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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***

Confidential

**Corrected version of the "Observations of the Legal Representative of Victims
on the 'Appellant's document in support of the appeal'",
9 January 2016, ICC-01/05-01/08-3489-Conf**

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Other

I	INTRODUCTION	5
A	Procedural history	5
B	Confidentiality	6
C	The personal interests of victims affected by the appeal	6
D	Applicable law on appeal	7
II	The fairness of the trial.....	8
A	The personal interests of victims are affected by the Defence's submissions..	8
B	Observations of the Legal Representative.....	9
1	The Prosecution's <i>ex parte</i> submissions	9
2	Delayed disclosure	14
3	Disclosure to the Prosecution of privileged Defence communications	15
III	Scope of the charges	17
A	The personal interests of victims affected by the Defence's submissions	17
B	Observations of the Legal Representative.....	18
1	Reliance on underlying acts not confirmed by the Pre-Trial Chamber	18
2	Respect for the rights of the accused	19
a	Prosecutor's notice of charges to the Accused	19
b	Legal Representatives' notice of charges to the Accused	20
IV	Mr Bemba's responsibility as a superior.....	23
A	Applicable law	23
B	Observations of the Legal Representative of Victims	24
1	Mr Bemba had effective control over his troops in the CAR	24
2	Mr Bemba had actual knowledge of the alleged crimes	24
3	Mr Bemba did not take the necessary and reasonable measures	26
C	The causal link issue.....	28
V	The contextual elements of the crimes were established	29
A	The required <i>mens rea</i> finding.....	29
B	The MLC organisational policy to commit the attack directed against the civilian population	32
C	How the law of pillage was applied	33

VI	Evidence pertaining to the identity of the perpetrators	36
A	The Trial Chamber did not err in law	36
B	The Trial Chamber did not err in fact.....	37
VII	The scope of involvement of the Legal Representatives of Victims in the proceedings.....	40
A	Questioning of witnesses by the Legal Representatives of Victims	40
B	Defence witnesses were not cross-examined three times	45
C	The Defence's allegation of leading and repetitive questions.....	47

(I) INTRODUCTION

(A) Procedural history

1. On 21 March 2016, Trial Chamber III ("the Trial Chamber") issued its Judgment convicting Mr Bemba ("the Judgment").¹ On 4 April 2016, the Defence gave notice of appeal against the Judgment.²
2. On 15 April 2016, the Appeals Chamber ("this Chamber") authorised the victims who had participated in the trial proceedings to participate in these appeal proceedings by filing observations.³
3. On 19 September 2016, the Defence submitted its Document in Support of the Appeal,⁴ and, on 21 November 2016, the Prosecution filed its Response.⁵
4. On 7 December 2016, the Appeals Chamber granted the Defence leave to file a reply.⁶ In the same decision, it ordered the Legal Representative of Victims ("the Legal Representative") to file her observations by 9 January 2016.⁷
5. On 20 December 2016, the Defence submitted its Reply to the Prosecution Response.⁸

¹ "Judgment pursuant to Article 74 of the Statute", 21 March 2016, ICC-01/05-01/08-3343 ("the Judgment").

² "Defence Notice of Appeal against the Judgment pursuant to Article 74 of the Statute", 4 April 2016, ICC-01/05-01/08-3348.

³ "Decision on the participation of victims in the appeal against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'", 15 April 2016, ICC-01/05-01/08-3369.

⁴ "Appellant's document in support of the appeal", 19 September 2016, ICC-01/05-01/08-3434-Conf ("Document in Support of the Appeal").

⁵ "Prosecution's Response to Appellant's Document in Support of Appeal", 21 November 2016, ICC-01/05-01/08-3472-Conf ("Prosecution Response").

⁶ "Decision on Mr Bemba's request for leave to reply to the Prosecutor's Response to the Document in Support of the Appeal", 7 December 2016, ICC-01/05-01/08-3480, para. 1.

⁷ *Ibid.*, para. 2.

⁸ "Appellant's Reply to 'Prosecution's Response to Appellant's Document in Support of Appeal'", 20 December 2016, ICC-01/05-01/08-3483-Conf ("Defence Reply").

(B) Confidentiality

6. In accordance with regulation 23 *bis*(2) of the Regulations of the Court, the Legal Representative submits these observations as “confidential”.

(C) The personal interests of victims affected by the appeal

7. In its Decision of 15 April 2016, the Appeals Chamber found that the victims who had participated in the trial proceedings were authorised to participate in the proceedings on appeal against the Judgment, “as, in principle, their personal interests are affected by the appeal in the same way as during trial”.⁹ It therefore authorised the Legal Representative to submit observations presenting her clients’ views and concerns “in respect of their personal interests in the issues on appeal”.¹⁰

8. In this regard, the Legal Representative recalls the Trial Chamber’s view that the interests of victims

are not limited to the physical commission of the alleged crimes under consideration. Rather, their interests extend to the question of the person or persons who should be held liable for those crimes [...]. In this respect, **victims have a general interest in the proceedings and in their outcome.**¹¹

9. In its Decision of 17 October 2016 authorising the Legal Representative to submit observations on the additional evidence tendered by the Defence, the Appeals Chamber also considered that, “[a]s the **proposed additional evidence is adduced to support arguments on the basis of which Mr Bemba seeks ‘to**

⁹ ICC-01/05-01/08-3369, para. 3.

¹⁰ *Ibid.*, para. 1.

¹¹ “Decision (i) ruling on legal representatives’ applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses”, 9 September 2011, ICC-01/05-01/08-1729, para. 15.

vacate the [conviction decision]', [...] the personal interests of victims are affected by its admission".¹²

10. The Legal Representative recalls that, in her view, if the Judgment were to be amended, her clients' interests would necessarily be affected because, under the Judgment, Mr Bemba was found guilty of the crimes committed against them, and because any reparations depend on that verdict.¹³
11. The Legal Representative notes that the Defence seeks to revisit practically every point already litigated at trial and accordingly appears to challenge the Judgment in its near entirety.¹⁴ As a result, the Defence's Document in Support of the Appeal affects the personal interests of the victims she represents. Therefore, in the light of the foregoing, she considers that the victims are in a position to present their views and concerns to this Chamber on each of the challenges raised by the Appellant.
12. The Legal Representative hereby submits her observations on the points affecting the personal interests of those victims.

(D) Applicable law on appeal

13. Under article 81(1)(b) of the Rome Statute, a convicted person may make an appeal on the grounds of (i) procedural error, (ii) error of fact, (iii) error of law, or (iv) any other ground that affects the fairness or reliability of the proceedings or decision. Under article 83(2) of the Statute, moreover, if the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or

¹² "Decision on the Request of Legal Representative of Victims for Access to Documents", 17 October 2016, ICC-01/05-01/08-3445-Conf, para. 8.

¹³ "*Requête de la Représentante légale des victimes relative à 'Defence application to present additional evidence in the appeal against the Judgment pursuant to Article 74 of the Statute'*", 30 September 2016, ICC-01/05-01/08-3438-Conf, para. 12.

¹⁴ The Defence challenges the fairness of the proceedings (II, VII) and contests the Trial Chamber's findings as to the crimes of which Mr Bemba was convicted (III, V, VI), as well as the mode of liability with which he was charged (IV).

sentence appealed from was materially affected by error of fact or law or procedural error, it may (a) reverse or amend the decision or sentence; or (b) order a new trial before a different Trial Chamber. This article has been construed as establishing that

the Appeals Chamber may only interfere with a conviction decision if the error of fact or law or a procedural error "materially affected" that decision, and, in respect of unfairness allegations, that the unfairness "affected the reliability of the decision".¹⁵

In other words, "the appellant must substantiate specifically how the error materially affected the impugned decision".¹⁶

14. The Legal Representative remarks that the Defence in no way demonstrates how its alleged grievances affect the Judgment; it merely reiterates the same arguments already duly disposed of by the Trial Chamber.

(II) The fairness of the trial

(A) The personal interests of victims are affected by the Defence's submissions

15. The Defence contends that Mr Bemba's right to a fair trial was violated by the manner in which the Prosecution's allegations of offences against the administration of justice were dealt with. It submits that the fairness of the trial was affected by (1) the Prosecution's *ex parte* submissions to the Trial Chamber; (2) the delay in disclosing the allegations to the Defence, in violation of rule 77 of the Rules of Procedure and Evidence (RPE); and (3) the disclosure to the Prosecution, including to the Senior Trial Attorney in the Main Case, of privileged and confidential communications during the trial itself.¹⁷ According to the Defence, these measures "destroyed the substance and appearance of the fairness" of the trial, with the result that the "only appropriate remedy" would

¹⁵ ICC-01/04-01/06-3121-Red, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", para. 16.

