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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 *with* Public Annex A

Public Redacted Version of "Corrected Version of 'Prosecution's Response to Appellant's Document in Support of Appeal'", 19 January 2017 (originally filed on 21 November 2016), ICC-01/05-01/08-3472-Conf

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INTRODUCTION

1. Jean-Pierre Bemba Gombo was brought to trial for his responsibility as a superior for the grave crimes of his subordinates. The Chamber was scrupulous in ensuring his trial was fair.¹ It applied the well established law necessary for his conviction carefully and correctly.² It evaluated the evidence reasonably.³ It convicted him properly.

2. Just as the Judgment portrayed Bemba's blithe refusal to carry out his duties as a superior, well within his ability, so has his conduct in this trial reflected that same view that the rules do not apply to him. They do.

3. In some respects, this case was indeed the first of its kind at this Court. But to recognise its importance is not to concede that it should be sensationalised. Bemba's complaints on appeal that these proceedings are "unique" and "unprecedented" are an overstatement.⁴ Indeed, throughout his Brief, his arguments are partial, partisan, speculative, and obfuscatory, sometimes even resorting to innuendo and hyperbole.⁵

4. There is nothing behind the empty rhetoric. The Judgment may not be perfect in every footnote,⁶ but the essence—convicting Bemba, based on factual findings beyond reasonable doubt—is legally correct, reasonable, and fair. When each

¹ See [Lubanga AJ](#), para. 28. For full citations, see Annex A. For convenience, many public materials are also hyperlinked. References to the Brief are linked to the public redacted version only.

² See [Lubanga AJ](#), paras. 18-19; *also* para. 20.

³ See [Lubanga AJ](#), paras. 21-27.

⁴ E.g. [Brief](#), paras. 4-5.

⁵ E.g. [Brief](#), para. 10 (alleging the Chamber's "systemic dismissal, misconstruction or wilful blindness to evidence helpful to the Appellant").

⁶ Cf. [Brief](#), para. 9 (fn. 4: alleging "errors" in "84" unidentified footnotes, without explanation).

ground of appeal is considered in context—legal, evidentiary, and procedural—it is evident that the appeal cannot be substantiated.⁷

5. The Appeals Chamber should, therefore, dismiss each ground of appeal, and maintain Bemba's convictions accordingly.

⁷ See [Lubanga AJ](#), paras. 29-34.

I. THE TRIAL WAS FAIR

6. Bemba was convicted on all charges after an extended and complex trial. The trial withstood the intentional attempts by Bemba and some members of his defence team to interfere with this Court's administration of justice.⁸ At all times, the Chamber ensured that the trial was fair. It safeguarded the integrity of these proceedings by deferring to an independent Pre-Trial Chamber on investigative measures associated with alleged article 70 offences.⁹ This enabled the Chamber to focus on its core mission: ensuring that *these* proceedings remained fair at all times,¹⁰ both procedurally and substantively.

7. In particular, the Chamber ensured that the Parties and participants were aware of all matters pertinent to the fairness of this trial, in the most timely fashion possible, consistent with the Statute and the Rules. It ensured that Bemba had all the necessary opportunities to raise any concerns about the fair conduct of the proceedings, and to seek any necessary relief. It addressed these concerns exhaustively on their merits.¹¹

8. Further reflecting its independent and balanced perspective, the Chamber determined the merits of this case on the entirety of the evidence before it. This included defence evidence on which even Bemba had ultimately declined to rely.¹² Conversely, the Chamber declined to hear evidence going purely to the credibility

⁸ These persons have, independently, been convicted of article 70 offences: [Bemba et al TJ](#). Also [Judgment](#), paras. 252-254.

⁹ [Article 70 Decision](#), paras. 21-22.

¹⁰ E.g. [Abuse of Process Decision](#), para. 18 ("while it will not review the legality or propriety of measures conducted in the Article 70 Investigation or [case ICC-01/05-01/13], the Chamber reiterates that it is bound by the duty to ensure full respect for the fundamental rights of the Accused, including his right to a fair trial in the Bemba case"). Also [Interim Relief Decision](#), para. 18; [First Privileged Communications Decision](#), para. 40; [Second Privileged Communications Decision](#), para. 23.

¹¹ E.g. [Abuse of Process Decision](#); [Abuse of Process ALA Decision](#).

¹² [Judgment](#), paras. 261-263.

of certain defence witnesses but which was not itself directly material to the charged crimes.¹³

9. Notwithstanding the unusual circumstances of the trial, and having examined a number of defence claims on their merits, the Chamber found it necessary to caution Bemba “against making such serious allegations regarding the conduct and fairness of the proceedings in such an unconsidered and factually unsubstantiated manner”.¹⁴ These were strong words, not uttered lightly. They are equally relevant to this appeal, and the way it has been presented.

10. Bemba’s renewed challenge to the fairness of his trial suffers from similar defects to many of his trial submissions.¹⁵ The challenge is fundamentally misconceived, avoiding direct engagement with the Chamber’s reasoning and resurrecting *de novo* old complaints, many relying on innuendo and hyperbole. His account of the procedural history is partial. For these reasons alone, much of the first ground warrants summary dismissal.¹⁶

11. In any event, Bemba fails to show that the Chamber erred in law, fact, or procedure, or erred in any other way affecting the fairness or reliability of the proceedings or the Judgment.¹⁷ Not only did the Chamber hear and reject Bemba’s arguments concerning the extent of any *ex parte* submissions, but those submissions

¹³ [Judgment](#), paras. 252, 259-260. *Also* para. 258 (recalling that it would not consider any information or allegation not based upon evidence admitted in the case).

¹⁴ [P178 Reconsideration Decision](#), para. 28.

¹⁵ [Abuse of Process Decision](#), para. 125 (“the Defence’s submission, again, misrepresents the Chamber’s previous decisions, obfuscates the nature of the Chamber’s analysis, and effectively seeks to re-litigate the Chamber’s prior decisions”).

¹⁶ [Lubanga AJ](#), para. 183.

¹⁷ [Statute](#), art. 81(1)(b).

themselves comported with the requirements of fairness.¹⁸ The Chamber ensured that proper disclosure was made,¹⁹ and that privilege was adequately safeguarded.²⁰

12. Overall, based on its careful reasoning, the Chamber was consistently satisfied that Bemba suffered no prejudice in this trial resulting from the article 70 investigation into his conduct. No error in this conclusion has been shown.²¹ Instead, and impermissibly, Bemba merely seeks to reargue his unsuccessful claim for an abuse of process before a different forum.²²

13. Accordingly, the Chamber should dismiss the first ground of appeal.

I.A. BEMBA’S ARGUMENTS ARE MISCONCEIVED

14. Parties are expected to raise issues of fairness with the Trial Chamber seised of the case, and then the Appeals Chamber will review the correctness of the Trial Chamber’s decision(s). The Appeals Chamber is not a forum to ‘second-guess’ the Trial Chamber on matters of fairness, without a showing of error. The Trial Chamber is the guarantor of the fairness of its own trial proceedings.

15. Bemba overlooks or misunderstands these basic principles, and hence misconceives his arguments in two key respects. First, he almost entirely fails to address—much less to show error in—the Chamber’s reasoned analysis on the very issues of which he complains. Second, his arguments commingle matters pertaining to *this* case with irrelevant matters pertaining to *another* case (ICC-01/05-01/13)—which was subject to the jurisdiction of its own Pre-Trial Chamber and Trial Chamber and, ultimately, a different bench of the Appeals Chamber.

¹⁸ *Contra* [Brief](#), paras. 51-75.

¹⁹ *Contra* [Brief](#), paras. 76-92.

²⁰ *Contra* [Brief](#), paras. 93-106.

²¹ *Contra* [Brief](#), paras. 107-114 (including a lengthy—but manifestly incomplete—“sequence of relevant events”: paras. 16-50.)

²² *See* [Brief](#), para. 114.

I.A.1. Bemba ignores the Chamber's steps to safeguard the trial

16. Notwithstanding the unprecedented extension of pages granted to Bemba for his brief,²³ and his lengthy submissions challenging the fairness of the trial,²⁴ Bemba largely ignores the Chamber's key decisions, including the Article 70 Decision, Interim Relief Decision, First Privileged Communications Decision, Second Privileged Communications Decision, Abuse of Process Decision, Abuse of Process ALA Decision, Stay of Proceedings Decision, Further Disclosure Decision, and the Stay of Proceedings and Further Disclosure ALA Decision.

17. These decisions addressed Bemba's concerns about the article 70 investigation and ancillary matters, and his subsequent requests for a permanent stay of proceedings.²⁵ They specifically addressed—and rejected—claims *inter alia* of improper *ex parte* submissions,²⁶ inadequate disclosure,²⁷ and breach of privilege.²⁸ These are the same claims Bemba now resurrects.²⁹ But his sole references to this extensive previous litigation consist of acknowledging that “the Defence filed its ‘Request for Abuse of Process’”,³⁰ and four dismissive citations to select aspects of the Chamber's Abuse of Process Decision.³¹

18. In all other respects, Bemba simply fails to engage with reasoned analysis that he finds unpalatable.

19. The Appeals Chamber has already ruled on the procedure for when an appellant addresses matters previously litigated in the context of abuse of process. It stated:

²³ [Extension Decision](#), paras. 11, 13.

²⁴ [Brief](#), paras. 13-114.

²⁵ [Abuse of Process Decision](#), paras. 1, 12.

²⁶ *E.g.* [Abuse of Process Decision](#), paras. 12, 91-115.

²⁷ *E.g.* [Abuse of Process Decision](#), paras. 12, 75-90.

²⁸ *E.g.* [Abuse of Process Decision](#), paras. 12, 19-74.

²⁹ *Below* paras. 25-48 (*ex parte* submissions), 49-59 (disclosure), 60-68 (privilege).

³⁰ [Brief](#), para. 49.

³¹ [Brief](#), paras. 71, 86-88, 112-113.

“[A] Trial Chamber [...] enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached”. [...] [W]here a Trial Chamber has already addressed and disposed of the substance of allegations that a trial should have been stayed owing to violations of fair trial rights, the Appeals Chamber’s role is not to address these allegations *de novo*. Rather, the Appeals Chamber must review [...] the relevant decision.³²

20. Where an appellant “has not challenged the approach or findings of the Trial Chamber” in such relevant decisions, “the Appeals Chamber will not address his submissions [...] any further”.³³ Therefore, much of the first ground of appeal should be dismissed *in limine*.

21. Although arguments not previously adjudicated *may* be addressed for the first time on appeal³⁴ (if not waived), an appellant may not circumvent the Appeals Chamber’s corrective review simply by raising, in a new or disguised format, essentially the same challenges to fairness that have been previously adjudicated.³⁵

I.A.2. The Appeals Chamber should consider only the fairness of *this* trial

22. One bulwark of fairness in this trial was the Chamber’s deferral of all procedural and substantive matters associated with the article 70 investigation to an independent Pre-Trial Chamber’s supervision. The Chamber’s mission was, thus, at all times clear and distinct—to preserve the integrity of its *own* proceedings, concerned with Bemba’s guilt or innocence of the charges in this case.³⁶ Although it described “the legality or propriety” of the article 70 investigative measures as

³² [Lubanga AJ](#), para. 155.

³³ [Lubanga AJ](#), para. 155. *Also e.g.* paras. 156, 160, 168-170.

³⁴ [Lubanga AJ](#), para. 156.

³⁵ *E.g.* [Lubanga AJ](#), para. 181.

³⁶ [Abuse of Process Decision](#), paras. 17-18. *Also* [Article 70 Decision](#), para. 20. Conversely, for the fairness of ICC-01/05-01/13, the Chamber concluded that it should not act *ultra vires* to review matters *not* affecting the fairness of this case: [Second Privileged Communications Decision](#), para. 21; [Interim Relief Decision](#), para. 16.

being outside its competence “*in themselves*”,³⁷ it stressed that it retained the duty to guarantee Bemba’s rights in this case and that it could and would act if satisfied “that the Accused’s right to a fair trial in the Bemba case has been violated, prejudiced, or infringed”.³⁸ No such showing, however, was ever made.

23. By this means, the Chamber adopted a responsible and measured approach to a potentially challenging procedural situation. Nor has Bemba even attempted to show error in this approach, either now or in his unsuccessful effort to appeal the Abuse of Process Decision.³⁹

24. The Appeals Chamber should now adopt the same approach. It should not entertain issues concerning the article 70 investigative measures (case ICC-01/05-01/13) unless Bemba clearly shows the issues are relevant to the fairness of *these proceedings*. He fails to do so.⁴⁰ Accordingly, the place for adjudicating any issues regarding the article 70 investigation is in any appeal in that case.

I.B. EX PARTE SUBMISSIONS WERE MINIMAL, ADEQUATELY SAFEGUARDED, AND FAIR

25. Bemba fails to show that the limited use of *ex parte* submissions at trial, to address a discrete procedural matter, either occasioned unfairness or constituted legal, factual, or procedural error. Contrary to his claims, this question has been thoroughly ventilated, with all relevant information made available for more than two years, in good time to address these matters with the Chamber before it commenced its deliberations. Bemba’s lingering suspicion—based solely on his

³⁷ [Abuse of Process Decision](#), para. 17 (emphasis supplied). *Also* [Second Privileged Communications Decision](#), para. 21; [First Privileged Communications Decision](#), paras. 35, 41; [Interim Relief Decision](#), para. 15; [Article 70 Decision](#), paras. 14, 16-19, 21.

³⁸ [Abuse of Process Decision](#), para. 18 (emphasis supplied). *Also* paras. 123, 125; [Interim Relief Decision](#), para. 18.

³⁹ *Cf.* [Abuse of Process ALA Decision](#), paras. 15-19.

⁴⁰ *Also* Additional Evidence Response.

supposition of what “could not have failed” to have an impact—ignores both the procedural history and the record, and does not justify appellate intervention.⁴¹

I.B.1. The Chamber correctly and reasonably addressed this issue

26. Bemba’s concern about the nature and extent of Prosecution *ex parte* submissions was extensively addressed at trial. Not only was Bemba promptly made aware of an *ex parte* matter, he raised associated concerns as soon as he could do so.⁴² Bemba’s claim that “the Defence was *never* given an opportunity to address the Trial Chamber on the[] validity” of the use of *ex parte* submissions is manifestly incorrect.⁴³ The Chamber itself previously rejected the same argument.⁴⁴

27. Bemba argued strenuously at trial that the Prosecution “[r]epeatedly attempted to contaminate the ability of the Trial Chamber to adjudicate the case impartially”.⁴⁵ However, the Chamber found that his submissions were “without merit”, and failed to show sufficient prejudice to warrant a stay of the proceedings.⁴⁶ It affirmed that none of the matters addressed *ex parte* “represent ‘key evidential discussions’, relate to evidential issues or the substance of the *Bemba* case”.⁴⁷ Moreover, it “took no decisions”, “reached no conclusions”, and “made no

⁴¹ *Contra* [Brief](#), para. 51. The claim that, “[m]ost importantly”, he “was deprived of the opportunity to explain the Prosecution’s mistaken premise that Mr. Bemba was receiving Legal Aid from the Registry” is undeveloped and should be summarily dismissed. *Also* [Brief](#), para. 33.

⁴² *E.g.* [Interim Relief Decision](#), paras. 2, 6 (referring to *ex parte* decisions, which may have caused “grave[] prejudice[]”). Within two months of the *inter partes* reclassification of the Article 70 Decision on 9 December 2013, Bemba sought relief. Arrest warrants in ICC-01/05-01/13 were executed on 23-24 November 2013: [Bemba et al TJ](#), para. 2.

⁴³ *Contra* [Brief](#), para. 75 (emphasis added).

⁴⁴ [Abuse of Process Decision](#), para. 108 (concluding that “the Defence” had not “identified any matters which were ‘resolved’ in the absence of the Accused, or any submissions that could ‘influence the Chamber’s determination’”).

⁴⁵ [Refiled Abuse of Process Motion](#), paras. 7(d), 96-102; [Abuse of Process Decision](#), paras. 91-115. Indeed, the Appellant previously alleged that “almost every ICC Judge”—including “the Appeals Chamber”—“has been exposed to privileged information and substantial Prosecution accusations on the Defence case”: [Refiled Abuse of Process Motion](#), paras. 106-108. The Appellant no longer pursues this argument. *Further below* fns. 97, 192.

⁴⁶ [Abuse of Process Decision](#), paras. 102, 115.

⁴⁷ [Abuse of Process Decision](#), para. 109.

assessment—even on a preliminary basis—of the merit of any allegations or information put before it”.⁴⁸

28. To the contrary, the Chamber stressed that the Judgment would be “[...] based solely on evidence submitted and discussed before it at trial” and that “any information, allegations, or submissions made before it not based upon evidence admitted in the *Bemba* case will not be [considered]”.⁴⁹ It rejected any notion that the trial record demonstrates any impact of *ex parte* submissions on its appearance of impartiality.⁵⁰

29. The Chamber denied certification for appeal.⁵¹ It stated it was “clear that the Chamber addressed all Defence submissions essential to the Chamber’s determination of whether the threshold for a stay of proceedings had been met.”⁵² Bemba did not otherwise challenge the Chamber’s specific findings, even though he now resurrects many of these original complaints without showing error. His arguments should be dismissed *in limine*.

I.B.2. The use of *ex parte* submissions was appropriate and strictly circumscribed

30. The Chamber did not err concerning the use of *ex parte* submissions, nor are Bemba’s submissions well-founded in law or fact.

31. This Court’s law on the use of *ex parte* submissions is clear. Chambers have “discretion” to “determine, within the framework of the applicable law, whether applications are kept *ex parte* [...] and whether or not to hold proceedings on an *ex parte* basis.”⁵³ There may well be circumstances where it is “inappropriate” for a Party even to be aware of some applications, and such matters must “be determined

⁴⁸ [Abuse of Process Decision](#), para. 103. *Also* para. 114.

⁴⁹ [Abuse of Process Decision](#), para. 105.

⁵⁰ [Abuse of Process Decision](#), paras. 104, 110-114.

⁵¹ [Abuse of Process ALA Decision](#), paras. 54-55, 60-61, 66-68, 71-73.

⁵² [Abuse of Process ALA Decision](#), para. 54.

⁵³ [Lubanga Rule 81 AD](#), para. 66.

on [their] own specific facts and consistently with internationally recognized human rights standards”.⁵⁴ Thus, *ex parte* procedures should only be “used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the [C]ourt must ensure that their use is proportionate given the potential prejudice”.⁵⁵ Furthermore, even when the reasons for the *ex parte* proceeding no longer apply, it may not be appropriate to make available *inter partes* the entirety of the *ex parte* submissions.⁵⁶

32. The Chamber’s approach to the Prosecution’s *ex parte* submissions concerning the article 70 investigation conformed entirely to these principles. Moreover, Judges of this Court are professional judges, who are well able to differentiate between inadmissible and admissible information in carrying out their functions.⁵⁷ Bemba overstates the law when he contends that *ex parte* submissions that may “colour the decider of fact’s assessment of the evidence” are “antithetical to the fairness of the proceedings.”⁵⁸ Rather, consistent with the Appeals Chamber’s guidance, chambers must consider the nature of the application, on its facts, and apply the Court’s procedural law consistent with international human rights law accordingly.⁵⁹

33. In this case, *ex parte* procedures were necessary, and their use was proportionate to the potential prejudice. Initial *ex parte* submissions were justified because they contained “sensitive information that, if disclosed, would compromise an ongoing investigation.”⁶⁰ *Ex parte* submissions were thus legitimate,⁶¹ especially when the investigation was prompted by the Prosecutor’s

⁵⁴ [Lubanga Rule 81 AD](#), para. 67. Also [Lubanga Ex Parte Proceedings Decision](#), para. 12 (“Complete secrecy” may be justified “if providing information about the procedure would risk revealing the very thing that requires protection”).

⁵⁵ [Lubanga Ex Parte Proceedings Decision](#), para. 12.

⁵⁶ [Lubanga Ex Parte Proceedings Decision](#), para. 14.

⁵⁷ E.g. [Abuse of Process Decision](#), para. 105; [Defence Witnesses Decision](#), para. 29.

⁵⁸ *Contra* [Brief](#), para. 53.

⁵⁹ *Above* para. 31; *below* fn. 79.

⁶⁰ E.g. [Reclassification Order](#), para. 3.

⁶¹ *Mutatis mutandis*, e.g. rule 81(2).

unique role in ensuring the integrity of the Court's proceedings by detecting, investigating, and prosecuting article 70 violations. Indeed, with hindsight, the importance of ensuring confidential investigations was graphically illustrated by Trial Chamber VII's independent finding that Bemba and his associates sought to implement "a number of remedial measures [...] with a view to frustrating the Prosecution's investigation" as soon as they became aware of it.⁶²

34. From the outset, the Chamber sought to mitigate any effect of the limited *ex parte* submissions by ensuring that Bemba received relevant information as soon as possible.⁶³ The Chamber never contemplated that the article 70 investigation, or the Prosecution's submissions, would remain wholly unknown to Bemba. Nor did it countenance the possibility that the Prosecution's submissions would form part of its deliberations on Bemba's guilt or innocence. The Chamber also rejected Bemba's assertion that those limited materials in the case which remain *ex parte* "relate to evidential issues or the substance of the *Bemba* case", and indeed has largely explained their content.⁶⁴ The basis for his claim of "a pattern of *ex parte* submissions" is unclear.⁶⁵

35. Bemba's assertion that the relevant "submissions were not revealed to the Defence as soon as reasonably practicable" is speculative, unfounded, and shows no error or other unfairness.⁶⁶ Bemba unduly emphasises the Prosecution's initial estimate of the potential speed of its investigation (at that time, necessarily very

⁶² E.g. [Bemba et al TJ](#), para. 110.

⁶³ E.g. [Status Conference Order](#) (notifying the Appellant of an *ex parte* matter); [Article 70 Decision](#), para. 22(ii) (inviting Prosecution submissions "when the present Decision can be issued in redacted form"); [T-359](#), 12:9-13:3 (Prosecution confirming, after execution of the arrest warrants in case ICC-01/05-01/13, that it did not object to reclassifying the Article 70 Decision); [Reclassification Order](#), paras. 4-6 (reclassifying other relevant documents).

⁶⁴ [Abuse of Process Decision](#), para. 109; *also* fn. 258 (explaining that three filings relate to rule 74 duty counsel, one a VWU report, one a witness familiarisation report, one a Registry filing on a practical matter, and the remaining four cannot be further detailed). *Contra* [Brief](#), para. 67 (referring to the same ten filings, but omitting the Chamber's explanation).

⁶⁵ *Contra* [Brief](#), para. 67.

⁶⁶ *Contra* [Brief](#), para. 58.

provisional).⁶⁷ Nor does the alleged and unexplained practice of other tribunals bear on what will always be a highly fact-sensitive question.⁶⁸

36. Bemba fails, moreover, to substantiate his claim that he had already suffered irremediable prejudice by the time the relevant *ex parte* submissions were made available to him.⁶⁹ Again, the Chamber rejected this conclusion in the Abuse of Process Decision, and he identifies no specific error.⁷⁰ His assertion that the Chamber's "first impression of 23 of the Defence's 34 witnesses was formed under the cloud of these allegations" was rejected in plain terms.⁷¹ The Chamber clarified that it was appropriately cautious regarding these allegations and their very limited relevance to the trial.⁷² It reiterated this in the Judgment.⁷³ Nor did the Chamber's decision not to admit evidence from the article 70 investigation into this trial prevent Bemba from addressing any feared prejudice, as he seems to imply.⁷⁴ To the contrary, as the Abuse of Process Motion itself demonstrates, Bemba remained fully able to bring his concerns to the Chamber after this time, and did so.

37. The *Lubanga* Intermediaries Decision does not assist Bemba, since the factual context is entirely dissimilar.⁷⁵ At no point in this case did the Chamber conduct any "part of the trial"—in the sense of hearing or analysing submissions or evidence *material to the charges*—"in the absence of the accused", let alone "on a highly

⁶⁷ *Contra* [Brief](#), para. 69. *Further* [T-303](#), 3:24 ("We have no idea of the volume of work that this would represent"), 27:24-25 ("we are continuing to follow up, and I will be very cautious here"); [T-303-CONF](#), 6:8-9:25.

⁶⁸ *Contra* [Brief](#), para. 68. *Also below* para. 57.

⁶⁹ *Contra* [Brief](#), para. 72.

⁷⁰ *Contra* [Brief](#), para. 57 (relying on the practice of one national jurisdiction to assert that "prejudice should be presumed"). The Chamber rejected this same argument: *see* [Abuse of Process Reply Decision](#), paras. 4, 10; [Abuse of Process Reply](#), para. 47; [Abuse of Process Decision](#), paras. 98, 124-125. No leave to appeal that specific legal determination was sought: [Abuse of Process ALA Decision](#).

⁷¹ *Contra* [Brief](#), para. 72.

⁷² *Above* para. 27.

⁷³ [Judgment](#), paras. 259-263.

⁷⁴ *Contra* [Brief](#), para. 72 (citing [Additional \(Trial\) Evidence Decision](#), paras. 26, 31). *Cf.* [Abuse of Process Reply Decision](#), para. 12.

⁷⁵ *Contra* [Brief](#), para. 53 (quoting [Lubanga Intermediaries Decision](#), para. 137).

contentious and potentially important matter”.⁷⁶ To the contrary, the Chamber only received submissions on a discrete *procedural* matter—and all its utterances, both contemporaneously and subsequently, evinced its determination to treat the article 70 allegations entirely separately from this case’s merits.⁷⁷ Nor did the Chamber contemplate that Bemba would not be informed of the contents of the Prosecution submissions, as soon as it was feasible to do so.⁷⁸ For similar reasons, Bemba’s reliance on the *Lanz* case is inapposite.⁷⁹

38. Similarly, Bemba’s reference to domestic case law of various jurisdictions adds nothing to the Court’s own practice consistent both with the Statute and internationally recognized human rights.⁸⁰

39. Finally, the five discrete issues raised in this context fail to show that the Chamber erred in law, fact or procedure, or was otherwise unfair.

I.B.2.a. The Prosecution was justified in informing the Chamber of its suspicions

40. Bemba wrongly asserts that *ex parte* submissions were unnecessary and thus always unjustified.⁸¹ Although the Chamber determined that a Pre-Trial Chamber should have jurisdiction over the article 70 investigation, the Prosecution was still obliged to inform the Chamber so it could exercise its core function of ensuring the integrity of *this* trial.⁸² Bemba mistakes the Chamber’s conclusion that it should not

⁷⁶ [Lubanga Intermediaries Decision](#), para. 137.

⁷⁷ Above para. 28.

⁷⁸ Above para. 34.

⁷⁹ Contra [Brief](#), para. 56 (fn. 82). See [Lanz](#), paras. 15, 54, 62 (concerning *ex parte* submissions on *the merits of the case*). Although “quantifiable unfairness flowing from a procedural inequality” was not required—and hence any *ex parte* submission breached equality of arms—this was *obiter*. The Court was not required to decide whether an ancillary procedural matter fell within this principle, especially when a.) there was a legitimate public interest in confidentiality; b.) the confidentiality was proportionate and limited. Any broad view of *Lanz* is contradicted by this Court’s consistent jurisprudence: *above* para. 31. Also [Abuse of Process Decision](#), para. 101.

⁸⁰ Contra [Brief](#), paras. 54-56.

⁸¹ Contra [Brief](#), paras. 58, 68.

⁸² Above para. 6.

be *involved in* the article 70 investigation for a conclusion that it should have been *unaware* of it.

I.B.2.b. The Chamber did not receive “extensive ex parte submissions” on Defence witness credibility before issuing the Article 70 Decision

41. Bemba asserts incorrectly that, by 26 April 2013, “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”.⁸³ To the contrary, as Bemba knows,⁸⁴ the Prosecution submissions were strictly limited to the procedural matters at hand and the necessary context. Thus:

- In its initial four-page submission of 15 November 2012, the Prosecution informed the Chamber that it was “conducting an investigation into potential payments to Defence witnesses”, including three identified expert witnesses.⁸⁵
- In its further 16-page submission of 20 March 2013, the Prosecution informed the Chamber that it was conducting an article 70 investigation, in which the “available evidence so far” “indicate[d]” that Bemba’s “close associates”, “members of the Defence team, and *possibly* the Accused” are “involved in a scheme to provide benefits to Defence witnesses in exchange for false testimony and false documents”.⁸⁶ An annex suggested that “high-dollar payments” had been made to Defence witnesses by Bemba’s associates including Kilolo and Babala.⁸⁷ It was also alleged that “the Accused may be

⁸³ [Brief](#), paras. 59, 75.

⁸⁴ *Also* [Brief](#), paras. 60, 62-63.

⁸⁵ [Payment Record Request](#), para. 1. *Also* [Article 70 Decision](#), para. 1; [Brief](#), para. 60.

⁸⁶ [Article 70 Notice](#), para. 1 (emphasis added). *Also* paras. 17 (relevant witnesses may have “lied”), 20 (suspicion that Bemba was “orchestrating the scheme” and that “money paid to the witnesses” may “ultimately” come from him). *Also* [Brief](#), para. 62.

⁸⁷ [Article 70 Notice](#), para. 3, Annex A; [Article 70 Decision](#), para. 5.

using the Detention Centre telephone system to contact supporters and thus has the opportunity also to further the bribery scheme in this way.”⁸⁸

- In the 9 April 2013 status conference, the Prosecution stated that it would try to avoid “repeat[ing] what is already submitted in writing” but would “answer the questions that you communicated to us”.⁸⁹ The Prosecution underlined its intention to act “with the least possible effect on the ongoing trial”.⁹⁰ In answering the Chamber’s questions, the Prosecution referred to possible money transfers involving Kilolo, Mangenda, and Babala.⁹¹

42. At no point did the Prosecution make “extensive”, or any, *ex parte* submissions to the Chamber concerning the credibility of specific witnesses. It made no definitive conclusion concerning the criminal responsibility of any individual, nor did it invite the Chamber to do so. It was careful to stress the limited evidentiary basis on which its suspicions rested. To the extent consistent with its obligation of candour, the Prosecution gave the Chamber only the minimum necessary information for the legitimate purpose pursued.

43. Bemba is thus wrong to conclude that the “allegations made in the 9 April status conference went to the heart of the credibility of Defence witnesses and the Defence itself.”⁹² He merely disagrees with the Chamber’s own recollection,⁹³ and confuses the essentially procedural purpose of the *ex parte* hearing.⁹⁴ His claim that there was *no basis at all* for suspicion of article 70 offences strains credibility.⁹⁵ Yet in

⁸⁸ [Article 70 Notice](#), para. 3.

⁸⁹ [T-303](#), 3:7-9.

⁹⁰ [T-303](#), 3:12-13.

⁹¹ T-303-CONF, 8:15-9:25. Also [Brief](#), para. 63.

⁹² [Brief](#), para. 67.

⁹³ *Contra* [Brief](#), para. 67. See [Abuse of Process Decision](#), para. 114; [Abuse of Process ALA Decision](#), paras. 65-67.

⁹⁴ *Contra* [Brief](#), paras. 64-66.

⁹⁵ *Contra* [Brief](#), paras. 64-66. E.g. [Bemba et al Confirmation Decision](#), paras. 72, 76, 85, 96, 106 (“substantial grounds to believe” article 70 offences were committed); [Bemba et al TJ](#), paras. 113-184, 894-949 (finding beyond reasonable doubt that article 70 offences were committed). Regarding the Appellant’s specific

any event, since the Chamber itself stressed that it drew “no conclusions” concerning the merits of this case based upon any *ex parte* submissions,⁹⁶ Bemba’s view of those submissions (to which the Chamber gave no weight) is irrelevant. He fails to show that the Chamber erred in stating that it did not rely upon matters discussed *ex parte*. His apparent, but unsupported, conclusion that the Chamber had formed a bias against him based on the status conference is no more than innuendo, which should be summarily dismissed.⁹⁷ Nor indeed does he squarely argue that the Chamber erred in finding there was no appearance of bias.⁹⁸

I.B.2.c. The Registry’s provision of information in late 2012 occasioned no prejudice

44. The Chamber did not err by failing to admonish the Registry for providing records of payments to the Prosecution on its own motion.⁹⁹ Bemba does not show how this was erroneous or improper, or caused any prejudice. Indeed, so weak is this argument that Bemba dropped it from his Refiled Abuse of Process Motion, and did not even seek the Chamber’s ruling.¹⁰⁰

I.B.2.d. Cross-examinations were not improper, nor was the Chamber influenced

45. Since the Chamber never concluded that it should not have been aware of the article 70 investigation,¹⁰¹ any remote allusion to it, *arguendo*, in *inter partes* questioning concerning witness payments could not be inappropriate.¹⁰² Both before and after its *ex parte* submissions the Prosecution had questioned Defence witnesses “to ascertain both whether witnesses have been paid or compensated and whether

observations, the Prosecution’s submissions at the status conference were based on the written annex to its *ex parte* motion, and so the amounts of the suspect payments were clear to the Chamber. Further, many similar issues were discussed: *e.g.* T-303-CONF, 28:13-25 ([REDACTED]), 29:13-14 (D59 is an expert), 29:21-24 (significance of the scale of payments is “relative”). Regarding P169, cited by Bemba, *below* paras. 382-416.

⁹⁶ [Abuse of Process Decision](#), paras. 103, 114.

⁹⁷ *Contra* [Brief](#), para. 67. Also [Abuse of Process Response](#), paras. 10 (fn. 9), 12 (fn. 14).

⁹⁸ [Abuse of Process Decision](#), paras. 99-102, 115; [Abuse of Process ALA Decision](#), paras. 58-61.

⁹⁹ *Contra* [Brief](#), para. 61. Also [Article 70 Decision](#), paras. 1-3.

¹⁰⁰ [Abuse of Process Response](#), para. 12 (fn. 13; noting, *inter alia*, that the Appellant no longer pursued his claim of “[i]mproper disclosures by the Registry”).

¹⁰¹ *Above* para. 40.

¹⁰² *Contra* [Brief](#), para. 59.

there could be a legitimate reason for such payments.”¹⁰³ This inquiry was proper,¹⁰⁴ and Bemba shows nothing different.¹⁰⁵ Indeed, *Bemba’s counsel* himself questioned a Defence witness in similar fashion.¹⁰⁶

46. Bemba also claims that the Chamber’s supervision of cross-examination demonstrates that it was “influenced” by the *ex parte* submissions—specifically, he contends that, unlike the Prosecution, the Defence was “reprimanded for putting similar questions to Prosecution witnesses”.¹⁰⁷ Yet this argument was previously rejected by the Chamber,¹⁰⁸ which explained that it had intervened in P178’s questioning because the “tone” was “offensive”—but “did not restrict the Defence’s questioning or prevent it from pursuing a relevant line of inquiry.”¹⁰⁹ Bemba disagrees, but without showing error.¹¹⁰ The transcript contradicts his assertion that “nothing in the transcripts reveal[s] any difference in tone”.¹¹¹ He also overlooks the distinction between a proper and an improper question, which is quintessentially a matter for deference to the trial judge. Bemba’s further insinuations concerning the Chamber’s motives or reasoning are speculative and unsubstantiated, and should be summarily dismissed.¹¹²

I.B.2.e. The Chamber did not err in assessing witness credibility

47. Finally, it is not the Chamber but Bemba who attempts “an impossible feat”—holding the Chamber’s cautious and measured approach to the evidence against it. Bemba claims, preposterously, that the influence of the *ex parte* procedural

¹⁰³ [Article 70 Notice](#), para. 15. Also T-303-CONF, 26:17-25.

¹⁰⁴ E.g. [Bemba et al TJ](#), para. 22.

¹⁰⁵ *Contra* [Brief](#), paras. 59, 71.

¹⁰⁶ T-328-CONF, 28:25-29:2.

¹⁰⁷ [Brief](#), paras. 59, 71.

¹⁰⁸ [Abuse of Process Decision](#), paras. 54, 110. Also [Abuse of Process ALA Decision](#), para. 72.

¹⁰⁹ [Abuse of Process Decision](#), para. 110.

¹¹⁰ *Contra* [Brief](#), para. 71.

¹¹¹ E.g. [T-157](#), 51:20 (suggesting the witness’ statement had been “dictated” to him), 52:11-12 (suggesting the Prosecution had made a “promise” to the witness).

¹¹² *Contra* [Brief](#), para. 71 (suggesting the Chamber was “mistaken” in its understanding of proper witness payments); also fn. 122 (suggesting the Chamber’s approach to P178 may “further” be explained by additional *ex parte* submissions relating to security concerns). Further [Abuse of Process Decision](#), para. 119.

submissions (which the Chamber expressly disclaimed) is evident because the Chamber *did not* consider these allegations expressly in its reasoning.¹¹³ This tortured logic cannot stand.

48. The Judgment did not “evaluat[e] the extent to which the Prosecution’s allegations had affected” the Defence witnesses’ credibility because the Chamber had admitted no evidence concerning the article 70 allegations.¹¹⁴ Having declined to admit such evidence, the Chamber necessarily could not consider it. Nor could it consider allegations of which it heard no evidence. Conversely, the Chamber’s individualised assessment of the credibility of many witnesses,¹¹⁵ based on demeanour and testimony in court, is supported by careful citations to the trial record.¹¹⁶ The Chamber’s scrupulous approach—separating evidence admitted in the record from immaterial allegations—only *supports* its assurance that it drew no adverse conclusions from the limited *ex parte* procedural submissions.¹¹⁷ Bemba fails to explain, much less to show, how this could be otherwise. Indeed, by acknowledging the “facial propriety” of the Chamber’s credibility assessments,¹¹⁸ Bemba concedes as much.

I.C. DISCLOSURE WAS PROPER

49. The extent to which information from the article 70 investigation required disclosure in this case was, again, extensively litigated at trial and adjudicated by the Chamber. The procedural history, generally ignored by Bemba, again reflects the Chamber’s careful supervision of its proceedings. Bemba was informed of

¹¹³ *Contra* [Brief](#), para. 73.

¹¹⁴ *Above* para. 8. Notably, when the Prosecution tendered such evidence, Bemba opposed its admission: [Additional \(Trial\) Evidence Decision](#), paras. 12-13.

¹¹⁵ [Judgment](#), paras. 304-378. *Also* [Brief](#), para. 73. The Judgment does not dedicate a specific section to evaluating D4 and D6, but made relevant findings: *contra* [Brief](#), para. 74 (fn. 139). Their evidence was “marked by various issues giving rise to further, significant doubts” on a specific issue: [Judgment](#), paras. 414, 429-430. The Appellant concedes as much: [Brief](#), para. 110 (fn. 219).

¹¹⁶ *E.g.* [Judgment](#), paras. 348, 352, 357, 361, 370, 375, 377.

¹¹⁷ *Above* para. 27.

¹¹⁸ [Brief](#), para. 75.

material information within a reasonable time, and had every opportunity to take the steps that he now claims he would have taken. The Chamber ensured both a fair trial, and the Prosecution's compliance with its disclosure obligations.¹¹⁹

I.C.1. The Chamber correctly and reasonably addressed this issue

50. Bemba first raised rule 77 disclosure in his abuse of process claim in late 2014, almost five months *after* relevant article 70 information had been disclosed to him on 22 July 2014.¹²⁰ The Chamber found:

While the Chamber notes the Prosecution's statement that it *notified* the Chamber of the existence of its Article 70 Investigation, the Prosecution did not *apply* to the Chamber for a ruling as to whether it must disclose relevant Rule 77 information or material or not. [...] [I]nsofar as the Prosecution was (i) in the possession of and (ii) did not disclose Rule 77 information on the grounds that it could prejudice further or ongoing investigations without applying to the Chamber for authorisation, it failed to satisfy the requirements of Rule 81(2).¹²¹

51. Yet, although the initial disclosure of article 70 material under rule 77 may not have been timely,¹²² the Chamber affirmed there was no prejudice.¹²³ In particular, the Prosecution had not relied on article 70 information in the trial proceedings, nor was that material admitted into evidence.¹²⁴ It stressed that it was not influenced by the article 70 information, nor would it consider it in deliberations.¹²⁵ It also stated that the timing of the Prosecution disclosure was unrelated to Bemba's decision

¹¹⁹ *Contra* [Brief](#), para. 76.

¹²⁰ [Abuse of Process Decision](#), para. 84. After the charges in ICC-01/05-01/13 were public, the Chamber had "twice clarified the Prosecution's disclosure obligations" concerning article 70 material: *e.g.* [Defence Witnesses Decision](#), paras. 19, 24, 27; [Disclosure Decision](#), para. 42.

¹²¹ [Abuse of Process Decision](#), para. 83 (emphasis supplied). *Also* [Brief](#), para. 86.

¹²² *But see below* para. 53.

¹²³ [Abuse of Process Decision](#), para. 90.

¹²⁴ [Abuse of Process Decision](#), para. 87.

¹²⁵ [Abuse of Process Decision](#), para. 88.

how to approach the witnesses affected by the article 70 allegations.¹²⁶ The Chamber subsequently denied certification to appeal because Bemba merely misrepresented and disagreed with its decision.¹²⁷

52. Litigation concerning subsequent disclosure of article 70 information and claims of abuse of process continued. Again, the Chamber consistently found that Bemba was not materially prejudiced by the manner of disclosure,¹²⁸ especially since he also benefited from related disclosure in ICC-01/05-01/13.¹²⁹ It concluded that Bemba “grossly overstates the impact of the timing of the Prosecution’s disclosure”, not least because he “was already on notice of the majority of the relevant information”.¹³⁰

I.C.2. Disclosure at trial was adequate and fair

53. Notwithstanding any technical breach of rule 77, caused by the delayed disclosure of article 70 information, the Chamber found no prejudice. Accordingly, disclosure at trial was adequate and occasioned no unfairness. Although the Prosecution regrets the oversight in failing to make an *express* application to the Chamber under rule 81(2),¹³¹ it maintains the view that such an application would have resulted in the Chamber authorising delay of disclosure until approximately such time as it was in fact made (*i.e.*, after the warrants of arrest in ICC-01/05-01/13 were executed).

54. Bemba now challenges the Chamber’s conclusion in the Abuse of Process Decision and claims that the Prosecution’s late disclosure of the initial article 70

¹²⁶ [Abuse of Process Decision](#), paras. 88-89.

¹²⁷ [Abuse of Process ALA Decision](#), paras. 35-36.

¹²⁸ [Stay of Proceedings Decision](#), paras. 20-26, 28-30, 33-35, 38, 40; [Further Disclosure Decision](#), paras. 51-53, 60; *also* paras. 33, 35, 54-58. *Further Stay of Proceedings and Further Disclosure ALA Decision*, paras. 12-13.

¹²⁹ [Stay of Proceedings Decision](#), paras. 32-33; [Further Disclosure Decision](#), para. 50; [Disclosure Decision](#), para. 34.

¹³⁰ [Stay of Proceedings Decision](#), para. 34.

¹³¹ *Above* para. 50. *Also* [Abuse of Process Response](#), para. 56.

materials was a “catastrophic consequence”, depriving him of “the opportunity to select witnesses with the benefit of information of capital relevance to their credibility.”¹³² Yet he fails to support this claim, and instead merely disagrees with the Chamber’s decision.

55. Bemba argues, counter-factually, that if disclosure had been made earlier, “numerous [...] measures” were available to him including improving his scheme for witness expenses, replacing witnesses, addressing the issue of payments during testimony, explaining the payments to the Chamber, and seeking to recall his initial witnesses.¹³³ These arguments, however, are flawed and self-serving, and do not show that the trial was damaged at all, let alone “irremediably”.¹³⁴

- Bemba was always able to address the issue of witness payments during testimony. As he admits, the Prosecution routinely asked such questions of witnesses,¹³⁵ and this not only afforded him a chance to raise such issues in re-examination but also put him on notice (if he was not already) to address this topic in his legitimate preparations with his remaining witnesses. Moreover, since the issue of witness payments was not relevant to the Chamber’s assessment of the witnesses’ credibility—which was instead based on their demeanour and the content of their testimony¹³⁶—it cannot be concluded that greater questioning on the payments could have affected the Chamber’s deliberations.
- Bemba could have made any substantive submissions to the Chamber that he wished. His final brief was filed approximately nine months after Bemba and others were arrested in ICC-01/05-01/13, eight months after he gained access

¹³² [Brief](#), para. 88.

¹³³ [Brief](#), para. 89.

¹³⁴ *Contra* [Brief](#), para. 89.

¹³⁵ [Brief](#), paras. 59, 71. *Above* para. 45.

¹³⁶ *Above* para. 48.

to the limited *ex parte* procedural submissions, and one month after he received disclosure (in *this* case) of the initial article 70 information. Closing oral arguments were held later still. As the Chamber itself implied, Bemba chose freely the approach for his submissions to the Chamber, when he possessed the very information he claims he lacked.¹³⁷

- Bemba could have sought to recall witnesses or to reopen his case. Indeed, his own practice demonstrates this capacity. Thus, he first (unsuccessfully) sought to recall P169 and P178 on 11 November 2013.¹³⁸ Nearly a year later, almost five months after the submission of evidence had been closed, Bemba renewed these requests. The Chamber found good cause to recall P169,¹³⁹ but not P178.¹⁴⁰ Nearly a year later again, in September 2015, Bemba further applied (unsuccessfully) to reopen the evidence on P33's credibility.¹⁴¹ This procedural history demonstrates not only that the Chamber reasonably considered requests to recall witnesses or to reopen the evidence—even after it had commenced deliberations—but also that Bemba made such requests when he considered it necessary. Yet he made no such requests related to the article 70 information (either to replace witnesses, or to recall witnesses who had testified), despite possessing for more than a year the very information he claims he lacked.
- Likewise, the transparency or otherwise of Bemba's scheme for paying witness expenses was irrelevant to this trial. Payment of legitimate expenses, as such, was not the issue in the article 70 investigation. Nor in any event did the payment of witness expenses affect the Chamber's deliberations. Again,

¹³⁷ [Abuse of Process Decision](#), para. 89.

¹³⁸ [Witness Contacts Decision](#), paras. 5, 35, 37-38.

¹³⁹ [P169 Recall Decision](#), paras. 4, 7, 25-30, 50.

¹⁴⁰ [P178 Recall Decision](#), paras. 8, 19-25. The Chamber denied reconsideration: [P178 Reconsideration Decision](#), paras. 18-34.

¹⁴¹ [P33 Reopening Decision](#), paras. 8, 15-22, 30.

the adverse credibility findings were based on witnesses' demeanour in court and the substantive content of their testimony.¹⁴²

56. Bemba's claims in this context may be considered especially self-serving given the independent finding, beyond reasonable doubt, that Bemba and his then lead counsel, Kilolo, deliberately presented evidence of these Defence witnesses knowing full well that their evidence contained falsehoods and was the result of illicit coaching and bribery.¹⁴³

57. Reference to the practice of other tribunals is unhelpful.¹⁴⁴ First, the facts of this case, and case ICC-01/05-01/13, are entirely distinct from any ICTY or ICTR contempt case.¹⁴⁵ The scale of the attempt to interfere with this trial, now proven beyond reasonable doubt, dwarfs any previous contempt case. Second, great caution is necessary in assuming that the cases cited (where the public information may be partial) reflect a principle of disclosing contempt investigations to the possible targets of the investigation. To the contrary, those cases equally show that the proper procedural course is dictated by the prevailing circumstances as the allegations come to light, their complexity, and the extent to which they appear well-founded. Thus:

- In *Simić*, where the allegations arose before trial, the entire matter could be settled before the trial started.¹⁴⁶
- In *Nyiramasuhuko*, the issue was sufficiently straightforward that it could be promptly decided in a single reasoned motion.¹⁴⁷

¹⁴² Above para. 48.

¹⁴³ E.g. *Bemba et al TJ*, paras. 896-908, 924-933.

¹⁴⁴ Contra *Brief*, paras. 79-84.

¹⁴⁵ Contra *Brief*, paras. 79, 84.

¹⁴⁶ See *Brief*, paras. 80-81.

¹⁴⁷ See *Brief*, para. 82.

- In *Lukić*, the Trial Chamber appears to have ordered the disclosure of *ex parte* documents *after* it had determined that it “was not satisfied that there were sufficient grounds to proceed against any of the suspects being investigated” and “that the Prosecution had presented no evidence to the Chamber to substantiate the claim that the integrity of the Accused’s defence was in question”.¹⁴⁸

58. In claiming that the *Lukić* Trial Chamber permitted evidence to be heard concerning alleged witness interference, in determining charges on the main indictment, Bemba also illustrates the case-sensitive nature of these questions.¹⁴⁹ By contrast, this Chamber declined to admit evidence of such interference tendered by the Prosecution,¹⁵⁰ and Bemba did not seek such admission either. Appropriate responses to concerns about witness interference thus vary from case to case.

59. Nor does Bemba show that the practice of other tribunals relates to the material question—whether the Chamber erred in assessing that Bemba sustained no prejudice from the delayed initial disclosure of the article 70 information. Bemba’s rhetorical deprecation of the article 70 investigation (“an eight-month investigative odyssey”) neither demonstrates that the investigative measures were “disproportionate”¹⁵¹ nor shows how actual prejudice ensued. His claim that the investigation could have been concluded more quickly flies in the face of the facts as they turned out to be.¹⁵²

¹⁴⁸ *Lukić* Report, para. 17. Also [Brief](#), para. 83.

¹⁴⁹ [Brief](#), para. 83. Further [Lukić TJ](#), paras. 168, 211 (exercising particular caution regarding the credibility of a witness allegedly subject to interference).

¹⁵⁰ *Above* para. 8.

¹⁵¹ *Contra* [Brief](#), para. 90.

¹⁵² *Contra* [Brief](#), para. 91. *Above* para. 35.

I.D. PRIVILEGE WAS ADEQUATELY SAFEGUARDED

60. Various chambers seised of case ICC-01/05-01/13—including the Appeals Chamber—have noted the Prosecution’s cautious and responsible approach to potentially privileged material.¹⁵³ The Prosecution never accessed information still bound by privilege. Yet, in any event, this is irrelevant on appeal.¹⁵⁴ Rather, the question is whether this trial was prejudiced or otherwise unfair as a result of any breach of privilege. Bemba’s argument misses the point. Again, he ignores the lengthy procedural history, and the Chamber’s careful adjudication of his concerns. He engages in an empty, hypothetical, and ultimately irrelevant discussion concerning his view of the merits of the investigation in ICC-01/05-01/13—an area into which this Appeals Chamber should not venture.¹⁵⁵ His interests in this case are not prejudiced.

I.D.1. The Chamber correctly and reasonably addressed this issue

61. Bemba repeatedly brought concerns about potential breaches of privilege to the Chamber’s attention. It addressed these concerns correctly and reasonably. It clarified the scope of privilege.¹⁵⁶ It correctly informed Bemba that the legality of the investigative measures granted by the Single Judge of Pre-Trial Chamber II *per se* were not within its competence, but stressed that it would entertain claims if Bemba was prejudiced in *this* trial.¹⁵⁷

62. On the merits of the claims, however, the Chamber repeatedly found that Bemba:

¹⁵³ [Abuse of Process Decision](#), para. 36; [Abuse of Process Response](#), para. 30 (citing [Bemba et al Mangenda Decision](#), paras. 2, 4, 8; [Bemba et al Disqualification AD](#), paras. 58-59).

¹⁵⁴ [Contra Brief](#), para. 93.

¹⁵⁵ [Above](#) para. 24.

¹⁵⁶ [First Privileged Communications Decision](#), paras. 19, 24-25. *Also* paras. 20-23.

¹⁵⁷ [Interim Relief Decision](#), paras. 15-16, 18; [Second Privileged Communications Decision](#), paras. 21, 23; [Abuse of Process Decision](#), paras. 17-18. *Also* [Abuse of Process ALA Decision](#), paras. 15, 19.

- failed to “articulate any concrete instance of prejudicial impact”;¹⁵⁸
- raised “speculative and misleading” concerns;¹⁵⁹
- raised concerns of “potential prejudice” that were “impermissibly speculative”;¹⁶⁰
- failed to “demonstrate prejudice to the fairness of the *Bemba* case”;¹⁶¹
- “provided little substantiation of [his] allegations” or “any explanation” of how prejudice is shown;¹⁶²
- provided “no substantiation or explanation” for his allegations;¹⁶³
- “to a large extent” sought “to re-litigate” previous claims, and still provided no “substantiation or explanation” for his allegations;¹⁶⁴ and
- sought “to re-litigate” previous decisions, and still did not show that his allegations were not “impermissibly speculative” nor “substantiate[d]” any prejudice.¹⁶⁵

I.D.2. Bemba shows no error, nor any breach of privilege occasioning prejudice

63. Despite his broad arguments, Bemba drops many of the claims he advanced (unsuccessfully) at trial concerning alleged breach of privilege. Nor do his

¹⁵⁸ [Interim Relief Decision](#), paras. 19-20, 23-25.

¹⁵⁹ [First Privileged Communications Decision](#), para. 33. *Also* paras. 34, 39.

¹⁶⁰ [Second Privileged Communications Decision](#), paras. 24-26.

¹⁶¹ [Abuse of Process Decision](#), para. 74. *Also* [Abuse of Process ALA Decision](#), paras. 20-26, 32.

¹⁶² [Abuse of Process Decision](#), paras. 46-47 (also describing the claim as “speculative”). *Also* [Abuse of Process ALA Decision](#), paras. 20-26, 32.

¹⁶³ [Abuse of Process Decision](#), para. 56. The kind of substantiation required would be, for example, “illustrating any resulting actual or potential impediment to the Defence’s presentation of its evidence, advantage gained by the Prosecution, or impact upon the Chamber’s ability to fairly assess the evidence presented to it at trial”. *Also* [Abuse of Process ALA Decision](#), paras. 20-26, 32.

¹⁶⁴ [Abuse of Process Decision](#), paras. 62-64. *Also* [Abuse of Process ALA Decision](#), paras. 20-26, 32.

¹⁶⁵ [Abuse of Process Decision](#), paras. 69, 71-72. *Also* [Abuse of Process ALA Decision](#), paras. 20-26, 32.

remaining arguments show an unfair trial, any breach of privilege, or any error.¹⁶⁶ His subjective and erroneous view that the article 70 investigation was unduly slow does not suffice.¹⁶⁷ Nor does reference to the Prosecutor's exercise of her case management discretion in *Ongwen*.¹⁶⁸

64. Bemba's claim that "Trial Chamber VII" found a breach of one of the safeguards in ICC-01/05-01/13, allowing the Prosecution to review the transcript of a conversation between Kilolo and Mangenda, is flawed in several ways.¹⁶⁹

- First, Bemba cites no decision of Trial Chamber VII, but only Pre-Trial Chamber II's confirmation decision.¹⁷⁰ This decision, notably, was issued more than a month *before* Bemba made his abuse of process claim.¹⁷¹ Yet he did not materially rely upon it.
- Second, even Pre-Trial Chamber II did not find that the "Independent Counsel erred in the scope of the crime-fraud exception" to privilege.¹⁷² Rather, it declined only to confirm charges—at the article 61 standard of proof—on the basis of an intercepted conversation of 6 November 2013.¹⁷³ This does not mean that the Independent Counsel in case ICC-01/05-01/13 was wrong to have cleared this document for access by the Prosecution. In screening potentially privileged material for investigative purposes, counsel was neither required to apply the standard of proof under article 61 nor in

¹⁶⁶ *Contra* [Brief](#), paras. 102, 104.

