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**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 Document*

**Filing in compliance with decision ICC-01/05-01/08-3370**

**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**

Peter Haynes QC

Kate Gibson

Melinda Taylor

**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**

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**Registrar**

Herman von Hebel

## A. BACKGROUND

1. On 21 March 2016, Trial Chamber III rendered its Judgment under Article 74 of the Statute (“the Judgment”), convicting the appellant of the charges against him.<sup>1</sup>

2. The Appeals Chamber granted the appellant’s request for a variation of the time limit within which to file his document in support of appeal<sup>2</sup> on the basis of, *inter alia*, “the anticipated factual and legal complexity of the appeal, the novelty of the legal issues to be addressed and fair trial arguments that Mr Bemba may wish to make.”<sup>3</sup>

3. In its decision granting this variation, the Appeals Chamber considered:<sup>4</sup>

that it is in the interest of the efficient conduct of the proceedings that Mr Bemba inform the Appeals Chamber briefly of, **at the very least, the legal findings in the Conviction Decision that he intends to challenge within** the 90 day time limit prescribed in regulation 58 of the Regulations, **without prejudice to the actual formulation of the grounds of appeal that he wishes to advance** in the document in support of the appeal subsequently filed.

## B. IDENTIFICATION OF CONTESTED FINDINGS

4. In compliance with this order, the appellant hereby files a list of the legal, factual and procedural errors which he intends to challenge on appeal.

5. This information is intended as a guide to facilitate the efficient conduct of the appellate proceedings but is filed without prejudice to the appellant’s right to add, delete or revise any of the following complaints against either the Judgment and/or

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<sup>1</sup> ICC-01/05-01/08-3343.

<sup>2</sup> ICC-01/05-01/08-3353.

<sup>3</sup> ICC-01/05-01/08-3370, para. 6.

<sup>4</sup> ICC-01/05-01/08-3370, para. 9 (emphasis added).

the trial process. The appellant notes, to this end, that he is yet to receive a complete version of the Judgment in the language he fully understands and speaks, further underscoring the potential need for further revisions upon his complete review of the Judgment.

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## **I. OVERVIEW**

It is the appellant's central contention that no reasonable Trial Chamber could have convicted him of the charges he faced. However, this Trial Chamber fell into error in a number of ways. It adopted wholly inapposite procedures, misinterpreted and/or misapplied the law and took an unjustifiable approach to the evidence. Had the Trial Chamber behaved in a proper judicial manner, the appellant submits it would inevitably have found him not guilty of those charges.

## **II. THERE WAS A MISTRIAL**

**A. Failure to safeguard the fairness of the trial:** The Trial Chamber was informed in March 2013 that the Prosecution was in possession of information that a Defence intermediary was acting in a fraudulent manner, and that certain Defence witnesses were imposters.<sup>5</sup> Although this information fell within the four corners of the agreed scope of rule 77,<sup>6</sup> the Trial Chamber failed to either order the timely disclosure of this information to the Defence, or to otherwise take steps to ensure the effective representation of Mr. Bemba. In its decisions of 17 June 2015, 7 March 2016, and 9 March 2016, the Trial Chamber failed to provide the Defence with a remedy for the prejudice incurred by the Defence through this non-disclosure.<sup>7</sup>

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<sup>5</sup> ICC-01/05-01/08-2548-Red4, paras. 8-9.

<sup>6</sup> On 23 August 2012, the Prosecution avowed that it had, and would disclose all information in its possession which was relevant to the credibility of Defence witnesses: ICC-01/05-01/08-2283, para. 14.

<sup>7</sup> ICC-01/05-01/08-3255, ICC-01/05-01/08-3335, paras. 34-35, ICC-01/05-01/08-3336. See also ICC-01/05-01/08-3273, ICC-01/05-01/08-3382.

**B. Failure to safeguard the rights of the Defence:** From November 2012 onwards, the Trial Chamber was aware that the members of the Main Case Prosecution team were involved in the Article 70 investigations,<sup>8</sup> and were seeking access to evidence in that investigation, and resultant case, to which they would not, otherwise, have had access.<sup>9</sup> In April 2013, the Trial Chamber were further informed that the Prosecution had received a raft of confidential information concerning protected Defence witnesses, without first obtaining an order from the ICC, or waiver of privileges and immunities.<sup>10</sup> The Trial Chamber declined to take any measures to safeguard the rights and confidentiality of the Defence either on a *proprio motu* basis, or upon the request of the Defence.<sup>11</sup>

**C. Failure to curtail impermissible reliance on Article 70 material:** The Prosecution cross-examined Defence witnesses with the benefit of undisclosed information that was obtained in violation of Defence privileges and immunities, confidentiality, rule 73 and internal work product privilege.<sup>12</sup> This undermined the fair and adversarial conduct of the proceedings. In its decisions of 17 June 2015, 7 March 2016, and 9 March 2016, the Trial Chamber failed to provide the Defence with a remedy for these violations.<sup>13</sup>

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<sup>8</sup> See, for example, ICC-01/05-01/08-2412, ICC-01/05-01/08-2421, and T-303-Conf-Red3-ENG-ET.

<sup>9</sup> See, for example, according to the disclosure regime, information concerning payments to Defence witnesses was not disclosable: ICC-01/05-01/08-2141, paras. 29, 36(c)iv; D60, T-244-ENG-ET, p.58, line 24 – p.60, line 18.