¹⁶ *Ibid.*, para. 32.

¹⁷ Document in Support of the Appeal, paras. 13-14.

be to vacate the Judgment, order a permanent stay of proceedings and release Mr Bemba.¹⁸

16. The Legal Representative notes that on the basis of these arguments the Defence paradoxically requests both a reversal of the Judgment and a permanent stay of the proceedings. Among the Defence's submissions is that the Trial Chamber could have reached different findings as to the guilt or innocence of the Accused if the proceedings had been otherwise conducted. For these reasons, the Legal Representative considers that her clients' personal interests are affected – as the Appeals Chamber recently ruled in connection with these proceedings.¹⁹

(B) Observations of the Legal Representative

(1) The Prosecution's *ex parte* submissions

17. The Legal Representative notes that the Defence raises three errors of procedure. First, according to the Defence, the *ex parte* submissions in which the Office of the Prosecutor informed the Trial Chamber of its suspicions of offences against the administration of justice had a direct bearing on the credibility of Defence witnesses. According to the Defence, these submissions were illegal and improper,²⁰ and it – above all – had had “no” opportunity to respond to them. The submissions allegedly coloured the Trial Chamber's

¹⁸ *Ibid.*, paras. 15 and 114.

¹⁹ See “Decision on the Request of Legal Representative of Victims for Access to Documents”, 17 October 2016, ICC-01/05-01/08-3445-Conf, para. 8. The Appeals Chamber considered that “[a]s the proposed additional evidence is adduced to **support arguments on the basis of which Mr Bemba seeks ‘to vacate the [conviction decision],’ [...]** the personal interests of victims are affected by its admission” (emphasis added). The Legal Representative in the case at bar had submitted that “[TRANSLATION] her clients' interests would necessarily be affected because the Judgment convicts Mr Bemba of the crimes of which they were victims, and because any reparations depend on that verdict”; see “*Requête de la Représentante légale des victimes relative à ‘Defence application to present additional evidence in the appeal against the Judgment pursuant to Article 74 of the Statute’*”, 30 September 2016, ICC-01/05-01/08-3438-Conf, para. 12.

²⁰ Document in Support of the Appeal, paras. 52-56 and 67.

assessment of exculpatory evidence²¹ at trial.²² Consequently, the Defence submits, the right of the Accused to an impartial hearing²³ was violated.²⁴

18. The Legal Representative also notes that the Trial Chamber has already ruled, in response to similar Defence allegations, on the Prosecution submissions' impact on its impartiality.²⁵ In its ruling, the Trial Chamber recalled that it had decided it had no competence over Prosecution accusations under article 70 of the Statute.²⁶ It noted that a strong presumption of impartiality has been held to attach to judges of the Court, which is not easily rebutted, since it is presumed that they are professional judges and, by virtue of their experience and training, are capable of deciding on the issue before them "while relying **solely** and **exclusively** on the evidence adduced in the particular case".²⁷ The Trial Chamber added that, consequently, "any information, allegations, or submissions made before it not based upon evidence admitted in the *Bemba* case [would] not be taken into consideration" in its decision to convict or acquit the Accused.²⁸
19. In its Document in Support of the Appeal, the Defence neither contests this analysis directly nor refers to the Trial Chamber's ruling.²⁹ Nonetheless, it submits that the Judgment reflects influence exercised on the Trial Chamber by the Prosecution's *ex parte* accusations. According to the Defence, the Trial Chamber "chose to attempt an impossible feat: purporting to assess the credibility of the affected Defence witnesses [i.e. those affected by these

²¹ *Ibid.*, paras. 14, 51, 66 and 70.

²² *Ibid.*, para. 71.

²³ Rome Statute, article 67(1).

²⁴ Document in Support of the Appeal, para. 52.

²⁵ "Decision on 'Defence Request for Relief for Abuse of Process'", 17 June 2015, ICC-01/05-01/08-3255, paras. 99-115. Also see footnote 40 below.

²⁶ "Decision on the prosecution's request relating to Article 70 investigation", 26 April 2013, ICC-01/05-01/08-2606-Conf.

²⁷ ICC-01/05-01/08-3255, para. 100.

²⁸ *Ibid.*, para. 105, cited in para. 258 of the Judgment. The Trial Chamber refused to consider the Prosecution's *ex parte* submissions and supporting documents (see Judgment, para. 252).

²⁹ The Defence also failed to file any request for disqualification under rule 34 of the Rules of Procedure and Evidence.

accusations] without openly considering the *ex parte* allegations or the Article 70 case".³⁰ Thus, according to the Defence,

of the 14 witnesses who were alleged to have been part of the scheme that was the object of the Prosecution's *ex parte* accusations, the Trial Chamber did not find a single one to be generally credible or reliable on any issue. The Trial Chamber does not even address the credibility of five of those witnesses, or the reliability of their testimony.³¹

In the Defence's view, the "uniform rejection of the 14 witnesses [...] indicates that the Trial Chamber's evaluation of their credibility was affected by the Prosecution's *ex parte* allegations".³²

20. Regarding the *ex parte* submissions' purported impact on the manner in which the Trial Chamber assessed the credibility of the Defence witnesses affected by the accusations, the Legal Representative notes that the Judgment was delivered on 21 March 2016, more than four months after Pre-Trial Chamber II rendered its Decision on the confirmation of charges in ICC-01/05-01/13. In that decision, Pre-Trial Chamber II had determined that there was sufficient evidence to establish substantial grounds to believe that the offence of corruptly influencing witnesses **D2, D3, D4, D6, D13, D15, D23, D25, D26, D29, D54, D55, D57 and D64** had been committed.³³ The Legal Representative therefore does not view the Trial Chamber's having recalled this enumeration of witnesses in its Judgment³⁴ as reason to conclude that the Trial Chamber was influenced by the Prosecution's *ex parte* submissions.³⁵ Moreover, the Legal Representative notes that the verdict in ICC-01/05-01/13 was issued several months after the Judgment. Trial Chamber VII's findings therefore could not have influenced the members of the Trial Chamber bench in the instant case.

³⁰ Document in Support of the Appeal, para. 73.

³¹ *Ibid.*, paras. 79 and 110.

³² *Ibid.*, para. 111.

³³ "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/05-01/13-749, pp. 47-54.

³⁴ Judgment, para. 253.

³⁵ Document in Support of the Appeal, para. 72.

21. The Appeals Chamber has espoused the view that a Trial Chamber is best positioned to assess the reliability and credibility of evidence because it has the advantage of observing witnesses in person:

“[I]t is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness’ testimony to prefer, **without necessarily articulating every step of the reasoning in reaching a decision on these points**. This discretion is, however, tempered by **the Trial Chamber’s duty to provide a reasoned opinion**”.³⁶

The Appeals Chamber’s intervention is required only when “‘an unreasonable assessment of the facts of the case’ carried out by the Trial Chamber ‘may have occasioned a miscarriage of justice’”.³⁷

22. The Legal Representative observes that the Trial Chamber did rely, to a certain extent, on the testimony of some of the 14 affected witnesses, for example in reaching its findings on the identity of the perpetrators.³⁸ It is incorrect, therefore, for the Defence to assert that the Trial Chamber found none of the 14 witnesses reliable.³⁹ Moreover, the Legal Representative joins the Prosecution⁴⁰ in noting that, when the Trial Chamber did reject evidence from the affected witnesses, it provided a reasoned basis for doing so. The Trial Chamber relied only on its analysis of their demeanour and the content of their testimony in court, and on other evidence in the case record which contradicted that testimony; it provided footnote citations of the evidence supporting its analysis.⁴¹ The Legal Representative further observes that Prosecution witnesses

³⁶ ICC-01/04-01/01-3121-Red, *Lubanga Appeals Judgment*, para. 24 (emphasis added).

³⁷ *Ibid.*, para. 25.

³⁸ See, e.g., Judgment, footnote 2127, in which the Trial Chamber cites, *inter alia*, the testimony of D2, D3, D4, D6, D13, D23, D26, D29, D54, D57 and D64.