¹⁶⁷ *Contra* [Brief](#), para. 102. *Above* paras. 35, 59.

¹⁶⁸ *Contra* [Brief](#), para. 103. *Above* para. 58.

¹⁶⁹ *Contra* [Brief](#), paras. 94-95.

¹⁷⁰ [Brief](#), para. 94. *Also* [Abuse of Process ALA Decision](#), paras. 20, 25 (noting an apparently similar mistake in referring to an unexplained decision of "Trial Chamber III").

¹⁷¹ [Abuse of Process Decision](#), para. 1 (the Appellant's mis-filed abuse of process motion was filed on 15 December 2014). The *Bemba et al* Confirmation Decision was issued on 11 November 2014.

¹⁷² *Contra* [Brief](#), para. 94.

¹⁷³ [Bemba et al Confirmation Decision](#), paras. 47-50. *Also* [Brief](#), paras. 94-95.

any event is any error shown in his factual evaluation by a different body reasonably reaching a different conclusion.¹⁷⁴

65. Nor does Bemba's reference to the *Bemba et al* Confirmation Decision show that this trial was prejudiced, either preventing the Defence from acting, conferring an identifiable advantage upon the Prosecution, or affecting the basis upon which the Chamber deliberated. Indeed, as at trial,¹⁷⁵ Bemba does not even attempt to substantiate such a claim.

66. Bemba's further claim that the Pre-Trial Chamber's approach to the 6 November 2013 conversation may be the tip of "a very large iceberg" is vague and undeveloped.¹⁷⁶ First, it does not follow that a Chamber's view of a particular document shows that the original investigative screening process was flawed. Second, Bemba shows no prejudice—nor can he, since his argument is only hypothetical (premised on what Trial Chamber VII "may" decide).

67. Similarly, Bemba's renewed criticism of the implementation of safeguards in ICC-01/05-01/13 is immaterial for his appeal in this case.¹⁷⁷ He fails to show concretely how his interests in *this* case were adversely affected. Again, not only was he repeatedly warned at trial that such an approach is incorrect,¹⁷⁸ but he does not even attempt to argue that that guidance was itself erroneous.

68. Finally, Bemba's criticism of the degree of separation between the lawyers initially involved in this case and ICC-01/05-01/13 also fails to show any unfairness

¹⁷⁴ E.g. [Ntawukulilyayo AJ](#), para. 15 (even on the much stricter 'beyond reasonable doubt' standard, "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, both of which are reasonable.")

¹⁷⁵ Above paras. 61-62.

¹⁷⁶ *Contra* [Brief](#), para. 99. The Appellant does not develop his submission concerning any significance of "confidential" information and, accordingly, the Prosecution is unable to respond to this point.

¹⁷⁷ *Contra* [Brief](#), paras. 96-98 (criticising the proceedings before Pre-Trial Chamber II), 106.

¹⁷⁸ Above paras. 61-62.

or error in the Chamber's supervision of the trial.¹⁷⁹ Just as in the abuse of process litigation at trial,¹⁸⁰ Bemba ignores the Appeals Chamber's previous express guidance on this issue. A "conflict of interest" does not "necessarily" arise if prosecutors are involved in "charges under article 70" arising from "the same proceedings as charges for crimes under articles 6 to 8".¹⁸¹ In this context, preference for an *obiter dictum* of the *Lubanga* Trial Chamber is immaterial.¹⁸² The practice of other tribunals in using an *amicus curiae* prosecutor is likewise immaterial since the Rules of this Court allow no such recourse.¹⁸³ Nor does Bemba provide any reasoned basis to contest the Prosecution's assertion before the Chamber that, "as the prospect of joining the article 70 proceedings to this case diminished, the Prosecution chose to implement an appropriate and practicable degree of separation between counsel working on the two cases."¹⁸⁴

I.E. BEMBA SUSTAINED NO PREJUDICE

69. Bemba fails to show that he sustained any prejudice in his trial, or that the Chamber erred in its repeated findings to this effect. He merely disagrees with the Chamber's approach, including in the Abuse of Process Decision, when he contends that "[p]rejudice should be presumed".¹⁸⁵ Yet merely referring to one national jurisdiction, without developing any argument or engaging with the Chamber's reasoning, does not show that the Chamber erred.¹⁸⁶ To the contrary, the consistent

¹⁷⁹ *Contra* [Brief](#), paras. 100-101.

¹⁸⁰ [Abuse of Process Response](#), para. 50.

¹⁸¹ [Bemba et al Disqualification AD](#), para. 35. *Also* para. 40 (employing prosecutors "already familiar with the Bemba case" in the "initial phases of article 70 proceedings" does not, on its own, "give rise to reasonable doubts as to the Prosecutor's impartiality", although it would be "generally preferable" if "staff members involved in a case are not assigned to related article 70 proceedings of this kind"). *Contra* [Brief](#), para. 106 (fn. 207: citing the decision without acknowledging the reasoning).

¹⁸² *Contra* [Brief](#), para. 100 (fn. 193).

¹⁸³ *Contra* [Brief](#), para. 101. *E.g.* rule 165; [P42 Decision](#), para. 13.

¹⁸⁴ *Contra* [Brief](#), para. 106. *See* [Abuse of Process Response](#), para. 51.

¹⁸⁵ *Contra* [Brief](#), para. 113.

¹⁸⁶ *Contra* [Brief](#), para. 113 (quoting one case from the United States of America). *Above* fn. 70 (the Chamber rejected a similar argument, and leave to appeal was not sought).

practice of this Court and other tribunals requires some threshold of prejudice to warrant judicial action.

70. Merely claiming prejudice in the abstract,¹⁸⁷ Bemba recycles his previous flawed arguments but fails to demonstrate prejudice. Thus:

- He repeats the incorrect assertions that he was deprived of an opportunity to make relevant submissions,¹⁸⁸ that the article 70 investigation could have been completed sooner,¹⁸⁹ and that he was precluded from taking any material remedial step.¹⁹⁰
- He repeats his unsubstantiated claim that the Prosecution had access to “defen[c]e strategies”, and yet again fails to show a concrete impact upon the conduct of the trial or the Chamber’s deliberations.¹⁹¹
- He repeats his claim that the limited *ex parte* procedural submissions “could not have failed to prejudice even the most steely-minded judge” —but, again, ignores the Chamber’s express reasoning to the opposite effect. He fails expressly to allege, much less to demonstrate, either actual or apparent bias if this is what he means to imply.¹⁹²
- Finally, he repeats his fundamentally illogical claim that the Chamber’s correct and reasonable assessment of witness credibility—based solely on the witnesses’ demeanour and testimony in court—is evidence that the Chamber was in fact influenced by the article 70 allegations which it had

¹⁸⁷ [Brief](#), para. 107 (“[t]he conduct of the trial would have been substantially different if the foregoing violations [...] had not occurred”).

¹⁸⁸ *Contra* [Brief](#), para. 107. *Above* para. 55.

¹⁸⁹ *Contra* [Brief](#), para. 107. *Above* paras. 35, 59, 63.

¹⁹⁰ *Contra* [Brief](#), para. 107. *Above* para. 55.

¹⁹¹ *Contra* [Brief](#), para. 108. *Above* paras. 61-66.

¹⁹² *Contra* [Brief](#), para. 109. *Above* para. 43.

expressly set aside.¹⁹³ So tortured is the logic that Bemba even asserts that the Chamber's reasonable reference to evidence undermining the credibility of *other* witnesses, untainted by the article 70 allegations, somehow still proves that it was affected.¹⁹⁴

I.F. CONCLUSION

71. For all the reasons above, the first ground of appeal should be dismissed. The trial, and convictions, were fair.

II. BEMBA'S CONVICTIONS ARE PROPERLY BASED ON THE CHARGES

72. Bemba's convictions do not exceed the facts and circumstances described in the charges. The Chamber did not err in law by convicting Bemba of rape, murder and pillaging based on underlying acts not included in the Amended DCC.¹⁹⁵

73. All the underlying acts for which Bemba was convicted fell within the scope of the charges in the Confirmation Decision. Moreover, the findings in the Confirmation Decision and the Prosecution's auxiliary documents filed before trial provided Bemba with additional detail on the charges. Thus, his rights to be informed promptly and in detail of the nature, cause and content of the charges and to have adequate time and facilities to prepare his defence were fully respected.

74. To the limited extent that the LRV notified Bemba of further acts or incidents¹⁹⁶ underlying the charges *after* the trial had commenced (and for which he was

¹⁹³ *Contra* [Brief](#), paras. 110-111. *Above* para. 48. Concerning the Appellant's allegation regarding D4 and D6, *above* fn. 115. With regard to D23, D26, and D29, the Chamber considered their evidence in at least one respect: [Judgment](#), para. 695 (fn. 2127).

¹⁹⁴ *Contra* [Brief](#), para. 111 (referring to D45).

¹⁹⁵ *Contra* [Brief](#), paras. 115-128.

¹⁹⁶ "Acts" and "incidents" refer interchangeably to the specific murders, rapes and acts of pillaging underlying the charges.

convicted),¹⁹⁷ he was not unfairly prejudiced. Potential prejudice was effectively cured because Bemba received sufficient detail, in a timely manner, on the additional underlying incidents (*i.e.*, the date, location and the victims' identities). He had sufficient time to prepare and effectively examine the witnesses testifying about these acts and to defend himself against these incidents. In relying on these acts, the Chamber did not err.

II.A. APPLICABLE LAW

75. Article 67(1)(a) entitles the Accused to be informed of the “nature, cause and content” of the charges.¹⁹⁸ Concerning where and how such notice is provided, the *Lubanga* Appeals Chamber held that “the decision on the confirmation of the charges defines the parameters of the charges at trial.”¹⁹⁹ Auxiliary documents may, depending on the circumstances, provide further details about the charges.²⁰⁰ All documents designed to inform an accused of the charges, including auxiliary documents, must be considered to determine whether he was sufficiently informed of the charges,²⁰¹ provided the information was made available “before the start of the trial hearings”,²⁰² including in Prosecution submissions on the factual allegations in advance of the trial hearings.²⁰³ Further information provided “in the course of the trial” is nevertheless relevant to “[assess] whether prejudice caused by the lack of detail of the charges may have been cured”.²⁰⁴

76. Concerning the degree of detail needed for proper notice, regulation 52(b) provides that the charges shall include “[a] statement of the facts, including the time

¹⁹⁷ [Brief](#), paras. 122-123.

¹⁹⁸ *Also* [Judgment](#), paras. 31-34, 43 (fns. 90-103, 127-130: citing international caselaw).

¹⁹⁹ [Lubanga AJ](#), para. 124.

²⁰⁰ [Lubanga AJ](#), paras. 124, 132.

²⁰¹ [Lubanga AJ](#), para. 128.

²⁰² [Lubanga AJ](#), para. 129.

²⁰³ [Lubanga AJ](#), para. 130.

²⁰⁴ [Lubanga AJ](#), para. 129. *Also* [Ntaganda DCC Decision](#), paras. 17, 19, 28, 36, 40 (correctly following this approach).

and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial [...]”²⁰⁵ Further “[t]he term ‘facts’ refers to the factual allegations [supporting] the legal elements of the crime charged”.²⁰⁶ These “factual allegations must be distinguished from the evidence put forward by the Prosecutor at the [...] hearing”.²⁰⁷

77. According to the *Lubanga* Appeals Chamber, the underlying criminal acts form an integral part of the charges. The Prosecution must provide details on the date and location of the acts and the identity of the alleged victims “to the greatest degree of specificity possible in the circumstances”.²⁰⁸ However, the precise level of detail needed will depend, *inter alia*, on the applicable mode of liability and the proximity of the accused to the events.²⁰⁹ The ICTR/ICTY Appeals Chamber has consistently held that where an accused is charged with command responsibility, the facts relevant to the acts of the subordinates for which the superior is allegedly responsible will usually be stated with less precision because the detail of those acts are often unknown.²¹⁰ Moreover, in certain circumstances, the sheer scale of the alleged crimes makes it impracticable for a high degree of specificity on the victims’ identities and the dates of the commission of the crimes.²¹¹

²⁰⁵ [Lubanga AJ](#), para. 119.

²⁰⁶ [Lubanga AJ](#), para. 121 (citing [Lubanga Regulation 55 AD](#), fn. 163).

²⁰⁷ [Lubanga Regulation 55 AD](#) (fn. 163). However, documents that consist of, or refer to, evidence may include or refer to factual allegations. Accordingly, the disclosure of such documents may serve the purpose of giving notice of the charges: *below* para. 78.

²⁰⁸ [Lubanga AJ](#), para. 123.

²⁰⁹ [Lubanga AJ](#), paras. 122-123 (citing [Blaškić AJ](#), paras. 210-211); [Gaddafi AD](#), paras. 61-62; also [Kupreškić AJ](#), paras. 89-91; [Kvočka AJ](#), para. 65; [Popović AJ](#), para. 65; [Bagosora AJ](#), paras. 63, 150; [Sesay AJ](#), paras. 52, 830, 833.

²¹⁰ [Blaškić AJ](#), para. 218; [Ntagerura AJ](#), para. 26 fn. 82; [Muvunyi AJ](#), para. 58.

²¹¹ [Blaškić AJ](#), para. 218((b)(ii)); [Muvunyi AJ](#), para. 58; [Muhimana AJ](#), para. 79; [Gacumbitsi AJ](#), para. 50; [Kupreškić AJ](#), para. 89.

II.B. THE INCIDENTS FOR WHICH BEMBA WAS CONVICTED WERE CHARGED PROPERLY

78. Bemba's convictions did not exceed the charges. The Chamber should dismiss this ground.²¹² Bemba was properly informed of the nature, cause and content of the charges, including the dates and places of the alleged incidents, and the victims' identities with sufficient specificity. While these details were broadly set out in the confirmed charges,²¹³ additional notice was provided through the findings in the Confirmation Decision²¹⁴ and the following auxiliary documents provided before the trial commenced: the DCC (as amended); the Evidence Summary; the IDAC; Post-Confirmation Evidence; the Witness Summary; the LoE;²¹⁵ and the witness statements or other evidence disclosed to the Defence.²¹⁶ Before the trial began, the Chamber expressly informed the Defence that the DCC,²¹⁷ the IDAC²¹⁸ and the Evidence Summary²¹⁹ serve the purpose of informing the Accused of the nature, cause and content of the charges. Indeed, all the above documents were designed or had the effect to provide detailed information about the charges.²²⁰

II.B.1. The scope of the confirmed charges

79. Consistent with regulation 52(b), the confirmed charges set out a statement of the facts, including the temporal and geographic scope of the alleged crimes. The

²¹² E.g. [Lubanga AJ](#), paras. 131-137 (dismissing a similar ground).

²¹³ [Confirmation Decision](#), paras. 129, 160, 272, 282, 315.

²¹⁴ [Confirmation Decision](#), paras. 140-158, 165-188, 197-209.

²¹⁵ The LoE identifies Prosecution evidence, providing additional notice of details of the related charges.

²¹⁶ The IDAC's last two columns identify the relevant evidentiary item and the precise location of the identified references within that item.

²¹⁷ [DCC Corrections Decision](#), para. 35 (DCC "describe[s] the charges").

²¹⁸ [IDAC Decision](#), paras. 21, 24, 26 (the IDAC ensures "no ambiguity in the alleged facts", informs the Defence of "the exact case against it" and "assists in revealing the prosecution's case against the accused"). Also [Disclosure System Decision](#), paras. 65-73 (the IDAC informs the Defence in detail of the nature, cause and content of the charges).

²¹⁹ The Evidence Summary explains "how the evidence relates to the charges" and "promote[s] a greater understanding of the charges": [T-14](#), 12:14-13:3; [DCC Corrections Decision](#), para. 31. Also [Bemba et al TJ](#), para. 60 (the DCC and pre-trial brief, analogous to the Evidence Summary, "clearly specify [...] the factual allegations underpinning the Pre-Trial Chamber's conclusions"); [Lubanga Disclosure Decision](#), para. 26.

²²⁰ [Lubanga AJ](#), para. 128.

charges also broadly identified the perpetrators and the victims of the crimes by their association to a group.²²¹

80. Regarding murder as a crime against humanity, the Pre-Trial Chamber concluded that “murder of CAR civilians was committed by MLC soldiers as part of a widespread attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003.”²²² Similarly, for murder as a war crime, it concluded that “acts of murder of civilians [...] were committed by MLC soldiers in the context of the armed conflict not of an international character on [CAR territory] from on or about 26 October 2002 to 15 March 2003.”²²³

81. Regarding rape as a crime against humanity, the Pre-Trial Chamber concluded that “acts of rape [...] directed against CAR civilians were committed by MLC soldiers as part of a widespread attack against the CAR civilian population from on or about 26 October 2002 to 15 March 2003.”²²⁴ Similarly, for rape as a war crime, it concluded that “in the context of and in association with the armed conflict [...] acts of rape [...] were committed on civilians by MLC soldiers from on or about 26 October 2002 to 15 March 2003.”²²⁵

82. Finally, regarding pillaging as a war crime, the Pre-Trial Chamber concluded that “acts of pillaging [...] were committed by MLC soldiers in the context of the armed conflict [...] on [CAR territory] from on or about 26 October 2002 to 15 March 2003.”²²⁶

²²¹ [Confirmation Decision](#), paras. 129, 160, 272, 282, 315.

²²² [Confirmation Decision](#), para. 129; [Judgment](#), para. 622. In this response, “MLC” and “ALC” troops are described interchangeably.

²²³ [Confirmation Decision](#), para. 272; [Judgment](#), para. 622.

²²⁴ [Confirmation Decision](#), para. 160; [Judgment](#), para. 631.

²²⁵ [Confirmation Decision](#), para. 282; [Judgment](#), para. 631.

²²⁶ [Confirmation Decision](#), para. 315; [Judgment](#), para. 639.

83. The Confirmation Decision,²²⁷ and two Trial Chamber decisions issued before the trial commenced,²²⁸ clarified that the scope of the charges was not limited to the individual incidents of killings, rapes and pillaging discussed in the Confirmation Decision, but extended to all such acts committed by MLC soldiers against CAR civilians on CAR territory from on or about 26 October 2002 to 15 March 2003, as long as Bemba received adequate notice of their details.²²⁹

II.B.2. Bemba had additional notice

84. The Chamber convicted Bemba on the basis of multiple acts underlying the charges of murder,²³⁰ rape²³¹ and pillaging,²³² committed by MLC soldiers against CAR civilians on CAR territory from on or about 26 October 2002 to 15 March 2003. Accordingly, they all fell within the scope of the confirmed charges. Before the trial commenced, the Accused had additional notice of the charges from the findings in the Confirmation Decision and a number of auxiliary documents, as indicated in the footnotes to the following three paragraphs.²³³ Bemba did not incur unfair prejudice from the manner in which notice was given. Due to the timely notice, he was able to prepare his defence, to effectively question the witnesses against him and to lead evidence to challenge the Prosecution evidence.

85. Bemba received adequate notice of the date, place and the victims' identities of the following murders:

²²⁷ [Confirmation Decision](#), paras. 65-66, 134, 140, 145, 170, 323.

²²⁸ [DCC Corrections Decision](#), paras. 85-87, 257-279; *also* paras. 88-89, 102-103, 159, 249; [Victims Decision](#), paras. 55, 58.

²²⁹ *See* [DCC](#), pp. 33-35 (clarifying that the respective crimes "include but are not limited" to the listed incidents). Similarly, the Prosecution stressed that the listed incidents "are indicative and merely symptomatic of a wider phenomenon of rapes, murders and pillaging": [Evidence Summary](#), para. 136. *Also* [Judgment](#), para. 42. The Chamber consistently rejected the Defence's application to delete inclusionary language from a prior version of the DCC: [DCC Corrections Decision](#); T-178-CONF, 11:14-22; [Judgment](#), para. 9. *Cf.* [Ntaganda DCC Decision](#), paras. 70-72 (generally disallowing inclusive language in the DCC—except for child soldier offences—due to the different language used to confirm the charges).

²³⁰ [Judgment](#), para. 624.

²³¹ [Judgment](#), para. 633.

²³² [Judgment](#), para. 640.

²³³ Details of the incidents mentioned by V1 and V2 were, however, only provided after the trial commenced: *below* paras. 95-98.

- a) P87's "brother" in Bangui at the end of October 2002;²³⁴
- b) P69's sister in PK12 the day after the MLC's arrival in PK12;²³⁵ and
- c) an unidentified "Muslim" man on 5 March 2003 in Mongoumba.²³⁶

86. Bemba received adequate notice of the date, place and the victims' identities of the following rapes:

- a) P68 and P68's sister-in-law in Bangui at the end of October 2002;²³⁷
- b) two unidentified girls aged 12 and 13 years in Bangui on or around 30 October 2002;²³⁸
- c) P87 in Bangui on or around 30 October 2002;²³⁹
- d) eight unidentified women at the Port Beach naval base in Bangui at the end of October or beginning of November 2002;²⁴⁰
- e) P23, P80, P81, P82, and two of P23's other daughters in PK12 in early November 2002;²⁴¹
- f) P69 and his wife in PK12 at the end of November 2002;²⁴²
- g) P22 in PK12 on or around 6 or 7 November 2002;²⁴³
- h) P79 and her daughter in PK12 several days after the MLC arrived in PK12;²⁴⁴

²³⁴ [Confirmation Decision](#), paras. 148-150; [DCC](#), para. 48; [Evidence Summary](#), para. 160.

²³⁵ [Evidence Summary](#), para. 169; Post-Confirmation Evidence, p. 3; IDAC, pp. 112, 119-121; Witness Summary: Annex C18; P69's statements (disclosed 09.11.2009): CAR-OTP-0035-0003_R01, CAR-OTP-0035-0012_R01, CAR-OTP-0035-0034_R01.

²³⁶ V1's statement: ICC-01/05-01/08-2061-Conf-Anx1-Red2, p.6, first paragraph. *Also* CAR-V20-0001-0001.

²³⁷ [Confirmation Decision](#), paras. 175-176; [DCC](#), para. 46; [Evidence Summary](#), para. 155.

²³⁸ Post-Confirmation Evidence, p. 6; IDAC, pp. 96-97, 108, 199-200, 212, 249-250; Witness Summary: Annex C27; P119's statements (disclosed 09.11.2009): CAR-OTP-0044-0114, CAR-OTP-0044-0128, CAR-OTP-0044-0159, CAR-OTP-0044-0184, CAR-OTP-0044-0202.

²³⁹ [Confirmation Decision](#), para. 181; [DCC](#), para. 48; [Evidence Summary](#), para. 159.

²⁴⁰ [DCC](#), para. 51; IDAC, pp. 91-93, 105-107, 114, 285; Witness Summary: Annex C14; P47's statements (disclosed 09.11.2009): CAR-OTP-0028-0409, CAR-OTP-0028-0452, CAR-OTP-0028-0459, CAR-OTP-0028-0306, CAR-OTP-0028-0339.

²⁴¹ [Confirmation Decision](#), paras. 171-172, 177-180; [DCC](#), para. 49; [Evidence Summary](#), paras. 138-139, 142-145.

²⁴² [Evidence Summary](#), paras. 168, 170; Post-Confirmation Evidence, p. 3; IDAC, pp. 86-88, 97-98, 104, 108, 190-191; Witness Summary: Annex C18; P69's statements (disclosed 09.11.2009): CAR-OTP-0035-0003, CAR-OTP-0035-0012, CAR-OTP-0035-0034.

²⁴³ [Confirmation Decision](#), paras. 182-185; [DCC](#), para. 47; [Evidence Summary](#), paras. 146-147.

- i) P42's daughter in PK12 around the end of November 2002;²⁴⁵
- j) [REDACTED] in the bush outside of PK22 in November 2002;²⁴⁶
- k) P29 in Mongoumba on 5 March 2003;²⁴⁷ and
- l) V1 in Mongoumba on 5 March 2003.²⁴⁸

87. Bemba received adequate notice of the date, place and the victims' identities of the following acts of pillaging:

- a) P68 and her sister-in-law in Bangui at the end of October 2002;²⁴⁹
- b) P119 in Bangui after 30 October 2002;²⁵⁰
- c) P87 and her family in Bangui on or around 30 October 2002;²⁵¹
- d) P23, P80, P81, and P82 in Bangui in early November 2002;²⁵²
- e) P69's sister in PK12 the day after the MLC arrived;²⁵³
- f) P69 in PK12 in November 2002;²⁵⁴
- g) P108 in PK12 during the MLC's presence;²⁵⁵

²⁴⁴ [Evidence Summary](#), para. 171; IDAC pp. 88-90, 105, 192-194, 209; Post-Confirmation Evidence, p. 4; Witness Summary: Annex C21; P79's statements (disclosed 09.11.2009): CAR-OTP-0039-0135, CAR-OTP-0039-0166, CAR-OTP-0039-0196, CAR-OTP-0039-0205.

²⁴⁵ [Confirmation Decision](#), para. 174; [DCC](#), para. 50; [Evidence Summary](#), para. 162.

²⁴⁶ [Evidence Summary](#), paras. 165-166; IDAC pp. 93-94, 107, 197-198; Post-Confirmation Evidence, p. 4; Witness Summary: Annex C20; P75's statements (disclosed 09.11.2009): CAR-OTP-0039-0379, CAR-OTP-0039-0400.

²⁴⁷ [Confirmation Decision](#), para. 173; [DCC](#), para. 54; [Evidence Summary](#), para. 181.

²⁴⁸ V1's statement: ICC-01/05-01/08-2061-Conf-Anx1-Red2, pp. 5 (4th paragraph), 6 (4th paragraph). *Also* CAR-V20-0001-0001.

²⁴⁹ [DCC](#), para. 46; [Evidence Summary](#), para. 155; IDAC, pp. 236, 266-267, 281; P68's statements (disclosed 07.11.2008, 09.11.2009): CAR-OTP-0020-0371, CAR-OTP-0020-0385, CAR-OTP-0020-0426 (particularly CAR-OTP-0020-0395, CAR-OTP-0020-0400, CAR-OTP-0020-0401).

²⁵⁰ Post-Confirmation Evidence, p. 6; IDAC, pp. 249-250, 273, 285-286; Witness Summary: Annex C27; P119's statements (disclosed 09.11.2009): CAR-OTP-0044-0114, CAR-OTP-0044-0128, CAR-OTP-0044-0159, CAR-OTP-0044-0184, CAR-OTP-0044-0202.

²⁵¹ [Confirmation Decision](#), para. 329; [DCC](#), para. 48; [Evidence Summary](#), para. 159.

²⁵² [Confirmation Decision](#), paras. 325, 327-328; [DCC](#), para. 49; [Evidence Summary](#), paras. 140-141.

²⁵³ [Evidence Summary](#), paras. 167, 169; IDAC, pp. 254-255, 275, 287-288; Post-Confirmation Evidence, p. 3; P69's statements (disclosed 09.11.2009): CAR-OTP-0035-0003, CAR-OTP-0035-0012, CAR-OTP-0035-0034.

²⁵⁴ [Evidence Summary](#), paras. 167, 169; IDAC, pp. 237-238, 254, 268; Post-Confirmation Evidence, p. 3; Witness Summary: Annex C18; P69's statements (disclosed 09.11.2009): CAR-OTP-0035-0003, CAR-OTP-0035-0012, CAR-OTP-0035-0034.

²⁵⁵ [Evidence Summary](#), paras. 178-179; IDAC, pp. 237-238, 239, 243, 251, 253-254, 267-268; Post-Confirmation Evidence, p. 5; P108's statements (disclosed 09.11.2009): CAR-OTP-0037-0269, CAR-OTP-0037-0283, CAR-OTP-0037-0245.

- h) P110 in PK12 the day after the MLC arrived;²⁵⁶
- i) P112 in PK12 in November 2002;²⁵⁷
- j) P22 and her uncle in PK12 on or around 6 or 7 November 2002;²⁵⁸
- k) P79 and her brother in PK12 several days after the MLC's arrival;²⁵⁹
- l) P73 in PK12 at the end of November 2002;²⁶⁰
- m) P42 and his family in PK12 at the end of November 2002;²⁶¹
- n) [REDACTED] in the bush outside PK22 in November 2002;²⁶²
- o) V2 in Sibut in the days after the MLC's arrival;²⁶³ and
- p) V1, a church, nuns, priests, an unidentified "Muslim" man and his neighbour, the gendarmerie, and mayor in Mongoumba on 5 March 2003.²⁶⁴

88. Sufficient notice is not impacted merely because some victims were not identified by name or because the dates in the Confirmation Decision, Amended DCC or other auxiliary documents differed by a few days from the incident for which Bemba was convicted.²⁶⁵ This is especially considering article 28 was the mode of liability, Bemba's remoteness from the crimes and their sheer scale.²⁶⁶

²⁵⁶ [Evidence Summary](#), para. 179; IDAC, pp. 244, 271, 274, 284; Post-Confirmation Evidence, p. 5; Witness Summary: Annex C25; P110's statements (disclosed 04.11.2009): CAR-OTP-0038-0360, CAR-OTP-0038-0383, CAR-OTP-0038-0397.

²⁵⁷ [Evidence Summary](#), para. 177; IDAC, pp. 237, 252-253, 267, 274, 281; Post-Confirmation Evidence, p. 6; Witness Summary: Annex C26; P112's statements (disclosed 09.11.2009): CAR-OTP-0040-0137, CAR-OTP-0040-0079, CAR-OTP-0040-0109.

²⁵⁸ [Confirmation Decision](#), para. 324; [DCC](#), para. 47; Evidence Summary, para. 148.

²⁵⁹ [Evidence Summary](#), para. 172; IDAC, pp. 239, 243, 268, 270, 282-283; Post-Confirmation Evidence, p. 4; Witness Summary: Annex C21; P79's statements (disclosed 09.11.2009): CAR-OTP-0039-0135, CAR-OTP-0039-0166, CAR-OTP-0039-0196, CAR-OTP-0039-0205.

²⁶⁰ Post-Confirmation Evidence, p. 4; IDAC, pp. 255-257, 288; Witness Summary: Annex C19; P73's statements (disclosed 09.11.2009): CAR-OTP-0039-0315, CAR-OTP-0039-0341, CAR-OTP-0039-0368.

²⁶¹ [Confirmation Decision](#), para. 326; [DCC](#), para. 50; [Evidence Summary](#), paras. 161-163.

²⁶² [Evidence Summary](#), para. 165; IDAC p. 246; Post-Confirmation Evidence, p. 4; Witness Summary: Annex C20; P75's statements (disclosed 09.11.2009): CAR-OTP-0039-0379, CAR-OTP-0039-0400.

²⁶³ V2's Statement: ICC-01/05-01/08-2066-Conf-Anx5-Red2, p. 3 (penultimate paragraph). *Also* CAR-V20-0001-0018.

²⁶⁴ V1's Statement: ICC-01/05-01/08-2061-Conf-Anx1-Red2, pp. 4 (first paragraph: V1; last three paragraphs: church, nuns, priests), 5 (first paragraph: the gendarmerie; last two paragraphs: the mayor), 6 (first two paragraphs: unidentified "Muslim" and neighbour). *Also* CAR-V20-0001-0001.

²⁶⁵ *E.g.* rape of P22, not committed at the end of October 2002 ([Confirmation Decision](#), paras. 182-185), but on 6 or 7 November, 2002: [Judgment](#), para. 633(g).

²⁶⁶ *Above* para. 77.

II.C. BEMBA HAS NOT SHOWN ERROR

89. Bemba raises three unsustainable arguments: first, that his conviction was based on unconfirmed underlying acts;²⁶⁷ second, that V1's and V2's evidence cannot form the basis of his conviction;²⁶⁸ third, that his conviction was based on acts improperly included in the Amended DCC.²⁶⁹

II.C.1. Bemba's conviction was based on confirmed underlying acts

90. Bemba argues that the Chamber improperly convicted him of unconfirmed acts of murder, rape and pillaging outside of the charges.²⁷⁰ However, this argument misconceives the scope of the confirmed charges and appellate jurisprudence on how an accused may be provided detailed notice of the charges.

91. First, the scope of the charges was not limited solely to the incidents of murder, rape and pillaging discussed in the Confirmation Decision.²⁷¹ Both the Pre-Trial Chamber²⁷² and the Trial Chamber, in two decisions issued before the trial began,²⁷³ expressly stated that the scope of the charges extended to all such acts of murder, rape and pillaging committed by MLC soldiers against civilians on the CAR territory from on or about 26 October 2002 to 15 March 2003, as long as Bemba had adequate notice of their details.²⁷⁴ The Pre-Trial Chamber acknowledged that the Confirmation Decision need not expressly set out all underlying incidents of murder, rape and pillaging. A charging document could use expressions such as

²⁶⁷ [Brief](#), paras. 115-121.

²⁶⁸ [Brief](#), paras. 122-123.

²⁶⁹ [Brief](#), paras. 124-128.

²⁷⁰ [Brief](#), paras. 115-121.

²⁷¹ *Contra* [Brief](#), para. 117.

²⁷² [Confirmation Decision](#), paras. 65-66, 134, 140, 145, 170, 323.

²⁷³ [DCC Corrections Decision](#), paras. 84-87, 257-279; *also* paras. 88-89, 102-103, 159, 249; [Victims Decision](#), paras. 55, 58.

²⁷⁴ [DCC](#), pp. 33-35; [Evidence Summary](#), para. 136; [Judgment](#), para. 42.

“[including] but [...] not limited to” when referring to the underlying incidents.²⁷⁵
The Trial Chamber confirmed this approach.²⁷⁶

92. At confirmation, the Pre-Trial Chamber examined the limited pool of Prosecution evidence presented to determine whether the article 61(7) standard was met.²⁷⁷ Accordingly, even if the Prosecution had not at that stage provided evidence on all underlying acts,²⁷⁸ or if that Chamber had not relied on certain evidence before it,²⁷⁹ this does not mean that specific incidents of killings, rapes or pillaging were excluded from the scope of the charges.²⁸⁰

93. Second, although the underlying acts of murder, rape and pillaging were an integral part of the charges, and the Prosecution was required to provide details to the greatest degree of specificity possible,²⁸¹ the Pre-Trial Chamber did not need to set out every underlying act in the Confirmation Decision. The Prosecution was entitled to provide “further details about the [confirmed] charges [...] in other auxiliary documents”,²⁸² including dates and locations of certain acts, and victims’ identities.²⁸³

94. As demonstrated above,²⁸⁴ Bemba had such adequate notice. The Chamber did not err.

²⁷⁵ [Confirmation Decision](#), paras. 65-66, 134, 140, 145, 170, 323.

²⁷⁶ *Above* para. 83.

²⁷⁷ [Confirmation Decision](#), paras. 129, 160, 272, 282, 315. *Also* paras. 140-158.

²⁷⁸ [Mbarushimana AD](#), para. 47 (“[for the] limited purpose of the confirmation of charges [...] the Prosecutor [...] need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe”); [Lubanga Rule 81 AD](#), para. 49 (investigations need not be concluded before the confirmation hearing).

²⁷⁹ *E.g.* [Confirmation Decision](#), paras. 169, 338.

²⁸⁰ *Contra* [Brief](#), para. 119.

²⁸¹ [Lubanga AJ](#), para. 123; [Brief](#), paras. 117, 120.

²⁸² [Lubanga AJ](#), paras. 124, 132.

²⁸³ [Lubanga AJ](#), para. 123.

²⁸⁴ *Above* paras. 85-87.

II.C.2. The convictions properly included the V1 and V2 incidents

95. The Chamber convicted Bemba of murder, rape and pillaging based, *inter alia*, on three incidents which V1 referred to in his testimony, namely the killing by MLC soldiers of an unidentified “Muslim” man on 5 March 2003 in Mongoumba; the rape of V1 in Mongoumba on 5 March 2003; and the pillaging of V1, a church, nuns, priests, an unidentified “Muslim” man and his neighbour, the gendarmerie, and the mayor in Mongoumba on 5 March 2003.²⁸⁵ It also convicted Bemba of pillaging based, *inter alia*, on one incident to which V2 referred in his testimony, namely the pillaging of V2 in Sibut in the days after the MLC’s arrival. These incidents clearly fell within the scope of the confirmed charges.²⁸⁶

96. Although the LRV notified Bemba about the date, location and victims’ identities for these incidents only after the trial had commenced, any potential prejudice from this late notice was effectively cured.²⁸⁷ Accordingly, the Trial Chamber did not err in relying on these incidents.

97. Bemba’s argument—that, as a matter of law, V1’s and V2’s evidence, and the facts supported by their evidence, could only have been considered if notice of these facts had been given before the trial started²⁸⁸—disregards the law acknowledging that the effects of late notice may be cured.²⁸⁹

98. In fact, Bemba does not argue that he was unfairly prejudiced by the late notice of these incidents, and particularly, that the notice of facts testified to by V1 and V2 was insufficient and violated his right to be informed of the charges (article 67(1)(a)), that it was untimely and violated his right to adequate time and facilities

²⁸⁵ [Judgment](#), paras. 624(c), 633(l), 640(p).

²⁸⁶ [Judgment](#), para. 640(o).

²⁸⁷ *Below* para. 99.

²⁸⁸ [Brief](#), para. 123.

²⁸⁹ [Lubanga AJ](#), para. 129.

to prepare his defence (article 67(1)(b)), or that it otherwise caused him unfair prejudice. This ground should therefore be dismissed.²⁹⁰

99. Moreover, any potential prejudice flowing from such late notice was cured. First, Bemba was in fact informed in necessary detail of the underlying incidents referred to by V1 and V2. The trial commenced on 22 November 2010.²⁹¹ On 23 January 2012, the LRV applied to present V1's and V2's evidence.²⁹² Following the Trial Chamber's order,²⁹³ the LRV annexed comprehensive written statements outlining the facts about which the victims would testify.²⁹⁴ These statements included sufficient detail about the date, location and the victims' and the perpetrators' identities of the murders, rapes and acts of pillaging.²⁹⁵ The Defence received them on 1 February 2012 in redacted form without the witnesses' identities.²⁹⁶ Lesser redacted versions with the witnesses' identities were disclosed on 12 March 2012.²⁹⁷ When challenging the submission of V1's and V2's evidence, the Defence never stated that the notice from V1's and V2's statements lacked specificity.²⁹⁸

100. Second, late notice of these incidents did not affect Bemba's rights. At trial, besides arguing that their evidence would delay the proceedings,²⁹⁹ the Defence never claimed that V1's and V2's proposed evidence would affect Bemba's rights or the fairness of the trial. Similarly, during the 27 March 2012 status conference discussing V1's and V2's upcoming testimony,³⁰⁰ the Defence did not argue that its

²⁹⁰ [Lubanga AJ](#), paras. 133-138.

²⁹¹ [Judgment](#), para. 10; T-32.

²⁹² E.g. V1/V2 Request, para. 4 (V1: "a/0866/10"; V2: "a/1317/10").

²⁹³ [LRV Evidence Decision](#), para. 15.

²⁹⁴ V1's statement: ICC-01/05-01/08-2061-Conf-Anx1-Red; V2's statement: ICC-01/05-01/08-2066-Conf-Anx5-Red.

²⁹⁵ *Above* paras. 85(c), 86(l), 87(o)-(p).

²⁹⁶ ICC-01/05-01/08-2061-Conf-Anx1-Red; ICC-01/05-01/08-2066-Conf-Anx5-Red.

²⁹⁷ ICC-01/05-01/08-2061-Conf-Anx1-Red2; ICC-01/05-01/08-2066-Conf-Anx5-Red2.

²⁹⁸ V1/V2 Response, paras. 17-30.

²⁹⁹ V1/V2 Response, paras. 34-39.

³⁰⁰ [T-219](#).

ability to prepare Bemba's defence or to question the witnesses was affected. Instead, the Defence reiterated its objections that it was "duplicative,"³⁰¹ and in its view, "the important thing is that the victims' case has an identifiable period of time", meaning that the start of the Defence case was not delayed.³⁰² It only requested that the start date for V1's and V2's evidence, scheduled to commence on 23 April 2012, should be "put back by a couple of days at least" to accommodate the Defence's travel arrangements.³⁰³ The Trial Chamber granted this request. V1 testified from 1 to 3 May 2012³⁰⁴ and V2 testified on 4, 7 and 8 May 2012.³⁰⁵

101. That Bemba was not unfairly prejudiced is also demonstrated by the Defence's questioning of V1 and V2. The Defence was not restricted in its time to question V1 and V2, and examined them extensively, including on the circumstances surrounding the alleged killings, rapes and acts of pillaging, the identities of the victims and alleged perpetrators, and aspects related to their credibility.³⁰⁶ Not only was the Defence fully aware of the details of V1's and V2's testimony and their relevance to the charges, it was prepared to conduct an effective witness examination, and did so. Finally, the Defence's presentation of evidence commenced on 14 August 2012,³⁰⁷ over three months after V1 and V2 testified. The Defence had extensive time to conduct additional investigations and to challenge the witnesses' evidence through its own.

102. Thus, although the LRV should ideally have notified the factual details concerning the murder, rape and pillaging allegations before trial, Bemba was not unfairly prejudiced. The Chamber did not err.

³⁰¹ [T-219](#), 11:2-6.

³⁰² [T-219](#), 11:11-15.

³⁰³ [T-219](#), 11:16-12:7.

³⁰⁴ [T-220](#); [T-221](#); [T-222](#).

³⁰⁵ [T-223](#); [T-224](#); [T-225](#).

³⁰⁶ Defence questioning of V1: [T-221](#), 21:13-49:18; [T-222](#), 10:15-27:17. Defence questioning of V2: [T-224](#), 42:10-55:24; [T-225](#), 2:25-51:17.

³⁰⁷ [Judgment](#), para. 10.

II.C.3. The conviction is properly based on the charges

103. Bemba’s argument that the Chamber improperly convicted Bemba of the rape of victims 1 to 35 and the pillaging of the belongings of P68 and her sister-in-law³⁰⁸ also misconceives the scope of the confirmed charges.

104. The Pre-Trial Chamber did not “decline to confirm” the incident of rape against victims 1 to 35,³⁰⁹ but simply did not “rely” on P47’s evidence on victims 1 to 35 to confirm the rape charges, primarily because the Prosecution had not yet disclosed P47’s identity to the Defence.³¹⁰ Therefore, the Chamber held that the confirmed charges did not exclude the underlying incident, and rejected the Defence’s request to remove it from a prior version of the Amended DCC.³¹¹

105. The rapes of eight unidentified women at the Port Beach naval base in Bangui at the end of October or beginning of November 2002—including in the rapes of victims 1 to 35³¹²—fall within the scope of the charges.³¹³ Moreover, the Prosecution timely notified the details of this charge³¹⁴ and in so doing, clearly indicated its intention to rely on this incident as an underlying act of rape. No error is thus shown.

106. Similarly, while P68’s evidence (regarding the pillaging of her belongings and those of her sister-in-law) was not relied upon to confirm the charge,³¹⁵ this does not mean that the incident was “unconfirmed [and] [fell] outside the scope of the charges”.³¹⁶ The incident clearly fell within the scope of the confirmed charges. The Prosecution gave timely and detailed notice of this incident in several auxiliary

³⁰⁸ [Brief](#), paras. 124-128.

³⁰⁹ *Contra* [Brief](#), para. 125.

³¹⁰ [Confirmation Decision](#), paras. 169; [Judgment](#), para. 45(c).

³¹¹ [DCC Corrections Decision](#), paras. 265-266.

³¹² [DCC](#), paras. 51-53.

³¹³ *Above* paras. 79-83.

³¹⁴ *Above* fn. 240.

³¹⁵ [Confirmation Decision](#), para. 338; [Judgment](#), para. 45(e).

³¹⁶ *Contra* [Brief](#), para. 127.

documents.³¹⁷ The Chamber thus properly convicted Bemba of pillaging based, *inter alia*, on the pillaging of P68 and her sister-in-law.

II.D. CONCLUSION

107. For these reasons, the Chamber did not err. Ground 2 should be dismissed.

III. BEMBA IS RESPONSIBLE AS A SUPERIOR

108. The Chamber properly determined that Bemba was responsible for the crimes of his subordinates under article 28(a) of the Statute. Bemba shows no error in its reasoned findings that he exercised effective control over his MLC subordinates, knew of their crimes, and failed to take all necessary and reasonable measures to prevent, investigate, and punish them.³¹⁸ Likewise, his arguments concerning the Chamber's approach to causation must be dismissed, for lack of impact on the Judgment. This ground should be dismissed.

III.A. BEMBA HAD EFFECTIVE CONTROL OVER MLC TROOPS IN THE CAR

109. Bemba had effective authority and control over MLC troops who committed crimes during the 2002-2003 CAR Operation.³¹⁹ The Chamber correctly defined effective control as the material ability to prevent or repress the commission of the crimes or to submit the matter to competent authorities.³²⁰ Since this assessment is fact-sensitive,³²¹ the Chamber properly considered well-established indicators relevant to effective control.³²²

³¹⁷ Above para. 87(a).

³¹⁸ In this response, the Prosecution uses the terms "punish" and "repress" interchangeably.

³¹⁹ [Judgment](#), paras. 697, 700-705.

³²⁰ [Judgment](#), para. 183.

³²¹ [Judgment](#), paras. 185, 188, 697, 700-705.

³²² [Judgment](#), paras. 188, 190. *Contra* Brief, para. 130.

110. The Chamber's analysis was cautious, reasoned, and correct. It was reasonable. Bemba shows no error in it, in either law (III.A.1) or fact (III.A.2).

111. Instead, Bemba resorts to hollow and unsupported statements³²³ and to hyperbolic legal³²⁴ and factual³²⁵ theories disconnected from the law and the evidence without showing the Chamber's analysis was unreasonable. Indeed, by asserting once again that MLC troops were in some way resubordinated to the CAR, Bemba re-litigates unsuccessful factual arguments from trial.³²⁶ His legal analysis—also based on this faulty assumption—is not only misplaced, but tenuous and incorrect. The Chamber did not err either in its interpretation of “effective control” or its assessment of relevant indicators and evidence.

112. Above all, Bemba's appeal is not assisted by resort to “established military doctrine and practice”,³²⁷ but undermined by it. His claims are contradictory and opportunistic, seeking to characterise the MLC as “non-linear actors operating across international boundaries, in a composite contingent of state forces and militia” yet claiming the protection of the “realities of military command”.³²⁸ More importantly, his claims are simply wrong. There is no “military impossibility” in holding a superior responsible for failing to prevent, punish, or investigate his subordinates' crimes when he is correctly and reasonably proven to have effective

³²³ E.g. [Brief](#), paras. 131, 139, 145, 159, 162, 167, 169-171, 192, 194-195, 201, 224-226, 276, 284.

³²⁴ [Brief](#), paras. 175-185.

³²⁵ *Below* para. 123 (first bullet).

³²⁶ Compare e.g. [Bemba Final Brief](#), para. [REDACTED], with [Brief](#), para. 151 (concerning [REDACTED]); [Bemba Final Brief](#), para. 711, with [Brief](#), para. 212 (concerning [REDACTED]); [Bemba Final Brief](#), para. 637 *et seq.*, with [Brief](#), paras. 143, 148-150 (concerning the CAR CO's role); [Bemba Final Brief](#), paras. 767, 769, with [Brief](#), paras. 204-206 (concerning P33); [Bemba Final Brief](#), paras. 718, 759, with [Brief](#), paras. 177-178 (concerning D53); [Bemba Final Brief](#), para. 776, with [Brief](#), para. 222 (admissibility of five media reports).

³²⁷ *Contra* [Brief](#), para. 129.

³²⁸ *Contra* [Brief](#), paras. 130, 139, 144.

control over them.³²⁹ Nor has the superior's position in a higher "level of command", even if it were established,³³⁰ ever been a bar to that responsibility.³³¹

III.A.1. The Chamber correctly defined and applied "effective authority and control"

113. Bemba's legal challenge to the Chamber's interpretation of "effective authority and control" is misconceived³³² and wrongly presupposes that the MLC was resubordinated to the CAR authorities,³³³ which the Chamber rejected. MLC troops were never materially resubordinated to the CAR, and the MLC leadership (and Bemba) retained both command and "operational control"³³⁴ over the MLC contingent throughout the 2002-2003 Operation.³³⁵ Nor in any event would such facts displace effective control as a matter of law, which remains a fact-sensitive enquiry.

III.A.1.a. The material test is "effective control"

114. Bemba's effort to explain away his role as retaining 'command' but not 'effective control' is unconvincing and self-serving, and shows no error in the Chamber's legal analysis.³³⁶ Vague reference to the powers retained by TCCs in multinational operations³³⁷—to which, in any event, the MLC was not analogous³³⁸—does not show that the Chamber erred on the material question: the

³²⁹ *Contra* [Brief](#), para. 132.

³³⁰ This was not established here. D53 considered the CAR forces and not the MLC: CAR-D04-0003-0342, at 0351-0356. *Contra* [Brief](#), paras. 135-141.

³³¹ The appellant raised similar arguments in *Strugar*, concerning the situation in the JNA, which enforced a relatively formal command structure, and where Strugar was multiple "levels" of command above the perpetrators. This did not bar his conviction as a superior. See [Strugar AJ](#), paras. 249, 255; *also* paras. 115-116, 195, 235, 249, 341, 347, 353-354; [Strugar TJ](#), paras. 379-391, 393-405. *Also below* fn. 457.

³³² *Contra* [Brief](#), paras. 176-181, 184-185 (asserting that the Chamber confused "command" and "effective control", and assessed effective control incorrectly).

³³³ *Contra* [Brief](#), paras. 175, 183-184.

³³⁴ Consistent with the Judgment, this term is used here to mean the factual ability to control MLC operational movements: [Judgment](#), paras. 427, 446.

³³⁵ [Judgment](#), paras. 427, 446, 699-700.

³³⁶ *Contra* [Brief](#), paras. 175-178.

³³⁷ [Brief](#), paras. 177-178, 185.

³³⁸ The analogy is unsubstantiated, except by reference to D53's report, to which the Chamber attached "no weight": [Judgment](#), para. 369. Moreover, different multinational operations have diverse mandates (e.g. for UN

definition of effective control, and whether it was established on the facts of this case.

115. To the contrary, the Chamber correctly defined ‘effective control’ as a superior’s³³⁹ “material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities”.³⁴⁰ It correctly interpreted ‘command’ and ‘authority’ under article 28,³⁴¹ and recognised that these concepts have “no substantial effect on the required level or standard of ‘control’, but rather denote the modalities, manner, or nature in which a military commander or person acting as such exercises control over his or her forces”.³⁴² Indeed, the required level of control remains the same³⁴³ as ‘control’ encompasses both the ‘authority’ and the ‘command’.³⁴⁴

116. The Chamber likewise correctly distinguished effective control from the doctrine of “singleness or unity of command”³⁴⁵—which is not a legal principle but, at most, a *factual* consideration potentially relevant to evaluating the practices of some militaries. Indeed, since effective control refers to the *material ability* to prevent

operations, [UN Agenda for Peace](#) and [Supplement to an Agenda for Peace](#); for NATO, [NATO Operations and Missions](#) which are generally distinguished by express agreements (usually an MoU or ToA: Zwanenburg, p. 39; Gill, p. 48; Gill/Fleck, pp. 181-182). Determining effective control is still fact-sensitive (Zwanenburg, p. 40; Leck, at 356; Gill/Fleck, p. 182 (referring to a “*de facto* dual line of command involving mission leadership and TCCs”). Further, TCCs often retain primary disciplinary responsibility and exclusive criminal jurisdiction: e.g. [DPKO MoU](#), Ch. 9 (pp. 189-192), arts. 7*ter*, *quater*, *quinqüens*; [NATO SoFA](#), arts. VII(1)(a), (3)(a)(ii).

³³⁹ Effective control must be exercised within the context of a superior-subordinate relationship, which is “some sort of formal or informal hierarchy to those who commit the crimes”: [Judgment](#), para. 184; [Confirmation Decision](#), para. 414; [Halilović AJ](#), paras. 59, 210; [Delalić AJ](#), paras. 248-254, 303. *Also* Meloni (2010), p. 92.

³⁴⁰ [Judgment](#), paras. 183, 188, 698. *Also e.g.* [Delalić AJ](#), paras. 257, 266; [Stakić TJ](#), para. 459; [Delalić TJ](#), para. 378; [Bagilishema AJ](#), para. 51; [Bagosora AJ](#), para. 450; Meloni (2010), p. 100 (fn. 119).

³⁴¹ [Judgment](#), para. 180. *Also* Meloni (2010), p. 161; Bantekas (1999), at 585 (fn 120).

³⁴² [Judgment](#), para. 181; [Confirmation Decision](#), para. 412 (also finding this interpretation to be supported by the drafting history of article 28). *Also* [Bagilishema AJ](#), para. 52 (military and civilian superiors will not necessarily exercise effective control in the same way); Meloni (2010), p. 161 (“authority” refers to those lacking the official qualification of military commanders but who effectively act as such (*de facto* commanders), or to civilian superiors, and is normatively equivalent to “command”); Karsten, at 990.

³⁴³ [Judgment](#), para. 181. *Also* Mettraux, p. 29.

³⁴⁴ Kiss, p. 618 (citing Ambos (2013), p. 210; Ambos (2002), p. 857).

³⁴⁵ [Judgment](#), para. 698, fn. 2137 (citing [Popović TJ](#), paras. 2025-2026). *Contra* [Brief](#), para. 182.

or punish—as opposed to the daily or routine *exercise* of that power³⁴⁶—a commander need not have sole or exclusive effective control over the forces who committed the crimes.³⁴⁷ Depending on the facts, multiple superiors may in principle exercise effective control at the same time, whether within the same or parallel chains of command.³⁴⁸ Thus, the *Popović* Appeals Chamber re-emphasised that “the exercise of effective control by one commander does not necessarily exclude effective control being exercised by a different commander”,³⁴⁹ and upheld Pandurević’s superior responsibility for the crimes of his subordinates even though they were subject to two parallel chains of command.³⁵⁰

III.A.1.b. Effective control is fact-sensitive

117. As Bemba concedes,³⁵¹ and the Chamber correctly found, the question of “whether a commander had effective control over particular forces is case specific”, requires a “fact-specific analysis”, and is “more a matter of evidence than of substantive law”.³⁵² Indeed, “there is no definitive list of indicators of effective control”,³⁵³ and “the ability to prevent a crime is not necessarily a prerequisite to proving effective control.”³⁵⁴

118. Consistent with these principles, transfer, division or delegation of powers (such as operational control) as well as other formal adjustments or additions to the chain of command, may not automatically entail a loss of effective control under

³⁴⁶ [Popović AJ](#), para. 1858; [Popović TJ](#), paras. 2023, 2025.