<sup>10</sup> ICC-01/05-01/08-2548-Red4; T-303-Conf-Red3-ENG-ET.

<sup>11</sup> ICC-01/05-01/08-3059.

<sup>12</sup> See, for example, ICC-01/05-01/08-3257-Conf, paras. 22, 25, 26, ICC-01/05-01/08-3217-Conf-Red, para. 109; D57, T-258-Conf-ENG-CT, p.2, line 25 – p.3, line 10, D64, T-260-Conf-ENG-ET, p.6, lines 14-23, D51, T-263-Conf-ENG-ET, p.14, lines 6-20, D55, T-265-Conf-ENG-ET, p.15, lines 7-18, D48, T-268-Conf-ENG-ET, p.78, line 22 – p.79, line 12, D49, T-274-Conf-ENG-CT, p.34, lines 2-14, D16, T-277-Conf-ENG-ET, p.38, lines 7-20, p.39, lines 4-11, D45, T-297-Conf-ENG-ET, p.18, line 17- p.20, line 5, T-299-Conf-ENG-ET, p.24, lines 11-16, D2, T-322-Conf-ENG-ET, p.26, line 6 – p.27, line 9, D9, T-323bis-Conf-ENG-ET, p.21, lines 22-23, D23, T-334-Conf-ENG-ET, p.17, lines 23-25, D26, T-335-Conf-ENG-ET, p.19, lines 8-13, D25, T-337-Conf-ENG-ET, p.40, lines 3-6, 13-20, D29, T-339-Conf-ENG-ET, p.41, lines 18-19, D30, T-342-Conf-ENG-ET, p.13, lines 1-10, D15, T-345-Conf-ENG-ET, p.12, line 4 – p.15, line 6.

<sup>13</sup> ICC-01/05-01/08-3255, ICC-01/05-01/08-3335, paras. 34-35, ICC-01/05-01/08-3336. See also ICC-01/05-01/08-3273, ICC-01/05-01/08-3382.

**D. Violation of the principle of open and adversarial justice:** During the course of the trial, the Prosecution made *ex parte* submissions on contentious factual issues pertaining to Prosecution and Defence witnesses.<sup>14</sup> The Defence was not apprised of these submissions until after the conclusion of the respective witness's testimony (and in some cases, until after the conclusion of the Defence case). The Trial Chamber thus failed to ensure that the Defence was informed of all relevant factual submissions in a timely manner. This omission undermined the impartial and adversarial nature of the trial process, was contrary to the principle of open justice, and impacted on the Trial Chamber's appreciation of the credibility of the witnesses in question.

**E. Failure to act in an impartial manner:** The Trial Chamber acted in a manner which was contrary to its duty of impartiality, and Mr. Bemba's right to a fair and adversarial trial by:

- i. engaging in the Prosecution's investigation of the Defence;<sup>15</sup>
- ii. imposing prejudicial, and more rigorous restrictions on the Defence as concerns its ability to challenge the credibility of Prosecution witnesses during their testimony;<sup>16</sup>
- iii. relying on evidence which was not relied upon by the parties;<sup>17</sup>
- iv. issuing adverse findings concerning Defence witnesses on the basis of matters which were never put to the witnesses in question ("unchallenged testimony");<sup>18</sup>
- v. issuing findings on the basis of factual and legal theories, which differed in fundamental respects from those which were advanced by the parties;<sup>19</sup> and

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<sup>14</sup> See, for example, ICC-01/05-01/08-1623-Conf-Red; T-148-Conf-Red2-ENG-ET (see in particular, p.7, lines 14-25, p. 20, lines 7-12, 21-23), T-155-Conf-Red2-ENG-ET.

<sup>15</sup> See, for example, ICC-01/05-01/08-T-303-Conf-Red2-ENG-ET, p.16, lines 4-7, p.24, lines 8-12.

<sup>16</sup> See, for example P178, T-157-Conf-ENG-ET, p.53, line 10 – p.54, line 3, D16, T-277-Conf-ENG-ET, p.37, line 3 – p.38, line 1, and D15, T-345-Conf-ENG-ET, p.12, line 4 – p.15, line 6. See also P81, T-56-CONF-ENG-ET, p.38, line 3 – p.40, line 11, CHM1, T-357-CONF-ENG-ET, p.116, lines 8-16.

<sup>17</sup> See, for example, Judgment, para. 263.

<sup>18</sup> See, for example, Judgment, para. 232.

<sup>19</sup> See, for example, Judgment, paras. 586, 678, 681-684, 702, 712, 729, 730, 740.

- vi. implicitly relying on allegations from the Article 70 case, which were not in evidence in the Main Case.<sup>20</sup>

### III. THE TRIAL CHAMBER ERRED IN ITS ASSESSMENT OF THE EVIDENCE

**A. Burden and standard of proof:** The Trial Chamber erred in its application of the burden of proof:

- i. The Trial Chamber reversed the burden of proof through its findings that the Defence had failed to substantiate challenges to Prosecution evidence;<sup>21</sup> and/or even if the burden may have applied properly to the Defence, the Trial Chamber failed to define the standard of proof or argumentation which should have applied;<sup>22</sup> and
- ii. The Trial Chamber failed to identify findings which rested on circumstantial evidence or inferences, failed to apply the correct standard of proof to such findings, and/or misdirected itself as to the difference between speculation, and a reasonable inference.<sup>23</sup>

**B. Inconsistent treatment of Prosecution and Defence evidence:** The Trial Chamber erred by applying inconsistent evidential standards to its assessment of Defence and Prosecution evidence, in a manner which prejudiced the Defence. This is reflected, *inter alia*, in its findings concerning:

- i. The credibility of Prosecution and Defence witnesses in light of the receipt of payments or undisclosed contacts;<sup>24</sup>

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<sup>20</sup> See, for example, Judgment, paras. 300, 355, 363-365, 366.

