ops Bangui" situation reports relied upon by the Trial Chamber are similarly innocuous.[369] Having mined 256 pages of MLC communication logs,[370] the Trial Chamber found 23 messages apparently providing "detailed information" from Colonel Moustapha. The messages deal with, *inter alia,* general morale,

[363] Judgment, para. 420, fn. 1152, citing T-138, 24:10-23.
[364] Judgment, para. 420, fn. 1152, citing T-138, 25:8-23.
[365] Judgment, para. 420, fn. 1152, citing T-141-Conf, 3:25-4:4.
[366] Judgment, paras. 317-329.
[367] Judgment, para. 537.
[368] Judgment, para. 420, fn. 1152, citing T-145, 5:11-7:6: "From what I heard, he provided 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."
[369] Judgment, para. 424.
[370] EVD-T-OTP-00702/CAR-D04-0002-1514 entitled "Messages in c/man" contains messages sent and received between 4 September 2002 and 1 November 2002; EVD-T-OTP-00703/CAR-D04-0002-1641 covers communications sent and received between 21 December 2002 and 7 February 2003.

casualties suffered, and the fact New Years Eve passed peacefully. Troop movements are described in the broadest of brushstrokes. The MLC General Staff was receiving information **after** the events, because it was not needed earlier. This is inconsistent with a relationship of effective control. Rather, it is demonstrative of the maintenance of an organic link with a contingent ceded to a different hierarchical command.

200. "Ops Isiro" in the DRC reported to the MLC Chief of General Staff every day.[371] "Ops Bangui" did not. There are frequent and significant gaps between the "Ops Bangui" situation reports. The Trial Chamber relies, for example, on a message from "Ops Bangui" on 8 January 2003.[372] The MLC Chief of General Staff, General Amuli, responded five days later on 12 January 2003, asking for basic information about the enemy, such as its strength, its weapons, its tactics, and its intentions.[373] Two and a half months into the operation, the MLC Chief of General Staff was still not in possession of basic information about the enemy, and takes five days to respond to a situation report. This is not a relationship of effective control.

201. Each of the situation reports from "Ops Bangui" are sent to General Amuli. They are copied for information to Mr. Bemba. There is no evidence that Mr. Bemba read each (or any) of them, despite being copied. On 22 December 2002, the MLC Chief of General Staff told General Bule that he would contact the Chairman for a solution to a funding problem, indicating that Mr. Bemba was not reading the messages despite being copied.[374] No reasonable Trial Chamber would have concluded that the MLC communication logs support a finding of effective control. In fact, they demonstrate the contrary.

[371] EVD-T-OTP-00702/CAR-D04-0002-1514; EVD-T-OTP-00703/CAR-D04-0002-1641.
[372] Judgment, para. 424, fn. 1163-1164, citing EVD-T-OTP-00702/CAR-D04-0002-1641 at 1693.
[373] Judgment, para. 424, fn. 1171, citing EVD-T-OTP-00702/CAR-D04-0002-1641 at 1702.
[374] EVD-T-OTP-00702/CAR-D04-0002-1641 at 1649.

202. The Trial Chamber found that "Mr Bemba also received information on the combat situation, troop positions, politics, and allegations of crimes via intelligence services, both military and civilian."[375] It cites to three excerpts in which P36 and P33 testify as to the situation in the MLC generally, or in the DRC specifically. [376] There is no basis for a finding that Mr. Bemba received intelligence about the combat situation, or troop positions, or politics, **from the CAR.**

203. To support its finding that Mr. Bemba received information about "allegations of crimes", the Trial Chamber relies on the evidence of P33.[377] The selective nature of this reliance is troubling. P33 was [REDACTED].[378] The Chamber relies upon his examination in chief, where he asserted that the [REDACTED].[379]

204. When asked if "intelligence reports" concerning the CAR contained details such as when and where crimes were committed, he eventually conceded that:[380]

> 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. […]Bangui was not part of [REDACTED] on military operations, as far as I'm concerned. So everything that [REDACTED] in this regard was an add-on, if you like. [REDACTED] the situation in Bangui.

205. Despite apparently [REDACTED], P33 was not even aware that Mr. Bemba had visited Bangui during the intervention.[381] This is explained by [REDACTED]".[382] He could not give a number of [REDACTED].[383]

---

[375] Judgment, para. 425. *See also* Judgment, para. 700: Mr. Bemba "additionally received numerous detailed operations and intelligence reports".
[376] Judgment, para. 425, fn. 1172, citing T-214, 17:18-19:1; T-158, 47:4-15; T-159, 8:20-9:6.
[377] Judgment, para. 425, fns. 1172-1174.
[378] T-158-CONF-ENG, 56:6-17.
[379] Judgment, para. 425, fn. 1173, citing T-159-CONF-ENG, 16:17-17:18.
[380] T-162-CONF-ENG, 50:8-11; T-163-CONF-ENG, 13:3-7.
[381] T-160-CONF-ENG, 15:5-14.
[382] T-162-CONF-ENG, 29:5-30:12.
[383] T-162-CONF-ENG, 30:13-31:15.

206. Given this retreat under cross-examination, the Trial Chamber's unequivocal reliance on P33's evidence that [REDACTED], in the absence of any reasoning as to why the qualifications to this testimony do not affect its credibility, is an error. In any event, P33 never testified that [REDACTED] information about "troop movements, the combat situation, or politics". This finding remains unsupported. A central factual finding without evidentiary support is an error which undermines the Trial Chamber's conclusion on effective control.

207. Lastly, the Trial Chamber relies on Mr. Bemba's visits to the CAR.[384] There is no reasoning or finding as to how visits were an exercise of effective control, or that Mr. Bemba learnt any information about the combat situation, or troop movements. Just like President Hollande in the CAR in February 2014, Prime Minister Cameron and President Sarkozy in Libya in September 2011, President Bush in Afghanistan in December 2008, Prime Minister Rudd in East Timor in July 2011, or Prime Minister Trudeau in Ukraine on 12 July 2016, Commanders-in-Chief visit troops fighting as part of multinational contingents in the field. This demonstrates nothing more than the troops having been sent by their original hierarchy, to which they will eventually return.

c) The finding on logistics does not support Mr. Bemba's effective control

208. The Prosecution's case was that Mr. Bemba supplied logistics to the MLC contingent.[385] The Defence's case was that logistics came from the CAR authorities.[386]

209. The Trial Chamber accepted both. It found that the CAR authorities managed the crossing of the MLC troops, provided the arriving troops with transport and initial accommodation and, over the course of the 2002-2003 intervention, provided

[384] Judgment, para. 426.
[385] ICC-01/05-01/08-856-Conf-AnxA, para. 27; ICC-01/05-01/08-3079-Conf-Corr, paras. 595-597.
[386] ICC-01/05-01-08-3121-Conf, paras. 777-798.

weapons, ammunition, new uniforms, vehicles, fuel, food, money, and communications equipment.[387] The MLC were found to have brought radios and at least one Thuraya, individual weapons and ammunition as well as support weapons, and heavy weapons such as artillery.[388]

210. Thus, the supply of logistics is equivocal on the issue of effective control. The Chamber provides no basis to conclude that the shared provision of logistics favours a finding of effective control by the sending commander. In fact, the few command responsibility cases in which logistics are considered, indicate that little importance should be ascribed to their provision.[389]

d) The finding that Mr. Bemba retained primary disciplinary authority misstates the evidence

211. No reasonable Trial Chamber could have concluded that Mr. Bemba, and not the CAR authorities, had primary authority to decide whether to sanction MLC troops. The Trial Chamber relies on the testimony of P45, P36 and P173 about whom it had concerns. It assuages these concerns on the basis of apparent "corroboration" by [REDACTED].[390]

212. The Trial Chamber cites to seven excerpts from [REDACTED]'s testimony. In the only excerpt addressing discipline, he asserts that [REDACTED].[391] However, under cross-examination, [REDACTED] confirmed that the CAR authorities were responsible for investigating allegations of criminal conduct by the MLC troops.[392]

> Q. […] Now, when you said that the people should have complained to the government, which government were you referring to?
> A. The Central African government at the time.

[387] Judgment, para. 412.
[388] Judgment, paras. 413-418.
[389] *Hadžihasanović* TJ, paras. 1736-1737; *Čelebići* TJ, para. 664; *Bagosora* AJ, paras. 329-330, 375.
[390] Judgment, para. 447.
[391] Judgment, para. 447, fn. 1243, citing T-354-CONF, 41:19-20; 70:6-7; T-355, 17:5-8; 20:13-18; 65:24-66:12; T-356-CONF, 74:5-75:5.
[392] T-357-CONF-ENG, 7:25-8:20.

> 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.

213. This is a definitive discussion of the question of who retained primary disciplinary authority, unlike the selective and mainly irrelevant excerpts relied upon by the Trial Chamber.[393] The Chamber erred in failing to acknowledge this directly relevant testimony and providing a reasoned opinion as to why [REDACTED] could still be relied upon to corroborate the evidence of three otherwise unreliable witnesses. On this basis, the finding that "Mr Bemba and the MLC had ultimate disciplinary authority" is unsafe.[394]

214. Even had this evidence been reliable, the Trial Chamber makes no finding as to why the retention of some measure of disciplinary authority on the part of Mr. Bemba was indicative of effective control in the circumstances of this case. General Seara told the Chamber that the national authority of contingents in multinational operations will be informed about personnel matters, including discipline.[395]

[393] Judgment, para. 447, fn. 1243, citing T-353, 56:21-25; T-354-CONF, 41:19-20; 70:6-7; T-355, 17:5-8; 20:13-18; 65:24-66:12; T-356-CONF, 74:5-75:5.
[394] Judgment, para. 448.
[395] EVD-T-D04-00070/CAR-D04-0003-0342 at 0357.

215. Again, the Trial Chamber's conflation of basic military concepts led it into error. The finding on disciplinary authority does not support the Trial Chamber's conclusion on effective control.

e) Mr. Bemba's representation of MLC forces in external matters falls outside the case as confirmed

216. The Prosecution has never alleged,[396] nor did the Pre-Trial Chamber confirm[397] that Mr. Bemba's apparent continued representation of the MLC forces in external matters was an *indicium* of his effective control.

217. Mr. Bemba suffered concrete prejudice as a result of the Trial Chamber's reliance on a factor never raised at trial. With no citation to jurisprudence or evidence, the Trial Chamber asserts that referring all matters to President Patassé, "would be consistent with a complete re-subordination of forces…"[398]. Mr. Bemba was specifically impugned for "responding to media, and other reports, of alleged crimes".[399]

218. Had Mr. Bemba been notified that the Trial Chamber considered that commanders referring "all matters" to the multinational contingent was an indication of complete re-subordination, he would have been in a position to lead evidence demonstrating the opposite. Namely, that Commanders-in-Chief with national troops under the operational control of a multinational contingent, regularly speak on behalf of their troops (and indeed pledge to investigate allegations of sexual violence) without assuming effective control.

[396] ICC-01/05-01/08-856-Conf-AnxA; ICC-01/05-01/08-3079-Conf-Corr.
[397] ICC-01/05-01/08-424, paras. 466-477.
[398] Judgment, para. 702.
[399] Judgment, para. 702.

f) Mr. Bemba's did not order the withdrawal of the troops

219. Patassé died during the Prosecution case, and did not testify. At the time of the intervention, he gave a contemporaneous interview, in which he addressed the question of who had the authority to order the MLC troops to withdraw. He was unequivocal 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.[400]

220. The Chamber did hear, however, from President Patassé's spokesman, Prosper Ndouba. Testifying publicly, Mr. Ndouba gave detailed evidence as to the multilateral process, which resulted in a decision at the CEMAC summit in Libreville to ask President Patassé to withdraw the MLC troops, which led to President Patassé "himself order[ing] that the MLC troops should withdraw."[401]

221. The Chamber makes no reference to either President Patassé's interview, or Mr. Ndouba's testimony, despite it casting reasonable doubt on its finding that Mr. Bemba ordered the withdrawal.[402] The Trial Chamber elsewhere relies on Mr. Ndouba to make findings adverse to the accused,[403] and relies on press interviews of Mr. Bemba concerning other aspects of the withdrawal.[404] Nor did the Trial Chamber address [REDACTED]'s evidence that [REDACTED] not have been able to follow an order from Mr. Bemba to withdraw from the CAR, as the order would have had to have come from the Central Africans.[405] The Chamber's failure to address directly relevant evidence that Patassé ordered the withdrawal of the MLC troops is a legal error which undermines its reliance on this factor as an *indicium* of effective control.

---

[400] EVD-T-OTP-00443/CAR-OTP-0013-0005 at 0006.
[401] T-247-CONF-ENG, 34:5-16.
[402] Judgment, para. 555.
[403] Judgment, para. 411, fn. 1112.
[404] Judgment, para. 555, fn. 1705.
[405] T-292-CONF-ENG, 39:12-40:14.

222. Other corroborative evidence did exist. A series of AFP and UN IRIN media reports, published between 24 February 2003 and 11 March 2013, show that the decision to withdraw the MLC troops was not taken unilaterally by Mr. Bemba at his political convenience,[406] but as the result of this same multilateral process aimed at facilitating a CAR "national dialogue" between the Patassé regime, and the Bozizé rebellion.[407] A Defence request to admit these media reports was refused. Considering that "an essential part of the information contained in the Documents is already part of the evidence admitted by the Chamber", the Trial Chamber found that their admission was not necessary either in the interests of justice, or for a determination of the truth.[408] To refuse the admission of evidence as being duplicative, and then decline to rely on the testimony of Defence witnesses "absent corroboration by other credible and reliable evidence"[409] is an error.

223. A further problem exists. At trial, Mr. Bemba submitted that an order to withdraw is of no evidentiary significance to a determination of effective control.[410] These submissions are not addressed, and no reasoned opinion is provided as to why an order to withdraw the troops is an *indicium* of effective control, despite the requirement that a superior is required to exercise effective control at the time the crimes were committed.[411]

4. Conclusion

224. The Prosecution never wanted this to be a superior responsibility case. Mr. Bemba was arrested on the basis that he was responsible as an indirect co-perpetrator under Article 25(3)(a) of the Statute. The Pre-Trial Chamber disagreed,

---

[406] Judgment, para. 555.
[407] ICC-01/05-01/08-3045-Conf, paras. 39-53.
[408] ICC-01/05-01/08-3075-Conf, paras. 26-29.
[409] Judgment, para. 557.
[410] ICC-01/05-01/08-3121-Conf, paras. 691-692.
[411] ICC-01/05-01/08-424, paras. 418-419, citing *Halilović* AJ, para. 59; *Bagosora* TJ, para. 2012. *See also*: *Semanza* TJ, para. 402; *Ntagerura* TJ, para. 628; *Karera* TJ, para. 564; *Halilović* TJ, para. 100; *Taylor* TJ, para. 6984; *RUF* TJ, paras. 2294, 2297.

and suggested that Mr. Bemba be charged as a commander instead.[412] Even then, in its amended document confirming the charges, the Prosecution clung to its original charge, stating that "primarily" Mr. Bemba "is individually criminally responsible under 25(3)(a)", but then "in the alternative" he is responsible as a superior.[413]

225. Presumably, this reluctance was born from the fact that the superior responsibility case was not a natural fit. With no physical evidence of any orders, no evidence of the accused on the ground commanding the troops, and the added complication of the contingent fighting as part of a loyalist coalition of forces, the facts do not sit comfortably within the doctrine of superior responsibility as previously understood. Never had a commander so removed from his troops been accused of being criminally liable for their actions.

226. The case as presented did not demonstrate that he was. The Trial Chamber constructed a theory of command which misappreciates, at a fundamental level, basic military concepts and realities. Effective control is stretched to a point that it could give rise to criminal culpability of the part of any commander who does not abandon all links with troops participating in a multinational operation. Unrealistic at best, and disturbingly counter-productive at worst, this alone is sufficient to warrant the Appeals Chamber's reversal of the effective control finding. The Trial Chamber's numerous and irreparable errors in reaching this conclusion make this the only possible course.

B. THE EVIDENCE DISMISSED OR IGNORED

227. The Chamber is required to carry out a holistic evaluation and weigh **all the evidence taken together**.[414] Its judgment must be based on its evaluation of the

[412] ICC-01/05-01/08-388.
[413] ICC-01/05-01/08-395-Anx3, para. 57.
[414] Judgment, para. 218.

evidence and the entire proceedings.[415] The Trial Chamber is not required to refer to all evidence on the record,[416] "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence."[417] Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[418]

228. In the present case, the Trial Chamber erroneously dismissed, on a wholesale basis, documentary and testimonial Defence evidence with direct relevance to the central question of the proceedings; the command of the MLC contingent in the CAR. Had this evidence been considered, the Trial Chamber could never have concluded that Mr. Bemba was liable as a commander. This evidence, individually and cumulatively, undermines the Trial Chamber's findings on command. The fact that it features nowhere in the Trial Chamber's reasoning is a legal error warranting the reversal of the decision.

1. The 2001 intervention

229. Of assistance to assessing effective control in the context of the 2002-2003 operation, is the fact that the MLC had intervened in CAR before.

230. In 2001, forces loyal to former President Kolingba attempted to seize power from President Patassé.[419] A contingent of 450 MLC troops[420] was sent to Bangui to assist. [REDACTED], D18, testified that [REDACTED] Mr. Bemba who at the time "was in Beni, about 2,000 kilometres from Gbadolite."[421] [REDACTED] had no contact with Mr. Bemba during the intervention. [REDACTED] "direct superior in Bangui…was General Bozizé, who was the Chief of Staff of the FACA. It is from

[415] Judgment, para. 224.
[416] Judgment, para. 227, fn. 518-520, citing *Kvočka* AJ and *Perišić* AJ.
[417] *Kvočka* AJ, para. 23.
[418] *Ibid*.
[419] T-317-CONF-ENG, 37:25-38:4.
[420] T-317-CONF-ENG, 41:10-17.
[421] T-317-CONF-ENG, 38:11-13.

him that [REDACTED] received operational orders".[422] Logistics were provided by the Central Africans.[423] The decision to withdraw the MLC troops was made by the Central Africans.[424] The Chamber entertained evidence concerning the 2001 events without objection.[425] No evidence was lead demonstrating a change in practice between 2001 and 2002**.**

231. The fact that the 2001 operation mirrored the Defence's version of the conduct of the 2002-2003 operations is relevant evidence that should have been considered. The Judgment makes no reference to the 2001 intervention, and the Defence submissions thereon are ignored.[426] This amounts to a failure to consider relevant facts, and give a reasoned opinion.

232. This failure cannot be excused on the basis that the 2001 intervention fell outside the temporal scope of the charges. On that basis, the Appeals Chamber would need to revisit each of the Trial Chamber's findings on the MLC's military operations and strategy, communication, and discipline, which rely almost exclusively on evidence from the DRC, outside the trial's temporal and geographical scope.[427]

2. The FACA documents

233. On 12 July 2012 the Defence disclosed 14 documents from the FACA military archives,[428] which demonstrated the re-subordination of the MLC troops. The documents fall into two categories: firstly, those which deal with the period relevant to the charges, with particular emphasis on the period at the end of

[422] T-317-CONF-ENG, 46:16-18.
[423] T-317-CONF-ENG, 44:18-46:10.
[424] T-317-CONF-ENG, 46:23-47:5
[425] T-317-CONF-ENG; T-318-CONF-ENG; T-319-CONF-ENG; T-319bis-CONF-ENG; T-320-CONF-ENG; T-320bis-CONF-ENG.
[426] ICC-01/05-01/08-3121-Conf, paras. 627, 787, 860.
[427] Judgment, Sections V(A)(3), (4) and (5), and paras. 394-403.
[428] EVD-T-D04-00058/CAR-D04-0003-0128 to EVD-T-D04-00075/CAR-D04-0003-0141. EVD-T-D04-00058/CAR-D04-0003-0128 and EVD-T-D04-00058/CAR-D04-0003-0135 are duplicates.

January 2003; and, secondly, those which deal with the insertion of MLC forces into the CAR in 2001. Individually and cumulatively, they are devastating to the Trial Chamber's theory of Mr. Bemba's effective control.

234. The Prosecution initially sought the exclusion of 11 of the 14 documents, but did not contest the authenticity of documents bearing the signatures of Patassé,[429] Demafouth,[430] and Bozizé.[431] The Chamber called [REDACTED] to testify to the authenticity of the documents. The Chamber limited its examination to those [REDACTED]. The subsequent finding that none of the 13 documents had any evidential weight,[432] depends entirely on [REDACTED]'s evidence, his assertions as to the genuineness of various signatures, and the contents of the documents.[433] No other evidential source is referenced.

235. The Prosecution first interviewed [REDACTED].[434] He was questioned about the organisation of the loyalist forces during the period 2002-2003,[435] [REDACTED]. He was not called to testify. After March 2003, [REDACTED]. At the time of his 2012 Prosecution interview, he was [REDACTED][436] in Bozizé's government. It might, thus, be thought that he had an interest in protecting [REDACTED] Bozizé from implication in the events of 2002-2003.

236. Against this background, the manner in which his 2012 interview[437] was conducted was improper. The interviewer commenced by informing [REDACTED] that the Defence had commenced its case and had disclosed certain documents which he was to be shown. The purpose of the exercise was for him to indicate

[429] EVD-T-D04-00060/CAR-D04-0003-0129.
[430] EVD-T-D04-00064/CAR-D04-0003-0134.
[431] EVD-T-D04-00075/CAR-D04-0003-0141.
[432] Judgment, paras. 286, 291, 293, 297.
[433] Judgment, paras. 278-297, fn. 646-678.
[434] EVD-P-03120/CAR-OTP-0008-0219_R01.
[435] ICC-01/05-01/08-2301-Conf, para. 11.
[436] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0011.
[437] EVD-T-OTP-00858/CAR-OTP-0069-0010.

whether they were genuine, the Prosecution being involved, *inter alia*, in analysing whether they were authentic or not.[438] Thereafter, each document was presented to him as one which had emanated from Mr. Bemba's defence.

237. The interview was not neutral. Even though it followed a screening interview three weeks prior, [REDACTED]. [REDACTED].[439] The error in the manner of the interview was reinforced by the examination of the Presiding Judge, whose opening question bears repetition:[440]

> [REDACTED]. Could you please repeat to the Chamber what are – whether this document is true in its format and in its content?

238. Even after objection by the Defence, the witness was prompted to repeat the assertions previously made about each document.[441] The prejudicial manner of his examination, thus, undermines the credibility of his responses.

239. [REDACTED]'s evidence about [REDACTED] signature and the contents of the documents was significantly different from his 2012 account. In relation to CAR-D04-0003-0137, he claimed in 2012 that the signature [REDACTED],[442] but when presented to him in court, he asserted that [REDACTED] must have been scanned[443] and inserted under the stamp in the document by the forgers.[444] The Chamber's finding that [REDACTED] did not recognise [REDACTED] signature in any of the documents[445] is, accordingly, erroneous.

---

[438] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0017-0018.
[439] T-357-CONF-ENG, 116:8-118:1. The Presiding Judge's intervention displays a marked contrast to the approach towards Defence witness, D19, when he was required to provide an example of his signature in evidence.
[440] T-353-CONF-ENG, 25:3-9.
[441] T-353-CONF-ENG, 29:4-8.
[442] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0033.
[443] T-357-CONF-ENG, 103:1-3.
[444] T-357-CONF-ENG, 104:1-8.
[445] Judgment, para. 284.

240. When presented with CAR-D04-0003-0140 in 2012, the only irregularity he noted in the document was [REDACTED] rank and position.[446] However, his evidence highlighted that one of the recipients of the message was allegedly the commander of military engineering whereas the topic of the message was about lodging and clothing.[447] This observation bears no scrutiny; the message was about, *inter alia*, toilet installations, electricity supply, and lodging: matters well within the province of the engineering department.

241. Whilst he pointed out the fact that [REDACTED] rank and position were wrong in CAR-D04-0003-0136,[448] and suggested that the addressees and priority levels were not in the style of the General Staff,[449] the main focus of his criticism of the document was the use of XX rather than STOP as a form of punctuation,[450] an assertion he did not make in evidence, preferring rather to point out imaginary spelling mistakes.[451]

242. In addition to the shift in his position as to authenticity of [REDACTED] signature on CAR-D04-0003-0137, his criticisms of the document's contents changed significantly. In his interview, he highlighted the fact that it would not be for the Chief of General Staff to correspond with the commander of a foreign force,[452] something he did not aver to the Chamber. In his testimony, he pointed to the fact that the Coat of Arms was missing and the fact that the Minister of Defence was not a General. Of course, the former observation may illustrate nothing more than the document being a photocopy of an incomplete original.

[446] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0034.
[447] Judgment, para. 278, fn. 648.
[448] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0027.
[449] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0029 and 0031.
[450] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0028.
[451] Judgment, para. 279, fn. 650-651. In fact his evidence on this point is incorrect. There is no mistake. He alleges that the word 'Destinataires' is in the singular form. It is not.
[452] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0033.

243. When shown CAR-D04-0003-0133, [REDACTED] said it was a work of imagination, because the FACA had no stock or reserve of vehicles, and no Jeeps at all. [453] The Chamber found as a fact that the MLC were provided with vehicles and fuel by the CAR authorities.[454] No reasonable Chamber could have found his evidence that this document was a forgery by reason of its contents credible against that background.

244. [REDACTED]'s assertions that [REDACTED] could not have signed the documents in his capacity as *General de Brigade* and Chief of Staff, as he was not appointed until 16 January 2003, is disingenuous. In October 2002, the Chief of General Staff was General Mbeti-Bangui,[455] who then died, although the date of his death was not established in evidence.[456] Colonel Thierry Lengbe, the commander of the CAR CO, fled the CAR on 25 November 2002.[457] The office of the General Staff, like the CAR CO and the Ministry of Defence, was situated at Camp Béal.[458] In the period of one month between the start of the war and his departure from the country, Lengbe had no memory of dealing with Mbeti-Bangui at the CAR CO, only with the Minister of Defence and someone he referred to as **General** Gambi.[459] Similarly, [REDACTED] had no memory of Mbeti-Bangui, only of Chief of General Staff, Gambi.[460]

245. It is inconceivable that, during a time of civil war in the country, during which a composite loyalist force needed to be coordinated,[461] the army should be without a functioning Chief of Staff for 2-3 months. [REDACTED]. Initially, when questioned by the Chamber, he denied that he knew that Lengbe was in charge of the CAR

[453] Judgment, para. 282, fn. 662.
[454] *See*, *e.g.*, Judgment, para. 412.
[455] Judgment, para. 405.
[456] Judgment, para. 405.
[457] Judgment, para. 406.
[458] T-357-CONF-ENG, 12:9-20.
[459] T-182-CONF-ENG, 17:17-21:13.
[460] T-218-CONF-ENG, 49:21-50:3. In fairness, P36 did not purport that Amuli had met Gambi prior to his visit to Gbadolite (see below).
[461] *See* Judgment, paras. 404-409.