³⁴⁷ [Judgment](#), paras. 185, 698; [Bagosora AJ](#), para. 491; [Nizeyimana AJ](#), paras. 201, 346.

³⁴⁸ [Judgment](#), paras. 185, 698; [Perišić TJ](#), paras. 1763, 1769; [Strugar TJ](#), para. 365; [Blaškić TJ](#), para. 303; [Aleksovski TJ](#), para. 106. *Also* Mettraux, pp. 123-124; Meloni (2010), pp. 96-97. *Contra* [Brief](#), para. 182.

³⁴⁹ [Popović AJ](#), para. 1892.

³⁵⁰ [Popović AJ](#), paras. 1890-1896, 1899, 1948.

³⁵¹ [Brief](#), paras. 179, 183.

³⁵² [Judgment](#), paras. 185, 188; [Strugar AJ](#), para. 254; [Blaškić AJ](#), para. 69; [Delalić AJ](#), para. 197; [Delalić TJ](#), para. 377. *Also* Ambos (2013), p. 212.

³⁵³ [Popović AJ](#), para. 1860 (and citations).

³⁵⁴ [Perišić AJ](#), para. 88; *but see* para. 110. *Also* [Bagosora AJ](#), para. 472; [Blaškić TJ](#), para. 302; [Aleksovski TJ](#), para. 78. *Also below* paras. 240, 247, 249.

article 28.³⁵⁵ Nor does one chain of command automatically take precedence over or displace another.³⁵⁶ Factual assessment of the *reality* of the superior's material ability to prevent or punish subordinates' crimes remains the only consideration.³⁵⁷ Consistent international jurisprudence supports this proposition.³⁵⁸

III.A.1.c. The Chamber correctly and reasonably assessed indicators of effective control

119. The Chamber did not err in the indicators it relied upon to determine Bemba's effective control.³⁵⁹ Bemba's preference for different indicators is unsupported and shows no error³⁶⁰—especially since the Chamber *did* consider the particular circumstances of irregular forces that Bemba claims were disregarded, including: Bemba's independent access to, and control over, the means to wage war (including communication, equipment and weapons), control over finances, and his personal profile, manifested through public appearances representing the MLC.³⁶¹

120. Indeed, Bemba cannot even specify alternative criteria that the Chamber should have considered—and, unsurprisingly, since there are none: the Chamber's list was comprehensive and fitting to this case. Nor indeed is any factor determinative. The Chamber correctly and reasonably concluded that Bemba had

³⁵⁵ In this context, Bemba might not have exercised *operational control* but still retained *effective control*: [Judgment](#), para. 699 (apparently equating “authority” with operational control).

³⁵⁶ *Contra* [Brief](#), paras. 183-184; Triffterer/Arnold, p. 1093, mn. 102 (“[w]hen multiple chains of command exist, responsibility is assigned to the chain of command that holds the power to give orders related to the conduct of hostilities or the care of victims of war”). This statement is unreasoned and unsupported, and may confuse omission liability for certain specific IHL duties with superior responsibility. The relationship between any parallel chains of command, if established, is a factual matter: Mettraux p. 169 (fn. 149).

³⁵⁷ [Bagilishema AJ](#), para. 51; [Musema TJ](#), para. 135.

³⁵⁸ *E.g.* [Hadžihasanović AJ](#), paras. 199-200 (apparent evidence of resubordination may not reflect operational reality), 209, 213-214 (joint military operations, or assistance provided, may not disturb effective control). *Also* [Judgment](#), para. 185; [Renzaho AJ](#), para. 596 (confirming [Renzaho TJ](#), para. 785 (assessing effective control on a case-by-case basis notwithstanding Renzaho's lack of operational command over subordinates)); [Bagosora AJ](#), paras. 491-492, 495 (existence of a collegiate structure may not disturb effective control). *Compare* [Brima TJ](#), paras. 786, 1655-1657 (effective control not established). *Also* Mettraux, pp. 161-162.

³⁵⁹ [Judgment](#), paras. 188, 190. *Contra* [Brief](#), paras. 179-180.

³⁶⁰ *Contra* [Brief](#), paras. 130, 180.

³⁶¹ [Judgment](#), paras. 188 (*especially* (vi), (viii), (x)), 700, 702. *Also* [Brima TJ](#), paras. 788-789 (“traditional indicia of effective control remain central, although they may be more loosely defined”). *Contra* [Brief](#), para. 180 (fn. 338).

effective control “[f]rom the entirety of the evidentiary record”.³⁶² Moreover, since the Chamber rejected the exercise of either operational or effective control by the CAR authorities (either exclusively or shared with the MLC hierarchy), these factors could not properly be taken into account.³⁶³

III.A.2. The Chamber reasonably found that Bemba had effective authority and control over MLC troops in the CAR

121. Bemba’s challenge to the indicators establishing his effective control lacks merit and shows no factual error. The Chamber reasonably found that:

- Bemba had operational control over MLC troops in the CAR;³⁶⁴
- Bemba ordered the initial MLC deployment to the CAR;³⁶⁵
- Bemba maintained regular, direct contact with senior commanders in the field and received detailed operations and intelligence reports;³⁶⁶
- MLC hierarchy provided logistical support to MLC troops in the CAR;³⁶⁷
- Bemba retained primary disciplinary authority over MLC troops in the CAR;³⁶⁸
- Bemba represented the MLC in external matters;³⁶⁹
- Bemba ordered the withdrawal of MLC troops in the CAR.³⁷⁰

³⁶² [Judgment](#), para. 700.

³⁶³ *Contra* [Brief](#), para. 183.

³⁶⁴ [Judgment](#), paras. 427, 446, 700. *Contra* [Brief](#), paras. 132-174.

³⁶⁵ [Judgment](#), paras. 453-454, 700. *Contra* [Brief](#), paras. 188-192.

³⁶⁶ [Judgment](#), paras. 419-420, 423-426, 700. *Contra* [Brief](#), paras. 193-207.

³⁶⁷ [Judgment](#), paras. 412-418, 701. *Contra* [Brief](#), paras. 208-210.

³⁶⁸ [Judgment](#), paras. 447, 449, 703. *Contra* [Brief](#), paras. 211-215.

³⁶⁹ [Judgment](#), para. 702. *Contra* [Brief](#), paras. 216-218.

122. In addition, the Chamber reasonably assessed the 2001 CAR intervention,³⁷¹ the FACA documents,³⁷² and the evidence of [REDACTED] ([REDACTED])³⁷³ and [REDACTED] ([REDACTED]).³⁷⁴

123. Bemba shows no error in any respect. Since his arguments suffer from four irreparable defects, they must fail.

- First, he advances unsupported speculations as “reasonable” alternatives.³⁷⁵ This is incorrect. Article 66(3) does not require proof beyond *any* doubt but proof beyond *reasonable* doubt. The Chamber was neither obliged to identify nor reject all hypothetically possible alternatives, however unrealistic or unsupported.³⁷⁶
- Second, he complains that evidence and trial arguments were unaddressed.³⁷⁷ Yet a Chamber need not expressly address all evidence or arguments, provided the basis of its decision is clear.³⁷⁸ Bemba also confuses the admission of evidence with a determination of its weight.³⁷⁹ Chambers need not attach weight to admitted evidence which, considered with other evidence, is found to be unreliable.³⁸⁰ Hence, Bemba merely disagrees with the Chamber’s evidentiary assessments.³⁸¹

³⁷⁰ [Judgment](#), paras. 555, 704. *Contra* [Brief](#), paras. 219-228.

³⁷¹ [Judgment](#), para. 398. *Contra* [Brief](#), paras. 229-232.

³⁷² [Judgment](#), paras. 273-297. *Contra* [Brief](#), paras. 233-266.

³⁷³ *Contra* [Brief](#), paras. 267-276.

³⁷⁴ *Contra* [Brief](#), paras. 277-286.

³⁷⁵ *E.g.* [Brief](#), paras. 148, 163, 184, 200.

³⁷⁶ [Judgment](#), para. 216 (quoting [Ngudjolo AJ](#), para. 109 (quoting [Rutaganda AJ](#), para. 488)) ; [Bemba et al TJ](#), para. 187.

³⁷⁷ *E.g.* [Brief](#), paras. 142, 189-191, 219-221, 223, 230.

³⁷⁸ [Judgment](#), para. 227.

³⁷⁹ *E.g.* [Brief](#), paras. 222, 260-266.

³⁸⁰ [Judgment](#), para. 223; [Admission Decision](#), para. 18.

³⁸¹ *E.g.* [Brief](#), paras. 233-286. The Appellant’s account of [REDACTED]’s and [REDACTED]’s evidence is, in particular, partial: *below* paras. 170-176.

- Third, he assesses evidence in isolation,³⁸² instead of in context.³⁸³
- Fourth, he confuses³⁸⁴ facts essential or “material” for conviction (elements of the crime and modes of liability) which form part of the charges (which must be proven beyond reasonable doubt³⁸⁵ and for which notice must be given),³⁸⁶ with evidence and non-essential facts (subject to no such requirements).³⁸⁷ Indeed, evidence need not be pleaded in order to adequately inform the accused of the charges³⁸⁸ and article 74 decisions need not be—and cannot be—based on the same evidence as confirmation decisions.³⁸⁹

III.A.2.a. Bemba had operational control

124. Bemba fails to show that no reasonable chamber could have found that he had operational control over the MLC contingent in the CAR throughout the 2002-2003 CAR Operation.³⁹⁰ He shows no error in the findings that (i) D53’s evidence was unreliable;³⁹¹ (ii) the MLC General Staff assisted Bemba in the 2002-2003 Operation;³⁹² (iii) MLC troops operated independently from other CAR troops;³⁹³ and (iv) Bemba sometimes issued direct orders to the field.³⁹⁴ His arguments on operational control must be rejected.

³⁸² E.g. [Brief](#), paras. 201, 210.

³⁸³ [Judgment](#), para. 225.

³⁸⁴ E.g. [Brief](#), paras. 216-218, 223.

³⁸⁵ [Judgment](#), para. 225; [Lubanga AJ](#), para. 22; [Ngudjolo AJ](#), paras. 124-125; [Ntagerura AJ](#), para. 171.

³⁸⁶ *Above* para. 75.

³⁸⁷ [Lubanga AJ](#), para. 22. Pre-Trial Chambers use the term “subsidiary facts” to refer to facts relied upon by the Prosecution to prove the charges and which are functionally “evidence”: e.g. [Gbagbo Confirmation Proceedings Decision](#), para. 27; [Banda Confirmation Decision](#), paras. 36-37; [Practice Manual](#), p. 12.

³⁸⁸ [Judgment](#), para. 31 (*especially* fn. 92).

³⁸⁹ [Mbarushimana AD](#), paras. 47-48 (noting the limited purpose of confirmation and the limited pool of evidence presented to meet the required evidentiary threshold). *Also* [Ongwen Confirmation ALA Decision](#), para. 38 (at trial, “the entirety of the evidence” will be aired); [Statute](#), art. 74(2) (“evidence submitted and discussed before it at the trial”).

³⁹⁰ [Judgment](#), paras. 427, 446, 700. *Contra* [Brief](#), paras. 132-174.

³⁹¹ [Judgment](#), paras. 368-369. *Contra* [Brief](#), paras. 134-140, 146; *also* paras. 260-266.

³⁹² [Judgment](#), paras. 446, 700-701. *Contra* [Brief](#), paras. 145-152.

³⁹³ [Judgment](#), para. 411. *Contra* [Brief](#), paras. 153-163.

³⁹⁴ [Judgment](#), paras. 427, 700. *Contra* [Brief](#), paras. 164-174.

III.A.2.a.i. D53's evidence was unreliable

125. The Chamber reasonably assessed General Seara's (D53) expert evidence³⁹⁵ and gave no weight to it.³⁹⁶

126. The Chamber explained that when assessing expert evidence it would consider, *inter alia*, the witness' competence in their field of expertise, the methodologies used, consistency of the expert's findings with the evidence of the case and the general reliability of the evidence.³⁹⁷ Bemba does not contest this approach.

127. Applying this approach to D53, the Chamber considered the unreliability of some of the material upon which his opinion was based,³⁹⁸ especially 13 documents to which it gave no weight, given serious doubts about their authenticity.³⁹⁹ D53 testified that he did not assess the documents' authenticity and agreed that, had they been false, he would have "follow[ed] a false line of reasoning".⁴⁰⁰ Likewise, D53 relied on many of D19's statements,⁴⁰¹ which D19 subsequently contradicted in court (especially concerning operational control of the 2002-2003 Operation).⁴⁰² Significant facts relied upon by D53 appear incorrect on their face.⁴⁰³ Moreover, not a single line of D53's report was sourced, preventing the Chamber from examining

³⁹⁵ The Prosecution notes the Defence disclosure of an unofficial English translation of EVD-T-D-4-00070/CAR-D04-0003-0342 (disclosed as CAR-D04-0006-0695, on 29 September 2016). Absent any official verification or certification of the accuracy of the translation, the Prosecution requests the Appeals Chamber to rely upon the French language version of EVD-T-D-4-00070, which was available at trial.

³⁹⁶ *Contra* [Brief](#), paras. 260-266 (citing [Judgment](#), paras. 368-369).

³⁹⁷ [Judgment](#), para. 233.

³⁹⁸ [Judgment](#), para. 368 (fn. 929: citing CAR-D04-0003-0342, at 0346-0350). *Contra* [Brief](#), para. 264.

³⁹⁹ Also known as the "Contested Items" or "FACA documents". See [Judgment](#), paras. 273-297. *Contra* [Brief](#), para. 262.

⁴⁰⁰ [Judgment](#), para. 368 (fn. 932: citing T-232, 4:1-12).

⁴⁰¹ [Judgment](#), para. 368 (citing CAR-D04-0003-0342, at 0347-0348).

⁴⁰² [Judgment](#), para. 368 (fn. 934: citing section IV(E)(7)(c)(iv)). The Prosecution understands, however, that the Chamber intended to refer to (vi), namely, paragraphs 359-360.

⁴⁰³ CAR-D04-0003-0342, at 0362 (para. 78: only a handful of MLC troops were armed), 0366 (para. 101: Bemba did not have information in real time), 0370 (para. 127: MLC troops were under CAR operational command), 0377 (para. 173: crossing of the Oubangui River and the reception of MLC troops was organised entirely by the CAR). *Also* 0385 (para. 231), 0390 (para. 259), 0393 (paras. 279-281).

the basis for his opinion.⁴⁰⁴ The Chamber was thus wholly reasonable to give D53's evidence no weight "in light of the risk that [his conclusions] were reached on the basis of unreliable information".⁴⁰⁵ The Chamber was not bound to do otherwise, even though it admitted D53's report into evidence and notwithstanding D53's experience.⁴⁰⁶

III.A.2.a.ii. MLC General Staff assisted Bemba in the 2002-2003 CAR Operation

128. The Chamber reasonably found that the MLC General Staff assisted Bemba in the 2002-2003 Operation by implementing his orders, monitoring and coordinating operations, reporting their activities, and providing military advice and intelligence.⁴⁰⁷ Bemba shows no error in these findings, but merely relies on his view that, if [REDACTED] ([REDACTED]) [REDACTED], the General Staff played no role in the Operation.⁴⁰⁸ Similarly, he claims that the CAR CO must have coordinated the Operation merely because [REDACTED] and D53 opined that coordination was necessary.⁴⁰⁹ Neither theory is logical, nor supported by the evidence.

129. First, abundant evidence shows that Bemba often communicated orders directly to field commanders, with the General Staff informed afterwards.⁴¹⁰ Indeed, [REDACTED] knew of Bemba's decision to deploy the troops.⁴¹¹

130. Second, although the MLC General Staff may not have been "significantly involved in planning operations, issuing orders, or intelligence" in the CAR

⁴⁰⁴ [Judgment](#), para. 369. *Contra* [Brief](#), para. 262.

⁴⁰⁵ [Judgment](#), para. 369.

⁴⁰⁶ [Judgment](#), para. 223 (citing [Admission Decision](#), para. 18 (explaining approach to admission of evidence)). *Contra* [Brief](#), para. 266 (asserting the Chamber was "bound to consider" evidence once admitted).

⁴⁰⁷ [Judgment](#), paras. 446, 701.

⁴⁰⁸ *Contra* [Brief](#), para. 151; *also* paras. 280-281. *Also* [Bemba Final Brief](#), para. 619.

⁴⁰⁹ [Brief](#), paras. 146-150.

⁴¹⁰ [Judgment](#), para. 399 (fn. 1046).

⁴¹¹ *See* [Judgment](#), para. 453 ([REDACTED]).

Operation,⁴¹² the evidence demonstrates the General Staff's role in coordination and monitoring, and reporting and providing advice to Bemba.⁴¹³ Indeed, *after* Bemba decided to intervene in CAR, the General Staff, consistent with its role,⁴¹⁴ proposed units for deployment,⁴¹⁵ implemented and monitored deployments,⁴¹⁶ and provided military intelligence to Bemba.⁴¹⁷ Oral testimony and MLC logbooks ("*cahiers de communication*") support this conclusion.⁴¹⁸

131. Despite [REDACTED],⁴¹⁹ [REDACTED] acknowledged the General Staff's significant role in the operation. Thus, [REDACTED] testified about: [REDACTED];⁴²⁰ logistical support provided to the MLC contingent;⁴²¹ assistance provided by the CAR authorities;⁴²² [REDACTED] reports of MLC crimes and measures in response;⁴²³ [REDACTED] Bemba to Bangui in November 2002 to meet with President Patassé;⁴²⁴ and [REDACTED] the situation of MLC troops in the CAR (including in PK2 after Bemba's visit in November 2002);⁴²⁵ and the limited payment and rations received by MLC soldiers.⁴²⁶ Further, [REDACTED] during the Operation, including in January 2003 urging MLC troops to exercise "vigilance towards the civilian population who are doubtlessly hiding mutineers among them".⁴²⁷

⁴¹² [Judgment](#), para. 446.

⁴¹³ [Judgment](#), para. 446 ([REDACTED]). *Also* para. 401 ([REDACTED]).

⁴¹⁴ [Judgment](#), paras. 399, 401.

⁴¹⁵ [Judgment](#), para. 455 (*especially* fn. 1282).

⁴¹⁶ [Judgment](#), para. 455 (*especially* fn. 1283). *Also* para. 424 (fns. 1165-1171).

⁴¹⁷ [Judgment](#), paras. 425 (*especially* fn. 1174), 701.

⁴¹⁸ *Above* fns. 415-417.

⁴¹⁹ [Judgment](#), para. 307.

⁴²⁰ [REDACTED].

⁴²¹ [Judgment](#), paras. 413-415 ([REDACTED]).

⁴²² [Judgment](#), para. 412. Concerning assistance to cross the Oubangui river, fn. 1115 ([REDACTED]). Concerning uniforms, fn. 1119 ([REDACTED]).

⁴²³ [Judgment](#), para. 425 ([REDACTED]).

⁴²⁴ [Judgment](#), para. 591 ([REDACTED]).

⁴²⁵ [Judgment](#), para. 596 ([REDACTED]).

⁴²⁶ [Judgment](#), para. 565 ([REDACTED]).

⁴²⁷ EVD-T-OTP-00703/CAR-D04-0002-1641, at 1702. *See* [Judgment](#), para. 568 (fn. 1765).

132. Bemba's alternate theory (that the CAR CO coordinated MLC operations) is similarly unsupported, and certainly shows no basis to conclude that the CAR authorities exercised operational control over the MLC forces.⁴²⁸ To the contrary, there is no evidence that the CAR CO issued orders to Moustapha.⁴²⁹ The evidence shows that the CAR was considered "a failing command authority [...] which had shown its shortcomings even before [the MLC] troops crossed over Bangui"⁴³⁰—one of the key reasons why the MLC was there in the first place. As P33 stated, CAR operational control "would have been meaningless" and "doesn't add up".⁴³¹ Other factual findings support this view.⁴³² Nor is Bemba assisted by [REDACTED] hypothetical observation that, had several forces been available to Patassé (which [REDACTED] did not know), a coordination centre would have been necessary. [REDACTED] never testified specifically that the CAR CO actually exercised such a function *vis-à-vis* the MLC.⁴³³ To the contrary, [REDACTED] testified that MLC troops remained subject to MLC control.⁴³⁴

III.A.2.a.iii. MLC forces operated independently

133. The Chamber reasonably found that MLC troops operated independently in the CAR, notwithstanding some cooperation and coordination with the CAR forces.⁴³⁵ Bemba fails to show any error, but only misapprehends the Judgment and the evidence.

⁴²⁸ *Contra* [Brief](#), para. 148 (citing [Judgment](#), para. 406). The Appellant refers only to the Chamber's general finding as to the CAR CO's composition and lack of authority over USP.

⁴²⁹ T-154-CONF, 33:14-34:12; T-353-CONF, 68:8-69:1; T-355-CONF, 19:1-23.

⁴³⁰ [T-159](#), 51:1-20.

⁴³¹ [T-159](#), 51:1-20.

⁴³² [Judgment](#), para. 405 ("FACA troops were disorganised, demoralised, underequipped and distrusted by President Patassé"), 444 (noting poor relations between MLC and CAR forces).

⁴³³ *Contra* [Brief](#), para. 147 ([REDACTED]). This extract must be read in context.

⁴³⁴ [Judgment](#), para. 427 ([REDACTED]); *also* paras. 428-446 (other relevant context).

⁴³⁵ [Judgment](#), paras. 411, 427. *Contra* [Brief](#), paras. 153-163.

134. The Chamber's finding must be read in context. It concluded that the MLC contingent "operated independently of other armed forces in the field"⁴³⁶ based on multiple factors, including: the MLC leadership's continuing command over MLC forces in the CAR;⁴³⁷ Bemba's operational control;⁴³⁸ ongoing MLC logistic support to MLC forces in the CAR;⁴³⁹ direct two-way communications between MLC officials (including Bemba) and MLC forces in the CAR;⁴⁴⁰ and Bemba's primary disciplinary authority over MLC forces in the CAR.⁴⁴¹

135. This is not inconsistent with the MLC's communication and cooperation "with the CAR authorities throughout the 2002-2003 CAR Operation".⁴⁴² Notwithstanding some ambiguity about its precise details, the Chamber reasonably concluded that this was a logical and unsurprising "liaison"—which did not displace either operational or effective control⁴⁴³—because the MLC was a foreign force operating on unfamiliar terrain.⁴⁴⁴

136. Likewise, evidence that other Patassé forces may sometimes have advanced alongside the MLC is consistent with CAR/MLC cooperation, and neither shows *ipso facto* resubordination or loss of effective control under article 28(a).⁴⁴⁵ Indeed, cooperation in combat operations, or assistance provided by one group to another,

⁴³⁶ [Judgment](#), para. 411.

⁴³⁷ [Judgment](#), paras. 427, 699, 700.

⁴³⁸ [Judgment](#), paras. 446, 700.

⁴³⁹ [Judgment](#), paras. 412-413, 415-416, 418.

⁴⁴⁰ [Judgment](#), paras. 419-420, 423, 425.

⁴⁴¹ [Judgment](#), paras. 447, 449.

⁴⁴² [Judgment](#), para. 699. *Contra* [Brief](#), para. 154.

⁴⁴³ [Judgment](#), para. 699. The Chamber expressly noted that a "small number" of CAR troops provided operational support to MLC troops (acting as guides and providing intelligence); the initial operation to take Bangui was cooperative; CAR authorities managed the Oubangui crossing; USP troops provided additional support to MLC troops, and that there was "cooperation and coordination" between MLC leadership and CAR authorities: [Judgment](#), paras. 411-412, 427, 456, 558.

⁴⁴⁴ [Judgment](#), para. 699.

⁴⁴⁵ *Contra* [Brief](#), paras. 155-159, 161.

does not necessarily alter a commander's effective control over his forces.⁴⁴⁶ Certainly, nothing shows the Chamber's factual findings to be unreasonable.⁴⁴⁷

137. Moustapha's 30 October 2002 report that "we have been abandoned by the nationals", and detailing an absence of coordination with the Libyans,⁴⁴⁸ simply confirms that MLC troops operated independently from other Patassé forces.⁴⁴⁹ Even accepting *arguendo* Bemba's interpretation—that communication was expected and essential to future operations—the evidence, as a whole, still did not reasonably show that the CAR authorities assumed operational—or effective—control. This remains no more than tenuous speculation.⁴⁵⁰

III.A.2.a.iv. Bemba sometimes issued orders directly to units in the field

138. The Chamber reasonably found that Bemba "sometimes issu[ed] orders directly to the units in the field".⁴⁵¹ This does not mean that he "commanded on [a] part-time basis"⁴⁵² or lacked operational control.⁴⁵³ Rather that, in practice, he could give orders directly *or* through the MLC chain of command.⁴⁵⁴ The Chamber did not suggest that another command also issued orders to MLC troops in the CAR.⁴⁵⁵

139. In this context, the Chamber correctly stated that "whether or not Bemba issued *direct* operational orders to the MLC forces in the CAR is not determinative" of effective control.⁴⁵⁶ Indeed, Bemba's personal ability to order MLC troops both directly *and* through the MLC chain of command tends to *support* his effective

⁴⁴⁶ [Hadžihasanović AJ](#), paras. 213-214.

⁴⁴⁷ [Judgment](#), paras. 696-705. *Contra* [Brief](#), paras. 159, 162.

⁴⁴⁸ [Brief](#), para. 163 (citing EVD-T-OTP-00702/CAR-D04-0002-1514, at 1637). *Also* [T-214](#), 33:3-11; [Judgment](#), para. 409.

⁴⁴⁹ [Judgment](#), paras. 699, 700, 705; *also* paras. 427, 446 (operational control).

⁴⁵⁰ *Contra* [Brief](#), para. 163.

⁴⁵¹ [Judgment](#), para. 427. *Also* paras. 399, 420 (fn. 1152), 700.

⁴⁵² *Contra* [Brief](#), paras. 165-169.

⁴⁵³ *Contra* [Brief](#), para. 174.

⁴⁵⁴ [Judgment](#), paras. 395, 399, 401, 424, 425, 446, 455, 701. *Above* paras. 129-130.

⁴⁵⁵ *Contra* [Brief](#) paras. 165-167.

⁴⁵⁶ *Contra* [Brief](#) para. 172 (quoting [Judgment](#), para. 700, emphasis added).

control.⁴⁵⁷ However, an absence, *arguendo*, of operational orders (whether directly or indirectly conveyed) does not necessarily preclude effective control.⁴⁵⁸

III.A.2.b. Bemba ordered the initial MLC deployment to the CAR

140. The Chamber reasonably concluded that Bemba ordered the MLC deployment to the CAR on 25 October 2002.⁴⁵⁹ Overlooked by Bemba, the Chamber relied on ample evidence, including from [REDACTED], [REDACTED],⁴⁶⁰ P213, P44, [REDACTED],⁴⁶¹ P32 and P15.⁴⁶²

141. The MLC logbook corroborates these accounts. On the day of deployment, Moustapha reported to Bemba the situation in advancing into the CAR, referred to previous conversations with Bemba, and sought orders and authorisation for resupply of his troops.⁴⁶³ A report the following morning stated that a company of 151 soldiers had already crossed to Bangui.⁴⁶⁴

142. The Chamber reasonably rejected D49's evidence that [REDACTED].⁴⁶⁵ Particular caution was required in assessing D49's testimony.⁴⁶⁶ Moreover, D49 allowed for the possibility that soldiers had already crossed to Bangui before this meeting.⁴⁶⁷ The Chamber thus did not err in giving no weight to D49 in this

⁴⁵⁷ Effective control is not necessarily interrupted by intermediate subordinates: Triffterer/Arnold, p. 1093, mn. 102 ("orders may be transmitted directly or through intermediate subordinate commanders"); Bantekas (1999), at 579-580.

⁴⁵⁸ *Above* paras. 117-118 (effective control is fact-sensitive). Also [Bagosora AJ](#), para. 472 (absence of proof of orders does not necessarily establish lack of effective control); [Renzaho AJ](#), para. 596 (lack of operational command does not necessarily establish lack of effective control).

⁴⁵⁹ [Judgment](#), paras. 453-454. *Contra* [Brief](#) paras. 188-192.

⁴⁶⁰ T-157-CONF, 65:8-12, 67:4-14.

⁴⁶¹ T-205-CONF, 8:6, 10:8-25.

⁴⁶² [Judgment](#), para. 453 (*especially* fn. 1268). *Contra* [Brief](#), paras. 189-190.

⁴⁶³ [Judgment](#), para. 455 (fn. 1279: citing EVD-T-OTP-00702/CAR-D04-0002-1514, at 1628).

⁴⁶⁴ [Judgment](#), para. 454 (fn. 1274: citing EVD-T-OTP-00702/CAR-D04-0002-1514, at 1631). This is the first mention of "OPS Bangui" in the logbook.

⁴⁶⁵ T-270-CONF, 29:21-25 (cited in [Judgment](#), para. 454, fn. 1272). *Contra* [Brief](#), paras. 188-190.

⁴⁶⁶ [Judgment](#), paras. 366-367.

⁴⁶⁷ [Judgment](#), para. 454 (*especially* fn. 1273).

respect,⁴⁶⁸ notwithstanding the partial corroboration of D15—who was, himself, “exaggerated, inconsistent and evasive”, requiring particular caution.⁴⁶⁹

143. Nor was D39’s testimony ignored.⁴⁷⁰ D39’s evidence was inapposite because he was neither present at the material time nor, contrary to Bemba’s submission, contemporaneously informed of relevant decision-making.⁴⁷¹ Likewise, [REDACTED] testimony does not corroborate D39’s and D49’s evidence because it relates to a meeting *after* the deployment.⁴⁷² Specifically, [REDACTED]⁴⁷³ to request reinforcements, which arrived soon after.⁴⁷⁴ Any consultation by Bemba with his MLC’s staff in January 2003 shows no error in the Chamber’s assessment of prior events.⁴⁷⁵

III.A.2.c. Bemba maintained close contacts with and received information from field commanders

144. The Chamber reasonably found that “Bemba maintained regular, direct contact with senior commanders in the field on the state of operations, and additionally received numerous detailed operations and intelligence reports”.⁴⁷⁶ The Chamber reasonably considered this factor, with others, to establish Bemba’s effective control based on the entirety of the evidence.⁴⁷⁷ Bemba’s arguments—

⁴⁶⁸ [Judgment](#), paras. 366, 454.

⁴⁶⁹ [Judgment](#), paras. 357-358.

⁴⁷⁰ *Above* para. 123 (second bullet).

⁴⁷¹ *Contra* [Brief](#), paras. 188-190. [REDACTED]: T-308-CONF, 33:17-18.

⁴⁷² *Contra* [Brief](#), para. 191.

⁴⁷³ [REDACTED].

⁴⁷⁴ [Judgment](#), para. 529.

⁴⁷⁵ *See* T-356-CONF 19:3-19 (selectively quoted in the [Brief](#), para. 191, fn. 359).

⁴⁷⁶ [Judgment](#), para 700; *also* paras. 419-420, 423-426. *Contra* [Brief](#), paras. 193-207.

⁴⁷⁷ [Judgment](#), para. 188; *also* paras. 697, 700 (“[f]rom the entirety of the evidentiary record”), 705. *Contra* [Brief](#), paras. 194, 201.

which are unsupported,⁴⁷⁸ inconsistent with basic evidentiary principles,⁴⁷⁹ and incorrect⁴⁸⁰—must fail.

145. First, Bemba’s contention that “[t]here is no physical or documentary evidence of Bemba’s operational orders” is beside the point.⁴⁸¹ The Chamber reasonably found that, directly and indirectly,⁴⁸² and consistent with his practice in other operations,⁴⁸³ Bemba issued key operational orders: he ordered the MLC into the CAR,⁴⁸⁴ he selected troops and commanders,⁴⁸⁵ he decided troop movements and operational matters,⁴⁸⁶ he decided on reinforcements,⁴⁸⁷ and he ordered the withdrawal.⁴⁸⁸ Absence of these orders in the available MLC logbooks is not evidence of absence of such orders. Indeed, although the logbooks contain numerous situation reports for “Ops Bangui”, it is well established that they are incomplete, and not only in their temporal scope.⁴⁸⁹ For example, there is no written record of oral communications and orders issued throughout the “phonie” network—or through Thurayas and other telephones—between Gbadolite and field commanders.⁴⁹⁰

146. Second, the Chamber reasonably found that Bemba regularly communicated with, and issued orders to, Moustapha.⁴⁹¹ Moustapha executed Bemba’s orders,⁴⁹²

⁴⁷⁸ [Brief](#), paras. 194-195, 197, 201.

⁴⁷⁹ [Brief](#), paras. 194, 201.

⁴⁸⁰ [Brief](#), paras. 196-206.

⁴⁸¹ *Contra* [Brief](#), para. 193. Moreover, even if *arguendo* there were no such orders, this is still not dispositive of effective control: *above* fn. 458.

⁴⁸² *Above* paras. 138-139.

⁴⁸³ [Judgment](#), para. 399 (*especially* fn. 1045, citing logbook references to Bemba’s operational orders).

⁴⁸⁴ [Judgment](#), para. 453.

⁴⁸⁵ [Judgment](#), para. 455.

⁴⁸⁶ [Judgment](#), para. 427.

⁴⁸⁷ [Judgment](#), para. 529.

⁴⁸⁸ [Judgment](#), paras. 555, 559.

⁴⁸⁹ The two logbooks in evidence only cover communications from 4 September 2002 to 1 November 2002, and 21 December 2002 to 7 February 2003: [Judgment](#), para. 395. Other logbooks were said to have been accidentally burned. The numbering of messages in the remaining logbooks nonetheless shows that messages were sent during the missing 85 days of the conflict.

⁴⁹⁰ [Judgment](#), para. 394.

⁴⁹¹ *Contra* [Brief](#), paras. 196-198.

⁴⁹² [Judgment](#), para. 427 (*especially* fn. 1185).

and reported to him from the field.⁴⁹³ P36, P169, P173, P178 and P213 testified to the content and frequency of these communications, corroborated by: authenticated Thuraya records (for example, Bemba called Moustapha 126 times from 4 February 2003 to 15 March 2003);⁴⁹⁴ the testimony of CHM1, P15, P33, P44 and P9;⁴⁹⁵ general MLC practice concerning communications;⁴⁹⁶ and the MLC logbooks which confirm that orders were conveyed orally.⁴⁹⁷

147. Third, the frequency, content and detail of the reports in evidence show Bemba's effective authority and control over MLC forces in the CAR,⁴⁹⁸ especially as this was supplemented with oral communications.⁴⁹⁹ Although reports were necessarily truncated and summarised in the recording process,⁵⁰⁰ they show that detailed information was conveyed on matters such as morale, logistics and MLC dispositions.⁵⁰¹ The logbooks also show that Bemba received reports on operational progress, coordination with the CAR, casualties, resupply and communications, and enemy action and intentions.⁵⁰² Bemba knew all that he needed to know to issue further orders, and field commanders often requested instructions from Bemba or his Chief of Staff.⁵⁰³

⁴⁹³ [Judgment](#), para. 420 (*especially* fn. 1152).

⁴⁹⁴ [Judgment](#), para. 420 (fn. 1151: citing EVD-T-OTP-00591/CAR-OTP-0055-0893).

⁴⁹⁵ [Judgment](#), para. 420 (fns. 1151-1152).

⁴⁹⁶ [Judgment](#), paras. 394-397.

⁴⁹⁷ [Judgment](#), para. 395 (fns. 1027-1028: citing EVD-T-OTP-00702/CAR-D04-0002-1514; EVD-T-OTP-00703/CAR-D04-0002-1641). *Also* [Judgment](#), para. 455 (fn. 1279: citing EVD-T-OTP-00702/CAR-D04-0002-1514, at 1628: report from Moustapha to Bemba, referring to oral conversation).

⁴⁹⁸ *Contra* [Brief](#), para. 199.

⁴⁹⁹ *E.g.* [Judgment](#), para. 420.

⁵⁰⁰ [Judgment](#), para. 395.

⁵⁰¹ [Judgment](#), para. 424 (*especially* fn. 1164, citing MLC logbook entries). *Contra* [Brief](#), para. 199.

⁵⁰² [Judgment](#), paras. 424 (*especially* fns. 1165-1171, citing MLC logbook entries), 576. *E.g.* EVD-T-OTP-00702/CAR-D04-0002-1514, at 1637 (detailed report sent by Moustapha on 30 October 2002 to Bemba concerning Bangui).

⁵⁰³ *Contra* [Brief](#), para. 199. *E.g.* EVD-T-OTP-00702/CAR-D04-0002-1514, at 1628 (cited in [Judgment](#), para. 455, fn. 1279); EVD-T-OTP-00703/CAR-D04-0002-1641, at 1658 (cited in [Judgment](#), para. 416, fn. 1137), 1726 (cited in [Judgment](#), para. 417, fn. 1142).

148. Fourth, Bemba was not only apprised of the reports he received⁵⁰⁴ but *acted* upon that information.⁵⁰⁵ In any event, the reports noted in the MLC logbooks were not the only source of Bemba's knowledge.⁵⁰⁶

149. Fifth, Bemba received intelligence information on matters including the combat situation, troop positions, politics and criminal allegations⁵⁰⁷—specifically, about theft, pillage, rape, civilian deaths, harassment and transport of looted goods by “*Banyamulenges*” and MLC troops,⁵⁰⁸ which he discussed with the General Staff.⁵⁰⁹ In this context, the Chamber reasonably evaluated P33's testimony, recognising that he was “occasionally evasive, especially when questioned in relation to General Amuli's role”, but dismissing “general and largely unsubstantiated allegations” which “even considered cumulatively [did not] raise any significant doubts” as to P33's overall credibility or reliability.⁵¹⁰ P33's evidence [REDACTED] was, moreover, corroborated by P36.⁵¹¹ Bemba [REDACTED].⁵¹² He testified that [REDACTED],⁵¹³ and merely explained that [REDACTED].⁵¹⁴ Nor did [REDACTED]—[REDACTED]—undermine the reliability of its reports or alter the alarming nature of its reports to Bemba.⁵¹⁵

⁵⁰⁴ [Judgment](#), para. 395 (*especially* fn. 1031). *Contra* [Brief](#), para. 201.

⁵⁰⁵ *E.g.* EVD-T-OTP-00703/CAR-D04-0002-1641, at 1649 (message dated 22 December 2002 at 09.30, copied to Bemba, stating that a request for social assistance will be discussed with Bemba), at 1649 (message dated 22 December 2002 at 15.15, copied to Bemba, stating that Bemba had approved the request and ordering further reporting). These entries confirm Bemba's active role and the effective operation of the hierarchy supporting him: *contra* [Brief](#), para. 201.

⁵⁰⁶ [Judgment](#), paras. 706-717. *Below* paras. 185-186.

⁵⁰⁷ [Judgment](#), para. 425 (*especially* fns. 1172, 1175). *Also above* para. 147. *Contra* [Brief](#), paras. 202-203.

⁵⁰⁸ [Judgment](#), para. 425 (*especially* fn. 1175). Bemba apparently overlooks this material: [Brief](#), para. 202 (fn. 376).

⁵⁰⁹ [Judgment](#), para. 425 (fn. 1174).

⁵¹⁰ [Judgment](#), para. 305. *Contra* [Brief](#), paras. 203-206.

⁵¹¹ [Judgment](#), para. 425 (fns. 1174-1175). *Contra* [Brief](#), para. 203. Bemba similarly errs in [Brief](#), para. 204 (fn. 380). *See* T-163-CONF, 13:3-7.

⁵¹² [Brief](#), para. 204 (fn. 380). *Compare* [Bemba Final Brief](#), paras. 767, 769.

⁵¹³ *E.g.* T-162-CONF, 49:25-50:2 (“[REDACTED]”).

⁵¹⁴ *E.g.* T-162-CONF, 50:4-11.

⁵¹⁵ *Contra* [Brief](#), paras. 205-206. Likewise, P33's ignorance of [REDACTED] is irrelevant.

150. Finally, the Chamber reasonably considered Bemba's visits to the CAR.⁵¹⁶ His public appearances for the MLC illustrated his senior position, and his close links with its members.⁵¹⁷

III.A.2.d. The MLC provided logistical support to MLC troops in the CAR

151. The Chamber reasonably found that, although the CAR authorities made some contribution, "the MLC hierarchy in the DRC, controlled by Bemba, continued to provide logistical support and equipment to the MLC troops in CAR".⁵¹⁸ It was this finding, rather than "the shared provision of logistics", which was reasonably considered an indicator of Bemba's effective control.⁵¹⁹

152. The evidence of P36, P169, P178 and P213 shows that the MLC contingent brought communications equipment, individual weapons and ammunition to the CAR, as well as support weapons and heavy weapons, such as artillery.⁵²⁰ This was corroborated by photographic and contemporaneous documentary evidence, and the evidence of witnesses in a position to speak of such matters, like CHM1, P31, P47 and P63.⁵²¹ The Chamber reasonably rejected contrary Defence evidence.⁵²²

153. Likewise, P36, P45 and P213 testified that the MLC resupplied its forces in the CAR with goods including weapons and ammunition sourced from Libya. Again, this was corroborated in various respects by contemporaneous documentary evidence and relevant witness testimony from P33, P47, CHM1 and D66.⁵²³

154. Bemba incorrectly asserts that "the few command responsibility cases in which logistics are considered" show that "little importance should be ascribed to their

⁵¹⁶ [Judgment](#), paras. 188, 702. *Contra* [Brief](#), para. 207.

⁵¹⁷ [Judgment](#), para. 188 (*especially* fn. 432).

⁵¹⁸ [Judgment](#), para. 700 (citing Section V(B)(2)(a), *especially* paras. 412-418).

⁵¹⁹ [Judgment](#), paras. 700, 705 ("[i]n light of the above and the evidence as a whole"). *Contra* [Brief](#), para. 210.

⁵²⁰ [Judgment](#), para. 413.

⁵²¹ [Judgment](#), para. 413.

⁵²² [Judgment](#), para. 414.

⁵²³ [Judgment](#), para. 416. *Also* para. 414 (reasonably rejecting contrary Defence evidence).

provision”.⁵²⁴ In *Hadžihasanović*, logistical support was considered an indicator, although not determinative, of effective control.⁵²⁵ Conversely, *Bagosora* and *Delalić* are inapposite, because they both concerned circumstances in which effective control could not be established *solely* on the basis of a person’s role in providing logistical support.⁵²⁶ By contrast, in this case, Bemba’s involvement in logistical support was just one of many factors relied upon by the Chamber. Moreover, given the fact-sensitive nature of an effective control analysis, the disposition of other cases is of little relevance.

III.A.2.e. Bemba retained primary disciplinary authority over MLC troops in the CAR

155. The Chamber reasonably found that Bemba retained primary disciplinary authority over MLC troops in the CAR.⁵²⁷

156. The Chamber largely dismissed the Defence’s challenges to P45, P36 and P173’s credibility as unfounded.⁵²⁸ It refused to find them not credible and their testimonies, as a whole, unreliable.⁵²⁹ Instead, the Chamber reasonably decided to exercise caution in assessing their testimonies on a case-by-case basis.⁵³⁰ When considering these witnesses’ evidence concerning disciplinary matters, the Chamber recalled the need for caution, but found that their testimony was internally consistent, and corroborated not only by each other but also by [REDACTED] evidence and the Chamber’s other relevant findings.⁵³¹

⁵²⁴ *Contra Brief*, para. 210.

⁵²⁵ *Hadžihasanović TJ*, para. 1742. In fact, logistical support provided by other bodies (akin to the CAR cooperation) did not displace Hadžihasanović’s effective control. *Also Ntaganda Confirmation Decision*, para. 166 (noting that Ntaganda “armed” certain civilians in considering his effective control over those civilians).

⁵²⁶ *Bagosora AJ*, paras. 362, 369, 375; *Delalić TJ*, paras. 659-665.

⁵²⁷ *Judgment*, paras. 447, 449.

⁵²⁸ *Judgment*, paras. 308-309 (P45), 322-327 (P173).

⁵²⁹ *Contra Brief*, paras. 211, 213.

⁵³⁰ *Judgment*, paras. 307, 310, 329.

⁵³¹ *Judgment*, para. 447 (*especially* fns. 1243 (citing *T-202*, 21:16-22:5 (P45); *T-144*, 75:8-15 (P173); *T-216*, 8:5-9:23; *T-215*, 18:2-16 (P36), 1246 (citing paras. 402-403)).

157. Bemba is not assisted by [REDACTED] testimony, which does not undermine the evidence of Bemba's and the MLC's disciplinary authority over MLC forces.⁵³² The Chamber recognised that the CAR authorities had some ability to take disciplinary or investigative measures relating to MLC troops in the CAR⁵³³—which is hardly surprising⁵³⁴—without displacing the MLC's primary duty and ability to do so. Indeed, CAR investigations were largely unsuccessful given Bemba's political prominence as DRC Vice-President.⁵³⁵ Moreover, [REDACTED], as the MLC was not under FACA command, [REDACTED] did not have authority or control over them,⁵³⁶ or power to punish them.⁵³⁷ To the contrary, [REDACTED] the MLC took internal disciplinary measures against some MLC forces for certain abuses.⁵³⁸ Nor does D53's evidence—which the Chamber gave no weight—show any error.⁵³⁹

III.A.2.f. Bemba represented the MLC externally

158. Bemba shows no error in the Chamber's reliance on his external role as an indicator of his effective control. Bemba's claim that he lacked notice about this factor lacks merit.⁵⁴⁰ It confuses *material facts* underlying the charges, which must be proven beyond reasonable doubt and for which notice must be given,⁵⁴¹ with *evidence and other facts*, such as indicators of effective control, which need no such requirements.⁵⁴²

159. Moreover, Bemba's argument founders because evidence and “subsidiary facts” relating to his external role were cited in the Confirmation Decision and other

⁵³² [Judgment](#), para. 448. *Contra* [Brief](#), para. 212 (quoting T-357-CONF, 6:24-8:21, suggesting that CAR nationals should have reported criminal allegations to domestic authorities, who should have investigated).

⁵³³ [Judgment](#), para. 448.

⁵³⁴ [Statute](#), Preamble, para. 6.

⁵³⁵ [Judgment](#), para. 575.

⁵³⁶ [Judgment](#), para. 447 ([REDACTED]).

⁵³⁷ [Judgment](#), para. 447 ([REDACTED]).

⁵³⁸ [Judgment](#), para. 447 (fn. 1243).

⁵³⁹ *Contra* [Brief](#), para. 214 (citing CAR-D04-0003-0342, at 0357). *Above* paras. 125-127.

⁵⁴⁰ *Contra* [Brief](#), paras. 216-218 (citing [Judgment](#), para. 702). *Also* [Judgment](#), para. 188(x).

⁵⁴¹ *Above* fns. 385-386.

⁵⁴² *Above* fns. 387-389.

auxiliary documents.⁵⁴³ Finally, a Chamber may rely on ‘external representation’ as an indicator of effective control.⁵⁴⁴

III.A.2.g. Bemba ordered the withdrawal of the troops

160. The Chamber reasonably found that Bemba ordered the MLC withdrawal from the CAR,⁵⁴⁵ based on the evidence of P36, P169, P213 and P178, who were corroborated in various respects by P15, P44, P45 and D48;⁵⁴⁶ contemporaneous news reports,⁵⁴⁷ and the Chamber’s other relevant findings.⁵⁴⁸

161. Mere preference for other evidence, which the Chamber must be presumed to have considered,⁵⁴⁹ shows no error in this analysis. Thus, Bemba shows no error in the absence of a citation to Patassé’s media interview,⁵⁵⁰ or to D65’s testimony, which was in any event inapposite.⁵⁵¹ Likewise, the Chamber reasonably declined to rely on the evidence of D13, D19, and D25, given its doubts about the reliability of their evidence on operational command.⁵⁵²

⁵⁴³ [Confirmation Decision](#), paras. 453, 470, 471, 477, 487; [DCC](#), paras. 24, 28, 64, 70; [Evidence Summary](#), paras. 57, 76, 77, 78, 81, 87, 91; IDAC: pp. 347 (CAR-OTP-0020-0502), 359 (CAR-OTP-0004-0667), 361 (CAR-OTP-0004-0511; DRC-OTP-0098-0003), 369 (CAR-OTP-0039-0293), 376 (CAR-OTP-0031-0116), 377 (CAR-OTP-0054-0503), 380 (CAR-OTP-0017-0363; CAR-OTP-0013-0151), 382 (CAR-OTP-0010-0346), 383 (CAR-OTP-0010-0346; CAR-OTP-0005-0141), 400 (CAR-OTP-0017-0355), 401 (CAR-OTP-0027-0180; CAR-OTP-0008-0287), 404 (CAR-OTP-0056-0348), 406 (CAR-OTP-0056-0348; CAR-OTP-0056-0387). *Contra* [Brief](#), para. 217.

⁵⁴⁴ *E.g.* [Bagosora AJ](#), para. 455; [Brima TJ](#), para. 788; [Kordić TJ](#), para. 424. *Contra* [Brief](#), para. 217.

⁵⁴⁵ [Judgment](#), paras. 555, 704.

⁵⁴⁶ [Judgment](#), para. 556.

⁵⁴⁷ [Judgment](#), para. 555 (*especially* fns. 1704-1705: citing EVD-T-OTP-00444/CAR-OTP-0013-0053, at 0053-0054; EVD-T-OTP-00807/CAR-OTP-0064-0265, at 0267).

⁵⁴⁸ [Judgment](#), para. 556 (*especially* fn. 1708: citing sections V(A)(4), para. 399; V(B)(2)(c), paras. 427, 446).

⁵⁴⁹ [Judgment](#), para. 227.

⁵⁵⁰ [Brief](#), paras. 220-221. *Also* [Judgment](#), para. 269 (recalling the limited purposes for which press reports might be admitted, assessed on a case-by-case basis, citing [Second Admission Decision](#), paras. 95, 101, 104, 107, 110, 124, 126).

⁵⁵¹ T-247, 34:17-35:12 (claiming Patassé ordered withdrawal in October 2002, before the MLC deployed). *Contra* [Brief](#), paras. 220-221.

⁵⁵² [Judgment](#), para. 557. *Also* paras. 359-360 (caution concerning D19), 361-362 (caution concerning D25). *Contra* [Brief](#), para. 221.

162. Bemba fails to show error in the Fourth Admission Decision which affects the Judgment, confusing admissibility with the weight to be accorded to evidence.⁵⁵³ Indeed, in rejecting the admission of the media articles, the Chamber noted that the information contained in the articles was already in the record.⁵⁵⁴ The Chamber's reasonable subsequent decision to give no weight to that similar evidence in its Judgment did not render the Fourth Admission Decision erroneous.⁵⁵⁵ Moreover, even if the Chamber had admitted the information of which Bemba complains, it would have had no material impact on its subsequent deliberations, given its similar irrelevance.

163. Bemba's submission that the Chamber failed to address arguments concerning the irrelevance of the withdrawal order is likewise misplaced.⁵⁵⁶ First, a Chamber need not address all the Parties' arguments, but only provide a reasoned basis for its decision, as the Chamber did.⁵⁵⁷ Second, Bemba again confuses "material facts" with evidence.⁵⁵⁸ Bemba's withdrawal order is evidence relevant to his effective control, and thus need not be limited to the time period of the charges.⁵⁵⁹

⁵⁵³ *Contra* [Brief](#), para. 222.

⁵⁵⁴ The Chamber indicated that media articles would be admitted on a case-by-case basis and for limited purposes (corroboration and knowledge): [Fourth Admission Decision](#), para. 29. *Also* [Judgment](#), para. 269 (citing [Second Admission Decision](#), paras. 95, 101, 104, 107, 110, 124, 126).

⁵⁵⁵ *Contra* [Brief](#), para. 222.

⁵⁵⁶ *Contra* [Brief](#), para. 223.

⁵⁵⁷ *Above* para. 123 (second bullet).

⁵⁵⁸ *Above* para. 123 (fourth bullet).

⁵⁵⁹ *E.g.* [Ntaganda Reconsideration Decision](#), para. 15; [Ntaganda Clarification Decision](#), para. 13.

III.A.2.h. The Chamber reasonably considered the 2001 intervention

164. Since the Chamber was not obliged to refer expressly to all the evidence that it considered,⁵⁶⁰ Bemba's complaint that the Chamber failed to consider the 2001 intervention and D18's evidence shows no error.⁵⁶¹ To the contrary, the Chamber expressly stated that it relied upon evidence relating to MLC military operations in the CAR in 2001 *if* "relevant to Mr Bemba's general authority over military operations and strategy".⁵⁶² By not addressing this evidence when considering Bemba's effective control the following year, the Chamber thus manifestly considered this evidence irrelevant. This was wholly reasonable, given the fact-sensitive analysis demanded by the law on effective control,⁵⁶³ and the burden to establish only that Bemba had effective authority and control over relevant MLC forces in the CAR in the approximate period 26 October 2002 to 15 March 2003. The Prosecution did not need to prove that Bemba had effective control in 2001 or that there had been "a change in practice between 2001 and 2002."⁵⁶⁴

165. Moreover, D18's testimony is contradicted by Bemba's own version of the 2001 operation. In his book, Bemba explained that MLC troops *remained* under his command during the 2001 CAR Operation, detailing some of the operational orders he issued in that period.⁵⁶⁵ Thus, the Chamber did not unreasonably approach D18's evidence in this respect.

⁵⁶⁰ Above para. 123 (second bullet).

⁵⁶¹ *Contra* [Brief](#), paras. 229-232.

⁵⁶² [Judgment](#), para. 398 (citing section V(B)(2), *especially* paras. 420(iii), 427(iii), 447(iii)).

⁵⁶³ [Judgment](#), para. 185.

⁵⁶⁴ *Contra* [Brief](#), para. 230.

⁵⁶⁵ EVD-T-CHM-00028/CAR-OTP-0069-0372, at 0421-0423; EVD-T-CHM-00029/CAR-OTP-0070-0138, at 0139-0140 (translation).

III.A.2.i. The Chamber reasonably gave no weight to the FACA documents

166. The Chamber reasonably gave no weight to the 13 “FACA Documents” or “Contested Items”.⁵⁶⁶

167. First, the Chamber did not rely solely on [REDACTED].⁵⁶⁷ Consistent with its “holistic evaluation and weighing of all the evidence”, the Chamber considered the Contested Items in light of all other relevant evidence.⁵⁶⁸ It reasonably gave them no weight not only because of the inaccuracies and inconsistencies identified [REDACTED]—including, notably, [REDACTED] signature had been forged on all seven documents [REDACTED]—but also because they were contradicted by abundant evidence concerning the MLC’s and Bemba’s command and control over MLC troops throughout the CAR Operation.⁵⁶⁹ [REDACTED] was, moreover, highly relevant to evaluating the Contested Items. Not only was [REDACTED] assessed as credible and reliable in this respect,⁵⁷⁰ but [REDACTED] well-placed to authenticate the Contested Items.⁵⁷¹ Other witnesses, such as D53 and D59, acknowledged they could not authenticate the documents.⁵⁷²

168. Second, Bemba shows no error in the Chamber’s individualised assessment of the documents themselves.

- Concerning the seven documents [REDACTED],⁵⁷³ the Chamber reasonably considered [REDACTED],⁵⁷⁴ and [REDACTED] substantial and formal

⁵⁶⁶ [Judgment](#), paras. 273-297. *Contra* [Brief](#), paras. 233-259. The documents comprised: (i) seven documents [REDACTED]; (ii) three documents allegedly signed by, or for, Regonessa (CAR Defence Minister); (iii) one document allegedly signed by Patassé; (iv) one document allegedly signed by Demafouth; and (v) one document allegedly signed by Bozizé.