<sup>21</sup> See, for example, Judgment, paras. 305, 318-319, 323, 333, 338-339.

<sup>22</sup> *Ibid.*

<sup>23</sup> See, for example, Judgment, paras. 487 (fn. 1415), 541.

<sup>24</sup> Judgment, paras. 320, 334-335, 342, 355.

- ii. The impact of differences between prior statements and testimony on its assessment of the credibility of witnesses;<sup>25</sup> and
- iii. The level of proof required to authenticate Prosecution evidence,<sup>26</sup> as compared to that which was required to authenticate Defence evidence.<sup>27</sup>

**C. Erroneous standard for collusion:** The Trial Chamber found, erroneously, that discussions between witnesses on factual issues in dispute would not impact on their credibility “unless it is demonstrated that witnesses colluded or actually fabricated or falsified their evidence”.<sup>28</sup>

#### **IV. THE APPELLANT WAS CONVICTED OF A CASE OF WHICH IN MATERIAL RESPECTS HE WAS IGNORANT**

**A. NOTICE:** The Trial Chamber erred in law by convicting Mr. Bemba of crimes for which he was not charged, and by relying on material facts which fell outside the scope of the confirmed charges:

- i. The Trial Chamber convicted the accused for incidents of murder, pillage and rape which were not confirmed by the Pre-Trial Chamber;<sup>29</sup>
- ii. The Trial Chamber relied on material facts, which had been expressly rejected by the Pre-Trial Chamber;<sup>30</sup>
- iii. The Trial Chamber’s reliance on the statements of V1 and V2 to add additional uncharged crime incidents,<sup>31</sup> was incompatible with the Appeals Chamber’s directive that victim participation must occur within the framework of the confirmed charges;<sup>32</sup> and

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<sup>25</sup> For example, Judgment, paras. 230, 343-344, 359, 483, 490, 492, 500, 512.

<sup>26</sup> Judgment, paras. 420, 512.

<sup>27</sup> See, for example, Judgment, paras. 237, 273-302.

<sup>28</sup> Judgment, para. 334.

<sup>29</sup> Judgment, paras. 44-49. See also ICC-01/09-01/11-1123, para 29.

<sup>30</sup> Judgment, paras. 58-64. See also ICC-01/05-01/08-424, paras. 377-378, 384, 389, 397, 480.

<sup>31</sup> Judgment, paras. 50, 546-554, 532-533.

<sup>32</sup> ICC-01/04-01/06-1432, paras. 55-63.



- iv. The Trial Chamber improperly relied on unclear auxiliary documents in order to infer that the Defence had been put on notice regarding fundamental changes to the charges.<sup>33</sup>

**B. The case against Mr. Bemba was not properly litigated:** The Trial Chamber erred in rejecting Defence and other exculpatory evidence that had gone expressly unchallenged by the Prosecution in violation of the right of an accused to notice of the case against him.<sup>34</sup>

## **V. MR. BEMBA IS NOT LIABLE AS A SUPERIOR FOR THE ACTIONS OF THE MLC TROOPS IN THE CENTRAL AFRICAN REPUBLIC**

The case as ultimately framed by the Trial Chamber does not comport with any recognisable legal standard of command responsibility, or military practice. Internally inconsistent, factually implausible, and based on a selective – and often flawed – assessment of evidence, the Judgment impermissibly finds Mr. Bemba responsible on the basis of speculation as to the impact of measures, and hypothetical standards of which he had no notice during the proceedings, let alone during the course of 2002 and 2003.

**A. Effective Control:** The Trial Chamber erred in concluding that Mr. Bemba had effective control over the MLC troops in the Central African Republic.<sup>35</sup>

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<sup>33</sup> Judgment, paras. 46-48.

<sup>34</sup> See generally Judgment para. 232 (fn. 527 and 530) but by way of specific examples see ICC-01/05-01/08-3121, para. 95 with Judgment, paras. 426 (fn. 1176) and 707 (fn. 2160); ICC-01/05-01/08-3121, paras. 113 and 115 with Judgment, paras. 534-542 (fn. 1617, 1619, 1621, 1628, 1629-1636, 1643, 1645 and 1651); ICC-01/05-01/08-3121, paras. 171-173 with Judgment, para. 707; and ICC-01/05-01/08-3121, paras. 178-185 with Judgment, paras. 483-484.

<sup>35</sup> Judgment, paras. 705, 742.