CO.[462] When confronted with Lengbe's testimony that Gambi had assisted in the setting up of the CAR CO in October 2002, [REDACTED],[463] [REDACTED].[464] Given that Lengbe fled the CAR on 25 November 2002,[465] Gambi was the Chief of Staff prior to 16 January 2003. Notably, the document of Gambi's appointment is ambiguous in that respect, stating in fact that he was appointed **or confirmed** in the position.[466]

246. [REDACTED] cannot attest to the signatures of others many years after the event. He had no contemporaneous knowledge of the documents signed by others. His comments on the contents of those documents were not sufficient to determine that they were inauthentic as opposed to merely badly written, punctuated or formatted.

247. In fact, [REDACTED] only purports to deny one signature, that of Yangongo on EVD-T-D04-00058/CAR-D04-0003-0128.[467] The basis of the denial is unclear. He makes some remarks about Yangongo not being *Ministre Délégué* on the date in question. His evidence is contradicted by that of Lengbe, who testified that not only was Yangongo the delegated Minister,[468] but that he regularly fulfiled the Minister's role.[469]

248. The point is a red herring. There is no reason to suppose someone other than the *Ministre Délégué* cannot sign a letter on behalf of the Minister. The document bears significant *indicia* of authenticity; the letter heading is the correct one,[470] it has

[462] T-353-CONF-ENG, 32:8-21.
[463] T-357-CONF-ENG, 14:9-19; 24:19-22.
[464] T-357-CONF-ENG, 24:19-20.
[465] Judgment, para. 406.
[466] EVD-T-OTP-00856/CAR-OTP-0069-0043. It is worthy of note that Seregeza, the only other nominee in the decree had not previously held the post of Deputy Chief of Staff; T-357-CONF-ENG, 31:20-21.
[467] Judgment, para. 288.
[468] T-182-CONF-ENG, 21:17-18; 14:2, 14.
[469] T-182-CONF-ENG, 14:2, 14; 13:14-20.
[470] Judgment, para. 289.

the stamp of the Ministry, and contextual indicia of reliability. Perhaps the most compelling feature, however, is the signature of Yangongo itself. The signatory to the document is Regonessa, but Yangongo has signed this on his behalf. Elsewhere among the documents are two examples bearing Regonessa's signature,[471] sufficiently authentic for [REDACTED] not to be able to declare it false.[472] If the forger had already perfected Regonessa's signature, why then increase the risk of detection by attempting Yangongo's?

249. Much of [REDACTED]'s criticism of the documents signed by others depends upon apparent breaches of protocol in their language. Indeed, in relation to the document apparently signed by Patassé,[473] that is the sum total of his observations and was sufficient for the Chamber to determine no reliance could be placed on the document.[474] However it has to be borne in mind when considering these criticisms that even according to [REDACTED], these were unusual times, there were occasions when no written orders were issued at all because this was a crisis.[475]

250. In relation to CAR-D04-0003-0128, the indicia of reliability lies not just in the coat of arms, the Presidential stamp, Patassé's unchallenged signature and its contextual compatibility, but also in the fact that this is a document the original of which appears to have been printed on paper either embossed or watermarked with the crest of the Republic.

251. The eight January and February 2003 documents undoubtedly refer to various logistical operations concerning the third battalion deployed to the CAR in January

[471] EVD-T-D04-00067/CAR-D04-0003-0138; EVD-T-D04-00068/CAR-D04-0003-0139.
[472] T-357-CONF-ENG, 49:21-22.
[473] EVD-T-D04-00059/CAR-D04-0003-0129.
[474] Judgment, para. 293.
[475] T-357-CONF-ENG, 50:1-4.

2003.[476] Despite his protestations their contents dovetail with his testimony and triangulate with other evidence in the case.[477]

252. According to [REDACTED], the additional MLC troops came "[REDACTED]; [REDACTED].[478] They crossed the river Ubangui by motorised boat.[479] CAR-D04-0003-0138 is a governmental authorisation, signed by Regonessa, Minister of Defence, dated 19 January 2003. It requires the amphibious battalion to organise for the crossing of a reinforcement battalion of MLC soldiers to cross the river Ubangui to Port Beach.

253. [REDACTED] agreed that the signature might be that of Regonessa,[480] and apparently conceded that he had no basis for suggesting that the document was not genuine (whilst simultaneously claiming it was a forgery).[481] CAR-D04-0003-0139, an authorisation to billet a battalion at PK12, dated 19 January, signed by Regonessa, and CAR-D04-0003-0133, a *message porté* dated 17 January, signed by Gambi, providing vehicles for transport of the MLC troops bear not just *indicia* of authenticity on their face, but contextual *indicia*.

254. Indeed, they are corroborated by other contemporaneous documents. [REDACTED].[482] The MLC communication logs record a request for arms and ammunition to be supplied on 20 January 2003.[483] [REDACTED] confirmed that this would be an appropriate amount of ordinance for a force of 500 men.[484] The

[476] EVD-T-D04-00058/CAR-D04-0003-0128; EVD-T-D04-00059/CAR-D04-0003-0129; EVD-T-D04-00060/CAR-D04-0003-0130; EVD-T-D04-00061/CAR-D04-0003-0131; EVD-T-D04-00062/CAR-D04-0003-0132; EVD-T-D04-00063/CAR-D04-0003-0133; EVD-T-D04-00067/CAR-D04-0003-0138; EVD-T-D04-00068/CAR-D04-0003-0139.
[477] EVD-T-OTP-00703/CAR-D04-0002-1641 at 1726; *See also* T-215-CONF-ENG, 18:20-25; T-218-CONF-ENG, 50:10-23; T-295, 36:17-37:14.
[478] T-357-CONF-ENG, 47:6-22.
[479] T-357-CONF-ENG, 48:13-22.
[480] T-357-CONF-ENG, 49:21-22.
[481] T-357-CONF-ENG, 50:7-20.
[482] T-357-CONF-ENG, 63:21-25.
[483] EVD-T-OTP-00703/CAR-D04-0002-1641 at 1726; T-357-CONF-ENG, 64:13-65:11.
[484] T-357-CONF-ENG, 65:11.

documents are contextually correct, meaning that if indeed they were forgeries, the pool of alleged forgers is miniscule.

255. Two of the documents relate to 2001, one signed by François Bozizé[485] and the second by Demafouth.[486] The Prosecution adduced no evidence about the dates of the MLC insertion in 2001. According to D18, [REDACTED], a unit of 500 men crossed into the CAR on or about 28 May 2001. He thought they stayed until 11 June, although he was not sure of the dates.[487] The operation was jointly carried out with the FACA.[488] D18 testified that [REDACTED] under the command of the FACA and reported to the Chief of General Staff and Demafouth, the Minister of Defence.[489] The Chief of Staff of the FACA in May and June 2001 was, of course, François Bozizé.[490] The content and dates of the documents are, again, correct.

256. [REDACTED] was not [REDACTED], and not well placed to authenticate any document emanating from the General Staff at that time.[491] He alleges that CAR-D04-0003-0141 is a fabrication,[492] yet concedes that it has substantial contextual accuracy: the deployment of troops to the 7th arrondissement, the south eastern part of the city and Camp Kassai fits with the location of President Kolingba's forces and supporters and where the operations in fact took place.[493] The document, moreover, has several other *indicia* of authenticity: its date, the stamp, the signature, the various seraphs at the head of the page, and the precisely similar manner in which the writer's name is typed (Francois B O Z I Z E) to an admitted document signed by him.[494] His criticisms of the document are without merit. His allegation that

485 EVD-T-D04-00075/CAR-D04-0003-0141.
486 EVD-T-D04-00064/CAR-D04-0003-0134.
487 T-317-CONF-ENG, 41:20-21.
488 T-317-CONF-ENG, 42:1-25.
489 T-317-CONF-ENG, 44:21-45:18.
490 Judgment, para. 379.
491 T-354-CONF-ENG, 29:12-14.
492 Judgment, para. 296.
493 T-354-CONF-ENG, 29:15-30:7.
494 T-357-CONF-ENG, 107:25-108-1.

Camp Kassai is misspelt is not correct.[495] In any event, a spelling mistake does not make a document a forgery. The other alleged misspelling[496] is inconsequential to the document's authenticity.

257. [REDACTED] was able to identify that CAR-D04-0003-0134 was dated June 2001, in court.[497] The Chamber's finding that the date of the document is illegible is an error of fact.[498] [REDACTED] could not know Demafouth's signature, nor how it looked in 2001, nor know the practices of the Minister of Defence at that time. The document is contextually accurate, both in terms of its date and contents, as well as the fact that it emanates from Demafouth who, according to the evidence, was the principal focal point for the MLC forces in the CAR in 2001.[499] D18 also confirmed that MLC forces were well supplied with food by the CAR authorities in 2001.[500]

258. The dismissal of these documents on the basis that they might not relate to the temporal scope of the charges,[501] is an error of law. The Chamber has made use of evidence outside the scope of the charges in order to establish that Mr. Bemba had effective control of MLC forces in the DRC at times outside the scope of the charges.[502] The Chamber, moreover, entertained D18's evidence, and indeed other evidence on the events of 2001.[503] The significance, moreover, of the 2001 documents is that they emanated from the same source. Their authenticity gives rise to an obvious inference in relation to the other documents.

---

[495] On the document the word Camp appears in full. Kassai has a diphthong or umlaut over the final 'I', and although the quartier of Bangui is spelt Kasai, the associated Camp is spelt with two 's'. *See*, *e.g.*, Judgment, Annex B.
[496] See Judgment, para. 296: DGA, not DIGA.
[497] T-354-CONF-ENG, 12:10-13.
[498] Judgment, para. 295.
[499] *See above* para. 255.
[500] T-317-CONF-ENG, 46:4-10.
[501] Judgment, para. 295.
[502] Judgment, Sections V(A)(3), (4) and (5), and paras. 394-403.
[503] *See* T-317-CONF-ENG; T-318-CONF-ENG; T-319-CONF-ENG; T-319bis-CONF-ENG; T-320-CONF-ENG; T-320bis-CONF-ENG. And *see*, *e.g.*, T-215-CONF-ENG, 60:4-18; T-173-CONF-ENG, 40:25-42:16; T-105-CONF-ENG, 39:17-40:13; T-201-CONF-ENG, 52:20-22; T-165-CONF-ENG, 34:20-35:2; T-168-CONF-ENG, 39:12-19, T-161-CONF-ENG, 16:12-25; T-208-CONF-ENG, 39:5-40:11; T-209-CONF-ENG, 19:19-20:12; 31:16-24; T-230-ENG, 49:13-52:7; T-246-CONF-ENG, 44:4-18.

259. The Trial Chamber's decision to attach no weight to these documents[504] was erroneous. They are contemporaneous records, demonstrative of the transfer of operational command of the MLC troops to the Central African authorities. As such, they corroborate the evidence of Defence witnesses D19, D21, D39, D49 and D51 who testified that operational command was transferred, and whose evidence the Trial Chamber dismissed, in part, because "it is not corroborated by other credible or reliable evidence".[505] The FACA documents are that evidence.

3. General Jacques Seara

260. This is the first superior responsibility case at the ICC. It involves a composite military force conducting combat operations on foreign territory, where the force comprised both state forces and assorted armed militia. Both parties called military expert witnesses to assist the Trial Chamber. Their respective reports and testimony were effectively sidelined.[506]

261. In discarding this evidence, the Trial Chamber not only threw away a helpful tool, intended to inform its judgment, it failed to fulfil its Article 74 responsibility to consider the entirety of the case and address evidence clearly relevant to its findings.

262. The Chamber's determination that it could attach "no weight" to General Seara's evidence[507] because his report "does not indicate the specific basis for each of his conclusions",[508] and that he reviewed the FACA documents and D19's prior

[504] Judgment, paras. 286, 291, 293, 297.
[505] Judgment, paras. 429, 445.
[506] The Prosecution military expert is cited only four times, two of them not about military command. *See* Judgment paras. 396, 399, 412 and 443.
[507] Judgment, para. 369.
[508] Judgment, para. 368.

statements,[509] is a simplistic and inadequate discharge of the judicial obligation to weigh evidence.

263. Much of Seara's evidence about the general theory of command, which was pertinent to an assessment of the issues of effective control and measures, derived not from his reading of 13 one-page documents and the out-of-court statements of a single witness, but from his 37 years of experience as a soldier and a commanding officer in the French army, encompassing combat, intelligence and NATO operations.[510] His opinions on these topics were valid, whatever extraneous material he had perused.

264. His extensive reading list was annexed to his report.[511] He conducted interviews with a number of significant figures within the MLC military structure, about whom the Chamber had no apparent concerns.[512] The General's report is perfectly explicit as to the sources used for his opinions about general military principles, namely documents of general application[513] and his own experience.[514] The Chamber's apparent inability to discern his sources[515] is thus incomprehensible.

265. The Trial Chamber also failed to assess General Seara's opinions by reference to other evidence. There was substantial support for his conclusions from P36, P65, [REDACTED], Lengbe, General Opande, and, as well as other documentary evidence, including the MLC communication logs.

266. Much of Seara's report explains the general functioning of an army and how war is conducted, especially when this army has been called as reinforcement from

[509] Judgment, para. 368.
[510] EVD-T-D04-00070/CAR-D04-0003-0342 at 0344; T-229-CONF-ENG, 7:16-8:6; 8:22-25; 9:2-3; 9:21-10:9; 11:14-20
[511] T-229-CONF-ENG, 14:9-15:4; EVD-T-D04-00070/CAR-D04-0003-0342 at 0346.
[512] EVD-T-D04-00070/CAR-D04-0003-0342 at 0350.
[513] EVD-T-D04-00070/CAR-004-0003-0342 at 0346.
[514] EVD-T-D04-00070/CAR-004-0003-0342 at 0343.
[515] Judgment, para. 369.

abroad. These are rules that apply universally. These principles are not based on a few of the documents provided by the Defence, but on his own knowledge, experience and military doctrine.[516] Having admitted the report into evidence, the Chamber was bound to consider it. No reasonable Trial Chamber could have considered that his expert opinion on the realities of conflict, the re-subordination of troops, and the retention of residual command were invalid or in any way affected by a fraction of the materials considered by the witness. Quite explicitly, it was not.

4. [REDACTED]'s evidence on command

267. [REDACTED] was summoned by the Chamber. His evidence in relation to certain documents was found to be consistent, credible and reliable.[517] However, the principal purpose for calling him, according to the Presiding Judge was: [518]

[REDACTED].

268. [REDACTED].[519] [REDACTED].[520] [REDACTED].[521]

269. [REDACTED] on the mechanics of cooperation between the MLC and the CAR authorities. Unlike Lengbe, [REDACTED] throughout the intervention, not just for a few weeks. Unlike P36, P45, P15 and P33, he was in the CAR at the time, and unlike P169, P173 and P178, he was a soldier [REDACTED]. That his evidence, so heavily leaned upon to establish the inauthenticity of the FACA documents

[516] See EVD-T-D04-00070/CAR-004-0003-0342 at 0351 paras. 6-7; at 0352, paras. 10-14; at 0353, paras. 22-24; at 0356 para. 40; at 0357, paras. 42-43, 45-47, 49; at 0358, paras. 50-54; at 0359, paras. 55-56, 59; at 0360, paras. 60-65; at 0361 paras. 69-73; at 0362, paras. 74-75; at 0363, paras. 85-87; at 0366-0367 paras. 105-111; at 0370-0371, paras. 129-130; at 0372, paras. 140-141; at 0373-0374, paras. 149-153; at 0378-0379, paras. 181-186, paras. 188-189, 191; at 0380, paras. 193-199; at 0384, paras. 222-227; at 0385-0386, paras. 234-236; at 0387-0388, paras. 238-249.
[517] Judgment, para. 276.
[518] T-353-CONF-ENG, 41:7-14.
[519] T-356-CONF-ENG, 50:6-14.
[520] T-353-CONF-ENG, 6 :19-62:23; T-357-CONF-ENG, 42:14-47:5.
[521] T-357-CONF-ENG, 69:2-70:5; 72:21-73:3.

merits scarcely more than a handful of footnotes in Chapter V of the Judgment, is an error.

270. His evidence was entirely incompatible with the Trial Chamber's theory on command. Militarily, the USP was leading the operations, together with MLC forces.[522] In response to the question, "who was ultimately in command of the MLC forces that were fighting in the CAR", [REDACTED] replied:[523]

> …The MLC units on conducting operations with the presidential security unit, they would talk to one another and you would see Libyans and the MLC forces, the MLC were fighting in the field with soldiers from the presidential security unit.

271. The MLC troops did not "operate independently of other forces in the field".[524] There were daily or weekly meetings attended by the Chief of Staff, Bombayake (the commander of the USP), the Minister of Defence, the Minister of the Interior, the director general of the police and the chief of intelligence.[525] The MLC was represented by the Director General of the USP. He would report on the situation concerning the MLC, including their location.[526] Orders were made following the meetings concerning logistics and other matters,[527] the director of military intelligence reported on intelligence and the chief of police reported on crime.[528] He reported on cases of rape and looting.[529] There is no evidence that any of this information was transferred back to Mr. Bemba, nor that the operational orders being transmitted to the MLC contingent were coming from Gbadolite.

272. [REDACTED].[530] [REDACTED].[531] [REDACTED].[532]

---

[522] T-353-CONF-ENG, 52:16-18.
[523] T-353-CONF-ENG, 59:10-14.
[524] Judgment, para. 411.
[525] T-353-CONF-ENG, 69:11-15.
[526] T-357-CONF-ENG, 69:8-16.
[527] T-357-CONF-ENG, 70:10-25.
[528] T-357-CONF-ENG, 71:20-72:4.
[529] T-357-CONF-ENG, 72:8-13.
[530] T-357-CONF-ENG, 72:21-73:3.

273. [REDACTED] confirmed that the Chief of Staff was subordinate to the Minister of Defence who was in turn subordinate to the President.[533] Complaints of crimes committed should have been made to and investigated by the Central African authorities.[534] The CAR CO was an organ established to allow the Chief of Staff to make decisions.[535] The USP and FACA were responsible for feeding and clothing the MLC soldiers.[536]

274. [REDACTED].[537] [REDACTED].[538] The CAR CO followed the position in the field, especially the position of enemy and friendly troops and where there were problems. [REDACTED].[539]

275. [REDACTED].[540] [REDACTED].[541] [REDACTED].[542] The MLC soldiers who arrived in January came with their arms, but when they ran out the FACA re-supplied them.[543] [REDACTED] testified that "the troops were **placed at the disposal** of the government and they had to be taken to the front. That is what was done with the limited resources at the time."[544]

276. This evidence is devastating to the Trial Chamber's findings that the MLC troops acted independently, that Mr. Bemba had effective control over the MLC contingent, and that the re-subordination of the MLC troops simply never occurred. Having relied on [REDACTED]'s evidence elsewhere, absent corroboration, in

[531] T-357-CONF-ENG, 74:18-24.
[532] T-357-CONF-ENG, 79:1-7.
[533] T-356-CONF-ENG, 65:20-66:3.
[534] T-357-CONF-ENG, 8:7-20.
[535] T-357-CONF-ENG, 20:23-25.
[536] T-354-CONF-ENG, 45:4-10.
[537] T-357-CONF-ENG, 26:20-27:5.
[538] T-357-CONF-ENG, 28:15-21.
[539] T-357-CONF-ENG, 29:25-30:9.
[540] T-357-CONF-ENG, 43:15-20.
[541] T-357-CONF-ENG, 44:20-21.
[542] T-357-CONF-ENG, 46:6-22.
[543] T-357-CONF-ENG, 67:19-68:13.
[544] T-357-CONF-ENG, 55:7-11 (emphasis added).

order to make findings adverse to Mr. Bemba,[545] the Trial Chamber's failure to discuss explicitly and analyse his evidence on central aspects of command, particularly given his direct knowledge of such matters, constitutes a failure to provide a reasoned opinion.[546]

5. [REDACTED]

277. [REDACTED]. [REDACTED]. His assessment that the CAR authorities necessarily would have coordinated and commanded forces on the ground in 2002 undermines the Trial Chamber's finding that Mr. Bemba had effective control over the MLC troops in the CAR.[547]

278. The Chamber's approach to [REDACTED]'s evidence was flawed. It observed that he was "at times, evasive or contradictory in an apparent attempt to distance himself from the events and understate his role and position within the MLC." Accordingly, it considers that particular caution is required in analysing his evidence. [548]

279. Unlike the other witnesses to whom "particular caution" was applied, the Trial Chamber did not consider [REDACTED]'s evidence and then determine whether or not it was corroborated by other credible and consistent proof. Rather, the Trial Chamber gave itself a *carte blanche* to rely on [REDACTED] when he inculpated Mr. Bemba,[549] and disregard (or misstate) his evidence when incompatible with its findings.[550]

---

[545] Judgment, paras. 277-293.
[546] *Perišić* AJ, paras. 93-96.
[547] T-218-CONF-ENG, 44:1-46:21.
[548] Judgment, para. 307.
[549] Judgment, paras. 301, 394-403, 411, 413, 420, 427, 447, 453, 455-456, 529, 565, 576, 582, 586, 590-592, 594-597.
[550] Judgment, paras. 391-393, 399, 599. *See also* T-213-CONF-ENG, 49:16-51:20; T-214-CONF-ENG, 47:14-22; T-217-CONF-ENG, 41:13-21; 44:18-46:3.

280. The most significant misstatement concerns the finding of the MLC General Staff's consultative role in Mr. Bemba's command of the troops in the CAR.[551] The only evidence cited is that of [REDACTED]. [552] The passage referenced does not support the Chamber's finding, but displays a complete disconnect from the operation in Bangui on the part of the MLC General Staff. [REDACTED] lacked basic knowledge about the details of the CAR intervention. He could not name the various military forces available to Patassé. He was unaware of the USP, Miskine's militia, the Balawi or Paul Barril's forces.[553]

281. Moreover, according to him, [REDACTED] had no information about the crossing of troops to the CAR, nor how it was to be paid for.[554] [REDACTED] had no information about the billeting of the troops in Bangui, nor the provision of uniforms,[555] nor any information as to who had given the order to MLC troops to open fire or commence operations.[556] The order to open fire may have come from someone in Bangui.[557] Moreover, [REDACTED] had no knowledge of the weaponry available to MLC troops at the time fighting commenced in the CAR, nor intelligence about the state of the enemy.[558]

282. Crucially, in [REDACTED]'s view ([REDACTED]), different fighting units demanded proper coordination.[559] There would have to have been a command centre in the FACA Staff Headquarters, and a communications plan and a logistics plan overseen by the CAR authorities.[560] The MLC received information from Bangui but it amounted to little more than "keeping in contact", and contained no

[551] Judgment, para. 446.
[552] Judgment, fn. 1242.
[553] T-218-CONF-ENG, 44:9-45:3.
[554] T-218-CONF-ENG, 13:21-24; 14:3-8.
[555] T-218-CONF-ENG, 14:16-22.
[556] T-218-CONF-ENG, 21:5-9.
[557] T-218-CONF-ENG, 22:22-25.
[558] T-218-CONF-ENG, 22:17-21.
[559] T-218-CONF-ENG, 45:6-8.
[560] T-218-CONF-ENG, 45:22-47:3.

acknowledgement of operational orders.[561] The General Staff knew that Moustapha was working in close cooperation with the authorities in Bangui, but not in what way.[562]

283. His testimony on these issues is wholly incompatible with central tenets of the Trial Chamber's theory on Mr. Bemba's effective control, and aligns with that of Generals Seara, [REDACTED], and the contents of the FACA documents.[563] This evidence, [REDACTED], was not considered and weighed against other evidence. It was simply ignored, as part of the Chamber's systematic and erroneous dismissal of evidence supporting Defence theories of command.

284. The Trial Chamber's approach to evidence relating to the command and effective control of MLC troops in the CAR was extraordinary. Presented with military expert evidence and the testimony of those [REDACTED] in the field at the relevant time [REDACTED], as well as contemporaneous records, it preferred instead to place reliance upon civilian [REDACTED], victims, [REDACTED], and [REDACTED] who had barely set foot in the theatre of operations during the conflict. Each of those witnesses, without exception, the Chamber acknowledged, needed to be approached with caution.[564]

285. In doing so, the Trial Chamber summarily dismissed as irrelevant the former categories of evidence by the twin expedients of excluding the evidence altogether, or simply ignoring it.

286. The Trial Chamber thus failed to fulfil its responsibilities under Article 74 of the Statute, or observe its own criteria for dealing with evidence. Far from being holistic, its approach to the evidence on this issue was inappropriately selective and

[561] T-218-CONF-ENG, 58:22-59:2.
[562] T-218-CONF-ENG, 63:25-64:9.
[563] T-218-CONF-ENG, 63:25-64:4.
[564] Judgment, paras. 310-312, 316, 328-329, 337.

injudicious. It did not address Defence submissions on the evidence concerned nor provide any, or any adequate, reasons for its dismissal or ignorance of the evidence concerned. They are accordingly, in each case, errors of law. The Chamber's findings on effective control must be reversed.

C. MR. BEMBA DID NOT HAVE ACTUAL KNOWLEDGE OF THE ALLEGED CRIMES

287. "Actual knowledge" is an extremely high threshold. The more physically distant the commission of the acts, "the more difficult it will be, in the absence of other *indicia*, to establish that the superior had knowledge of them."[565]

288. A finding of "actual knowledge" has usually been reserved as a basis for convicting commanders who ordered the crimes, participated in the crimes, or were present during their commission. In *Čelebići*, Mucić admitted that he was aware that crimes were being committed in the prison camp, and he had personally witnessed detainees being abused.[566] Krnojelac saw a detainee being beaten, and another after he had been severely beaten. He could hear the sounds of beatings through the administrative buildings, and prisoners had obvious resulting physical marks.[567] Naletilić was physically present when prisoners were mistreated by soldiers, and personally participated in the mistreatment.[568]Aleksovski lived in the prison for a period, and witnessed the abuse of prisoners and even encouraged it.[569] Bagosora, Ntabakuze and Nsengiyumva were involved in the authorisation and planning of the crimes in question.[570] Brima was present when crimes were carried out, and was consistently on the ground with his troops.[571] These accused all had "actual

[565] *Hadžihasanović* TJ, para. 94, citing *Aleksovski* TJ, para. 80.
[566] *Čelebići* TJ, para. 769.
[567] *Krnojelac* TJ, paras. 309, 311-312.
[568] *Naletilić & Martinović* TJ, para. 435.
[569] *Aleksovski* TJ, para. 114.
[570] *Bagosora* TJ, paras. 2038-2041, 2065-2067, 2082-2083.
[571] *AFRC* TJ, paras. 1729-1734.

knowledge". It did not need to be presumed, or inferred.[572] It was clear from the facts.