⁵⁶⁷ *Contra* [Brief](#), para. 234.

⁵⁶⁸ [Judgment](#), paras. 225, 274 (quoting [Third Admission Decision](#), para. 50).

⁵⁶⁹ [Judgment](#), paras. 427, 446, 699-700.

⁵⁷⁰ [Judgment](#), para. 276.

⁵⁷¹ [Judgment](#), para. 276. The Appellant’s criticism of the questioning is speculative and shows no error: *contra* [Brief](#), paras. 235-238.

⁵⁷² [Judgment](#), para. 275.

⁵⁷³ [Judgment](#), para. 277.

⁵⁷⁴ [Judgment](#), para. 284.

inaccuracies.⁵⁷⁵ There was no inconsistency between [REDACTED] and his prior statement on either of the documents identified by Bemba,⁵⁷⁶ or between [REDACTED] and other evidence relied upon by the Chamber.⁵⁷⁷ Conversely, Bemba is incorrect to imply that some documents are generally consistent with other evidence, nor in any event *arguendo* would some consistency with troop movements demonstrate *ipso facto* the documents' authenticity.⁵⁷⁸

- The Chamber reasonably gave no weight to three documents allegedly signed by or for CAR Defence Minister Regonessa,⁵⁷⁹ given [REDACTED] reasoned assertion that "[REDACTED]".⁵⁸⁰ For example, given its content, one document should have been signed by the Defence Minister and Head of State, not the Deputy Defence Minister;⁵⁸¹ another document was also shown to have significant inaccuracies.⁵⁸² Likewise, a document purporting to

⁵⁷⁵ E.g. [Judgment](#), paras. 278-283. E.g. para. 278 (fn. 648: citing [T-353](#), 40:18-23, discussing CAR-D04-0003-0140/EVD-T-D04-00069: document 8 November 2002). [REDACTED] this document incorrectly suggested that its purported recipient (commander of military engineering) was responsible for lodging and clothing. *Contra* [Brief](#), para. 240.

⁵⁷⁶ Concerning CAR-D04-0003-0136/EVD-T-D04-00065: document of 20 November 2002, *compare* CAR-OTP-0069-0010, at 0026-0032, with [Judgment](#), paras. 278 (fn. 646(ii)), 279, 284 (fn. 665(ii)). *Contra* [Brief](#), para. 241. Concerning CAR-D04-0003-0137/EVD-T-D04-00066: document of 25 November 2002, *compare* consistency between CAR-OTP-0069-0010, at 0033, with [Judgment](#), paras. 280, 284 (fn. 665(iii)). [REDACTED] that the signature on this document was better forged than others. *Contra* [Brief](#), paras. 239, 242.

⁵⁷⁷ Concerning CAR-D04-0003-0133/EVD-T-D04-00063: document of 7 January 2003. The Chamber found that the USP, not the FACA, may have provided vehicles to MLC troops ([Judgment](#), para. 412 (fn. 1120: citing [T-355](#), 10:18-24, 14:8-15)); this was not inconsistent with [REDACTED] the document wrongly suggested FACA possessed a reserve of jeeps which it could provide the MLC, even though it had some other vehicles: [Judgment](#), para. 282 (fn. 662: citing [T-353](#), 35:5-21). *Contra* [Brief](#), para. 243. Further, [REDACTED] did not testify that [REDACTED] ([REDACTED]) and [REDACTED] testified that [REDACTED] also worked with [REDACTED] when [REDACTED] ([REDACTED]). *Contra* [Brief](#), paras. 244-245.

⁵⁷⁸ Concerning CAR-D04-0003-0130/EVD-T-D04-00060: document of 20 January 2003; CAR-D04-0003-0131/EVD-T-D04-00061: document of 7 January 2003; CAR-D04-0003-0132/EVD-T-D04-00062: document of 17 January 2003), *see* [Judgment](#), paras. 281, 283. *Contra* [Brief](#), para. 251.

⁵⁷⁹ [Judgment](#), para. 287.

⁵⁸⁰ T-357-CONF, 49:23-50:20. *Contra* [Brief](#), para. 253 (fns. 480-481).

⁵⁸¹ CAR-D04-0003-0128/EVD-T-D04-00058: document of 17 January 2003. *See* [Judgment](#), para. 288. The Appellant's submissions are speculative: it is irrelevant why the falsifier chose to forge General Yangongo's signature when he had mastered Regonessa's. [REDACTED] doubts whether General Yangongo was *Ministre Délégué* on 17 January 2003 were well-founded, as Lieutenant-Colonel Bouba had been appointed to this position on 16 January 2003. *Contra* [Brief](#), paras. 247-248.

⁵⁸² CAR-D04-0003-0138/EVD-T-D04-00067: document of 19 January 2003. In particular, the *Ministère de la Défense* had changed its name by that date. General Yangongo's capacity was also missing and he was not the *Ministre Délégué* in charge of national defence. [REDACTED] never agreed that the signature was

quarter MLC troops in PK12 is inconsistent with the evidence indicating that, at that time, MLC reinforcements could not be sent to PK12 because the front was no longer there.⁵⁸³

- The Chamber reasonably gave no weight to the document purportedly signed by Patassé.⁵⁸⁴ [REDACTED] did not merely identify linguistic “breaches of protocol”, but rather testified that the content was incorrect.⁵⁸⁵ Moreover, even if *arguendo* [REDACTED] only took issue with its wording, this may be enough to find an official document unreliable—especially if purportedly emanating from such a source as a Head of State. In any event, the date, content, and procedure reflected by the document further confirmed its falsity.⁵⁸⁶
- The Chamber reasonably gave no weight to documents purportedly signed by Demafouth⁵⁸⁷ and Bozizé.⁵⁸⁸ Not only was the date of the former unclear,⁵⁸⁹ and the latter outside the period of the charges,⁵⁹⁰ but both documents were notably dubious in both substance and form.⁵⁹¹ Nor can they be said to be “contextually accurate”—indeed, evidence of the 2001 operation in the CAR is incomplete since this was not the focus of this trial.⁵⁹²

Regonessa’s and he explained why the documents were false. See [Judgment](#), para. 289. *Contra* [Brief](#), paras. 251-253.

⁵⁸³ CAR-D04-0003-0139/EVD-T-D04-00068: document of 19 January 2003. See [Judgment](#), para. 290 (*especially* fn. 690). *Also* paras. 459, 485, 520, 524, 527, 529, 531, 534, 536, 560 (concerning MLC troop movements). *Contra* [Brief](#), para. 252.

⁵⁸⁴ CAR-D04-0003-0129/EVD-T-D04-00059: document of 2 February 2003. See [Judgment](#), paras. 292-293. *Contra*, [Brief](#), paras. 249-250.

⁵⁸⁵ [Judgment](#), para. 292 ([REDACTED]). [REDACTED] stated that the President would not “inform” a subordinate, but rather he “makes the decision or issues a presidential instruction”.

⁵⁸⁶ [Judgment](#), para. 292 ([REDACTED]).

⁵⁸⁷ CAR-D04-0003-0134/EVD-T-D04-00064: document of unknown date. See [Judgment](#), paras. 294-295.

⁵⁸⁸ CAR-D04-0003-0141/EVD-T-D04-00075: document of 4 June 2001. See [Judgment](#), para. 296.

⁵⁸⁹ [Judgment](#), para. 295. *Contra* [Brief](#), para. 257.

⁵⁹⁰ [Judgment](#), para. 296. *Also* para. 398 (considering evidence outside the framework of the charges to the extent relevant). *Contra* [Brief](#), para. 258.

⁵⁹¹ [Judgment](#), para. 294 (*especially* fns. 702-703: citing [T-354](#), 7:1-8:15), 296. *Contra* [Brief](#), paras. 256-257.

⁵⁹² *Contra* [Brief](#), paras. 255-257.

169. Moreover, even if the Contested Items were authentic, *arguendo*, they could not themselves have disturbed the Chamber's finding of Bemba's effective control. They would remain one aspect in the Chamber's overall fact-sensitive enquiry, contradicted by a significant wealth of other credible evidence, and would not necessarily have established that MLC troops were subject to an alternative line of operational control.⁵⁹³ And furthermore, even if this was so, it would *still* not have precluded Bemba's effective control.⁵⁹⁴

III.A.2.j. The Chamber reasonably assessed [REDACTED] evidence

170. The Chamber reasonably evaluated [REDACTED] evidence, confirming that MLC troops remained under MLC command.⁵⁹⁵ Far from being "devastating", his evidence only supports the Chamber's findings.⁵⁹⁶

171. First, the Chamber's finding that MLC troops "operated independently of other armed forces in the field" is not inconsistent with, and must be read in context with, the Chamber's finding that the MLC and the CAR authorities cooperated in some practical matters during the operation.⁵⁹⁷ This did not undermine Bemba's effective control.⁵⁹⁸

172. Second, [REDACTED] did not testify about the MLC-FACA-USP relationship as Bemba claims. He did not testify that [REDACTED],⁵⁹⁹ and repeatedly denied that [REDACTED].⁶⁰⁰ Likewise, although the USP provided some assistance,⁶⁰¹ MLC troops brought their own weapons, ammunition and communications equipment to

⁵⁹³ [Judgment](#), paras.700-705.

⁵⁹⁴ *Above* paras. 113, 117-118.

⁵⁹⁵ [Judgment](#), paras. 427, 446, 699-700. *Contra* [Brief](#), paras. 270, 276.

⁵⁹⁶ *Contra* [Brief](#), para. 276.

⁵⁹⁷ *E.g.* [Judgment](#), paras. 411, 699. *Contra* [Brief](#), paras. 271, 276.

⁵⁹⁸ *Above* paras. 133-137, 151-153.

⁵⁹⁹ *E.g.* [REDACTED] ([REDACTED]). *Contra* [Brief](#), para. 272 (fn. 532).

⁶⁰⁰ *Contra* [Brief](#), para. 275 (fn. 544: citing T-357-CONF, 55:7-11). Read in context, [REDACTED], because the MLC troops came to assist Patassé, the least Patassé could do was to show them to the front. This did not mean that MLC troops were resubordinated to Patassé. *Also* [Judgment](#), para. 427 ([REDACTED]).

⁶⁰¹ [Judgment](#), para. 412 (fns. 1116, 1119-1121).

the CAR.⁶⁰² [REDACTED] never questioned Bemba's disciplinary authority over MLC troops' crimes; rather, [REDACTED] Bemba had disciplined some of his soldiers.⁶⁰³

173. Finally, Bemba's claim that the MLC did not know "about the forces at Patassé's disposal or where they were deployed" distorts the evidence.⁶⁰⁴ In fact, when [REDACTED], Bemba was *better* informed of the actual situation than the CAR authorities.⁶⁰⁵

III.A.2.k. The Chamber reasonably assessed [REDACTED] evidence

174. The Chamber reasonably assessed [REDACTED] testimony.⁶⁰⁶ It neither disregarded nor misstated his evidence on Bemba's disciplinary authority⁶⁰⁷ but instead expressly acknowledged [REDACTED] evidence concerning: rapid military training of four to five months (for new recruits) and "some sort of re-education or awareness" (for FACA defectors);⁶⁰⁸ the MLC Code of Conduct,⁶⁰⁹ which did not prohibit pillaging;⁶¹⁰ Bemba's warning at PK12;⁶¹¹ and the limited disciplinary measures imposed solely for pillaging,⁶¹² such as the chaotic Mondonga Inquiry⁶¹³ and the Gbadolite court-martial.⁶¹⁴ Furthermore, [REDACTED] evidence was consistent with other evidence showing the inconsistent MLC training and uneven dissemination of the Code of Conduct, Bemba's failure to address these deficiencies,

⁶⁰² [Judgment](#), paras. 413 (fns. 1125-1126), 416 (fn. 1139), 419-420 (fn. 1146).

⁶⁰³ *Above* para. 157. *Contra* [Brief](#), para. 273.

⁶⁰⁴ [Brief](#), para. 275 (fn. 542: citing T-357-CONF, 46:6-22).

⁶⁰⁵ [Judgment](#), para. 529 ([REDACTED]).

⁶⁰⁶ *Contra* [Brief](#), paras. 277-283.

⁶⁰⁷ *Contra* [Brief](#), para. 279 (fn. 550).

⁶⁰⁸ [Judgment](#), para. 391 ([REDACTED]).

⁶⁰⁹ [Judgment](#), paras. 392 ([REDACTED]), 393 ([REDACTED]).

⁶¹⁰ [Judgment](#), paras. 392-393, 736. *Also below* paras. 265-269.

⁶¹¹ [Judgment](#), para. 594 ([REDACTED]).

⁶¹² [Judgment](#), para. 599 ([REDACTED]). *Also* paras. 582 ([REDACTED]), 586 ([REDACTED]).

⁶¹³ [Judgment](#), para. 589 ([REDACTED]).

⁶¹⁴ [Judgment](#), paras. 597 ([REDACTED]), 599 ([REDACTED]).

and his failure to require genuine and effective investigations and punishments of MLC troops as necessary.⁶¹⁵

175. Likewise, the Chamber properly addressed [REDACTED] concerning the MLC General Staff. Although [REDACTED], [REDACTED] the MLC General Staff assisted Bemba in various tasks, including operational coordination, monitoring, military advice and intelligence.⁶¹⁶ Contrary to Bemba's submissions,⁶¹⁷ [REDACTED]: the CAR deployment order;⁶¹⁸ [REDACTED];⁶¹⁹ [REDACTED] ([REDACTED]);⁶²⁰ the limited assistance from the CAR authorities ([REDACTED],⁶²¹ [REDACTED]⁶²²); [REDACTED];⁶²³ and the arms with which the MLC deployed.⁶²⁴

176. Finally, the Chamber properly considered [REDACTED] concerning the command structure of MLC troops in the CAR, which supported the finding that Bemba retained operational—and effective—control.⁶²⁵ [REDACTED] never testified that the CAR authorities commanded MLC troops.⁶²⁶ To the contrary: he testified that MLC troops were under MLC command, Bemba issued orders to advance, and neither Patassé nor [REDACTED] could interfere but only advise Moustapha, who would then consult Bemba.⁶²⁷

177. In conclusion, the Chamber correctly found that Bemba had effective authority and control over the MLC troops in the 2002-2003 CAR Operation.

⁶¹⁵ E.g. [Judgment](#), paras. 391, 393, 729, 736-737. Also section V(D) (*especially* paras. 582, 586-589, 597-600, 601-603, 614).

⁶¹⁶ *Above* paras. 128-132.

⁶¹⁷ [Brief](#), paras. 280-281.

⁶¹⁸ *Above* fn. 411.

⁶¹⁹ T-218-CONF, 13:21-24 (“[REDACTED]”). [REDACTED].

⁶²⁰ [REDACTED] ([REDACTED]).

⁶²¹ [REDACTED].

⁶²² [REDACTED] (“[REDACTED]”). [REDACTED].

⁶²³ [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]). [REDACTED].

⁶²⁴ *Above* fn. 421. *Contra* [Brief](#), para. 281 (“the General Staff had no knowledge of the weaponry available to the MLC troops”).

⁶²⁵ [Judgment](#), paras. 427, 446, 699, 700, 705. *Contra* [Brief](#), paras. 272, 282-284.

⁶²⁶ *Contra* [Brief](#), paras. 277, 282.

⁶²⁷ [Judgment](#), para. 427 (fn. 1183: citing [T-213](#), 71:6-18; [T-215](#), 29:7-14, 47:18-20, 48:15-16).

III.B. BEMBA HAD ACTUAL KNOWLEDGE OF THE ALLEGED CRIMES

178. The Chamber reasonably found that “throughout the 2002-2003 CAR Operation, 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”.⁶²⁸ He was told of these crimes by his field commanders, his intelligence services, an international NGO and the media. Bemba discussed these allegations with his commanders and in public and reacted to them.⁶²⁹

179. Bemba erroneously asserts that the legal threshold for actual knowledge is “extremely high”,⁶³⁰ and that the Chamber conflated the actual knowledge standard with a constructive knowledge one.⁶³¹ However, he takes a piecemeal approach to the evidence,⁶³² instead of recognising that the Chamber based its conclusion on “the evidence as a whole”.⁶³³ Finally, many of his arguments do not correctly reflect the findings in the Judgment.

⁶²⁸ [Judgment](#), para. 717. A superior need not master every detail of their subordinates’ crimes: para. 194.

⁶²⁹ [Judgment](#), paras. 706-717.

⁶³⁰ [Brief](#), paras. 287-324.

⁶³¹ [Brief](#), paras. 287, 295

⁶³² *E.g.* [Brief](#), paras. 309-316.

⁶³³ [Judgment](#), para. 717.

III.B.1. The Chamber correctly applied the legal standard for actual knowledge

180. The Prosecution must establish the accused's knowledge under article 28(a)(i) beyond reasonable doubt. Yet, the legal threshold for actual knowledge is not "extremely high".⁶³⁴ Actual knowledge about crimes can properly be *inferred* from, *inter alia*, evidence that the superior had "reliable and concrete information" of their occurrence—this does not conflate actual knowledge with constructive knowledge.⁶³⁵ Bemba provides no arguments for his view.⁶³⁶ His interpretation of knowledge in article 28(a)(i) is contrary to the object and purpose of article 28 and international practice.

181. Military commanders and persons effectively acting as such are expected to make decisions on a regular basis. These decisions are, necessarily, based on their appreciation of the relevant circumstances, in light of the information available to them at the time. Yet, although their decisions may have significant consequences, military superiors rarely, if ever, have "perfect" information or "perfect" confidence in that information. Reports may conflict with one another, be partial or contrary to expectations. It is inherent in the nature of armed conflict that military commanders must make timely decisions based on their knowledge derived from information in their possession, and based on common sense and experience.

182. If the "fog of war" does not prevent military superiors from making operational decisions,⁶³⁷ nor should it excuse military superiors from making

⁶³⁴ *Contra* [Brief](#), paras. 287-288.

⁶³⁵ *Contra* [Brief](#), para. 295.

⁶³⁶ Reference to other cases applying the notion of "actual knowledge" to different fact patterns shows no error in this Judgment: *contra* [Brief](#), paras. 288-289.

⁶³⁷ *E.g.* UK MoD Manual, p. 55, mn. 5.4.3 ("commanders and others planning, deciding on, or launching attacks [must] exercise their discretion. In doing so, they *must necessarily reach their decisions on the basis of their assessment of the information from all sources which [are] available* to them at the relevant time", emphasis added; *further* fn. 17: UK declaration on ratification of API); *also* mn. 5.32.10. Other States agree, including: [Australia Statement](#), [Austria Statement](#), [Canada Statement](#), [Italy Statement](#), [Netherlands Statement](#), [Spain Statement](#). *Also* [US DoD Manual](#), p. 192 ("Commanders and other decision-makers must make decisions in good faith and based on the information available to them. Even when information is imperfect or lacking (as will frequently be the case during armed conflict), commanders and other decisions-makers may direct and

decisions to prevent or repress their subordinates' crimes.⁶³⁸ This would defeat the object and purpose of article 28. Accordingly, "knowledge" must be sensibly and clearly defined—not just for this Court's own purposes, but also to provide meaningful guidance for commanders in the field on how to discharge their superior responsibility properly.

183. Thus, for article 28, "actual knowledge" does not require the superior to be *convinced* to a degree of certainty that his subordinates were committing or about to commit crimes, but to be *aware* that this was so.⁶³⁹ Accordingly, the Court should look at the nature and extent of the information with which the superior was acquainted. If that information is such that, with common sense and experience, a reasonable commander in the accused's position would feel confident in taking a decision,⁶⁴⁰ the Chamber can in principle conclude that the person has "actual knowledge" of the fact to which that information pertains.

184. This approach conforms to international practice,⁶⁴¹ which links actual knowledge to an enquiry into the "specific situation of the superior concerned at the time in question".⁶⁴² Chambers may thus infer that a commander had actual knowledge through objective factors—such as whether he was informed of his subordinates' criminal activity, the available means of communication, the general

conduct military operations, so long as they make a good faith assessment of the information that is available to them at that time"); *also* p. 193.

⁶³⁸ If anything, the superior's degree of confidence when initiating an attack should be *higher* than when determining whether to investigate subordinates' alleged crimes. Whereas IHL favours *caution* in the first respect (e.g. [CIHL Rule 16](#); UK MoD Manual, p. 82, mn. 5.32.2), it favours a *broad* interpretation of the duty in the second respect.

⁶³⁹ Article 30(3) does not apply to article 28: [Confirmation Decision](#), para. 479; Nerlich, at 671, 675; Werle/Jessberger, at 47. *Contra* Ambos (2009), at 720.

⁶⁴⁰ Boothby, pp. 172, 191 (quoting Canadian Manual, 4-5, para. 418).

⁶⁴¹ [Judgment](#), paras. 191-194; [Confirmation Decision](#), paras. 430-431, 483-489; [Ntabakuze AJ](#), paras. 198-200; [Delalić TJ](#), para. 386; [Blaškić TJ](#), para. 307; [Strugar TJ](#), para. 368; [Bagosora TJ](#), para. 2014; [Sesay TJ](#), paras. 309, 368; [Limaj TJ](#), para. 524; [Halilović TJ](#), para. 66; [Blagojević TJ](#), para. 792; [Stakić TJ](#), para. 460; [Kordić TJ](#), para. 427; [Naletilić TJ](#), para. 72; [Galić TJ](#), paras 700-705.

⁶⁴² [Karadžić TJ](#), para. 585; [Krnojelac AJ](#), para. 156; [Delalić AJ](#), para. 239.

notoriety of illegal acts, and whether he acted on these reports—all of which were factors in this case.

III.B.2. Bemba shows no error in the Chamber's knowledge findings

185. The Chamber reasonably concluded that Bemba knew of his subordinates' crimes considering the evidence as a whole⁶⁴³ and its multiple factual findings on:

- Bemba's position and authority in the MLC and the ALC;⁶⁴⁴
- Bemba's regular direct communications with field commanders, reporting to him;⁶⁴⁵
- Bemba's visits to the CAR;⁶⁴⁶
- the detailed information on MLC crimes provided to Bemba from MLC leadership;⁶⁴⁷
- reports of MLC crimes provided to Bemba by his intelligence services, directly or through the General Staff;⁶⁴⁸
- the FIDH report on MLC crimes that Bemba discussed with Kaba;⁶⁴⁹
- regular and consistent reports of MLC crimes by international and local media,⁶⁵⁰ which Bemba followed and discussed with senior MLC officials;⁶⁵¹

⁶⁴³ [Judgment](#), para. 717.

⁶⁴⁴ [Judgment](#), para. 706; *also* paras. 382-403, 410-449.

⁶⁴⁵ [Judgment](#), paras. 707, 716; *also* paras. 419-446.

⁶⁴⁶ [Judgment](#), para. 707; *also* paras. 590-596.

⁶⁴⁷ [Judgment](#), paras. 712-713; *also* paras. 582-589, 594-603.

⁶⁴⁸ [Judgment](#), para. 708; *also* para. 425.

⁶⁴⁹ [Judgment](#), para. 714; *also* paras. 607-611.

⁶⁵⁰ [Judgment](#), paras. 709, 717; *also* paras. 563, 576-581.

⁶⁵¹ [Judgment](#), paras. 709, 711; *also* paras. 576, 582.

- Bemba's reactions to allegations of MLC crimes;⁶⁵² and
- Bemba's express references in his speeches and communications to MLC "misbehaviour", "stealing", and "brutalis[ing]" the civilian population in the CAR⁶⁵³ and to allegations concerning MLC crimes.⁶⁵⁴

186. The Chamber properly concluded Bemba had actual knowledge of MLC crimes. It correctly applied the legal standard and did not conflate it with "constructive knowledge".⁶⁵⁵ Its finding was not unreasonable and is properly supported by the facts as found by the Chamber.⁶⁵⁶

III.B.2.a. The Chamber did not conflate "actual knowledge" with "constructive knowledge"

187. The Chamber neither conflated "actual knowledge" with "constructive knowledge" nor ignored evidence purportedly showing that Bemba was told the criminal allegations were untrue or baseless.⁶⁵⁷ In finding that Bemba knew of his subordinates' crimes, the Chamber properly considered each fact or item of evidence that Bemba now claims it ignored.⁶⁵⁸ In particular:

- The Chamber did not disregard [REDACTED],⁶⁵⁹ but reasonably found that D19's testimony going to Bemba's direct involvement in the 2002-2003 CAR Operation was not credible and required particular caution.⁶⁶⁰
- The Chamber considered media reports of Patassé claiming that criminal allegations were lies,⁶⁶¹ but reasonably relied on such reports to *corroborate* its

⁶⁵² [Judgment](#), paras. 709, 713, 715; *also* paras. 576, 582-583, 590, 594, 601, 612.

⁶⁵³ [Judgment](#), para. 711; *also* paras. 594-596.

⁶⁵⁴ [Judgment](#), para. 714; *also* paras. 604-606, 610.

⁶⁵⁵ *Contra* [Brief](#), paras. 292-308.

⁶⁵⁶ *Contra* [Brief](#), paras. 309-324.

⁶⁵⁷ *Contra* [Brief](#), paras. 292-296.

⁶⁵⁸ [Brief](#), paras. 297-308.

⁶⁵⁹ *Contra* [Brief](#), paras. 297-299.

⁶⁶⁰ [Judgment](#), para. 359; *also* paras. 298-302, 422.

⁶⁶¹ *Contra* [Brief](#), paras. 299-300.

finding that the media reported on MLC crimes.⁶⁶² This was because the same reports included Patassé's acknowledgment about MLC crimes in the CAR.⁶⁶³ Accordingly, Bemba cannot show that the Chamber erred by giving no weight to Patassé's contrary claims in these reports.

- The Chamber considered P15 and D21's evidence concerning the Sibut Mission,⁶⁶⁴ which Bemba claims to mean he was told by "trusted senior MLC members" that the criminal allegations were false.⁶⁶⁵ However, the Chamber was not unreasonable to discount the significance of P15 and D21's testimonies on Bemba's knowledge. While the Chamber acknowledged that these two witnesses denied MLC crimes in Sibut,⁶⁶⁶ it also noted that *other* persons interviewed in the Sibut Mission *did* allege MLC crimes, particularly pillaging.⁶⁶⁷ Bemba also maintains that the Chamber ignored D19's evidence,⁶⁶⁸ but the Chamber found he lacked credibility on this matter.⁶⁶⁹
- Bemba incorrectly asserts that the Bomengo case file, which included the Mondonga Inquiry findings, and which was forwarded to Bemba, included no findings that rape had occurred.⁶⁷⁰ The Chamber reviewed this evidence⁶⁷¹ and found that it contained detailed information on pillaging and rape attributed to MLC soldiers in the initial days of the 2002-2003 CAR

⁶⁶² [Judgment](#), paras. 576-581.

⁶⁶³ [Judgment](#), para. 577 (fn. 1780: citing *e.g.* EVD-T-OTP-00448/CAR-OTP-0013-0161; EVD-T-OTP-00443/CAR-OTP-0013-0005; EVD-T-OTP-00398/CAR-OTP-0004-0336, at 0338). In the former reports, Patassé recognised that rapes were committed by Bemba's soldiers (in Bangui), claimed that Bemba went to Bangui and punished those responsible, and dismissed crimes as "consequences of war". In the latter, Patassé is reported as stating that he had requested Bemba's support, and knew that "some things have happened". The Chamber did not rely on EVD-T-OTP-00576/CAR-OTP-0031-0099.

⁶⁶⁴ [Brief](#), para. 305; [Judgment](#), paras. 615, 715. *Also* T-208-CONF, 31:8-14; T-302-CONF, 41:3-13.

⁶⁶⁵ [Brief](#), para. 302.

⁶⁶⁶ [Judgment](#), paras. 615, 715.

⁶⁶⁷ [Judgment](#), paras. 715, 725-726.

⁶⁶⁸ T-292-CONF, 53:8-54:2; [Brief](#), para. 302.

⁶⁶⁹ [Judgment](#), para. 359.

⁶⁷⁰ [Brief](#), para. 303.

⁶⁷¹ [Judgment](#), paras. 582-589.

Operation.⁶⁷² In addition, the Chamber did not disregard that the Bomengo case file did not mention any murders.⁶⁷³ Instead, it gave that omission no weight when determining Bemba's knowledge, especially given its observation that during the Mondonga Inquiry investigators did not question the suspects about murder.⁶⁷⁴

- The Chamber did not disregard that the Zongo Commission was unable to establish that the pillaging was attributable to MLC soldiers.⁶⁷⁵ When assessing Bemba's knowledge, the Chamber noted this fact,⁶⁷⁶ but also pointed out that the Zongo Commission's final report included further information indicating that pillaging had in fact been committed by MLC soldiers.⁶⁷⁷

III.B.2.b. The Chamber reasonably found Bemba had actual knowledge

188. The Chamber found that Bemba knew of MLC crimes based on the "evidence as a whole"⁶⁷⁸ and multiple specific findings.⁶⁷⁹ Bemba's piecemeal challenges to specific evidence (such as the FRI's reporting of crimes⁶⁸⁰) or specific findings (concerning the Sibut Mission⁶⁸¹ or Bemba's knowledge of the Mongoumba attack⁶⁸²) are themselves unsustainable.⁶⁸³ In addition, Bemba's arguments fail to recognise that the Chamber's overall conclusion on Bemba's knowledge was based on the totality of the facts and evidence, which corroborate the challenged findings and reasonably support the Chamber's conclusion on Bemba's knowledge.

⁶⁷² [Judgment](#), paras. 586-589, 712.

⁶⁷³ *Contra* [Brief](#), para. 303.

⁶⁷⁴ [Judgment](#), para. 589.

⁶⁷⁵ *Contra* [Brief](#), para. 304.

⁶⁷⁶ [Judgment](#), para. 713.

⁶⁷⁷ [Judgment](#), para. 713.

⁶⁷⁸ [Judgment](#), para. 717.

⁶⁷⁹ [Judgment](#), paras. 706-717.

⁶⁸⁰ [Brief](#), paras. 309-316.

⁶⁸¹ [Brief](#), para. 324.

⁶⁸² [Brief](#), paras. 317-320.

⁶⁸³ *Contra* [Brief](#), paras. 309-324.

III.B.2.b.i. The Chamber reasonably assessed RFI reporting

189. The Chamber found that international media outlets, including RFI, consistently reported MLC crimes⁶⁸⁴ and that Bemba knew this.⁶⁸⁵ It reasonably considered this finding, among others,⁶⁸⁶ in concluding that Bemba knew that MLC soldiers committed murder, rape and pillage.⁶⁸⁷ Bemba's challenge to RFI's reporting, and his implication that he disbelieved it,⁶⁸⁸ seems predicated on the view that MLC crimes did not occur—which the Chamber rejected, beyond reasonable doubt.⁶⁸⁹ There is no basis to doubt the material accuracy of the RFI reporting. Nor was the RFI the only source of media reporting⁶⁹⁰ or the only source of Bemba's knowledge of MLC crimes.⁶⁹¹

190. Furthermore, the Chamber reasonably held that Bemba had no reason to disbelieve RFI's reports.⁶⁹² Claims of RFI bias were based on contradictory evidence,⁶⁹³ and testimony from witnesses that the Chamber generally disbelieved.⁶⁹⁴ Moreover, RFI's report about cannibalism—later retracted⁶⁹⁵—was dated *18 February 2003*⁶⁹⁶ and therefore could not have adversely affected Bemba's view of RFI's reporting *before* that date.

⁶⁸⁴ [Judgment](#), para. 576.

⁶⁸⁵ [Judgment](#), para. 576.

⁶⁸⁶ [Judgment](#), paras. 706-718.

⁶⁸⁷ [Judgment](#), paras. 709, 711, 717.

⁶⁸⁸ [Brief](#), paras. 309-316.

⁶⁸⁹ [Judgment](#), paras. 624; *also* paras. 366, 640, 688.

⁶⁹⁰ *E.g.* [Judgment](#), paras. 576 (fn. 1777), 577 (fn. 1780). *Contra* [Brief](#), para. 311. The Appellant's argument concerning syndication of reporting is unsupported, nor accounts for the varied international and local media and their consistent reporting of crimes.

⁶⁹¹ [Judgment](#), paras. 706-718.

⁶⁹² [Judgment](#), paras. 579-581.

⁶⁹³ [Judgment](#), paras. 579-580 (citing D18, P15).

⁶⁹⁴ [Brief](#), paras. 312-314. *Also* paras. 366 (credibility of D49), 448 (credibility of D21, D48).

⁶⁹⁵ [Brief](#), para. 312, 316; *also* para. 313, fn. 614 (citing P33).

⁶⁹⁶ EVD-T-OTP-00580/CAR-OTP-0031-0120, track 1, at 02.50-03.22; *also* metadata.

III.B.2.b.ii. The Chamber reasonably found that Bemba knew about the Mongoumba attack

191. The Chamber did not misstate the evidence concerning the punitive Mongoumba attack, where only civilians were present.⁶⁹⁷ Bemba's argument—suggesting that his knowledge was inferred solely from his contacts with Colonel Moustapha⁶⁹⁸—misapprehends the Judgment. He fails to show the Chamber was unreasonable in determining he knew about the attack.

192. Having carefully reviewed the relevant evidence,⁶⁹⁹ the Chamber reasonably concluded that Bemba knew of the punitive attack on Mongoumba,⁷⁰⁰ based on the following factors. Bemba shows no error in this analysis.

- Bemba was in constant contact with Colonel Moustapha on the day of the attack and the preceding day.⁷⁰¹
- Bemba had general authority over strategic military decisions, and closely followed the progress of military operations on the ground.⁷⁰²
- Colonel Moustapha was one of the senior field commanders who directly informed Bemba of the situation in the field.⁷⁰³
- Colonel Moustapha had transmitted an order to his troops for a punitive operation against Mongoumba,⁷⁰⁴ after learning of the alleged detention of some MLC soldiers by FACA forces in Mongoumba.⁷⁰⁵
- Only Bemba was in a position to have ordered the attack on Mongoumba.⁷⁰⁶

⁶⁹⁷ [Judgment](#), para. 716. *Contra* [Brief](#), paras. 317-320

⁶⁹⁸ [Brief](#), paras. 319-320.

⁶⁹⁹ [Judgment](#), paras. 536-544; *also* fn. 1644 (citing paras. 398-401, 427-446).

⁷⁰⁰ [Judgment](#), paras. 541, 716-717.

⁷⁰¹ [Judgment](#), paras. 716, 541; *contra* [Brief](#), para. 317.

⁷⁰² [Judgment](#), para. 541. *Also* paras. 398-399, 427, 446 (cited in fn. 1644).

⁷⁰³ [Judgment](#), paras. 420, 423-424.

⁷⁰⁴ [Judgment](#), para. 542.

⁷⁰⁵ [Judgment](#), paras. 536, 542.

- Bemba knew of the Mongoumba attack—and alleged MLC crimes—from international media reports.⁷⁰⁷

III.B.2.b.iii. The Chamber reasonably found that Bemba knew of MLC murders

193. Bemba fails to show that the Chamber unreasonably concluded that he knew of MLC murders: his claim that there were no credible reports of murder overlooks the significant evidence upon which the Chamber relied.⁷⁰⁸ Specifically, the Chamber took into account, *inter alia*, that:

- MLC soldiers in fact committed “many acts of [...] murder against civilians”,⁷⁰⁹ and field commanders directly informed Bemba of the situation in the field;⁷¹⁰
- Bemba received intelligence reports that MLC troops killed civilians;⁷¹¹
- Bemba received and discussed⁷¹² an FIDH report expressly referring to murder;⁷¹³
- Bemba received a report from members of the Gbadolite court-martial concerning a case involving killing;⁷¹⁴

⁷⁰⁶ [Judgment](#), para. 541. The Chamber did not specifically find that Bemba ordered the Mongoumba attack: [Judgment](#), para. 540.

⁷⁰⁷ [Judgment](#), para. 576 (fn. 1777: citing EVD-T-OTP-00583/CAR-OTP-0031-0136, track 1 (RFI programme from 14 March 2003, translated at EVD-T-OTP-00734/CAR-OTP-0056-0300, at 0303).

⁷⁰⁸ [Brief](#), paras. 323-324.

⁷⁰⁹ [Judgment](#), para. 671.

⁷¹⁰ [Judgment](#), paras. 419-426.

⁷¹¹ [Judgment](#), para. 425 (fn. 1175: *especially* T-159-CONF, 15:22-16:16). P33 was credible and reliable: [Judgment](#), para. 305.

⁷¹² [Judgment](#), paras. 607-611.

⁷¹³ EVD-T-OTP-00395/CAR-OTP-0001-0034, at 0048-0057.

⁷¹⁴ [Judgment](#), paras. 597 (fn. 1861: EVD-T-OTP-00703/CAR-D04-0002-1641, at 1642-1643, message dated 21 December 2002, copied to Bemba, referring to court-martial in Gemena concerning the killing of Mr Bwanmanda-Mborna by an MLC soldier), 612.

- the international media⁷¹⁵ extensively reported MLC murders,⁷¹⁶ prompting Bemba to discuss the allegations and respond to them.⁷¹⁷

194. Even though some of Bemba's sources of information about MLC crimes did not specifically mention murder (e.g. the Sibut mission),⁷¹⁸ this does not detract from the sources of information that did. Nor does it detract from the correctness of the Chamber's conclusion, based on the credible information that Bemba had, that Bemba knew of the crimes of murder. Bemba fails to show that no reasonable trier of fact could have reached this conclusion.

III.C. BEMBA FAILED TO TAKE NECESSARY AND REASONABLE MEASURES

195. The Chamber reasonably found that "Bemba failed to take all necessary and reasonable measures within his power to prevent or repress the commission of crimes by his subordinates during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities".⁷¹⁹

196. Bemba misinterprets the Judgment.⁷²⁰ Instead of assessing the evidence as a whole—as the Chamber properly did⁷²¹—he takes a piecemeal approach to the evidence and disregards important factual findings made by the Chamber.

⁷¹⁵ [Judgment](#), para. 576 (fn. 1777: EVD-T-OTP-00846/CAR-OTP-0004-0874; EVD-T-OTP-00575/CAR-OTP-0031-0093, track 6, from 00:05:49 to 00:08:24; EVD-T-OTP-00407/CAR-OTP-0004-0667, at 0667-0668; EVD-T-OTP-00576/CAR-OTP-0031-0099 (transcription: EVD-T-CHM-00040/CAR-OTP-0036-0041, at 0041-0048); EVD-OTP-00400/CAR-OTP-0004-0345, at 0346-0348; EVD-T-OTP-00578/CAR-OTP-0031-0106, track 3, at 00:09:46 to 00:12:07; EVD-T-OTP-00579/CAR-OTP-0031-0116, two tracks (transcription: EVD-T-CHM-00042/CAR-OTP-0057-0243); EVD-T-OTP-00582/CAR-OTP-0031-0124, track 2, from 00:10:30 to 00:12:45; EVD-T-OTP-00583/CAR-OTP-0031-0136, track 1 (translation: EVD-T-OTP-00734/CAR-OTP-0056-0300, at 0303).

⁷¹⁶ *Also* [T-204](#), 9:25-10:16; [Judgment](#), para. 577 (other evidence of local media reporting).

⁷¹⁷ [Judgment](#), paras. 576, 582-583, 590, 594, 601, 612. *E.g.* fn. 1779 (citing: EVD-T-OTP-00821/CAR-OTP-0030-0274 (report of 1 November 2002); EVD-T-OTP-00575/CAR-OTP-0031-0093, track 6, from 00:08:25 to 00:08:39).

⁷¹⁸ [Brief](#), para. 324.

⁷¹⁹ [Judgment](#), para. 734; *also* paras. 719-733.

⁷²⁰ [Brief](#), paras. 325-380.

⁷²¹ [Judgment](#), para. 734.

197. Moreover, even if the Chamber had erred regarding some measures, this would not materially affect the Judgment.⁷²² Bemba was required to take *all* necessary and reasonable measures within his power to prevent or repress MLC crimes or to refer the matter to the competent authorities for investigation and prosecution.⁷²³ As the Chamber found, he did not do so.

III.C.1. The Chamber correctly applied the law

198. Bemba accepts how Chamber articulated the law on article 28(a)(ii),⁷²⁴ but challenges how it applied it when determining *which* measures were necessary and reasonable in the circumstances.⁷²⁵ He claims that the Chamber relied on “hypothetical measures”,⁷²⁶ of which he did not have sufficient notice.⁷²⁷ Yet these arguments fail to consider the Chamber’s multiple findings supporting its conclusion, and incorrectly rely on international caselaw based on different underlying facts.⁷²⁸ His arguments should be rejected.

199. The limited measures taken by Bemba in response to information of MLC crimes⁷²⁹ were “not properly and sincerely executed”, “grossly inadequate”, and “not genuine”.⁷³⁰ In addition, the Chamber reasonably held that Bemba’s material ability was not limited to the few measures he took, and that he had the power to take more appropriate measures to prevent or repress MLC crimes, or to submit the matter to the competent authorities for investigation and prosecution.⁷³¹

⁷²² *Contra* [Brief](#), para. 354.

⁷²³ Statute, art. 28(a)(ii); [Judgment](#), paras. 199-200, 729.

⁷²⁴ *Compare* [Brief](#), paras. 338-344, *with* [Judgment](#), paras. 197-209.

⁷²⁵ [Brief](#), paras. 338-341.

⁷²⁶ [Brief](#), paras. 340-341.

⁷²⁷ [Brief](#), paras. 342-344.

⁷²⁸ [Brief](#), paras. 328-336; [Judgment](#), para. 197. *Also* [Brief](#), para. 341 (each case must be decided on its own facts).

⁷²⁹ [Judgment](#), paras. 719-726.

⁷³⁰ [Judgment](#), paras. 727-728.

⁷³¹ [Judgment](#), paras. 729-733.

200. The Chamber articulated in detail the factual basis for assessing Bemba's material powers.⁷³² This included that Bemba (i) was the President of the MLC and Commander-in-Chief of the ALC;⁷³³ (ii) had broad formal powers, ultimate decision-making authority, powers of appointment, promotion, and dismissal, and controlled the MLC's funding;⁷³⁴ (iii) provided logistical support, equipment, weapons and ammunition to the MLC troops in the CAR;⁷³⁵ (iv) had authority over strategic military operations and decisions, such as commencing military operations;⁷³⁶ (v) held and exercised primary disciplinary powers over MLC members, including the power to initiate inquiries and establish courts-martial;⁷³⁷ (vi) had the ability to deploy troops in the CAR, monitor their deployment and withdraw them;⁷³⁸ (vii) had direct lines of communication with commanders in the field and well-established reporting systems, received operational and technical advice from the MLC General Staff, and could, and did, issue operational orders;⁷³⁹ and (viii) personally represented MLC forces in the CAR by interacting with external actors, such as the UN and FIDH and when responding to allegations of MLC crimes.⁷⁴⁰

201. Based on these factual findings, the Chamber concluded that Bemba had power to take the following concrete measures:⁷⁴¹ (i) ensuring that the MLC troops in the CAR were properly trained in the rules of international humanitarian law, and adequately supervising them during the 2002-2003 CAR Operation; (ii) initiating genuine and full investigations into the commission of crimes, and properly trying and punishing any soldiers alleged to have committed crimes; (iii)

⁷³² *Contra* [Brief](#), paras. 339-341.

⁷³³ [Judgment](#), para. 697; *also* paras. 384-389.

⁷³⁴ [Judgment](#), para. 697; *also* paras. 384-389.

⁷³⁵ [Judgment](#), para. 700; *also* paras. 388, 412-418.

⁷³⁶ [Judgment](#), paras. 398-399, 412, 446.

⁷³⁷ [Judgment](#), paras. 703, 733; *also* paras. 402-403, 447-449, 597-603.

⁷³⁸ [Judgment](#), para. 704; *also* paras. 380, 455, 704, 555-562.

⁷³⁹ [Judgment](#), paras. 697, 700; *also* paras. 398, 397, 399-401, 419-446, 594-596.

⁷⁴⁰ [Judgment](#), para. 702; *also* paras. 590-593, 604-620.

⁷⁴¹ [Judgment](#), paras. 729-730.

issuing clear orders to the commanders of the troops in the CAR to prevent the commission of crimes; (iv) altering the deployment of the troops, for example, to minimise contact with civilian populations; (v) removing, replacing, or dismissing officers and soldiers found to have committed or condoned crimes in the CAR; (vi) sharing relevant information with the CAR authorities or others, and supporting them in efforts to investigate criminal allegations; and (vii) ordering the withdrawal of the MLC troops from the CAR.

202. Bemba had sufficient notice of these measures,⁷⁴² both from the Confirmation Decision⁷⁴³ and the auxiliary documents.⁷⁴⁴ Although these documents may have used some different wording from the Judgment, all of the above measures which the Chamber found he could have taken squarely fell within the scope of the notice provided to Bemba.⁷⁴⁵ As the Chamber stated “the question is not whether a particular word or expression has been used; rather, it is whether the Accused has been meaningfully informed of the nature, cause, and content of the charges so as to prepare an effective defence.”⁷⁴⁶

III.C.2. The Chamber reasonably assessed Bemba’s investigative powers

203. The Chamber did not err in assessing the measures which Bemba could take in the CAR, notwithstanding his claims concerning state sovereignty, jurisdiction and the practical difficulties of investigating in a foreign warzone.⁷⁴⁷ Nor did it dismiss Bemba’s argument that he had difficulties investigating in the CAR merely because

⁷⁴² *Contra* [Brief](#), paras. 342-344.

⁷⁴³ [Confirmation Decision](#), paras. 457, 460-464, 468, 474, 477.

⁷⁴⁴ [DCC](#), paras. 22-31, 58-71; [Evidence Summary](#), paras. 6, 56-93; IDAC, pp. 291-408.

⁷⁴⁵ In particular, as shown in the previous two footnotes, the Defence was given notice of the fact that Bemba had the power to “alter the deployment of troops to minimise contact with civilian populations” (*contra* [Brief](#), para. 343) through the factual allegation that Bemba deployed the MLC troops in the CAR and that they remained under his effective command and control and that he had the power to withdraw them.

⁷⁴⁶ [Judgment](#), para. 33.

⁷⁴⁷ *Contra* [Brief](#), paras. 345-348.

he had been able to take some (albeit insufficient) investigative measures in the CAR.⁷⁴⁸

204. The Chamber reasonably considered that any investigative difficulties later encountered by the CAR authorities or the Prosecution were irrelevant.⁷⁴⁹ It carefully analysed the breadth of *Bemba's* concrete powers to discipline his forces,⁷⁵⁰ including any relevant limitations,⁷⁵¹ and concluded that Bemba had ultimate disciplinary authority over MLC troops in the CAR and was the competent authority to investigate the crimes and to establish courts-martial.⁷⁵²

205. The Chamber's conclusion was bolstered by its findings that Bemba actually exercised his disciplinary powers at various times in the relevant period in the CAR.⁷⁵³ Thus, Bemba established a commission of inquiry—the “Mondonga Inquiry”—which he sent to Bangui to investigate allegations of MLC crimes.⁷⁵⁴ He also dispatched an MLC delegation to Sibut, a village in the CAR, to question civilians about alleged MLC crimes.⁷⁵⁵ Moreover, seven soldiers detained in Bangui and accused of minor pillaging were court-martialled in Gbadolite under Bemba's authority.⁷⁵⁶ The Chamber's broader findings on Bemba's authority over military operations and strategy within the MLC generally, and over the MLC contingent in the CAR in particular, further supported its specific findings concerning his disciplinary power over MLC troops in the CAR.⁷⁵⁷

⁷⁴⁸ *Contra* [Brief](#), para. 346 (citing [Judgment](#), para. 732).

⁷⁴⁹ [Judgment](#), para. 732.

⁷⁵⁰ [Judgment](#), paras. 402-403, 447-449, 733.

⁷⁵¹ [Judgment](#), para. 448.

⁷⁵² [Judgment](#), para. 733; *also* paras. 402-403, 447-449, 597-603.

⁷⁵³ [Judgment](#), para. 703.

⁷⁵⁴ [Judgment](#), para. 720; *also* paras. 582-583.

⁷⁵⁵ [Judgment](#), para. 725; *also* paras. 612-614.

⁷⁵⁶ [Judgment](#), para. 720; *also* paras. 597-600.

⁷⁵⁷ [Judgment](#), paras. 447, 449; *also* paras. 382-403, 427-446.

206. The Chamber did not err by not expressly referring to the evidence which Bemba claims to show that MLC activity in the CAR was limited and reliant on CAR cooperation.⁷⁵⁸

- P36's evidence—that the commission conducting the Mondonga Inquiry included CAR representatives who facilitated access, movement and contact with civilians⁷⁵⁹—was immaterial to assessing Bemba's authority over the Mondonga Inquiry in particular or over the MLC discipline in the CAR generally.⁷⁶⁰
- The reference in the Zongo Commission report to one interviewee's suggestion that the Mondonga Inquiry included FACA elements likewise has no impact on Bemba's authority over the Mondonga Inquiry, and need not have been addressed.⁷⁶¹
- The Chamber expressly *relied* on D48 to find that Bemba set up the Zongo Commission and excluded CAR territory from its jurisdiction, and thus did not fail to consider his evidence.⁷⁶² Yet nothing in this evidence demonstrates that *Bemba* lacked the power to send investigative missions to the CAR if he chose, nor does it contradict any other relevant evidence concerning Bemba's powers to investigate MLC crimes in the CAR.⁷⁶³

⁷⁵⁸ *Contra* [Brief](#), paras. 347-355.

⁷⁵⁹ [Judgment](#), para. 349; [T-218](#), 39:15-40:7; [T-215](#), 6:12-15.

⁷⁶⁰ [Judgment](#), paras. 582, 711. *Also* paras. 584-585 (rejecting claim that the Mondonga Inquiry was conducted by CAR authorities). *Contra* [Brief](#), paras. 349, 351.

⁷⁶¹ *Contra* [Brief](#), para. 351. *See* CAR-DEF-0001-0155, at 0157; [Judgment](#), paras. 582, 711.

⁷⁶² [Judgment](#), paras. 448, 602, 713. *Contra* [Brief](#), para. 350.

⁷⁶³ [Judgment](#), paras. 703, 733; *also* paras. 402-403, 447-449, 597-603. *Further* paras. 582-583 (concerning Mondonga Inquiry); 612-614, 725 (concerning Sibut Mission).

- The Chamber reasonably gave no weight to General Seara's evidence⁷⁶⁴ and did not err by its approach to his report.⁷⁶⁵

III.C.3. The Chamber reasonably addressed Bemba's letter to the CAR authorities

207. The Chamber did not err by not expressly referring to D48's evidence that he believed Bemba wrote a letter to the CAR Prime Minister asking for the establishment of an international commission of inquiry to address MLC crimes.⁷⁶⁶

208. The Chamber reasonably found that the MLC had its own disciplinary system, including courts-martial and disciplinary councils, and that it had access to the DRC court system.⁷⁶⁷ It also found that "Bemba, not the CAR authorities, had primary authority to decide whether to sanction MLC troops or launch an investigation related to their activities in the CAR".⁷⁶⁸ The Chamber expressly rejected evidence suggesting that the CAR authorities had disciplinary authority over the MLC troops as unreliable,⁷⁶⁹ and found that the CAR authorities could not have successfully investigated alleged MLC crimes.⁷⁷⁰

209. Accordingly, the Chamber reasonably concluded that where Bemba failed to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes, he could not be said to have submitted the matter to the competent authorities for investigation and prosecution.⁷⁷¹ D48's reference to Bemba's letter to the CAR Prime Minister was not relevant to this conclusion because it referred to a potential measure other than empowering MLC officials to investigate and prosecute MLC crimes.

⁷⁶⁴ [Judgment](#), paras. 368-369. *Above* paras. 125-127.

⁷⁶⁵ *E.g.* [Brief](#), para. 352.

⁷⁶⁶ *Contra* [Brief](#), paras. 356-360 (citing T-267-CONF, 51:5-16, 55:7-10).

⁷⁶⁷ [Judgment](#), paras. 402-403.

⁷⁶⁸ [Judgment](#), para. 733; *also* paras. 447, 449.

⁷⁶⁹ [Judgment](#), para. 448.

⁷⁷⁰ [Judgment](#), para. 575.

⁷⁷¹ [Judgment](#), para. 733.

210. Nor does D48's evidence undermine the finding that Bemba failed to share relevant information with the CAR authorities,⁷⁷² or to "refer the matter to the CAR authorities",⁷⁷³ because there is no evidence that such a letter included any concrete information about the MLC crimes of which Bemba knew.⁷⁷⁴

211. In any event, any request by Bemba to the CAR authorities to set up an international commission of inquiry is similar to Bemba's requests to the UN and to FIDH.⁷⁷⁵ These requests did not amount to adequate or genuine measures to address allegations of MLC crimes, especially since there was no evidence that Bemba ever followed up on these requests.⁷⁷⁶ Likewise, there is no evidence that Bemba followed up on the letter to the CAR Prime Minister.⁷⁷⁷

III.C.4. The Chamber did not err in considering Bemba's motives

212. Bemba shows no error in the Chamber's finding—based on corroborated evidence of his "desire to counter public allegations and [to] rehabilitate the public image of the MLC"⁷⁷⁸—that a key intention behind the measures was to protect the MLC's image and not genuinely to take all reasonable and necessary measures to prevent or prevent the commission of crimes.⁷⁷⁹ Indeed, having analysed the scope, execution and effect of the measures taken by Bemba,⁷⁸⁰ the Chamber reasonably concluded that they were "a grossly inadequate response", were "not properly and sincerely executed", and were "not genuine".⁷⁸¹

⁷⁷² [Judgment](#), para. 729(vi).

⁷⁷³ [Judgment](#), para. 733.

⁷⁷⁴ [T-267](#), 51:6-8 (D48 merely stated that Bemba sought an international commission of inquiry "to look into [...] possible [serious] events").

⁷⁷⁵ [T-267](#), 51:2-8 (D48 testified that the three letters had the same purpose: an international commission of inquiry).

⁷⁷⁶ [Judgment](#), paras. 723-724, 727-728, 733; *also* paras. 604-611.