- i. The Trial Chamber erred in its application of the principle of unity of command, resulting in an erroneous conclusion on the re-subordination of MLC troops;<sup>36</sup>
- ii. The Trial Chamber improperly relied on instances of Mr. Bemba's conduct outside the temporal and geographical scope of the charges<sup>37</sup> as indicative of his effective control;<sup>38</sup> and
- iii. The finding on effective control is based on conclusions which are undermined by procedural and factual errors on the part of the Trial Chamber.<sup>39</sup>

**B. Knowledge:** The Trial Chamber erred in concluding that Mr. Bemba knew that MLC troops were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape and pillage:<sup>40</sup>

- i. The Trial Chamber erred in law by conflating actual knowledge with constructive knowledge;<sup>41</sup>
- ii. The Trial Chamber erred in relying on factors such as rumours and media reports, which are manifestly insufficient to meet the evidential standard for actual knowledge of an accused;<sup>42</sup>
- iii. Given that the Trial Chamber found firstly, that the accused had actual knowledge for the purposes of article 28(a)(i),<sup>43</sup> secondly, that the accused's

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<sup>36</sup> Judgment, paras. 185, 427-446, 698-700.

<sup>37</sup> See, for example, Judgment, Section (V)(A)(3) as cited in paras. 425, 707 and 420; (V)(A)(4) as cited in paras. 412, 421, 454, 541, 556, 697, 701; (V)(A)(5) as cited in paras. 447, 697, 703, 737.

<sup>38</sup> Judgment, paras. 696-705.

<sup>39</sup> See, for example, the findings that: (i) the MLC operated independently of other armed forces in the field (Judgment, paras. 411, 700); (ii) the MLC provided logistics to its contingent in the Central African Republic (Judgment, paras. 412-418); (iii) the level of communication between Mr. Bemba and the MLC contingent in the Central African Republic (Judgment, paras. 419-426); (iv) Mr. Bemba had operational control over the MLC contingent in the Central African Republic throughout the operation (Judgment, paras. 427-446, 705); (v) Mr. Bemba had primary disciplinary authority over the MLC contingent in the Central African Republic (Judgment, paras. 447-449); and (vi) Mr. Bemba ordered the withdrawal of the MLC contingent (Judgment, paras. 555-559, 704-705).

<sup>40</sup> Judgment, paras. 706-717, 742.

<sup>41</sup> Judgment, paras. 706-717.

<sup>42</sup> Judgment, paras. 269-271, 576-581, 709-710, 717.

<sup>43</sup> Judgment, para. 717.

responsibility was triggered by the commission of the crimes themselves,<sup>44</sup> the Trial Chamber erred by finding that lack of notice regarding uncharged crimes had not unduly prejudiced the Defence;<sup>45</sup>

- iv. In relying on the Zongo commission,<sup>46</sup> the Sibut mission,<sup>47</sup> and the Gbadolite trials<sup>48</sup> in order to find Mr. Bemba had actual knowledge of crimes, the Trial Chamber impermissibly relied on factors falling outside the case as confirmed;<sup>49</sup> and
- v. The finding on knowledge is otherwise undermined by procedural and factual errors on the part of the Trial Chamber.<sup>50</sup>

**C. Measures:** No reasonable Trial Chamber would have found that Mr. Bemba failed to take all necessary and reasonable measures within his power:<sup>51</sup>

- i. The Trial Chamber committed a legal error in delineating “necessary and reasonable measures”, which fall outside the scope of obligations applying to a commander in Mr. Bemba’s circumstances, at the time of the charged conduct,<sup>52</sup> and placing Mr. Bemba under an obligation to take steps which he had no jurisdiction to take;<sup>53</sup>
- ii. The Trial Chamber erred in taking into account irrelevant factors such as the alleged motivation for measures taken, and their apparent lack of results,<sup>54</sup> and by failing to tailor the necessary and reasonable measures to the

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<sup>44</sup> Judgment, para. 173.

<sup>45</sup> Judgment, para. 43.

<sup>46</sup> Judgment, paras. 713, 717.

<sup>47</sup> Judgment, paras. 715, 717.

<sup>48</sup> Judgment, paras. 712-713, 717.

<sup>49</sup> ICC-01/05-01/08-424, paras. 485-489.

<sup>50</sup> See, for example, (i) reliance on out-of-court testimony, not admitted through rule 68 of the Rules of Procedure and Evidence, to establish the existence of Mr. Bemba’s knowledge, and in misconstruing evidence concerning his review of this material (Judgment, paras. 586, 712); (ii) drawing adverse inferences concerning the confusion as to the identity of perpetrators despite refusing to admit evidence of conflicting media reports at the time (See, for example, ICC-01/05-01/08-3121-Conf, paras. 855-870. See also ICC-01/05-01/08-3045-Conf, paras. 30-32, 36, ICC-01/05-01/08-3075, paras. 24, 29).

<sup>51</sup> Judgment, paras. 731, 734, 742.

<sup>52</sup> Judgment, paras. 729-731.

<sup>53</sup> Judgment, paras. 726-734.

<sup>54</sup> Judgment, paras. 720, 727-728.

particular circumstances, knowledge, capabilities, and responsibilities of Mr. Bemba;<sup>55</sup>

- iii. The Trial Chamber erred by finding that Mr. Bemba had a duty to investigate allegations, which were only substantiated by rumours and media reports;<sup>56</sup> and
- iv. The finding on measures is otherwise undermined by procedural and factual errors on the part of the Trial Chamber.<sup>57</sup>

**D. Causation:** No reasonable Trial Chamber would have concluded that the crimes committed by the MLC contingent were a result of Mr. Bemba's failure to exercise control properly;<sup>58</sup>

- i. The Trial Chamber erred in relying on speculative unproven assertions falling outside the confirmed case,<sup>59</sup> and arguments which were neither pleaded nor advanced by the Prosecution, in order to reach a conclusion not open to a reasonable Trial Chamber, and for which insufficient reasons were given;<sup>60</sup> and
- ii. The finding on causation is otherwise undermined by its reliance on manifestly unsafe factual findings.<sup>61</sup>

**E. Ignoring exculpatory evidence:** The Trial Chamber's error in disregarding central evidence on command, undermines its findings as to Mr. Bemba's liability as a superior.<sup>62</sup> The evidence includes, but is not limited to, (i) the FACA documents;<sup>63</sup>

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<sup>55</sup> Judgment, para. 732. For example, ICC-01/05-01/08-3121-Conf, paras. 930-932.