289. The Bemba case is not comparable. This may explain why the Trial Chamber was drawn towards re-characterising to the lower "should have known standard".[573] Mr. Bemba did not order crimes, nor did he participate in their commission. He was nowhere near the crime sites, nor did he see those who had been attacked. He was not only "physically distant" from the crimes, he was in a different country. The evidence does not fit within the "actual knowledge" framework. In reality, it comes nowhere near meeting this standard.

290. Mr. Bemba was seeking accurate information from the field, actively searching for facts and publicly appealing for information. Upon learning of rumors of crimes, he promptly took the actions that a commander acting in good faith would be expected to take. Despite having no independent authority to investigate on another state's territory, he contacted the UNSG Special Representative in the CAR, asking for help in conducting an investigation. He suggested that CAR authorities involve the Central African population, religious communities, and other credible NGOs.[574] He wrote to the CAR Prime Minister asking for an international commission of inquiry.[575] On hearing of the FIDH report of crimes committed by MLC troops, he telephoned its president, Mr. Sidiki Kaba. In a follow-up letter, he offered to work with FIDH to establish the truth of the events in Bangui.[576] No less than three investigative commissions or delegations were dispatched to the field to collect concrete information on what was happening on the ground.[577] The

[572] ICC-01/05-01/08-424, para. 430, citing *Delić* TJ, para. 64; and *Brđanin* TJ, para. 278. *See also Blaškić* AJ, para. 57.
[573] ICC-01/05-01/08-2324; ICC-01/05-01/08-2419; ICC-01/05 01/08-2480; ICC-01/05-01/08-2500.
[574] Judgment, para. 605.
[575] T-267-CONF-ENG, 51:5-8.
[576] Judgment, para. 610.
[577] Judgment, paras. 582, 601, 614.

delegation to Sibut was accompanied, at the MLC's invitation, by members of the international press.[578]

291. If Mr. Bemba had actual knowledge that MLC troops were committing, or about to commit crimes, then publicly appealing to international organisations and officials to conduct their own public investigations would have been foolish. If Mr. Bemba had actual knowledge that the MLC troops were committing, or about to commit crimes, then urging an independent commission of enquiry by the Central Africans was a significant risk. If Mr. Bemba had actual knowledge that the MLC troops were committing widespread rapes and killings in Sibut, then sending a delegation including international journalists to interview the population was not rational. His actions were not those of a man with actual knowledge of crimes. They were the actions of someone who had heard rumors of crimes, and wanted to know whether or not they were true.

1. The Trial Chamber conflates the "actual knowledge" with the "constructive knowledge" (should have known) standard

a) The legal error

292. Having declined to re-characterise the charges,[579] the Trial Chamber was confined to an enquiry of what Mr. Bemba, in the particular circumstances of the case, actually knew.

293. The Trial Chamber heard evidence that Mr. Bemba was aware of allegations of crimes on the part of the MLC troops.[580] It also heard evidence that he was being told that these allegations were untrue.[581] The Trial Chamber's analysis reflects only

[578] Judgment, para. 614.
[579] ICC-01/05-01/08-424, paras. 478-489; ICC-01/05-01/08-2324.
[580] Judgment, paras. 576-578, 709.
[581] T-208-CONF-ENG, 31:8-14; T-302-CONF-ENG, 41:3-13; T-292-CONF-ENG, 53:8-54:2. *See also* ICC-01/05-01/08-3121-Conf , para. 886.

the former. Significantly, therefore, it ignores the effect that corroborated denials of crimes would have had on Mr. Bemba's level of knowledge.

294. This was not insignificant evidence. Denials came from President Patassé,[582] [REDACTED],[583] and Mr. Bemba's trusted MLC advisors sent to the field to determine the truth of the allegations.[584] This bears comparison to generalised allegations of crimes, circulated predominantly by the press and human rights organisations, often relying on anonymous or unknown sources.[585]

295. The Trial Chamber's incorrect approach to the evidence arose from a basic legal error. It conflated the "actual knowledge" standard with the "constructive" (or should have known) standard. Under the latter, knowledge is "construed" or inferred from reliable and concrete information. If sufficient information exists, a finder of fact may conclude that the commander "should have known" (but not that he actually knew). The Chamber's conceptual conflation shifted the focus to a classic "should have known" enquiry; looking primarily at the state of information available at the time to see whether the superior had sufficient notice of the actions of his subordinates to warrant criminal culpability.[586] As such, the Trial Chamber disregarded evidence that Mr. Bemba was being told that the allegations were baseless.

296. In fact, this evidence exists, and is directly relevant to an assessment of whether or not Mr. Bemba "knew". The Trial Chamber's failure to consider this evidence and provide a reasoned opinion as to its impact on its assessment of Mr.

---

582 EVD-T-OTP-00576/CAR-OTP-0031-0099 at 03:12-04:00. French transcript, EVD-T-CHM-00040/CAR-OTP-0036-0041 at 0044 (English translation can be found at CAR-OTP-0056-0287 at 0290-0291); EVD-T-OTP-00448/CAR-OTP-0013-0161 at 0162-0163; T-96-CONF-ENG, 4:10-14.
583 T-292-CONF-ENG, 53:8-54:2.
584 Judgment, paras. 589, 601, 603, 614-615.
585 Judgment, paras. 576-578, 709.
586 Judgment, paras. 576-581, 707, 717.

Bemba's knowledge is a significant legal error, which undermines its finding in its entirety.

b) The evidence that was erroneously ignored

297. A seminal moment in the hearing of evidence in this case was a series of questions posed by Her Honour Judge Ozaki [REDACTED]. On [REDACTED]'s seventh day of testimony, Judge Ozaki asked questions about Mr. Bemba's level of knowledge. Specifically, whether or not Mr. Bemba had discussed rumours of crimes:[587]

> JUDGE OZAKI: […][REDACTED] […]
>
> THE WITNESS: (Interpretation) Thank you, Madam President. This is what I was saying: [REDACTED].

298. This is [REDACTED] testimony of a conversation between [REDACTED], which directly concerns the state of Mr. Bemba's knowledge of crimes committed by his troops. It is absent from the Trial Chamber's reasoning.

299. [REDACTED]'s insistence that the rumours of crimes were baseless, and "nothing of that sort had happened",[588] mirrored what President Patassé was saying. In an RFI broadcast, Patassé tells journalists to "Go to PK12!" so that they can see Mr. Bemba's men who are "in step with the local people". He says that rumours and allegations are "all lies yet again".[589]

300. In another interview with the Editor-in-Chief of *Jeune Afrique l'Intelligent* and a journalist from RFI's website, (also published in *Le Confident* on 24 February 2003), Patassé says that Mr. Bemba came to Bangui and punished some soldiers, but the allegations are all lies, and the population is cheering Mr. Bemba's men. He says

[587] T-292-CONF-ENG, 53:8-22.
[588] T-292-CONF-ENG, 54:1.
[589] EVD-T-OTP-00576/CAR-OTP-0031-0099 at 03:12-04:00. French transcript, EVD-T-CHM-00040/CAR-OTP-0036-0041 at 0044 (English translation can be found at CAR-OTP-0056-0287 at 0290-0291).

that a report from his Ministry of Defence reveals that claims are exaggerated, but he has sent a new commission to investigate allegations of crimes.[590] P6 remembered these statements, and that Patassé said publicly at the time that his people lived in harmony with Bemba's soldiers.[591]

301. The Trial Chamber found that Mr. Bemba was following the international media.[592] As such, he would have been aware of the value placed by Patassé' on these allegations. This evidence goes directly to the question of whether Mr. Bemba "knew" his troops were committing crimes. It is, again, ignored.

302. Mr. Bemba was also told the rumours were false from trusted senior MLC members who were sent to CAR to investigate their veracity.[593] The officers ordered by Mr. Bemba to conduct inquiries had a military duty to investigate appropriately. They could be held criminally responsible for poor investigations or passing inaccurate information. In that context, Mr. Bemba was entitled to rely on their assurances. A finding of actual knowledge that fails to take into account this military context injects legal error.

303. A commission of enquiry was sent to Bangui, headed by Colonel Mondonga. Seven soldiers were arrested for pillage as a result. There were no findings that rape or killings had occurred; nothing coming close to what some press was reporting at the time.[594]

304. Mr. Bemba sent a further investigative commission to Zongo, [REDACTED],[595] to investigate the allegations that pillaged goods from the CAR were entering the

[590] EVD-T-OTP-00448/CAR-OTP-0013-0161 at 0162-0163.
[591] T-96-CONF-ENG, 4:10-14.
[592] Judgment, para. 576.
[593] T-208-CONF-ENG, 31:8-14; T-302-CONF-ENG, 41:3-13; T-292-CONF-ENG, 53:8-54:2.
[594] Judgment, para. 589.
[595] T-267-CONF-ENG, 31:5-33:22.

DRC.[596] The commission reported that it was unable to establish that MLC soldiers pillaged, and that France and the political opponents of the CAR had developed a campaign of "demonization" to tarnish President Patassé's regime.[597]

305. Mr. Bemba then dispatched a delegation of MLC soldiers and officials, accompanied by reporters (including Gabriel Khan from RFI),[598] to Sibut. The delegation reported back to Mr. Bemba that Bozizé's soldiers were generally responsible for the crimes; the population considered themselves "liberated" by the MLC; only some MLC soldiers had "misbehaved"; and the relevant officers had already addressed this.[599]

306. None of these facts are taken into account in assessing the state of Mr. Bemba's knowledge. Time and time again, he was told that the rumours of crimes were baseless. [REDACTED], the CAR Head of State, his trusted senior advisors tasked with looking into the situation; each was assuring him that nothing of the sort was happening. This evidence is patently relevant to an assessment of whether he "knew" that his troops were committing crimes. The Trial Chamber, however, was viewing this evidence through a "should have known" lens. As such this evidence is erroneously discounted.

307. Any fair-minded assessment of the evidence into the state of a commander's knowledge of crimes would consider all the information he received. Mr. Bemba was being told by people with direct knowledge of the situation on the ground, and who were trusted advisors, that MLC troops were not committing offences and the rumours were unfounded. The Trial Chamber was entitled to consider and reject this evidence. In accepting the unconfirmed evidence of reports as *prima facie*

[596] Judgment, para. 601.
[597] Judgment, para. 603.
[598] Judgment, para. 614.
[599] Judgment, para. 615.

evidence of actual knowledge, the Trial Chamber commits legal error by shifting the burden of proof onto Mr. Bemba.

308. This error does not just affect the Trial Chamber's reliance on media allegations and NGO reports as a source of Mr. Bemba's actual knowledge. It cannot be discounted that corroborated denials of crimes from sources of this standing would have tainted all information that Mr. Bemba was receiving, whether from the media, NGOs, or MLC "intelligence reports".[600] The Trial Chamber's reliance on the fact that Mr. Bemba could communicate with his troops in the field,[601] is undermined entirely by its failure to consider evidence that he was being told that nothing criminally relevant was happening.[602] In these circumstances, Mr. Bemba acted precisely in the manner that a geographically remote commander acting in good faith to uphold the laws and customs of war should act. This error infects the entirety of the Trial Chamber's finding on Mr. Bemba's *mens rea*, and warrants the reversal of this finding by the Appeals Chamber.

2. The facts as found by the Trial Chamber do not support a finding of actual knowledge

a) The findings on RFI's reporting misstate the evidence

309. The majority of international media reports cited by the Trial Chamber as "consistently report[ing] allegations that MLC soldiers were committing acts of pillaging, rape, and murder" are from *Radio France Internationale*.[603]

310. RFI had a history of inaccurate reporting about the MLC. The Trial Chamber acknowledges the evidence of two witnesses, D18 and P15, who spoke of this bias,

[600] Judgment, paras. 708-709, 717.
[601] Judgment, para. 707.
[602] T-292-CONF-ENG, 53:8-22.
[603] Judgment, para. 576.

and the internal suspicion of RFI within the MLC.[604] Together, their evidence is deemed "insufficient" to support a suggestion that Mr. Bemba disbelieved RFI reports.[605]

311. P15 and D18's evidence is dismissed, *inter alia*, on the basis that other media reports published during the conflict were generally consistent with that reported by RFI.[606] The Trial Chamber fails to consider syndication of reporting. Its reasoning would require every news outlet to have a reporter, or source, in every location from which its stories are filed. In fact, the Trial Chamber relies on syndicated reports. It cites, for example, media articles from the BBC with the "Original Source" or "Text of Report" listed as "Radio France Internationale, Paris".[607] News agencies were reporting what RFI was reporting. All Africa cites to IRIN;[608] IRIN cites to Radio Centrafrique;[609] BCC cites to Misna.[610] The "consistency" of content means nothing.

312. In any event, the Trial Chamber's reasoning fails to consider a wealth of other corroborative evidence demonstrating why Mr. Bemba would have disbelieved the media reports of RFI. Four other witnesses – D48, D49, D21 and P33 – testified about false reporting by RFI of MLC crimes, and the suspicion with which RFI "news" was regarded within the MLC. Their testimony corroborates P15's evidence that, contemporaneously with the CAR incursion, RFI reporters spread false accusations of cannibalism, which were later retracted.[611] The Trial Chamber not only ignores this testimony, it ignores the corroborative messages in the MLC

---

[604] Judgment, paras. 579-580.
[605] Judgment, para. 581.
[606] Judgment, para. 580.
[607] Judgment, para. 576, fn. 1777, citing EVD-T-OTP-00427/CAR-OTP-0008-0413, and EVD-T-OTP-00407/CAR-OTP-0004-0667. *See also* Judgment, para. 403, fn. 1060, citing EVD-T-OTP-00425/CAR-OTP-0008-0409.
[608] Judgment, para. 576, fn. 1777, citing EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0679-0680.
[609] Judgment, para. 576, fn. 1777, citing EVD-T-OTP-00438/CAR-OTP-0011-0293.
[610] Judgment, para. 576, fn. 1777, citing EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0669.
[611] T-210-CONF-ENG, 52:1-53:25; T-267-CONF-ENG, 70:9-71:19; T-272-CONF-ENG, 60:11-62:13; T-306-CONF-ENG, 83:7-22.

logbooks which show the surprise of the commander in Isiro upon hearing of RFI's cannibalism allegations,[612] and a further message describing a meeting between MONUC and the individuals who were alleged to have been eaten.[613]

313. The four witnesses ignored by the Trial Chamber provide an interesting insight into RFI's motivation for repeatedly slandering the MLC. P33 called it "political warfare" with allegations being "raised in order to tarnish the image of the movement".[614] D49 attributed it to "dirty politics",[615] with D21 characterising it as "lies designed for political reasons."[616] P15 considered these stories the result of manipulation by the leaders of the RDC K/ML who used the media "for political purposes."[617]

314. This is evidence from those within the leadership of the MLC, testifying as to how the RFI allegations were viewed at the time. It is undoubtedly relevant to any assessment of how Mr. Bemba viewed RFI (or indeed any) media reports, and whether sufficient evidence supports a finding that he "knew" that his troops were committing or about to commit crimes. To simply ignore this evidence was not a path open to a reasonable Trial Chamber.

315. Further evidence of RFI's false reporting was ignored. The MLC delegation to Sibut returned to Gbadolite with a video recording of their mission.[618] This video was given to Mr. Bemba.[619] In one excerpt, a civil servant recounts that:[620]

> Let me tell you, first of all, Mr Journalist, that the clear distinction between what we hear over radio, be it RFI or

[612] EVD-T-OTP-00703/CAR-D04-0002-1641 at 1702.
[613] EVD-T-OTP-00703/CAR-D04-0002-1641 at 1736. *See also* T-210-CONF-ENG, 53:1-3; T-267-CONF-ENG, 70:21-71:19.
[614] T-162-CONF-ENG, 6:18-7:4.
[615] T-272-CONF-ENG, 60:11-62:13.
[616] T-306-CONF-ENG, 83:7-22.
[617] T-210-CONF-ENG, 53:1-25.
[618] Judgment, para. 616.
[619] T-302-CONF-ENG, 41:5-13.
[620] EVD-T-D04-00008/CAR-DEF-0001-0832 at 39.20 to 42.18 minutes.

> 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.

316. The Chamber's focus should have been on what Mr. Bemba actually knew at the time. He knew that in 2001, RFI had spread false rumours about the MLC in Bangui, which then were retracted.[621] He knew that RFI was contemporaneously lying about allegations of cannibalism, which again were retracted.[622] The Sibut mission confirmed that the allegations made by RFI of widespread abuse against civilians in Sibut and Bozoum, including murder,[623] were untrue.[624] This would undoubtedly colour his assessment of reports of crimes in the CAR, regardless of their ultimate veracity. The finding of Mr. Bemba's actual knowledge constitutes legal error.

b) The Trial Chamber's reliance on the 'Mongoumba' attack misstates the evidence

317. According to the Trial Chamber, "in March 2003, Mr Bemba knew of the punitive attack on Mongoumba, where only civilians were present at the time, being in constant contact with Colonel Moustapha the day before and the day of the

[621] Judgment, para. 579, fn. 1789, citing T-319, 28:6-12.
[622] T-210-CONF-ENG, 53:1-25; T-267-CONF-ENG, 70:9-71:19; T-272-CONF-ENG, 60:11-62:13; T-306-CONF-ENG, 83:7-22; T-162-CONF-ENG, 6:18-7:4.
[623] Judgment, para. 715.
[624] Judgment, para. 715. *See also* T-208-CONF-ENG, 31:8-14.

attack."[625] The Chamber considered this "to be indicative that Mr Bemba knew that his forces would commit crimes against civilians in the course of the attack."[626] There is no evidence that Mr. Bemba knew that all other armed forces had left this area. There are certainly no findings on this point.

318. The "constant contact" between Mr. Bemba and Moustapha is, at most,[627] 13 minutes the day before the alleged incident, and 17 minutes on the day.[628] Leaving aside whether a reasonable Trial Chamber could characterise 30 minutes over 48 hours as "constant contact", this is a terribly thin wedge upon which to base a finding that Mr. Bemba "knew" that his troops would commit crimes against civilians.

319. This evidence comes from phone logs, not phone intercepts; a number connecting with another number.[629] There is no evidence that it was Mr. Bemba speaking on the phone, and not someone else from the MLC Etat Major, or the MLC at large. These possibilities cannot reasonably be excluded. The phone logs provide no indication of the content of discussions. It cannot reasonably be excluded that the 30 minutes demonstrate nothing more than the time taken for whoever answered to attempt to locate Moustapha, and come back and report that he was unavailable. Even if Mr. Bemba and Moustapha did spend this 30 minutes speaking, it cannot reasonably be excluded that they were talking about other things, particularly given that Moustapha was in Zongo, and not Mongoumba.[630] Even if they had been speaking about Mongoumba, there is simply no evidential basis upon which to conclude that they were speaking about an alleged plan to attack civilians.

[625] Judgment, para. 716.
[626] Judgment, para. 716.
[627] ICC-01/05-01/08-3121-Conf, paras. 740-747.
[628] Judgment, para. 541.
[629] Judgment, para. 541.
[630] Judgment, para. 537.

320. There are too many leaps. There are too many unknowns. Certainly, it is not the only reasonable conclusion that, on the basis of a phone log, "Mr. Bemba knew that his forces would commit crimes against civilians".[631] No reasonable Trial Chamber would have found that the "only reasonable conclusion"[632] was that Mr. Bemba knew of the attack on Mongoumba, and then taken an unexplained leap to finding that he "knew that his forces would commit crimes against civilians in the course of the attack".[633] The Trial Chamber misappreciated the evidence, and erred in relying on the attack on Mongoumba as a basis of Mr. Bemba's actual knowledge.

c) No reasonable Trial Chamber could have found that Mr. Bemba had actual knowledge that the MLC were committing murder

321. A superior is required to have knowledge that his troops were committing or about to commit the crimes with which he is charged.[634] It is not the case that a superior's knowledge that his troops were committing pillage as a war crime, for example, can suffice to form the basis of a conviction for murder as a crime against humanity. The object of knowledge is the crime charged.[635]

322. The Trial Chamber's error lies in its approach. Packaging together all evidence of any reports of MLC crimes, the Trial Chamber concluded in sweeping terms that throughout the 2002-2003 Operation, Mr. Bemba knew that the MLC forces "were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging."[636]

323. The Trial Chamber erred in failing specifically to enquire whether sufficient evidence supported a finding that Mr. Bemba had actual knowledge that the MLC

[631] Judgment, para. 716.
[632] Judgment, para. 541.
[633] Judgment, para. 716.
[634] *Krnojelac* AJ, para. 155; *Strugar* TJ, para. 417; *AFRC* TJ, para. 792; *Kordić & Čerkez* TJ, para. 427; *Gacumbitsi* AJ, para. 143.
[635] Khan QC, K. and Dixon, R., Archbold International Criminal Courts: Practice, Procedure and Evidence, p. 961; Meloni, C, Command Responsibility in International Criminal Law, p. 189; Mettraux, G., The law of command responsibility, p. 200.
[636] Judgment, para. 717.

troops were committing or about to commit murder, as opposed to rape or pillage. The Trial Chamber asserts, for example, that the intelligence reports Mr. Bemba was receiving referred to "theft, pillaging, rape, the killing of civilians, harassment of persons, and the transportation of looted goods."[637] The evidence cited, however, refers almost exclusively to theft, looting and harassment.[638] The media reports which "consistently reported allegations that MLC soldiers were committing acts of pillaging, rape, and murder", regularly refer to only pillage and/or rape.[639] There were no credible reports of murder committed by MLC troops sufficient to support a finding of actual knowledge.

324. The Trial Chamber also failed to consider whether any evidence would cast doubt on such a finding. Sibut is a glaring example. The Chamber accepts that Mr. Bemba established the Sibut mission in response to media reports of MLC abuses against the civilian population in Sibut and Bozoum, including murder.[640] It then accepted that those interviewed during the Sibut Mission largely refuted allegations of crimes by MLC soldiers, but some also claimed that the MLC soldiers committed

[637] Judgment, para. 425.
[638] Judgment, para. 425, fn. 1175.
[639] Judgment, para. 576, fn. 1777, citing EVD-T-OTP-00438/CAR-OTP-0011-0293 which is an IRIN Africa article, dated 31 October 2002 which refers only to pillaging; EVD-T-OTP-00821/CAR-OTP-0030-0274, which is a BBC News article published on 1 November 2002 which refers to pillage and serious violence; EVD-T-OTP-00575/CAR-OTP-0031-0093, track 4, from 00:04:46 to 00:06:32, which is an RFI program from 2 November 2002 which refers to pillaging; EVD-T-OTP-00575/CAR-OTP-0031-0093, track 5, which is an RFI program from 3 November 2002, transcribed and translated into English at EVD-T-CHM-00019/CAR-OTP-0056-0278, at 0280, which speaks of pillage and rape; EVD-T-OTP-00427/CAR-OTP-0008-0413, which is a BBC article published on 4 November 2002 which refers to pillage and rape; EVD-T-OTP-00413/CAR-OTP-0005-0133, which is an RFI article published on 5 November 2002, which refers to pillage and rapes; EVD-T-OTP-00407/CAR-OTP-0004-0667, at 0669, a BBC article published on 6 November 2002, which refers to pillage and rapes; EVD-T-OTP-00407/CAR-OTP-0004-0667, at 0669 to 0671, which is an AP article published on 8 November 2002 which refers to pillage and rapes; EVD-T-OTP-00407/CAR-OTP-0004-0667, at 0671 to 0673, which is a Contra Costa Times article published on 11 November 2002 which refers to pillage and rapes; EVD-T-OTP-00407/CAR-OTP-0004-0667, at 0673 to 0675, a Comtex News article published on 15 November 2002 which refers to pillage, rapes and "many cruel acts"; EVD-T-OTP-00407/CAR-OTP-0004-0667, at 0675 to 0676 which is a BBC article published on 16 November 2002 which refers to reports of atrocities; EVD-T-OTP-00407/CAR-OTP-0004-0667, at 0676 to 0679, which is a Comtex News article published on 28 November 2002 which refers to theft, pillage and rapes.
[640] Judgment, para. 715.

abuses against civilians in Sibut, in particular, pillaging.[641] This undermined its conclusion that Mr. Bemba had actual knowledge of murder. He heard allegations of murder. He sent a mission to investigate. He was told it is not true. These facts, as accepted by the Trial Chamber, must cast doubt on any finding that Mr. Bemba "knew" that his troops were committing murder. A reasonable Trial Chamber would have at least explained why they did not.

D. MR. BEMBA TOOK NECESSARY AND REASONABLE MEASURES

325. Having received rumours of criminal activity by his troops, Mr. Bemba went quickly to the field to speak to them directly, on or around 2 November 2002.[642]

326. The Trial Chamber accepted that Mr. Bemba told the surrounding population in French that he was concerned about their complaints, which would be addressed. He then spoke to the troops, in Lingala.[643] He acknowledged that rumours of crimes had reached Gbadolite, and "warned the troops against further misconduct".[644] He talked to the troops about "courage and conduct" and "reminded them that their mission in the CAR was to protect the population and their property".[645]

327. This was the first in a litany of measures which included the arrest, public trial and imprisonment of the only troops ever identified as having been involved in crimes;[646] three separate investigations and delegations sent to gather credible information as to the veracity of rumours of crimes;[647] and personal pleas from Mr. Bemba to the head of FIDH and the UNSG Special Representative in the CAR to provide the MLC with any information so that measures could be taken, and to

[641] Judgment, para. 715.
[642] Judgment, para. 590.
[643] Judgment, para. 595, fn. 1848 citing T-52, 16:22-17:1; 18:13-21; 20:16-20.
[644] Judgment, para. 594.
[645] Judgment, para. 595, fn. 1848, citing T-285, 5:20-25; T-293, 12:21-24.
[646] Judgment, para. 597.
[647] Judgment, paras. 582, 601, 614.

solicit assistance in further investigations.[648] Regardless, the Trial Chamber found that Mr. Bemba failed in his duty to take necessary and reasonable measures.[649]

328. In the vast majority of international command cases, the commander in question either took **no measures** to prevent or punish the crimes of subordinates, or was **participating or present** when the crimes were committed. The Trial Chamber found no evidence suggesting that the commander Mucić "**ever** took appropriate action to punish anyone for mistreating prisoners."[650] General Pavle Strugar, a JNA commander in Dubrovnik,[651] "**failed entirely** to take reasonable measures,"[652] and chose "to take **no action of any type**".[653]

329. Milorad Krnojelac, commander of a Serb-run camp,[654] "failed to take **any appropriate measures** to stop the guards from beating and mistreating detainees"[655] and took no steps to punish. General Blaškić commanded soldiers and Military Police implicated in illegal attacks.[656] "**At no time did he take even the most basic measure**."[657]

330. Mladen Naletilić was "**present** during instances of plunder," but "**disregarded** his duties of taking reasonable measures".[658] Vinko Martinović was "**present** on some occasions when his soldiers committed acts of looting", and "**failed to take** the necessary and reasonable measures."[659]

---

[648] Judgment, paras. 605, 610; T-267-CONF-ENG, 54:23-55:10 ; T-269-CONF-ENG, 55:5-8.
[649] Judgment, para. 734.
[650] *Čelebići* TJ, para. 772 (emphasis added).
[651] *Strugar* TJ, para. 2.
[652] *Strugar* TJ, para. 434.
[653] *Strugar* TJ, paras. 444, 446 (emphasis added).
[654] *Krnojelac* TJ, para. 96.
[655] *Krnojelac* TJ, para. 318 (emphasis added).
[656] *Blaškić* TJ, paras. 9, 452.
[657] *Blaškić* TJ, para. 754 (emphasis added).
[658] *Naletilić & Martinović* TJ, para. 631 (emphasis added).
[659] *Naletilić & Martinović* TJ, para. 628 (emphasis added).