⁷⁷⁷ Accordingly, the Chamber's finding that Bemba failed to cooperate with international efforts to investigate the crimes remains unaffected: [Judgment](#), para. 733.

⁷⁷⁸ [Judgment](#), para. 728 (citing Section V(D), including paras. 582, 604).

⁷⁷⁹ [Judgment](#), para. 728. *Contra* [Brief](#), paras. 361-364 (citing [Judgment](#), paras. 582, 728).

⁷⁸⁰ [Judgment](#), paras. 574-620, 720-726.

⁷⁸¹ [Judgment](#), para. 727.

213. Comparisons between Bemba's reactions to alleged rapes, and those of the UN and the French President, are inapposite, unsupported by the evidentiary record, and should be dismissed.⁷⁸²

III.C.5. The Chamber's findings were otherwise reasonable

214. In challenging the Chamber's conclusion that he failed to take all necessary and reasonable measures,⁷⁸³ Bemba merely re-litigates his trial arguments⁷⁸⁴ but fails to demonstrate that the Chamber failed to consider relevant evidence or was otherwise unreasonable.

215. In particular, the Chamber reasonably gave limited weight to evidence that the CAR and Chad had agreed to create an international commission of inquiry.⁷⁸⁵ The Chamber acknowledged that General Cissé, the UN representative in the CAR, had referred to such an agreement when responding to Bemba's letter.⁷⁸⁶ However, the Chamber did not find that Bemba was simply allowed to wait for the outcome of a foreign investigation.⁷⁸⁷ It found that Bemba's letter to General Cissé was a "grossly inadequate" response to the allegations of MLC crimes and there was no evidence he ever took General Cissé up on his offer of assistance or otherwise took any concrete measures as a result of their correspondence.⁷⁸⁸ This finding must be viewed together with the Chamber's finding that Bemba—and not the CAR authorities—held and exercised primary disciplinary authority over the MLC contingent in the CAR.⁷⁸⁹

⁷⁸² *Contra* [Brief](#), para. 362 (fns. 711-712).

⁷⁸³ [Brief](#), paras. 365-380.

⁷⁸⁴ [Bemba Final Brief](#), paras. 919-1066.

⁷⁸⁵ *Contra* [Brief](#), paras. 366-368.

⁷⁸⁶ [Judgment](#), para. 606.

⁷⁸⁷ *Contra* [Brief](#), para. 368.

⁷⁸⁸ [Judgment](#), paras. 723, 727, 733.

⁷⁸⁹ [Judgment](#), paras. 447, 449, 703, 733; *also* fn. 1243.

216. The Chamber reasonably found that Bemba took no concrete measures following his correspondence with the UN.⁷⁹⁰ No error is shown by referring to his reaction to the FIDH report or the Sibut Mission.⁷⁹¹ These were grossly inadequate responses to the allegations of MLC crimes, given the extent of Bemba's effective powers.⁷⁹² Accordingly, the Chamber was accurate when it found that these initiatives did not amount to *concrete* measures.⁷⁹³ Bemba was not required to "start arresting" people⁷⁹⁴ based on the FIDH report alone, but he was required to use his powers to take all necessary and reasonable measures to prevent or repress MLC crimes, or to submit the matter to the competent authorities for investigation and prosecution. He did not.

217. The Chamber further reasonably concluded that the Mondonga Inquiry was a grossly inadequate response to the allegations of MLC crimes.⁷⁹⁵ It found that (i) Bemba's motives for establishing the Mondonga Inquiry were not genuine,⁷⁹⁶ (ii) the inquiry did not address the responsibility of commanders,⁷⁹⁷ (iii) the inquiry did not question the suspects of the crime of murder and did not pursue reports of rape;⁷⁹⁸ (iv) the inquiry was riddled with unexplained procedural irregularities, such as a lack of guidelines and conducting suspect interviews in the middle of the night;⁷⁹⁹ and (v) the response to the inquiry, namely proceedings against seven low-ranking soldiers solely on charges of pillaging minor goods and small sums of money, was inadequate.⁸⁰⁰ The fact that the Mondonga Inquiry continued until the end of the 2002-2003 CAR Operation⁸⁰¹ demonstrates no error, because there was no evidence

⁷⁹⁰ [Judgment](#), para. 723.

⁷⁹¹ *Contra* [Brief](#), paras. 369-371.

⁷⁹² [Judgment](#), paras. 724-725, 727.

⁷⁹³ *Contra* [Brief](#), para. 369.

⁷⁹⁴ [Brief](#), paras. 370-371.

⁷⁹⁵ *Contra* [Brief](#), paras. 372-375.

⁷⁹⁶ [Judgment](#), para. 582.

⁷⁹⁷ [Judgment](#), para. 589.

⁷⁹⁸ [Judgment](#), para. 589; *also* para. 720.

⁷⁹⁹ [Judgment](#), paras. 586, 720.

⁸⁰⁰ [Judgment](#), paras. 589, 720.

⁸⁰¹ [Brief](#), paras. 372-373.

that, even at a later stage, it was conducted differently or produced different outcomes. Nor has Bemba shown an error in the Chamber's finding that the Mondonga Inquiry "did not question the suspects about the crime of murder and did not pursue reports of rape".⁸⁰² The Chamber found the evidence cited by Bemba to be unreliable.⁸⁰³

218. The Chamber's conclusion that the Sibut Mission was a grossly inadequate response to the allegations of MLC crimes was also reasonable.⁸⁰⁴ The Chamber found that the Sibut Mission "was not an investigation",⁸⁰⁵ which Bemba does not challenge. This finding alone sufficiently demonstrates the reasonableness of the Chamber's conclusion, given the Chamber's finding concerning Bemba's disciplinary power and responsibilities to investigate MLC crimes in the CAR.⁸⁰⁶

219. Finally, Bemba simply disagrees with the Chamber's evaluation of the evidence respecting findings about the scope of the question by the reporters who accompanied the Sibut Mission, or the context in which these interviews were conducted, and does not show that the Chamber's findings were unreasonable.⁸⁰⁷

III.D. THE CAUSATION ARGUMENTS MUST BE DISMISSED

220. Bemba's arguments concerning the Chamber's causation analysis must be dismissed.⁸⁰⁸ They cannot materially affect the Judgment, because article 28 of the Statute does not require that a superior causally contributed to the occurrence of the crimes for which they are held responsible. Rather, under the Statute, a superior "shall be *criminally responsible* [...] as a result of his or her failure to exercise control

⁸⁰² [Judgment](#), paras. 589, 720; *contra* [Brief](#), paras. 374-375.

⁸⁰³ [Judgment](#), para. 585 (D19's evidence concerning the Mondonga Inquiry "is unreliable").

⁸⁰⁴ [Brief](#), paras. 376-379.

⁸⁰⁵ [Judgment](#), paras. 615, 725.

⁸⁰⁶ [Judgment](#), para. 447, 449, 703, 733; *also* fn. 1243.

⁸⁰⁷ [Brief](#), paras. 377-379 (citing [Judgment](#), para. 725).

⁸⁰⁸ *Contra* [Brief](#), paras. 381-413.

properly” over subordinates.⁸⁰⁹ In this sense, since it was unnecessary for the Chamber to conduct the legal and factual analysis that it did, Bemba’s complaints cannot materially affect the Judgment. Notwithstanding any error in its approach to causation, the Chamber did not err in convicting Mr Bemba as a superior, based on its reasoning elsewhere in the Judgment.⁸¹⁰

221. Moreover, Bemba’s arguments fail because the Chamber’s reasoning as to the causal standard applied was adequate.⁸¹¹ Preference for a particular style of legal analysis does not itself suffice to show error. Indeed, the very problem in workably defining causation for superior responsibility is illustrated not only in the Judgment but Bemba’s own submissions. Despite asserting that the Chamber erred by “conflating” any causation requirement with the other elements of article 28, Bemba is unable to develop his argument sufficiently to specify the correct approach.⁸¹² The argument must, therefore, be dismissed *in limine*.

222. Finally, although it need not have made such an inquiry, the Chamber was reasonable to find in this case that Bemba *did* causally contribute to the MLC crimes.⁸¹³

III.D.1. The alleged errors cannot materially affect the Judgment

223. Mere “harmless errors” neither warrant nor justify appellate intervention. If the Appeals Chamber cannot determine that the Judgment was materially affected by an error,⁸¹⁴ an appellate argument may be dismissed *in limine*.⁸¹⁵ The Appeals Chamber should dismiss the challenge to the causation analysis accordingly.⁸¹⁶

⁸⁰⁹ [Statute](#), art. 28 (emphasis added).

⁸¹⁰ *E.g.* [Judgment](#), para. 735.

⁸¹¹ *Contra* [Brief](#), paras. 381-388.

⁸¹² *See* [Brief](#), paras. 389-393.

⁸¹³ *E.g.* [Judgment](#), para. 741. *Contra* [Brief](#), paras. 394-413.

⁸¹⁴ *See* [Statute](#), art. 83(2); [Lubanga AJ](#), para. 19; [DRC Arrest Warrant AD](#), para. 84.

224. Bemba's challenge to the Chamber's causation analysis should be dismissed because article 28 does not require proof of a causal contribution to the crimes. Since the verdict, and the *material* reasoning, would have been exactly the same, the Judgment cannot be materially affected by Bemba's challenge.⁸¹⁷ The same logic led the Prosecutor to conclude that she could not herself properly appeal the causation analysis in the Judgment. Since Bemba was convicted on all counts, despite applying in the Prosecution's view a *more demanding test* than the law requires, the Chamber's error in interpreting article 28 to impose a causal contribution requirement did not *materially* affect the Judgment.⁸¹⁸

225. However, now that Bemba challenges the causal *standard* applied in the Judgment, the correctness of the Chamber applying a causation requirement at all must be decided by the Appeals Chamber.⁸¹⁹ There is nothing improper in a respondent seeking dismissal of an appeal by showing that the legal premise is incorrect.⁸²⁰ Consistent with its position at trial,⁸²¹ the Prosecution contends that the

⁸¹⁵ [Bemba et al Compensation AD](#), para. 27; [Admissibility AD](#), paras. 102-104. Also [Stanišić and Župljanin AJ](#), paras. 17, 24.

⁸¹⁶ *Contra* [Brief](#), paras. 388-389, 393.

⁸¹⁷ Mere impact on legal reasoning which is not essential to a conviction is insufficient. The Appeals Chamber has no advisory function and will not depart from the statutory grounds of appeal: [Katanga Admissibility AD](#), para. 38; [Lubanga Regulation 55 AD](#), para. 110; [DRC Extraordinary Review AD](#), paras. 35, 38-39; [DRC Victim Participation AD](#), para. 30; [Katanga Directions AD](#), para. 7; [Lubanga Registrar's Request AD](#), para. 4; [Lubanga Directions AD](#), paras. 7-8; [Lubanga DCC AD](#), para. 9; [Lubanga Registrar's Submission AD](#), para. 14; [Katanga Detained Witnesses AD](#), paras. 28, 30. Nor has the Appeals Chamber identified any exceptional jurisdiction to decide legal questions of "general importance": compare [Milošević AJ](#), para. 12; [Stakić AJ](#), para. 59; [Tadić AJ](#), para. 247; [Nyiramasuhuko AJ](#), para. 30; [Fofana AJ](#), para. 32.

⁸¹⁸ The Prosecution cannot appeal against convictions, in its own interest: *see mutatis mutandis* [Jelisić AJ](#), para. 7; [Jelisić Order](#); [Delalić AJ](#), Annex A, para. 9. Nor is the Prosecutor's power under article 81(1)(b) of the [Statute](#) amenable for such a use.

⁸¹⁹ This issue is "intrinsically" or "inextricably" linked to the appeal: [Lubanga Disclosure AD](#), para. 17; [Lubanga Oral Decision AD](#), paras. 11-18, 20; [Katanga Redaction AD](#), para. 37; [Gbagbo Regulation 55 AD](#), paras. 25-27; [Gbagbo Rule 68 AD](#), para. 19. *A contrario*, [Gbagbo Adjournment AD](#), para. 64. Also e.g. [Šešelj Counsel AD](#), para. 20; [Prlić Documents AD](#), para. 17.

⁸²⁰ The Appeals Chamber may correct a trial chamber's reasoning but still uphold a conviction on the same factual findings, even without a Prosecution appeal, subject to the fundamental rights of the accused: [Gotovina AJ](#), paras. 106-108 (recalling this practice, *inter alia*, in cases including *D. Milošević*, *Simić*, *Stakić*, *Krstić*, *Vasiljević*, and *Rukundo*). This is unlike *Orić*, where the Prosecution impermissibly sought, without appealing, *new reasoning on new factual findings*: [Orić AJ](#), paras. 64-67.

⁸²¹ *Contra* [Brief](#), para. 382 (citing only Prosecution Final Brief, paras. 765-766). The Prosecution had argued that, if it must be proved "that the Accused's subordinate forces committed crimes as a result of Bemba's failure to exercise control properly, the Prosecution must prove that Bemba's acts and omissions *increased the risk* that his forces would commit crimes": Prosecution Final Brief, para. 765 (emphasis added). In oral

Chamber was incorrect to interpret article 28 as requiring Bemba to have causally contributed to the MLC crimes. The Appeals Chamber should confirm this view, and dismiss Bemba's causation challenge for lack of impact on the verdict.

III.D.1.a. The Chamber failed to interpret article 28(a) correctly

226. The Chamber erred in law when it concluded that “[t]he crimes committed by [the subordinates] must have been a result of the failure of the accused to exercise control properly over them”.⁸²² Its analysis was cursory.⁸²³ Although brevity is not a legal error,⁸²⁴ heightened scrutiny may nonetheless be warranted on appeal when novel, complex or controversial matters are so addressed. The need is acute in this case as the course of an important—even vital⁸²⁵—aspect of this Court's practice has been set by no more than one paragraph of reasoning in the Confirmation Decision⁸²⁶ and barely even that in the Judgment.⁸²⁷

227. The Chamber found the existence of a causal contribution requirement solely by quoting article 28(a), without analysis,⁸²⁸ and asserting without further comment that “[i]t is a core principle of criminal law that a person should not be individually criminally responsible for a crime in the absence of some form of personal nexus to it.”⁸²⁹ The Chamber did not refer to the analysis in the Confirmation Decision.⁸³⁰ It did not interpret article 28(a) in the manner prescribed by the VCLT and the Appeals Chamber: analysing the ordinary meaning of the terms used, in their

arguments, it stressed its primary view that article 28(a) is “an articulation that *criminal responsibility*, under the Statute, arises as a result of the accused's failure to exercise effective control and *not that the crimes themselves are a result thereof*”: [Prosecution Closing Submissions](#), p. 79, lns. 20-22 (emphasis added).

⁸²² [Judgment](#), para. 170(f).

⁸²³ [Judgment](#), paras. 210-213.

⁸²⁴ E.g. [Kvočka AJ](#), para. 25.

⁸²⁵ E.g. [Amnesty International Amicus Brief](#), paras. 1, 41; Cryer, pp. 316-317; Triffterer/Arnold, p. 1076, mn. 46.

⁸²⁶ [Confirmation Decision](#), para. 423.

⁸²⁷ [Judgment](#), paras. 210-211.

⁸²⁸ [Judgment](#), para. 210.

⁸²⁹ [Judgment](#), para. 211.

⁸³⁰ [Judgment](#), fns. 480-481 (citing only [Confirmation Decision](#), paragraphs 425-426).

context, and in light of their object and purpose.⁸³¹ It did not consider the reasonable alternate interpretations of article 28. It did not consider the drafting history of the Statute. It did not consider the position in customary international law.

228. Judges Steiner and Ozaki wrote separately to state their personal views. Yet it is evident, from the very nature of a “separate opinion”, that there was no consensus in the Chamber on these points. Whereas Judge Steiner appeared generally to adopt the Pre-Trial Chamber’s reasoning in the Confirmation Decision,⁸³² Judge Ozaki alone attempted a textual analysis of article 28(a)—but erroneously concluded that article 22(2) required her “to favour the interpretation which links the failure on the part of the commander to exercise control properly to the commission of the crimes.”⁸³³

229. Applying the correct approach to interpretation of the Statute, using the VCLT framework, article 28(a) does *not* require proof of a causal contribution to the crimes.⁸³⁴ Moreover, as a threshold matter, not even the Chamber’s own logic supported the conclusion that it reached, as shown by four considerations.

III.D.1.a.i. The Chamber wrongly concluded that any “personal nexus” to the crimes could be established only by a causal contribution requirement

230. Recognising that article 28 is a mode of liability,⁸³⁵ the Chamber reasoned that “some form of personal nexus” must be established between the superior and the subordinates’ crimes.⁸³⁶ Yet its further logical step—that the requisite personal nexus could *only* be satisfied by a causal contribution requirement—was incorrect. A personal nexus is required only to satisfy the principle of culpability, which

⁸³¹ E.g. [Lubanga AJ](#), para. 277; [ACRed-01/16 Asset Freezing AD](#), para. 56; [DRC Extraordinary Review AD](#), para. 33. Also [Ruto Summonses AD](#), para. 105.

⁸³² E.g. [Steiner Opinion](#), para. 4 (citing [Confirmation Decision](#), para. 423).

⁸³³ [Ozaki Opinion](#), paras. 3, 8-11. Further below para. 244.

⁸³⁴ Below paras. 243-253.

⁸³⁵ [Judgment](#), para. 171. Also fn. 384 (superior responsibility is not “a distinct crime of pure omission”).

⁸³⁶ [Judgment](#), para. 211.

entails that a person may only be criminally punished for their own conduct, undertaken with a “guilty mind”.⁸³⁷ If the person’s conduct is not itself a crime, their conduct must in some way be related to the “harm” which is a crime. *But* that relation need not be understood solely in causal terms.⁸³⁸

231. The Chamber ignored the fact that the basic elements of article 28 satisfy the personal nexus, even without causation. The mental element, although low in relative terms, ensures that a superior is responsible *only* for those crimes of his subordinates of which he knew or should have known.⁸³⁹ Moreover, liability is conditional upon proof that crimes were actually committed,⁸⁴⁰ by persons under the superior’s effective control⁸⁴¹ (and thus whose crimes the superior *could* have prevented *or* punished),⁸⁴² and that the superior actually failed to take all necessary and reasonable measures regarding those crimes.⁸⁴³ While this does not require that the superior’s conduct caused or even affected the crimes,⁸⁴⁴ the superior’s conduct is nonetheless culpable because it *condones* and is *responsive to knowledge* of the subordinates’ crimes. Close examination of some advocates for “causation” in

⁸³⁷ E.g. Van Sliedregt, p. 6; Shahabuddeen, p. 215 (citing [Delalić AJ](#), Dissenting Opinion of Judges Hunt and Bennouna, para. 27); [Tadić AJ](#), para. 186. Compare Kiss, p. 634 (citing a German commentator, it is “an old principle in criminal law” that “a result can only be attributed to an individual if his conduct has *caused* that result”, emphasis added), with Ashworth, p. 135 (“Proof of causation is often said to be an essential precondition of criminal liability, but there is reason to doubt the generality of that requirement”).

⁸³⁸ E.g. [Ozaki Opinion](#), para. 19 (for accomplice liability, “typically no factual causation is required, and instead some form of contribution *or other nexus* is considered sufficient”, emphasis added); Ashworth, pp. 97, 134 (causation is problematic for at least some forms of accomplice liability and omissions); Robinson, at 5, 12-13, 41-42, 46-51 (initially accepting uncritically the notion that “[c]ulpability requires contribution”, but also acknowledging models of culpability *not* grounded on causal contributions). These observations cannot be dismissed solely by asserting that they refer only to the difficulties of ‘but for’ causation. Illustrating these difficulties, furthermore, the drafters of the Statute elected *not* to attempt a general regulation of *actus reus*: Saland, pp. 205, 212-213.

⁸³⁹ [Statute](#), art. 28(a)(i). *Also* art. 28(b)(i) (applying a similar structure, but somewhat differing standards, for superiors other than those regulated by article 28(a)).

⁸⁴⁰ E.g. [Judgment](#), para. 170(a).

⁸⁴¹ E.g. [Judgment](#), para. 170(c).

⁸⁴² Mettraux, p. 75 (“a direct link between the superior and the crimes”).

⁸⁴³ [Statute](#), art. 28(a)(ii), (b)(iii)

⁸⁴⁴ Kiss, p. 631 (“Article 28 does not encompass an obligation to obtain a ‘result’, in the sense that the crimes are indeed hindered or repressed”).

superior responsibility reveals that, in fact, they consider the nexus to be adequately met by a *non-causal* link of this kind.⁸⁴⁵

III.D.1.a.ii. The Chamber misconceived article 28 as a participatory mode of liability

232. The Chamber correctly recognised article 28 as a "distinct mode of liability" from those in article 25.⁸⁴⁶ Yet it failed to do so in practice, and seems to have misunderstood what this means. Misconceiving superior responsibility as accessorial *participation* in the subordinates' crime(s) not only collapsed the distinction between articles 25 and 28 but led the Chamber to infer erroneously that a causal contribution must be required.⁸⁴⁷ Conversely, recognising superior responsibility as a unique *non-participatory* mode of liability restores the careful balance between articles 25 and 28, and makes clear that a causal contribution requirement is not only unnecessary but self-defeating.⁸⁴⁸

233. Recognising the derivative nature of superior responsibility did not mean it was necessary to regard it as an accessorial form of participation. For example, in

⁸⁴⁵ Although Mettraux considers that "international law" and article 28 require a "causal relationship", this is *not* a causal relationship between the superior's conduct and the subordinates' crimes. This follows from his view that the requirement is satisfied *either* by a causal link between "the failure of the accused and the commission of crimes by subordinates (in regard to his duty to prevent crimes)" *or* "his failure and *the resulting impunity of the perpetrators* (in regard to his duty to punish crimes)": Mettraux, p. 82 (emphasis added); *also* pp. 33, 43, 89. *Also* Bantekas, at 1200 (agreeing with Mettraux); Robinson, at 47. Ambos also acknowledges a so-called causation requirement in article 28 yet apparently endorses the Pre-Trial Chamber's approach (dispensing with causation for the 'failure to punish'): Ambos (2013), pp. 215-217; *further below* paras. 235, 240.

⁸⁴⁶ [Judgment](#), para. 173; [Sentence](#), para. 16. The Chamber also seemed to accept the "residual" nature of superior responsibility, compared to article 25: [Judgment](#), para. 173 (fn. 338: citing *e.g.* [Kajelijeli AJ](#), para. 81; [Kordić AJ](#), para. 34; [Blaškić AJ](#), para. 91); [Ozaki Opinion](#), para. 22; Nerlich, at 671 (fn. 20); Triffterer, at 188. Likewise, Judges Aluoch and Ozaki endorsed the "*sui generis*" nature of superior responsibility: [Judgment](#), para. 174; [Sentence](#), para. 16; [Ozaki Opinion](#), paras. 6, 22.

⁸⁴⁷ *E.g.* [Steiner Opinion](#), para. 7 ("[a]ll forms of accessory liability require a connection between conduct and an unlawful result"). *Also* [Judgment](#), para. 173 (distinguishing superior responsibility only from *commission* of a crime); [Ozaki Opinion](#), para. 22; Kiss, p. 626.

⁸⁴⁸ Mettraux, pp. 38, 43 (fitting command responsibility into a "traditional mode[] of liability is bound to be unsuccessful or, at least, of limited assistance"); Meloni (2010), p. 210 ("command responsibility should remain as far as possible distinct from the other forms of criminal participation provided [...] by the Rome Statute in particular").

customary international law, superior responsibility is described as *sui generis*,⁸⁴⁹ because it is neither a discrete ‘dereliction of duty’ offence⁸⁵⁰ nor liability for participation in or contribution to the subordinates’ crime(s).⁸⁵¹ “It cannot be overemphasized” that a superior “is *not* charged with the crimes of his subordinates but with his *failure to carry out his duty as a superior* to exercise control.”⁸⁵² It is this focus on breach of the superior’s duty which is at the heart of its unique object and purpose (demanding active measures of superiors to enforce IHL),⁸⁵³ while also making it distinct from accessorial participation.⁸⁵⁴ Yet superior responsibility is still a “mode of liability” rather than a discrete offence because (i) it is predicated on proof of the subordinates’ crimes;⁸⁵⁵ (ii) there is a personal nexus between the superior’s conduct and the subordinates’ crimes, although not a *causal* nexus;⁸⁵⁶ and (iii) “punishment for the actual crime committed by the subordinate is [...] the measure of punishment of the commander for his failure to control the subordinate”,⁸⁵⁷ whether *ex ante* or *ex post facto*. To the extent this may challenge some criminal law orthodoxy, it is a reasonable and balanced response to a pressing social need—especially when considering the unique power, and duty, of superiors

⁸⁴⁹ E.g. [Hadžihasanović AJ](#), paras. 38-40 (quoting [Halilović TJ](#), para. 78: “command responsibility [...] as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not require a causal link”).

⁸⁵⁰ Mettraux, pp. 74, 80.

⁸⁵¹ E.g. [Confirmation Decision](#), para. 479 (a superior “does not participate in the commission of the crime”); [Orić TJ](#), para. 293; [Halilović TJ](#), para. 54; [Aleksovski TJ](#), para. 67. Also Shahabuddeen, pp. 215-216; Mettraux, pp. 40, 45-46 (“superior responsibility is not a form of ‘*responsabilité du résultat*’” but “a ‘*responsabilité de moyens*’ in the sense that it compels superiors to adopt certain measures to prevent and punish crimes and provides for liability if they fail to do so”); Jackson, p. 115 (responsibility is “derivative” but “not imputational”).

⁸⁵² [Krnojelac AJ](#), para. 171 (emphasis added). Also [Orić AJ](#), Declaration of Judge Shahabuddeen, paras. 20, 24; [Ongwen Confirmation Decision](#), para. 45; [Gbagbo Confirmation Decision](#), para. 262 (“a fundamental difference exists between the forms of commission incriminated in article 25 [...], which establish liability for one’s own crimes, and article 28 [...], which establishes *liability for violation of duties* in relation to crimes committed by others”, emphasis added); Robinson, at 22-23, 37-38.

⁸⁵³ E.g. [Judgment](#), para. 172; [Amnesty International Amicus Brief](#), para. 47; Van Sliedregt, p. 190; Nybondas, pp. 135-136. Also Triffterer, at 186. *Further* Munoz-Rojas/Fréchard, at 194-195, 203-205; Sandoz, paras. 3549, 3559-3561.

⁸⁵⁴ E.g. [Lubanga AJ](#), para. 468 (for the *participatory* modes in article 25, “the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question”).

⁸⁵⁵ E.g. Mettraux, p. 39.

⁸⁵⁶ *Above* paras. 230-231.

⁸⁵⁷ Shahabuddeen, p. 215. Also [Orić AJ](#), Declaration of Judge Shahabuddeen, paras. 22, 25; [Halilović TJ](#), para. 54. Cf. Greenwood, at 599.

to control the dangerous forces under their command. Reconciling tensions of this kind is inherent in modern criminal law.⁸⁵⁸

234. The Chamber considered none of this. Indeed, its narrow conception of superior responsibility, based on accessorial participation and a causal contribution, makes article 28 substantially redundant. Conduct meeting this standard—with actual knowledge—would almost always be punishable more simply under article 25(3)(c) or (d)(ii),⁸⁵⁹ which require a limited contribution,⁸⁶⁰ including by omission.⁸⁶¹ These are the same standards, essentially, as the Chamber applied to superior responsibility.⁸⁶² This outcome starkly contradicts the Chamber's espoused claim to distinguish clearly between articles 25 and 28.⁸⁶³

⁸⁵⁸ E.g. Ashworth, pp. 155-156. Also Robinson, at 24.

⁸⁵⁹ An aider and abettor need not intend (*dolus directus*, first degree) the crimes of the principal perpetrator: e.g. *Bemba et al TJ*, paras. 95, 97-98; *Al Mahdi Confirmation Decision*, para. 26; *Ongwen Confirmation Decision*, para. 43; *Blé Goudé Confirmation Decision*, para. 167. Since intent to facilitate may readily be inferred from the knowing execution of conduct which causally contributes to a crime, this element is in practice largely established by proving 'knowledge' and 'causal contribution'. Cf. Nerlich, at 673. Concerning the *mens rea* for article 25(3)(d)(ii), see *Katanga TJ*, paras. 1640-1642.

⁸⁶⁰ For article 25(3)(c), *Bemba et al TJ*, paras. 93-94; *Blé Goudé Confirmation Decision*, para. 167. For article 25(3)(d)(ii), *Katanga TJ*, para. 1633, 1635-1636. For articles 25(3)(c) and 25(3)(d)(ii), *Al Mahdi Confirmation Decision*, paras. 26-27; *Ongwen Confirmation Decision*, paras. 43-44. Compare also *Statute*, art. 25(3)(c) ("aids, abets, or otherwise assists", emphasis added) with art. 25(3)(d) ("[i]n any other way contributes", emphasis added). The perpetrator's misconduct in a position of authority can be an aggravating factor: rule 145(2)(b)(ii). Also Mettraux, p. 93.

⁸⁶¹ *Ozaki Opinion*, para. 7; also *Lubanga Confirmation Decision*, paras. 351-352, 354 (contemplating liability for "actions or omissions"); *Katanga Confirmation Decision*, para. 287 (wilful killing may be committed "by action or omission"); *Confirmation Decision*, paras. 132 (murder "may be committed by action or omission"), 274. For the general proposition that liability (including as a 'direct' perpetrator) can result from failure to discharge an international legal duty, when the accused had the material ability to have acted, e.g. *Mrkšić AJ*, paras. 146, 151, 154; *Orić AJ*, para. 43; *Brđanin AJ*, para. 274; *Galić AJ*, paras. 175-176; *Blaškić AJ*, para. 663; *Ntagerura AJ*, para. 334. Cf. *Stanišić and Župljanin AJ*, paras. 109-110, 731-734. Further Meloni (2010), pp. 220-224; Ambos (2013), pp. 189-193, 197 (contemplating a "general principle of law providing for criminal responsibility" for omissions "if a legal duty to act exists and the agent has the material ability to act"); *Statute*, art. 21(1)(c); Saland, p. 213. Contra Triffterer, at 187.

⁸⁶² *Judgment*, paras. 191-196, 213.

⁸⁶³ Robinson's related argument that article 28 is distinctive solely for its *mens rea* is also unsatisfactory since it makes 50% of article 28 redundant, and is inconsistent with customary law: contra Robinson, at 8-9, 29.

III.D.1.a.iii. A causal contribution requirement, based on breach of a 'general' duty to exercise control properly, is alien to the Statute and wrong in law

235. The Judgment does not explain expressly how the causal contribution requirement would be applied;⁸⁶⁴ in particular, it does not address the problem of identifying a causal link between a subordinate's crime and a *subsequent* 'failure to punish', with no prior knowledge attributable to the superior. This very concern had led the Pre-Trial Chamber to conclude that "the element of causality *only relates to the commander's duty to prevent* the commission of future crimes."⁸⁶⁵ Yet this solution is inconsistent with the wording of article 28.⁸⁶⁶ Instead, the Chamber inferred there must be a *third*, general duty in article 28 ("to exercise control properly"), and required a causal link between breach of *that* duty and the subordinates' crimes.⁸⁶⁷

236. The Chamber's reliance on an elaborate 'general duty' analysis is problematic. First, the notion of a distinct 'general duty' is unsupported by article 28. Second, it makes superior responsibility dependent on proof of a matter which, with good reason, international law generally leaves to States. If this is the only way to implement a causal contribution requirement, as the Chamber apparently concluded, the existence of the requirement itself should be doubted.

- The *chapeau* of article 28(a) does not support the Chamber's 'general duty' analysis.⁸⁶⁸ It need not be interpreted as requiring a causal contribution at all.⁸⁶⁹ Moreover, since the *chapeau* likewise conditions superior responsibility

⁸⁶⁴ [Judgment](#), paras. 210-213. Also [Steiner Opinion](#), para. 10 (acknowledging "that the Judgment has not addressed this issue explicitly").

⁸⁶⁵ [Confirmation Decision](#), para. 424 (reasoning "it is illogical to conclude that a failure [to investigate or punish] can retroactively cause the crimes to be committed").

⁸⁶⁶ [Ozaki Opinion](#), para. 17. Also *below* paras. 240, 247.

⁸⁶⁷ *E.g.* [Judgment](#), paras. 213, 741 (charged crimes resulted from "Bemba's failure to exercise control properly"). Some commentators proposed a similar theory: *e.g.* Cryer et al, p. 328; Nerlich, at 678; Kiss, pp. 636-638. Also Triffterer, at 192-193, 196-201, 203-204.

⁸⁶⁸ *Contra* [Steiner Opinion](#), para. 10; [Ozaki Opinion](#), paras. 13-14.

⁸⁶⁹ *Above* para. 220; *below* paras. 245-246.

upon effective control,⁸⁷⁰ and effective control is defined by the material ability to carry out the specific duties in article 28(a)(ii),⁸⁷¹ it is illogical and inconsistent to conclude that *other* references to “control” in the *chapeau* are defined *more broadly* than article 28(a)(ii).⁸⁷² In this context, resort to secondary sources of international law—even if they genuinely assisted—is inappropriate and unnecessary.⁸⁷³

- Moreover, international criminal law—with good reason—has resisted judicial inquiry into a superior’s duties beyond preventing and punishing subordinates’ crimes. The Chamber’s ‘general duty’, upon which it predicated liability, is the same notion as “responsible command”.⁸⁷⁴ To any extent that such an assessment extends beyond the accused’s efforts to prevent or to punish crimes,⁸⁷⁵ it is prone to vagueness and subjectivity.⁸⁷⁶ Command responsibility has thus always been distinguished from responsible command;⁸⁷⁷ there is no international liability for ‘irresponsible’ command,⁸⁷⁸ which is a matter for domestic regulation by domestic

⁸⁷⁰ Above paras. 114-115.

⁸⁷¹ [Judgment](#), para. 183.

⁸⁷² Also Robinson, at 54 (the “only feasible” interpretation of the breach from which any causation must flow is the failure to prevent or the failure to punish, and not “an entirely separate type of dereliction”).

⁸⁷³ Contra [Steiner Opinion](#), para. 12; [Ozaki Opinion](#), para. 15. See [Ruto Summonses AD](#), para. 105 (“recourse to other sources of law is possible only if there is a lacuna in the Statute”); [Statute](#), art. 21(1)(b).

⁸⁷⁴ [Ozaki Opinion](#), para. 15.

⁸⁷⁵ Although Judges Steiner and Ozaki conceded that the ‘general’ and ‘specific’ duties are “interrelated” and “bear similarities”, the Judgment hinges on the view that they are legally distinct: [Judgment](#), para. 735; [Steiner Opinion](#), paras. 10, 15; [Ozaki Opinion](#), paras. 15-17. Relevant factors might be: “maintaining order”, “ensuring that an effective reporting system is established”, and “monitoring the reporting system to ensure its effectiveness”: [Steiner Opinion](#), para. 12; [Ozaki Opinion](#), para. 15. Also [Judgment](#), paras. 736-741.

⁸⁷⁶ Below para. 238.

⁸⁷⁷ E.g. [Hadžihasanović Superior Responsibility AD](#), para. 22 (“responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties. [...] [T]he elements of command responsibility are derived from the elements of responsible command”). In the context of *mens rea*, also *mutatis mutandis* [Bagilishema AJ](#), para. 36; [Delalić AJ](#), para. 226.

⁸⁷⁸ E.g. Meloni (2007), at 628; Meloni (2010), pp. 165-167.

standards. In this context, although differently, both Judges Steiner⁸⁷⁹ and Ozaki⁸⁸⁰ erred.

III.D.1.a.iv. The Chamber overlooked the adverse implications of a causal contribution requirement

237. Finally, applying a causal contribution requirement to superior responsibility significantly, and adversely, distorts superior responsibility as a whole. It is not possible to apply such a requirement in a “consistent and objective” fashion, within the practical and legal realities of the doctrine.⁸⁸¹

238. First, if causal contribution depends on proving breach of a ‘general duty’ — conceived as something *more* than the duties to prevent and punish subordinates’ crimes but instead whether control was exercised “properly” — the necessary analysis becomes subjective, vague, and strays from law to policy. In particular:

- To the extent the analysis considers professional military doctrine and practice, *beyond* the absolute duties to prevent and punish subordinates’ crimes, this is an area of reasonable State discretion.⁸⁸² Different States apply different command doctrines (*e.g.* NATO and the former Warsaw Pact), and

⁸⁷⁹ Judge Steiner wrongly asserted that international jurisprudence “supports the existence of a ‘general duty’ imposed on commanders to maintain order and to control his troops”: *contra* [Steiner Opinion](#), para. 12 (citing [Orić AJ](#), para. 177; [Halilović AJ](#), para. 63; [Halilović TJ](#), paras. 79-81, 86, 88). Although the *Halilović* Trial Chamber did explore the notion of a “general” duty ([Halilović TJ](#), paras. 81-87), it *did not conceive it as a legal element* necessary for responsibility but merely a circumstance which might be *factually relevant* to the superior’s specific *duty to prevent* subordinates’ crimes: [Halilović TJ](#), paras. 80, 88. On appeal, this approach was rejected as an “artificial distinction” in the context of criminal liability which is “confusing and unhelpful”: [Halilović AJ](#), paras. 62, 64. The *Orić* Appeals Chamber likewise endorsed this reasoning and observed only that “the general duty of commanders *to take the necessary and reasonable measures*” (emphasis added)—*i.e.*, the *specific duties*—“is well rooted in customary international law”: [Orić AJ](#), para. 177 (citing [Halilović AJ](#), para. 63; [Aleksovski AJ](#), para. 76). The *Orić* Appeals Chamber then affirmed its view in *Halilović* that distinguishing between general and specific obligations was unhelpful.

⁸⁸⁰ Judge Ozaki acknowledged the contrary ICTY jurisprudence, but resort to the “distinct statutory framework” of this Court does not resolve the problem given the interpretive dispute: *contra* [Ozaki Opinion](#), para. 15 (fn. 22).

⁸⁸¹ *Contra* [Judgment](#), para. 212.

⁸⁸² Instructively, moreover, domestic systems frequently distinguish between legal adjudication and professional regulation. For example, doctors typically regulate and determine medical practice and professional standards, even though courts may hear cases of clinical negligence or criminal conduct.

this Court has no mandate to rule upon what is a “proper” exercise of command and control beyond questions directly material to the prevention and punishment of article 5 crimes. Nor are the Parties well placed to assist the Court on such questions.

- To the extent the ‘general duty’ analysis is applied beyond military commanders but to “other” types of superiors (including civilians)—all of whom are regulated by article 28—determining a “proper” exercise of authority and control, beyond the bedrock duties to prevent and punish subordinates’ crimes, becomes yet more fraught with difficulty.

239. Accordingly, rather than promoting responsible command, as the Chamber may have hoped, its approach could *reduce* the effectiveness of superior responsibility if the Prosecution is required to prove beyond reasonable doubt the breach of such a vaguely conceived ‘general duty’.

240. Second, if causal contribution applies only to the ‘failure to prevent’ (the Pre-Trial Chamber’s approach),⁸⁸³ the requirement is not only redundant⁸⁸⁴ but is an untenable interpretation of article 28. In its present form, article 28 can only be interpreted as a unitary basis of responsibility, however complex,⁸⁸⁵ with both ‘failures to prevent’ and ‘failures to punish’ having the same legal status. Any interpretation treating the liability for ‘failure to prevent’ as substantially different from ‘failure to punish’ cannot be reconciled with this obvious quality of article 28.⁸⁸⁶ For the same reason, although arguments might be made for a differentiated

⁸⁸³ *Above* para. 235.

⁸⁸⁴ *E.g.* Werle, p. 137, mns. 396-397; Triffterer/Arnold, p. 1081, mn. 70.

⁸⁸⁵ Triffterer/Arnold, p. 1059, mn. 1.

⁸⁸⁶ Moreover, if the Pre-Trial Chamber recognised that ‘failure to prevent’ and ‘failure to punish’ are *the same*, then the purposive argument for imposing a causal contribution requirement only to the former is undermined.

model of superior responsibility,⁸⁸⁷ this can only be a matter for potential amendment of the Statute.⁸⁸⁸ Such a model cannot be ‘interpreted’ into article 28 in its present form.⁸⁸⁹

241. Third, since the causal standard for any contribution requirement is necessarily low,⁸⁹⁰ it provides only a limited enhancement to the personal nexus while substantially complicating adjudication of superior responsibility cases.

242. Fourth, any causal contribution requirement based on breach of a ‘general duty’ creates a significant liability gap, as well as potentially entrenching an inequity in the enforcement of international criminal law depending on the relative ‘sophistication’ of the armed force or group. In particular, superiors who exercise their powers of command actively and may be seen to embody high professional standards—but who acquire the necessary *mens rea* concerning their subordinates’ crimes *after* they have occurred—will almost never be proved to have breached the ‘general duty’. Thus, even if such superiors make a deliberate choice not to punish such crimes, they can *never* be convicted of a ‘one off’ crime or rapid series of crimes.⁸⁹¹ At most, their initial failure to punish will itself breach the ‘general duty’, allowing them to be convicted as superiors only for *future* crimes of their subordinates. This liability gap is of fundamental concern because superior responsibility is not concerned simply with the prosecution of ‘bad’ commanders—it is concerned equally with the conduct of otherwise ‘good’ commanders who

⁸⁸⁷ Cryer et al, pp. 329-330; Cassese/Baig, pp. 191-192; Meloni (2007), at 634-637; Meloni (2010), pp. 137, 144-145, 194-204, 247-249; Nerlich, at 667-668; Jackson, pp. 115-118. *Also* Nybondas, pp. 129-130; Triffterer, at 189-190.

⁸⁸⁸ *E.g.* Ohlin.

⁸⁸⁹ *Contra* Ambos (2002), p. 871.

⁸⁹⁰ See [Judgment](#), paras. 211 (citing [Confirmation Decision](#), para. 425: “it is only necessary to prove that the commander’s omission increased the risk of the commission of the crimes charged”), 213, 741. *Also* [Steiner Opinion](#), para. 24; [Ozaki Opinion](#), para. 23, fn. 33.

⁸⁹¹ *Contra* [Steiner Opinion](#), para. 15. The reference to the general duty in *Halilović* (disapproved on appeal) was *not* dispositive of liability ([Halilović TJ](#), para. 88; *above* fn. 879), but the Chamber’s use of the concept in this case *may* be dispositive of liability. *Also* Meloni (2010), p. 175 (the ‘general duty’ “gives rise to some perplexity” because, “[i]f the superior exercised his [general] duty to control properly, and nevertheless crimes were committed, he would never be responsible”).

subsequently condone unexpected crimes of their subordinates. Such incidents are far from hypothetical, and may be of the utmost gravity—yet this is precisely when the Chamber’s conception of superior responsibility fails. Even highly effective troops and superiors must comply strictly with IHL, and cannot be given ‘a break’ simply because the command climate is otherwise efficient. Indeed, bearing in mind the difficulty in evaluating the ‘general duty’,⁸⁹² there is a real risk that superiors in less ‘sophisticated’ armed forces or groups would, perversely, be held to an higher standard than superiors of leading military powers. This would be highly regrettable.

III.D.1.b. Article 28 does not require a superior to causally contribute to their subordinates’ crimes

243. Not only was the Chamber’s analysis incorrect, leading to the erroneous application of a causal contribution requirement, but conversely a proper interpretation of article 28 according to the VCLT principles leads to the opposite outcome.⁸⁹³ The Appeals Chamber should find accordingly.

244. Applying the accepted VCLT principles to interpret the Statute, as prescribed by the Appeals Chamber,⁸⁹⁴ is not inconsistent with article 22(2), which should be applied only to resolve any ambiguity when the canons of interpretation have been *exhausted*.⁸⁹⁵ Frequently, proper interpretation will ensure that no genuine “ambiguity” arises in the Statute, which then needs to be “interpreted in favour of the person being [...] prosecuted”.

⁸⁹² Above paras. 236, 238.

⁸⁹³ E.g. [Amnesty International Amicus Brief](#), para. 38.

⁸⁹⁴ Above fn. 831.

⁸⁹⁵ Contra [Ozaki Opinion](#), para. 11.

III.D.1.b.i. Article 28, in its ordinary meaning, does not require a causal contribution to the subordinates' crimes

245. The starting point for any statutory interpretation is the ordinary meaning of the express terms of the relevant provision. In English, the reference to causation in article 28(a) allows two alternative 'plain' readings—one which requires the subordinates' crimes to result from the superior's "failure to exercise control properly", and one which states that the superior "shall be criminally responsible" as a result of their "failure to exercise control properly". The former reading suggests that there is a causal contribution requirement; the latter suggests that the reference to causation is merely hortatory. Judge Ozaki recognised that, "in the English version of the Statute, either interpretation is possible."⁸⁹⁶ Likewise, Kiss has described the two readings as "equally plausible from a grammatical point of view".⁸⁹⁷

246. The six, equally authentic,⁸⁹⁸ linguistic versions of the Statute may resolve the ambiguity.⁸⁹⁹ Judge Ozaki recognised that, like the English text, "the Russian, Arabic and Spanish texts appear to each be, at least, capable of being read as either attaching the clause [referring to causation] to the criminal responsibility of the commander or to the commission of the crimes"—but, by contrast, "the French and Chinese texts appear to favour *the former interpretation*, to different degrees".⁹⁰⁰ In other words, the different linguistic versions of the Statute confirm either that the plain terms of article 28 are ambiguous, or favour the *absence* of a causal contribution requirement. No version unambiguously *requires* a causal contribution requirement. On this basis alone, the Appeals Chamber should conclude that article 28 does not require a causal contribution.⁹⁰¹ Otherwise, the Appeals Chamber

⁸⁹⁶ [Ozaki Opinion](#), para. 8.

⁸⁹⁷ Kiss, p. 637.

⁸⁹⁸ [Statute](#), art. 128.

⁸⁹⁹ [ACRed-01/16 Asset Freezing AD](#), paras. 55-57. Also [Bemba et al TJ](#), para. 33.

⁹⁰⁰ [Ozaki Opinion](#), para. 11. Also [Amnesty International Amicus Brief](#), para. 44.

⁹⁰¹ *Contra* [Steiner Opinion](#), para. 8; [Ozaki Opinion](#), para. 11.

should consider the other VCLT interpretive principles—and especially the drafting history, and the object and purpose of article 28. These principles likewise demand the conclusion that article 28 does not require a causal contribution.⁹⁰²

III.D.1.b.ii. The context of article 28 is inconsistent with a causal contribution requirement

247. The context of article 28 is inconsistent with any causal contribution requirement. First, as Judges Steiner and Ozaki both acknowledge, any reference to causation in article 28 must apply equally to the different conditions for responsibility as a superior. Thus, it must be capable of equal and consistent application to the three types of superiors (military, paramilitary, others), the three kinds of *mens rea*, and the three specific duties (prevention, punishment, referral for investigation). However, the causal contribution requirement is almost impossible to reconcile with responsibility for breach of the duties to punish or refer.⁹⁰³ Second, article 28 is a distinct mode of liability from article 25. Since article 25 sets out exhaustively the participatory modes of liability under the Statute, including various forms of accessorial participation, article 28 should not be understood to duplicate this provision. The context of article 28 thus suggests that it should be understood to reflect a distinct, non-participatory form of responsibility.⁹⁰⁴

III.D.1.b.iii. A causal contribution requirement is contrary to the object and purpose of article 28

248. A causal contribution requirement is also inconsistent with the object and purpose of article 28, which is to enforce the requirements of customary and treaty

⁹⁰² *Contra* [Ozaki Opinion](#), para. 11 (“[r]esort to supplementary means of interpretation, pursuant to Article 32 of the VCLT, also does not assist”). Judge Ozaki did not appear to consider other VCLT factors (context, object and purpose): [Ozaki Opinion](#), paras. 10-11.

⁹⁰³ Jackson, p. 119 (“[w]hen responsibility is based on a failure to punish a crime, it makes no sense to additionally require that the crime itself occurred as a result of the commander’s failure to exercise control”); Meloni (2010), p. 128 (causation for ‘failure to punish’ is “highly problematic”). *Also* [Amnesty International Amicus Brief](#), para. 40; Robinson, at 16-20, 56-57 (acknowledging that causation could not be established for failure to punish a single criminal incident, or the first in a series).

⁹⁰⁴ [Amnesty International Amicus Brief](#), para. 40. *Above* paras. 232-234.

IHL requiring superiors to prevent and to punish the crimes of their subordinates.⁹⁰⁵ Superiors are not held uniquely responsible because they may contribute to their subordinates' crimes, but because international law imposes upon them a specific duty to take active measures to repress violations. The focus of superior responsibility is the superior's breach of duty.⁹⁰⁶ Yet imposing a causal contribution requirement would restrict the prosecution of some breaches of duty—especially concerning the duty to punish or investigate—and defeat this purpose.⁹⁰⁷ It would alter the 'message' sent to the world at large and confirm that, as a matter of international criminal law, a superior need not prevent and punish crimes if they have not in some way contributed to them. Critics might meaningfully question the purpose of the distinct provision in article 28 at all.

249. Customary international law is also instructive in considering the object and purpose of superior responsibility, and the extent to which it may be reconciled with a causal contribution requirement. The ICTY and ICTR have consistently rejected any suggestion that superior responsibility contains an element of causation,⁹⁰⁸ an approach which would “dramatically constrain[]” the scope of the doctrine.⁹⁰⁹ In particular, requiring a “causal link” would “change the basis of command responsibility [...] to the extent that it would practically require involvement on the part of the commander in the crime his subordinates

⁹⁰⁵ E.g. Meloni (2010), p. 31.

⁹⁰⁶ Above para. 233.

⁹⁰⁷ [Amnesty International Amicus Brief](#), para. 41. Above fn. 903.

⁹⁰⁸ E.g. [Hadžihasanović AJ](#), para. 40; [Kordić AJ](#), para. 832; [Blaškić AJ](#), para. 77; [Popović TJ](#), para. 1044; [Halilović TJ](#), para. 78; [Kordić TJ](#), para. 445; [Delalić TJ](#), para. 398. Also [Orić AJ](#), Partially Dissenting Opinion of Judge Liu, para. 32.

⁹⁰⁹ Boas, p. 261; also Cryer, p. 323. Furthermore, applying a causal contribution requirement would also exclude from the jurisdiction of this Court the liability of a “successor commander” (*i.e.* a commander who knowingly fails to punish crimes of his subordinates committed *prior* to his or her assumption of command): e.g. Kiss, p. 630, fn. 132. This question has been controversial at the ICTY, where such liability is presently *not* recognised, but with a significant reasoned consensus among judges that it does exist within customary law: e.g. [Orić AJ](#), Declaration of Judge Shahabuddeen, Partially Dissenting Opinion of Judge Liu, Partially Dissenting Opinion of Judge Schomburg; [Hadžihasanović Superior Responsibility AD](#), paras. 44-46, Dissenting Opinion of Judge Hunt, Dissenting Opinion of Judge Shahabuddeen; [Orić TJ](#), paras. 335-336; [Hadžihasanović TJ](#), paras. 194-199; [Hadžihasanović Superior Responsibility TD](#), para. 202; [Kordić TJ](#), para. 446. But see [A. Bizimungu AJ](#), paras. 369-370; [Ndindiliyimana TJ](#), paras. 1961-1964; [Taylor TJ](#), para. 502. Cf. [Confirmation Decision](#), para. 418.

committed”.⁹¹⁰ No tribunal applying customary international law has departed from this approach,⁹¹¹ nor does any treaty.⁹¹²

III.D.1.b.iv. There is no evidence that the drafters of the Statute intended a causal contribution requirement

250. Further supporting the conclusion that article 28 imposes no causal contribution requirement is the absence of any evidence in the drafting history of the Statute suggesting an intention to impose such a unique constraint on the doctrine of superior responsibility. Given the strong implication that article 28 should not be interpreted to include a causal contribution requirement, resulting especially from the object and purpose of the provision but also its context within the Statute, only clear evidence of the drafters’ contrary intent should be accepted as the basis to narrow the Court’s jurisdiction in this way.

251. Neither the ILC’s 1994 *Draft Statute* nor the 1996 *Draft Code of Crimes* referred to causation for superior responsibility.⁹¹³ Yet the Preparatory Committee’s proposals that same year included substantially similar wording to the material passage now in article 28.⁹¹⁴ During the remainder of the Committee stage, and the diplomatic negotiations at Rome, the material wording varied only to a minor

⁹¹⁰ [Hadžihasanović AJ](#), para. 39 (quoting [Halilović TJ](#), para. 78).

⁹¹¹ E.g. [Case 001 TJ](#), paras. 548-549; [Case 002/01 TJ](#), paras. 716 (fn. 2234), 892-898, 913-917, 932-939, 941. A previous challenge raising causation was rejected on procedural grounds: [Case 002 Declaratory Relief CIJ Decision](#), paras. 10-12; [Case 002 Declaratory Relief AD](#), paras. 1, 11.

⁹¹² [Amnesty International Amicus Brief](#), paras. 33-35. Triffterer’s apparent implication that a causation requirement “could” be read into articles 86 and 87 of API is unpersuasive: *contra* Triffterer (2016), p. 1067, mn. 20. *Further below* fn. 916. Likewise, national military manuals generally impose no causation requirement: [Amnesty International Amicus Brief](#), para. 42, fn. 105. Although the STL Statute refers to causation in the context of superior responsibility ([STL Statute](#), art. 3(2)), it does so only to reflect the content of this Court’s Statute and so is equally ambiguous: [UNSG Report on STL](#), para. 26. Conversely, the new KSC declined to adopt article 28 as a model for superior responsibility: [KSC Law](#), art. 16(1)(c). *Further* Triffterer/Arnold, p. 1076, mn. 47.

⁹¹³ [ILC Draft Code](#), art. 6 (with commentary: pp. 25-26). Also [Amnesty International Amicus Brief](#), para. 35. The 1994 *Draft Statute* was silent about modes of liability altogether: [ILC Draft Statute](#); [Ad Hoc Committee Report](#), paras. 52, 87, 89.

⁹¹⁴ E.g. [Preparatory Committee Draft \(1996\)](#), p. 85.

extent.⁹¹⁵ Hence, after 1996, there is little, if any, indication that the States Parties realised the possible import of the “as a result” phrase in article 28, much less made a conscious decision to depart from customary international law by imposing a causal contribution requirement.⁹¹⁶ Rather, in this period, discussion was centred on *mens rea* and the proposed distinction between military and other kinds of superiors.⁹¹⁷

252. The only apparent discussion concerning the “as a result” wording in article 28 thus occurred in the 1996 proceedings of the Preparatory Committee. Contrary to the views of Judges Steiner and Ozaki,⁹¹⁸ these proceedings do not suggest any consensus, even among the Committee, for imposing a causal contribution requirement. To the contrary, delegates were united in viewing superior responsibility as a “critical” doctrine,⁹¹⁹ whereas they divided on a range of matters associated with causation.⁹²⁰ Likewise, the delegates rejected a proposed formulation from France, punishing only a superior’s failure to prevent subordinates’ crimes.⁹²¹ Instead, wording from a UK proposal found favour,⁹²² amplified by Canada.⁹²³ Although the UK proposal did indeed contain the “as a result” formulation (with the same ambiguity contained in the present article 28), it is apparent that Canada did *not* understand the UK to impose a causal contribution

⁹¹⁵ Bassiouni, pp. 210-214. None of these successive drafts resolves the linguistic ambiguity remaining in article 28: *contra* Kiss, p. 637, fn. 172.