³⁹ *Ibid.*, para. 695.

⁴⁰ Prosecution Response, para. 48. The Prosecution submits that “the Chamber’s individualised assessment of the credibility of many witnesses, based on demeanour and testimony in court, is supported by careful citations to the trial record”.

⁴¹ **D2**: see Judgment, paras. 348-351 and corresponding footnotes; **D3**: see Judgment, paras. 352-353 and corresponding footnotes; **D15**: see Judgment, paras. 357-358, 432 and corresponding footnotes; **D25**: see Judgment, paras. 361-362 and corresponding footnotes; **D54**: see Judgment, paras. 370-371 and corresponding footnotes; **D55**: see Judgment, paras. 372-374 and corresponding footnotes; **D57**: see Judgment, paras. 375-376 and corresponding footnotes; **D64**: see Judgment, paras. 372-374 and corresponding footnotes 377-378; **D13**: see Judgment, para. 431 and corresponding footnotes. The Defence asserts that “[t]he Trial Chamber lists D4’s and D6’s testimony as being among those ‘marked

were treated in the same manner,⁴² and therefore takes the view that the accusations against the 14 impugned witnesses did not influence the Trial Chamber's assessment of the reliability and credibility of the evidence.

23. The Defence submits that the Trial Chamber's assessment of these witnesses' credibility caused it to reject essential facts in Mr Bemba's case, for example that he did not have "operational control" over the MLC troops deployed to the CAR.⁴³ This allegedly led the Trial Chamber into a miscarriage of justice because the absence of such control should have precluded Mr Bemba's conviction.
24. The Legal Representative notes, however, that in its own Closing Brief – which it filed before Pre-Trial Chamber II's Decision on the confirmation of charges – the Defence chose **not** to rely on the 14 witnesses in question.⁴⁴ In the Legal Representative's view, this shows that the Defence had its own doubts about the credibility of the 14 witnesses. Yet, the Defence was able to make its arguments in any case, by relying on **other** evidence in the record.⁴⁵ Furthermore, the Trial Chamber clearly stated its reasons for not finding in its favour.⁴⁶

by various issues giving rise to further, significant doubts' but then gives no reasons for this finding in the ensuing discussion" (*Lubanga* Judgment, footnote 217). The Legal Representative considers this assertion to be erroneous because the Trial Chamber gave its reasons for not relying on certain aspects of D4's and D6's testimony. See Judgment, para. 430 and footnote 1195: "D3, D4 and D6 all testified that they were not in a position to know about communications between Mr Bemba and Colonel Moustapha or the internal organization of the MLC contingent in the CAR. Accordingly, the Chamber doubts the ability of these witnesses to conclude that the CAR authorities had operational command over the MLC contingent in the CAR"; para. 414 and footnote 1134: "D6's testimony that the MLC troops in the CAR were initially unable to communicate because they did not bring communications equipment is contradicted by messages from the MLC contingent in the CAR recorded in the MLC logbook".

⁴² Judgment, paras. 305-316 and 343-347.

⁴³ Document in Support of the Appeal, para. 74.

⁴⁴ "Closing Brief of Mr. Jean-Pierre Bemba Gombo", 25 August 2014, ICC-01/05-01/08-3121-Conf, paras. 13-16. Also see Judgment, para. 262.

⁴⁵ *Ibid.*, paras. 607-666.

⁴⁶ Judgment, paras. 427-449.

(2) Delayed disclosure

25. The Defence's second claim is that the disclosure of the Prosecution's allegations to it was delayed,⁴⁷ in violation of rule 77 of the RPE,⁴⁸ which provides that the Prosecutor shall permit the defence team to inspect any materials "in the possession or control of the Prosecutor, which are material to the preparation of the defence". The Defence argues that this delayed disclosure prejudiced its case: if it had been made privy to the Prosecutor's suspicions earlier, it could have taken all appropriate measures to "remedy" the situation.⁴⁹ Instead, 11 of "its" witnesses were called with the allegations of offences against the administration of justice involving them yet to be disclosed. In its Judgment, the Trial Chamber rejected the testimonies of five of these witnesses relating to Mr Bemba's effective control over the aforementioned troops.⁵⁰
26. The Legal Representative notes that the Defence already had an opportunity before the Trial Chamber to address delayed disclosure and the alleged resulting prejudice. The Trial Chamber found that "insofar as the Prosecution was (i) in the possession of and (ii) did not disclose Rule 77 information [...] without applying to the Chamber for authorisation, it failed to satisfy the requirements of Rule 81(2)". However, it also found the Defence's assertions of prejudice to be unfounded.⁵¹ Although the Defence cites one of the Trial

⁴⁷ The evidence was disclosed to the Defence on 22 July 2014 ("Prosecution's Communication of Rule 77 Evidence", 22 July 2014, ICC-01/05-01/08-3108).

⁴⁸ Document in Support of the Appeal, paras. 76-77.

⁴⁹ *Ibid.*, para. 89.

⁵⁰ *Ibid.*, para. 91.

⁵¹ ICC-01/05-01/08-3255, paras. 82-90. Also see Document in Support of the Appeal, paras. 86-87, and Prosecution Response, paras. 50-52. Several of the other issues raised by the Defence have also already been adjudicated by the Trial Chamber. See Decision 3255, paras. 17 and 65-72 (disclosure to the Prosecution of information concerning the Defence and protected by attorney-client privilege); paras. 99-115 (influence of the *ex parte* submissions on the Judges). In its Reply, the Defence argues that its ground of appeal is not limited to the Trial Chamber decision in question but encompasses the trial's fairness and procedure in its totality, and that, accordingly, it is not asking the Appeals Chamber to address the allegations anew (Defence Reply, paras. 7-8). The Legal Representative takes issue with the Defence's approach here. She observes that the only "new" allegations offered by the Defence on appeal are those concerning the Trial Chamber's analysis, in its Judgment, of evidence given by the Defence witnesses implicated in the article 70 case. Therefore, in accordance with the

Chamber's rulings on this issue,⁵² it fails to contest these findings directly. Yet, as the Prosecution recalls,⁵³

“[in circumstances] where 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**”.⁵⁴

27. The Legal Representative further notes that, on 19 October 2016, Mr Bemba was found guilty of having solicited false testimony from 14 Defence witnesses.⁵⁵ Accordingly, the Defence's argument that the Prosecution, in failing to meet its disclosure obligations, prevented the Defence from taking appropriate measures to ensure the credibility of its witnesses⁵⁶ seems inadmissible by virtue of the familiar maxim *nemo auditur propriam turpitudinem allegans*.⁵⁷

28. As shown above, the Trial Chamber did not reject the affected witnesses' testimony without explaining why.⁵⁸ The allegation that delayed disclosure prejudiced the Defence's case⁵⁹ is therefore unfounded.

(3) Disclosure to the Prosecution of privileged Defence communications

29. The Defence's third claim is that, during the trial, the team representing the Office of the Prosecutor in this case obtained undue access to privileged and/or confidential information concerning the Defence.⁶⁰ The Prosecution rebuts this claim in its Response,⁶¹ contending that it had never had access to information

appellate case-law on allegations already addressed at the trial stage, the Legal Representative believes that the Defence should have referred to the relevant Trial Chamber decisions and demonstrated how the Trial Chamber purportedly erred.

⁵² Document in Support of the Appeal, para. 112.

⁵³ Prosecution Response, paras. 19-21.

⁵⁴ ICC-01/04-01/01-3121-Red, *Lubanga* Appeals Judgment, para. 155.

⁵⁵ Public redacted version of “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/13-1989-Red.

⁵⁶ Document in Support of the Appeal, paras. 89 and 107.

⁵⁷ No one is heard when alleging his own wickedness.

⁵⁸ See above, paras. 20-21.

⁵⁹ Document in Support of the Appeal, para. 91.

⁶⁰ *Ibid.*, paras. 93-95 and 108.

⁶¹ Prosecution Response, paras. 60-69.

still bound by privilege, and that, even if it had, that would not have detracted from the fairness of the trial.