<sup>56</sup> Judgment, paras. 576-581, 726-727, 729-734.

<sup>57</sup> See, for example, (i) relying on evidence for the truth of its contents in the absence of notice to the Defence (Judgment, paras. 268, 586-589. See also ICC-01/05-01/08-3121-Conf, paras. 64-68); (ii) drawing adverse inferences despite having refused to admit contemporaneous evidence which directly contradicts its findings (Judgment, para. 730. See also ICC-01/05-01/08-3121-Conf, paras. 687-690, ICC-01/05-01/08-3045-Conf, paras. 39-54, ICC-01/05-01/08-3075, paras. 24-29).

<sup>58</sup> Judgment, para. 741.

<sup>59</sup> Judgment, paras. 738-740.

<sup>60</sup> Judgment, paras. 735-741.

<sup>61</sup> Judgment, paras. 391-393, 402-403, 536-544.

<sup>62</sup> Judgment, paras. 705, 742.

<sup>63</sup> Judgment, paras. 286, 291, 293, 297.

(ii) the report and evidence of General Jacques Seara<sup>64</sup> (particularly in light of the significant proportion of his evidence that did not rely on allegedly impugned evidence);<sup>65</sup> the evidence of CHM1 concerning command;<sup>66</sup> P63's video and accompanying commentary;<sup>67</sup> D45's evidence;<sup>68</sup> and Colonel Thierry Lengbe's organigram.<sup>69</sup>

## VI. THE TRIAL CHAMBER ERRED IN FINDING THAT THE MLC COMMITTED WAR CRIMES AND CRIMES AGAINST HUMANITY

**A. Contextual Elements of War Crimes:** The Trial Chamber erred in concluding that the charged crimes were committed in close connection to an armed conflict, which had the requisite level of intensity and (for the purposes of Article 8(2)(d) was protracted in character),<sup>70</sup> due to:

<sup>64</sup> Judgment para. 369, concerning EVD-T-D04-00070/CAR-D04-0003-0342.

<sup>65</sup> D53, T-229-CONF-ENG-CT, p.9, lines 4-20, p.10, lines 10-18, p.27, line 21 – p.28, line 2, p.28, line 13 – p.29, line 1, p.29, lines 2-10, p.31, line 17 – p.32, line 9, p.54, lines 12-19, p.57, lines 13-20, p. 58, lines 11-12, lines 15-23, p.62, line 21 – p.63, line 5; T-230-CONF-ENG-ET, p.6, lines 8-15, lines 16-21, p.10, line 24 – p.11, line 9, p.15, lines 16-18, p.19, line 1-8, lines 10-13, line 21 to p.20, line 4, p.20, lines 5-6, lines 11-17, p.30, lines 3-10, p.32, lines 13-19, p.47, lines 14-15, p.56, lines 1-5, p.57, lines 14-20, p.57, line 24 – p.58, line 3, p.58, line 22 – p.59, line 3, p.60, lines 2-5, lines 9-15, p.61, line 23 – p.62, line 4, p.64, lines 14-19; T-231-CONF-ENG-ET, p.2, line 24 – p.3, line 21, p.7, line 25 – p.8, line 8, p.14, line 23 – p.15, line 5, p.16, lines 10-17, p.33, lines 6-20, p.34, line 14 – p.35, line 8, p.35, lines 9-19, p.38, line 24 – p.39, line 12, p.39, line 13 – p.40, line 10, p.40, line 24 – p.41, line 10, p.50, line 22 – p.51, lines 10, p.51, line 23 – p.52, line 10, p.52, line 22 – p.53, line 7, T-232-CONF-ENG-ET, p.16, line 19 – p.18, line 5, p.55, lines 18-24; T-233-CONF-ENG-CT, p.21, lines 17-23, p.23, lines 9-22, p.31, lines 1-24, p.44, line 21 – p.45, line 9, p.52, line 16 – p.53, line 11, p.53, line 20 – p.54, line 18, p.62, lines 9-13, p.62, line 14 – p.64, line 2; T-234-CONF-ENG-ET, p.2, line 20 – p.5, line 9, p.8, lines 8-19, p.8, line 25 – p.9, line 7, p.9, line 22 – p.10, line 12, p.10, line 22 – p.11, line 8, p.12, line 17 – p.14, line 6, p.26, line 10 – p.27, line 4, p.55, line 18 – p.56, line 16, p.56, line 17 – p.57, line 4, T-235-CONF-ENG-ET, p.6, line 19 – p.7, line 3, p.7, lines 9-15, p.13, line 6 – p.14, line 1. See also, 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. 29-30; at 0372, paras. 141-142; 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 0387-388, paras. 238-249.