331. Zlatko Aleksovski, a Bosnian Croat prison commander,[660] "took **no measures** to prevent the crimes committed. Nor did the accused use everything in his power to attempt to punish the guards responsible for them." Ljubomir Borovčanin was the Deputy Commander of a Special Police Brigade.[661] When confronted with a pile of dead bodies, he "**did not report anything to anyone**."[662] Vinko Pandurević was the commander of the Zvornik Brigade during the Srebrenica massacre.[663] There was **no evidence** to indicate that he "**took any steps** to prevent or stop the participation of members of the Zvornik Brigade in the detention, execution, and burial of the prisoners."[664]

332. General Rasim Delić was the Commander of the Main Staff of the Army of BiH.[665] Under his watch, "**nothing was done or even attempted to be done**" to prevent or punish alleged violations of IHL during the detention of enemy soldiers and civilians.[666] There was "**no evidence**" that any subordinates "were subjected to disciplinary or criminal proceedings".[667] Miodrag Jokić was the Commander of the 9th Military Naval Sector, responsible for attacking Dubrovnik. **No investigation** initiated following the shelling of the Old Town, **nor were any disciplinary measures taken, to punish**.[668]

333. Clément Kayishema was the *préfet* of Kibuye *préfecture*,[669] for whom "**no evidence was adduced that he attempted to prevent** the atrocities that he knew were about to occur and were within his power to prevent",[670] and "**no action was**

[660] *Aleksovski* TJ, paras. 86, 93 (emphasis added).
[661] *Popović* TJ, para. 1434.
[662] *Popović* TJ, paras. 1574-1576 (emphasis added).
[663] *Popović* TJ, para. 147.
[664] *Popović* TJ, para. 2044 (emphasis added).
[665] *Delić* TJ, para. 101.
[666] *Delić* TJ, paras. 468, 550 (emphasis added).
[667] *Delić* TJ, para. 554 (emphasis added).
[668] *Jokić* SJ, para. 24.
[669] *Kayishema & Ruzindana* TJ, para. 9.
[670] *Kayishema & Ruzindana* TJ, para. 513 (emphasis added).

commenced" which might have brought those responsible to justice."[671] Alfred Musema was the director of a Rwandan state-owned tea factory.[672] He not only "**failed to take** necessary and reasonable measures to prevent the commission of said acts by his subordinates."[673]

334. Colonel Théoneste Bagosora was the former *directeur du cabinet* in the Rwandan MINADEF, Major Aloys Ntabakuze was the commander of the Para Commando Battalion within the FAR, and Colonel Anatole Nsengiyumva was the Commander of military operations for Gisenyi. Each "failed in his duty to prevent the crimes because **he in fact participated** in them. There is **absolutely no evidence** that the perpetrators were punished afterwards."[674]

335. Alex Tamba Brima was a Staff Sergeant of the AFRC in Sierra Leone.[675] His appointment of a provost marshal to enforce rules regarding "which troops were entitled to rape civilians or prohibited rape at specified times" was "**indicative of the tolerance and institutionalised nature of the commission of the crimes** within the AFRC forces."[676] Santigie Borbor Kanu was a senior commander in the AFRC.[677] He **failed** to take the necessary and reasonable measures" to prevent or punish crimes, and in fact "**presided over a system that institutionalised serious abuse** of civilians."[678]

336. Mr. Bemba stands alone in terms of the measures he took following the receipt of allegations of criminal conduct by MLC troops. The disparity between the efforts he made, and those commanders who did absolutely nothing, is striking.

---

[671] *Kayishema & Ruzindana* TJ, para. 514 (emphasis added).
[672] *Musema* TJ, para. 12.
[673] *Musema* TJ, paras. 895, 899-901, 905, 914, 916, 919 (emphasis added).
[674] *Bagosora* TJ, paras. 2040, 2067, 2083 (emphasis added).
[675] *ARFC* TJ, para. 332.
[676] *AFRC* TJ, para. 1741 (emphasis added).
[677] *AFRC* TJ, para. 526 (emphasis added).
[678] *AFRC* TJ, para. 2041-2042 (emphasis added).

337. These cases aside, the finding that Mr. Bemba failed to take necessary and reasonable measures is manifestly unreasonable when viewed objectively against the evidence. Again, the Trial Chamber ignored directly relevant evidence and failed to give a reasoned opinion as to why its findings are still reliable. More fundamentally, it is based on a flawed interpretation of the relevant law, warranting its reversal.

1. The Trial Chamber failed to assess Mr. Bemba's conduct against the correct legal standard

338. A commander's duty under the laws of war to prevent and punish crimes entails an obligation to take such measures that are feasible, and appropriate in the circumstances. The duty is restricted to measures reasonably falling within the commander's power, meaning those which are "within his material possibility".[679] A commander is not obliged to perform the impossible.[680]

339. This central idea - that the scope of reasonable measures is tempered by considerations of what was feasible and possible in the circumstances - was absent from the Trial Chamber's reasoning. Its enunciation of the law recognises that a commander's measures must be assessed on a case-by-case basis and within his

[679] Additional Protocol I, Article 86(2), Article 87; ICRC, Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), para. 3543, para. 3548: "Using relatively broad language, the clause requires both preventive and repressive action. However, it reasonably restricts the obligation upon superiors to "feasible" measures, since it is not always possible to prevent a breach or punish the perpetrators. In addition, it is a matter of common sense that the measures concerned are described as those "within their power"; and only those […]. *Halilović* AJ, paras. 63; *Orić* AJ, para. 177; *Popović* AJ, para. 1932; *Blaškić* AJ, paras. 72, 417; *Hadžihasanović* AJ, paras. 33, 142; *Kayishema & Ruzindana* AJ, para. 302; *Bagosora* AJ, para. 672; *Naletilić & Martinović* TJ, paras. 76-77; *Aleksovski* TJ, para. 81; *Boškoski* TJ, para. 415; *see also Boškoski* AJ, para. 230; *Čelebići* TJ, para. 395; *Delić* TJ, para. 76; *Limaj* TJ, para. 526; *Stakić* TJ, para. 461; *Strugar* TJ, para. 372; *Kordić & Čerkez* TJ, para. 442; *Krnojelac* TJ, para. 95; *Mrkšić* TJ, para. 565; *Blagojević* TJ, para. 793; *Brđanin* TJ, para. 279; *Đordević* TJ, para. 1887; *AFRC* TJ, para. 798; *Nuon Chea and Khieu Samphan* TJ, para. 716. *See also In re Yamashita*, 327 US 1 (1945), at 16: "such measures […] within his power and appropriate in the circumstances"; *US v. Karl Brandt et al.*, in TWC, Vol. II, p. 212: "The law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command…".

[680] *Blaškić* AJ, para. 417, citing *Čelebići* TJ, para. 395; *Blagojević* TJ, para. 793.

power, but goes no further.[681] More significantly, in assessing Mr. Bemba's measures, the Trial Chamber fails to consider any of the limitations arising from the unique conditions of this case, nor makes any assessment of what was feasible in Mr. Bemba's objectively exceptional circumstances.

340. Rather, the Trial Chamber's approach was to point out apparent flaws in each of the measures taken, lay each of those failings at Mr. Bemba's feet, and then draft a list of hypothetical measures which, in its view, were "necessary and reasonable." The Trial Chamber operated with the benefit of hindsight from its *post hoc* position of superior information rather than that which was available to Mr. Bemba at the time. In doing so, the Trial Chamber fixed criminal responsibility on the basis of its own conjecture. There are two problems with this approach.

341. Firstly, Mr. Bemba is not required to undertake every possible measure that can be conceived by jurists looking at the facts with hindsight a decade after their occurrence (*ex post*). Speculation will always be possible. The legal test against which Mr. Bemba's conduct should have been evaluated was what was feasible in the circumstances prevailing at that time (*ex ante*), and based on the information reasonably available to him. It was not the Trial Chamber's role to speculate, on no apparent evidential basis, as to what measures it thought would have stemmed or mitigated the commission of crimes, and then evaluate Mr. Bemba's conduct against this hypothetical list. Its focus should have been on the circumstances at the time, and whether Mr. Bemba took steps which were feasible and practicable **at that time**. Having failed to do so, the Trial Chamber committed a legal error.

342. Secondly, in grounding his conviction on a list of measures which he theoretically should have taken, the Trial Chamber has deprived Mr. Bemba of the opportunity to present evidence as to why these measures were not practicable, appropriate, possible (or even legal) in the circumstances.

[681] Judgment, paras. 197-201.

343. For example, in reading his conviction Mr. Bemba was informed for the first time that his conduct was being impugned on the basis of a failure to alter the deployment of troops to minimise contact with the civilian population.[682] Even accepting that Mr. Bemba had operational control over the MLC contingent (a premise which remains unsupported by the evidence), and leaving aside the lack of evidence that Mr. Bemba knew where civilians lived in the CAR, there is no basis to find that he could have unilaterally redesigned the deployment of the MLC troops who were acting as part of a larger contingent, without putting lives at risk from instances of friendly fire.

344. Had Mr. Bemba known of the allegation that his duty to take necessary and reasonable measures encompassed altering the deployment of troops, he could have lead evidence demonstrating this to have been impossible. In depriving him of the opportunity, the Trial Chamber committed a legal error.

2. The Trial Chamber misappreciated the limitations on the MLC's jurisdiction and competence to investigate

345. The Trial Chamber's failure to be guided by the correct legal standard contaminated its assessment of the evidence. Unbridled by considerations of what was feasible in the circumstances, the Trial Chamber viewed Mr. Bemba's ability to investigate in the CAR as being limitless.

346. Defence submissions as to the obstacles faced by MLC investigations at the time, and limitations arising from basic notions of state sovereignty, jurisdiction, and the practical difficulties arising from investigating in a foreign warzone,[683] were dismissed. The Trial Chamber relied on the fact that Mr. Bemba "could and did create commissions and missions in relation to allegations of crimes, two of which

[682] Judgment, para. 729.
[683] ICC-01/05-01/08-3121-Conf, paras. 920-932.

operated in CAR territory at the height of the 2002-2003 CAR Operation."[684] He was impugned for failing to initiate "genuine and full investigations into the commission of crimes".[685]

347. The idea that armed MLC soldiers were able to insert themselves into a warzone in a third state and ask civilians if they had been the victim of a crime, without inviting armed attack, arrest, or risking an international incident, is unreasonable. The likelihood of Central African civilians, let alone victims of crime, voluntarily submitting to an interview with foreign, armed soldiers is remote, particularly in such traumatic times. How were these civilians to be found? The Trial Chamber accepted that the MLC contingent needed assistance from the FACA to guide them through the CAR.[686] Any investigative mission needed the same assistance. There were linguistic barriers to overcome. The idea that the MLC had an unlimited and unilateral ability to take preventative and punitive measures on Central African territory strains the boundaries of credulity for a Trial Chamber assessing the available evidence.

348. It becomes even more difficult to accept in the face of corroborated Prosecution, Defence and expert evidence that the MLC's ability to take measures within CAR territory was limited, and dependent on cooperation with the CAR authorities. None of this evidence forms part of the Trial Chamber's analysis. Like so much evidence which is incompatible with the Trial Chamber's theories, it features nowhere in the Judgment. This is a significant omission. The law requires that a commander take those measures which are "within his material possibility". Actual limitations on his ability to take certain measures must necessarily form part of a reasonable Trial Chamber's analysis.

[684] Judgment, para. 732.
[685] Judgment, para. 729.
[686] Judgment, para. 411.

349. P36 gave comprehensive testimony on this point. According to him, the MLC's investigative efforts were dependent on the Central African authorities for access, movement, and contact with civilians.[687] Mr. Bemba responded to allegations of crimes by deciding that "a joint committee would be set up to investigate", "made up of both people from the Central African Republic and people from the Congo."[688] Mr. Bemba insisted that this initial commission, of which Colonel Mondonga formed a part, "had to be mixed".[689] This testimony was ignored.

350. D48 explained the same limitations to the Trial Chamber. In reference to the Zongo Commission, tasked with determining whether pillaged goods had crossed to Zongo in the DRC, D48 testified that this commission was not able to investigate cases of rape "because it had no mandate whatsoever to go into the CAR" and that it "wouldn't be possible" unilaterally to investigate rapes committed on the soil of a foreign nation.[690] Collaboration and cooperation would have been a prerequisite of any such investigation *in situ*. This evidence was again, ignored.

351. P36 and D48's testimony is corroborated by the contemporaneous report of the Zongo Commission.[691] This report referenced the earlier Mondonga Inquiry and called it "une commission mixte composée des élements de la FACA (Forces Armées Centrafricaines) et ALC".[692] The Trial Chamber was aware of this report. It is relied upon on numerous occasions to make findings adverse to Mr. Bemba.[693] This exculpatory detail, that it was a joint commission, is skipped over.

352. Similarly, General Seara's report explained that:[694]

[687] T-218-CONF-ENG, 39:15-19.
[688] T-215-CONF-ENG, 6:12-15.
[689] T-218-CONF-ENG, 40:6-7.
[690] T-267-CONF-ENG, 47:14-17.
[691] EVD-T-OTP-00392/CAR-DEF-0001-0155.
[692] EVD-T-OTP-00392/CAR-DEF-0001-0155 at 0157.
[693] Judgment, paras. 601-603.
[694] 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.

353. Separate from Seara's expert report, this evidence from P36, D48, and the Zongo Commission Report provide the backdrop against which the legal sufficiency of Mr. Bemba's measures should have been assessed. The Trial Chamber considered none of it. Any limitation on the mandate or scope of the MLC's investigative measures was the natural corollary of the allegations of crimes arising across a state border, the realities of conflict, and the territorial and jurisdictional sovereignty of states. The Trial Chamber dismissed available evidence to conclude that Mr. Bemba failed to initiate a "full" investigation,[695] but the limitations in his investigative authority arose from the very limitations on his authority and lack of full control on the ground.

354. The failure to take into account the realities on the ground infects the entirety of the Trial Chamber's findings on measures. This unaddressed evidence is relevant to the findings that Mr. Bemba failed to initiate genuine and full investigations into the commission of crimes;[696] failed to share relevant information and support investigative efforts;[697] and made no effort to refer the matter to the CAR authorities, or cooperate with international efforts to investigate.[698] It is also relevant to the Trial Chamber's criticisms of the measures taken as "minimal", "inadequate", and "limited".[699] In fact, they were necessary, and reasonable, and set an attainable and appropriate benchmark for future commanders.

[695] Judgment, para. 729.
[696] Judgment, para. 729.
[697] Judgment, para. 729.
[698] Judgment, para. 733.
[699] Judgment, paras. 726-727.

355. Should the commander-in-chief of a contingent operating as part of a multinational force, in the face of allegations of crimes, immediately (and personally) remind his troops of their obligations, contact the host nation and ask for an investigation, work together with that nation to investigate allegations of crimes, contact credible international organisations to solicit information and offer to cooperate in future investigations, send numerous delegations and commissions to investigate allegations, and commit all identified perpetrators to public trials, these efforts should be recognised. They should not give rise to criminal liability, particularly by a Tribunal which fails to assess his conduct in light of established legal principles, and ignores the reality of the prevailing circumstances. No reasonable Trial Chamber could have found that Mr. Bemba failed to take necessary and reasonable measures. The legal and factual errors underpinning this finding warrant its reversal.

3. The Trial Chamber ignored that Mr. Bemba asked the Central African Prime Minister to investigate the allegations

356. D48 [REDACTED].[700] He was a credible witness. The Trial Chamber relied on his evidence, without reservation, throughout the Judgment to support findings adverse to Mr. Bemba.[701]

357. Significantly, D48 testified that Mr. Bemba had written to the Central African Prime Minister, Martin Ziguele, "asking for an international commission of inquiry to be establish to look into these possible events". These were serious crimes "that could not go unpunished".[702] D48 explained that it was decided that Mr. Bemba should write to the Central African authorities, "given that there was an impossible situation to verify what had actually happened in the Central African Republic

[700] T-267-CONF-ENG, 8:22-23.
[701] Judgment, paras. 385, 402, 448, 556, 576, 602-603.
[702] T-267-CONF-ENG, 51:5-8.

territory, and they themselves, they had to show diligence in this regard and possibly investigate and pass on the results of the investigations to us."[703]

358. D48 remembers the Central African Prime Minister responding. Notably, despite providing this information, [REDACTED] did not receive any correspondence or complaints from the CAR authorities. [704] The MLC, for its part, had made the various authorities aware of the issue and "that's all that could be done."[705]

359. This testimony, from a witness otherwise relied upon unreservedly, is clearly relevant to the Trial Chamber's finding that Mr. Bemba made "no effort to refer the matter to the CAR authorities".[706] Here was a credible witness, with direct knowledge of the events, saying that Mr. Bemba did. D48's evidence, moreover, finds corroboration in Mr. Bemba's other requests for information for those better placed to investigate,[707] and his contact with and involvement of the Central African authorities from the time allegations of crimes first arose.[708]

360. The Trial Chamber should have addressed this directly relevant evidence before finding that Mr. Bemba made no effort refer the matter to the CAR authorities, [709] failed to share relevant information, and did not support the CAR authorities in efforts to investigate. [710] Having not done so, the Trial Chamber failed to take into account relevant evidence, which warrants a reversal of this finding.

[703] T-267-CONF-ENG, 55:7-10.
[704] T-267-CONF-ENG, 51:10-13.
[705] T-267-CONF-ENG, 51:13-16.
[706] Judgment, para. 733.
[707] Judgment, paras. 604-606, 610-611.
[708] Judgment, paras. 582-589, 590-591.
[709] Judgment, para. 733.
[710] Judgment, para. 729.

4. The Trial Chamber erred by taking into account irrelevant considerations

361. The Trial Chamber also erroneously impugned Mr. Bemba's measures on the basis that his "primary motivation" was "a desire to counter public allegations".[711] The motivation of a commander in taking measures is irrelevant to the question of whether they were necessary and reasonable.

362. Following allegations of 108 instances of rape against UN and French troops in the CAR,[712] the extent to which the measures taken by French President Hollande, and the UN Secretary-General Ban-Ki Moon mirror those taken by Mr. Bemba is extraordinary. Mr. Bemba's calls for justice in the light of Central African allegations have been repeated almost word for word.[713]

363. The reputation of the French Army is undeniably at stake. Undoubtedly, its commander-in-chief would want to preserve its reputation, that of its troops, and Republic as a whole. Should the measures taken be motivated by this desire, this renders them no less reasonable, and no less necessary.

364. The Trial Chamber erred in taking Mr. Bemba's motivation into account. In any event, this finding is unwarranted on the evidence. The Trial Chamber had no direct evidence of Mr. Bemba's inner motivations. It relies on circumstantial evidence to conclude that he was motivated by a desire to counter public

---

[711] Judgment, paras. 582, 728.

[712] «Centrafrique: des soldats français accusés d'avoir forcé des enfant à des actes zoophiles», http://tempsreel.nouvelobs.com/monde/20160401.OBS7549/centrafrique-des-soldats-francais-accuses-d-avoir-force-des-enfants-a-des-actes-zoophiles.html ; «Central African Republic abuse: Ban Ki-moon 'shocked to core' by bestiality report», http://www.bbc.com/news/world-africa-35940061.

[713] «Hollande sera "implacable" si les viols en Centrafrique sont avérés»,http://www.liberation.fr/societe/2015/04/30/accusation-de-viols-en-centrafrique-hollande-sera-implacable-si-les-faits-sont-averes_1279094 ; « Les enfants violés parlent : «Le soldat français m'a dit qu'il fallait mettre son bangala dans ma bouche », http://www.canalfrance.info/Les-enfants-violes-parlent-Le-soldat-francais-m-a-dit-qu-il-fallait-mettre-son-bangala-dans-ma-bouche_a4805.html; «Les forces internationales accusées de nouveaux viols en Centrafrique», http://www.lemonde.fr/afrique/article/2016/04/01/les-forces-internationales-accusees-de-nouveaux-viols-en-centrafrique_4893712_3212.html.

allegations and protect the MLC's reputation.[714] This is not the only reasonable inference available. Evidence exists that Mr. Bemba was motived by a desire for a disciplined army,[715] and that within the MLC discipline was prioritised.[716]

5. The findings on the measures taken are unreasonable, misstate the evidence and ignore relevant evidence

365. The Trial Chamber's findings on the adequacy of measures taken by Mr. Bemba do not refer to the agreement between Chad and the CAR to investigate allegations of crimes committed during the 2002-2003 intervention.

366. The Trial Chamber recognised that on 27 January 2003, in his response to Mr. Bemba's request for the UN's assistance in conducting a transparent investigation, the UNSG Special Representative, General Laminé Cissé, informed Mr. Bemba that the CAR and Chad had agreed to create an international commission of inquiry.[717] This letter was copied to President Patassé who was in a position to have corrected any false impression as to this commission's existence.

367. In fact, its existence finds contextual corroboration in Mr. Bemba's request to the Central African Prime Minister "asking for an international commission of inquiry to be established to look into these possible events",[718] and a February 2003 radio interview with President Patassé in which he stated that a commission had been sent to investigate allegations of crimes.[719] Neither of these corroborating factors which are relevant to the findings on measures are addressed in the Judgment.

---

[714] Judgment, para. 728.
[715] T-207-CONF-ENG, 48:5-6; T-210-CONF-ENG, 43:21-25.
[716] T-210-CONF-ENG, 44:7-8; T-301-CONF-ENG, 36:9-37:3; T-308-CONF-ENG, 50:5-51:4; T-213-CONF-ENG, 51:8-20; T-275-CONF-ENG, 21:16-22; T-301-CONF-ENG, 43:9-19; T-270-CONF-ENG, 43:1-7; T-217-CONF-ENG, 23:12-14; 45:10-14; T-202-CONF-ENG, 39:14-18.
[717] Judgment, para. 606.
[718] T-267-CONF-ENG, 51:5-8.
[719] EVD-T-OTP-00448/CAR-OTP-0013-0161 at 0162-0163.

368. Instead, the Trial Chamber impugns Mr. Bemba's exchange with the UN on the basis that there is no evidence that Mr. Bemba "took any concrete measures as a result".[720] Having been told that two other states would initiate an investigation, a reasonable commander acting in good faith could justifiably have decided to wait for the outcome of that investigation. Given General Cissé's assurances that he would seise the UN Secretary-General, a reasonable commander could also have expected the UN, given its competence under Article 34 of the UN Charter and history of investigating allegations of crimes, to provide the MLC with actionable information upon which further punitive measures could be based.

369. In fact, Mr. Bemba did not sit and wait. He ordered the Sibut mission, which took place in late February 2003,[721] and he telephoned and wrote to FIDH President Sidiki Kaba, offering to work with FIDH to establish the truth of the events in question.[722] The Trial Chamber's criticism that he took no further concrete measures is wholly unreasonable, and misstates the evidence.

370. His contact with FIDH is attacked on similar grounds. The Trial Chamber found that "there is no evidence that Mr Bemba took any concrete measures in conjunction with or in light of his correspondence with Mr Kaba."[723] The 2003 FIDH report is founded on anonymous hearsay: the names of all witnesses and sources have been withheld. No MLC troops are identified, whether by name, or even battalion.[724] A good faith commander could not have simply started arresting people, without a reasonable basis.

371. Moreover, in his letter of 26 February 2003, Mr. Kaba informed Mr. Bemba that the FIDH had provided the information in its possession to the ICC,[725] and not to

[720] Judgment, para. 723.
[721] Judgment, paras. 612, 614. *See also* EVD-T-OTP-00416/CAR-OTP-0005-0147.
[722] Judgment, para. 610.
[723] Judgment, para. 724.
[724] EVD-T-OTP-00395/CAR-OTP-0001-0034 at 0039.
[725] Judgment, para. 611.

the MLC. In effect, FIDH withheld the information that would have facilitated the steps which the Trial Chamber criticises Mr. Bemba for having failed to take.

372. The Trial Chamber dismisses the Mondonga and Zongo investigative commissions on the basis that they were limited to allegations of pillaging committed in the initial days of the operation, and pillaged goods being transferred via Zongo.[726] These criticisms are both inaccurate and unreasonable. A commander who reacts immediately to crimes cannot then be impugned for the investigation not encompassing future allegations. In any event, this finding is incompatible with the corroborated evidence that the Mondonga Inquiry continued to operate and investigate throughout the operation. P36 testified that the Inquiry ran for:[727]

> [o]ne or two weeks, perhaps a month, but I do know that the committee that was set up by Jean Pierre Bemba did work in Bangui right up until the end, almost to the end of operations.

373. The Trial Chamber deemed P36's evidence on the Mondonga Inquiry to be credible, relying on it extensively to impugn Mr. Bemba's efforts.[728] This critical (and exculpatory) detail is not addressed. This is particularly egregious, given that P36's evidence is corroborated by the Bomengo file, the covering report of which reads: "[…] the operation continues to arrest those who may be involved directly or indirectly."[729] The investigation was not limited to the initial days of the operation. The Trial Chamber misstates the evidence.

374. In finding that the Mondonga Inquiry was limited to allegations of pillage, the Trial Chamber ignores [REDACTED] relevant evidence. [REDACTED], who was interviewed by this mixed commission, testified that:[730]

---

[726] Judgment, para. 726.
[727] T-215-CONF-ENG, 6:22-24.
[728] Judgment, paras. 582, 586, 589.
[729] EVD-T-OTP-00393/CAR-DEF-0002-0001.
[730] T-285-CONF-ENG, 42:6-11

> 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].

375. The Mondonga Inquiry was not limited to investigations of pillage. The Trial Chamber erred in failing to consider this directly relevant evidence, or in providing a reasoned opinion as to why it did not affect its finding as to the Inquiry's limited scope.