30. Regardless of whether the Prosecution was privy to such information at trial, the Legal Representative notes that the Trial Chamber, when seized of the issue at the Defence's initiative, determined that the Defence had

fail[ed] to substantiate, for example, how, based upon the timing of the transmission of any communications together with a description of their likely content, th[ese] actions [...] could have caused prejudice to the fairness of the *Bemba* case or afforded the Prosecution an unfair advantage such that the fairness of the trial would be irreparably tainted.⁶²

The Legal Representative notes that the Defence, in its Document in Support of the Appeal, neither demonstrates prejudice nor establishes how the transmission of the communications allegedly affected the Judgment. In its Reply, the Defence asserts that prejudice should be presumed in this case.⁶³

31. The Legal Representative seconds the Prosecution's rebuttal that nothing in any text or international case-law requires a presumption of prejudice to the Defence in such circumstances.⁶⁴ Prejudice must be shown – it must be proven, not presumed. Moreover, as established in the Appeals Judgment cited above,⁶⁵ since the Defence is challenging neither the approach nor the findings of the Trial Chamber, its submissions are moot.

32. **In conclusion**, the Legal Representative submits that the Defence's allegations with respect to its first ground of appeal are either unfounded or moot. In particular, the Legal Representative considers that the Defence fails to substantiate how the alleged "errors" affected the Judgment.⁶⁶ She therefore joins the Prosecution in moving that the Appeals Chamber dismiss the appeal.

⁶² ICC-01/05-01/08-3255, para. 72.

⁶³ Defence Reply, para. 23.

⁶⁴ Prosecution Response, para. 69.

⁶⁵ ICC-01/04-01/01-3121-Red, *Lubanga* Appeals Judgment, para. 155.

⁶⁶ *Ibid.*, para. 32.

(III) Scope of the charges

(A) The personal interests of victims affected by the Defence's submissions

33. The Defence challenges Mr Bemba's conviction of a certain number of underlying acts⁶⁷ of murder,⁶⁸ pillage⁶⁹ and rape,⁷⁰ arguing that a conviction cannot be based on the acts in question because they were not confirmed in the Pre-Trial Chamber's Decision on the confirmation of charges.⁷¹ The Defence accordingly alleges legal error on the part of the Trial Chamber.
34. The Legal Representative observes that many of the underlying acts to which the Defence refers concern dual-status victims.⁷² The Defence also challenges findings of guilt based on direct testimony from victims whom the Legal Representative called before the Trial Chamber.⁷³

⁶⁷ Document in Support of the Appeal, paras. 115 *et seq.* (see footnote 225 in particular).

⁶⁸ Judgment, para. 624(b) (P69's sister in PK12); para. 624(c) (an unidentified "Muslim" man in Mongoumba).

⁶⁹ *Ibid.*, para. 633(b) (two unidentified girls in Bangui); para. 633(d) (eight unidentified women at the Port Beach naval base); para. 633(f) (P69 and his wife in PK12); para. 633(h) (P79 and her daughter in PK12); para. 633(j) (P75, a woman in the bush outside PK22); para. 633(l) (V1 in Mongoumba).

⁷⁰ *Ibid.*, para. 640(a) (P68 and her sister-in-law in Bangui); para. 640(b) (P119 in Bangui); para. 640(e) (P69's sister in PK12); para. 640(f) (P69 in PK12); para. 640(g) (P108 in PK12); para. 640(h) (P110 in PK12); para. 640(i) (P112 in PK12); para. 640(k) (P79 and her brother); para. 640(l) (P73 in PK12); para. 640(n) (P75, a woman in the bush outside PK22); para. 640(o) (V2 in Sibut); para. 640(p) (V1, a church, nuns, priests, an unidentified "Muslim" man and his neighbour, and the mayor in Mongoumba).

⁷¹ Document in Support of the Appeal, para. 116.

⁷² Besides V1 and V2, the Legal Representative represents P68, P69, P108, P110, P112 and P73.

⁷³ V1 and V2. See Document in Support of the Appeal, paras. 123 and 124.

(B) Observations of the Legal Representative

(1) Inclusion of underlying acts not confirmed by the Pre-Trial Chamber

35. A verdict cannot exceed the facts and circumstances described in the charges according to article 61(7) of the Statute. The Defence submits that the Pre-Trial Chamber's Decision on the confirmation of charges defines the charges.⁷⁴

36. However, the Legal Representative notes that the Appeals Chamber determined in *Lubanga* that "the decision on the confirmation of the charges defines the **parameters** of the charges at trial",⁷⁵ not the charges themselves.⁷⁶ The Legal Representative observes, according to this precedent, that, whereas the underlying acts form an integral part of the charges,⁷⁷ the charges themselves are **not** limited to the underlying acts confirmed by the Pre-Trial Chamber. Indeed, the Appeals Chamber found that, while the Decision on the confirmation of charges defined the parameters of the charges, this did not preclude the use of "auxiliary documents" containing "further details about the charges".⁷⁸

37. The Trial Chamber correctly found that Pre-Trial Chamber II had "broadly defined the temporal and geographical scope" of the charges.⁷⁹ Likewise, the Legal Representative recalls that the Pre-Trial Chamber relied "**in particular**" on certain facts and evidence⁸⁰ to establish that crimes against humanity (murder and rape) and war crimes (murder, rape and pillage) had been committed in the CAR from on or about 26 October 2002 to 15 March 2003. The

⁷⁴ *Ibid.*, paras. 115-116.

⁷⁵ ICC-01/04-01/01-3121-Red, *Lubanga* Appeals Judgment, para. 124 (emphasis added).

⁷⁶ Similarly, see Judgment, para. 32.

⁷⁷ ICC-01/04-01/01-3121-Red, *Lubanga* Appeals Judgment, para. 122.

⁷⁸ *Ibid.*, para. 124.

⁷⁹ Judgment, para. 42.

⁸⁰ "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, paras. 145 (acts of murder), 170 (acts of rape) and 323 (acts of pillage) ("Confirmation Decision").

Pre-Trial Chamber found that the attack directed against the CAR civilian population was widespread, targeting “various locations **such as** Bangui (districts of Boy-Rabé and Foh), PK 12 and Mongoumba as well as Bossangoa, Damara, Bossembélé, Sibut, Bozoum, Bossempélé and PK 22”.⁸¹

38. In the Legal Representative’s view, it follows from the foregoing that other underlying acts could be included in the charges after the Confirmation Decision, as long as they fell within the scope of the charges and were not excluded by the Pre-Trial Chamber.⁸² The Trial Chamber therefore did not err on this point.⁸³

(2) Respect for the rights of the accused

(a) Prosecutor’s notice of charges to the Accused

39. The Defence alleges that the inclusion in the charges of underlying acts not confirmed by the Pre-Trial Chamber is inconsistent with the right of the accused to be informed of the charges and to prepare his or her defence.⁸⁴
40. The Pre-Trial Chamber took the view that the Prosecution’s use of “open” expressions (“including, but not limited to”, “in particular”, “such as”) when listing the pertinent incidents did not infringe the rights of the Defence.⁸⁵ The Legal Representative considers it important here to take into account the nature of the crimes (mass crimes) and the mode of responsibility (indirect criminal responsibility) with which the Accused was charged.⁸⁶ In the circumstances, the

⁸¹ *Ibid.*, para. 486; also see paras. 117 (the Pre-Trial Chamber determined that several direct witnesses had suffered from MLC attacks in various locations **such as** Bangui (districts of Boy-Rabé and Foh), PK 12 and Mongoumba) and 188 (the acts of rape were committed “in localities, **such as** PK 12, Foh, Boy-Rabé and Mongoumba”).

⁸² On this point, see in particular the Document in Support of the Appeal, paras. 125-127 and Prosecution Response, paras. 104-106. The Legal Representative shares the Prosecution’s position.

⁸³ For more on this, see also the Prosecution Response, paras. 83, 92-93.

⁸⁴ Document in Support of the Appeal, para. 121. See Statute, article 67(1)(a) and (b).

⁸⁵ Confirmation Decision, para. 66.

⁸⁶ See Judgment, para. 42.

Prosecution cannot be expected to prove every crime committed by MLC troops in the CAR during the 2002-2003 operation.⁸⁷ In *Lubanga*, the Appeals Chamber found that

where an accused is not alleged to have directly carried out the incriminated conduct [...] the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible **in the circumstances**".⁸⁸

41. It also found that "all documents that were designed to provide information about the charges" must be considered in determining whether an accused was properly informed of the charges. Such "documents" include the Confirmation Decision and any relevant "auxiliary documents".⁸⁹
42. The Legal Representative accordingly notes, as the Prosecution Response shows, that Mr Bemba was informed of the Prosecution charges against him in sufficient detail before the start of the trial.⁹⁰ The Trial Chamber therefore neither erred nor violated the rights of the Accused in finding that the acts in question fell within the scope of the charges⁹¹ and in convicting Mr Bemba on that basis.