<sup>66</sup> See, for example, CHM1, T-357-CONF-ENG-ET, p.8, lines 7-20, p.67, line 6 – p.68, line 13, p.69 lines 2-17, p.77, lines 19-24, p.78, line 24 – p.79, line 7.

<sup>67</sup> EVD-T-OTP-00345/CAR-OTP-0039-0058.

<sup>68</sup> Judgment, para. 365.

<sup>69</sup> EVD-T-D04-00034/CAR-ICC-0001-0076. See ICC-01/05-01/08-3121-Conf, para. 645.

<sup>70</sup> Judgment, paras. 662-666, 668.

- i. The Trial Chamber's finding that it was not necessary for the Prosecution to prove that the accused was aware of factual circumstances that established the existence of an armed conflict;<sup>71</sup>
- i. The Trial Chamber's finding that the conflict was not internationalised through the involvement of troops from Chad;<sup>72</sup>
- ii. The Trial Chamber's finding that the question as to whether the violence was sustained was not relevant to its assessment as to whether the hostilities were protracted, which contradicted the Pre-Trial Chamber's conclusion that the conflict was 'protracted' because it occurred over a period of five months;<sup>73</sup>
- iii. The Trial Chamber's failure to make evidential findings – to the standard of beyond reasonable doubt – that an armed conflict fulfilling the criteria in either Article 8(2)(c) or (e) was in existence at the time, when the charged crimes occurred;<sup>74</sup>
- iv. The Trial Chamber's failure to make evidential findings – to the standard of beyond reasonable doubt – that the conduct of the perpetrators was "closely linked" to the hostilities;<sup>75</sup>
- v. The Trial Chamber's rejection of the Pre-Trial Chamber's finding that the material fact which underpinned the link between the armed conflict and the perpetrator's conduct was the temporal and geographic proximity between the conduct and the armed hostilities;<sup>76</sup> and

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<sup>71</sup> Judgment, paras. 147, 195 (finding that knowledge of the commission of crimes necessarily presupposed that the accused was aware that the requisite contextual elements for war crimes and crimes against humanity were fulfilled).

<sup>72</sup> Judgment, para. 655.

<sup>73</sup> Judgment, para. 140, ICC-01/05-01/08-424, para. 235.

<sup>74</sup> See, for example, Judgment, paras. 524, 527-528, 531 ("the MLC was the only armed force present in Sibut"), 651.

<sup>75</sup> Judgment, para. 664.

<sup>76</sup> Judgment, para. 144. See ICC-01/05-01/08-424, para. 277 "as MLC soldiers moved in battle throughout the CAR, they killed civilians thus committing war crimes according to article 8(2)(c)(i) of the Statute", para. 288: "[t]he Chamber is also satisfied that these acts of rape took place in the context of and were associated with the armed conflict not of an international character in the CAR which existed from on or about 26 October 2002 to 15 March 2003. The evidence shows that acts of rape occurred at the time when MLC soldiers were moving in battle through the CAR territory"; para. 322 "Having reviewed the Disclosed Evidence as a whole, the Chamber finds that the evidence shows that, as MLC soldiers moved in battle from on or about 26 October 2002 to 15 March 2003 throughout the

- vi. The Trial Chamber's reliance on out of court testimony, which had not been admitted through rule 68 of the Rules of Procedure and Evidence, to establish the existence of an armed conflict.<sup>77</sup>

**B. Pillage:** The Trial Chamber erred in finding that the constituent elements of pillage were met:<sup>78</sup>

- i. The Trial Chamber erred by finding that the obligation of the Prosecution to prove that property was appropriated for personal or private use does not equate to an obligation to prove that it was not appropriated for military necessity;<sup>79</sup> and
- ii. The Trial Chamber employed an incorrect definition of personal or private use;<sup>80</sup> and failed to find - to the standard of beyond reasonable doubt - that the objects were misappropriated for personal purposes;<sup>81</sup>

**C. Crimes against humanity:** The Trial Chamber erred in finding that the contextual elements of crimes against humanity were met:<sup>82</sup>

- ii. The Trial Chamber erred by finding that it was not necessary for the Prosecution to prove that the accused knew that his conduct was part of a widespread attack on a civilian population;<sup>83</sup>
- iii. The Trial Chamber misdirected itself to the evidence<sup>84</sup> in reaching its conclusions that there was an attack directed against the civilian

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CAR territory, they appropriated for their own private or personal use belongings of civilians, such as their livestock, vehicles, televisions, radios, clothing, furniture and money, without the consent of the rightful owners."

<sup>77</sup> Judgment, paras. 266, 456 (fn. 1285), 520, 527, 531, 534, 563.

<sup>78</sup> Judgment, paras. 639-648.

<sup>79</sup> Judgment, para. 124.

<sup>80</sup> Judgment, para. 643.

<sup>81</sup> Judgment, para. 643.

<sup>82</sup> Judgment, para. 692.

<sup>83</sup> Judgment, paras. 168, 195 (finding that knowledge of the commission of crimes necessarily presupposed that the accused was aware that the requisite contextual elements for war crimes and crimes against humanity were fulfilled).