376. Most glaring, was the Trial Chamber's distortion of the evidence of the Sibut mission. The mission was recorded, in part, on videotape. An hour-long video records interviews between reporters and local population. Locals described having been terrorised by Bozizé's rebels, and characterised the MLC as liberators. Although some MLC soldiers had also stolen provisions, they had also protected the population, for which it was grateful. Mr. Bemba is personally thanked. Children, who can be heard on the videotape, are described by an elderly woman identifying herself as the president of the *Organisation des Femmes de Centrafrique*, as crying with joy because, thanks to the MLC, they no longer had to hide in the bush.[731]

377. The Trial Chamber dismisses the Sibut mission on the basis that the reporters spoke to a "narrow selection of interviewees, a number of whom exercised public functions and were linked to President Patassé's regime" and that the "interviews were conducted in a coercive atmosphere with armed MLC soldiers moving among the interviewees and nearby population".[732]

[731] Judgment, para. 616.
[732] Judgment, para. 725.

378. There is no evidence that the MLC officials, and not the reporters, chose the people to whom they spoke. Regardless, speaking with local authorities in an effort to get an overview of the situation would be perfectly normal, as would their association with President Patassé's regime. Prosecution witnesses who testified against Mr. Bemba included local authorities under Bozizé,[733] and members of President Kabila's government.[734] Each was deemed credible. Had the MLC hand-picked (or inserted) MLC-friendly interviewees into the Sibut community who were required to somehow end up in front of the reporters' microphones, then why did some of them stray from the script and report that some MLC soldiers had also stolen some provisions?[735] And why was this not deleted from the tape?

379. As to the fact that armed MLC soldiers were moving in the area, this was a warzone. Sibut had just been seized by loyalist troops. There was no guarantee that the rebels would not regroup, and return. The people interviewed said that the MLC soldiers, armed and on guard, were making the population feel safe. To find that the MLC troops created a "coercive atmosphere" is an abuse of the Trial Chamber's discretion. The Sibut mission was a reasonable measure.

380. The Trial Chamber took an unreasonable approach to the evidence. It also disregarded or failed to give a reasoned opinion as to corroborated evidence which cast doubt on its findings, and took into account irrelevant or unreasonable considerations to distort otherwise exculpatory acts and events. These errors led to a conclusion not open to a reasonable Trial Chamber, warranting the Appeals Chamber's intervention.

[733] [REDACTED]; T-94-ENG, 9:1-2; T-102-CONF-ENG, 11:5-13; [REDACTED].
[734] Judgment, paras. 308-310.
[735] Judgment, paras. 617-618.

E. THE FINDING ON CAUSATION IS INVALID

1. The Trial Chamber failed to define the applicable legal standard

381. A commander is liable for those crimes which arise "as a result" of his failure to exercise control properly.[736]

382. The parties took different positions on the nature of this causal link between the commander's conduct and the ensuing criminal acts by his subordinates. The Prosecution submitted that it was only required to prove that Mr. Bemba's failures "increased the risk" that the MLC troops would commit crimes.[737] The Defence argued that the threshold was in fact, higher.[738]

383. The Trial Chamber considered it unnecessary to elaborate on the threshold of causation between the superior's failures and the resultant crimes. While finding that the nexus requirement would clearly be satisfied when the crimes would not have been committed had the commander exercised control properly,[739] the precise contours of the "as a result of" standard were not addressed. The Trial Chamber found that had Mr. Bemba taken measures, "the crimes would have been prevented or would not have been committed in the circumstances in which they were."[740] It then held that "[g]iven these findings, the Chamber does not consider it necessary to further elaborate on this element."[741] This is a legal error.

384. A Trial Chamber may decline to take a stance on a particular legal threshold or standard. International criminal jurisprudence is littered with examples of Trial and

[736] Article 28(a) of the Rome Statute.
[737] Prosecution Closing Brief, paras. 765-766
[738] Defence Closing Brief, paras. 1048-1051.
[739] Judgment, para. 213.
[740] Judgment, para. 741.
[741] Judgment, para. 213.

Appeals Chambers declining to decide on particular questions of law.[742] Where the question does not have "the potential to impact the conviction or sentence,"[743] or where the standard has become a "hypothetical question,"[744] judges have decided to leave legal questions for adjudication in cases when they will have a determinative effect.

385. In none of these cases, however, did the Chamber in question decline to elaborate on an essential element of the crime, which it then went on to apply to convict the accused. This was an abdication of its judicial responsibility. The legal requirement that the crimes were committed "as a result" of Mr. Bemba's actions is at the very core of his liability.

386. An accused may only be convicted on the basis of a norm which "must make it sufficiently clear what act or omission could engage his criminal responsibility."[745] While the *lex certa* element in the *nullum crimen sine lege* principle as recognised by Article 22(2) of the Statute does not exclude the use of normative elements in offences or modes of responsibility, as in fact the "as a result of" formulation, it is one of the most important tasks of criminal courts to give these elements a precise enough determination so that defendants know the precise legal basis upon which their possible conviction may be founded. Accordingly, Mr. Bemba cannot be convicted on the basis of a causal requirement which has not been defined by the Trial Chamber in the first place. Otherwise, it is impossible for him, or any other commander, to know how far his conduct was alleged to have fallen below the legal standard applicable. Mr. Bemba's right to appeal was inappropriately impaired, compounding the initial error.

---

[742] *See, e.g., Hadžihasanović* AJ, para. 120; *Galić* TJ, paras. 87, 95; *Aleksovski* TJ, para. 46; *Kanyarukiga* AJ, paras. 62, 172; *Kajelijeli* TJ, paras. 752-753; *Nyiramasuhuko et al.* TJ, para. 94; *CDF* TJ, paras. 133-134.
[743] *Kanyarukiga* AJ, paras. 62.
[744] *Hadžihasanović* AJ, para. 120.
[745] *Vasiljević* TJ, para. 193.

387. The effect of the Trial Chamber's failure to articulate a legal standard is to subject commanders in the field to imprecise and shifting subjective evaluations against an unspecified *ad hoc* judicial mandate. The Defence agrees with the Trial Chamber that the appropriate legal standard should be "capable of consistent and objective application" in the field.[746] The Trial Chamber's error rendered this impossible.

388. The failure of the Trial Chamber to articulate a legal standard and to evaluate the evidence in light of that standard constitutes reversible error.

2. The Trial Chamber conflated the "measures" and "causation" requirements

389. The Trial Chamber's failure to articulate the legal requirement for causation, constitutes reversible error. The Trial Chamber compounded this error by conducting the same analysis in assessing causation as that conducted to determine whether Mr. Bemba had taken necessary and reasonable measures. This is impermissibly circular.

390. With no legal standard against which to evaluate the evidence, the Trial Chamber's consideration of whether Mr. Bemba's acts "caused" the crimes, consisted of listing putative measures which, in its view, Mr. Bemba should have taken. Thus, the Trial Chamber conflated two materially distinct legal elements of the offence; the duty to take all necessary and reasonable measures is distinct from the element of causation.

391. This is not a subtle overlap. In fact, the Trial Chamber incorporates "by reference its findings regarding Mr. Bemba's failure to take all necessary and reasonable measures".[747] After having listed a number of other alleged measures

[746] Judgment, para. 212.
[747] Judgment, para. 737.

that Mr. Bemba could theoretically have taken, the Trial Chamber speculated that "had Mr. Bemba taken, *inter alia*, the measures identified above, the crimes would have been prevented or would not have been committed in the circumstances that they were."[748]

392. In fact, the Trial Chamber has assumed causation on the basis of its finding that Mr. Bemba failed to take necessary and reasonable measures. Thus, in a way, it replaces the causality standard (it never defined) by counter-measures which allegedly have not been taken and thus confuses these two legal requirements. By this reasoning, every commander who fails to take any measure that a court can conceptualise after the fact would have automatically "caused" the crimes in question. This legal error relieves the Prosecution of its burden to prove beyond a reasonable doubt that the crimes were committed as a result of Mr. Bemba's actions.

393. The Trial Chamber's erroneous conflation of two distinct legal elements invalidates its finding as to the link between Mr. Bemba and the MLC crimes.

3. The Trial Chamber misstated the evidence and its findings

394. Separately, the Trial Chamber misstates both the evidence and its own findings to conclude that the crimes "were a result of Mr Bemba's failure to exercise control properly."[749] On any meaningful review, one by one, these factors which allegedly demonstrate that the crimes were committed as a result of Mr. Bemba's failure to "exercise control properly" are without evidential basis.

395. The finding that "if the soldiers had received adequate payments and rations, the risk that they would pillage or rape for self-compensation, and murder those who resisted, would have been reduced, if not eliminated"[750] is extraordinary. Elsewhere, the Trial Chamber accepts and relies on the corroborated evidence from

[748] Judgment, paras. 736-741.
[749] Judgment, para. 741.
[750] Judgment, para. 739.

11 Defence and Prosecution witnesses that payments and rations were provided by the Central African government.[751] There is no finding that these provisions were inadequate, let alone that their inadequacy prompted criminal conduct on the part of the MLC soldiers. The Trial Chamber provides no concrete evidence on which it based its finding that the MLC acted in a "culture of acquiescence," let alone that Mr. Bemba made a conscious decision to create a culture of acquiescence in which the standards of pay and rations would incentivise criminal conduct. This (already speculative) argument is pulled out of thin air. It is, moreover, wholly incompatible with the corroborated evidence, ignored by the Trial Chamber, that rations were sufficient.[752] [REDACTED] told the Trial Chamber that they were "very well fed".[753]

396. In finding that Mr. Bemba failed in his duty to ensure the MLC troops were aware of the laws of war, the Trial Chamber recalled its finding that the training regime employed by the ALC was "inconsistent, resulting in some soldiers receiving no or minimal training."[754]

397. This is not, in fact, what the Trial Chamber found. It was not an "inconsistent" regime which resulted in some soldiers receiving minimal or no training. Rather, the Trial Chamber accepted that this was a product of some soldiers having prior military experience, and having been incorporated into the MLC from other armed forces. The Trial Chamber relied on P33 who explained that officers from the former Zairean army did not need training because they had already been through "highly reputable academies".[755] P36 corroborated this.[756] These soldiers received "no or minimal training" because they did not need it, not because of any failings on the part of Mr. Bemba.

---

[751] Judgment, para. 412, fn. 1121.
[752] T-284-CONF-ENG, 44:15-23; T-182-CONF-ENG, 29:23-30:2; T-106-CONF-ENG, 50:15-53:13; T-116-CONF-ENG, 30:23-31:7; T-279-CONF-ENG, 33:7-15.
[753] T-289-CONF-ENG, 13:18.
[754] Judgment, para. 736.
[755] Judgment, para. 391, fn. 1009, citing T-159, 61:8-24.
[756] Judgment, para. 391, fn. 1009, citing T-213, 50:12-24.

398. In the following paragraph, the Trial Chamber goes one step further to imply that the training was "inadequate".[757] Again, there is no finding of this kind. Relying on four witnesses, the Trial Chamber found that the training of most MLC soldiers was "rapid," although this finding was unwarranted. P36 testified that the training period for new recruits was four to five months; an extraordinary period for a rebellion movement in the midst of armed conflict.[758] P15 and P33 give no indication of the length of training.[759] P32 said in his interview that the training was "rapid" but testified that he "didn't know the exact duration" but that "when the movement or army was winning they took people, they trained them quickly, and turned them into soldiers".[760] Certainly, none of these witnesses testified that the training was inadequate, and the sole witness who testified as to recruits being trained "quickly" still found that the training was sufficient to turn them into soldiers. Again, the assertion that the MLC training was "inadequate" has no basis in the Trial Chamber's findings.

399. The criticisms of the Code of Conduct are similarly unfounded. It is worth considering, firstly, that the MLC may well be the only rebellion in history which can lay claim to having a Code of Conduct. Compared with Bozizé's undisciplined and largely untrained rebels,[761] or indeed any of the movements who seek political change through armed conflict, the MLC was unique. Not only was the Code of Conduct established and popularised,[762] it was enforced through a court-martial, and disciplinary councils within military units which could immediately reprimand breaches.[763]

[757] Judgment, para. 738.
[758] Judgment, para. 391, fn. 1009, citing T-213, 50:12-24.
[759] Judgment, para. 391, fn. 1009, citing T-159, 61:8-24; T-207, 48:5-13.
[760] Judgment, para. 391, fn. 1009, citing T-165, 62:21-63:1.
[761] Judgment, para. 450.
[762] Judgment, para. 393.
[763] Judgment, para. 402.

400. Against this backdrop, the Trial Chamber criticised the Code's purported failure to provide details as to the distinction between civilians and combatants, or the concept of protected persons. In fact, the Code prohibited "assassinat d'un civil ou d'une autre personne".[764] It prohibits "abus, injures, agression, mauvais traitement d'un civil",[765] and "tuer sans autorisation les prisonniers de guerre".[766] It aimed to defend the (civilian) population: "[c]apable de defendre efficacement la population".[767] Civilians were not to be harmed, and violations would be punished.[768]

401. The Trial Chamber then impugned the Code's apparent failure to prohibit the crime of pillaging.[769] In fact, "vol" is listed in the Code as a type of case which must be referred to the Court Martial, and not tried in disciplinary councils.[770] Its position alongside murder, kidnapping, rape, treason, terrorism, and insubordination, demonstrates the seriousness with which the unlawful appropriation of property was viewed within the MLC. No one reading the Code could think that pillage was condoned.

402. If there had been any real doubt in the Trial Chamber's mind as to whether pillage was prohibited, it had plentiful evidence to assist. The MLC's prison records were in evidence.[771] [REDACTED].[772] [REDACTED].[773] Soldiers are listed as being in prison for theft. The MLC communication logs also showed that the MLC prosecuted and imprisoned soldiers who stole goods from civilians.[774]

---

[764] EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0164.
[765]EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0164.
[766]EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0163.
[767]EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0161.
[768]EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0164-0165.
[769] Judgment, para. 736.
[770] EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0162.
[771] EVD-T-OTP-00450/CAR-OTP-0017-0349, EVD-T-OTP-00451/CAR-OTP-0017-0351 (also referred to as CAR-DEF-0001-0078).
[772] T-270-CONF-ENG, 45:22-46:10.
[773] T-270-CONF-ENG, 46:6-12.
[774] 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

403. All of this evidence was ignored. In assessing whether Mr. Bemba's conduct caused the crimes, a reasonable Trial Chamber would have wanted to know, in reality, whether pillage was prohibited and punished. A reasonable Trial Chamber would have weighed this evidence against any purported deficiencies in the language of the Code. The evidence was available and improperly ignored.

404. Mr. Bemba was impugned for having failed to ensure adequate supervision.[775] There is no discussion as to why the supervision of troops was his responsibility, and not that of the operational commander present on the ground. In any event, the Judgment is absent any findings on whether MLC troops were adequately supervised. If the Trial Chamber is relying on its findings that the MLC troops committed crimes in order to find that they were not adequately supervised, this reasoning is impermissibly circular.

405. The Trial Chamber also criticised Mr. Bemba's failure to ensure that MLC commanders and soldiers implicated in committing or condoning such crimes were, as appropriate, tried, removed, replaced, dismissed, and punished.[776] The only MLC troops identified as having committed crimes were removed, arrested, tried, and punished.[777] There is no evidence, nor any findings that Mr. Bemba's attention was drawn to other MLC soldiers in the CAR who should have been arrested and tried, and he refused to do so. His ongoing hunt for precisely this kind of concrete information would certainly suggest otherwise. The Prosecution has never

martial cases of Didanga who killed one civilian and a robbery case; at 1643-44: From General 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 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; 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.

[775] Judgment, para. 738.

[776] Judgment, para. 738.

[777] Judgment, para. 597.

provided Mr. Bemba with the name of an MLC soldier or soldiers who committed crimes and should have been arrested.[778]

406. Commanders must initiate criminal proceedings based on specific evidence against specific wrongdoers, and then the prosecutors appointed under that commander's authority must prove those allegations beyond a reasonable doubt. No responsible commander in practice would arrest an entire unit (or random soldiers within that unit) based on media allegations of wrongdoing, particularly in circumstances when the media outlet has proven itself to be the source of false allegations.[779]

407. The Trial Chamber speculated that "clear training, orders, and hierarchical examples indicating that the soldiers should respect and not mistreat the civilian population would have reduced, if not eliminated, crimes motivated by a distrust of the civilian population".[780]

408. MLC soldiers who were found to have committed murder or rape, were put to death. On 31 May 2000, Mr. Bemba sent an instruction to all ALC brigade commanders, setting the death penalty as the punishment for, *inter alia*, killing of civilians and rape.[781] This was not an empty threat. Those accused convicted of rape or murder were executed, as recorded in the MLC communication logs.[782] Not only was criminal conduct prohibited and punished, a failure to report and punish

[778] ICC-01/05-01/08-3121-Conf, paras. 389-390.
[779] *See above* paras. 310-316.
[780] Judgment, para. 739.
[781] EVD-T-OTP-00691/CAR-D04-0002-1513.
[782] 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 Bineganga 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. *See also* T-270, 42:2-4; *See also* EVD-T-OTP-00451/CAR-OTP-0017-0351 at 0354.

crimes was also criminalised.[783] Significant resources were taken away from the war effort to establish a judicial system.[784] Judges and Prosecutors were appointed,[785] and bar associations were asked to send Defence counsel to represent suspects[786] in public trials.[787] The court martial acted as a mobile court, moving throughout the MLC territory to conduct trials *in situ*.[788] Should they harm civilians, the MLC troops had every reason to fear punishment.

409. This evidence features nowhere in the Judgment. The Trial Chamber whitewashes the MLC's history of instilling its troops with a respect for the civilian population. This is particularly egregious given the unchallenged and corroborated evidence from both Prosecution and Defence witnesses that the MLC enjoyed the support of the civilian population because of the discipline exercised by its troops, and that its reputation for having a disciplined army was its biggest asset during the Sun City talks, and resulted in the MLC being elected in Equateur by the population who lived among them.[789]

410. Finally, the Trial Chamber concludes that Mr. Bemba "caused" the crimes by failing to withdraw the MLC contingent upon learning of rumors of crimes. This finding eviscerates the very core of the military ethos. Taken through to its logical conclusion, the Trial Chamber is requiring, as a matter of law, that if an operation does not go to plan, a commander must withdraw, and abandon the mission. This is the only way to avoid criminal liability.

411. The commander's entire professional reputation and ethos is staked upon fulfiling his orders. Accomplishing a mission is a non-negotiable necessity of

[783] 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.
[784] T-267-CONF-ENG, 18:1-18.
[785] T-267-CONF-ENG, 12:6-13:11; 17:3-20.
[786] T-267-CONF-ENG, 17:3-12.
[787] T-275-CONF-ENG, 41:8-12; T-267-CONF-ENG, 61:11.
[788] T-275-CONF-ENG, 16:6-11.
[789] T-210-CONF-ENG, 49:21-50:8, T-301-CONF-ENG, 34:16-35:19; T-308-CONF-ENG, 50:13-23.

military conduct. By their very essence, soldiers are required to be prepared to die, rather than fail in their duty to fulfil their orders. If something goes wrong during a military mission, a responsible commander acting within the parameters of the laws of war, is required to readjust; to change and adapt and resolve the issue. There is a reason that in armed forces around the world, the abandonment of a mission gives rise to charges of cowardice and relief for cause. Withdrawal is not an option.

412. This is even more apparent in the context of a multinational operation. In the CAR in 2002-2003, the overall mission was to protect the democratically-elected president from a violent military overthrow.[790] The MLC was not acting alone in this mission.[791] Having accepted President Patassé's request for assistance, the MLC was not in a position to do something to jeopordise the overall military mission – such as a unilateral withdrawal. At the very least, this would have certainly risked the lives of those soldiers who remained.

413. The completion of a mission becomes the criteria for the success or failure of a military commander. For the Trial Chamber to superimpose a binary requirement that the conduct of troops must be unimpeachable, or the mission must stop, ignores the fact that a commander's duty flows from the articulation of the military mission. A commander cannot be placed, as a matter of authoritative criminal law, in a position of being legally obligated to abandon his mission in the face of allegations of criminal conduct on the part of troops, or face criminal liability. The Trial Chamber's reasoning undermines fundamental tenets of military practice, and its own finding on the causal link between Mr. Bemba and the crimes.

[790] Judgment, paras. 379-380.
[791] Judgment, paras. 405, 407-409.

V. THE CONTEXTUAL ELEMENTS WERE NOT ESTABLISHED

A. THE TRIAL CHAMBER FAILED TO MAKE THE REQUISITE *MENS REA* FINDING

414. To convict a person of a crime against humanity, as opposed to the "ordinary" underlying criminal act, a Trial Chamber must find that he knew that his conduct was part of a widespread attack on a civilian population. No such finding was made in this case. This failure invalidates Mr. Bemba's convictions for the crimes against humanity of rape and murder[792] and, thus, materially affects the Judgment.

415. Article 7(1) of the Statute requires that the underlying acts of crimes against humanity be committed "with knowledge of the attack". In its analysis of the contextual elements, the Trial Chamber erred by limiting its inquiry to "whether or not the alleged underlying crimes against humanity were committed"[793] and, thus, to "the *mens rea* of the perpetrators of the crimes."[794] While the Trial Chamber stated that "an assessment of the Accused's knowledge of the attack is dealt with when considering his individual criminal responsibility under Article 28",[795] no such assessment is made. As a result, no finding, either express or implied, is made in the Judgment that Mr. Bemba knew, at all relevant times, that his conduct was part of a widespread attack on the civilian population of the CAR. This is fatal to establishing his individual criminal responsibility for the crimes against humanity of rape and murder.

416. Article 30(1) of the Statute stipulates that, unless otherwise provided, a person will only be criminally responsible if all material elements of the crime are

[792] Judgment, paras. 752(a) and (c).
[793] Judgment, para. 168, citing *Šainović* TJ, paras. 158-159. *See also Šainović* AJ, paras. 280-281: The ICTY Appeals Chamber confirmed that the Trial Chamber did not find that the *mens rea* of the "intermediary perpetrator" could substitute that of the accused. The Trial Chamber still required, and did find, that the accused had the requisite *mens rea* for crimes against humanity.
[794] Judgment, paras. 168, 691.
[795] Judgment, para. 169 (emphasis added).

committed with intent and knowledge. The contextual elements of crimes are material elements, raising "ordinary" crimes to ones demanding international attention, and, thus, must be committed with the intent and knowledge of the accused.[796] Further, paragraph 8 of the General Introduction to the Elements of Crimes confirms that the inquiry into the mental element of the contextual elements of crimes against humanity is not limited to direct perpetrators. This paragraph states "the appropriate mental elements, apply, *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute."

417. Accordingly, to convict Mr. Bemba of the crimes against humanity of rape and murder, the Trial Chamber was required to find proved that he "knew that the conduct was part of […] a widespread […] attack against a civilian population."[797] It did not. This is a legal error.

418. The Trial Chamber's error is not remedied by its finding that "knowledge on the part of the accused of the commission of crimes within the jurisdiction of the Court necessarily implies knowledge of the requisite contextual elements which qualify the conduct as […] a crime against humanity".[798]

419. First, as argued elsewhere, the findings regarding Mr. Bemba's actual knowledge of the crimes are legally and factually flawed, warranting their reversal.[799] Second, and in the alternative, the two types of knowledge which the Trial Chamber equates are not the same. In relation to the knowledge element of crimes against humanity, while proof that Mr. Bemba had "knowledge of all characteristics of the attack or the precise details of the plan or policy" is not

[796] *See, e.g., Tadić* AJ, para. 271; *Naletilić and Martinovič* AJ, paras. 114, 116; *Kordić & Čerkez* AJ, paras. 99-100; *Kunarac* AJ, para. 102. *See also Regina v. Finta* [1994] 1 SCR 701 at 819.
[797] Elements of Crimes, Articles 7(1)(a), para. 3 and 7(1)(g)-1, para. 4.
[798] Judgment, para. 195.
[799] Section IV(C).

required,[800] it must be established that he was aware that his conduct took place within the general contours of a widespread attack at all relevant times.

420. When assessing individual criminal responsibility, the Trial Chamber makes findings regarding Mr. Bemba's knowledge that MLC forces were committing or about to commit crimes.[801] However, Mr. Bemba's knowledge of the commission of crimes generally does not equate to knowledge either that there was an "attack against a civilian population" involving "the multiple commission of acts referred to in" Article 7(1) (as a war crime, pillage alone is not sufficient), or that his conduct was part of the attack. On this latter point, no findings are made. A generalised knowledge of crimes is insufficient to convict a person for crimes against humanity.

421. The Trial Chamber's failure to establish a material element of crimes against humanity as required by Article 30 is a legal error which materially affects the Judgment. In the absence of such finding, the convictions for crimes against humanity must be quashed.

B. THERE WAS NO ORGANISATIONAL POLICY TO COMMIT AN ATTACK DIRECTED AGAINST THE CIVILIAN POPULATION

422. The Trial Chamber relied on eight factors cumulatively to find that there was an attack committed pursuant to, or in furtherance of an organisational policy.[802] In doing so, the Chamber made a series of legal and factual errors. An organisational policy is an indispensable element of Article 7. These errors mean that the convictions of murder and rape as crimes against humanity must be reversed.[803]

[800] Elements of Crimes, Article 7, para. 2.
[801] Judgment, paras. 706-718.
[802] Judgment, paras. 675-687.
[803] Judgment, paras. 752(a), 752(c).

1. The Trial Chamber fails to establish a link between any policy and the MLC

423. In determining whether the MLC implemented an organisational policy to commit crimes, the Trial Chamber's exclusive focus on the knowledge and measures of Mr. Bemba widens to encompass "other senior MLC commanders".[804] The Trial Chamber "notes its findings that **senior MLC commanders**, including Mr. Bemba, were aware of the crimes being committed by MLC troops"[805] and "the failure on the part of Mr. Bemba and other **senior MLC commanders** to take action".[806]

424. These findings do not exist. The Trial Chamber's findings are limited to the "knowledge" and "measures" **taken by Mr. Bemba**.[807] The idea that some unidentified "senior MLC commanders" also had knowledge and also failed to take measures has no basis in the evidence and, more significantly, no basis in the Trial Chamber's findings. [REDACTED]. [REDACTED],[808] [REDACTED],[809] [REDACTED],[810] [REDACTED],[811] [REDACTED],[812] [REDACTED],[813] [REDACTED],[814] [REDACTED].[815] None were asked whether the MLC had an organisational policy to attack the civilian population in the CAR.