(b) Legal Representatives' notice of charges to the Accused

43. The Defence also contends that evidence from **V1** and **V2** should not have been relied upon to convict Mr Bemba, since the acts they describe in their testimony were not notified to Mr Bemba before the trial commenced.⁹²
44. The Legal Representative notes that, according to the Appeals Chamber, "because a trial must commence based on a set of clearly defined charges", only information made available "before the start of the trial" may be taken into

⁸⁷ *Ibid.*, para. 43.

⁸⁸ ICC-01/04-01/01-3121-Red, *Lubanga* Appeals Judgment, para. 123.

⁸⁹ *Ibid.*, para. 128.

⁹⁰ Prosecution Response, paras. 85-87.

⁹¹ Judgment, paras. 44-50.

⁹² Document in Support of the Appeal, para. 123.

account in determining whether an accused was properly informed of the charges.⁹³ However, prejudice caused to the Defence by insufficient information on the charges before the start of the trial may be remedied by information made available **during the trial**.⁹⁴

45. The purpose and scope of confirmation proceedings are limited – specifically, to determining whether there is “sufficient evidence” to commit the suspect to trial.⁹⁵ Confirmation hearings are not a “mini-trial” before the [...] trial”.⁹⁶ If all incriminatory and exculpatory evidence had to be adduced at the pre-trial stage,⁹⁷ one would question the point of the trial – and of article 69(3) of the Statute, which allows the parties and the Court to submit and request relevant evidence during the trial stage.
46. **V1** and **V2**’s testimony falls squarely within the bounds of the Trial Chamber’s authority to “request the submission of all evidence that it considers necessary for the determination of the truth”.⁹⁸ Contrary to what the Defence alleges in its Document in Support of the Appeal, the victims did not act as “second (and third) Prosecutor”.⁹⁹ The onus is not on the victims to prove the guilt of accused.¹⁰⁰ Accordingly, their right to submit evidence during the proceedings is closely linked to the Trial Chamber’s evidentiary powers, and strictly governed.
47. The Single Judge did not authorise the victims to submit evidence at the pre-trial stage.¹⁰¹ Consequently, the acts testified to by **V1** and **V2** could not be notified to the Accused before the trial commenced. When, at trial, the Legal

⁹³ *Ibid.*, para. 129.

⁹⁴ ICC-01/04-01/01-3121-Red, *Lubanga* Appeals Judgment, para. 130. Also see Prosecution Response, para. 99.

⁹⁵ Statute, article 61(7)(a).

⁹⁶ “Fourth Decision on Victims’ Participation”, 8 January 2009, ICC-01/05-01/08-320, para. 94.

⁹⁷ See Defence arguments in Document in Support of the Appeal, para. 121.

⁹⁸ Statute, article 69(3).

⁹⁹ Document in Support of the Appeal, para. 525.

¹⁰⁰ Statute, article 66(2).

¹⁰¹ ICC-01/05-01/08-320, paras. 101-111 on victims’ participation rights before the Pre-Trial Chamber.

Representatives applied to call a certain number of victims to the stand, they did so only once the Trial Chamber had invited them to,¹⁰² after the Prosecution case ended and **before the Defence case began**.¹⁰³ The Trial Chamber made a painstaking study of those victims' written statements to satisfy itself, *inter alia*, that they fell within the scope of the charges against Mr Bemba.¹⁰⁴

48. Like the Prosecution,¹⁰⁵ the Legal Representative considers that the rights of the Accused were not infringed when the Defence received notice at trial of the underlying acts of murder, rape and pillage to which **V1** and **V2** testified. Not only was the notice he received sufficiently prompt and detailed,¹⁰⁶ he was also given adequate time to prepare his defence.¹⁰⁷ Moreover, while **V1** and **V2** were on the stand, the Defence had the opportunity to cross-examine them exhaustively and at length.¹⁰⁸

49. In view of the above, the Legal Representative considers that the Trial Chamber did not err in relying on the underlying acts described by **V1** and **V2** to convict

¹⁰² "Order regarding applications by victims to present their views and concerns or to present evidence", 21 November 2011, ICC-01/05-01/08-1935.

¹⁰³ The Defence case began on 14 August 2012, more than three months after V1 and V2 testified. See Judgment, para. 10.

¹⁰⁴ For example, Victim a/0555/08 was not authorised to give evidence because the Trial Chamber determined that the information described in her written statement "would not be relevant to the charges". See "Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims", 22 February 2012, ICC-01/05-01/08-2138, para. 38.

¹⁰⁵ Prosecution Response, paras. 99-101.

¹⁰⁶ Redacted and then less redacted versions of V1 and V2's written statements were disclosed to the Defence on 1 February 2012 and 12 March 2012, respectively. Their statements described the underlying acts on which the Trial Chamber relied in its verdict. ICC-01/05-01/08-2061-Conf-Anx1-Red and ICC-01/05-01/08-2066-Conf-Anx5-Red (redacted); ICC-01/05-01/08-2061-Conf-Anx1-Red2 and ICC-01/05-01/08-2066-Conf-Anx5-Red2 (less redacted).

¹⁰⁷ The Defence challenged the proposed testimony of **V1** and **V2** on the basis that it was cumulative and that its introduction would delay the proceedings. See "Defence Response to the Supplemental Applications of the Legal Representatives of Victims to present evidence", 9 February 2012, ICC-01/05-01/08-2125-Conf, paras. 20-30. The Defence did not advance the argument that their testimony would exceed the scope of the charges. Moreover, the Trial Chamber granted the Defence's request to postpone **V1** and **V2**'s testimony by several days. They began testifying in early May 2012, instead of on 23 April 2012 as initially planned. See ICC-01/05-01/08-T-219-FRA.

¹⁰⁸ The Defence cross-examination included questions on the underlying acts at issue. ICC-01/05-01/08-T-221-CONF-FRA (**V1**) and ICC-01/05-01/08-T-222-FRA; ICC-01/05-01/08-T-223-CONF-FRA (**V2**).

Mr Bemba.¹⁰⁹ The Legal Representative recalls that the Appeals Chamber already disposed of this issue in *Lubanga*, where it confirmed the Trial Chamber's decision "allowing participating victims the possibility to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of evidence in the trial proceedings".¹¹⁰

(IV) Mr Bemba's responsibility as a superior

(A) Applicable law

50. Trial Chamber III found Mr Bemba guilty of war crimes and crimes against humanity in his capacity as a person effectively acting as a military commander.¹¹¹ Under article 28(a) of the Statute, a military commander or person effectively acting as a military commander may be found criminally responsible when he or she has failed to exercise control properly over forces, where:

- (i) [t]hat military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) [t]hat military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

51. The Defence argues that Mr Bemba is not liable as a superior because (1) he did not have effective control over the MLC troops in the CAR;¹¹² (2) he did not have actual knowledge of the alleged crimes;¹¹³ and (3) he took all necessary and reasonable measures¹¹⁴ to prevent or repress the crimes. The Defence

¹⁰⁹ Judgment, para. 50.

¹¹⁰ ICC-01/04-01/06-1432, para. 105; ICC-01/04-01/06-1119, para. 108.

¹¹¹ Judgment, para. 752.

¹¹² Document in Support of the Appeal, p. 58: "A. Mr. Bemba did not have effective control over the MLC troops in CAR".

¹¹³ *Ibid.*, p. 109: "C. Mr. Bemba did not have actual knowledge of the alleged crimes".

¹¹⁴ *Ibid.*, p. 124: "D. Mr. Bemba took necessary and reasonable measures".

submits that the Trial Chamber dismissed or ignored certain evidence¹¹⁵ and that its finding on causation was invalid.¹¹⁶

(B) Observations of the Legal Representative of Victims

52. The Legal Representative joins the Prosecution in submitting that the Trial Chamber made the proper determination as to Mr Bemba's responsibility for the crimes of his subordinates under article 28(a) of the Statute, and as to his failure to take all necessary and reasonable measures to prevent, investigate and punish those crimes.