⁹¹⁶ [Amnesty International Amicus Brief](#), para. 43. Although Triffterer considers the “important, relevant result” of the negotiation to have been the combination of the “failure to act (control)” of article 86(1), API, with the reference to the duties of commanders in article 87, API, again there is no evidence that this was understood to impose a causal contribution requirement: Triffterer/Arnold, p. 1068, mns. 21-22.

⁹¹⁷ E.g. Ambos (2002), pp. 848-849; Saland, pp. 202-204; Schabas, p. 456. *Cf.* Greenwood, at 604.

⁹¹⁸ *Contra* [Steiner Opinion](#), para. 7; [Ozaki Opinion](#), para. 10.

⁹¹⁹ [Preparatory Committee: First Session](#), p. 28, para. 100 (emphasis added). *Also* [Preparatory Committee Report \(1996\)](#), p. 46, para. 203.

⁹²⁰ [Preparatory Committee: First Session](#), p. 27, para. 95. *Above* fn. 838.

⁹²¹ [Preparatory Committee: French Working Paper](#), p. 60 (art. 82).

⁹²² [Preparatory Committee: First Session](#), Annex II, p. 85.

⁹²³ [Preparatory Committee: Canadian Working Paper](#), p. 15 (art. 33-10).

requirement.⁹²⁴ The Preparatory Committee’s 1996 draft was closely modelled on the UK/Canadian proposal. It also dropped the possibility, which had been tentatively proposed by the UK, of describing superior responsibility as a form of aiding and abetting.⁹²⁵

253. In construing the Statute, it would be incorrect to place great weight on the view of one State (the UK), especially when that view is not only ambiguous⁹²⁶ but inconsistent with the views of other bodies, such as the ILC, and customary law. There is no evidence that the States Parties even generally understood article 28 to impose a causal contribution requirement, much less intended that it should do so.

III.D.2. The Chamber’s reasoning on the causal standard applied was adequate

254. In any event, notwithstanding its error in requiring proof of a causal contribution to the crimes, the Chamber did not err concerning the *degree* of causation, or causal standard, that it should apply.

255. Bemba incorrectly asserts that the Chamber erred by failing to provide a reasoned opinion concerning the causal standard itself.⁹²⁷ Yet a close definition was unnecessary because the Chamber was satisfied that its factual finding was *more demanding* than the standard actually required by law.⁹²⁸ The Chamber’s mere academic opinion is immaterial. In these circumstances, Bemba cannot explain *why*

⁹²⁴ This follows from the Canadian proposal to sanction a failure “to punish”, if not captured by the term “repress”. Furthermore, in the accompanying note, Canada linked the superior’s breach of duty with their “liability”, not the crimes: [Preparatory Committee: Canadian Working Paper](#), p. 16.

⁹²⁵ See [Preparatory Committee Draft \(1996\)](#), p. 85.

⁹²⁶ First, the UK proposal contains the same linguistic ambiguity as article 28. Second, it initially contemplated the possibility that superior responsibility might be a form of aiding and abetting; but, since this view was *rejected*, the remaining wording must be read accordingly. *Contra* [Steiner Opinion](#), para. 7; [Ozaki Opinion](#), para. 10. Moreover, even if the UK conceives superior responsibility as a form of aiding and abetting, great caution should be adopted in associating this characterisation with a causal contribution requirement, which may not mean the same as a domestic perspective: Ashworth, p. 134 (“[m]any writers now acknowledge that the element of causation is absent from some cases of ‘aiding and abetting’”); [ICC Act](#), s. 65(4); *also* [ICC \(Scotland\) Act](#), s. 5(4).

⁹²⁷ [Brief](#), para. 383; *also* paras. 385, 388-390.

⁹²⁸ [Judgment](#), paras. 213, 741.

the Chamber's approach invalidated or materially affected the Judgment,⁹²⁹ and so his challenge must be dismissed *in limine*.

256. The causal standard actually applied by the Chamber was not unclear.⁹³⁰ The *extent* to which Bemba traversed his obligations is insignificant for the purpose of his liability, and need not have been reasoned.⁹³¹ Nor is his right to appeal impaired, since both the standard applied by the Chamber (even if higher than the law may require) and the underlying evidence were stated with clarity.⁹³² Nor indeed does Bemba challenge the substantive correctness of the standard applied, or contend that it was below the legal threshold.

257. Bemba's preference for a particular manner of judgment writing is neither compelling nor legally cognizable. He confuses the requirement for a reasoned opinion with the requirement of 'fair notice', a facet of the legality principle which is more than satisfied by article 28 itself.⁹³³ Likewise, his concern that the Judgment may not be "precise enough" for *future* defendants lacks material impact and contravenes the rule against mere advisory opinions.⁹³⁴

III.D.3. The alleged error in "conflating" the elements of article 28 is undeveloped and must be dismissed *in limine*

258. Bemba's claim that the Chamber further erred in law by "conducting the same analysis in assessing causation as that conducted to determine whether Bemba had

⁹²⁹ E.g. [Stanišić and Simatović AJ](#), para. 16. *Above* para. 223.

⁹³⁰ [Judgment](#), para. 213 ("the crimes would not have been committed, in the circumstances they were, had the commander exercised control properly").

⁹³¹ *Contra* [Brief](#), para. 386.

⁹³² *Contra* [Brief](#), paras. 386, 390.

⁹³³ *Contra* [Brief](#), para. 386 (citing [Vasiljević TJ](#), para. 193). Nor can the principle of fair notice (what a defendant knew *ex ante*) assist in ascertaining whether a judgment is adequately reasoned (what a defendant understands *ex post facto*).

⁹³⁴ *Contra* [Brief](#), para. 386.

taken necessary and reasonable measures” must also be dismissed *in limine*.⁹³⁵ The argument is undeveloped and vague.

259. First, Bemba apparently assumes that the Chamber took into account only the ways in which he failed “to take all necessary and reasonable measures” to prevent or to punish his subordinates’ crimes.⁹³⁶ Yet the Chamber considered not only these failures *but also* other relevant factors,⁹³⁷ including deficiencies in the MLC training regime, Bemba’s failure to address these deficiencies, the absence of clear orders to respect the civilian population, the inadequate pay and rations provided to MLC troops, the operational design which placed such MLC troops in close proximity to the civilian population, and so on.⁹³⁸

260. Second, Bemba fails to articulate how or why the factors addressed by the Chamber in the context of causation were “impermissibly circular” with its findings on Bemba’s failure to prevent or punish his subordinates’ crimes. Bemba appears to suppose that the ‘general duty’ upon which the Chamber’s causation analysis was based must be wholly different from the specific duties to prevent or punish—but, if so, it fails to explain what this duty must be, or its origin.⁹³⁹ Bemba shows no legal error in the Chamber’s approach. Certainly, to the extent that two different legal requirements may be established by similar types of facts, this does not represent any shift in the burden of proof.⁹⁴⁰

⁹³⁵ *Contra* [Brief](#), paras. 389, 390, 392-393.

⁹³⁶ *E.g.* [Brief](#), paras. 393-394.

⁹³⁷ [Judgment](#), para. 737 (“[a]dditionally”).

⁹³⁸ [Judgment](#), paras. 736-741. *Compare* paras. 719-734 (factual findings concerning Mr Bemba’s specific failures to prevent or to punish his subordinates’ crimes).

⁹³⁹ Bemba’s inability to conceptualise such arguments underlines the difficulty in requiring a distinct ‘general duty’: *above* para. 238.

⁹⁴⁰ *Contra* [Brief](#), para. 392.

III.D.4. The Chamber reasonably found that Bemba causally contributed to the MLC crimes

261. The Chamber reasonably found that Bemba causally contributed to his subordinates' crimes. It neither misstated the evidence nor its own findings.⁹⁴¹

III.D.4.a. The Chamber reasonably considered inadequate pay and rations

262. The Chamber's acknowledgement that the CAR authorities provided some logistical support to the MLC, including "food" and "money (primarily for the purpose of buying food)",⁹⁴² does not show that it was unreasonable—let alone "extraordinary"—to consider that "adequate payment and rations" for the MLC would have reduced or eliminated their crimes.⁹⁴³ Bemba "exercised close control" over MLC expenditure, and "held authority over decisions as to food, fuel, medication, and clothing."⁹⁴⁴ The provision even of *some* pay or food by the CAR to the MLC does not show that the provision as a whole was *adequate*. To the contrary, MLC troops "did not receive adequate payment and rations from their superiors",⁹⁴⁵ and "secured—including by acts of murder, rape, and pillaging—compensation, in cash and kind, from the civilian population."⁹⁴⁶ In particular, MLC soldiers not only "prepared and ate food items" that they had taken,⁹⁴⁷ but also sometimes specifically told the victims that they were hungry.⁹⁴⁸

263. Bemba merely disagrees with the Judgment, relying on evidence which does not support the proposition claimed. Indeed, such evidence is not only consistent with the Chamber's finding that the CAR authorities may have provided *some* logistical support to the MLC, but refers to individual cases and does not speak to

⁹⁴¹ *Contra* [Brief](#), para. 394.

⁹⁴² [Judgment](#), para. 412.

⁹⁴³ [Judgment](#), para. 739. *Contra* [Brief](#), para. 395.

⁹⁴⁴ [Judgment](#), para. 388.

⁹⁴⁵ [Judgment](#), para. 565 (fn. 1748).

⁹⁴⁶ [Judgment](#), para. 565 (fn. 1750).

⁹⁴⁷ [Judgment](#), para. 566 (fn. 1753).

⁹⁴⁸ [Judgment](#), para. 566 (fn. 1751).

the sufficiency of the provision as a whole.⁹⁴⁹ Just one witness claims that as a whole “[REDACTED]” —but even he acknowledges that “[REDACTED]”, [REDACTED].⁹⁵⁰ Nor is there any error in the Chamber not referring in this context to D19.⁹⁵¹

264. Whether Bemba “made a conscious decision” to “incentivise criminal conduct” by providing inadequate pay and rations is, in the context of the Chamber’s objective causation analysis, immaterial.⁹⁵²

III.D.4.b. The Chamber reasonably considered the deficient training and Code of Conduct

265. Bemba shows no error in the Chamber’s finding that “the training regime employed by the ALC was inconsistent”, with “some soldiers receiving no or minimal training”.⁹⁵³ The Chamber noted especially that the Code of Conduct did not prohibit pillage, and that “some MLC troops, including at least one high-ranking officer” were unfamiliar with it.⁹⁵⁴ Bemba took no measures to remedy these deficiencies, despite his effective authority and control.⁹⁵⁵ Among other factors, “clear training” would have reduced MLC crimes.⁹⁵⁶

266. Bemba merely disputes the Chamber’s interpretation of its own reasoning and findings. It did not find that the “minimum” or non-existent training provided to some MLC soldiers was solely because the affected soldiers “did not need it”.⁹⁵⁷ Rather, it accepted that, “for example”, soldiers “recruited from other armed forces” were among those who received minimal training—and that “[s]ome evidence”

⁹⁴⁹ *Contra* [Brief](#), para. 395 (fn. 752: citing [T-182](#), 29:23-25 (MLC troops were not given rations, but were given “some money”), [T-106](#), 50:15-53:13 (CAR treasury provided money to an MLC official to purchase food), [T-116- PART I](#), 30:23-31:7 (P63 saw an MLC official “buy a cow and cook it”), T-279-CONF-ENG, 33:7-15 ([REDACTED])).

⁹⁵⁰ T-289-CONF, 13:13-14:4.

⁹⁵¹ *Contra* [Brief](#), para. 395 (fn. 752: citing T-284-CONF, 44:15-23). *See* [Judgment](#), paras. 359-360 (D19 was, relevantly, “not credible”, evasive, and lacked “spontaneity and impartiality”).

⁹⁵² *Contra* [Brief](#), para. 395.

⁹⁵³ [Judgment](#), para. 736. *Contra* [Brief](#), para. 397.

⁹⁵⁴ [Judgment](#), para. 736.

⁹⁵⁵ [Judgment](#), para. 737.

⁹⁵⁶ [Judgment](#), para. 739.

⁹⁵⁷ *Contra* [Brief](#), para. 397.

suggests training was “according to one’s prior experience”.⁹⁵⁸ Yet consistent evidence showed that the training delivered as a whole “did not follow a consistent or clear rubric” and “could touch upon” various military matters, of which the Code of Conduct was just one.⁹⁵⁹ For example, P15 doubted “that the rank and file soldier received training” on subjects such as “humanitarian law”.⁹⁶⁰ The subjective views of some witnesses that the training was adequate does not affect the Chamber’s view that, objectively, to ensure the basic protection of the civilian population, it was inadequate.⁹⁶¹

267. One basis for the Chamber’s view of the inadequacy of the training was the deficiency of the Code of Conduct used in that training. Although warning that murder and rape were to be punished, it did not expressly prohibit pillage—and, indeed, criminalising the “[f]ailure to verify and safeguard the spoils of war” (without defining what spoils of war might be) may even have suggested that pillage was permitted. Moreover, the Code of Conduct was only available in French, and only translated into Lingala *ad hoc*, often orally.⁹⁶² Whether or not the MLC was “unique” in making basic provision for training and internal discipline, *arguendo*, cannot affect the Chamber’s reasonable conclusion that the absence of consistent information on the illegality of pillage was causally linked to the subsequent occurrence of pillage.⁹⁶³

268. Reference in the Code of Conduct to “*vol*” (theft) as an offence which must be tried by court-martial does not affect the Chamber’s finding.⁹⁶⁴ The Chamber correctly found that pillage (“*pillage*”) is not prohibited in the code, although it does prohibit property-related conduct such as corruption (“*corruption*”),

⁹⁵⁸ [Judgment](#), para. 391 (emphasis added).

⁹⁵⁹ [Judgment](#), para. 391.

⁹⁶⁰ [Judgment](#), para. 391 (fn. 1011).

⁹⁶¹ *Contra* [Brief](#), para. 398.

⁹⁶² [Judgment](#), paras. 392-393.

⁹⁶³ *Contra* [Brief](#), para. 399.

⁹⁶⁴ *Contra* [Brief](#), para. 401.

misappropriation (“*détournement*”), and fraud (“*escroquerie*”).⁹⁶⁵ The Chamber was correct in finding that the code refers, in passing to the notion of “spoils of war” (“*butin de guerre*”).⁹⁶⁶ In this context, although the Code of Conduct might arguably have warned against property offences against the MLC, the protection afforded to the civilian population remained ambiguous, to say the least.

269. In challenging the Chamber’s reasoning, Bemba also confuses the purpose of the causation analysis. The Chamber did not consider the nature of the MLC training to determine whether “pillage was prohibited”,⁹⁶⁷ but rather to consider whether any deficiencies in ensuring that MLC troops consistently *knew* pillage was prohibited could have contributed to the ensuing crimes. In this context, specific incidents in which some attempt may have been made to punish individuals for pillage—which the Chamber itself acknowledged⁹⁶⁸—were of limited relevance.⁹⁶⁹ Furthermore, since any attempts to punish pillage were in any event “grossly inadequate” to the scale of the alleged criminality,⁹⁷⁰ there is nothing unreasonable in finding that the inadequate training causally contributed to the MLC crimes.⁹⁷¹

III.D.4.c. The Chamber reasonably considered Bemba’s inadequate supervision

270. The Chamber reasonably considered Bemba’s failure to “ensure[] adequate supervision” of his subordinates as another factor establishing his causal contribution to his subordinates’ crimes.⁹⁷² Notably, the Chamber did not say that “supervision of troops was his responsibility”, but made clear it was at least his duty to *ensure* that his immediate subordinates were adequately carrying out this task. Bemba’s ability to do this was amply demonstrated by his effective authority

⁹⁶⁵ E.g. EVD-T-OTP-00700/CAR-DEF-0001-0161, at 0164.

⁹⁶⁶ E.g. EVD-T-OTP-00700/CAR-DEF-0001-0161, at 0163.

⁹⁶⁷ *Contra* [Brief](#), para. 402.

⁹⁶⁸ E.g. [Judgment](#), paras. 722, 726. *Contra* [Brief](#), para. 403.

⁹⁶⁹ *Contra* [Brief](#), paras. 402-403.

⁹⁷⁰ [Judgment](#), para. 727.

⁹⁷¹ *Contra* [Brief](#), para. 403.

⁹⁷² [Judgment](#), paras. 738-739. *Contra* [Brief](#), para. 404.

and control over the MLC troops in CAR.⁹⁷³ There is nothing impermissible in inferring failure to ensure adequate supervision from the findings that MLC troops did in fact commit crimes,⁹⁷⁴ and that Bemba failed to take necessary and adequate measures to ensure that those crimes were prevented or punished.⁹⁷⁵

III.D.4.d. The Chamber reasonably considered Bemba's inadequate disciplinary measures

271. The Chamber reasonably found that Bemba could have ensured the effective discipline or punishment of “MLC commanders and soldiers implicated as committing or condoning such crimes”, and that this was another factor establishing his causal contribution to his subordinates’ crimes.⁹⁷⁶ The prosecution of seven soldiers for pillage shows no error in this conclusion⁹⁷⁷ — and was indeed a fact which the Chamber expressly acknowledged but described as “grossly inadequate”.⁹⁷⁸ Although it is of course true that disciplinary or criminal measures cannot be imposed against unidentified persons,⁹⁷⁹ *arguendo*, it was obviously implicit in the Chamber’s reasoning that Bemba could and should have ensured adequate investigations. The absence of effective investigations may themselves causally contribute to subsequent crimes, suggesting that they will go undetected or unpunished. Bemba’s spurious claim that “MLC troops had every reason to fear punishment” is contradicted, for example, by the Chamber’s reasoned finding of the inadequacy of the measures taken, as well as their insincerity.⁹⁸⁰ Again, no error is shown by the Chamber’s approach to the evidence of D48 or D16.⁹⁸¹

⁹⁷³ E.g. [Judgment](#), para. 705. Also paras. 700-701.

⁹⁷⁴ See [Judgment](#), paras. 694-695.

⁹⁷⁵ See [Judgment](#), para. 734. Further above paras. 259-260.

⁹⁷⁶ [Judgment](#), paras. 738-739.

⁹⁷⁷ *Contra* [Brief](#), para. 405 (citing [Judgment](#), para. 597).

⁹⁷⁸ E.g. [Judgment](#), paras. 726-727.

⁹⁷⁹ [Brief](#), paras. 405-406.

⁹⁸⁰ [Judgment](#), paras. 727-728. *Contra* [Brief](#), paras. 408-409. Concerning the Defence reference to “the discipline exercised by [MLC] troops”, e.g. [Judgment](#), paras. 563-573.

⁹⁸¹ *Contra* [Brief](#), paras. 408-409 (citing T-267-CONF, 12, 17, 18; T-275-CONF, 16, 41, 61). Concerning D48, see [Judgment](#), paras. 448 (in another context, noting “inconsistencies” and “apparent lack of knowledge” on material issues), 602.

III.D.4.e. The Chamber reasonably considered the possibility of withdrawing the MLC

272. The Chamber reasonably found that Bemba had acknowledged the possibility of withdrawing the MLC from the CAR “as early as November 2002” and that, if he had done so, this would have prevented the crimes.⁹⁸² Since the Chamber’s observation was based on evidence that Bemba contemplated withdrawing his troops some five months before he did,⁹⁸³ and evidence of his concrete intention to that effect thereafter,⁹⁸⁴ it was no more than a statement *of fact*. Based on Bemba’s own statements, MLC troops might have been withdrawn earlier than they were.⁹⁸⁵

273. Bemba mistakes this reasoning, asserting that “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”.⁹⁸⁶ This is incorrect, since the Chamber espoused no such legal principle.⁹⁸⁷ Moreover, *arguendo*, since breach of the ‘general duty’ to exercise proper control (to which the Chamber’s observation was relevant) does not suffice, on its own, to establish criminal responsibility under article 28, Bemba is also wrong that the Chamber suggested withdrawing was as a matter of law “the only way to avoid criminal liability”.⁹⁸⁸ To the contrary, liability depends also on proof that a superior failed to prevent or to punish his subordinates’ crimes, with the necessary *mens rea*.

III.E. CONCLUSION

274. Bemba was properly found to be the superior of the MLC troops who committed the charged crimes, and to have failed to prevent, investigate or punish

⁹⁸² [Judgment](#), para. 740.

⁹⁸³ [Judgment](#), para. 555 (fn. 1704).

⁹⁸⁴ [Judgment](#), para. 555 (fn. 1705).

⁹⁸⁵ *Contra* [Brief](#), para. 412.

⁹⁸⁶ [Brief](#), para. 410.

⁹⁸⁷ *Contra* [Brief](#), paras. 411, 413.

⁹⁸⁸ *Contra* [Brief](#), para. 410.

their conduct, with the necessary *mens rea*. This ground of appeal should be dismissed.

IV. THE NECESSARY ELEMENTS WERE ESTABLISHED

275. The Chamber reasonably found that the contextual elements of crimes against humanity were satisfied,⁹⁸⁹ namely, that MLC soldiers perpetrated the charged crimes of murder and rape as part of⁹⁹⁰ a widespread⁹⁹¹ attack⁹⁹² directed against the civilian population⁹⁹³ pursuant to an organisational policy.⁹⁹⁴

276. By misrepresenting the Judgment and misunderstanding the evidence, Bemba challenges the Chamber's assessment of the required *mens rea* to establish the commission of crimes against humanity,⁹⁹⁵ and the organisational policy to commit the attack.⁹⁹⁶ Because Bemba fails to show any legal or factual error, his arguments must be dismissed.

277. Similarly, Bemba's challenge to the Chamber's analysis of the elements of pillage is incorrect in law and cannot succeed. Nor in any event can he show any material impact on the Judgment.

⁹⁸⁹ [Judgment](#), para. 692.

⁹⁹⁰ [Judgment](#), para. 690.

⁹⁹¹ [Judgment](#), para. 689.

⁹⁹² [Judgment](#), para. 672.

⁹⁹³ [Judgment](#), para. 674.

⁹⁹⁴ [Judgment](#), paras. 686-687.

⁹⁹⁵ [Brief](#), paras. 414-421.

⁹⁹⁶ [Brief](#), paras. 422-444.

IV.A. THE CHAMBER MADE THE REQUIRED *MENS REA* FINDINGS

278. The Chamber made no legal error when it held that only the perpetrators must know that their crimes formed part of an attack against the civilian population to determine whether crimes against humanity were committed.⁹⁹⁷ Nor was it required, under either article 7 or article 28, to determine whether Bemba's own conduct *as a superior* formed part of the attack, and that Bemba was aware that it did.⁹⁹⁸ Finally, the Chamber rightly concluded that it did not need to make an express finding under article 28 concerning Bemba's knowledge that his subordinates' crimes were part of the attack⁹⁹⁹—although, in any event, the evidence proved beyond reasonable doubt that Bemba did have such knowledge.¹⁰⁰⁰

279. While the Chamber correctly separately reviewed the legal requirements for the crimes¹⁰⁰¹ and the modes of liability,¹⁰⁰² Bemba erroneously conflates the legal framework for crimes against humanity under article 7 with that for command responsibility under article 28.¹⁰⁰³ In essence, he incorrectly seeks to import elements required to prove the crimes, into the elements required to prove superior responsibility—and *vice versa*. However, these matters should be analysed separately, particularly when an accused is not the physical perpetrator of a crime.¹⁰⁰⁴

280. Bemba's submission that the Chamber failed to make the requisite *mens rea* finding should be dismissed for four reasons:

⁹⁹⁷ [Judgment](#), para. 168. *Contra* [Brief](#), para. 421.

⁹⁹⁸ *Contra* [Brief](#), paras. 414-417, 419-420.

⁹⁹⁹ [Judgment](#), para. 195. *Contra* [Brief](#), paras. 417-418

¹⁰⁰⁰ [Judgment](#), paras. 706-717. *Above* paras. 185-194.

¹⁰⁰¹ [Judgment](#), paras. 148-169.

¹⁰⁰² [Judgment](#), paras. 170-213.

¹⁰⁰³ *E.g.* [Brief](#), para. 415.

¹⁰⁰⁴ [Milutinović TJ, Vol. I](#), paras. 66-67.

- First, he fails to explain why knowledge of the contextual elements on the part of the superior is required to determine whether crimes against humanity were committed under article 7;
- Second, he provides no support for why the superior's failure to prevent, repress or report under article 28 must be part of the attack under article 7;
- Third, in arguing that the *mens rea* required under article 7 applies to a superior under article 28, he mistakes the relationship between the modes of liability and the Elements of Crimes;
- Fourth, he mistakes the relationship between article 28 and article 30 when submitting that the Chamber should have made express findings on Bemba's knowledge that his subordinates' crimes were part of the attack.

IV.A.1. Knowledge of the attack on the part of the superior is not required to establish the underlying crimes against humanity under article 7

281. As the Chamber found, in a command responsibility case the commander's knowledge of the attack is not required under article 7 to satisfy the material elements of the subordinates' crimes.¹⁰⁰⁵

282. The Chamber correctly relied upon the ICTY Trial Chamber's finding in *Milutinović* (to which it referred as *Šainović*) that, in command responsibility cases, the commander's knowledge of the contextual element is not a required element of the crime.¹⁰⁰⁶ In general, the ICTY has not "require[d]" that the accused possess the *mens rea* for the underlying crimes, but rather has first determined whether crimes were committed, including with the relevant *mens rea*, and then determined

¹⁰⁰⁵ [Judgment](#), para. 168.

¹⁰⁰⁶ [Judgment](#), para. 168 (citing [Milutinović TJ, Vol. I](#), paras. 158-159).

whether the accused was criminally responsible for those crimes, which is a different question, based, *inter alia*, on their own *mens rea*.¹⁰⁰⁷

283. The *Milutinović* Trial Chamber reasoned that when the charged mode of liability requires the accused's intent for the crime,¹⁰⁰⁸ knowledge of the context of the offence is inherently part of the accused's mental process.¹⁰⁰⁹ But when the charged mode of liability does not require the accused's intent —such as superior responsibility—the physical perpetrator's knowledge of the context in which his conduct occurs is needed to fulfil the requirements for crimes against humanity. The superior's or commander's knowledge of the attack is irrelevant to establish whether crimes against humanity took place.¹⁰¹⁰ The Chamber stressed that this analysis should not be confused with the question of whether the accused bears criminal responsibility for a particular crime.¹⁰¹¹

284. Bemba notes that the *Šainović* Appeals Chamber found that the *Milutinović* Trial Chamber “still required, and did find, that the accused had the requisite *mens rea* for crimes against humanity.”¹⁰¹² However, this overlooks that the accused in that case (Pavković) was convicted for crimes as a “member of a JCE”—a mode of liability which, unlike superior responsibility, requires intent.¹⁰¹³ Accordingly, the Chamber had to be satisfied that Pavković possessed the requisite *mens rea* for crimes against humanity.¹⁰¹⁴

¹⁰⁰⁷ [Milutinović TJ, Vol. I](#), para. 159.

¹⁰⁰⁸ Within the statutory framework of article 25(3)(a)-25(3)(d)(i).

¹⁰⁰⁹ [Milutinović TJ, Vol. I](#), para. 158. In these situations the elements of the crime are still met even if the physical perpetrator lacked knowledge of the context of his conduct.

¹⁰¹⁰ [Milutinović TJ, Vol. I](#), para. 158.

¹⁰¹¹ [Milutinović TJ, Vol. I](#), para. 159.

¹⁰¹² [Brief](#), para. 415 (fn. 793).

¹⁰¹³ [Šainović AJ](#), para. 281.

¹⁰¹⁴ [Šainović AJ](#), para. 281.

IV.A.2. The superior need not know that his conduct was part of the attack for articles 7 and 28

IV.A.2.a. The superior's failure need not be part of the attack

285. Bemba's submission that the Chamber should have established that Bemba knew that *his* conduct was part of the attack¹⁰¹⁵ is based on the wrong premise that for a superior to be responsible under article 28 for crimes against humanity, *his own conduct* (i.e. his failure to prevent, punish or report) must be part of the attack against the civilian population.¹⁰¹⁶ Neither article 7 nor article 28 require such a finding.

286. For crimes against humanity, article 7 requires that *one of the listed acts* (murder, extermination, enslavement, etc) is committed as part of an attack against the civilian population. The superior's failure to prevent, punish or report the subordinate's crimes—one of the elements of article 28—is *not* included in that list because it is not, *per se*, a crime against humanity—rather it is a form of responsibility for the subordinate's crime.¹⁰¹⁷ Nor does article 28 require that the superior's failure form part of an attack against the civilian population.

287. Bemba's submission thus incorrectly collapses the distinct requirements of article 7 and article 28 into one another and must be dismissed. It erroneously considers "failures" under article 28 as acts under article 7, and incorrectly seeks to apply one element of crimes against humanity under article 7—being part of the attack—to the mode of liability of superior responsibility under article 28.

¹⁰¹⁵ [Brief](#), paras. 414-416, 419-420.

¹⁰¹⁶ [Brief](#), paras. 414-416, 419-420. Also [Bemba Final Brief](#), para. 404.

¹⁰¹⁷ *Above* paras. 232-234.

IV.A.2.b. The superior need not know that his conduct was part of the attack

288. Similarly, Bemba incorrectly submits that a commander must know that his conduct was part of the attack to establish the material elements under article 7.¹⁰¹⁸ He argues that because paragraph 8 of the General Introduction to the Elements of the Crimes states that “the appropriate mental elements [for a crime] apply, *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28,”¹⁰¹⁹ the *mens rea* elements under article 7(1) of the Elements of the Crimes—including the perpetrator’s knowledge that his conduct was part of the attack—must also apply to the commander *vis-à-vis* his failures under article 28.

289. Bemba reverses the relationship between the modes of liability in articles 25 and 28 and the Elements of Crimes. Precisely because paragraph 8 states that “the appropriate mental elements [for a crime], apply, *mutatis mutandis*” under different modes of liability, in the case of superior responsibility—where it is the accused’s *subordinate* who “perpetrates” the crime, and not the accused himself—it is the subordinate who must know that *his* conduct (as listed under article 7) was part of the attack.

290. The Elements of Crimes specify the elements which must be proved to establish that a crime occurred. They do not require that every person charged under articles 25 or 28 must themselves individually satisfy every element to be convicted of the crime. Article 9 further confirms that the Elements of Crimes assist in defining and applying *crimes* in articles 6, 7, 8 and 8*bis* and *not* forms of responsibility under articles 25 and 28.

¹⁰¹⁸ [Brief](#), paras. 415-416, 421.

¹⁰¹⁹ [Brief](#), para. 416.

IV.A.3. Bemba knew that the crimes of his subordinates were part of the attack

291. The Chamber properly observed that, if the superior knew of his subordinates' crimes against humanity, he had knowledge of the required contextual element.¹⁰²⁰ To the extent that Bemba argues that the Chamber failed to find expressly that Bemba knew that *the crimes of his subordinates* were part of the attack,¹⁰²¹ he has not shown any error in the Chamber's reasoning.

292. The Chamber found that throughout the 2002-2003 CAR Operation Bemba knew that MLC forces were committing or about to commit the crimes against humanity of murder and rape,¹⁰²² based on: (i) Bemba's regular and direct communication with his subordinates reporting the status of operations and the situation on the ground;¹⁰²³ (ii) his receipt of intelligence reports on crimes committed by subordinates;¹⁰²⁴ (iii) international media reporting his subordinates' many acts of rape, murder and pillage;¹⁰²⁵ (iv) his establishment of several commissions of inquiry;¹⁰²⁶ (v) his knowledge that "his forces would commit crimes against civilians in the course of the attack" on Mongoumba;¹⁰²⁷ (vi) his receipt of the FIDH Report;¹⁰²⁸ and (vii) the notoriety of the crimes, widely reported by general sources of information.¹⁰²⁹

293. The Chamber did not need to make more explicit findings than these.¹⁰³⁰ Bemba's reliance on article 30¹⁰³¹ overlooks that article 28 on superior responsibility has its own separate *mens rea* requirement—an example of the "unless otherwise

¹⁰²⁰ [Judgment](#), para. 195. *Contra* [Brief](#), paras. 416-418, 421.

¹⁰²¹ [Brief](#), paras. 416-418, 421.

¹⁰²² [Judgment](#), para. 717.

¹⁰²³ [Judgment](#), para. 707.

¹⁰²⁴ [Judgment](#), para. 708.

¹⁰²⁵ [Judgment](#), para. 709.

¹⁰²⁶ [Judgment](#), paras. 711-713, 715.

¹⁰²⁷ [Judgment](#), para. 716.

¹⁰²⁸ [Judgment](#), para. 714.

¹⁰²⁹ [Judgment](#), para. 717.

¹⁰³⁰ *Contra* [Brief](#), para. 418.

¹⁰³¹ [Brief](#), para. 416.

provided” clause of article 30.¹⁰³² Article 28 does not require that a superior know the specific identities of the subordinates who committed the crimes, nor the details of specific criminal incidents.¹⁰³³ It would be contradictory to suggest that the commander’s liability is contingent upon his specific knowledge that each crime was part of the attack.¹⁰³⁴

294. In any event, even if the Chamber was required to *expressly* find that Bemba had knowledge of the contextual elements, this error would be harmless. Indeed, the evidence shows, beyond reasonable doubt, that Bemba *knew* that his subordinates were committing the crimes of murder and rape as part of an attack against the civilian population.¹⁰³⁵

295. In conclusion, the Chamber properly established the *mens rea* for crimes against humanity. Bemba has not shown any legal or factual error.

IV.B. THERE WAS AN MLC ORGANISATIONAL POLICY TO COMMIT THE ATTACK DIRECTED AGAINST THE CIVILIAN POPULATION

296. The Chamber properly found that MLC soldiers committed many acts of rape and murder against civilians during the 2002-2003 CAR Operation.¹⁰³⁶ These acts were not random or isolated but part of an attack as required by article 7—*i.e.* they occurred during a course of conduct involving multiple crimes directed against a civilian population.¹⁰³⁷ After considering a multiplicity of relevant factors,¹⁰³⁸ the Chamber concluded that the MLC—an organisation¹⁰³⁹—had a policy to commit

¹⁰³² [Confirmation Decision](#), para. 479; Nerlich, pp. 671, 675; Werle/Jessberger, p. 47. *Contra* Ambos (2009), at 720.

¹⁰³³ [Judgment](#), para. 194.

¹⁰³⁴ *Contra* [Brief](#), para. 420.

¹⁰³⁵ [Judgment](#), paras. 706-717; *above* paras. 185-194. Bemba was the apex of the MLC which had the policy to commit the attack, *below* paras. 296-328.

¹⁰³⁶ [Judgment](#), para. 671.

¹⁰³⁷ [Judgment](#), paras. 671-674.

¹⁰³⁸ [Judgment](#), paras. 676-684.

¹⁰³⁹ [Judgment](#), para. 675.

such an attack¹⁰⁴⁰ and that any suggestion that the crimes resulted from uncoordinated and spontaneous perpetrators acting in isolation was not reasonable.¹⁰⁴¹ Rather, Bemba and other senior commanders' failure to take action was deliberately aimed at encouraging the attack.¹⁰⁴² The Chamber found a sufficient link between the course of conduct and the organizational policy.¹⁰⁴³

297. The Chamber carefully considered the following factors which cumulatively demonstrated an MLC policy to attack the civilian population:

- the MLC's *modus operandi*;¹⁰⁴⁴
- the MLC's recurrent pattern of violence over four and a half months in a broad geographic area, encompassing each location under their control;¹⁰⁴⁵
- MLC troops' general motives (self-compensation and punishment), which was tacitly approved by the MLC hierarchy;¹⁰⁴⁶
- the scale and degree of organisation of the acts of pillaging (during the course of which many acts of rape and murder were committed), and the knowledge and involvement of the MLC hierarchy;¹⁰⁴⁷
- the punitive attack on Mongoumba (where only civilians were present) conducted in retaliation for FACA's seizure of pillaged goods that the MLC was transporting to the DRC;¹⁰⁴⁸

¹⁰⁴⁰ [Judgment](#), para. 685.

¹⁰⁴¹ [Judgment](#), para. 685.

¹⁰⁴² [Judgment](#), para. 685.

¹⁰⁴³ [Judgment](#), para. 686.

¹⁰⁴⁴ [Judgment](#), para. 676.

¹⁰⁴⁵ [Judgment](#), para. 677.

¹⁰⁴⁶ [Judgment](#), para. 678.

¹⁰⁴⁷ [Judgment](#), para. 679.

¹⁰⁴⁸ [Judgment](#), para. 681.

- the orders to MLC troops to exercise vigilance, including the use of force, against civilians;¹⁰⁴⁹
- the inadequate MLC Code of Conduct and the inconsistent training of MLC troops;¹⁰⁵⁰
- knowledge of MLC crimes by senior MLC commanders, including Bemba, who failed to take all necessary and reasonable measures in response.¹⁰⁵¹

298. Rather than showing that the Chamber's conclusion was unreasonable on the totality of the evidence, Bemba misrepresents the Judgment and challenges each finding in isolation.¹⁰⁵²

IV.B.1. The Chamber properly considered that Bemba and MLC senior commanders actively encouraged the attack

299. Based on several findings,¹⁰⁵³ including that Bemba and senior MLC members actively encouraged the attack,¹⁰⁵⁴ the Chamber concluded that the MLC had a policy to commit such attack.¹⁰⁵⁵

300. Although calling them legal errors,¹⁰⁵⁶ Bemba advances purely factual arguments. He submits that the Chamber erred by failing to "link" the policy with the MLC.¹⁰⁵⁷ He argues incorrectly that the Chamber's conclusion that there was an MLC policy to attack the civilian population was *exclusively* based upon Bemba's and the senior MLC commanders' knowledge of the crimes and failure to take

¹⁰⁴⁹ [Judgment](#), para. 682.

¹⁰⁵⁰ [Judgment](#), para. 683.

¹⁰⁵¹ [Judgment](#), para. 684.

¹⁰⁵² [Brief](#), paras. 423-444.

¹⁰⁵³ [Judgment](#), paras. 676-684.

¹⁰⁵⁴ [Judgment](#), para. 685.

¹⁰⁵⁵ [Judgment](#), paras. 685-687.

¹⁰⁵⁶ [Brief](#), para. 427.

¹⁰⁵⁷ [Brief](#), paras. 425-426.

action,¹⁰⁵⁸ a finding which he argues does not exist in the Judgment.¹⁰⁵⁹ These arguments misrepresent the Chamber's reasoning and findings.

301. First, the Chamber properly found that senior MLC commanders were aware of MLC crimes yet failed to take action and thereby deliberately encouraged the attack.¹⁰⁶⁰ Bemba's submission that the Chamber's conclusion was based on findings that "do not exist"¹⁰⁶¹ misrepresents the Judgment. Although, for obvious reasons, the Chamber focused on Bemba's knowledge and failures,¹⁰⁶² the Chamber made findings in relation to other MLC senior commanders' knowledge and/or failures, including that:¹⁰⁶³

- Bemba and senior MLC officials discussed the media allegations of MLC crimes;¹⁰⁶⁴
- Colonel Mondonga led the Mondonga Inquiry, whose purpose was to counter media allegations and to demonstrate that action was being taken, thus "vindicating" MLC leadership of responsibility and rehabilitating MLC's image;¹⁰⁶⁵
- Colonel Mondonga transmitted to the MLC Chief of General Staff the "Bomengo case file" containing information about proceedings on charges of pillaging;¹⁰⁶⁶
- Lieutenant Bomengo handed over pillaged goods and a large amount of money to Colonel Moustapha;¹⁰⁶⁷

¹⁰⁵⁸ [Brief](#), para. 423.

¹⁰⁵⁹ [Brief](#), paras. 424-425.

¹⁰⁶⁰ [Judgment](#), paras. 684-685.

¹⁰⁶¹ [Brief](#), para. 424. *Also* para. 425.

¹⁰⁶² [Judgment](#), paras. 717, 734; [Brief](#), para. 424.

¹⁰⁶³ [Judgment](#), para. 684 (citing sections V(D) and VI(F)(4)).

¹⁰⁶⁴ [Judgment](#), para. 582.

¹⁰⁶⁵ [Judgment](#), para. 582.

¹⁰⁶⁶ [Judgment](#), para. 586.

- Before Bemba's public speech at PK12, Colonel Moustapha addressed the crowd promising that their grievances for MLC's criminal activities would be reported to Bemba;¹⁰⁶⁸
- No action was taken by MLC officials to pursue leads uncovered during the Zongo Commission investigation¹⁰⁶⁹—whose members were MLC officials;¹⁰⁷⁰
- Bemba discussed with senior MLC officials his letter to the UN representative in the CAR, General Cissé, addressing the accusations against the MLC;¹⁰⁷¹
- In response to media reports of crimes, Bemba dispatched a delegation of MLC soldiers and officials to Sibut, accompanied by reporters, headed by Colonel Thomas Luhaka, MLC Secretary General .¹⁰⁷² After the mission, an RFI article raised further allegations of MLC crimes and expressed scepticism of the MLC's actions. ¹⁰⁷³

302. The Chamber found that these measures, involving senior MLC officials, were primarily motivated to counter public allegations and rehabilitate the MLC's public image.¹⁰⁷⁴ Based on these findings and all the evidence, the Chamber reasonably concluded that Bemba and other senior MLC commanders' failure to

¹⁰⁶⁷ [Judgment](#), paras. 586-588.

¹⁰⁶⁸ [Judgment](#), para. 595.

¹⁰⁶⁹ [Judgment](#), para. 722.

¹⁰⁷⁰ [Judgment](#), para. 602.

¹⁰⁷¹ [Judgment](#), para. 604.

¹⁰⁷² [Judgment](#), para. 614.

¹⁰⁷³ [Judgment](#), para. 620.

¹⁰⁷⁴ [Judgment](#), para. 728. *Also* paras. 719-727.

take action was deliberately aimed at encouraging the attack—a factor relevant to the Chamber’s conclusion that the MLC had a policy to commit such attack.¹⁰⁷⁵

303. Further, the Chamber’s conclusion that the MLC had such a policy was not *exclusively* based upon the senior MLC commanders’ knowledge of crimes and their failure to take action.¹⁰⁷⁶ Rather, it was based on a combination of the above listed considerations—ignored by Bemba—which intrinsically linked such a policy to the MLC.¹⁰⁷⁷

304. Contrary to Bemba’s submission,¹⁰⁷⁸ the Chamber reasonably found that Bemba and senior MLC members actively encouraged the attack,¹⁰⁷⁹ and reasonably considered this circumstance, among others, to conclude that the MLC had a policy to commit such attack.¹⁰⁸⁰

IV.B.2. The Chamber properly relied on MLC troops’ *modus operandi*

305. The Chamber reasonably found that MLC troops had a consistent *modus operandi*: after General Bozizé’s rebels had left an area, MLC soldiers searched “house-to-house” for remaining rebels, raping civilians, pillaging their belongings, and occasionally killing those who resisted.¹⁰⁸¹ The MLC’s *modus operandi* was not limited to house-to-house searches or “mop up” operations:¹⁰⁸² rather, MLC soldiers “committed many acts of murder and rape, and many acts of pillaging against civilians over a large geographical area [...]”,¹⁰⁸³ targeted civilians “in and around

¹⁰⁷⁵ [Judgment](#), para. 685. Concerning the unsubstantiated submissions that i) the Chamber’s findings on Bemba’s knowledge and inadequate measures were erroneous ([Brief](#), para. 426) and ii) evidence favourable to Bemba was dismissed without reasoning ([Brief](#), para. 427), *above* paras. 195-219.

¹⁰⁷⁶ *Contra* [Brief](#), para. 423.

¹⁰⁷⁷ [Judgment](#), paras. 676-686. *Above* para. 297.

¹⁰⁷⁸ [Brief](#), paras. 423, 425.

¹⁰⁷⁹ [Judgment](#), para. 685.

¹⁰⁸⁰ [Judgment](#), para. 685.

¹⁰⁸¹ [Judgment](#), paras. 564, 676.

¹⁰⁸² *Contra* [Brief](#), paras. 430, 432. *Also below* paras. 359-363.

¹⁰⁸³ [Judgment](#), para. 563.

schools, homes, fields, and roads”¹⁰⁸⁴ and “in areas where MLC commanders and their troops were based [such as] on a ferry docked at the Port Beach naval base”.¹⁰⁸⁵

306. Thus, the Chamber properly considered the MLC’s *modus operandi* as one factor showing the MLC’s policy to attack the civilian population.¹⁰⁸⁶ Once again, Bemba misrepresents the Chamber’s reasoning and takes a piecemeal approach to the evidence.

307. First, the Chamber did not rely solely on P6 and P9’s evidence to find that MLC troops followed a *modus operandi*.¹⁰⁸⁷ The Chamber also considered P63, V2, P178, P119, P87, P47¹⁰⁸⁸ and other “reliable evidence from various sources, including testimony, as corroborated by media articles, NGO reports, and the *procès verbaux d’audition de victime* submitted to the Bangui Court of Appeals.”¹⁰⁸⁹ Bemba’s argument that the Chamber’s findings lack an evidentiary basis¹⁰⁹⁰ misrepresents the Judgment and the evidence relied on by the Chamber.

308. Second, Bemba oversimplifies P6’s and P9’s evidence by suggesting that they provided exclusively ‘hearsay’ evidence.¹⁰⁹¹ P6 (a CAR public prosecutor) and P9 (a CAR investigative judge) provided reliable and direct evidence about the CAR official judicial inquiry into the 2002-2003 CAR operation. In their official capacities, they interviewed victims of rape and pillaging and the families of those murdered.¹⁰⁹² P9 compiled a dossier with around 203 witness accounts (“*procès-verbaux d’audition de victimes*”) of multiple acts of rape, murder and pillaging

¹⁰⁸⁴ [Judgment](#), para. 563.

¹⁰⁸⁵ [Judgment](#), para. 680.

¹⁰⁸⁶ [Judgment](#), para. 676. *Contra* [Brief](#), paras. 428-432.

¹⁰⁸⁷ *Contra* [Brief](#), para. 428.

¹⁰⁸⁸ [Judgment](#), para. 564 (fns.1741-1746).

¹⁰⁸⁹ [Judgment](#), para. 563.

¹⁰⁹⁰ [Brief](#), para. 428.

¹⁰⁹¹ *Contra* [Brief](#), paras. 428, 431.

¹⁰⁹² [T-102](#), 21:8-9. *Also* [Judgment](#), para. 264.

committed by the MLC.¹⁰⁹³ The dossier was created during the immediate aftermath of the crimes¹⁰⁹⁴ and authenticated in Court by P9.¹⁰⁹⁵ The interviewed victims came from Bangui, Damara, Bossembélé, Sibut, Bossangoua and many other towns.¹⁰⁹⁶

309. Third, the MLC's *modus operandi* did not encompass only crimes committed during "house-to-house" searches for rebels or "mop up" operations.¹⁰⁹⁷ The MLC committed crimes "in and around schools, homes, fields, and roads" and in areas where MLC troops had their bases.¹⁰⁹⁸ Accordingly, Bemba's arguments disagreeing with or overlooking the Chamber's findings on the MLC's *modus operandi* should be dismissed.¹⁰⁹⁹

310. Finally, the Chamber properly considered that several charged crimes were committed by multiple perpetrators (*i.e.* they operated in groups).¹¹⁰⁰ Bemba has failed to explain why the fact that most incidents involved multiple MLC perpetrators is a circumstance that the Chamber should have ignored when establishing if the MLC had a policy to attack the civilian population.¹¹⁰¹

IV.B.3. The Chamber properly relied on the MLC troops' general motives and the MLC hierarchy's tacit approval of self-compensation

311. The Chamber reasonably found that the MLC hierarchy at least condoned the troops' self-compensation through pillaging and rape.¹¹⁰² It was thus reasonable for the Chamber to consider this factor as indicating the existence of an MLC policy to

¹⁰⁹³ [Admission Decision](#), para. 65.

¹⁰⁹⁴ [Admission Decision](#), para. 65.

¹⁰⁹⁵ [Admission Decision](#), para. 67. *Also* [Judgment](#), paras. 264-266. The Chamber relied on the dossier to the extent that it corroborated other evidence on the contextual elements of the crimes charged.

¹⁰⁹⁶ [T-102](#), 16:7-22.

¹⁰⁹⁷ [Below](#) paras. 359-363.

¹⁰⁹⁸ [Judgment](#), paras. 563, 680.

¹⁰⁹⁹ *Contra* [Brief](#), paras. 429, 431, 432.

¹¹⁰⁰ [Judgment](#), paras. 563-564.

¹¹⁰¹ [Judgment](#), para. 676 (fn. 2103). *Contra* [Brief](#) para. 432.

¹¹⁰² [Judgment](#), paras. 565-567, 678.

attack the civilian population.¹¹⁰³ Contrary to Bemba's misrepresentation,¹¹⁰⁴ the Chamber did not consider "[a]ny failure to pay"¹¹⁰⁵ to be *per se* indicative of a policy. Rather, the Chamber found that the MLC hierarchy's tacit approval of the MLC troops' self-compensation through crimes indicated, together with other factors, the existence of such a policy.¹¹⁰⁶

312. These findings do not contradict the Chamber's conclusion that CAR authorities provided logistical support to the MLC (transport, initial accommodation, weapons, ammunitions, uniforms, vehicles, fuel, food, money primarily for buying food and communication equipment).¹¹⁰⁷ The Chamber did not find that CAR authorities otherwise gave financial compensation to MLC troops.¹¹⁰⁸

313. Finally, the Chamber did not infer the existence of a policy "solely" from the MLC hierarchy's tacit approval of the attack.¹¹⁰⁹ Rather, it considered this factor together with all the evidence to conclude that the MLC had a policy to attack the civilian population.¹¹¹⁰

IV.B.4. The Chamber properly relied on the scale and degree of organisation of the pillaging

314. The Chamber found that many of the acts of rapes and murder were committed during the course of the MLC's pillaging.¹¹¹¹ The Chamber properly considered the scale and degree of organisation of those acts of pillage as well as the

¹¹⁰³ [Judgment](#), paras. 676, 678.

¹¹⁰⁴ [Brief](#), paras. 433-434.

¹¹⁰⁵ [Brief](#), para. 434.

¹¹⁰⁶ [Judgment](#), para. 678.

¹¹⁰⁷ [Judgment](#), para. 412. *Contra* [Brief](#), para. 434.

¹¹⁰⁸ *Contra* [Brief](#), para. 434.

¹¹⁰⁹ *Contra* [Brief](#), para. 435.

¹¹¹⁰ [Judgment](#), paras. 676-686. *Also above* para. 297.

¹¹¹¹ [Judgment](#), para. 679.

level of knowledge and involvement of the MLC hierarchy as indicating the existence of an MLC policy to attack the civilian population.¹¹¹²

315. Bemba confuses the legal elements of an attack against a civilian population under article 7—i.e. the multiple commission of acts referred to in article 7(1)—¹¹¹³ with the evidence revealing that such attack was part of an organisational policy. In determining whether an organisational policy exists, a Chamber may rely upon any relevant circumstance—and not only evidence of multiple underlying crimes.¹¹¹⁴

316. For instance, the following circumstances have been considered relevant to finding the existence of a policy: the historical circumstances and political background against which the criminal acts are set; the establishment of autonomous political and military structures; the general content of a political programme; media propaganda; the mobilisation of armed forces; repeated and co-ordinated military offensives; administrative discriminatory measures.¹¹¹⁵

317. Further, the MLC hierarchy knew that rapes and murders were committed in the course of pillaging.¹¹¹⁶ Bemba’s submission that there is “no evidential basis”¹¹¹⁷ for this conclusion ignores other findings, including that senior MLC commanders were informed of the crimes,¹¹¹⁸ were involved in measures primarily motivated to rehabilitate the MLC’s image¹¹¹⁹ and failed to take action in order to encourage the crimes.¹¹²⁰ In addition, the Chamber properly noted that the crimes were committed in locations where MLC troops and commanders were based.¹¹²¹ In light of these

¹¹¹² [Judgment](#), para. 679. *Contra* [Brief](#), paras. 437-438.

¹¹¹³ An attack is “a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population”: [Elements of Crimes](#), art. 7(3).

¹¹¹⁴ [Judgment](#), para. 160 (citing *inter alia* [Kenya Decision](#), paras. 87-88). *Contra* [Brief](#), para. 437.

¹¹¹⁵ [Kenya Decision](#), paras. 87-88.

¹¹¹⁶ [Judgment](#), paras. 679-680. *Contra* [Brief](#), paras. 437-438.

¹¹¹⁷ [Brief](#), para. 437.

¹¹¹⁸ *Above* paras. 299-304.

¹¹¹⁹ [Judgment](#), para. 728. *Also* paras. 719-727.

¹¹²⁰ [Judgment](#), paras. 684-685.

¹¹²¹ [Judgment](#), para. 680. *Contra* [Brief](#), para. 438.

findings and all the evidence, the Chamber reasonably concluded that MLC commanders knew that murders and rape were committed in the context of pillage and to rely on the scale and degree of organisation of the pillage as one factor, among others, to establish the MLC's policy to attack the civilian population.¹¹²² Bemba fails to show an error.

IV.B.5. The Chamber properly relied on orders to exercise vigilance, including the use of force against civilians

318. The Chamber reasonably found that “orders were issued to MLC troops during the 2002-2003 CAR Operation to exercise vigilance towards civilians in the CAR, including the use of force against them”.¹¹²³ It found that this was indicative that, at least, the commanders on the ground were aware of and authorised such treatment.¹¹²⁴ Accordingly, it properly considered this finding as indicating the MLC's policy to attack the civilian population.¹¹²⁵

319. Bemba misrepresents the Judgment.¹¹²⁶ The Chamber concluded, based on multiple evidence *taken together*,¹¹²⁷ that orders to exercise vigilance including the use of force against civilians were issued to the MLC troops.¹¹²⁸ The Chamber's finding was not based solely on the January 2003 order cited by Bemba.¹¹²⁹

320. There is no suggestion in the Chamber's reasoning that this specific order¹¹³⁰ expressly referred to the “use of force”.¹¹³¹ Since the order's content is reproduced

¹¹²² [Judgment](#), paras. 679-180.

¹¹²³ [Judgment](#), para. 573 (emphasis added). *Also* paras. 571, 682.

¹¹²⁴ [Judgment](#), para. 682.

¹¹²⁵ [Judgment](#), paras. 682, 685.

¹¹²⁶ [Brief](#), para. 440.