425. In trying to drag an unspecified section of the MLC hierarchy into the frame to establish an organisational policy, the Trial Chamber misstates its own findings,

---

[804] Judgment, paras. 684-687.
[805] Judgment, para. 684.
[806] Judgment, para. 685, (emphasis added).
[807] Judgment, paras 717, 734, (emphasis added).
[808] [REDACTED].
[809] [REDACTED]
[810] [REDACTED].
[811] [REDACTED]
[812] [REDACTED].
[813] [REDACTED].
[814] [REDACTED].
[815] [REDACTED]

and undermines its conclusion as to the critical link between a policy to attack civilians and the MLC.[816]

426. In any event, the legal and factual errors which infect the findings on Mr. Bemba's "knowledge" and "measures",[817] also invalidate the Trial Chamber's attempt to build a bridge between the policy and the MLC.

427. Only in "exceptional circumstances", can an organisational policy to attack a civilian population be implemented through a failure on the part of an organisation, rather than "active promotion or encouragement". In these exceptional circumstances, the failure must be "deliberate" and "consciously aimed at encouraging" an attack.[818] These requirements are baldly stated in paragraph 685 of the Judgment with no attempt made to substantiate them. This is insufficient, particularly when evidence to the contrary is dismissed without reasoning; specifically, the considerable evidence of the efforts made by Mr. Bemba and the MLC hierarchy to instill discipline and knowledge of IHL in the MLC troops.[819] Mr. Bemba's personal instruction to the MLC contingent in the CAR not to commit crimes, is brushed past on the basis that it merely indicates that the MLC policy was not "formalised".[820] Another reasonable inference was that he told the troops not to commit crimes, because he did not want them to commit crimes. The Trial Chamber was required to properly substantiate its findings and to properly address contradictory evidence. It did not. This is a legal error.

2. There was no evidential basis for a *modus operandi*

428. The finding that "the acts of rape and murder were committed consistent with evidence of a *modus operandi*"[821] has no evidential basis. The Trial Chamber relies on

[816] Judgment, para. 685.
[817] Judgment, paras. 706-734.
[818] Judgment, para. 159; Elements of Crime, Article 7, fn. 6.
[819] Section IV(E)(3).
[820] Judgment, para. 685.
[821] Judgment, para. 676.

the hearsay evidence of P6 (the CAR Prosecutor) and P9 (the CAR Investigative Judge).[822] However, neither witness provides evidence that the stated *modus operandi* – MLC soldiers searching "house-to-house" for remaining rebels or conducting "mop[…]up" operations while committing rape, pillage and murder[823] – was consistently employed by the perpetrators.

429. P6's testimony regarding any purported *modus operandi* was limited to rape and looting and did not extend to murder.[824] Further, no evidence was elicited that the "searching"[825] he referred to was part of a "house-to-house" search for remaining rebels as opposed to searching the house for other purposes, *e.g.* to loot. Crucially, P6 states "*[l]es viols et les pillages semblent ne pas correspondre à un plan arrêté*".[826]

430. Similarly, P9's statement does not support the existence of an identifiable *modus operandi*. It is limited to rape and, rather than establishing a consistent mode of criminal operation, states that "*plusieurs méthodes*" were used to commit rape.[827] According to P9, victims were surprised "*dans leurs maison* (sic), *dans les champs*, *dans les marches*".[828] These rapes were clearly not committed as part of any "house-to-house" searches or mop up operations during which murder and pillage were also committed.[829]

431. The unreliability of P9's hearsay evidence is expressly acknowledged by the witness in the sections relied on in the Judgment. He states "*je n'étais pas témoin de ces faits-là*" and admits that in his investigation he was unable to distinguish

[822] Judgment, fn. 2102 citing para. 564.
[823] Judgment, paras. 564, 676.
[824] T-96-CONF-ENG-ET, 4:18-5:22, 32:12-15.
[825] T-96-CONF-ENG-ET, 5:8, 5:15, 7:9.
[826] EVD-T-OTP-00044/CAR-OTP-0005-0099, at 0108.
[827] EVD-T-OTP-00046/CAR-OTP-0010-0120, at 0161.
[828] EVD-T-OTP-00046/CAR-OTP-0010-0120, at 0161.
[829] T-104-CONF-ENG, 7:22-8:3; 43:19-44:10, P9's testimony confirms that there was no consistent *modus operandi*.

between persons disguised as victims and "*les vraies victimes*".[830] The Trial Chamber's failure to address these evidential problems in its reasoning further undermines its finding.

432. The presence of "multiple perpetrators […] involved in the same incidents of murder, rape, or pillaging" is also referred to by the Trial Chamber in its discussion of a consistent *modus operandi* and cites to its findings on the facts at the various charged locations in support.[831] However, while the Chamber's factual findings may show the presence of multiple perpetrators, no reasoning is given as to how this demonstrates a distinctive *modus operandi*. Further, none of the incidents referred to in the factual findings conform to the stated *modus operandi*. The starkest examples are the rapes at the Port Beach naval base, the rape of the woman in the bush outside PK22, the rape of two unidentified girls in Bangui "in a canal",[832] and the Mongoumba attack[833] which the Trial Chamber characterised as a punitive attack and not undertaken to root out or "mop up" rebels.[834] Where an incident does occur in a house it is in the context of a break-in, which is no evidence of a "house-to-house" search for rebels.[835] The factual findings do not support the existence of a consistent *modus operandi* for the rapes and murders.

3. The Trial Chamber erred in relying on general motives

433. The Trial Chamber made a series of errors when finding that "the perpetrators' general motives, which the Chamber considers indicative of the attack being, at least, condoned by the MLC hierarchy" is a factor which could be relied on in this case to prove the "policy" requirement.[836]

---

[830] EVD-T-OTP-00046/CAR-OTP-0010-0120, at 0161.
[831] Judgment, fn. 2103 citing*inter alia*, Sections V(C)(3), V(C)(4), V(C)(5), V(C)(9), V(C)(11).
[832] Judgment, paras. 467, 480-483, 522-523. *See also* para. 462, P68 and P68's sister-in-law encountered the soldiers on the street.
[833] Judgment, paras. 546, 548: V1 encountered soldiers in a hospital and was raped on a riverbank.
[834] Judgment, para. 681 where the attack was relied on as a separate factor.
[835] Judgment, inter alia, paras. 496, 498, 502, 504, 507-508, 510, 514, 545.
[836] Judgment, para. 678.

434. The finding that the MLC condoned self-compensation because it was not paying the troops adequately contradicts the Chamber's finding that the CAR authorities "provided…support to the MLC over the course of the 2002-2003 CAR Operation".[837] Any failure to pay cannot be construed by a reasonable finder of fact as indicative of a policy attributable to the MLC but, rather, as indicative of the failure of the system which was operating between the MLC troops and the CAR authorities.

435. The Trial Chamber found that "the MLC hierarchy" only "tacitly approved the measures that MLC soldiers took, including pillaging, to 'make ends meet'."[838] As the Elements of Crimes establishes, "a policy cannot be inferred solely from the absence of[…]action" [839] such as tacit approval.

4. The reliance on pillage is infected by legal error and irrelevant considerations

436. The Trial Chamber's reliance on the scale and organisation of acts of pillage[840] is, firstly, invalidated by the Trial Chamber's failure to properly apply the law on pillage, discussed below.

437. Further, the Trial Chamber erred in finding that scale and organisation of pillage, a war crime, can be used to prove a policy to commit an attack which must involve, the multiple commission of acts referred to in Article 7(1), in this case, rape and murder. The Chamber attempts to link acts of rape and murder by stating that many were committed during the course of pillaging.[841] However, taking the evidence at its highest, there is no evidential basis, nor is one identified, to support the conclusion that the "MLC hierarchy" knew that rape and murder were being committed in the context of pillaging. Evidence about storing, transporting and

[837] Judgment, para. 412.
[838] Judgment, para. 644.
[839] Elements of Crime, Article 7, fn. 6.
[840] Judgment, para. 679.
[841] Judgment, para. 679.

benefiting from pillage does not prove that acts of rape and murder were condoned by the MLC as an organisation. By relying on evidence of pillage which has no evidential link to the crimes against humanity charged, the Trial Chamber took into account an irrelevant consideration and erred in law.

438. The error is not remedied by the finding that "acts of murder and rape […] were committed in areas where MLC commanders and their troops were based throughout the 2002-2003 CAR Operation."[842] The presence of commanders generally at a location without an evidential link to presence at the scene of the crime or knowledge about the crime is not sufficient to attribute any policy to the MLC as an organisation. The Trial Chamber erred by failing to make this link.

5. The significance of orders to exercise vigilance or use force against civilians are misrepresented

439. The Trial Chamber misrepresents the significance and inferences which can be reasonably drawn from the finding that "MLC troops in the CAR received orders to exercise vigilance against civilians in the CAR, including the use of force towards them" to prove the existence of the policy element.[843]

440. The Trial Chamber's elision of the order to "exercise vigilance" with the phrase "including the use of force towards them", is not supported by the evidence. The order instructs MLC troops in the CAR to "exercise vigilance towards the civilian population who are doubtlessly hiding mutineers among them".[844] It makes no reference to any use of force. On its face, it is a reasonable order to issue in a combat situation and does not require, either expressly or impliedly, MLC troops to commit crimes against civilians. No reasonable finder of fact, without considered

[842] Judgment, para. 680.
[843] Judgment, para. 682.
[844] Judgment, para. 568, fn. 1765 citing to the original order in French EVD-T-OTP-00703/CAR-D04-0002-1641, "*vigilance envers la population centrafricaine qui cache sans doute des mutins chez elle*".

reasoning, was entitled to conclude that this otherwise ordinary military order is indicative of the existence of a policy to attack the civilian population.

441. Although the Trial Chamber was satisfied that orders to use force against civilians were issued to MLC troops, it was "unable to reach any conclusion as to the exact source of these orders."[845] The Trial Chamber was only able to conclude that: "at least, the commanders on the ground were aware of and authorised such treatment."[846] This evidence regarding a small number of lower level commanders is insufficient to prove a policy which can be attributed to the MLC as an organisation. This deficiency is not remedied elsewhere in the judgment.

6. The Trial Chamber relies on factors which, as discussed elsewhere, are not available on the evidence

442. The Trial Chamber, otherwise, relies on factors which have no basis in the record, or are the product of the Trial Chamber's misappreciation or misstatement of the evidence. The "inconsistent" MLC training has been discussed elsewhere.[847] That this was indicative of an MLC policy to attack civilians was not a finding open to a reasonable Trial Chamber.[848] Similarly, the Trial Chamber provides no reasoning as to how a Code of Conduct which prohibits murder and rape[849] is consistent with the MLC's policy to attack civilians.[850]

443. The finding that the underlying acts were committed over broad geographical area and temporal period does not, in itself, support the finding of an organisational policy **on the part of the MLC**.[851] This finding is contingent on the MLC operating independently of other forces in the field,[852] and not being "re-

[845] Judgment, para. 569.
[846] Judgment, para. 682.
[847] Section IV(E)(3).
[848] Judgment, para. 683.
[849] Judgment, para. 392.
[850] Judgment, para. 683.
[851] Judgment, para. 677.
[852] Judgment, paras. 411, 700.

subordinated" to the CAR military hierarchy.[853] As argued elsewhere, these findings are erroneous and, thus, concomitantly invalidate the finding that the crimes were committed pursuant to the MLC's policy, as opposed to those who had effective control over the troops.

444. Nor does the "Mongoumba" attack assist. There is no evidentiary basis that Mr. Bemba knew that, in relation to the attack on Mongoumba, "only civilians were present at the relevant time."[854] Further, by relying on this attack to establish the policy, the Chamber contradicts its earlier reliance on the existence of a consistent *modus operandi,* as the attack did not employ such a mode of operation. The failure to address this inconsistency is an error.

C. THE TRIAL CHAMBER ERRED IN ITS APPLICATION OF THE LAW OF PILLAGE

445. Pillage is committed when private or public property is appropriated intentionally and unlawfully in armed conflict.[855] The Trial Chamber misdirected itself in its approach to the *actus reus* of the offence by failing to assess whether the appropriations at issue were "unlawful" under IHL.[856] Instead, the Chamber presumed that all items taken from civilians by soldiers and used during the 2002-2003 CAR Operation amounted to pillage. This error invalidates Mr. Bemba's conviction.[857]

446. In addition, or in the alternative, the Trial Chamber erred by incorrectly defining personal or private use and in failing to find, beyond reasonable doubt, that the objects were misappropriated for personal purposes.[858]

---

[853] Judgment, para. 699.
[854] Judgment, para. 681.
[855] *Kordić & Čerkez* AJ, para. 84; *Hadžihasanović* TJ, para. 49.
[856] Judgment, paras. 115-117, 122-125.
[857] Judgment, paras. 648, 752(e).
[858] Judgment, para. 643.

1. Pillage is the "unlawful appropriation of property in armed conflict"

447. To establish the *actus reus* of pillage, the appropriation of property must be proven to be "unlawful". This is the law's recognition of the practical realities of warfare whereby commanders are entitled in certain situations to appropriate property from civilians without their consent in order to achieve the military mission.[859]

448. This military reality, that the appropriation be "unlawful" for it to amount to a crime, is well established. The ICTY Appeals Chamber has defined the offence of "plunder"[860] as "all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law."[861] The "unlawfulness" element is inherent in the definition of the crime.[862]

449. Paragraph 6 of the General Introduction to the Elements of Crimes provides that "[t]he requirement of "unlawfulness" found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes." Paragraph 6 is "intended as a reference to relevant provisions of international humanitarian law defining the unlawfulness of particular conduct".[863] Further, "in the context of war crimes under the Statute…'unlawful' means 'in violation of international humanitarian law'".[864] Paragraph 6, described as "one of the most crucial in the Introduction",[865] is not mentioned in the Judgment. This silence is the heart of the error.

---

[859] Sivakumaran, S., *The Law of Non-International Armed Conflict* (2012), p. 426.
[860] "Plunder" encompasses "pillage", *Čelebići* TJ, para. 591.
[861] *Kordić & Čerkez* AJ, para. 79. See also *Hadžihasanović* TJ, para. 49; *CDF* AJ, para. 409. Commentators have also recognised the "unlawfulness" requirement, see Triffterer, O., and Ambos, K., *Rome Statute of the International Criminal Court, A Commentary*, (C.H. Beck Hart Nomos, 2008), p. 452
[862] The Trial Chamber recognized this in paragraph 114 of the Judgment but failed to apply this element in the remainder of its reasoning.
[863] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), p. 13.
[864] Ibid.
[865] Ibid.

450. IHL permits the appropriation of property from civilians without their consent in certain circumstances during armed conflict, *e.g.* requisitions, contributions, the seizure of "war booty" and in instances of military necessity.[866] This is recognised and respected *via* the application of paragraph 6 because the "unlawfulness" element must be read into the first element of the crime of pillage – "the perpetrator appropriated certain property" unlawfully or in violation of IHL.[867] If the appropriation was not unlawful or in violation of IHL, the *actus reus* has not been committed and there can be no crime of pillage. To ignore the fact that paragraph 6 modifies the act of appropriation in the first element, as the Trial Chamber did, places the law at odds with its previous practical ability to balance humanitarian and military considerations in this area.

2. The Trial Chamber took an erroneous approach to "military necessity"

451. Instead of recognising that military necessity is a standalone basis on which an appropriation may be lawful, the Trial Chamber relegated consideration of this principle to its analysis of the second element of pillage. It found that "'military necessity' in footnote 62 of the Elements of Crimes does not provide for an exception to the absolute prohibition on pillaging, but rather […] clarifies that the concept of military necessity is incompatible with a requirement that the perpetrator intended the appropriation for private or personal use."[868] First, this is the wrong order of things. The footnote stipulates in plain language that "appropriations justified by military necessity cannot constitute the crime of

[866] It is acknowledged that "there are no specific rules of international humanitarian law allowing requisitions, contributions, seizure or taking of war booty in a non-international armed conflict", *per* Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), p. 465.

[867] There are situations where appropriations are permitted without the need for justification, *i.e.* the seizure of war booty, hence, it is submitted, the term "unlawful" is used because it subsumes those situations as well as those covered by military necessity. *See also* the concerns raised in Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), p. 272 regarding "war booty".

[868] Judgment, para. 124.

pillaging."[869] It does not provide that appropriations that are taken for personal use are not justified by military necessity. Second, the argument is not that military necessity is an exception to pillage or that pillage is permitted in certain circumstances. Pillage is absolutely prohibited. The Trial Chamber misunderstands that military necessity is one basis on which an appropriation may be lawful.

452. The Trial Chamber's error stems from its misunderstanding of the permissiveness of the *jus in bello*, of which the principle of military necessity is a part. Military necessity is a broad principle which permits commanders to take "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[870] The discretion afforded to commanders in the midst of conflict is inextricably woven into the fabric of the law applicable during such conflicts.

453. Placed in its proper legal context, military necessity, contrary to the Trial Chamber's conclusion, can be invoked as an independent justification under the laws of war in relation to certain appropriations because the laws of armed conflict do provide for it.[871] Specifically, while pillage is prohibited in absolute terms, the fact that lawful appropriations are permitted is built into the crime's definition. As one commentator has observed, "*jus in bello* is not designed to be infinitely malleable based on the individualised will of combatants. The actions of all participants in armed conflict are constrained by considerations of lawfulness based on their relation to the conflict. The proper balance is **intentionally** integrated into the law itself."[872] Thus, when a warring party takes food away from civilians to feed its troops, it is by definition not pillage.

---

[869] Sivakumaran, S., *The Law of Non-International Armed Conflict* (2012), p. 426, "[t]hat…is where the emphasis lies and not the notion of private or personal use of the appropriated property. It recognises the importance of respecting ownership of property while appreciating that, in certain situations, such property may have to be used in the course of fighting."
[870] Judgment, para. 123 quoting the Lieber Code, Article 14. *See also Katanga* TJ, para. 894.
[871] Judgment, para. 123 citing with approval to ICC-01/04-01/07-717, para. 318.
[872] Newton, M., "Charging War Crimes: Policy & Prognosis", in Stahn, C. (ed.), *The Law and Practice of the International Criminal Court*, (2015) 732 at 737 (emphasis added).

454. Thus, the Trial Chamber erred when it found that, if the Prosecution proves that property was appropriated for private or personal use, it is not obliged to disprove military necessity.[873] To correctly apply the requirement of "unlawfulness" and to give proper recognition to the broad range of actions which might be taken by a commander to support the military effort under IHL, this finding must be reversed. The correct position is that the Prosecution must prove as an upfront affirmative matter that the property was unlawfully taken and, as a secondary matter, that it had no ostensible military purpose.

3. The error materially affected the findings on pillage

455. Having misdirected itself on the law, the Trial Chamber's assessment of the evidence was flawed. Crucially, no considered analysis of the items taken by the soldiers, how they were used and whether their appropriation was lawful pursuant to the principle of military necessity, was undertaken. Many of the items taken are ostensibly capable of military use, particularly in the setting up of a military base or in the feeding and maintaining of an armed force in the field, and, thus, fell within those considered lawful appropriations covered by military necessity:[874] radios,[875] food and livestock,[876] foam mattresses[877] (which were used in trenches),[878] generators[879] and kitchen items such as utensils, pots, cassava mills and coffee makers.[880] The Trial Chamber found that items were stored at MLC bases and that schools and houses were turned into storerooms and warehouses.[881] The storage of items in close proximity to the troops further indicates the potential for military use.

---

[873] Judgment, para. 124.
[874] While it is recognized that Articles 52 to 53 of the Hague Regulations are applicable to situations of occupation and, thus, inapposite to this case, they are instructive insofar as they illuminate the type of items and goods which might be seized for military purposes.
[875] Judgment, paras. 463, 470-471, 502, 507, 509, 514, 517.
[876] Judgment, paras. 463, 509, 514-515, 517, 547.
[877] Judgment, paras. 470, 471, 474, 495-496, 502, 507, 511, 517, 525, 532, 547.
[878] Judgment, fn. 1409 citing the evidence of P69.
[879] Judgment, paras. 495, 502, 525.
[880] Judgment, paras. 474, 495, 497, 502, 507.
[881] Judgment, para. 486.

456. Rather than requiring the Prosecution to prove that the appropriated items were not covered by military necessity, the Trial Chamber erroneously approached the question at the level of the second element through the lens of personal/private use and, thus, assumed that items which had been appropriated and "personally used" had been pillaged. This was an error. Troops eating appropriated food, beverages and livestock and burning items as firewood[882] is consistent with a military purpose.

457. The Trial Chamber's misappreciation of the law is exemplified by the fact that it concluded that military necessity was negated because the appropriations took place after the departure of General Bozizé's rebels from the relevant area.[883] This conclusion contradicts the finding that the soldiers' presence and control of certain areas "can be attributed to their involvement in the armed conflict".[884] Further, the rebels' departure did not mark an end to hostilities.

458. Notwithstanding the foregoing, it is recognised that there may have been instances of "sporadic acts"[885] of unlawful appropriation[886] but such acts do not amount to pillaging for the purposes of Article 8(2)(e)(v). Further, the findings[887] and the evidence[888] show that Mr. Bemba dealt with such acts when brought to his attention.

---

[882] Judgment, para. 643.
[883] Judgment, para. 643.
[884] Judgment, para. 664.
[885] Judgment, para. 117.
[886] *E.g.*, Judgment, para. 643, MLC troops traded certain goods for alcohol.
[887] Judgment, paras. 582-583, 586, 589, 591, 597, 599, 602, 719.
[888] The MLC communication logs show action was taken in respect of stealing. *See e.g.*,: (i) EVD-T-OTP-00450/ CAR-OTP-0017-0349, at 0350, 1 case on 02.01.2003 and 1 case on 27.01.03; (ii) EVD-T-OTP-00451/CAR-OTP-0017-0351, at 0351-0352, 3 cases on 30.11.2002, at 0353, 1 case on 07.12.2002, at 0354, 1 case on 12.12.2002.

4. The Trial Chamber misapplied the concept of "private or personal use"

459. In addition or in the alternative, the Trial Chamber erred by employing an overly narrow definition of personal or private use and in failing to find, beyond reasonable doubt, that the objects were misappropriated for personal purposes.[889]

460. While the Trial Chamber did consider the nature of the items and the uses to which they were put,[890] its approach was overly restrictive and, as outlined above, failed to recognise the military context in which the items were appropriated. Further, the Trial Chamber failed to find, beyond reasonable doubt, that many of the items had been appropriated for personal or private use. A reasonable inference could be drawn in respect of many of the items that they had been appropriated ostensibly for military use. Given that personal or private use was not the sole reasonable inference, the findings were not made to the requisite standard and should be quashed.

461. These errors, separately or cumulatively, invalidate the findings that Mr. Bemba is guilty of the war crime of pillage. His conviction for this crime should be quashed.

VI. THE TRIAL CHAMBER ERRED IN ITS APPROACH TO IDENTIFICATION EVIDENCE

462. There was no definitive means of identifying MLC soldiers in the CAR in 2002-2003. A soldier's uniform was indeterminate of his identity.[891] The MLC and FACA were dressed the same, and Bozizé's rebels also wore "uniforms similar".[892] The ability to speak Lingala was not unique to the MLC[893] and thus no proof of perpetration by Mr. Bemba's subordinates. The Trial Chamber accepted that "other

[889] Judgment, para. 643.
[890] Judgment, para. 643.
[891] Judgment, paras. 412, 626.
[892] Judgment, para. 695.
[893] Judgment, para. 695.

forces may have committed crimes during the relevant time period or had some characteristics in common with MLC soldiers."[894]

463. Despite these significant obstacles to identification and despite the "vagaries of human perception and recollection", in particular, "where identification is made in turbulent and traumatising circumstances";[895] in each case of rape, murder and pillage about which it heard evidence, the Trial Chamber found beyond reasonable doubt that the perpetrators were MLC soldiers.

464. It did this by grouping all the crimes together and performing a global evaluation of identification.[896] The Trial Chamber did not perform a case-by-case assessment of whether it was satisfied, beyond reasonable doubt, that each of the crimes was perpetrated by subordinates of Mr. Bemba. Nor did it give a reasoned opinion in relation to the perpetrator of each of the crimes upon which the conviction was founded. This was a legal error, which undermines the Trial Chamber's findings on the underlying acts.

A. THE CHAMBER FAILED TO DELIVER A REASONED JUDGMENT AS TO THE IDENTITIES OF THE PERPETRATORS OF RAPE AND PILLAGE

465. The Trial Chamber was required to be satisfied, beyond reasonable doubt, that each of the crimes for which Mr. Bemba was convicted was committed by his subordinates. Where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, a Trial Chamber "must rigorously implement its duty to provide a 'reasoned opinion'. In particular, a reasoned opinion must carefully articulate the factors relied upon in support of the

[894] Judgment, para. 695.
[895] Judgment para. 241.
[896] Judgment, paras. 626-628, 634, 642.

identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence."[897]

466. This was not done. The Trial Chamber held Mr. Bemba liable for each of the underlying acts of rape and pillage based on a cumulative assessment of identification criteria. For each of the 28 instances of rape,[898] for example, the Trial Chamber addressed the identification of each of the perpetrators in one paragraph:

> …the same identifying characteristics were also present in respect of the perpetrators of the other acts identified above, namely, the repeated interactions between the victims and witnesses and the MLC soldiers, the fact that the victims and witnesses identified the perpetrators as "Banyamulengués" or MLC, the troop movements and exclusive presence of the MLC in the relevant locations at the time of the crimes, the perpetrators' language, their uniforms, **and/or** the fact that their actions accorded with evidence of the MLC's *modus operandi* and the perpetrators' general motives in targeting the civilian population. Further, P119 testified that soldiers arriving at her house in PK12 – in the immediate vicinity of which two of the acts identified above occurred – told her that they were sent by "Papa Bemba".[899]

467. The only individualised assessment was in relation to P29, who testified that the foreign dialect spoken by her attackers was "probably not Lingala". The Trial Chamber found, regardless, that there were sufficient factors enabling it to identify P29's attackers. These factors were not identified, apart from being "set out above".[900]

468. This was insufficient. Identification was a crucial live issue in the case. The Defence made extensive submissions as to why the evidence of particular witnesses

[897] *Kupreskić* AJ, para. 39.
[898] Judgment, para. 633.
[899] Judgment, para. 634.
[900] Judgment, para. 635.

meant their attackers could not have been MLC soldiers.[901] The Trial Chamber's sweeping assessment of identification meant that these submissions were never addressed. P22, for example, testified that she was raped by men wearing uniforms of the "Garde présidentielle", or the GP. They had "GP" on the arm of their uniforms.[902] There is no evidence that the MLC wore Presidential Guard uniforms, or that Mr. Bemba ever had effective control over members of the Presidential Guard. This should have been sufficient to rule out the MLC as perpetrators, or at least warrant a reasoned opinion as to why the Trial Chamber was still satisfied beyond reasonable doubt that the GP-uniformed attackers were, in fact, part of the MLC contingent. The "sweeping analysis" obviated the need for basic judicial reasoning on crucial identification evidence.