(1) Mr Bemba had effective control over his troops in the CAR

53. The Defence fails to show error when arguing that Mr Bemba did not have effective control over his subordinates. Mr Bemba's status as a military commander or person effectively acting as a military commander is no longer at issue. This mode of criminal responsibility was confirmed as a prerequisite to his prosecution and conviction.¹¹⁷

(2) Mr Bemba had actual knowledge of the alleged crimes

54. According to the Defence, Mr Bemba could not have had actual knowledge of the alleged crimes because his actions¹¹⁸ (e.g. appealing to international organisations to conduct public investigations, and to the Central Africans to form an independent commission of enquiry; sending a delegation including international journalists to Sibut to interview the population) do not reflect such knowledge. The Defence also argues that the Trial Chamber erred in law by "conflat[ing] the 'actual knowledge' with the 'constructive knowledge' (should

¹¹⁵ *Ibid.*, p. 89: "B. The evidence dismissed or ignored".

¹¹⁶ *Ibid.*, p. 141: "E. The finding on causation is invalid".

¹¹⁷ Judgment, para. 752; "*Conclusions écrites de la Représentante légale des victimes*", section VII; Prosecution's closing brief, chapter 6.

¹¹⁸ Document in Support of the Appeal, paras. 290-291.

have known) standard”,¹¹⁹ and that, therefore, the facts as found by the Trial Chamber, which included RFI reporting and the attack on Mongoumba, do not support a finding of actual knowledge on the part of the Accused.¹²⁰

55. The Legal Representative notes that the Trial Chamber’s finding – according to which Mr Bemba had actual knowledge of the crimes his troops committed – was based on elements such as his establishment of the Mondonga Inquiry;¹²¹ his November 2012 speech at PK12;¹²² the Bomengo case file, which resulted in the establishment of the Gbadolite court-martial;¹²³ the Zongo Commission;¹²⁴ his letter to the President of the FIDH noting its report;¹²⁵ the Sibut Mission;¹²⁶ and knowledge of the punitive attack on Mongoumba through Colonel Mustapha.¹²⁷

56. The Legal Representative recalls her written closing submissions,¹²⁸ in which she asserted that

[TRANSLATION] the acts of violence which were being committed in the CAR [...] were known to Jean-Pierre Bemba in a number of ways: through oral reports, mainly via phonie; through written reports; through the media; and through meetings in person.¹²⁹

Moreover, the Trial Chamber reached its findings by assessing the evidence as a whole – not selectively, as the Defence intimates. In conclusion, to quote the Trial Chamber, “Mr Bemba knew that the MLC forces under his effective authority and control were committing or about to commit the crimes against

¹¹⁹ *Ibid.*, p. 112: “1. The Trial Chamber conflates the ‘actual knowledge’ with the ‘constructive knowledge’ (should have known) standard”.

¹²⁰ *Ibid.*, pp. 117-119.

¹²¹ Judgment, para. 711.

¹²² *Idem.*

¹²³ *Ibid.*, para. 712.

¹²⁴ *Ibid.*, para. 713.

¹²⁵ *Ibid.*, para. 714.

¹²⁶ *Ibid.*, para. 715.

¹²⁷ *Ibid.*, para. 716.

¹²⁸ ICC-01/05-01/08-3078-Conf, “Conclusions écrites de la Représentante légale des victimes, Me. Douzima-Lawson”.

¹²⁹ *Ibid.*, para. 280.

humanity of murder and rape, and the war crimes of murder, rape, and pillaging".¹³⁰

57. Moreover, in its Decision of 21 September 2012 the Trial Chamber had informed the parties and participants at trial that it might modify the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court. The change envisaged was:

to consider[,] "in the same mode of responsibility[,] the alternate form of knowledge contained in article 28(a)(i) of the Statute, namely that[,] owing to the circumstances at the time, the accused 'should have known' that the forces under his effective command and control or under his effective authority and control, as the case may be, were committing or about to commit the crimes included in the charges confirmed in the Decision on the Confirmation of Charges".¹³¹

58. The Legal Representative considers that the Defence's waiver of the measures granted to it by the Trial Chamber – in view of the potential change in the legal characterisation of the facts and circumstances related to the form of knowledge contained in article 28(a)(i) of the Statute – proves that the Defence could not show that Mr Bemba had no actual knowledge of the crimes being committed; even more to the point, he should have known, given his position in the MLC. In fact, his knowledge is why he had to take measures – although he failed to take reasonable ones – to prevent or punish the crimes.

(3) Mr Bemba did not take the necessary and reasonable measures

59. The Defence challenges the finding that Mr Bemba failed to take necessary and reasonable measures, on the ground that such a finding is itself unreasonable when viewed objectively against the evidence. According to the Defence, the Trial Chamber ignored directly relevant evidence and failed to give a reasoned opinion as to why its findings were reliable. The Defence seeks to support this claim by arguing that, in the vast majority of "international command cases",

¹³⁰ Judgment, para. 717.

¹³¹ ICC-01/05-01/08-2500, para. 1.

the commander in question either took no measures to prevent or punish the crimes of subordinates, or was participating or present when the crimes were committed.¹³²

60. In the Prosecution's view, the Trial 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". The Prosecution contends that Mr Bemba should have assessed the evidence as a whole – as the Trial Chamber did – instead of taking a piecemeal approach, which led him to disregard important facts found by the Trial Chamber. Mr 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. As the Trial Chamber found, he did not do so.¹³³

61. The Legal Representative notes the Trial Chamber's recognition that Mr Bemba did take a few measures¹³⁴ in reaction to allegations of crimes committed by MLC soldiers. But the Trial Chamber recalled that those measures were "limited in mandate, execution, and/or results"¹³⁵ and "a grossly inadequate response to the consistent information of widespread crimes committed by MLC soldiers in the CAR of which Mr Bemba had knowledge".¹³⁶ The Legal Representative stresses that the measures the Defence cites¹³⁷ are the same as those the Trial Chamber considered in its finding.

¹³² Document in Support of the Appeal, paras. 328-335.

¹³³ Prosecution Response, paras. 195-197.

¹³⁴ Judgment, para. 719.

¹³⁵ *Ibid.*, para. 720.

¹³⁶ *Ibid.*, para. 726.

¹³⁷ Document in Support of the Appeal, para. 327.

62. The Legal Representative recalls that the evidence presented at trial served to confirm Mr Bemba's guilty conduct in the CAR.¹³⁸ Several witnesses' trial testimony substantiated the criminal conduct arising from his failure to exert the effective authority expected of him.¹³⁹ The evidence shows that although Mr Bemba exercised effective command and control over the ALC soldiers under his authority, and was aware of the acts of violence being committed in the CAR, he failed to take the necessary measures to repress the commission of the crimes.
63. The Legal Representative also observes that the Defence contradicts itself when it asserts – on the one hand – that Mr Bemba did not have control over his troops or knowledge of the crimes being committed or about to be committed, and – on the other hand – that he took the necessary and reasonable measures to prevent or punish the crimes.

(C) The causal link issue

64. The Defence submits that the Trial Chamber erred in law by considering it unnecessary to elaborate further on the standard of causation between a superior's failures and the resultant crimes.¹⁴⁰
65. The Legal Representative recalls her written closing submissions,¹⁴¹ in which she noted that

[TRANSLATION] while Pre-Trial Chamber II identified a number of criteria for establishing individual criminal responsibility in accordance with article 28(a) of the Statute, above all that the crimes committed resulted from the suspect's failure to exercise control properly over the forces, this condition must be interpreted in a nuanced manner consistent with the Pre-Trial Chamber's legal reasoning.

The Legal Representative observes accordingly that this criterion identified by Pre-Trial Chamber II is not expressly mentioned in article 28(a) of the Rome Statute and therefore suggests that the existence of a causal link between, on the one hand,

¹³⁸ ICC-01/05-01/08-3078-Conf, "*Conclusions écrites de la Représentante Légale des Victimes*", para. 321.

¹³⁹ CAR-OTP-PPPP-0213, CAR-OTP-PPPP-0038 and CAR-OTP-PPPP-0047.

¹⁴⁰ Document in Support of the Appeal, paras. 382-383.