<sup>84</sup> See, for example, (i) taking into account irrelevant factors such as instances of pillage, and the directive to exercise vigilance against civilians (Judgment, paras. 673, 676, 679, 682); (ii) giving other

population,<sup>85</sup> and that this attack was committed pursuant to an organisational policy;<sup>86</sup>

- iv. The Trial Chamber erred by using the existence of crimes committed by the MLC to infer the existence of an organisational policy,<sup>87</sup> whilst at the same time using the existence of an organisational policy to infer that the crimes in question were committed by the MLC;<sup>88</sup> and
- v. The Trial Chamber erred in law in relying on out of court testimony, which had not been admitted through rule 68 of the Rules of Procedure and Evidence, to establish the existence of the contextual elements of crimes against humanity.<sup>89</sup>

## VII. THE TRIAL CHAMBER'S CONSIDERATION OF THE CRIME BASE EVIDENCE WAS FLAWED

**A. Murder:** Further, and/or alternatively to the errors concerning notice of individual crimes set out above,<sup>90</sup> no reasonable Trial Chamber would have found that the instances of murder had been established beyond a reasonable doubt.<sup>91</sup>

**B. Rape and Pillage:** Further and/or alternatively to the errors concerning notice of individual crimes set out above,<sup>92</sup> no reasonable Trial Chamber could have found that a number of instances of rape and pillage had been established beyond a reasonable doubt.<sup>93</sup>

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factors too much weight, such as the individual motives of the perpetrators, and omissions to act on the part of the MLC (Judgment, paras. 678, 683, 684); (iii) and failing to give sufficient weight to exculpatory factors such as Mr. Bemba's warning against misconduct (Judgment, para. 685).

<sup>85</sup> Judgment, para. 674.

<sup>86</sup> Judgment, para. 676.

<sup>87</sup> Judgment, para. 676.

<sup>88</sup> Judgment, para. 642.

<sup>89</sup> See for example, Judgment, paras. 461, 486, 520, 525, 527, 531, 534, 563.

<sup>90</sup> Section IV (A).

<sup>91</sup> Judgment, paras. 475-479, 496, 501, 549, 554, 624, 630.

<sup>92</sup> Section IV (A).

<sup>93</sup> Including, but not limited to (i) the pillage of P68 and her sister in law (Judgment, paras. 463, 640(a)); (ii) the pillage of P119 (Judgment, paras. 470, 640(b)); (iii) the pillage of P69 (Judgment, paras. 497, 501, No. ICC-01/05-01/08



**C. Dates:** The Trial Chamber erred in law by expressly misconstruing critical evidence as to the dates of offences and the movement of MLC troops in order to support factual conclusions that are inconsistent with the record of the case. By way of non-exhaustive example:

- i. The Trial Chamber erred by relying on out of court testimony, which was not admitted through rule 68 of the Rules of Procedure and Evidence, to establish the location of the MLC in certain locations on certain dates;<sup>94</sup>
- ii. No reasonable Trial Chamber could have concluded that the MLC units arrived in PK4 (4 kilometers north of Bangui City Centre) prior to 31 October 2002;<sup>95</sup>
- iii. No reasonable Trial Chamber could have failed to consider, *inter alia*, the unchallenged evidence of D65, P63, his contemporaneous account and videotape,<sup>96</sup> the contemporaneous operational log (cahiers de communication),<sup>97</sup> the evidence of D9, D19, D56, D57, and the date-adjusted evidence of P31,<sup>98</sup> in determining the operational movements of the MLC;
- iv. Without prejudice to the submissions above, having determined that Bozizé's forces withdrew from PK4 on or around 30 October,<sup>99</sup> that the MLC advanced to PK12, having passed through the northern neighbourhoods of Bangui on 30 or 31 October,<sup>100</sup> and that other forces may have committed crimes during the relevant period and had characteristics in common with MLC soldiers,<sup>101</sup> no reasonable Trial Chamber could have concluded that the

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640(f)); (iv) the rape of two unidentified girls aged 12 and 13 years (Judgment, paras. 467-469, 633(b)); (v) the rape of eight unidentified women at the Port Beach naval base (Judgment, paras. 480-483, 633(d)); (vi) the rape of P81 (Judgment, paras. 491-492, 633(e)); (vii) the rape of P69 and his wife (Judgment, paras. 498-501, 633(f)); and (viii) the rape of P22 (Judgment, paras. 508, 633(g)).

<sup>94</sup> Judgment, paras. 1285, 1304.

<sup>95</sup> Judgment, para. 471.

<sup>96</sup> EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0173.

<sup>97</sup> EVD-T-OTP-00702/CAR-D04-0002-1514; EVD-T-OTP-00703/CAR-D04-0002-1641.

<sup>98</sup> The Trial Chamber's finding that P31 arrived in Bangui on 22 October is also unsustainable, given his evidence that he returned on the day that Bozizé's forces arrived there. See Judgment, para. 406.

<sup>99</sup> Judgment, para. 471.

<sup>100</sup> Judgment, para. 485.