469. Also brushed aside is the evidence that, in many cases, the attackers spoke Sango, which the Trial Chamber found was "the language commonly spoken in the CAR".[903] P23 said that the "Banyamulengue" said to him "mbana alingbi na mbana", which is Sango,[904] P110 recalled that before shooting a woman some soldiers spoke in Lingala, some in Sango, and some in French.[905] One of the perpetrators who looted P112's house spoke Lingala and Sango,[906] D30 was raped by people who spoke in Sango and one of them in Lingala,[907] D36 [REDACTED] soldiers speaking Lingala, French and Sango,[908] P63 spoke to women carrying looted goods and some spoke Lingala and others Sango.[909] The Trial Chamber addresses none of this, despite it having been explicitly raised by the Defence.[910] It

[901] ICC-01/05-01/08-3121-Conf, paras. 538-593.
[902] T-41-CONF-ENG, 16:2-23, T-42-CONF-ENG, 39:10-15.
[903] Judgment, para. 627.
[904] T-53-CONF-ENG, 38:14-39:5.
[905] T-125-CONF-ENG, p33:12-14.
[906] T-129-CONF-ENG, p.8:3-15.
[907] T-340-CONF-ENG, 18:4-5; T-341-CONF-ENG, 3:16-22.
[908] T-338-CONF-ENG, 7:5-12.
[909] T-110-CONF-ENG, 12:7-8
[910] ICC-01/05-01/08-3121-Conf, para. 589.

concludes only that the perpetrators' language points to them being part of the MLC.[911] This is a failure to give a reasoned opinion.

470. The same approach is adopted for the 17 instances of pillage. The same cumulative reasoning is applied almost word for word. The Trial Chamber singles out the evidence of P108, and states that he found documents in his pillaged house "which contained headings and titles referring to the MLC".[912] Apart from this cursory assessment, the identity of the perpetrators of the acts of pillage is given the same treatment as those of rape.

471. A reasonable Trial Chamber "must take into account the difficulties associated with identification evidence **in a particular case** and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction."[913] The Trial Chamber's failure to do so in the present case undermines its findings on the underlying acts of rape and pillage, warranting their reversal.

472. In any event, the Trial Chamber's cumulative reasoning is erroneous. It relies on "the troop movements and exclusive presence of the MLC in the relevant location at the time of the crimes".[914] This is later qualified to the MLC's "**often** exclusive presence in a given area at a given time".[915] The necessary corollary of this qualification is that "**sometimes**" the MLC was not the only force present in the area at the time of the crimes. No details are given as to areas or dates. In fact, with only three exceptions,[916] each of the crimes for which Mr. Bemba was convicted was

[911] Judgment, para. 634.
[912] Judgment, para. 642.
[913] *Kupreskić* AJ, paras. 34-41 (emphasis added); In *Burke*, the appellate court found it unacceptable that the trial judge made no assessment of the identification evidence other than the general statement that she found the witness' evidence credible and therefore accepted it, *R.*v. *Burke*, [1996] 1 S.C.R. 474, para. 53.
[914] Judgment, paras. 634, 642.
[915] Judgment, para. 695.
[916] Judgment paras. 545-554.

committed in October and November 2002 in Bangui,[917] PK12,[918] and PK22 (on the road to Damara).[919] During that period, the Trial Chamber found that components of rebels and loyalist forces were present in each of those areas or very nearby.[920] The "exclusive presence" of the MLC in the areas in which the crimes were committed is not born out by the evidence.

473. The Trial Chamber then relies upon the fact that witnesses themselves identified the perpetrators as "Banyamulengue or MLC".[921] This is an accurate statement. What the Trial Chamber was required to do, however, was perform a judicial evaluation of whether this identification was reliable beyond a reasonable doubt. A wealth of jurisprudence details the caution required before identification evidence can be accepted as the basis for sustaining a conviction.[922] 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 […] whether it is reliable." In the turbulent and often traumatising circumstances in which witnesses find themselves, a Trial Chamber must be "acutely aware of the possibility of error in making identification later of a person previously unknown to the witness."[923]

474. The Trial Chamber applied no caution, because it failed to perform an individualised assessment in relation to each crime. It ignored precedent concerning the unreliability of auditory identification,[924] or that uniforms are an unreliable form of evidence where they are not unique to the perpetrators or readily differentiated

[917] Judgment paras. 459-484.
[918] Judgment paras. 485-519.
[919] Judgment paras. 520-523.
[920] Judgment, paras. 456 ("the MLC alongside other forces aligned with President Patassé, commenced operations in the CAR"), 459, 460 ("the first rebels had started withdrawing from Bangui by 29 October, 2002, the last…withdrew on 30 October"), 485 (On 30 or 31 October 2002, having passed through the northern neighbourhoods of Bangui, the MLC advanced to PK12), 520 (A few days after arriving in PK12, the MLC pursued and engaged in combat with General Bozizé's rebels on the road to PK22), 524 (On 7 December 2002, the MLC, along with other forces aligned with President Patassé, seized Damara).
[921] Judgment, paras. 626, 634, 642.
[922] *Kupreskić* AJ, paras. 34-41.
[923] *Kunarac et al.* TJ, para. 561.
[924] *Boškoski* TJ, para. 546. See also *R v Flynn and St John* [2008] 2 Cr. APP. R. 20.

from other uniforms.[925] Taking the witnesses' identification of their attackers as being "Banyamulengue" at face value is patently insufficient, and not a proper exercise of the Chamber's judicial function.

475. The Trial Chamber also states that the perpetrators were Mr. Bemba's subordinates "**and/or** because the actions of the perpetrators were consistent with evidence of the MLC's *modus operandi* and the general motives of MLC soldiers during the 2002-2003 CAR Operation in targeting the civilian population."[926] The use of the conjunctive/disjunctive terminology demonstrates the Chamber's palpable failure to consider the identification of the perpetrators of each crime. The Chamber's finding illustrates that in each of the 28 cases of rape listed at footnote 2006, it was able to identify the perpetrators of each offence as MLC soldiers because of one or more of the identifying features, therein specified, plus the offence being consistent with their so-called *modus operandi* and general motives. However, plainly from the terms of the judgment that is not true of every case. Where the Chamber could find no physical evidence sufficient to identify the perpetrators, it relied solely upon *modus operandi* and general motive. In other words, the Chamber identified MLC soldiers as the perpetrators because "that is the way they behaved".[927]

476. Such circular logic reverses the burden of proof: once the Chamber finds that a rape has been committed in certain circumstances, it behoves the accused to prove that the perpetrators were not his subordinates. There is an effective evidential presumption.

477. Nor does the stated *modus operandi* of MLC soldiers searching "house-to-house" for remaining rebels or conducting "mop…up" operations while

[925] *Boškoski* TJ, paras. 58, 61
[926] Judgment, para. 627.
[927] Judgment, paras. 452, 627, 642, 671, 676, 680.

committing rape, pillage and murder,[928] fit with allegations of rape in the bush,[929] in a ditch,[930] on the road,[931] or on a boat.[932]

478. In failing to explain how the *indicia* listed apply to each particular crime; the Trial Chamber has committed a legal and factual error. The findings in paragraphs 631-642 of the Judgment must be reversed. An appellate body must "carefully consider the manner in which identification evidence, particularly where identification is made under difficult circumstances, has been assessed by the fact-finder."[933] The failure of the Chamber to fulfil its judicial function and conduct a proper analysis of the evidence of the identity of perpetrators is not capable of repair.

B. THE CHAMBER FAILED TO DELIVER A REASONED JUDGMENT AS TO THE IDENTITIES OF THE PERPETRATORS OF MURDER

479. The same errors infect the murder findings. For reasons set out elsewhere,[934] the testimony of V1 cannot form the basis of a conviction. For P87, the Chamber applies no caution despite her identification of "Banyamulengue" through a crack in the door, in the dead of night, and later hearing gunshots. On that evidence, the Trial Chamber concluded that "a perpetrator" had murdered her brother and was satisfied on its "cumulative" test that MLC soldiers were responsible.[935] Notably, the following factors have been deemed "relevant to an appellate court's determination of whether a fact finder's decision to rely upon identification evidence was unreasonable": identifications based on "a fleeting glance or an obstructed view"; "occurring in the dark"; or "as a result of a traumatic event".[936]

[928] Judgment, paras. 564, 676.
[929] Judgment paras. 522-523.
[930] Judgment paras. 467-470.
[931] Judgment, paras. 462-466.
[932] Judgment, paras. 480-484.
[933] *Kupreskić* AJ, para. 130; See ICC-01/05-01/08-3121-Conf, paras. 531-537.
[934] Section III.
[935] Judgment, paras. 626-627.
[936] *Kupreskić* AJ, para. 40.

These all affect P87's identification evidence, and no caution was applied to her testimony, warranting a reversal of this finding. The murder of P69's sister receives no individualised assessment.[937]

C. THE CHAMBER ALTERED DATES TO FIT THE MLC'S MOVEMENTS

480. In addition to the overarching error identified above, the Judgment details no "operations" before 30 October when MLC troops "advanced along the Avenue de l'Indépendance and to the neighbourhoods of 36 Villas, Fouh and Bogombo".[938] The Chamber further found that "on 30 or 31 October 2002, having passed through the northern neighbourhoods of Bangui, the MLC arrived to PK12."[939]

481. Many Prosecution witnesses gave consistent, unequivocal evidence as to the dates on which they were attacked, or on which they witnessed attacks. On several occasions, the attacks occurred before the MLC arrived. Rather than this being an obstacle to a finding that the perpetrators were MLC troops, the Trial Chamber misconstrued the evidence of dates to fit its theory of perpetration.

482. These are not situations in which a witness testified that she was attacked "on 27 October" and later shifted the incident to "30 October", with the Trial Chamber accepting the latter. Nor are they examples of a witness saying "27 October" in the face of credible alternative evidence that the attack occurred on "30 October". The Trial Chamber's shifting of the dates is based on no apparent evidentiary basis. Its deliberate misappreciation of the evidence warrants the reversal of the findings identified below.

1. P68 and her sister-in-law

[937] Judgment, paras. 626-627.
[938] Judgment, para. 459.
[939] Judgment, para. 485.

483. P68's account that she and her sister-in-law were raped on 27 October 2002[940] was clear and consistent. The date of these offences, 27 October 2002, was repeated in the Decision Confirming the Charges,[941] which was based on her statement to the Prosecution, and in the Document Containing the Charges.[942]

484. P68 had a clear recollection of the actual date of the ordeal of her and her sister, born of the memorable nature of the experience.[943] That she is correct is supported by her further evidence that she was raped 2 days after Bozizé's forces arrived in Bangui,[944] at a time when the fighting had calmed down[945] and on the day when President Patassé announced that the MLC would be arriving to support the loyalist forces.[946] No reasonable Trial Chamber could have failed to conclude that the date of these offences was 27 October, rather than "the end of October".[947]

485. There is no evidential basis for suggesting that the MLC were in the Fouh area on 27 October, less still that they were in control of it. Indeed, even on the Trial Chamber's findings, the best that could be said is that they had "commenced operations" in some undefined area.[948] The Trial Chamber has failed properly to assess the evidence of identification of the perpetrators in relation to these offences.

---

[940] T-48, 10:18-12:1, 14:18-15:2, 18:10-19:1, (P68 learned on 27 October that the Banyamulengue came to give support); T-49, 10:1-3, 13:23-14:1, 18:12-16, 27:24-25:2, 17-18.
[941] ICC-01/05-01/08-424, paras. 176, 286.
[942] DCC, p. 34. The Confirmation of Charges refers on or about the 26 of October and in the DCC, it says 26 or 27 of October.
[943] T-48-CONF-ENG, 18:10-19:3. ("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", T-48-CONF-ENG, 18:24-19:1).
[944] T-48-CONF-ENG, 10:22-15:2.
[945] T-48-CONF-ENG, 11:3-8.
[946] T-48-CONF-ENG, 14:18-25.
[947] Judgment, para. 633(a).
[948] Judgment, para. 458.

2. The woman in the bush outside PK22

486. P75 described rapes occurring 2 days after Bozizé arrived in Bangui.[949] She remembered quite clearly, contrary to the Trial Chamber's finding,[950] that she was in church on Friday 25 October 2002 when she first heard shots being fired, and that two days later she fled Bangui to [REDACTED].[951] The offences occurred on that journey.[952]

487. The Trial Chamber had no evidential basis to find that these offences were committed "in November". Even on the basis of its own findings, the Trial Chamber was unable to ascribe any date to the offence.[953] Indeed the process that the Trial Chamber engaged in was not to use the date as a means of establishing identity by reference to presence in or control of the area, but rather making the date fit its theory of perpetration.

488. According to the Trial Chamber's findings, the MLC were not present in the area where these offences were committed until around 15 November.[954] According to Lengbe, they had not left PK12 by 25 November[955]. There is no plausible reason why P75 would have been fleeing combat in central Bangui in late November.

3. Two unidentified girls aged 12 or 13 in Bangui

489. P119 testified that the rapes she witnessed took place on 28 October 2002, three days after the commencement of hostilities in the capital.[956] Her testimony on the date was unequivocal, and consistent. No reasonable Trial Chamber could have found that the offences described by P119 occurred "on or around 30 October".

---

[949] ICC-01/05-01/08-3121-Conf, para. 322; T-92-CONF-ENG, 35:10-20.
[950] Judgment, para. 522, fn. 1569.
[951] T-93-CONF-ENG, 3:3-4:16.
[952] T-92-CONF-ENG, 8:10-11:3.
[953] Judgment, para. 522, fn. 1569.
[954] Judgment, para. 520.
[955] T-183-CONF-ENG, 20:23-21:1.
[956] T-82-CONF-ENG, 31:2-4 ; 32:4-33:5 ; 39:3-40:4 ; T-83-CONF-ENG, 4:21-5:1; T-86-CONF-ENG, 10:6-7.

490. There is no evidence that the MLC were present in the 4th arrondissement, where P119 describes the offences as taking place, on that date. The Trial Chamber, moreover, found that the MLC "passed through the northern neighbourhoods of Bangui on 30 or 31 October".[957] Again, rather than weighing the evidence of the date of the offence as a component of the various elements of proof of identification, the Chamber erred in misconstruing the evidence to make the date fit with its theory of who the perpetrators were.

491. No reasonable Trial Chamber could have been satisfied beyond reasonable doubt that MLC soldiers were the perpetrators of the offences set out above. The identification evidence was insufficient to establish the identities of them as such and the dates of the offences render it an impossibility that they were.

492. The consequent problems for the Chamber's theory of cumulative identification, however, are multiple. If these offences were not committed by MLC soldiers, but rather by other armed men, then the *modus operandi* is not peculiar to any faction. Moreover, the identification of perpetrators as "Banyamulengue" becomes worthless.

493. Add to that the fact that the Chamber's findings as to exclusive presence in, at least, the areas of Bangui, PK12 and PK22 do not survive any sensible scrutiny, and the acknowledgment that other forces who had "similar characteristics" to the MLC committed offences, and the Trial Chamber literally had no basis to distinguish the perpetrators of any offence.

[957] Judgment, para. 485.

VII. OTHER PROCEDURAL ERRORS INVALIDATE THE CONVICTION

A. NO RELIANCE SHOULD HAVE BEEN PLACED ON THE EVIDENCE OF P169, P178 AND 19 PROTECTED WITNESSES

494. The Prosecution called 21 CAR witnesses. Each was granted protective measures.[958] An accurate list of their names, addresses and telephone numbers was compiled, and circulated to the public ("the List").[959] The List, titled "*[REDACTED]*", first appeared as an annex to a letter from P169 to the Prosecutor (copied to, among others, the Presiding Judge and VWU), in which P169 referenced "*[REDACTED]*".[960]

495. At least two Prosecution witnesses, P169 and P178, have knowledge about the creation of the List, and the level of collusion between Prosecution witnesses. Both, along with the other 19 CAR witnesses, were relied on extensively in the Judgment in respect of central factual findings. This was an error. No reasonable Trial Chamber would have relied on the evidence of P169 and P178, or indeed any of the 19 witnesses, in the absence of a thorough investigation into the allegations of corruption and collusion.

1. Relevant Background

496. P169 and P178 testified in July and August 2011. They received [REDACTED] and [REDACTED] respectively as a result of their testimony.[961] P169 in fact received

[958] T-50-CONF-ENG, 37:24-42:9; T-63-CONF-ENG, 50:2-51:19; T-32-CONF-ENG, 61:8-62:19; T-66-CONF-ENG, 41:18-44:9; T-66-CONF–ENG, 1:25-4:5; T-79-CONF-ENG, 44:11-46:2; T-81-CONF–ENG, 54:21-56:24; T-115-CONF-ENG, 53:19-55:19; ICC-01/05-01/08-1940-Conf; ICC-01/05-01/08-1021-Conf; T-176-CONF-ENG, 6:4-10:11; T-107-CONF–ENG, 1:21-3:5; T-47-CONF-ENG, 45:12-46:12; T-123-CONF-ENG, 31:23-33:20; T-127-CONF-ENG, 58:12-60:10; T-90-CONF-ENG, 57:19-60:1.
[959] ICC-01/05-01/08-2827-Conf-AnxB-Red3.
[960] ICC-01/05-01/08-2827-Conf-Red-AnxA.
[961] ICC-01/05-01/08-2912-Conf-AnxD, pp. 2-3.

a [REDACTED][962] (although not the [REDACTED] he had requested).[963] These benefits went beyond the requirements of ordinary subsistence.

497. In August 2011, P169 sent a letter to a range of recipients,[964] with a series of financial complaints. Days later, the Prosecution paid P169 a "monthly allowance" of [REDACTED].[965]

498. On 7 June 2013, P169 wrote a second letter to the Prosecutor copied to, among others, members of the public, and the Presiding Judge. The letter appended the List.[966] Another letter on 8 June 2013 attached the same List.[967] On 18 June 2013, the Prosecution contacted "several" witnesses from P169's List. [REDACTED] told the Prosecution about three meetings with P169 and/or P178.[968]

499. On 25 June 2013, the Prosecution contacted P169 and P178. The Prosecution was informed, *inter alia*, of meetings held between P169, P178, [REDACTED], and "[REDACTED]".[969] Neither P169 nor P178 revealed how the List had been complied. On 3 October 2013, the Prosecution informed the Chamber, *ex parte*, of the existence of the List.[970]

500. The Defence was eventually informed of this situation via a 5 November 2013 decision.[971] In this decision, the Trial Chamber ordered VWU to report on the issues

---

[962] T-361-CONF-ENG, 29:17-22.
[963] ICC-01/05-01/08-2827-Conf-AnxB-Red3.
[964] ICC-01/05-01/08-1660-Conf-Anx1-Red2.
[965] ICC-01/05-01/08-3200-Conf, paras. 35; 45(a), fns. 26, 32.
[966] ICC-01/05-01/08-2827-Conf-AnxA-Red3.
[967] ICC-01/05-01/08-2827-Conf-AnxB-Red3.
[968] ICC-01/05-01/08-2827-Conf-Red, para. 13.
[969] ICC-01/05-01/08-2827-Conf-Red, para. 15. *See also* T-73-CONF-ENG, 18:17-29:15 regarding an "Emmanuel" who falsely represented himself as an ICC official and was complicit in falsifying victims' application forms in this case.
[970] ICC-01/05-01/08-2827-Conf-Exp and confidential ex parte Annexes A and B now reclassified as ICC-01/05-01/08-2827-Conf-Red2, (*see* para. 13) and ICC-01/05-01/08-2827-Conf-AnxA-Red3 and ICC-01/05-01/08-2827-Conf-AnxB-Red3.
[971] ICC-01/05-01/08-2845-Conf-Red.

raised.[972] On 8 November 2013, the Defence wrote to VWU, copying the Prosecution: "seeking the assistance of VWU in organising a physical or video-link meeting" with each of the 19 Prosecution witnesses.[973] VWU directed the Defence to the Prosecution, who refused the request.[974] The Prosecutor filed a report in which it stated it was prepared to "increase its measures" to deal with the situation created by P169 and P178.[975] On 11 November 2013, the Defence asked the Trial Chamber to recall P169 and P178.[976] Both the Defence request, and request for leave to appeal were denied.[977]

501. In February 2014, VWU reported to Trial Chamber that [REDACTED].[978] On 12 March 2014, the Defence reiterated its request to be provided with the contact details of P178 and P169. The Defence also asked that the Prosecution be ordered to report on the investigative steps it had taken, or be directed to investigate.[979] The Defence request was denied.[980]

502. On 27 June 2014, VWU reported that it had been unable [REDACTED].[981] On 5 August 2014, P169 wrote another letter. He confirmed the existence of contact between Prosecution witnesses.[982] Notably, he characterised his testimony as being the result of a bargain, and evinced an intention to "*reconsidérer mon témoignage*".[983] Of the 19 witnesses on the List, P169 stated that *"[i]ls sont prêts à apporter la preuve de subordination des témoins*". The Prosecution characterised this letter as "entirely untruthful".[984] The Trial Chamber ordered the recall of P169.[985]

---

[972] ICC-01/05-01/08-2845-Conf-Red, para. 13.
[973] *See* ICC-01/05-01/08-3013-Conf, para. 11, fn. 12.
[974] *See* ICC-01/05-01/08-3013-Conf, paras. 12-13, fns. 13-15.
[975] ICC-01/05-01/08-2867-Conf, para. 3.
[976] ICC-01/05-01/08-2872-Conf, paras. 49-50.
[977] ICC-01/05-01/08-2924-Conf; ICC-01/05-01/08-2980-Conf.
[978] ICC-01/05-01/08-2975-Conf-Red, paras. 4-8.
[979] ICC-01/05-01/08-3013-Conf, para. 39.
[980] ICC-01/05-01/08-3077-Conf, para. 37.
[981] ICC-01/05-01/08-3099-Conf, paras. 4, 6.
[982] ICC-01/05-01/08-3138-Conf-AnxA: [REDACTED].
[983] ICC-01/05-01/08-3138-Conf-AnxA.
[984] ICC-01/05-01/08-3139-Conf-AnxB.

503. P169's 2014 testimony was pock-marked with dishonesty. Significantly, he lied about his contacts with other Prosecution witnesses,[986] which had been relied upon by the Trial Chamber to deny Defence requests for further investigation.[987] His testimony raised other questions concerning the role and credibility of P178,[988] and rendered it impossible to assess his explanations for the List, and his allegations about proof of subornation of testimony, without further examination of P178. The Defence again seized the Trial Chamber with a request to recall P178.[989] The Defence request was denied.[990]

504. Within hours of this denial, VWU filed an additional report, stating that:

- [REDACTED];[991]
- [REDACTED];[992]
- [REDACTED];[993] and
- [REDACTED].[994]

For its part, VWU denied having received any [REDACTED].[995] [REDACTED].[996]

505. The Trial Chamber, however, had apparently had enough. A Defence request for reconsideration of the decision not to recall P178, on the basis of the above additional information, was denied.[997] The Trial Chamber moved into its

985 ICC-01/05-01/08-3154-Conf.
986 ICC-01/05-01/08-3200-Conf, paras. 50-57.
987 ICC-01/05-01/08-3077-Conf, paras. 18-19.
988 T-361-CONF-ENG, 55:7-10; 66:16-19; 69:16-24; T-362-CONF-ENG, 5:2-18; 7:12-16; T-363-CONF-ENG, 11:7-17; 17:9-24.
989 ICC-01/05-01/08-3177-Conf.
990 ICC-01/05-01/08-3186-Conf.
991 ICC-01/05-01/08-3190-Conf, para. 3.
992 ICC-01/05-01/08-3190-Conf, para. 4.
993 ICC-01/05-01/08-3190-Conf, para. 5.
994 ICC-01/05-01/08-3190-Conf, para. 10.
995 ICC-01/05-01/08-3190-Conf, para. 6.
996 ICC-01/05-01/08-2827-Conf-AnxB-Red3.
997 ICC-01/05-01/08-3192-Conf; ICC-01/05-01/08-3204-Conf.

deliberations with no clear picture of how the List had been assembled, or the level of collusion between Prosecution witnesses.

2. No reasonable Trial Chamber would have ascribed any weight to the testimony of P169 or P178

506. No reasonable Trial Chamber would have relied on the evidence of P169 and P178. First, rather than order proper investigations into the extent of a scheme to extort money from the Court (in addition to the [REDACTED] Euros already paid) and the extent of contact between witnesses, the Trial Chamber's actions were limited to recalling P169. This measure did not provide the Trial Chamber with the necessary basis to be able to rely on the evidence of P169 and P178.

507. The Trial Chamber itself acknowledged that P169's testimony "lacked clarity" in relation to the source, drafting, and meaning of his letters, the extent of his meetings with other Prosecution witnesses, and his use of the List.[998] That clarity could have been provided, *inter alia*, by P178. [REDACTED]". [REDACTED].[999]

508. However, the Trial Chamber denied Defence requests for P178's recall.[1000] This denial compounded the failure to pursue proper investigatory measures. Accordingly, the Judgment was rendered in the absence of evidence as to: (i) how the List was created; (ii) how many witnesses were involved in the scheme, and the level of collusion between them; and (iii) the identity of "[REDACTED]", and his involvement in the scheme to hold the court to ransom. This is particularly egregious given that the Trial Chamber dismissed Defence concerns on the basis

[998] Judgment, para. 320.
[999] ICC-01/05-01/08-3190-Conf, paras. 4-6, 10.
[1000] ICC-01/05-01/08-2924-Conf ; ICC-01/05-01/08-2980-Conf; ICC-01/05-01/08-3186-Conf ; ICC-01/05-01/08-3204-Conf.

that allegations of collusion were "unsubstantiated",[1001] while blocking Defence attempts to substantiate the very collusion in question.[1002]

509. Secondly, the reliance placed on the evidence of P169 and P178 was based on a superficial credibility analysis which lacked proper reasoning and ignored the broader credibility issues affecting the witnesses. In relation to P169, the conclusion that he was a reliable witness was based solely on: (i) his "assertion that his 2011 Testimony was truthful"; (ii) his claims were made after his 2011 testimony; and (iii) his denial that the Prosecution exerted any influence on his testimony before or after his court appearance.[1003] This reasoning is simplistic. No reasonable finder of fact would have accepted at face value the word of a witness whose relationship with the truth is the very matter at issue, without objective support.