¹⁴¹ ICC-01/05-01/08-3078-Conf, "*Conclusions écrites de la Représentante légale des victimes*".

the absence of effective control by the accused and, on the other, the crimes consequently committed results from that Chamber's interpretation. Furthermore, the Legal Representative notes that the Pre-Trial Chamber's findings lead to the identification of a causal link which need not be direct between "the superior's omission and the crime committed by his subordinates". Accordingly, to find a military commander responsible for the crimes committed by his forces, it must be demonstrated that his failure to exercise his duty to prevent crimes simply increased the risk that the forces would commit these crimes [emphasis added].

In this respect, the Legal Representative notes that the interpretation of the causal link between the misconduct of the military commander and the crimes subsequently committed by his forces must therefore be understood less restrictively, since the Pre-Trial Chamber envisaged the hierarchical superior's failure to act not as a necessary condition having caused the criminal abuses, but rather as a (non-exclusive) contributing factor in the commission of the crimes.¹⁴²

(V) The contextual elements of the crimes were established

66. The Defence claims that the contextual elements of the crimes of which Mr Bemba was convicted were not established.¹⁴³ In particular, it challenges the Trial Chamber's findings with regard to criminal intent (*mens rea*)¹⁴⁴ and the existence of an organisational policy,¹⁴⁵ both of which are required to establish that crimes against humanity were committed. The Defence also alleges that the Trial Chamber erred in its application of the law of pillage.¹⁴⁶ All of the above – the Defence argues – constitute legal and factual errors¹⁴⁷ which invalidate Mr Bemba's conviction.¹⁴⁸

(A) The required *mens rea* finding

67. The Defence contends that to convict a person of a crime against humanity, as opposed to the "ordinary" underlying criminal act, the Trial Chamber must determine that the person knew his or her conduct was part of a widespread

¹⁴² *Ibid.*, paras. 302-304.

¹⁴³ Document in Support of the Appeal, V: "The contextual elements were not established".

¹⁴⁴ *Ibid.*, paras. 414-421.

¹⁴⁵ *Ibid.*, pp. 155-162.

¹⁴⁶ *Ibid.*, paras. 445-461.

¹⁴⁷ *Ibid.*, paras. 417 and 422.

¹⁴⁸ *Ibid.*, paras. 414 and 445.

attack on a civilian population.¹⁴⁹ The Defence's argument is that the Trial Chamber failed to make the required finding and erred in law as a consequence.¹⁵⁰

68. The Legal Representative recalls the following *Lubanga* Appeals Chamber holding on legal errors:

"[T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision."¹⁵¹

According to the Defence's allegation, although the Trial Chamber stated that "an assessment of the Accused's knowledge of the attack is dealt with when considering his individual criminal responsibility under Article 28",¹⁵² no such assessment was made.¹⁵³ This is utterly inaccurate. The assessment is provided in section III(H)(4) of the Judgment¹⁵⁴ – in which, the Legal Representative notes, the Trial Chamber considered that "actual knowledge on the part of a commander cannot be presumed. Rather, it must be established either by direct or indirect (circumstantial) evidence".¹⁵⁵ As an "example [...] of direct evidence", the Trial Chamber cites "the accused's admission of knowledge or statements he may have made about the crimes".¹⁵⁶ Relevant factors that may indicate knowledge include "any orders to commit crimes, or the fact that the accused was informed personally that his forces were involved in criminal activity".¹⁵⁷

¹⁴⁹ *Ibid.*, para. 414.

¹⁵⁰ *Ibid.*, para. 417.

¹⁵¹ ICC-01/04-01/06-3121-Red, para. 18.

¹⁵² Judgment, para. 169.

¹⁵³ Document in Support of the Appeal, para. 415.

¹⁵⁴ Judgment, section III(H)(4), p. 98.

¹⁵⁵ *Ibid.*, para. 191.

¹⁵⁶ *Idem.*

¹⁵⁷ *Ibid.*, para. 193.

69. The Legal Representative accordingly notes the Defence's assertion in its Reply¹⁵⁸ that

a commander who receives a report alleging that his subordinate has raped a civilian, and does not take sufficient measures, is not thereby guilty of a crime against humanity. The commander must have knowledge that his conduct is part of a widespread attack on the civilian population.¹⁵⁹

This Defence argument is flawed because

[TRANSLATION] the acts of violence which were being committed in the CAR during the period covered by the charges were known to Jean-Pierre Bemba in a number of ways: thanks to oral¹⁶⁰ [and] written¹⁶¹ reports; via the media;¹⁶² and from face-to-face meetings.¹⁶³

The Legal Representative takes the view that Mr Bemba knew what was happening in the CAR.¹⁶⁴ She also recalls that, under article 28(a)(i) of the Statute, a military commander's responsibility is established where that person knew – or, owing to the circumstances at the time, should have known – that his or her forces were committing or about to commit crimes. Moreover, in the words of article 30(2) of the Statute,

[...] a person has intent where:

- (a) [i]n relation to conduct, that person means to engage in the conduct;
- (b) [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

70. Article 30(3) further specifies that

[f]or the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

¹⁵⁸ ICC-01/05-01/08-3483-Conf (Defence Reply).

¹⁵⁹ *Ibid.*, para. 64.

¹⁶⁰ ICC-01/05-01/08-3078-Conf, "Conclusions écrites de la Représentante légale des victimes", section VII(B)(1)(a).

¹⁶¹ *Ibid.*, section VII(B)(1)(b).

¹⁶² *Ibid.*, section VII(B)(1)(c).

¹⁶³ *Ibid.*, section VII(B)(1)(d).

¹⁶⁴ See above, paras. 55-56.

(B) The MLC organisational policy to commit the attack directed against the civilian population

71. The Defence contends that the Trial Chamber made a series of legal and factual errors when it relied on eight factors¹⁶⁵ cumulatively to find that there was an attack committed pursuant to or in furtherance of an organisational policy. The Defence's submissions state that an organisational policy is an indispensable element of article 7.¹⁶⁶

72. In her written closing submissions,¹⁶⁷ the Legal Representative observed that

[TRANSLATION] [t]he witnesses called by the Office of the Prosecutor and the Legal Representative of Victims established that the "attack" was "widespread" in all the above-mentioned areas. It was on a large scale and frequent, was carried out collectively, was of significant gravity and was directed against multitudinous victims. The attack was knowingly perpetrated by MLC troops, under the command of Jean-Pierre Bemba Gombo.¹⁶⁸

The attack and its cessation were Mr Bemba's decision. He gave the orders to the commander in the field; the commander in the field reported directly to him. The expression "attack directed against any civilian population" in article 7(2) of the Statute means "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack". The Legal Representative notes that this expression does not describe the commission of isolated incidents but rather a systematic – planned, directed and organised – attack against the civilian population. Hence the notion of "multiple commission of acts". The Legal Representative stresses that all of the accounts,¹⁶⁹ when read together, describe the "*modus operandi* of the MLC troops in their systematic and large-scale perpetration of the crimes

¹⁶⁵ Document in Support of the Appeal, footnote 802, referring to paras. 675-687 of the Judgment.

¹⁶⁶ *Ibid.*, para. 422.

¹⁶⁷ ICC-01/05-01/08-3078-Conf, "*Conclusions écrites de la Représentante légale des victimes*".

¹⁶⁸ *Ibid.*, para. 30.

¹⁶⁹ *Ibid.*, paras. 61, 69, 72, 75, 76, 83, 84, 86, 90, 103, 115, 116, 118, 144, 147, 148, 150, 187 and 234.

committed against the civilian population".¹⁷⁰ The policy is tellingly reflected in Mr Bemba's injunction to "[TRANSLATION] go there and carry out the task I have sent you to perform over there. You have no parent, brother or sister there".¹⁷¹ The case cannot be made that the crimes arose from isolated instances of uncoordinated, spontaneous conduct.

(C) How the law of pillage was applied

73. The Defence submits that pillage is committed when private or public property is appropriated intentionally and unlawfully in armed conflict. It therefore argues that the Trial Chamber misdirected itself in its approach to the *actus reus* of the offence by failing to assess whether the appropriations at issue were "unlawful" under international humanitarian law. In the Defence's approach, international humanitarian law permits the appropriation of property from civilians without their consent during armed conflict [...] and in instances of military necessity. The Defence alleges that the Trial Chamber erred in presuming that all items taken from civilians by soldiers and used during the 2002-2003 CAR Operation were pillaged – and thereby invalidated Mr Bemba's conviction. The Defence argues that the Trial Chamber would have had to find beyond a reasonable doubt that the objects were misappropriated for personal purposes.¹⁷²

74. In her written closing submissions,¹⁷³ the Legal Representative recalled Trial Chamber II's definition of pillaging, according to which "the pillaging of a town or place comprises all forms of appropriation, public or private, including not only organised and systematic appropriation, but also acts of appropriation

¹⁷⁰ ICC-01/05-01/08-3140-Conf-tENG, "Response of the Legal Representative of Victims, Ms Marie-Edith Douzima-Lawson, to 'Closing Brief of Mr. Jean-Pierre Bemba Gombo' ICC-01/05-01/08-3121-Conf", para. 100.