¹¹²⁷ P47 and P213 testified that MLC troops were instructed to treat everyone they encountered as the enemy and to kill them; P-23, P-112 and P178 testified that, in PK12, MLC troops were under order to kill civilians; P178 testified that Colonel Moustapha relayed an order to shoot anything that moved to avenge the death of Captain René. *See* [Judgment](#), paras. 568-571, 573.

¹¹²⁸ [Judgment](#), para. 573.

¹¹²⁹ *E.g.* [Judgment](#), para. 568 (recounting multiple orders). *Contra* [Brief](#) para.440.

¹¹³⁰ EVD-T-OTP-00703/CAR-D04-0002-1641.

¹¹³¹ *Contra* [Brief](#), para. 440.

both in English and French,¹¹³² there is no ambiguity in the Judgment. Further, the Chamber's conclusion¹¹³³ is not undermined by the lack of an express reference to the use of force in any of the orders discussed.

321. Finally, the Chamber's inability to determine the exact source of these orders within the MLC hierarchy is immaterial¹¹³⁴—unless Bemba is baselessly suggesting that the MLC troops acted pursuant to a policy and received orders to use force against civilians from outside the MLC organisation.

322. Accordingly, the Chamber properly considered orders issued to MLC troops to exercise vigilance including the use of force against civilians as indicative of an MLC policy to attack the civilian population.¹¹³⁵

IV.B.6. The Chamber properly relied on other factors to find an MLC policy to attack civilians

323. The Chamber also properly considered the following circumstances as indicating the existence of an MLC policy to commit the attack: the MLC's inadequate Code of Conduct and inconsistent training;¹¹³⁶ the MLC's recurrent pattern of violence;¹¹³⁷ and the MLC's punitive attack on Mongoumba.¹¹³⁸

324. When finding an MLC organisational policy to attack civilians, the Chamber reasonably considered that the MLC troops received no or minimal training and that some did not even receive adequate information about the Code of Conduct to

¹¹³² [Judgment](#), para. 568, fn. 1765.

¹¹³³ [Judgment](#), para. 573.

¹¹³⁴ [Judgment](#), para. 569. *Contra* [Brief](#), para. 441.

¹¹³⁵ [Judgment](#), paras. 682, 685.

¹¹³⁶ [Judgment](#), para. 683. *Contra* [Brief](#), para. 442.

¹¹³⁷ [Judgment](#), para. 677. *Contra* [Brief](#), para. 443.

¹¹³⁸ [Judgment](#), para. 681. *Contra* [Brief](#), para. 444.

be followed during their deployment.¹¹³⁹ Bemba's undeveloped submission¹¹⁴⁰ does not show any error in the Chamber's reasoning.

325. The Chamber also properly considered the "*recurrent pattern of violence*, carried out by MLC forces" for four and a half months over a broad geographical area encompassing each of the locations that fell under their control as indicating the MLC policy.¹¹⁴¹ Bemba's submission that the geographic and temporal scope of the crimes does not "in itself" support an organisational policy¹¹⁴² misrepresents the Judgment.¹¹⁴³

326. Finally, the Chamber properly relied on the punitive attack on Mongoumba — where only civilians were present at the relevant time — as another factor indicating the MLC policy to attack civilians.¹¹⁴⁴ First, the Chamber reasonably found that Bemba knew of the punitive attack on Mongoumba, including because he communicated with Colonel Moustapha, who led the MLC's attack, the day preceding and the day of the attack.¹¹⁴⁵ Further, Bemba's submission that the Mongoumba attack did not fit the MLC's *modus operandi*, is based on an erroneously narrow interpretation of the Chamber's findings.¹¹⁴⁶

327. Bemba merely disagrees with¹¹⁴⁷ and misrepresents¹¹⁴⁸ the Chamber's reasoning and findings but shows no error. The Chamber properly considered these

¹¹³⁹ [Judgment](#), paras. 391-393, 683.

¹¹⁴⁰ See [Brief](#) para. 442. *Also above* paras. 265-269.

¹¹⁴¹ [Judgment](#), para. 677 (emphasis added).

¹¹⁴² *Contra* [Brief](#), para. 443.

¹¹⁴³ [Judgment](#), para. 677.

¹¹⁴⁴ [Judgment](#), para. 681.

¹¹⁴⁵ [Judgment](#), para. 541. *Also above* paras. 191-192. *Contra* [Brief](#), para. 444.

¹¹⁴⁶ *Below* paras. 359-363. *Also above* para. 309.

¹¹⁴⁷ *E.g.* [Brief](#), para. 442.

¹¹⁴⁸ *E.g.* [Brief](#), paras. 443-444.

factors¹¹⁴⁹ cumulatively with others¹¹⁵⁰ as indicating the MLC policy to attack the civilian population.

328. In conclusion, the Chamber properly found beyond reasonable doubt that the contextual elements of crimes against humanity were satisfied.¹¹⁵¹ Bemba has not shown any error in the Chamber's conclusion.

IV.C. THE CHAMBER CORRECTLY APPLIED THE LAW OF PILLAGE

329. The Chamber correctly required the Prosecution to prove that the perpetrators of pillage appropriated relevant property for "private or personal use" (*mens rea*), but need not disprove that the appropriation was justified by military necessity (*actus reus*).¹¹⁵² The elements of pillage adequately ensure that the limited class of lawful military appropriations are not penalised. Bemba simply disagrees with the approach in the Statute and Elements of Crimes, and the Chamber's analysis, without showing any error. His challenge must be dismissed.¹¹⁵³

IV.C.1. Military necessity is not a general defence nor must it be disproved to establish "unlawfulness", except where specifically provided

330. Bemba argues that "the principle of military necessity" is a "part" of "the permissiveness of the *jus in bello*".¹¹⁵⁴ This implies a fundamental legal misconception. In fact, "[m]ilitary necessity is no longer, if it ever was, a general defence" to international crimes.¹¹⁵⁵ Although military necessity is one of the

¹¹⁴⁹ [Judgment](#), paras. 677, 681, 683.

¹¹⁵⁰ *Also above* para. 297.

¹¹⁵¹ [Judgment](#), para. 692.

¹¹⁵² [Judgment](#), paras. 118-125; *also* paras. 643-645.

¹¹⁵³ *Contra* [Brief](#), paras. 445-461.

¹¹⁵⁴ [Brief](#), para. 452. *Cf.* Newton, pp. 734-737 ("*jus in bello* operates on a permissive basis, *subject to express limitations*", emphasis added).

¹¹⁵⁵ Cryer et al, p. 348; Dörmann, p. 81 ("a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question and to the extent it is provided for"); UK MoD Manual, p. 23, mn. 2.3; Hayashi, p. 91.

animating principles of IHL (justifying use of force at all), it has for over fifty years been settled law that:

Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law. Articles 46, 47, and 50 of the Hague Regulations of 1907 make no such exceptions [...] The prohibitions therein contained *control, and are superior to, military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary.*¹¹⁵⁶

331. Consistent with this position in customary international law, the law of this Court recognises military necessity as a “negative element” for *certain specific crimes*,¹¹⁵⁷ but not as a general defence or a negative element which must be generally disproved in order to show “unlawfulness”.¹¹⁵⁸ Thus, the Prosecution is under no such burden for crimes where this requirement is *not* specified, including pillage. Indeed, recognising a general and implicit defence of military necessity, or a requirement generally to disprove military necessity, would by a single stroke compromise the absolute and unqualified nature of some of the most fundamental international law guarantees. Conversely, where certain war crimes *are* conditional and qualified, including by proving an absence of military necessity, the Statute makes this clear in express terms.

332. Nor do Bemba’s authorities suggest anything different.¹¹⁵⁹ While Bemba correctly concedes that “pillage is prohibited in absolute terms”, there is no basis for

¹¹⁵⁶ [Hostages Case](#), pp. 1256, 1296 (emphasis added); *also* pp. 1253, 1272, 1281. Article 47 of the Hague Regulations prohibits pillage. *Further Von Manstein*, pp. 512-513 (“Once the usages of war have assumed the status of laws they cannot be overridden by [military] necessity, except in those special cases where the law itself makes provision for that eventuality”).

¹¹⁵⁷ A negative element is an element which must be disproved by the Prosecution beyond reasonable doubt.

¹¹⁵⁸ Hosang, p. 171 (drafters of the Elements of Crimes “agreed that military necessity does not itself permit action prohibited by the laws of armed conflict. It may only be invoked if the laws of armed conflict provide for it and only to the extent that these laws provide for it”).

¹¹⁵⁹ *Contra* [Brief](#), paras. 452-453 (citing [Katanga TJ](#), para. 894; [Katanga Confirmation Decision](#), para. 318). The *Katanga* chambers considered military necessity as the negative element expressly provided for the offences in articles 8(2)(b)(xiii) and 8(2)(e)(xii). *Also* [Judgment](#), paras. 123-124.

his further claim that “military necessity [...] can be invoked as independent justification under the laws of war”.¹¹⁶⁰ To the contrary, this is wholly inconsistent with the established body of international criminal law. Other commentators cited by Bemba say the same.¹¹⁶¹ For the same reason, disproving military necessity is not required to establish “unlawfulness” in the meaning of paragraph 6 of the General Introduction to the Elements of Crimes.¹¹⁶² Sivakumaran’s reference to the concept of “military necessity” is *explanatory* of the mental element of pillage, and not intended to suggest proof of an additional element is required.¹¹⁶³

333. Bemba further neglects the “strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party”.¹¹⁶⁴ Even assuming *arguendo* that something like the IAC regime applies in NIACs,¹¹⁶⁵ the *Naletilić* Trial Chamber recognised just three ways in which belligerent occupants may lawfully subject *private property* to their military needs: forcible contribution of money from private individuals, requisition in kind and services from private individuals for needs of the army of occupation, and seizure

¹¹⁶⁰ *Contra* [Brief](#), para. 453. Newton does not assist Bemba and recognises that individual actors “cannot lawfully inject an individualized rationalization for ignoring *jus in bello*”, quoting Green’s warning against reducing “the entire body of the laws of war to a code of military convenience”: Newton, p. 737. Green further recalled that “military necessity” may only be relied upon “*when expressly permitted by the particular rule itself*”: Green, pp. 147-148 (emphasis added). *A contrario*, also [Orić 98bis Decision](#), pp. 9027, 9031 (the appropriation of food by the defenders of a besieged city potentially raising the *criminal law defence of necessity*, not military necessity); further [Katanga TJ](#), paras. 955-956.

¹¹⁶¹ *Contra* [Brief](#), para. 448 (fn. 862: citing as “Triffler” Zimmermann/Geiss, p. 452). Nothing in the cited passage supports the Appellant’s submission concerning “unlawfulness”; further Zimmermann/Geiss, p. 453 (mn. 559: “contrary to what footnote 47 [of the Elements of Crimes] seems to imply, military necessity must never function as an independent justification under the laws of war, except in those cases where ‘military necessity’ is explicitly mentioned as a legitimate exception to a given rule”).

¹¹⁶² *Contra* [Brief](#), paras. 447, 449-451, 454.

¹¹⁶³ *Contra* [Brief](#), paras. 447, 451 (citing Sivakumaran, p. 426). Although Sivakumaran prefers the notion of military necessity to explain why some property may be subject to lawful seizure, he acknowledges that this is not the present state of the law at the Court. Crucially, he acknowledges that the *existing elements* of pillage adequately ensure that “requisitioning for military purposes” remains “lawful”: Sivakumaran, p. 426 (citing UK MoD Manual, p. 395; also p. 23 (mn. 2.3)).

¹¹⁶⁴ [Delalić TJ](#), para. 587. Also e.g. [Hague Regulations](#), art. 46. *Contra* [Brief](#), para. 453.

¹¹⁶⁵ See [Brief](#), para. 450 (fn. 866: conceding 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”, emphasis added, citing Dörmann, p. 465).

of material “obviously related to the conduct of military operations”.¹¹⁶⁶ In each case, the property may only be seized with due process, frequently with a view to the payment of compensation.¹¹⁶⁷ Likewise, other kinds of potentially lawful appropriations—of *public* or “*State*” property of a nature to assist “military operations”,¹¹⁶⁸ and “enemy property or military equipment *captured on the battlefield*”¹¹⁶⁹ (war booty)—simply do not apply to the private property which the Chamber found to have been appropriated in this case.¹¹⁷⁰

334. Crucially, in any event, *none* of these five kinds of lawful appropriations may be conducted for *private gain*.¹¹⁷¹ Thus, quite apart from the clear law rejecting any notion that “military necessity is a standalone basis on which an appropriation may be lawful”,¹¹⁷² there is simply no need for such a requirement—the special intent requirement of pillage suffices to exclude liability where the appropriation is lawful.¹¹⁷³

IV.C.2. Pillage only requires proof of intent to appropriate for private or personal use

335. The Chamber reached just this conclusion.¹¹⁷⁴ It was supported in this view by footnote 62 of the Elements of Crimes,¹¹⁷⁵ relating to the special intent, which it

¹¹⁶⁶ [Naletilić TJ](#), para. 616 (citing [Hague Regulations](#), arts. 51, 52, 53(2)). Also [Martić TJ](#), para. 102; [Hadžihasanović TJ](#), para. 51; [Simić TJ](#), para. 100.

¹¹⁶⁷ E.g. [Hague Regulations](#), arts. 51, 52, 53(2).

¹¹⁶⁸ [Hague Regulations](#), art. 53(1). Property such as food may only be requisitioned subject to the needs of the civilian population: Gasser, p. 292 (mn. 551: citing [GCIV](#), art. 55).

¹¹⁶⁹ [Hadžihasanović TJ](#), para. 51 (emphasis added). Also [CIHL Rule 49](#) (property must be State property or property of a military nature; it is lawfully appropriated for the benefit of the belligerent party, not private individuals). Further [Hadžihasanović TJ](#), para. 52 (application of the doctrine of war booty to NIACs is unclear). *Contra* [Brief](#), para. 450 (fn. 867).

¹¹⁷⁰ [Judgment](#), paras. 640, 643, 646.

¹¹⁷¹ The implication that appropriations were not carried out privately but by the “warring party”, or at the order of the “commander”, is unsupported and inconsistent with the Judgment: [Judgment](#), paras. 565, 644. *Contra* [Brief](#), paras. 447, 453-454.

¹¹⁷² *Contra* [Brief](#), para. 451.

¹¹⁷³ *Contra* [Brief](#), paras. 447-448, 454. Conversely, where property is *not* appropriated for private or personal use but rather on behalf of a belligerent party as a whole, other potentially applicable offences under the Statute *do* require military necessity to be disproved: Statute, arts. 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(xii).

¹¹⁷⁴ [Judgment](#), para. 124.

understood to clarify “that the concept of military necessity”, in the context of the appropriation of property, “is incompatible with a requirement that the perpetrator intended the appropriation for private or personal use.”¹¹⁷⁶ In the broader legal context, this was the correct interpretation.¹¹⁷⁷ Bemba’s disagreement with the “order of things” in the Chamber’s analysis, and its wording, does not alter the view that the Chamber reached the only legally sustainable interpretation.

IV.C.3. Bemba merely disagrees with the Chamber’s analysis

336. Bemba’s challenge to the Chamber’s reasoning concerning the elements of pillage must also be rejected for its lack of impact on the Judgment. Even if the Prosecution had been required to disprove military necessity, the result would in this case have been the same.¹¹⁷⁸ This follows from the circumstances of the appropriations—seizing food and other items from private citizens, on an *ad hoc* basis, without record or recompense, in circumstances redolent of violence and criminality¹¹⁷⁹—which cannot remotely be considered to fall within the limited class of appropriations permitted by international law.¹¹⁸⁰ Bemba’s assertion that “[m]any of the items taken are ostensibly capable of military use” is, in this context, beside the point.¹¹⁸¹

337. Likewise, Bemba merely disagrees with the Chamber’s determination that the appropriated property was intended for private or personal use, without showing either legal error or that the Chamber was unreasonable. There is no inconsistency

¹¹⁷⁵ Statute, art. 9(1) (the Elements of Crimes “shall assist the Court in the interpretation and application” of, *inter alia*, article 8), (3).

¹¹⁷⁶ [Judgment](#), para. 124.

¹¹⁷⁷ *Contra* [Brief](#), para. 451.

¹¹⁷⁸ *Contra* [Brief](#), paras. 445, 455-458, 461.

¹¹⁷⁹ *E.g.* [Judgment](#), paras. 462-464, 466-467, 469, 471-479, 481, 483, 485, 487-488, 490-492, 494, 496-502, 508, 510-511, 516, 522-523, 531, 543, 545-554, 563-564, 625, 633-634, 640-642, 664, 673, 676, 680, 695; [Sentence](#), paras. 52-58.

¹¹⁸⁰ *Above* paras. 333-334.

¹¹⁸¹ *Contra* [Brief](#), paras. 455-456.

in the findings,¹¹⁸² nor does Bemba develop his argument that the findings were not made beyond reasonable doubt.¹¹⁸³

IV.D. CONCLUSION

338. Showing no error, the fourth ground of appeal should be dismissed.

V. IDENTIFICATION EVIDENCE WAS APPROACHED CORRECTLY

339. In determining whether each charged crime had been perpetrated by MLC soldiers, the Chamber performed a cautious¹¹⁸⁴ case-by-case assessment of the evidence¹¹⁸⁵ carefully considering factors potentially impacting negatively on the reliability of the evidence.¹¹⁸⁶ The Chamber considered several strands of evidence including: witness identification, self-identification, perpetrators' language, perpetrators' uniforms, MLC's presence in a given area (whether or not exclusive) and the fact that their actions fit with the MLC's *modus operandi* and motives.¹¹⁸⁷ The Chamber then summarised its conclusions cumulatively for each type of crime.¹¹⁸⁸ Bemba's submissions show no error.

340. First, Bemba's argument that the Chamber failed to provide sufficient reasoning¹¹⁸⁹ misrepresents the Judgment. Bemba focuses only on the Chamber's cumulative conclusions,¹¹⁹⁰ but ignores the Chamber's case-by-case analysis of the evidence.

¹¹⁸² *Contra* [Brief](#), para. 457.

¹¹⁸³ *Contra* [Brief](#), para. 460.

¹¹⁸⁴ See [Judgment](#), paras. 240-241 (citing, *inter alia*, [Kupreškić AJ](#), para. 39).

¹¹⁸⁵ [Judgment](#), sections V(C)(3)(a), V(C)(3)(b), V(C)(3)(c), V(C)(3)(d), V(C)(4)(a), V(C)(4)(b), V(C)(4)(c), V(C)(4)(d), V(C)(4)(e), V(C)(4)(f), V(C)(4)(g), V(C)(5)(b), V(C)(9), V(C)(11)(a), V(C)(11)(b).

¹¹⁸⁶ Including arguments and evidence advanced by Bemba, *e.g.* [Judgment](#), paras. 240, 626, 695.

¹¹⁸⁷ [Judgment](#), paras. 243-244, 626-628, 634-636, 642, 695.

¹¹⁸⁸ [Judgment](#), paras. 626-628 (murder), 634-636 (rape), 641-648 (pillaging).

¹¹⁸⁹ [Brief](#), paras. 465-471, 479.

¹¹⁹⁰ *E.g.* [Judgment](#), paras. 626-628, 634-636, 642.

341. Second, Bemba's submissions that the Chamber factually erred¹¹⁹¹ take a piecemeal approach to the evidence instead of one based on the totality of the evidence. Bemba challenges specific strands of evidence in isolation (such as the MLC's exclusive presence¹¹⁹² or the MLC's *modus operandi*)¹¹⁹³ but fails to show that, based on all the evidence, the Chamber's findings were unreasonable.

342. Third, Bemba's submission that the Chamber "altered" the dates of the crimes¹¹⁹⁴ to fit the MLC's movements¹¹⁹⁵ both misrepresents the Judgment and takes a piecemeal approach to the evidence. His fifth ground should be dismissed.

V.A. MLC SOLDIERS PERPETRATED RAPE AND PILLAGE

V.A.1. The Chamber provided sufficient reasoning

343. The Chamber sufficiently reasoned the identification of Bemba's subordinates as perpetrators of the crimes of rape and pillaging.¹¹⁹⁶ Bemba's arguments that the Chamber's conclusions were not adequately reasoned¹¹⁹⁷ only partially represent the Chamber's reasoning. Bemba challenges the Chamber's conclusions¹¹⁹⁸ in isolation and ignores its case-by-case analysis of the evidence.¹¹⁹⁹ His argument that "the Trial Chamber addressed the identification of each of the perpetrators [of the crimes of rape] *in one paragraph*"¹²⁰⁰ is misleading: the very same paragraph

¹¹⁹¹ [Brief](#), paras. 472-479.

¹¹⁹² [Brief](#), para. 472.

¹¹⁹³ [Brief](#), paras. 475-477.

¹¹⁹⁴ [Brief](#), paras. 483-490.

¹¹⁹⁵ [Brief](#), paras. 479-493.

¹¹⁹⁶ *E.g.* [Judgment](#), paras. 462, 467, 471-472, 480-481, 487-488, 496-497, 502, 504-508, 510, 514-515, 522, 531-533, 545-546.

¹¹⁹⁷ [Brief](#), paras. 464-471, 474.

¹¹⁹⁸ *E.g.* [Judgment](#), paras. 626-628, 634, 636, 695.

¹¹⁹⁹ *E.g.* [Judgment](#), paras. 462, 467, 471-472, 480-481, 487-488, 496-497, 502, 504, 508, 510, 514-515, 522, 531-532, 545-546.

¹²⁰⁰ [Brief](#), para. 466 (emphasis added, citing [Judgment](#), para. 634). Bemba advances "by reference" equally misleading arguments regarding pillaging: [Brief](#), para. 470.

incorporates by reference the parts of the Judgment where the Chamber set out its individualised assessments of the incidents.¹²⁰¹

344. In concluding that MLC soldiers perpetrated the crimes of rape, the Chamber considered the following evidence:¹²⁰²

Bangui:

- P68 and P68's sister-in-law: witness identification, perpetrators' language and uniforms and the MLC's exclusive presence in the area.¹²⁰³
- Two unidentified girls aged 12 and 13 years: witness identification (P119, [REDACTED], had repeated interactions with Bozizé's rebels and the MLC),¹²⁰⁴ self-identification (the perpetrators said they were sent by "Papa Bemba") and the MLC's exclusive presence in the area.¹²⁰⁵
- P87: witness identification (P87 had several interactions with MLC soldiers before and after the crimes), perpetrators' language and uniforms, and the MLC's exclusive presence in the area.¹²⁰⁶
- Eight unidentified women: witness identification (P47, a mechanic for a river transport company who ferried MLC troops to CAR), perpetrators' language, perpetrators' uniforms and the MLC's exclusive presence in the area.¹²⁰⁷

¹²⁰¹ [Judgment](#), fns. 2005-2008. On pillaging: [Judgment](#), para. 642 (fns. 2034: citing sections V(C)(3), V(C)(4), V(C)(5), V(C)(9), V(C)(11); 2035: citing section V(C)(14)).

¹²⁰² [Judgment](#), fn. 2006.

¹²⁰³ [Judgment](#), Sections V(C)(3)(a), para. 462. *Also below* paras. 368-371.

¹²⁰⁴ [Judgment](#), fn.1323 (citing [T-82](#), 25:15-17). *Also* [T-82](#), 25:18-23.

¹²⁰⁵ [Judgment](#), sections V(C)(3)(b) (para. 467), (VI)(B) (para. 634). *Also below* paras. 372-375.

¹²⁰⁶ [Judgment](#), sections V(C)(3)(c) (paras. 471-472), (VI)(A) (paras. 626-627).

¹²⁰⁷ [Judgment](#), section V(C)(3)(d) (paras. 480-481).

PK12

- P23, P80, P81, P82, and two of P23's daughters: witness identification (P23, [REDACTED],¹²⁰⁸ had several interactions with and told the MLC soldiers through a French interpreter that in PK12 there were no rebels left. The perpetrators said that P23 had to be punished for being a pro-Bozizé rebel), perpetrators' language and uniforms, and the MLC's exclusive presence in the area.¹²⁰⁹
- P69 and his wife: witness identification (P69, [REDACTED], had repeated interactions with MLC troops [REDACTED]),¹²¹⁰ perpetrators' language and uniforms and the MLC's exclusive presence in the area.¹²¹¹
- P22: witness identification, perpetrators' language and uniforms and the MLC's exclusive presence in the area.¹²¹²
- P79 and her daughter: witness identification, perpetrators' language and uniforms and the MLC's exclusive presence in the area.¹²¹³
- P42's daughter: witness identification, perpetrators' language and uniforms and the MLC's exclusive presence in the area.¹²¹⁴

¹²⁰⁸ T-50-CONF, 55:1.

¹²⁰⁹ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(a) (paras. 487-488).

¹²¹⁰ T-192-CONF, 12:1-4, 18:6-9, 24:9-10.

¹²¹¹ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(b) (para. 496), (VI)(A) (paras. 626-627).

¹²¹² [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(e) (para. 508).

¹²¹³ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(f) (para. 510).

¹²¹⁴ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(g) (para. 515).

PK22

- A woman in the bush: witness identification, perpetrators' language and the MLC's presence in the area.¹²¹⁵

Mongoumba

- P29:¹²¹⁶ witness identification, perpetrators' uniforms and the MLC's exclusive presence in the area.¹²¹⁷
- V1: witness identification (V1 acted as interpreter for the perpetrators and accompanied them while they looted Mongoumba), self-identification (the perpetrators said that their "President" was "Mr Bemba"), perpetrators' language and uniforms, and the MLC's exclusive presence in the area.¹²¹⁸

345. As for pillaging, Bemba likewise only focuses on the Chamber's conclusions and disregards its case-by-case assessment of the evidence.¹²¹⁹ The Chamber considered the following evidence:¹²²⁰

Bangui

- P68 and P68's sister-in-law: witness identification, perpetrators' language and uniforms and the MLC's exclusive presence in the area.¹²²¹

¹²¹⁵ [Judgment](#), sections V(C)(5)(b) (para. 522). *Also below* paras. 376-380.

¹²¹⁶ *Also below* para. 348.

¹²¹⁷ [Judgment](#), sections V(C)(11) (paras. 536, 543), V(C)(11)(a) (para. 545), VI(B) (para. 635).

¹²¹⁸ [Judgment](#), sections V(C)(11) (paras. 536, 543), V(C)(11)(b) (paras. 546-550), VI(A) (paras. 626-627).

¹²¹⁹ [Brief](#), para. 470.

¹²²⁰ [Judgment](#), paras. 641-642 (*especially* fns. 2033-2034).

¹²²¹ [Judgment](#), section V(C)(3)(a) (para. 462). *Also below* paras. 368-371.

- P119: witness identification (P119),¹²²² self-identification (the perpetrators said they were sent by “Papa Bemba”) and the MLC’s exclusive presence in the area.¹²²³
- P87 and her family: witness identification (P87),¹²²⁴ perpetrators’ language and uniforms, and the MLC’s exclusive presence in the area.¹²²⁵

PK12

- P23, P80, P81 and P82: witness identification (P23),¹²²⁶ perpetrators’ language and uniforms, and the MLC’s exclusive presence in the area.¹²²⁷
- P69’s sister: witness identification (P69),¹²²⁸ perpetrators’ language and uniforms, and the MLC’s exclusive presence in the area.¹²²⁹
- P69’s house in his absence: P69’s testimony that he observed MLC soldiers before and after the crime, including committing pillaging, and the MLC’s exclusive presence in the area.¹²³⁰
- P108’s house (a Senior Investigative Judge) occupied by MLC soldiers for months in his absence: P108’s testimony that upon his return he found MLC documents in his house, and the MLC’s exclusive presence in the area.¹²³¹

¹²²² Above para. 344 (Bangui).

¹²²³ [Judgment](#), sections V(C)(3)(b) (para. 467), (VI)(B) (para. 634). *Also below* paras. 372-375.

¹²²⁴ Above para. 344 (Bangui).

¹²²⁵ [Judgment](#), sections V(C)(3)(c) (paras. 471-472), VI(A) (paras. 626-627).

¹²²⁶ Above para. 344 (PK12).

¹²²⁷ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(a) (paras. 487-488).

¹²²⁸ Above para. 344 (PK12).

¹²²⁹ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(b) (para. 496), VI(A) (paras. 626-627).

¹²³⁰ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(b) (para. 497), VI(C) (para. 641).

¹²³¹ [Judgment](#), sections V(C)(4), (para. 485), V(C)(4)(c) (para. 502), VI(C) (para. 642).

- P110's house in her absence: P110's testimony that she observed MLC soldiers before and after the crime, including breaking into and pillaging other houses in PK12 (including P108's house),¹²³² and the MLC's exclusive presence in the area.¹²³³
- P112's house in his absence: P112 observed MLC soldiers before and after the crime. He was at P108's house when the MLC beat him up, broke into the house and occupied it,¹²³⁴ and the MLC's exclusive presence in the area.¹²³⁵
- P22 and her uncle: witness identification, perpetrators' language and uniforms, and the MLC's exclusive presence in the area.¹²³⁶
- P79 and her brother: witness identification, perpetrators' language and uniforms, and the MLC's exclusive presence in the area.¹²³⁷
- P73: witness identification (P73 had several interactions with MLC soldiers before and after the crime) perpetrators' language and uniforms, and the MLC's exclusive presence in the area.¹²³⁸
- P42 and his family: witness identification (P42 and his family had several interactions with MLC soldiers before and after the crimes. MLC soldiers accused his son of being a "rebel"), perpetrators' language and uniforms, and the MLC's exclusive presence in the area.¹²³⁹

¹²³² [T-125](#), 11:1-4, 16:3-24, 17:9-12, 24:2-5.

¹²³³ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(d) (paras. 504-506), VI(C) (para. 641).

¹²³⁴ [T-129](#), 5:4-6:16.

¹²³⁵ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(d) (paras. 504, 507), VI(C) (para. 641).

¹²³⁶ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(e) (para. 508).

¹²³⁷ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(f) (para. 510).

¹²³⁸ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(g) (para. 514).

¹²³⁹ [Judgment](#), sections V(C)(4) (para. 485), V(C)(4)(g) (para. 515).

PK22

- A woman in the bush outside PK22: witness identification, perpetrators' language and the MLC's presence in the area.¹²⁴⁰

Sibut

- V2's shop: V2 observed MLC soldiers, including pillaging and stockpiling pillaged items at the MLC's base. Witness identification, perpetrators' language and uniforms, and the MLC's exclusive presence in Sibut.¹²⁴¹

Mongoumba

- V1, a church, nuns, priests, an unidentified "Muslim" man and his neighbour, the gendarmerie, and the mayor in Mongoumba: V1's identification,¹²⁴² self-identification (the perpetrators said that their "President" was "Mr Bemba"), perpetrators' language and uniforms, and the MLC's exclusive presence in the area.¹²⁴³

346. In addition, for each area where the crimes charged were committed, the Chamber analysed the evidence related to the MLC's presence and whether the perpetrators' actions fit the MLC's *modus operandi*.¹²⁴⁴

¹²⁴⁰ [Judgment](#), section V(C)(5)(b) (para. 522). *Also below* paras. 376-380.

¹²⁴¹ [Judgment](#), sections V(C)(9) (paras. 531-533), VI(C) (para. 641).

¹²⁴² *Above* para. 344 (Mongoumba).

¹²⁴³ [Judgment](#), sections V(C)(11) (paras. 536, 543), V(C)(11)(b) (paras. 546-550), (VI)(A) (paras. 626-627).

¹²⁴⁴ [Judgment](#), sections V(C)(3) (paras. 459-461: Bangui), V(C)(4) (paras. 485-486: PK12); V(C)(5) (para. 520: PK22), V(C)(9) (para. 531: Sibut); V(C)(11) (paras. 543-544: Mongoumba); V(C)(14) (paras. 563-573). *Also* paraa. 634 (fn. 2007), 642 (fn. 2035) (citing section V(C)(14) and its prior findings on MLC's *modus operandi*).

347. Further, the Chamber considered the Defence submissions at trial,¹²⁴⁵ particularly that crimes were allegedly committed by “other loyalist forces and General Bozizé’s rebels, some of whom spoke Lingala or wore uniforms similar” to the MLC.¹²⁴⁶ Although a Trial Chamber need not recite each argument advanced by the Parties¹²⁴⁷—the Chamber did adequately address “significant factors impacting negatively on the reliability of the identification evidence.”¹²⁴⁸ The Chamber also referred to several parts of the Bemba Final Brief, including the paragraphs Bemba now argues were disregarded.¹²⁴⁹

348. Moreover, Bemba’s challenge to the identification of P29’s and P22’s rapists is futile. First, although P29 had testified that she could not detect the dialect of the perpetrators,¹²⁵⁰ the Chamber noted other criteria.¹²⁵¹ In particular, MLC soldiers were the only force present in the area,¹²⁵² and reliable testimony—corroborated by media reports—indicating that MLC soldiers committed pillaging, rape and murder in Mongoumba.¹²⁵³ Indeed, Colonel Moustapha passed the order to the MLC troops to carry out a *punitive* operation against (to “go and wipe out”) Mongoumba.¹²⁵⁴

349. Second, although P22 testified that the perpetrators wore uniforms with Presidential Guard (“GP”) insignia,¹²⁵⁵ the Chamber reasonably found that she was raped by MLC soldiers.¹²⁵⁶ P22 testified that one perpetrator had said that President

¹²⁴⁵ E.g. [Judgment](#), fns. 542-545, 548, 1330, 1350, 1378, 1391, 1393, 1580, 1696, 1787-1788. *Contra* [Brief](#), para. 468.

¹²⁴⁶ [Judgment](#), para. 695.

¹²⁴⁷ [Lubanga Redactions AD](#), para. 20.

¹²⁴⁸ [Kupreškić AJ](#), para. 39 (cited in [Judgment](#), para. 241). *Also* [Haradinaj AJ](#), para. 152.

¹²⁴⁹ *Compare* [Judgment](#), para. 695 (fn. 2126: citing *inter alia* [Bemba Final Brief](#), paras. 521-593) with [Brief](#), para. 468 (fn. 901: suggesting the Chamber ignored the Appellant’s submissions in [Bemba Final Brief](#), paras. 538-593).

¹²⁵⁰ [Judgment](#), para. 635 (citing also para. 545). *Contra* [Brief](#), para. 467.

¹²⁵¹ [Judgment](#), para. 635.

¹²⁵² [Judgment](#), paras. 536, 543.

¹²⁵³ [Judgment](#), para. 543. *Also* paras. 536-542.

¹²⁵⁴ [Judgment](#), paras. 538, 540.

¹²⁵⁵ *Contra* [Brief](#), para. 468.

¹²⁵⁶ [Judgment](#), para. 508.

Patassé provided them with GP uniforms,¹²⁵⁷ which is consistent with the Chamber's finding that MLC soldiers were given new CAR military uniforms.¹²⁵⁸ In addition, the perpetrators spoke Lingala¹²⁵⁹ and the MLC was the only force present in PK12.¹²⁶⁰ Further, the Chamber considered the Defence submissions about P22's credibility and testimony.¹²⁶¹

350. Finally, the Chamber did not ignore—but considered¹²⁶²—the Defence's submissions that some attackers spoke Sango.¹²⁶³ It noted the Defence's submissions on the language of the attackers and referred to the same paragraphs of the Bemba Final Brief¹²⁶⁴ that Bemba now argues were ignored.¹²⁶⁵ No error is shown.

V.A.2. The Chamber reasonably concluded that the perpetrators of rape and pillage were MLC soldiers

351. Based on all the evidence, the Chamber reasonably concluded that MLC soldiers perpetrated the charged crimes of rape and pillage.¹²⁶⁶ It did not err in fact.¹²⁶⁷

352. Bemba's argument that the Chamber's reasoning was erroneous¹²⁶⁸ is based on a piecemeal approach to the evidence. He challenges specific strands of evidence in isolation (*i.e.* MLC's exclusive presence;¹²⁶⁹ MLC's *modus operandi*)¹²⁷⁰ but fails to

¹²⁵⁷ [T-41](#), 16:23-17:2.

¹²⁵⁸ [Judgment](#), para. 508. *Also* Prosecution Final Brief, para. 191.

¹²⁵⁹ [Judgment](#), para. 508.

¹²⁶⁰ [Judgment](#), para. 486.

¹²⁶¹ [Judgment](#), para. 240 (fn. 543: citing [Bemba Final Brief](#), paras. 526, 536, 558-573). *Also* [Judgment](#), paras. 626, 695.

¹²⁶² [Judgment](#), paras. 24 (fn. 544), 695 (fn. 2126) (citing *inter alia* [Bemba Final Brief](#), para. 589).

¹²⁶³ *Contra* [Brief](#), para. 469.

¹²⁶⁴ *E.g.* [Judgment](#), paras. 240 (fn. 544), 695 (fn. 2126) (citing *inter alia* [Bemba Final Brief](#), para. 589).

¹²⁶⁵ [Brief](#), para. 469 (fn. 910: citing [Bemba Final Brief](#), para. 589). Relevant text repeated *verbatim*.

¹²⁶⁶ [Judgment](#), paras. 636, 642.

¹²⁶⁷ *Contra* [Brief](#), paras. 472-478.

¹²⁶⁸ [Brief](#), paras. 472-479.

¹²⁶⁹ [Brief](#), para. 472.

¹²⁷⁰ [Brief](#), paras. 475-477.

show that the Chamber's conclusion—based on all the evidence—was unreasonable.

VI.A.2.a. MLC's exclusive presence

353. The Chamber considered the MLC's exclusive presence in a given place at the time of the crimes as one of the factors to determine the perpetrator's identity *only* for those incidents where it was convinced, after a case-by-case assessment of the evidence, that no other force was active there.¹²⁷¹

354. Bemba misreads paragraph 695 of the Judgment when he suggests that the Chamber made a general and ambiguous finding that the MLC's soldiers were *often* but not *always* the only force present.¹²⁷² However, for each location the Chamber assessed whether the MLC was the only force present¹²⁷³—paragraph 695 being its summary conclusion.

355. Additionally, none of the findings cited by Bemba¹²⁷⁴ is inconsistent with the Chamber's conclusions that MLC soldiers were *often* the only force present.¹²⁷⁵

V.A.2.b. Witnesses' identification of the perpetrators as "Banyamulenge" or MLC

356. The Chamber properly approached the witnesses' identifications of the perpetrators as "Banyamulenge" or MLC with particular caution.¹²⁷⁶ In addressing

¹²⁷¹ For **Bangui**, e.g. [Judgment](#) paras. 458-460 (MLC presence in Bangui), 462 (events in Bondoro), 467 (events around P119's house), 471 (events at P87's house), 480 (events at Port Beach naval base). For **PK12**, e.g. [Judgment](#), paras. 485 (MLC's exclusive presence in PK12, relevant to events at the house of P22's uncle, at P73's house and at P42's compound), 487 (events at P23's compound), 496 (events at P69's house), 502 (events at P108's house), 510 (events at P79's house), 641 (events around the houses of P110 and P112). For **Sibut**, e.g. [Judgment](#), paras. 531, 641 (MLC's exclusive presence in Sibut, relevant to pillaging of V2's shop). For **Mongoumba**, e.g. [Judgment](#), para. 543 (MLC's exclusive presence in Mongoumba, relevant to events at P29's house and events experienced by V1).

¹²⁷² [Brief](#), para. 472 (citing [Judgment](#), para. 695).

¹²⁷³ *Above* fn. 1271.

¹²⁷⁴ [Brief](#), fn. 920.

¹²⁷⁵ *Above* fn. 1271.

¹²⁷⁶ *Contra* [Brief](#), paras. 473-474.

the Defence's trial submissions,¹²⁷⁷ it observed that a Chamber "must be extremely cautious in assessing [identification evidence] due to 'vagaries of human perception and recollection' in particular where identification is made in turbulent and traumatising circumstances."¹²⁷⁸

357. It pursuing its cautious approach the Chamber noted that "[i]n case a single identifying factor or piece of evidence is not sufficient to satisfy the Chamber beyond reasonable doubt as to the identification of an individual, the Chamber may still be satisfied based on the cumulative effect of the relevant evidence *as a whole*."¹²⁷⁹ The Chamber did not take witnesses' identifications "at face value", but rather assessed their evidence in light of all the evidence.¹²⁸⁰

358. Bemba's submission that the Chamber ignored relevant precedents concerning "auditory identification"¹²⁸¹ is misplaced. Not a single perpetrator was identified based on "auditory identification" or in circumstances comparable to those in the cases he cites.¹²⁸²

V.A.2.c. MLC's *modus operandi* and general motives

359. The Chamber properly considered the MLC's *modus operandi* and their general motives as relevant factors for the identification of the perpetrators.¹²⁸³ The Chamber carefully assessed evidence relating to MLC troops' conduct in the

¹²⁷⁷ [Judgment](#), para. 240 (fns. 542-545: citing *inter alia* [Bemba Final Brief](#), paras. 299-374, 453-520, 522-526, 536, 544-574, 593).

¹²⁷⁸ [Judgment](#), para. 241. The Chamber relied, *inter alia*, on [Kunarac TJ](#), para 561—upon which Bemba also relies: [Brief](#), fn. 923. *Also* [Judgment](#), paras. 240, 242-244.

¹²⁷⁹ [Judgment](#), para. 244 (emphasis added).

¹²⁸⁰ *Contra* [Brief](#), para. 474.

¹²⁸¹ [Brief](#), para. 474.

¹²⁸² Bemba refers to *Boškoski* where witnesses (kept with their heads covered) could not see but only hear the voices of the perpetrators: [Brief](#), para. 474 (citing [Boškoski TJ](#), para. 546). The other precedent (*R v. Flynn and St John* [2008] 2 Cr. APP. R. 20) is even less pertinent since it concerns police officers recognising the voices of the accused from conversations recorded in the van they had used to commit a robbery.

¹²⁸³ [Judgment](#), paras. 627, 634, 642, 695. *Contra* [Brief](#), paras. 475-477.

area,¹²⁸⁴ and reasonably found that the perpetrators' charged crimes accorded with their *modus operandi* and general motives.¹²⁸⁵

360. Bemba's submission that the Chamber applied a "circular logic"¹²⁸⁶ is misleading: the Chamber relied on different evidence to assess the MLC's *modus operandi* and general motives,¹²⁸⁷ and to establish the commission of the crimes.¹²⁸⁸ Contrary to Bemba's suggestion,¹²⁸⁹ no identification was made solely on the basis that the crimes accorded with the MLC's *modus operandi*. The Judgment paragraphs he refers to do not support his contention.¹²⁹⁰

361. Further, Bemba's submission that rapes in the bush, in a ditch, on a boat or on a road do not fit the MLC's *modus operandi*¹²⁹¹ misrepresents the Judgment. As noted above, the MLC's *modus operandi* did not only encompass house-to-house searches or "mop up" operations.¹²⁹² Rather, crimes were also committed over large geographical areas in schools, fields, roads and bases where MLC troops settled.¹²⁹³

362. As such, the Chamber did not err by finding that (i) the rape and pillaging of a woman in the bush,¹²⁹⁴ (ii) the rape of two girls in a canal near P119's compound,¹²⁹⁵

¹²⁸⁴ [Judgment](#), paras. 563-564.

¹²⁸⁵ [Judgment](#), paras. 627, 634, 642, 695.

¹²⁸⁶ [Brief](#), para. 476.

¹²⁸⁷ In its conclusions on the MLC's *modus operandi*, the Chamber relied on documents, overview witnesses and insider witnesses (including P6, P9, P63, P178, P119, and P47): [Judgment](#), paras. 563-564. Only P87, cited once at fn. 1745, was also a victim of the charged crimes.

¹²⁸⁸ [Judgment](#), paras. 459-554.

¹²⁸⁹ [Brief](#), para. 475.

¹²⁹⁰ [Brief](#), fn. 927 (citing [Judgment](#), paras. 452, 627, 642, 671, 676, 680). Paragraph 452 is an introduction to section (C); paragraphs. 627 and 642 list *several* factors which the Chamber relied on to determine the identity of the perpetrators, not solely the MLC's *modus operandi*. Paragraphs 671, 676, and 680 do not deal with the perpetrators' identifications.

¹²⁹¹ [Brief](#), para. 477. *Also above* paras. 305-309.

¹²⁹² *Contra* [Brief](#), para. 477.

¹²⁹³ [Judgment](#), paras. 563, 680

¹²⁹⁴ [Judgment](#), paras. 522-523; *contra* [Brief](#), para. 477. The Appellant omits mentioning that the bush was just outside PK22, which had been captured by the MLC.

¹²⁹⁵ [Judgment](#), paras. 467-470; *contra* [Brief](#), para. 477. The Appellant omits mentioning that the ditch was located behind P119's compound when it was stormed by the MLC.

(iii) the rape and pillaging of P68 and her sister-in-law in a compound¹²⁹⁶ and (iv) the rape of eight women at the Port Beach naval base¹²⁹⁷ fit the MLC's *modus operandi*.

363. In conclusion, the Chamber properly found that the crimes of rape and pillaging attributed to Bemba were committed by MLC soldiers. Bemba fails to show any legal or factual error in the Chamber's findings.

V.B. MLC SOLDIERS PERPETRATED MURDER

364. The Chamber likewise followed a cautious approach¹²⁹⁸ and properly identified the perpetrators of murder as MLC soldiers. Bemba fails to show an error in these findings.¹²⁹⁹

365. First, as explained above,¹³⁰⁰ the Chamber was fully entitled to rely upon V1's testimony to conclude that MLC soldiers murdered an unidentified Muslim man. Second, the Chamber reasonably found that MLC soldiers killed P87's brother¹³⁰¹ by considering: (i) P87's repeated interactions that day with the MLC soldiers who raped her and pillaged her belongings;¹³⁰² (ii) the MLC's exclusive presence in the Fourth Arrondissement;¹³⁰³ (iii) the perpetrators spoke French and Lingala and no Sango;¹³⁰⁴ (iv) the perpetrators wore army uniforms like those provided to the MLC when they deployed;¹³⁰⁵ and (v) crime scene analysis.¹³⁰⁶

¹²⁹⁶ [Judgment](#), paras. 462-466; *contra* [Brief](#), para. 477. The Appellant omits mentioning that the victims were captured on the road in the Bondoro neighbourhood of Bangui which was occupied by the MLC, and victimised in a compound.

¹²⁹⁷ [Judgment](#), paras. 480-483; *contra* [Brief](#), para. 477. The Appellant omits mentioning that "the boat" was docked at the Port Beach naval base in Bangui which was occupied by the MLC.

¹²⁹⁸ [Judgment](#), para. 241 (citing [Kupreškić AJ](#)). *Contra* [Brief](#), para. 479 (citing [Kupreškić AJ](#)).

¹²⁹⁹ [Judgment](#), paras. 626-627. *Contra* [Brief](#), para. 479.

¹³⁰⁰ *Above* paras. 95-102. *Contra* [Brief](#), para. 479.

¹³⁰¹ [Judgment](#), paras. 471-472, 626-627. *Contra* [Brief](#), para. 479.

¹³⁰² [Judgment](#), para. 626 (fns. 1980-1981: citing paras. 471-472).

¹³⁰³ [Judgment](#), para. 626 (fns. 1983, 1985: citing section V(C)(3)(c) (para. 471)).

¹³⁰⁴ [Judgment](#), para. 626 (fn. 1986: citing paras. 471-472).

¹³⁰⁵ [Judgment](#), para. 626 (fn. 1978: citing para. 472). *Also* para. 412.

366. Third, the Chamber reasonably found that MLC soldiers murdered P69's sister¹³⁰⁷ by relying on¹³⁰⁸ (i) P69's identification (based on his repeated interactions with MLC soldiers),¹³⁰⁹ (ii) the perpetrators' language, (iii) the perpetrators' uniforms, (iv) the MLC's exclusive presence in PK12¹³¹⁰ and (v) that it fit the MLC's *modus operandi*.¹³¹¹

V.C. THE CHAMBER DID NOT "ALTER THE DATES OF THE CRIMES" TO FIT THE MLC'S MOVEMENTS

367. The Chamber reasonably found that MLC soldiers raped and pillaged P68 and her sister-in-law at the end of October 2002,¹³¹² raped two unknown girls aged 12 or 13 years near P119's house on or around 30 October 2002,¹³¹³ and raped and pillaged a woman in the bush near PK22 in November 2002.¹³¹⁴ Bemba's argument that the Chamber deliberately misapprehended the evidence¹³¹⁵ and "altered the dates [of the crimes] to fit the MLC's movements"¹³¹⁶ is factually unsubstantiated.

V.C.1. The rape and pillage of P68 and P68's sister-in-law in Bondoro (Fourth Arrondissement)

368. The Chamber reasonably found that MLC soldiers raped and pillaged P68 and her sister-in-law at the end of October in the Fough neighbourhood of the Fourth Arrondissement.¹³¹⁷ Bemba argues that the crimes occurred on 27 October and that

¹³⁰⁶ [Judgment](#), para. 478.

¹³⁰⁷ [Judgment](#), paras. 496, 626-627. *Contra* [Brief](#), para. 479.

¹³⁰⁸ [Judgment](#), paras. 626-627 (fns. 1980-1981, 1983-1984, 1986: citing *inter alia* paras. 496-500).

¹³⁰⁹ [REDACTED]: T-192-CONF, 12:1-3, 18:8, 24:10.

¹³¹⁰ [Judgment](#), paras. 485, 496.

¹³¹¹ [Judgment](#), paras. 486, 627.

¹³¹² [Judgment](#), paras. 459-460, 462-466, 633, 640.

¹³¹³ [Judgment](#), paras. 459-460, 467-469, 633.

¹³¹⁴ [Judgment](#), paras. 522, 633, 640.

¹³¹⁵ [Brief](#), para. 482.

¹³¹⁶ [Brief](#), sub-title preceding para. 480; *also* para. 481.

¹³¹⁷ [Judgment](#), paras. 459-460, 462-466, 633, 640.

the Chamber “altered” their dates.¹³¹⁸ This is not correct. The Chamber’s finding was reasonable.

369. First, Bemba does not show that the Chamber, by referring to “the end of October”, meant a different date than 27 October 2002.

370. Second, whether the Chamber described the crimes as taking place “on 27 of October” or “at the end of October” is irrelevant since the MLC was active in the Fouh neighbourhood of the Fourth Arrondissement from 27 October.¹³¹⁹

371. The Chamber found that, upon their arrival in CAR on 26 October, MLC troops were transported to the Support Regiment, near Camp Beal and the Forth Arrondissement.¹³²⁰ Since then and until 30 October, they progressively advanced through the neighbourhoods of 36 Villas, Fouh and Bogombo.¹³²¹ By 30 October, after a large scale operation,¹³²² Bozizé’s rebels completely withdrew from Bangui and the MLC took control of the entire Fourth Arrondissement.¹³²³ Contrary to Bemba’s submissions,¹³²⁴ MLC troops were present and active in—although not in control of—the Fouh neighbourhood of the Fourth Arrondissement as early as 27 October, when the crimes took place. P68 further confirmed that she did not see any other armed group in the neighbourhood at that time.¹³²⁵

¹³¹⁸ [Brief](#), paras. 483-484.

¹³¹⁹ [Judgment](#), paras. 458-459. *Contra* [Brief](#), para. 485.

¹³²⁰ [Judgment](#), para. 458-459. *Also* paras. 455-457 (discussing evidence, including Defence evidence, of the beginning of the 2002-2003 CAR operation).

¹³²¹ [Judgment](#), paras. 458-459.

¹³²² [Judgment](#), para. 459.

¹³²³ [Judgment](#), para. 460.

¹³²⁴ [Brief](#), para. 485.

¹³²⁵ [Judgment](#), para. 462 (fn. 1309 : citing P68’s testimony: [T-48](#), 22:7-14).

V.C.2. The rape of two unknown girls near P119's house in Boy-Rabé (Fourth Arrondissement)

372. Similarly, the Chamber reasonably found that MLC soldiers raped two unidentified girls aged 12 or 13 *on or around* 30 October near P119's compound in the Boy-Rabé neighbourhood of the Fourth Arrondissement. The Chamber's finding that the MLC soldiers committed the rapes *on or around* 30 October¹³²⁶ is consistent with P119's testimony that she witnessed the rapes on 28 October.¹³²⁷

373. P119, [REDACTED], testified that on 28 October, Bozizé's rebels took refuge in her neighbourhood of Boy-Rabé.¹³²⁸ She prepared food for them.¹³²⁹ They wore civilian clothes and later that day they fled because of the MLC bombing.¹³³⁰ Soon after the rebels left, MLC soldiers arrived.¹³³¹ P119 was thus positioned to clearly distinguish Bozizé's rebels from the MLC soldiers. She testified that, unlike Bozizé's rebels, they had brand new military uniforms,¹³³² they spoke Lingala,¹³³³ and they said they had been sent by "Papa Bemba".¹³³⁴

374. The MLC troops were present and active in the Fourth Arrondissement as early as 27 October,¹³³⁵ although they took full control of it on 30 October.¹³³⁶ P119 testified that MLC soldiers were the only force present in Boy-Rabé at the time of the crime.¹³³⁷ Thus, whether the crimes took place *on or around 30 October* or

¹³²⁶ [Judgment](#), paras. 467-470, 633.

¹³²⁷ *Contra* [Brief](#), para. 489.

¹³²⁸ [T-82](#), 25:15-17 (cited at [Judgment](#), fn.1323).

¹³²⁹ [T-82](#), 25:14-23.

¹³³⁰ [T-82](#), 25:7-17, 26:6-16; [T-84](#), 14:15-22 (all cited at [Judgment](#), fn.1323).

¹³³¹ [T-82](#), 27:7-11 (cited at [Judgment](#), fn.1323).

¹³³² [T-82](#), 28:14-23 (cited at [Judgment](#), fn.1323).

¹³³³ [T-82](#), 33:6-7.

¹³³⁴ [T-82](#), 34:1-2 (cited at [Judgment](#), fn.1323).

¹³³⁵ [Judgment](#), paras. 458-459. *Above* paras. 370-371. *Contra* [Brief](#), paras. 489-490.

¹³³⁶ [Judgment](#), para. 460.

¹³³⁷ [T-82](#), 31:2-22 (partially cited at [Judgment](#), fn.1323); [T-84](#), 14:15-15:8 (cited at [Judgment](#), fn.1323)

specifically on 28 October is irrelevant.¹³³⁸ either way the MLC was the only force present in Boy-Robé near P119's compound when the crimes occurred.

375. Bemba does not address this evidence, but instead misquotes the Judgment's finding that on 30 or 31 October the MLC advanced to PK12, *after* having passed through the northern neighbourhoods of Bangui in the prior days¹³³⁹ (i.e. from no later than 27 October to 30 October).¹³⁴⁰

V.C.3. The rape and pillage of a woman in the bush outside PK22

376. The Chamber reasonably found that MLC soldiers raped a woman and pillaged her belongings in the bush outside PK22 in November 2002.¹³⁴¹ Bemba's reiteration of his trial submission that the crimes took place earlier—at the end of October—when MLC troops were not active in PK22,¹³⁴² is based on a piecemeal approach to the evidence.