<sup>101</sup> Judgment, para. 695.

perpetrators of offences prior to 30 October, or at best “at the end of October”<sup>102</sup> or “on or around 30 October”<sup>103</sup> were MLC soldiers;

- v. No reasonable Trial Chamber could have concluded to the requisite standard that P22 was attacked on 6 or 7 November,<sup>104</sup> when her evidence was that she was attacked on 26 October;<sup>105</sup>
- vi. No reasonable Trial Chamber could have concluded to the requisite standard that P68 and her sister-in-law were attacked “at the end of October”<sup>106</sup> as opposed to 27 October as she stated unequivocally in evidence.<sup>107</sup>
- vii. No reasonable Trial Chamber could have concluded that a woman was raped in the bush outside PK22 in November 2002<sup>108</sup> when the evidence was that this offence occurred on 27 October;<sup>109</sup> and
- viii. No reasonable Trial Chamber could have concluded that “two unidentified girls aged 12 or 13 [were attacked] in Bangui on or around 30 October 2002”<sup>110</sup> and attributed those crimes to the MLC when the evidence was that they were attacked on 28 October.<sup>111</sup>

**A. Other identifying features:** The Trial Chamber failed to apply its own standards for identification evidence, and failed to give sufficiently cogent reasons for its findings that each of the crimes it found proved had been perpetrated by subordinates of Mr. Bemba.<sup>112</sup>

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<sup>102</sup> Judgment, para. 633(a).

<sup>103</sup> Judgment, para. 633 (b),(c).

<sup>104</sup> Judgment, para. 633(g).

<sup>105</sup> ICC-01/05-01/08-3121-Conf, para. 313; P22, T-42-Red-ENG-ET, p.42, lines 1-4.

<sup>106</sup> Judgment, paras. 462-466 and 633(a).

<sup>107</sup> P68, T-48-Red-ENG-ET, p.18, line 20 – p.19, line 1.

<sup>108</sup> Judgment para. 633(j), T-367-ENG-ET, p.12, line 21.

<sup>109</sup> ICC-01/05-01/08-3121-Conf, para. 322; P75, T-92-Red-ENG-ET, p.14, line 21 – p.15, line 25, p.35, lines 7-23.

<sup>110</sup> Judgment, para. 633(b).

<sup>111</sup> ICC-01/05-01/08-3121-Conf, paras. 328-332.

<sup>112</sup> Judgment, para. 695, paras. 628-630, 633-636, and 640-642, ICC-01/05-01/08-3121-Conf paras. 312-315, 320-321, 322-323, 328-332, 352.

## VIII. OTHER PROCEDURAL ERRORS WHICH UNDERMINE THE CONVICTION

**A. The improper scope of victims' participation:** The unparalleled breadth of victims participation was inconsistent with the rights of Mr. Bemba to a fair and impartial trial,<sup>113</sup> given that:

- i. The Legal Representatives of Victims were permitted to admit and adduce evidence in a manner falling outside appellate directives on the scope of victims' participation;<sup>114</sup> and ask questions which were impermissibly leading,<sup>115</sup> oppressively repetitive,<sup>116</sup> and were in some instances based on their own alleged personal knowledge of the events in question.<sup>117</sup> This created an imbalance in the fact-finding mission of the trial which caused prejudice to the accused; and
- ii. The practice of permitting the Legal Representatives of Victims to ask "follow-up" questions for which no prior authorisation had been granted<sup>118</sup> violated the terms of rule 91(3) of the Rules of Procedure and Evidence and the Trial Chamber's own ruling on victims' questioning.<sup>119</sup> The failure to provide the Defence with a remedy for the prejudice incurred undermined the fairness of the proceedings.<sup>120</sup>

**B. Preventing access to, or refusing the admission of, exculpatory material:** The fairness of the proceedings was further undermined by the Trial Chamber's error in preventing the Defence from pursuing legitimate lines of questioning, and/or accessing, presenting, or relying on exculpatory material, by, for example:

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<sup>113</sup> Article 68(3) of the Rome Statute.

<sup>114</sup> ICC-01/04-556, para. 55, ICC-01/04-01-06-824 OA7, ICC-01/04-503; ICC-02/05-138.

<sup>115</sup> See, for example, ICC-01/05-01/08-2733-Conf, paras. 31-37. See also ICC-01/04-01/06-2127, paras. 28-30, ICC-01/04-01/07-1665, para. 91.

<sup>116</sup> See, for example, ICC-01/05-01/08-2733-Conf, paras. 22-30.

<sup>117</sup> See, for example, ICC-01/05-01/08-2733-Conf, paras. 38-39.

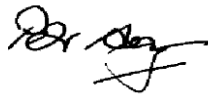
<sup>118</sup> See, for example, ICC-01/05-01/08-2733-Conf, paras. 9-14.

<sup>119</sup> ICC-01/05-01/08-1023, para. 19.

<sup>120</sup> ICC-01/05-01/08-2751-Conf, ICC-01/05-01/08-2800.

- i. preventing the Defence from speaking with Prosecution witnesses about whom allegations of collusion and corruption had been made,<sup>121</sup> or investigating these claims through the recall of P178;<sup>122</sup> and
- ii. refusing the admission of contemporaneous exculpatory press reports on the basis that the information contained therein were already in the record,<sup>123</sup> and then making adverse findings against the Defence on the issues dealt with in these reports.<sup>124</sup>

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands

20 June 2016

It is hereby certified that this document contains a total of 5728 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.

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<sup>121</sup> ICC-01/05-01/08-3077-Conf, paras. 14-23.

<sup>122</sup> ICC-01/05-01/08-2924-Conf, paras. 33-37, ICC-01/05-01/08-2980-Conf, paras. 35-46, ICC-01/05-01/08-3077-Conf, paras. 4, 6, 18, ICC-01/05-01/08-3186-Red.

<sup>123</sup> ICC-01/05-01/08-3075, paras. 24, 29.

<sup>124</sup> See, for example, Judgment, paras. 411, 555-559, 578, 700, 705.