510. When assessing credibility, the Trial Chamber also did not address, in any meaningful way, the Defence's supplemental submissions on P169's recall, and the web of lies in which he found himself entangled.[1004] To take one example, P169 lied about his contact with other Prosecution witnesses. Throughout his examination, he maintained that he had only met [REDACTED] once.[1005] Once confronted with telephone records, he conceded that there had been a number of meetings.[1006]

511. The broader credibility issues affecting P169 and P178 were also never properly addressed by the Trial Chamber. Even putting aside the "List", and their unapologetic financial motivation, their testimony was not of the quality that should be accepted by any court.[1007] Both testified to events which were not true: P169 spoke of an MLC soldier who used to rape children to infect them with

[1001] Judgment, paras. 318-319.
[1002] ICC-01/05-01/08-2924-Conf; ICC-01/05-01/08-2980-Conf; ICC-01/05-01/08-3186-Conf; ICC-01/05-01/08-3204-Conf.
[1003] Judgment, para. 321.
[1004] ICC-01/05-01/08-3200-Conf.
[1005] T-361-CONF-ENG, 37:15-40:3; 57:6-10; 68:22-69:1; T-362-CONF-ENG, 3:25-4:14.
[1006] T-363-CONF-ENG, 11:21-13:20.
[1007] ICC-01/05-01/08-3121-Conf.

AIDS;[1008] P178 claimed that the MLC employed child soldiers (on the basis of children seen playing with a baton behind a house).[1009] These aspects of their testimony were ignored. Inconsistencies between prior statements and testimony were disregarded.[1010]

512. The truthfulness of P169's and P178's testimony cannot sensibly be divorced from the blackmail, threats, exaggerated financial claims, and willingness to reveal the contact details of protected witnesses for their own financial gain.[1011] Both witnesses exaggerated their purported financial losses to VWU[1012] and made false claims about MLC threats.[1013] These acts demonstrate their disregard for the proceedings, the solemnity with which they view the responsibilities of testifying, and their fickle relationship with the truth. None of them were properly addressed by the Trial Chamber. As a result, the analysis of P169's and P178's credibility was insufficient.

513. Instead of dismissing the testimony of P169 and P178 as manifestly unsafe, the Trial Chamber put them at the heart of the Judgment. As concerns the central finding that Mr. Bemba exercised effective control over the MLC contingent in the CAR, the Trial Chamber relied on P36, P169, P173, and P178 to find that Mr. Bemba's orders were relayed and implemented by Colonel Moustapha.[1014] The Chamber has doubts about the credibility of each of these witnesses, but still finds that the evidence is reliable on the basis that, *inter alia*, their testimonies on this issue are "internally consistent and generally corroborate one another".[1015] P169 and P178 are at the heart of the findings on command.

[1008] ICC-01/05-01/08-3121-Conf, para. 115; T-138-CONF-ENG, 3:10-4:4.
[1009] ICC-01/05-01/08-3121-Conf, para. 130; T-151-CONF-ENG, 43:16-22.
[1010] ICC-01/05-01/08-3121-Conf, para. 109; T-154-CONF-ENG, 22:19-24:16; 45:16-52:6.
[1011] ICC-01/05-01/08-3200-Conf, para. 63.
[1012] ICC-01/05-01/08-2912-Conf-AnxD, pp. 3-4; ICC-01/05-01/08-3200-Conf, para. 3.
[1013] ICC-01/05-01/08-3200-Conf, paras. 2-26, 65-68; ICC-01/05-01/08-1816-Conf-Anx1-Red2.
[1014] Judgment, fn. 1185.
[1015] Judgment, para. 427.

514. Despite neither P169 nor P178 having been in Mongoumba during 2002-2003, Section V(C)(11) relies almost exclusively on their evidence to make adverse findings.[1016] Only a few footnotes cite to other witnesses or evidence. While unable to rely on P169's testimony to show that Mr. Bemba ordered the Mongoumba attack,[1017] the Chamber states that P169's testimony is consistent with P178 "in many aspects", and that Colonel Moustapha transmitted an order to his troops for a punitive operation against Mongoumba.[1018] This finding is central to that on the "*modus operandi*" of the MLC troops, which is relied upon not only to establish the alleged causal link between Mr. Bemba and the crimes (justifying his conviction as a commander),[1019] but also to show Mr. Bemba had knowledge of the crimes, and failed to exercise control properly.[1020] Moreover, the Mongoumba factual findings are relied upon to show the fulfilment of the contextual elements of war crimes and crimes against humanity.[1021]

515. Accordingly, the conviction is materially affected by the Trial Chamber's error. Its failures in the assessment of P169's and P178's credibility make any reliance on them, even "with caution", unsafe. The findings which rely upon the testimony of P169 and P178 including, but not limited to, where their evidence is uncorroborated should be quashed.[1022]

[1016] Judgment, fns. 1621-1653.
[1017] Judgment, para. 540.
[1018] Judgment, para. 542.
[1019] Judgment, fns. 2179, 2207.
[1020] Judgment, para. 737, fn. 2207.
[1021] Judgment, fns. 2083, 2113.
[1022] *See, e.g.*, Judgment, fns. 1767, 1184, citing T-140 , 21:1-4, who is the only witness cited to testify that Mr. Bemba "sometimes" gave operational orders". *See also,* fns. 1652, 1744, 1767.

3. The Trial Chamber's error undermines its reliance on the 19 witnesses

516. If a witness has an expectation of material benefit arising from his or her testimony, this automatically impacts on the witness' credibility and the weight that can be given to their evidence.[1023]

517. P169 wrote that the 19 witnesses on the List "*sont prêts à apporter la preuve de subordination des témoins*".[1024] Neither VWU nor the Prosecution contacted any of these witnesses to see if they wished to recant their testimony.[1025] No attempt was made to examine P169's or P178's telephone records to see whether they had been in contact with the numbers on the List. In 2011, P169 and P178's phone records were accessed to investigate their (false) allegations of threats from MLC members.[1026] The potential collusion and corruption of the entire list of the Prosecution's CAR witnesses should have merited at least the same response.

518. The Trial Chamber dismisses the entire issue on the basis of "P169's statement that claims of subornation of witnesses were untrue and used for the sole purpose of putting pressure on the readers of his letters."[1027] The testimony cited by the Trial Chamber is worth reviewing in full:[1028]

> Q. Sir, you've looked at this document a number of times. I don't have many questions to ask you about it. This is the document - the letter - in which you again said that witnesses wanted to bring evidence of their subornation and this time you threatened to reconsider your testimony. I just want to clarify one thing. By 5 August of this year you and [REDACTED] had completely fallen out with one another, hadn't you?
> A. Yes.

[1023] *Martić* TJ, para. 38; *Karemera* TJ, paras. 194-195, 249-250, 341-342, 437-438, 470-471, 495-496, 530-531, 591-592, 623-624, 701-702, 735-736, 878-879, 1281-1282, 1331-1332, 1352-1353; *Bizimungu* TJ, paras. 830-831; *Zigiranyirazo* TJ, paras. 139-140.
[1024] ICC-01/05-01/08-3138-Conf-AnxA.
[1025] ICC-01/05-01/08-2975-Conf-Red, paras. 4-8; ICC-01/05-01/08-2867-Conf, para. 11.
[1026] ICC-01/05-01/08-1816-Conf-Anx1-Red2.
[1027] Judgment, para. 322.
[1028] Judgment, fn. 781.

> Q. So this letter we can take it is all your own work? It's all your idea?
> A. So who wrote it? Myself. I added a few things to place more pressure on them. That is why I said that. I thought that by doing that I would get an answer to my claims, but it was me myself who wrote this letter.

519. P169 did not testify that the claims of subornation of witnesses were untrue. The Trial Chamber misstates the evidence. Its dismissal of the Defence challenges to the credibility of these 19 witnesses is based on an error of fact. Even had P169 testified that his letter of 5 August was a lie, he has offered no explanation for his assertion that there was a meeting at [REDACTED]'s house "in March" of "a lot of witnesses".[1029] [REDACTED].[1030]

520. A reasonable Trial Chamber would have wanted to know more. It dismissed the Defence request for further investigations,[1031] and refused to recall P178 despite [REDACTED].[1032] This was an error which undermines its reliance on these 19 witnesses without any measure of caution, and the findings upon which their testimony are based.[1033]

[1029] ICC-01/05-01/08-2827-Conf-AnxA-Red3.
[1030] EVD-T-D04-00105/CAR-OTP-0083-1489-R01.
[1031] ICC-01/05-01/08-3013-Conf; ICC-01/05-01/08-3077.
[1032] ICC-01/05-01/08-3190-Conf, para. 4.
[1033] Judgment, paras. 379, 389, 398, 405, 408-413, 416, 426, 440, 444, 449-450, 453, 456, 459-460, 462-501, 504-527, 531, 534-536, 542-543, 545, 549, 560, 562-571, 590, 594-596, 623-626, 629, 632-635, 640-641, 646, 695.

B. THE SCOPE OF LRV INVOLVEMENT LEAD TO AN UNBALANCED AND UNFAIR TRIAL

1. LRV questioning was unconstrained

521. Before questioning a witness, LRVs were required to file a written application setting out the "nature and details" of their proposed questions.[1034] In addition, the Trial Chamber held that:[1035]

> victims may, at the end of the questioning by the prosecution, **request leave to ask questions in addition to those filed in application** as set out in the paragraph above. Such **request must explain both the nature and the details of the proposed questioning as well as specify in what way the personal interests of the victims are affected** […]

522. This procedure was never implemented. In reality, the LRVs asked "follow-up" questions to every witness, without ever having specified the nature and the details of the questions, or the way in which personal interests of the victims were affected. The requirement of prior authorisation was successfully circumvented.

523. The widespread nature of this practice caused prejudice. During the examination of D6, for example, Maître Zarambaud was authorised to ask 14 questions.[1036] He asked only four of the authorised questions, and asked 21 unauthorised "follow-up" questions.[1037] Maître Douzima-Lawson was authorised to ask nine questions.[1038] She asked none of her authorised questions, and instead asked 52 unauthorised "follow-up" questions.[1039] For D4, Maître Zarambaud asked

[1034] ICC-01/05-01/08-1023, para. 19; ICC-01/05-01/08-807-Corr, para. 102(h); ICC-01/05-01/08-1005, para. 39.
[1035] ICC-01/05-01/08-1023, para. 19; T-42-RED-ENG, 18:6-14 (emphasis added).
[1036] ICC-01/05-01/08-2702-Conf; T-328-CONF-ENG, 2:7-18.
[1037] T-329-CONF-ENG, 30:20-48:23.
[1038] ICC-01/05-01/08-2700-Conf; T-328-CONF-ENG, 2:7-18.
[1039] T-329-CONF-ENG, 50:8-54:3; T-329bis-Conf-ENG, 2:7-16:22

only one of the 15 questions for which he received authorisation, [1040] but asked 27 follow-up questions.[1041] Maître Douzima-Lawson asked 15 of her 19 authorised questions,[1042] then also asked 22 unauthorised follow-up questions.[1043] There are similar statistics for each Defence witness.

524. Victim participation does not equate victims "to parties to the proceedings".[1044] Unlike the Prosecution, which bears the burden of proving its case beyond a reasonable doubt, the LRVs are mandated by the Statute and Rules of the ICC to present the views and concerns of victims.[1045]

525. Rule 91(3) ensures that LRVs justify their intervention in the trial process. The extensive use of "follow-up" questions asked with no prior justification or authorisation, removed any meaningful distinction between the Prosecution and the LRVs in their examination of Defence witnesses. The LRVs acted as a second (and third) Prosecutor, in a manner incompatible with their mandated role.[1046] Defence objections were dismissed.[1047]

526. This role has been meticulously monitored by other Trial Chambers. In *Lubanga*, a "general interest in the outcome of the case or in the issues or evidence the Chamber will be considering" was deemed insufficient to warrant the questioning of witnesses.[1048] LRVs were required to establish, for example, the "involvement in or presence at a particular incident which the Chamber is

[1040] ICC-01/05-01/08-2633-Conf; T-326-CONF-ENG, 23:23-24:6.
[1041] T-327-CONF-ENG, 41:10-56:2.
[1042] ICC-01/05-01/08-2637-Conf; T-326-CONF-ENG, 24:1-6.
[1043] T-327-CONF-ENG, 56:8-59 :21; T-327bis-CONF-ENG, 1:21-16:22.
[1044] ICC-01/04-556, para. 55.
[1045] Article 68(3).
[1046] *See* ICC-01/04-01/06-925, para. 28; *See also* Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06-925, p. 22, para. 19.
[1047] *See, e.g.* T-334-CONF-ENG, 47:3-49:5; ICC-01/05-01/08-2259-Conf; T-230-CONF-ENG, 44:1-45:19.
[1048] ICC-01/04-01/06-1119, para. 96.

considering", or "identifiable harm" from that incident.[1049] The LRVs questioned only 25 of the 67 witnesses heard.[1050]

527. The *Katanga* LRVs were reminded that it was not their role to "reinforce the prosecution team".[1051] Attempts to ask questions for which they had not received prior authorisation were not tolerated.[1052] Attempts to ask general questions were met with requests to ask specific questions restricted to "the victims you are representing."[1053] The *Ntaganda* Trial Chamber has limited LRV questions to those addressing "harm suffered by each individual and his or her family, or other closely connected matters."[1054] The LRVs participating in *Gbagbo* can question witnesses "to the extent relevant to the victims' interest."[1055]

528. The *Bemba* trial stands alone. No aspect of the content of Defence witness' testimony was off limits. For example, barring two questions about looting, the LRVs questioned D49 on military training of MLC members,[1056] popularisation of the code of conduct,[1057] remuneration of soldiers,[1058] the role of the MLC and CAR armies during the conflict,[1059] Mr. Bemba's visit,[1060] operational control,[1061] reasons for withdrawing from the CAR,[1062] whether or not there was documentary evidence of a request by Patassé for the MLC to intervene,[1063] information about the troops crossing from Zongo to Bangui,[1064] how the units were deployed to Bangui,[1065] other

[1049] ICC-01/04-01/06-1119, para. 96.
[1050] *Lubanga* TJ, para. 20, fn. 62.
[1051] ICC-01/04-01/07-T-87-Red-ENG, 26:15-25. *See also* ICC-01/04-01/07-T-160-Red-ENG, 20:1-25.
[1052] ICC-01/04-01/07-T-252-ENG, 40:15-18.
[1053] ICC-01/04-01/07-T-252-ENG, 43:7-13.
[1054] ICC-01/04-02/06-T-25-Red-ENG, 8:12-16.
[1055] ICC-02/11-01/15-205, para. 37.
[1056] T-274-CONF-ENG, 37:18-19.
[1057] T-274-CONF-ENG, 38:11,16-17.
[1058] T-274-CONF-ENG, 39:10-11,14-17.
[1059] T-274-CONF-ENG, 40:5-6, 12, 21-23.
[1060] T-274-CONF-ENG, 41:7-9, 11-12, 16-18.
[1061] T-274-CONF-ENG, 42:4-6, 16-18, 43:3-7.
[1062] T-274-CONF-ENG, 46:7-10, 13-14; 47:1-6.
[1063] T-274-CONF-ENG, 50:16-19; 51:11-15; 52:23-25; 53:4-6, 15-18.
[1064] T-274-CONF-ENG, 53:21-22, 24-25.
[1065] T-274-CONF-ENG, 54:8-12.

witnesses' testimony regarding harassment of CAR soldiers by MLC soldiers,[1066] the condition of the CAR army,[1067] and the command of the MLC soldiers.[1068]

2. Defence witnesses were cross-examined three times

529. The LRV questioning of Defence witnesses was designed to attack their credibility and character, and undermine the Defence case.

530. In breach of an express prohibition,[1069] the LRVs habitually asked wildly leading questions: "Did you learn that, once they got to the support regiment, the troops… looted everything in that area?";[1070] or "Do you know that, when they got to PK12 Begoua, the ALC soldiers occupied private individuals' homes without their authorisation and got involved in pillaging, murders and theft?".[1071] These questions were non-neutral, and put issues in dispute as established fact, without any reference to evidence in the case.

531. The LRVs were regularly allowed to put lengthy extracts from the testimony of other witnesses to Defence witnesses, with a view to contradicting their evidence.[1072] They used documents for the same purpose. Maître Douzima-Lawson's examination of General Seara lasted nearly two hours, during which she put 14 documents to him in an attempt to undermine aspects of his testimony.[1073]

[1066] T-274-CONF-ENG, 55:3-5.
[1067] T-274-CONF-ENG, 55:23-24.
[1068] T-274-CONF-ENG, 57:1-5,18-20, 24-25; 58:1-3, 6-7, 13-16.
[1069] T-35-RED-ENG, 6:13-15; T-61-RED-ENG, 32:8-17.
[1070] T-274-CONF-ENG, 54:16-18.
[1071] T-299-CONF-ENG, 41:10-12; *See also* T-310-CONF-ENG, 36:5-8; T-306-CONF-ENG, 70:7-8, 23-24 ; 71:1-2; T-292-CONF-ENG, 17:2-6; T-329-CONF-ENG, 42:10-12.
[1072] See, for example, T-316-CONF-ENG, 25:25-27:24; T-247-CONF-ENG, 32:16-33:4; T-258-CONF-ENG, 51:22-52:21; 55:7-56:6; T-263-CONF-ENG, 29:12-30:1; 36:18-37:13; T-274-CONF-ENG, 51:23-52:19; T-306-CONF-ENG, 59:8-60:21; T-324-CONF-ENG, 13:13-14:3; T-234-CONF-ENG, 59:1-60:6.
[1073] T-234-CONF-ENG, 32:25-33:8, 38:16-39:9.

532. The questioning was oppressively repetitive. D4 was asked **four** times about the mixing of FACA and MLC soldiers. The Defence asked:[1074]

> Q. You said that the Central African platoon and the MLC platoon were merged. How were they merged?
> A. After the organisation, there was a liaison commander for the MLC and FACA. The MLC and Central African platoons were merged following a ratio of 1:2. Two Central African platoons to one MLC platoon.

The Prosecution then asked:

> Q. [...] You testified that MLC troops were merged with FACA at a ratio of one-to-two and that is, according to your testimony, two CAR to one MLC platoon.

Maître Zarambaud then asked:[1075]

> Q. [...] So you have one Central African platoon and two MLC platoons. Can you explain that to me?

Maître Douzima-Lawson then asked:[1076]

> "Q. Were the MLC and FACA platoons mixed or together on the ground in the field?"

533. D50 explained that the MLC troops in the CAR spoke Lingala.[1077] He repeated this during the Prosecution questioning.[1078] Despite having heard the answer twice, Maître Zarambaud asked the witness to repeat "what language they spoke?" To which the witness answered "They all spoke Lingala."[1079] Finally, Maître Douzima-Lawson then stated, "Let me now revisit the MLC soldiers. Which language did these soldiers speak among themselves?" He replied, for the fourth time "Lingala, Counsel".[1080]

[1074] T-325bis-CONF-ENG, 25:19-23.
[1075] T-327-CONF-ENG, 52:13-14.
[1076] T-327-CONF-ENG, 57:19.
[1077] T-261-CONF-ENG, 34:15-19.
[1078] T-261-CONF-ENG, 66:11-67:13.
[1079] T-263-CONF-ENG, 26:12-13.
[1080] T-263-CONF-ENG, 50:17-19.

534. General Seara was questioned by the Defence as to his methodology. The Prosecution explored the same topic over 32 pages of transcript. Maître Douzima-Lawson then asked him to explain "what method did you use to draft this report?" On the sixth day of his testimony, the witness replied "I believe I've already answered that question", but went on to explain it again.[1081]

535. There are many other examples.[1082] These were not "follow-up" questions seeking to elicit further information. They were duplication. Sometimes the LRVs acknowledged this: "You have basically answered my second question, but I will put it to you all the same."[1083]

536. Throughout this oppressive process, the Trial Chamber sat silently. This bears comparison to other trials, such as *Ruto & Sang*, in which the LRVs were repeatedly directed to "avoid areas that the Prosecution has already covered",[1084] and were only authorised to ask those questions which had not been already asked by the calling party.[1085]

537. The exhaustion and agitation felt by Defence witnesses following three cross-examinations was palpable. Perversely, instead of protecting these witnesses from repetitive questions, this was used by the Trial Chamber to discount their testimony. Their reluctance to answer the same question over and over is cited to support a finding of "evasive" demeanor in the Judgment.[1086]

538. The prejudice was compounded by fact that the LRVs did not cross-examine **Prosecution** witnesses. Adversarial and repetitive questions were only directed

[1081] T-234-CONF-ENG, 51:5-10.
[1082] ICC-01/05-01/08-2733-Conf, paras. 10, 13, 24-28, 33-34.
[1083] T-247-CONF-ENG, 21:16.
[1084] ICC-01/09-01/11-T-105-Red-ENG, 37:20-38:19.
[1085] ICC-01/09-01/11-460, para. 75.
[1086] *See, e.g.* Judgment, para. 348, fn. 875, citing T-322-CONF-ENG, 55:24-57:7.

towards Defence witnesses. The Prosecution and Defence evidence was accordingly treated in a markedly different fashion, in violation of Article 67(1)(e).

539. The LRVs had been present during the CAR events, and were known to Defence witnesses.[1087] They underlined their personal opinions on the events during questioning,[1088] and cross-examined Defence witnesses on the basis of their own knowledge. When, for example, D50 testified about what he heard over the radio during the events, Maître Douzima-Lawson stated: on a crucial live issue in the case: "I raised this question as a Central African Republic citizen myself, who was there and who heard about these things."[1089] The Trial Chamber failed to intervene. Her dealings with Defence witnesses were, on occasion, more insidious.[1090]

540. The Trial Chamber dismissed 20 pages of Defence concerns[1091] in three paragraphs, asserting that it had appropriately supervised the LRVs questioning, and would continue to do so.[1092] Leave to appeal the decision, notably on the basis of the failure of the Trial Chamber to give a reasoned decision, was denied.[1093]

3. Mr. Bemba suffered prejudice

541. In addition to having his witnesses disbelieved on the basis of their discomfort at repetitive questions, other concrete prejudice arose. Had the LRVs been appropriately restricted, the Bemba proceedings would have been shorter. Four examinations take longer than two.

[1087] T-247-CONF-ENG, 14:25-15:1; T-250-CONF-ENG, 59:18-21.
[1088] *See, e.g.* T-258-CONF-ENG, 49:2-4.
[1089] T-255-CONF-ENG, 45:25-46:1.
[1090] ICC-01/05-01/08-2513-Conf, paras. 2, 7-8: [REDACTED].
[1091] ICC-01/05-01/08-2733-Conf, para. 49.
[1092] ICC-01/05-01/08-2751-Conf, paras. 9-11.
[1093] ICC-01/05-01/08-2800.

542. In October 2012, two years into the trial, the LRVs were finally ordered to restrict their examination of witnesses to two hours in total[1094] (not including technical or other delays, procedural debates or follow-up questions from the bench). However, this two-hour limit applied regardless of the length of the Defence examination in chief, (which was often little more than two hours per witness). D6, for example, was examined by the Defence for 1 hour and 55 minutes. The LRVs were still afforded (and used) more than two hours. Mr. Bemba's right to expeditious proceedings was undoubtedly compromised.[1095]

543. In making adverse findings, the Trial Chamber regularly corroborated evidence led by the parties with that led by LRVs. These were not insignificant findings: Mr. Bemba deciding to withdraw the MLC troops from the CAR;[1096] or Colonel Moustapha's ability to call Mr. Bemba via Thuraya.[1097] Testimony elicited by the LRVs, or documents introduced by them, is sometimes the only evidence supporting a proposition in the Judgment.[1098]

544. It is impossible to quantify the damage caused by the virtually unrestrained participation of victims. Mr. Bemba can identify the findings which should necessarily be overturned on the basis of their reliance on evidence which was elicited in a manner incompatible with the Statute, but the problem is larger. The net effect of the Trial Chamber's erroneous approach was that it heard three times as much evidence inculpating Mr. Bemba, as that which exculpated him.

545. When a delicate balance is achieved through the clear delineation of roles of the Prosecution and the Defence, the system is thrown out of balance if another

[1094] T-254-CONF-ENG, 66:21-23.
[1095] Article 64(2), Rule 101.
[1096] Judgment, para. 555, fn. 1702 citing T-269-CONF-ENG, 46:21-47:10.
[1097] Judgment, para. 419, fn. 1147 citing, among others, T-263-CONF-ENG, 36:16-17.
[1098] Judgment, para. 602, fn. 1884; para. 288, fns. 679-680.

party is involved in the case who actively works against the interests of the Defence.[1099] Zappalà opined:[1100]

> What seems to be impermissible is allowing the victims to directly become active parties in the trial proceedings for the determination of guilt or innocence…their presence in the courtroom as active parties would create a serious imbalance in the fact finding mechanism and would be inconsistent with the rights of the accused in that the defendant would be forced to confront more than one party (which would be in clear violation of the principle of equality and would alter the balance of the process in many other respects).

546. This theoretical concern became a reality in the *Bemba* trial. The only meaningful remedy would be for the trial to be conducted again in the manner envisaged by the drafters of the Statute. Given the length of time Mr. Bemba has spent in prison, a permanent stay of proceedings is the only appropriate remedy.

VIII. CONCLUSION

547. It is an extraordinary thing to present the evidence of a witness, about whom the Trial Chamber has had prior and secret discussions with the Prosecution, concerning the truth of his evidence. Being in the dark, as if taking part in play where the other principle actors are reading from a script which has never been provided to you. After 15 November 2012, the spectacle which took place in Courtroom I of the ICC was no longer, in truth, a trial at all. Defence lawyers have a role in the criminal process. They cannot assist in remedying unfairness from which they've been deliberately blindfolded.

548. However, even had the fairness of this trial had been appropriately monitored, even had the LRVs' participation been proper, even if the Trial Chamber had not entertained *ex parte* submissions on the credibility of the Defence case, even had the

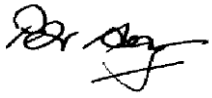
[1099] Doak, J., *Victims' Rights in Criminal Trials: Prospects for Participation* (2005) J. of Law & Soc, p. 298.
[1100] Zappalà, S., *The Rights of Victims v. The Rights of the Accused*, (2010) J. Int Crim J, p. 162.

Prosecution not gained access to privileged information on Defence strategy, even had allegations that Prosecution witnesses had colluded or been corrupted been investigated in the same manner as those against the Defence; this still would not resolve the central problem: the command responsibility case was never credible.

549. In reality, Mr. Bemba is the commander that international law would have him be. He trained his army, he gave them a Code of Conduct, he actively pursued rumours of crimes, he punished those identified to him. The ICC should go out of its way in this its first command responsibility case to reinforce the principles of responsible command rather than to create a self-fulfilling construct of criminality.

550. Mr. Bemba was unfairly tried, and too harshly judged. He did not exercise effective control over the MLC contingent in the CAR. Everything else aside, this necessitates his acquittal.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 28 September 2016

It is hereby certified that this document contains a total of 59,641 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.