377. P75 clearly and consistently described the events she witnessed, including identifying the perpetrators as MLC. She testified that, at PK22, a man told her to hide in the bush since "the Banyamulengue are already looting and raping women".¹³⁴³ In the bush, P75 encountered [REDACTED]¹³⁴⁴ who [REDACTED].¹³⁴⁵ Her identification was highly reliable since [REDACTED] before the crimes and could distinguish their clothing, language and behaviours.¹³⁴⁶ [REDACTED], [REDACTED].¹³⁴⁷ [REDACTED].¹³⁴⁸

¹³³⁸ *Contra* [Brief](#), para. 489.

¹³³⁹ [Brief](#), para. 490 (misquoting [Judgment](#), para. 485).

¹³⁴⁰ [Judgment](#), paras. 458-459.

¹³⁴¹ [Judgment](#), para. 522.

¹³⁴² [Brief](#), paras. 486-488. *Also* [Bemba Final Brief](#), para. 322.

¹³⁴³ T-92-CONF, 8:13-19.

¹³⁴⁴ T-92-CONF, 19:15-20 (cited at [Judgment](#), fn.1569).

¹³⁴⁵ T-92-CONF, 8:13-19. *Also* [Judgment](#), para. 522.

¹³⁴⁶ T-92-CONF, 8:9-15, 16:14-20, 17:1-11.

¹³⁴⁷ T-92-CONF, 22:3-20.

¹³⁴⁸ T-92-CONF, 20:25-21:17.

378. Bemba disregards this evidence¹³⁴⁹ and exclusively focuses¹³⁵⁰ on P75's testimony about the date of the crimes—and the Chamber's finding that she could not exactly remember it¹³⁵¹ (which is understandable considering the time elapsed and [REDACTED]).¹³⁵²

379. As for the MLC's presence in the area, the Chamber reasonably found that they had arrived in the vicinity of PK22 (about 8 kilometres from PK12)¹³⁵³ *before* 15 November 2002.¹³⁵⁴ The evidence, including Bemba's statement to the BBC on 1 November,¹³⁵⁵ mostly points to their arrival in the very early days of November.¹³⁵⁶

380. In light of all the evidence the Chamber reasonably concluded that the crime P75 witnessed took place in November and not in October 2002. The Chamber did not "misconstru[e] the evidence to make the date fit its theory".¹³⁵⁷ Rather, it assessed P75's testimony against the totality of the evidence to reasonably so conclude.¹³⁵⁸

¹³⁴⁹ [Judgment](#), paras. 522-523, 633, 640.

¹³⁵⁰ [Brief](#), para. 486.

¹³⁵¹ T-93-CONF, 4:25-5:7. See [Judgment](#), fn. 1569.

¹³⁵² [Judgment](#), para. 230.

¹³⁵³ [T-64](#), 13:16.

¹³⁵⁴ [Judgment](#), para. 520.

¹³⁵⁵ EVD-T-OTP-00821/CAR-OTP-0030-0274, at 0274 (Bemba's statement to the BBC on 1 November 2002 that MLC troops were more than 20 kilometres outside Bangui).

¹³⁵⁶ T-33-CONF, 23:5-7, 24:15-17; [T-64](#), 10:13-22, 13:13-19 (MLC went to PK22 one to three days after they arrived in PK12); EVD-T-OTP-00399/CAR-OTP-0004-0343 (10 November letter to the UN, including from the inhabitants of PK22, denouncing MLC crimes).

¹³⁵⁷ *Contra* [Brief](#), para. 490.

¹³⁵⁸ [Judgment](#), para. 522 (*especially* fn. 1569).

V.D. CONCLUSION

381. The Chamber properly found that MLC soldiers perpetrated the crimes of rape, pillaging and murder for which Bemba was convicted. Bemba has failed to show that the Chamber erred in law or fact. This ground of appeal should be dismissed.

VI. THE PROCEDURE WAS CORRECT

VI.A. P169, P178 AND THE 19 PROTECTED WITNESSES WERE ASSESSED PROPERLY

382. The Chamber properly assessed P169, P178 and the 19 Protected Witnesses.¹³⁵⁹ It appropriately investigated and dismissed Bemba's allegations that these witnesses had colluded or acted corruptly,¹³⁶⁰ based on P169's letters to the Court.¹³⁶¹ It did not err by recalling P169¹³⁶² but not P178.¹³⁶³ Even so, the Chamber exercised particular caution before relying on P169 and P178.¹³⁶⁴

383. Bemba's arguments do not meet the standard of appellate review. He does not show error simply by re-arguing his failed trial arguments, second-guessing the Chamber's reasonable assessment (often by selectively presenting the record), and interpreting differently evidence considered and properly rejected.¹³⁶⁵

VI.A.1. The Chamber properly assessed Prosecution witnesses

384. The Chamber properly assessed the merits and the limitations of P169, P178 and the 19 Protected Witnesses before relying on their testimony. It found that P169 explained the basis for his knowledge and openly admitted when he lacked the

¹³⁵⁹ *Contra Brief*, paras. 494-520.

¹³⁶⁰ *Contra Brief*, paras. 495, 506, 517.

¹³⁶¹ *Judgment*, paras. 318-319; *P178 Recall Decision*, para. 22; *Witness Contacts Decision*, para. 34.

¹³⁶² *Judgment*, para. 317; *P169 Recall Decision*.

¹³⁶³ *P178 Recall Decision*.

¹³⁶⁴ *Judgment*, paras. 328-329, 540.

¹³⁶⁵ *Ngudjolo AJ*, para. 198.

relevant information to respond.¹³⁶⁶ Following P169's letters to the Court about non-payment for income loss, and attaching the list of protected witnesses, the Chamber recalled P169 and allowed the Defence to question him.¹³⁶⁷ P169 reaffirmed his initial testimony was truthful, and confirmed he did not wish to reconsider it.¹³⁶⁸ He clarified that his claims of witnesses' subornation were untrue.¹³⁶⁹ The Chamber noted his testimony lacked clarity on the source, drafting and meaning of the letters, his use of the protected witnesses list and his meetings with P42 and/or P178.¹³⁷⁰ But, based on the whole record, it reasonably dismissed Bemba's allegations and found P169 credible. The Chamber nevertheless applied particular caution to his testimony.¹³⁷¹

385. Likewise, the Chamber carefully assessed P178.¹³⁷² Although P178 did not see the crimes being committed, he "gave a detailed account of events he allegedly witnessed, or explained the basis of his knowledge."¹³⁷³ The Chamber properly considered P178's source of knowledge in assessing his testimony.¹³⁷⁴ Noting that P169 had clarified that his witness subornation claims were untrue,¹³⁷⁵ the Chamber reasonably found no reason to doubt P178's testimony arising from P169's letters.¹³⁷⁶ The Chamber nevertheless applied particular caution to P178's testimony.¹³⁷⁷

386. The Chamber did not err.¹³⁷⁸ First, the Chamber appropriately investigated and considered Bemba's allegations of collusion and corruption among Prosecution witnesses. Second, based on P169's recalled testimony and the Prosecution's and

¹³⁶⁶ [Judgment](#), para. 327.

¹³⁶⁷ *E.g.* [T-362](#), 10:15-52:25; [T-363](#), 1:1-28:11.

¹³⁶⁸ [Judgment](#), para. 321 (fn. 779: [T-361](#), 40:20-41:11; 42:16-22; [T-362](#), 9:14-10:9).

¹³⁶⁹ [Judgment](#), para. 322 (fn. 781: T-363-CONF, 22:15-25).

¹³⁷⁰ [Judgment](#), para. 320.

¹³⁷¹ [Judgment](#), paras. 328-329, 540.

¹³⁷² [Judgment](#), paras. 329-330, 325, 327.

¹³⁷³ [Judgment](#), para. 327.

¹³⁷⁴ [Judgment](#), para. 327.

¹³⁷⁵ [Judgment](#), para. 322 (fn. 781: T-363-CONF, 22:15-25).

¹³⁷⁶ [Judgment](#), para. 322.

¹³⁷⁷ [Judgment](#), para. 329.

¹³⁷⁸ *Contra* [Brief](#), paras. 495, 506, 508-514.

VWU's independent reports, it reasonably dismissed those allegations—it saw no reason to doubt the 19 Protected Witnesses' testimony and relied cautiously on P169 and P178. Third, Bemba does not show error in the Chamber dismissing his discrete challenges to the Chamber's assessment of P169, P178 and the 19 Protected Witnesses. Fourth, Bemba does not show error in the Chamber relying on P169 and P178 for the Mongoumba attacks.

VI.A.1.a. The Chamber properly investigated and considered Bemba's allegations

387. In dismissing Bemba's challenges to the credibility of P169, P178 and the 19 Protected Witnesses based on their alleged collusion, the Chamber recalled its prior finding that "[P]169's testimony and [the Prosecution's and VWU's reports on] the alleged [witness contacts], is in line with the Chamber's assessment that the [D]efence's allegations of collusion among [Prosecution] witnesses is unsubstantiated."¹³⁷⁹ The Chamber had also found unsubstantiated Bemba's assertions that P169, P178 and the 19 Protected Witnesses had "acted as a collective bargaining unit."¹³⁸⁰ In its Judgment, the Chamber dismissed Bemba's attempt to seek reconsideration of these prior findings absent further substantiation of his allegations.¹³⁸¹

388. The Chamber properly investigated Bemba's allegations and did not simply rely on P169's recalled testimony to assess Bemba's claims.¹³⁸² The Chamber ordered the Prosecution and VWU to independently investigate the allegations.¹³⁸³ They interviewed P169, P178 and many of the 19 Protected Witnesses, and submitted reports to the Chamber, which were disclosed to the Defence.¹³⁸⁴ Based on these

¹³⁷⁹ [Judgment](#), para. 318; [P178 Recall Decision](#), para. 22; [Witness Contacts Decision](#), para. 34.

¹³⁸⁰ [Judgment](#), para. 318; [P178 Recall Decision](#), para. 22; [Witness Contacts Decision](#), para. 34.

¹³⁸¹ [Judgment](#), para. 319.

¹³⁸² *Contra* [Brief](#), paras. 506-515.

¹³⁸³ [Investigations Decision](#), para. 13; [P169 Recall Decision](#), para. 50.

¹³⁸⁴ *E.g.* [Prosecution Second Report](#); VWU Third Report; VWU Second Report; [Prosecution Report](#); VWU Report. *Also* [Witness Contacts Decision](#), paras. 36, 38.

reports, Bemba asked to recall P169 and P178.¹³⁸⁵ The reports also informed the Chamber's interlocutory decisions on Bemba's collusion allegations.¹³⁸⁶ Indeed, the Prosecution and VWU reports on the alleged interaction between P169 and P178 were the kind of material whose disclosure Bemba had initially stated "may well obviate the need for the recall of any witness."¹³⁸⁷ Bemba used these reports to question P169 during his recalled testimony, including on his alleged contacts with P42 and P178, and the source of the list attached to his letters.¹³⁸⁸ Following P169's recall, the Chamber allowed the parties to make additional written submissions on P169's testimony *and any related evidence*.¹³⁸⁹ This included the Prosecution and VWU reports.

389. The Chamber did not err by not recalling P178.¹³⁹⁰ The Prosecution and VWU reports covered relevant issues concerning P178 and the 19 Protected Witnesses (who were likewise not recalled). Further, they corroborated [REDACTED], [REDACTED], and [REDACTED].¹³⁹¹

VI.A.1.b. The Chamber reasonably dismissed allegations that P169, P178 and the 19 Protected Witnesses colluded to testify falsely

390. Bemba has not shown that the Chamber erred in dismissing Bemba's allegation that P169, P178 and the 19 Protected Witnesses had colluded to testify falsely. Bemba's claim—that the Chamber solely relied on P169's evidence, and that it should also have recalled P178¹³⁹²—overlooks that the Chamber also relied on the Prosecution's and VWU's independent reports. Those reports covered relevant

¹³⁸⁵ [Investigations Further Motion](#); [P178 Recall Request](#); [P178 Recall Decision](#); [Witness Contacts Decision](#); [Judgment](#), paras. 318-319.

¹³⁸⁶ [Judgment](#), para. 318; [P178 Recall Decision](#), para. 22; [Witness Contacts Decision](#), para. 34.

¹³⁸⁷ [Investigations Further Motion](#), para. 49.

¹³⁸⁸ T-363-CONF, 6:1-17:25.

¹³⁸⁹ [P169 Recall Decision](#), paras. 33, 50(xvi).

¹³⁹⁰ [P169 Recall Decision](#), para. 25 (re-opening a case is an exceptional remedy).

¹³⁹¹ VWU Annex, p. 2; [Prosecution Second Report](#), para. 13; [P178 Recall Decision](#), paras. 19, 22; [Witness Contacts Decision](#), para. 34; [Investigative Assistance Decision](#), para. 19.

¹³⁹² [Brief](#), paras. 506-509.

issues concerning P169, P178 and the 19 Protected Witnesses.¹³⁹³ Bemba merely disagrees with the Chamber's reasonable assessment of the evidence, but shows no error.

391. When testifying in 2014, P169 denied any collusion—whether with P178, P42 or the other 19 Protected Witnesses—or any influence from the Prosecution, to testify falsely. Rather, P169 reaffirmed that his initial testimony was truthful and that he did not intend to reconsider it;¹³⁹⁴ he said that he had spontaneously told the Court and investigators that he had received money because he wanted to tell the truth;¹³⁹⁵ he denied that the Prosecution had exerted any influence on his testimony before or after his testimony;¹³⁹⁶ and he clarified that his witness subornation claims were untrue and done solely to pressurise the readers of his letters.¹³⁹⁷ As the Chamber reasonably noted, P169's claims "were made *after* the completion of his 2011 Testimony."¹³⁹⁸

392. Crucially, as shown in the Prosecution's and VWU's reports, when P178 was interviewed about P169's letters, he corroborated much of P169's testimony and P169's statements to the Prosecution and the VWU. For example, P178 admitted that [REDACTED],¹³⁹⁹ something P169 had [REDACTED].¹⁴⁰⁰ [REDACTED].¹⁴⁰¹ Like P169, he stated that these meetings were motivated to pursue income loss claims.¹⁴⁰² The meetings were not for securing false testimony.

393. The motive underlying P169's and P178's actions is further supported by the Prosecution's report following its interviews of P169 and P178. The report shows

¹³⁹³ *Contra* [Brief](#), paras. 495, 508.

¹³⁹⁴ [Judgment](#), para. 321 (fn. 779: [T-361](#), 40:20-41:11; 42:16-22; [T-362](#), 9:14-10:9).

¹³⁹⁵ [Judgment](#), para. 320 (fn. 778: [T-139](#), 12:7-9; [T-142](#), 31:2-7).

¹³⁹⁶ [Judgment](#), para. 321 (fn. 780: [T-361](#), 65:7-14).

¹³⁹⁷ [Judgment](#), para. 322 (fn. 781: T-363-CONF, 22:15-25).

¹³⁹⁸ [Judgment](#), para. 321.

¹³⁹⁹ Updated VWU Report, paras. 4-5.

¹⁴⁰⁰ VWU Second Report, p. 6.

¹⁴⁰¹ [Prosecution Second Report](#), para. 13 ([REDACTED]).

¹⁴⁰² [Prosecution Second Report](#), para. 15.

that after they had testified in 2011, P169 and P178 filed income loss claims with VWU, for their time spent at the Court.¹⁴⁰³ [REDACTED], and [REDACTED]. [REDACTED]. [REDACTED], [REDACTED].¹⁴⁰⁴

394. Furthermore, when [REDACTED], they stated that [REDACTED].¹⁴⁰⁵ Witnesses confirmed that P178 had [REDACTED].¹⁴⁰⁶ No one said that such attempted meetings were to secure false testimony. Other witnesses stated they [REDACTED], [REDACTED], after testifying.¹⁴⁰⁷

395. Based on this evidence—and not merely P169’s recalled testimony—the Chamber reasonably rejected Bemba’s allegations that P169, P178 and the 19 Protected Witnesses had colluded to testify falsely. It did not err by not recalling P178. The Chamber also reasonably considered that P178’s attempt to [REDACTED] took place *after* the relevant witnesses had testified.¹⁴⁰⁸ Bemba merely disagrees, but has not shown that the Chamber lacked sufficient evidence to reasonably assess his collusion allegations or that it erred by not recalling P178.

VI.A.1.c. The Chamber reasonably dismissed allegations that P169, P178 and P42 colluded to testify falsely

396. Bemba has not shown that the Chamber erred by dismissing his claim that P169 and P178 had colluded (together with P42) to testify falsely.¹⁴⁰⁹ The Chamber considered evidence about their interactions, including the lack of clarity in P169’s recalled testimony on the number of times he had met with P178 and/or P42,¹⁴¹⁰ and

¹⁴⁰³ [Prosecution Second Report](#), para. 6.

¹⁴⁰⁴ [Prosecution Second Report](#), para. 6.

¹⁴⁰⁵ VWU Annex, p. 2; [Prosecution Second Report](#), para. 13; [P178 Recall Decision](#), paras. 19, 22; [Witness Contacts Decision](#), para. 34; [Investigative Assistance Decision](#), para. 19.

¹⁴⁰⁶ VWU Annex, p. 2.

¹⁴⁰⁷ VWU Annex, p. 2; VWU Corrected Annex.

¹⁴⁰⁸ [Judgment](#), paras. 318, 321; [P178 Recall Decision](#), paras. 19, 22; [Witness Contacts Decision](#), para. 34; [Investigative Assistance Decision](#), para. 18.

¹⁴⁰⁹ [Judgment](#), paras. 319-320. *Contra* [Brief](#), paras. 507-508, 510.

¹⁴¹⁰ [Judgment](#), para. 320.

reasonably rejected Bemba's allegations. Both confirmed that they interacted in order to claim income loss, and not to collude to testify falsely.¹⁴¹¹

397. Bemba does not show how the Chamber erred in assessing his collusion allegations without recalling P178.¹⁴¹² He does not show how further investigations by the Chamber into how the list of witnesses was created, the number of witnesses involved, or the identity and role of [REDACTED] would have affected its assessment.¹⁴¹³ [REDACTED], P178 admitted [REDACTED], and that [REDACTED] (and not to secure false testimony).¹⁴¹⁴ P42 confirmed to VWU that he [REDACTED].¹⁴¹⁵ P169 did not contradict P42 during his recalled testimony. Merely that P169 [REDACTED]¹⁴¹⁶ is insufficient to show P169 and P42 colluded. Although P169 admitted meeting with P178, he denied [REDACTED].¹⁴¹⁷ He denied colluding with P178 to influence any witnesses.¹⁴¹⁸

398. Bemba has not shown that the Chamber erred in rejecting his collusion allegations without recalling P178 to explore how the list was created and the level of contact between witnesses.¹⁴¹⁹ Because the evidence showed that [REDACTED] and witnesses had rejected [REDACTED], the Chamber did not need to explore those issues further. The Chamber also reasonably rejected recalling P178 to address witness protection issues arising from the witness list.¹⁴²⁰ It underscored that it would continue to pursue other measures to protect the witnesses.¹⁴²¹ While P178's violation of witness protective measures cannot be condoned, Bemba does

¹⁴¹¹ *Above* paras. 390-395.

¹⁴¹² [Brief](#), para. 508.

¹⁴¹³ [Brief](#), para. 508.

¹⁴¹⁴ Updated VWU Report, para. 4; VWU Second Report, p. 6.

¹⁴¹⁵ VWU Corrected Annex.

¹⁴¹⁶ T-363-CONF, 12:21-14:14.

¹⁴¹⁷ T-362-CONF, 3:14-23.

¹⁴¹⁸ T-361-CONF, 70:6-12.

¹⁴¹⁹ [P178 Recall Decision](#), paras. 19-22.

¹⁴²⁰ [P178 Recall Decision](#), paras. 19-23.

¹⁴²¹ [P178 Recall Decision](#), para. 23.

not show the Chamber erred in dismissing his collusion allegations without recalling P178 to explore these additional issues.

VI.A.1.d. The Chamber reasonably relied on the 19 Protected Witnesses

399. Bemba's challenges to the Chamber's reliance on the 19 Protected Witnesses—for their alleged involvement in P169's and P178's scheme and P169's subornation claims—must also fail.¹⁴²²

400. Firstly, the Chamber did not err in dismissing Bemba's allegations as to their collusion and corruption.¹⁴²³ Bemba asserts that VWU and the Prosecution did not verify if any of the witnesses wanted to recant their testimony¹⁴²⁴ but merely disagrees with the Chamber's reasonable finding.¹⁴²⁵ Because the witnesses interviewed by VWU and the Prosecution stated they had rejected [REDACTED] and because the Chamber found the collusion allegations to be unsubstantiated, it did not need to determine if any of the witnesses wanted to recant their testimony. Further, Bemba's argument that P169's and P178's telephone records had not been checked for whether they had contacted the witnesses¹⁴²⁶ merely disagrees with the scope of the investigations into his collusion allegations, but shows no error.

401. Secondly, the Chamber reasonably accepted P169's testimony that his witness subornation claims had been untrue and done solely by him to put pressure on the readers of his letters.¹⁴²⁷ P169 clearly testified that the letter was his sole idea "to get an answer to my claims."¹⁴²⁸ The letter had not come from the other witnesses: "it was me myself who wrote this letter."¹⁴²⁹ The Chamber thus rightly construed his

¹⁴²² [Brief](#), paras. 517-520.

¹⁴²³ *Above* paras. 390-395.

¹⁴²⁴ [Brief](#), para. 517.

¹⁴²⁵ [Judgment](#), para. 318; [Lubanga AJ](#), para. 22; [P178 Recall Decision](#), para. 22; [Witness Contacts Decision](#), para. 34.

¹⁴²⁶ [Brief](#), para. 517.

¹⁴²⁷ [Judgment](#), para. 322 (fn. 781: T-363-CONF, 22:15-25). *Contra* [Brief](#), paras. 518-519.

¹⁴²⁸ [T-363](#), 22:23-25.

¹⁴²⁹ [T-363](#), 22:25.

testimony as meaning that the subornation claims were untrue, made by him “to put pressure” on the Court.¹⁴³⁰

VI.A.1.e. The Chamber reasonably dismissed allegations that P169 and P178 (and the 19 Protected Witnesses) colluded to corruptly claim benefits from the Court

402. Bemba has not shown that the Chamber erred in dismissing his claims that P169 and P178 (and the 19 Protected Witnesses) colluded to corruptly receive benefits from the Court.¹⁴³¹ Based on P169’s evidence and the Prosecution and VWU reports, the Chamber reasonably dismissed Bemba’s allegations that Prosecution witnesses colluded to testify falsely¹⁴³² or that they “acted as a collective bargaining unit.”¹⁴³³ The witnesses’ refusal to [REDACTED] is inconsistent with Bemba’s claims that the witnesses “acted as a collective bargaining unit.”¹⁴³⁴

403. Nor has Bemba shown that the Chamber did not properly consider P169’s and P178’s alleged “blackmail” attempt and willingness to reveal witness contact details in assessing their credibility.¹⁴³⁵ Even if P169 had intended to pressurise the Court,¹⁴³⁶ Bemba shows no error in the Chamber’s credibility analysis. Witness misconduct and conduct that may be incompatible with credibility/testifying truthfully are distinct.¹⁴³⁷ Moreover, the Chamber considered such conduct when analysing P169’s and P178’s credibility—and thus treated their testimony cautiously.¹⁴³⁸ Bemba merely disagrees with the Chamber’s approach and the weight the Chamber accorded to P169’s and P178’s conduct. He shows no error.

¹⁴³⁰ [Judgment](#), para. 322. *Contra* [Brief](#), paras. 518-519.

¹⁴³¹ [Brief](#), paras. 495, 506, 508.

¹⁴³² [Judgment](#), para. 318; [P178 Recall Decision](#), paras. 19, 22; [Witness Contacts Decision](#), para. 34.

¹⁴³³ [Judgment](#), para. 318; [P178 Recall Decision](#), paras. 19, 22; [Witness Contacts Decision](#), para. 34.

¹⁴³⁴ [Judgment](#), para. 318; [P178 Recall Decision](#), para. 22; [Witness Contacts Decision](#), para. 34.

¹⁴³⁵ *Contra* [Brief](#), paras. 506-507, 512.

¹⁴³⁶ [Judgment](#), para. 322.

¹⁴³⁷ [Ntaganda Article 70 Decision](#), para. 5; [Rutaganda Decision](#), p. 4.

¹⁴³⁸ [Judgment](#), paras. 322, 328-329, 540.

404. The Chamber's cautious approach is also clear from the way it inquired into what might have initially motivated P169's interaction with the Court.¹⁴³⁹ The evidence showed, for instance, that P169 might have acted under a mistaken belief about the scope of his payments from the Court.¹⁴⁴⁰ It also reasonably considered that during his testimony, P169 explained that "he spontaneously told the Court and investigators he had received money because he intended to tell the entire truth before the Court,"¹⁴⁴¹ and repeatedly asserted that "his 2011 Testimony was truthful and that he had no intention to reconsider it."¹⁴⁴² Moreover, P169 did not insist on further payments from the Court: "I am a volunteer. I wanted to say the truth."¹⁴⁴³ He did not seek [REDACTED] as part of his protective measures.¹⁴⁴⁴

405. Although the Chamber did not recall P178, the context in which he acted did not show that P178 pursued "self-enrichment" at the expense of the truth. Rather, it showed that he believed he was entitled to be paid for income loss during the time he spent at the Court. Like P169,¹⁴⁴⁵ P178 stated he was motivated to pursue income loss claims.¹⁴⁴⁶ The Prosecution's report confirmed that after they had testified in 2011, P169 and P178 filed income loss claims with the VWU.¹⁴⁴⁷ The report further confirmed that [REDACTED], [REDACTED].¹⁴⁴⁸ Even though the two witnesses' conduct in relation to the letters to the Court cannot be condoned, Bemba has not shown the Chamber erred in finding them credible.¹⁴⁴⁹

¹⁴³⁹ *E.g.* [Judgment](#), paras. 320-322 (finding that P169 was in part motivated by a "personal desire to receive benefits from the Court" but that, in the circumstances, this did not itself render his 2011 Testimony on the merits of the case unreliable").

¹⁴⁴⁰ [Judgment](#), para. 320.

¹⁴⁴¹ [Judgment](#), para. 320.

¹⁴⁴² [Judgment](#), para. 321 (fn. 779: [T-361](#), 40:20-41:11; 42:16-22; [T-362](#), 9:14-10:9).

¹⁴⁴³ [T-361](#), 40:21-22.

¹⁴⁴⁴ [T-361-CONF](#), 41:15-19.

¹⁴⁴⁵ [Judgment](#), para. 320 (fn. 779).

¹⁴⁴⁶ [Prosecution Second Report](#), para. 15.

¹⁴⁴⁷ [Prosecution Second Report](#), para. 6.

¹⁴⁴⁸ [Prosecution Second Report](#), para. 6.

¹⁴⁴⁹ [Judgment](#), paras. 320-322, 328-329, 540.

406. Bemba's additional claims that the witnesses received benefits beyond ordinary subsistence are similarly unsubstantiated.¹⁴⁵⁰ Determining whether a witness' benefits go beyond the ordinary subsistence requirement cannot be based on abstract figures. Rather, a chamber must assess on a case-by-case basis whether the benefits were "reasonably required" (for instance as part of the protective measures), considering *inter alia* the cost of living in the witness' country or region and the witness' life circumstances.¹⁴⁵¹ Whether a witness has been relocated is also material.¹⁴⁵²

407. Here, the Chamber correctly found that the VWU reports showed that the assistance given to P169 and P178 were related to the [REDACTED] and did not exceed ordinary subsistence.¹⁴⁵³ Based on [REDACTED], [REDACTED], including [REDACTED] "[REDACTED]"¹⁴⁵⁴ Although [REDACTED], [REDACTED], P169 received [REDACTED], as [REDACTED].¹⁴⁵⁵ P178 was [REDACTED], [REDACTED], he received [REDACTED], [REDACTED].¹⁴⁵⁶ Bemba does not demonstrate how the benefits these witnesses received went beyond ordinary subsistence or affected their credibility.

VI.A.1.f. The Chamber reasonably dismissed Bemba's other challenges to P169 and P178's credibility

408. Bemba's additional challenges to P169's and P178's credibility are equally unmeritorious. Firstly, he wrongly claims, as "simplistic", the Chamber's credibility analysis of P169 based solely on P169's recalled testimony.¹⁴⁵⁷ Although a single witness' testimony or piece of evidence can be relied upon without

¹⁴⁵⁰ [Brief](#), paras. 496, 506.

¹⁴⁵¹ [Taylor AJ](#), para. 141.

¹⁴⁵² [Taylor AJ](#), para. 141.

¹⁴⁵³ [Investigative Assistance Decision](#), paras. 20-21.

¹⁴⁵⁴ VWU Annex C.

¹⁴⁵⁵ VWU Annex C.

¹⁴⁵⁶ VWU Annex C

¹⁴⁵⁷ [Brief](#), para. 509.

corroboration,¹⁴⁵⁸ the Chamber considered P169's evidence together with other evidence.

409. Bemba also incorrectly claims that the Chamber did not meaningfully address P169's "web of lies", such as his alleged concession that he had met P42 a number of times more than he had earlier testified,¹⁴⁵⁹ and inconsistencies between P169 and P178's prior statements and their testimony.¹⁴⁶⁰ Merely that P169's testimony was inconsistent is not sufficient to show he "lied."¹⁴⁶¹ P169 admitted [REDACTED], but for a reason unrelated to [REDACTED].¹⁴⁶² Even so, Bemba overlooks that the Chamber specifically considered P169's lack of clarity on the number of meetings he had with P42 and/or P178.¹⁴⁶³ A Trial Chamber does not err merely by accepting testimony containing inconsistencies. It is obliged to resolve and evaluate any inconsistencies within testimonies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the fundamental features of the evidence.¹⁴⁶⁴

410. Furthermore, P178 explained that some inconsistencies in his testimony *vis-à-vis* his prior statements could be attributed to the passage of time.¹⁴⁶⁵ He might have misunderstood the investigator's questions in some respects.¹⁴⁶⁶ Nonetheless, the Chamber carefully considered any limitations in P178's testimony and cautiously assessed his testimony.¹⁴⁶⁷

¹⁴⁵⁸ [Lubanga AJ](#), para. 218.

¹⁴⁵⁹ [Brief](#), para. 510.

¹⁴⁶⁰ [Brief](#), para. 511.

¹⁴⁶¹ *Contra* [Brief](#), para. 510.

¹⁴⁶² T-363-CONF, 13:1-20, 20:20-25.

¹⁴⁶³ [Judgment](#), para. 320.

¹⁴⁶⁴ [Lubanga AJ](#), para. 23.

¹⁴⁶⁵ [T-154](#), 24:7-15.

¹⁴⁶⁶ [T-154](#), 24:7-15, 46:6-47:15, 49:9-52:5.

¹⁴⁶⁷ [Judgment](#), para. 329; *contra* [Brief](#), para. 511.

411. Bemba also asserts that P169 and P178 testified to untrue events.¹⁴⁶⁸ However, the only material Bemba cites, namely, the defence's own closing arguments and the two witnesses' testimonies,¹⁴⁶⁹ does not show their accounts were untrue.¹⁴⁷⁰ Nothing in P169's and 178's testimony suggested that the witnesses lied. To the contrary, each provided the basis for their knowledge of the relevant events. Regarding P169's testimony about an MLC soldier who used to rape young children,¹⁴⁷¹ P169 testified that [REDACTED].¹⁴⁷² It is unclear from Bemba's transcript references that P178 inferred Bemba's use of children from seeing "children playing with a baton behind a house."¹⁴⁷³ To the contrary, P178's testimony recounts how Bemba's troops were trained, the location of the training, the manner it was executed, and the identity of some troops, who included children.¹⁴⁷⁴

VI.A.2. The Chamber reasonably relied on P169 and P178, including for the Mongoumba attacks

412. Bemba challenges the Chamber's reliance on P169 and P178 (in addition to P173 and P36) for the Judgment's central finding on Bemba's effective control over the MLC contingent in the CAR. He claims that although the Chamber doubted P169's and P178's credibility, it found their evidence that Colonel Moustapha relayed and implemented Bemba's orders reliable on the basis that, *inter alia*, they were internally consistent and generally corroborated each other.¹⁴⁷⁵ Bemba shows no error. A Chamber commits no error when it finds that witnesses with some limitations in their testimony sufficiently corroborate each other. It is sufficient that the witnesses were *prima facie* credible (as was the case here), because two

¹⁴⁶⁸ [Brief](#), para. 511.

¹⁴⁶⁹ [Brief](#), para. 511 (fns. 1008-1009).

¹⁴⁷⁰ *Contra* [Bemba Final Brief](#), para. 115.

¹⁴⁷¹ T-138-CONF, 3:10-4:4.

¹⁴⁷² T-138-CONF, 3:23.

¹⁴⁷³ [Brief](#), para. 511 (fn. 1009: citing [Bemba Final Brief](#); T-151-CONF, 43:16-22). The correct reference is 48:1-49:4.

¹⁴⁷⁴ [T-151](#), 48:4-9.

¹⁴⁷⁵ [Brief](#), para. 513.

testimonies corroborate one another “when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact.”¹⁴⁷⁶

413. Bemba incorrectly claims that the Chamber “almost exclusively” relied on P169 and P178 for the Mongoumba attacks, referring only to a few footnotes on other witnesses or evidence.¹⁴⁷⁷ First, the Chamber clearly relied on other witnesses and evidence besides P169 and P178, showing that the MLC launched a punitive attack against Mongoumba.¹⁴⁷⁸ Based on all the evidence the Chamber reasonably found that Bemba knew of the attack but took no preventive or remedial action.¹⁴⁷⁹

414. The Chamber additionally relied on testimony (P15, P29, P47, P173), the authenticated records of Bemba’s Thuraya device,¹⁴⁸⁰ and corroborating media reports on the MLC’s atrocities in Mongoumba.¹⁴⁸¹ P29 and P15 corroborated P169’s and P178’s testimony that in the beginning of March 2003, FACA forces seized goods being taken by MLC from the CAR to the DRC and allegedly detained some MLC soldiers.¹⁴⁸² Although P169 and P178 differed on whether Colonel Moustapha, on learning of these events, first spoke to Bemba or to Patassé before ordering the Mongoumba attack, P29, P15 and P173 corroborated their testimony that MLC troops attacked Mongoumba.¹⁴⁸³ The Chamber noted the discrepancies between P169’s and P178’s testimony, and found it could not rely on P169’s testimony that Bemba ordered the Mongoumba attack during the specific phone call he testified about, without corroboration.¹⁴⁸⁴

¹⁴⁷⁶ [Gatete AJ](#), para. 125.

¹⁴⁷⁷ [Brief](#), para. 514.

¹⁴⁷⁸ [Judgment](#), paras. 536-543.

¹⁴⁷⁹ [Judgment](#), para. 541.

¹⁴⁸⁰ [Judgment](#), paras. 536 (fn. 1621), 538 (fn. 1628), 541 (fn. 1647), 543 (fns. 1653, 1655).

¹⁴⁸¹ [Judgment](#), para. 543 (fn. 1655).

¹⁴⁸² [Judgment](#), para. 536 (fn. 1621: [T-80](#), 25:21-26:16; 28:20-23; 39:16-40:2 (P29); [T-209](#), 8:5-10:2; T-209-CONF, 10:5-12:13; 13:17-18 (P15)).

¹⁴⁸³ [Judgment](#), paras. 538, 542 (fn. 1651: [T-80](#), 25:21-26:21 (P29); [T-209](#), 8:2-9:18; T-209-CONF, 11:3-12:8 (P15); [T-144](#), 33:4-9, 74:13-14; [T-145](#), 29:10-14; [T-149](#), 40:6-22 (P173)).

¹⁴⁸⁴ [Judgment](#), para. 540.

415. Furthermore, the Chamber reasonably found that the authenticated records of Bemba's Thuraya device showed that Bemba communicated with Colonel Moustapha 16 times on the day of the attack,¹⁴⁸⁵ to further corroborate its finding that Bemba knew of the attack on Mongoumba, but took no preventive or remedial action.¹⁴⁸⁶ Finally, the Chamber also considered P29's and P47's testimony and reliable media reports that the MLC committed acts of pillaging, rape and murder against civilians in Mongoumba.¹⁴⁸⁷

416. In sum, the Chamber did not "almost exclusively" rely on P169 and P178 as to the Mongoumba attacks,¹⁴⁸⁸ but also relied on other corroborating evidence. The Chamber did not err by relying on P169 and 178's testimony which, although different in some respects, corroborated each other in material respects.

¹⁴⁸⁵ [Judgment](#), para. 541 (noting EVD-T-OTP00591/CAR-OTP-0055-0893).

¹⁴⁸⁶ [Judgment](#), para. 541.

¹⁴⁸⁷ [Judgment](#), para. 543 (fn. 1655: [T-80](#), 21:8-20; 22:5-24; 34:14-35-3; 40:3-22; [T-81](#), 11:1-22; 15:19-17:21; 47:17-24 (P29); [T-178](#), 35:14-19; 36:8-22).

¹⁴⁸⁸ [Brief](#), para. 514.

VI.B. THE LRVs' QUESTIONING OF WITNESSES WAS PROPERLY REGULATED

417. Bemba's argument that his trial was unfair because of the way the Chamber regulated the LRVs' questioning of Defence witnesses must be rejected.¹⁴⁸⁹ To expedite proceedings, the Chamber properly dispensed with the LRVs' written applications to ask follow-up questions.¹⁴⁹⁰ However, the LRVs were not given "unconstrained" permission to question witnesses.¹⁴⁹¹ The Chamber ensured, on a case-by-case basis, that the LRVs' proposed questions affected the victims' personal interests and did not prejudice or affect Bemba's rights under article 68.¹⁴⁹² Bemba exercised his right to object to any follow-up questions. The Chamber ruled on such objections before allowing the LRV to proceed.¹⁴⁹³ Further, the Chamber did not err by allowing the LRVs to ask questions relevant to Bemba's culpability and the credibility of his witnesses.¹⁴⁹⁴ Finally, the LRVs' follow-up questions did not materially prejudice the overall expeditiousness and fairness of his trial.¹⁴⁹⁵

VI.B.2. The Chamber properly restricted the LRVs' follow-up questions and complied with article 68(3)

418. Before questioning witnesses, the LRVs had to make a written application setting out the nature and details of their proposed questions at least seven days before the scheduled testimony.¹⁴⁹⁶ Bemba has not shown the Chamber erred by dispensing with this requirement each time the LRVs sought to ask follow-up questions additional to their applications.¹⁴⁹⁷

¹⁴⁸⁹ *Contra* [Brief](#), paras. 521-546.

¹⁴⁹⁰ [LRV Questioning Decision](#), para. 10.

¹⁴⁹¹ *Contra* [Brief](#), paras. 523-525, 528 (*also* sub-title).

¹⁴⁹² *Contra* [Brief](#), paras. 522, 526-528.

¹⁴⁹³ *Contra* [Brief](#), para. 525.

¹⁴⁹⁴ *Contra* [Brief](#), paras. 528-529.

¹⁴⁹⁵ *Contra* [Brief](#), paras. 541-546.

¹⁴⁹⁶ [Participation Decision](#); [LRV Decision](#), para. 39; [Conduct Directions](#), para. 18.

¹⁴⁹⁷ The Chamber, exercising its trial management discretion, dismissed Bemba's motion objecting to its earlier decision that LRVs submit written applications before asking follow-up questions: [LRV Questioning Motion](#). The Chamber closely monitored the nature of the follow-up questions: [LRV Questioning Decision](#), para. 10. The Chamber had already similarly ruled before the Defence's motion: *e.g.* T-313-CONF, 3:9-19. The

419. Moreover, it only allowed such questions on a case-by-case basis.¹⁴⁹⁸ And even so, it reserved “the right to refuse any questions that would be [...] irrelevant or leading.”¹⁴⁹⁹ Crucially, the LRVs’ questions had to meet the article 68(3) requirements,¹⁵⁰⁰ *i.e.* relate to matters affecting the victims’ interests.¹⁵⁰¹ The Chamber stated that it “closely monitored the nature of the follow-up questions and [had] requested clarification when the [questions’ relevance] to the personal interests of victims was [unclear].”¹⁵⁰²

420. The Chamber ensured that the LRVs’ questioning of witnesses did not prejudice or affect Bemba’s rights under article 68(3). It narrowly defined the scope of their follow-up questions: questions were “based on something the witness said during his testimony,”¹⁵⁰³ and disallowed if they did not.¹⁵⁰⁴ Moreover, the LRVs had to demonstrate that a follow-up question “could not have been anticipated in their prior applications.”¹⁵⁰⁵ The LRVs did not act like parties to the proceedings—the latter are not so restricted when questioning witnesses.¹⁵⁰⁶ Nor did Bemba challenge the LRVs asking follow-up questions that were “based upon the response given by the witness during the legal representatives’ questioning.”¹⁵⁰⁷ Many of the LRVs’ follow-up questions Bemba now impugns fell under this category.¹⁵⁰⁸ The LRVs’ additional questions also had to be “relevant...and consistent with the fairness, impartiality and expeditiousness of the trial as [required by] Rule 91.”¹⁵⁰⁹

Chamber did not allow the LRVs to “circumvent” its prior ruling. *Contra* [Brief](#), paras. 522, 525. Also [Lubanga AJ](#), para. 32; [Ongwen Directions](#), para. 10.

¹⁴⁹⁸ *Contra* [Brief](#), paras. 522, 523. See [Conduct Directions](#), para. 19; [T-243](#), 3:8-12; [T-246](#), 30:21-22.

¹⁴⁹⁹ [T-243](#), 3:16-18.

¹⁵⁰⁰ [Katanga Victims AD](#), para. 40.

¹⁵⁰¹ [LRV Questioning Decision](#), para. 10; [T-313](#), 3:22-4:1; [T-192](#), 59:14-24.

¹⁵⁰² [LRV Questioning Decision](#), para. 10.

¹⁵⁰³ [T-329-CONF](#), 35:3-8; 37:8-9; 40:23-24; 43:15-21; 46:15-19; 48:8-11; [T-247](#), 14:15-20; 29:25-30:4.

¹⁵⁰⁴ [T-329-CONF](#), 35:3-21.

¹⁵⁰⁵ [T-313](#), 3:13-19.

¹⁵⁰⁶ *Contra* [Brief](#), paras. 524-525. For decisions allowing a party to question a witness it has not called on matters going beyond the scope of the initial evidence: [Lubanga Testimony Decision](#), para. 32.

¹⁵⁰⁷ [T-192](#), 58:9-11.

¹⁵⁰⁸ *Contra* [Brief](#), para. 523.

¹⁵⁰⁹ [T-192](#), 59:18-24.

421. The Chamber allowed the parties to object to the LRVs' follow-up questions, and stopped the LRVs from asking questions it had disallowed.¹⁵¹⁰ Merely because the Chamber at times overruled Bemba's objections to the LRVs' follow-up questions does not demonstrate that "the LRVs acted as the 'second' or 'third' Prosecutor."¹⁵¹¹ Bemba's assertion is contradicted by the examples he cites.¹⁵¹² These examples show that before allowing the LRVs to ask follow-up questions, the Chamber carefully scrutinised them and considered any objections.¹⁵¹³

422. Bemba also asserts that he suffered prejudice because the Chamber allowed such follow-up questions in a widespread manner.¹⁵¹⁴ He argues that the number of LRV follow-up questions far exceeded the number of questions they were originally allowed.¹⁵¹⁵ Abstract figures cannot show whether the Chamber abused its discretion. The number of questions may be relevant but not decisive. Other factors, such as the nature or scope of each question, whether the witnesses' responses required clarification, etc., are also material. A Chamber cannot ensure that the victims' participation is meaningful¹⁵¹⁶ based merely on the number of questions they are permitted.

423. Even, *arguendo*, that the Chamber allowed the LRVs to ask Defence witnesses many follow-up questions, Bemba does not show the number of questions far exceeded those which they were originally allowed. Indeed, the examples Bemba cites are inapposite.¹⁵¹⁷ Bemba asserts that the LRV (Mr Zarambaud) was authorised to ask D6 14 questions, that he asked D6 only four of these, and that instead he

¹⁵¹⁰ [T-247](#), 35:15-36:1-6; T-329-CONF, 34:14-35:25; [T-234](#), 28:14-25; [T-327](#), 52:16-22.

¹⁵¹¹ *Contra* [Brief](#), para. 525. *Below* paras. 424-427.

¹⁵¹² [Brief](#), para. 525.

¹⁵¹³ *E.g.* T-334-CONF, 47:3-49.

¹⁵¹⁴ [Brief](#), para. 523.

¹⁵¹⁵ [Brief](#), para. 523.

¹⁵¹⁶ [Lubanga Victims AD](#), para. 97.

¹⁵¹⁷ [Brief](#), para. 523.

asked 21 “unauthorised” follow-up questions.¹⁵¹⁸ However, many of these latter follow-up questions were either part of, or sought to clarify, earlier LRV questions.¹⁵¹⁹ Others flowed from the responses given by the witness to the LRV’s question¹⁵²⁰—the very kind of follow-up questions Bemba conceded did not require the Chamber’s prior authorisation.¹⁵²¹ Douzima-Lawson asked D6 similar follow-up questions.¹⁵²²

VI.B.2. The Chamber correctly allowed the LRVs to ask questions concerning Bemba’s culpability and witness credibility

424. The Chamber did not err by allowing the LRVs to question witnesses on matters relevant to the credibility and Bemba’s culpability.¹⁵²³ It correctly required that the LRVs’ questions should affect the victims’ personal interests, as article 68(3) requires.¹⁵²⁴ Although victims are not parties, “[article 68(3)], to give effect to its spirit and intention[...], must be interpreted[...] to make participation by victims *meaningful*.”¹⁵²⁵ Victims do not become parties merely because a Chamber allows them to lead evidence or to question witnesses on matters relevant to an accused’s culpability,¹⁵²⁶ or to establish the truth.¹⁵²⁷ Accordingly, the Chamber correctly permitted the LRVs to ask witnesses questions relevant to their credibility and Bemba’s culpability.¹⁵²⁸

¹⁵¹⁸ [Brief](#), para. 523.

¹⁵¹⁹ *E.g.* T-329-CONF, 30:20-31:19; 36:7-21; 46:5-13; 48:8-23.

¹⁵²⁰ *E.g.* T-329-CONF, 39:6-23.

¹⁵²¹ [T-192](#), 58:9-11.

¹⁵²² T-329bis-CONF, 3:6-5:6.

¹⁵²³ *Contra* [Brief](#), paras. 528-529.

¹⁵²⁴ [LRV Questioning Decision](#), para. 10. *E.g.* [T-50](#), 56:20-57:7 (D23); T-76-CONF, 39:16-25 (D79); [T-77](#), 41:18-42:8 (D79); [T-90](#), 60:9-61:3 (D75); [T-93](#), 29:14-30:7 (D6); T-94-CONF, 2:10-22 (D6); [T-102](#), 3:10-25 (D9); [T-108](#), 25:5-26:13 (D63); T-123-CONF, 30:18-31:17 (D110); T-127-CONF, 57:15-58:8 (D112); [T-145](#), 1:21-2:13 (D173); [T-207](#), 1:20-2:20 (D15); [T-213](#), 3:17-4:25 (D36); T-254-CONF, 65:23-66:8 (D50); T-337-CONF, 73:4-20 (D36).

¹⁵²⁵ [Lubanga Victims AD](#), para. 97 (emphasis added).

¹⁵²⁶ [Katanga Victims AD](#), paras. 37-40.

¹⁵²⁷ [Lubanga Victims AD](#), paras. 97-98; [Katanga Victims AD](#), para. 40.

¹⁵²⁸ *Also* [Lubanga Victims AD](#), para. 109; [Katanga Participation Decision](#), para. 104

425. The Chamber did not err by allowing the LRVs to question witnesses on *inter alia* MLC military training, popularising the code of conduct, remunerating soldiers, the role of MLC and CAR armies, and Bemba's visit and operational control.¹⁵²⁹ Bemba was charged under article 28 for crimes committed by his MLC forces in the CAR. The LRVs' questions on these matters were relevant to the victims' personal interests: they concerned, *inter alia*, the crimes committed by Bemba's subordinates (from which the victims suffered), and Bemba's knowledge of those crimes and his failure to intervene.¹⁵³⁰

426. Similarly, a Chamber has broad discretion to determine the scope and mode of victim participation under article 68(3).¹⁵³¹ The practice of other trial chambers¹⁵³² does not show this Chamber erred. Even so, like those other chambers, the Chamber did not allow the LRVs to ask Defence witnesses questions simply because they had shown "a general interest in the outcome of the case or in the issues or evidence [before] the Chamber."¹⁵³³ Rather, the Chamber required the LRVs to demonstrate that the victims' personal interests were affected by their proposed questions. Indeed, even when the LRVs sought to question witnesses on the specific matters Bemba now impugns, such as the role of the MLC and other troops,¹⁵³⁴ the Chamber correctly asked the LRVs to show how the victims' personal interests were affected as article 68(3) requires.¹⁵³⁵

427. Bemba's additional discrete challenges must also be dismissed.¹⁵³⁶ Bemba has not shown that the LRVs' alleged use of 'non-neutral'¹⁵³⁷ or 'repetitive' questions¹⁵³⁸

¹⁵²⁹ [Brief](#), para. 528.

¹⁵³⁰ [T-176](#), 49: 14-18; [T-183](#), 3:3-9; [T-187](#), 47:16-23; [T-201](#), 4:2-7; [T-213](#), 4:7-12; [T-230](#), 45:7-12.

¹⁵³¹ [Lubanga Victims AD](#), paras. 100-104.

¹⁵³² [Brief](#), paras. 526-527.

¹⁵³³ [Brief](#), para. 526 (noting *Lubanga*). Also [Brief](#), para. 527.

¹⁵³⁴ [Brief](#), para. 528.

¹⁵³⁵ E.g. [T-248](#), 56:16-57:8 (D7); T-183-CONF, 2:11-3:20 (D31); [T-165](#), 1:24-3:14 (D32); T-213-CONF, 3:17-4:25 (D36); [T-246](#), 29:1-31:4 (D65); [T-187](#), 46:13-48:12 (D213).

¹⁵³⁶ [Brief](#), paras. 529-539.

¹⁵³⁷ [Brief](#), para. 530.

and other witnesses' testimonies to contradict Defence evidence¹⁵³⁹ materially prejudiced the overall fairness of the trial. The Chamber carefully restricted these forms of questioning throughout the proceedings.¹⁵⁴⁰ Likewise it rejected questions it deemed speculative, calling for opinion evidence or irrelevant to the charges.¹⁵⁴¹ The cited instances—to which Bemba did not generally object at trial—were isolated. And when viewed against the Chamber's overall careful control of the LRVs' questions, these isolated instances do not support Bemba's claims that his witnesses were "cross-examined three times," unlike Prosecution witnesses.¹⁵⁴²

VI.B.3. Bemba was not prejudiced

428. The Chamber carefully restricted the LRVs' questioning of witnesses. It subjected all questions to article 68(3) requirements. It required the LRVs to show that the victims' personal interests were affected by each question. The Chamber ensured fairness by monitoring questions and allowing narrowly defined follow-up questions. Even, *arguendo*, that some of the LRVs' questions to Defence witnesses were problematic, overall, Bemba was not prejudiced.¹⁵⁴³

429. Bemba's additional claims of prejudice lack merit. He wrongly claims that his right to an expeditious trial was compromised because the Chamber allegedly did not restrict the duration of the LRVs' questioning.¹⁵⁴⁴ This claim cannot be answered in the abstract simply by examining the length of time given to the LRVs and the Defence to ask questions; rather all relevant factors must be considered such as the

¹⁵³⁸ [Brief](#), paras. 532-535.

¹⁵³⁹ [Brief](#), para. 531.

¹⁵⁴⁰ E.g. [T-108](#), 25:19-24 (D63); [T-123](#), 31:2-4 (D110: Chamber rejecting leading questions); T-213-CONF, 4:15-18; [T-207](#), 2:11-15 (D36 and D15: Chamber's dissatisfaction with the number and length of quotes the LRV proposed for questioning); [T-247](#), 29:22-30:9 (disallowing the LRV from using documents during questioning).

¹⁵⁴¹ E.g. [T-77](#), 42:5-8 (D79); [T-94](#), 2:17-22 (D6); [T-102](#), 3:18-25 (D9); T-127-CONF, 58:7-8 (D110); [T-207](#), 2: 8-10 (D15); [T-254](#), 66:11-14 (D50).

¹⁵⁴² [Brief](#), paras. 529-539.

¹⁵⁴³ *Contra* [Brief](#), paras. 541-546.

¹⁵⁴⁴ [Brief](#), para. 542.

nature and subject of the questions, the witnesses' responses, and whether further questioning was required for clarity.

430. Bemba merely disagrees with how the Chamber regulated the time for the LRVs' questions. However, he has not shown that the Chamber abused its discretion by allowing the LRVs two hours to question a witness.¹⁵⁴⁵ With the exception of D6, the LRVs examined each of the 33 defence witnesses for a shorter time than the Defence. Even with D6, the LRVs exceeded the Defence's examination time by only 27 minutes. This does not show that the Chamber abused its discretion. Nor has Bemba shown that the Chamber's overall regulation of the LRVs' questions meant that the Chamber "heard three times as much evidence inculcating Mr. Bemba, as that which exculpated him."¹⁵⁴⁶

431. Finally, Bemba has not shown he was prejudiced simply because the Chamber relied on the LRVs' evidence to corroborate Prosecution or Defence evidence and make adverse findings against him.¹⁵⁴⁷ Although victims are not parties to the proceedings, their participation is meaningful.¹⁵⁴⁸ Victims may lead evidence and examine witnesses on any matter, including the accused's culpability.¹⁵⁴⁹

432. In sum, Bemba's argument that his trial was unfair because of the Chamber's regulation of the scope and manner of the LRVs' questioning of witnesses should be rejected.

¹⁵⁴⁵ [Lubanga AJ](#), para. 32.

¹⁵⁴⁶ [Brief](#), para. 544.

¹⁵⁴⁷ [Brief](#), para. 543.

¹⁵⁴⁸ [Lubanga Victims AD](#), para. 97.

¹⁵⁴⁹ [Lubanga Victims AD](#), para. 97; [Katanga Victims AD](#), para. 40.

VI.C. CONCLUSION

433. For the reasons above, Ground VI should be dismissed.

CONCLUSION

434. For the reasons above, the appeal should be dismissed, and Bemba's convictions affirmed.

Word count: 59,985¹⁵⁵⁰



Fatou Bensouda, Prosecutor

Dated this 19th day of January 2017
At The Hague, The Netherlands

¹⁵⁵⁰ The Prosecution hereby makes the required certification: [Al Senussi AD](#), para. 32.