¹⁷¹ ICC-01/05-01/08-3078-Conf, "*Conclusions écrites de la Représentante légale des victimes*", para. 70, footnote 71.

¹⁷² Document in Support of the Appeal, paras. 445 and 446.

¹⁷³ ICC-01/05-01/08-3078-Conf, "*Conclusions écrites de la Représentante légale des victimes*".

committed by combatants **in their own interest**".¹⁷⁴ Appropriation in one's own interest entails the very unlawfulness which the Defence invokes before this Chamber to support its claim of legal error. The Legal Representative notes that the definition she uses in her submissions is consistent with the Trial Chamber's definition in its Judgment, where it "treats the terms 'plunder' and 'pillage' as legally synonymous insofar as they both refer to the unlawful appropriation of property in an armed conflict".¹⁷⁵ The Legal Representative takes the view that pillaging does not require a demonstration of unlawfulness since we know it is prohibited under international humanitarian law¹⁷⁶ and any dispensation is strictly controlled.¹⁷⁷

75. The Legal Representative recalls that under article 53¹⁷⁸ of the Hague Convention:

the property for which pillaging would be "authorised" must be "strictly the property of the State"; this was clearly not the case in the matter at hand. Also noteworthy is that the property seized – even if it belongs to private individuals – not only is confined "generally, [to] all kinds of munitions of war", but also "must be restored and compensation fixed when peace is made", which clearly was not done in the case of the witnesses/victims [...].¹⁷⁹

¹⁷⁴ *Ibid.*, para. 99.

¹⁷⁵ Judgment, para. 114.

¹⁷⁶ [Convention \(IV\) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907](#). Annex to Convention IV respecting the Laws and Customs of War on Land. **Article 47**: "Pillage is formally forbidden".

¹⁷⁷ *Ibid.*, **article 52**: "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

¹⁷⁸ *Ibid.*, **article 53**: An army of occupation can only take possession of cash, funds, and realizable securities **which are strictly the property of the State**, depots of arms, means of transport, stores and supplies, and, generally, all movable property **belonging to the State** which may be used for military operations. All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, **all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.**

¹⁷⁹ ICC-01/05-01/08-3140-Conf-tENG, "Response of the Legal Representative of Victims, Ms Marie-Edith Douzima-Lawson, to the 'Closing Brief of Mr. Jean-Pierre Bemba Gombo' ICC-01/05-01/08-3121-Conf", para. 77.

76. In addition to the foregoing, the Legal Representative joins the Prosecution in noting that

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 of material “obviously related to the conduct of military operations”.¹⁸⁰

The Prosecution has also pointed out that

other kinds of potentially lawful appropriations – of *public* or “*State*” property of a nature to assist “military operations”, and “enemy property or military equipment *captured on the battlefield*” (war booty) – simply do not apply to the private property which the Chamber found to have been appropriated in this case.¹⁸¹

77. The Legal Representative further recalls that

[TRANSLATION] [s]tatements by Witnesses and/or Victims **CAR-V20-PPPP-0001, CAR-V20-PPPP-0002, CAR-OTP-PPPP-0006, CAR-OTP-PPPP-0063, CAR-OTP-PPPP-0038, CAR-OTP-PPPP-0209, CAR-OTP-PPPP-0112, CAR-OTP-PPPP-0108, CAR-OTP-PPPP-0178, CAR-OTP-PPPP-0031, CAR-OTP-PPPP-0219 and CAR-OTP-PPPP-0069** clearly proved systematic and widespread pillaging of property; public or private, movable or immovable. [...] Their statements highlight the fact that pillaging was often accompanied by destruction, torching and even occupation of the plundered places, chasing away the proprietors and forcing them to flee.¹⁸²

During hearings it was noted that MLC soldiers took away property for private and personal use. They even carried plundered property all the way to the Democratic Republic of the Congo¹⁸³ – proof enough that they pillaged for private and personal ends and not for the needs of the military occupation.

78. Moreover, the Legal Representative notes, the testimony as a whole shows that MLC troops took what they wanted from houses; civilians watched helplessly as their property was systematically looted.¹⁸⁴ This extensive pillaging¹⁸⁵ “left the families in even more precarious circumstances”, frustrating the intent of article 52 of the Hague Convention, which stipulates that “[c]ontributions in

¹⁸⁰ Prosecution Response, para. 333.

¹⁸¹ *Idem.*

¹⁸² ICC-01/05-01/08-3078-Conf, “*Conclusions écrites de la Représentante légale des victimes*”, para. 101.

¹⁸³ *Ibid.*, para. 104.

¹⁸⁴ *Ibid.*, para. 110.

¹⁸⁵ *Ibid.*, para. 221.

kind shall as far [as] possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible".

79. In view of the foregoing, the Legal Representative echoes the Prosecution's submission that the pillaging at issue here conforms to none of the above exceptions, and that military necessity cannot constitute a defence for crimes against humanity¹⁸⁶ – especially when the impact of the pillaging is still visible today. The unlawfulness to which the Defence refers is inherent in the violation of positive international law.
80. In conclusion, the Legal Representative submits that the Defence fails to demonstrate the legal and factual errors it alleges.

(VI) Evidence pertaining to the identity of the perpetrators

81. The Defence claims that the Trial Chamber committed legal and factual errors in its assessment of the evidence pertaining to the identity of the perpetrators of the crimes of which Mr Bemba was convicted.¹⁸⁷ Allegedly, the Trial Chamber also shifted the dates of the incidents of rape and pillage testified to by witnesses **P68**, **P75** and **P119**, with no evidentiary basis for doing so.¹⁸⁸ According to the Defence, these purported errors undermine the Trial Chamber's findings with regard to the underlying acts of rape, pillage and murder.

(A) The Trial Chamber did not err in law

82. The Defence claims that the Trial Chamber erred in law by performing a "global evaluation" of the evidence identifying the perpetrators of the crimes of which

¹⁸⁶ *Ibid.*, para. 330; footnote 1155.

¹⁸⁷ Document in Support of the Appeal, para. 478.

¹⁸⁸ *Ibid.*, para. 482.

Mr Bemba was convicted, instead of a “case-by-case” assessment for each underlying act of rape, pillage and murder.¹⁸⁹

83. The Legal Representative observes that the Trial Chamber, contrary to the Defence’s allegation, did perform a case-by-case analysis of the relevant evidence identifying the perpetrators, and therefore committed no legal error.

(B) The Trial Chamber did not err in fact

84. The Legal Representative notes that, in its Judgment, the Trial Chamber stated the principles on how to assess evidence identifying perpetrators.¹⁹⁰ The Trial Chamber established that

[i]dentification evidence does not need to be of any particular type, but the Chamber must be extremely cautious in assessing it due to the “vagaries of human perception and recollection”, in particular, where identification is made in turbulent and traumatising circumstances.¹⁹¹

It also relied on various criteria which other Chambers of the Court and the *ad hoc* tribunals have taken into account.¹⁹² It determined 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**.¹⁹³

85. The Legal Representative observes that the Trial Chamber based its conclusions as to the perpetrators’ identities on a **multitude** of criteria.¹⁹⁴ The Trial Chamber made specific findings in relation to those criteria and then used them to identify the perpetrators of **each** incident of rape, pillage and murder. The

¹⁸⁹ Document in Support of the Appeal, paras. 463 (rape), 470 (pillage) and 479 (murder). The paragraphs of the Judgment which are impugned here are paras. 631-642.

¹⁹⁰ Judgment, paras. 240-246.

¹⁹¹ *Ibid.*, para. 242.

¹⁹² *Ibid.*, para. 243.

¹⁹³ *Ibid.*, para. 244.

¹⁹⁴ Judgment, para. 695.

criteria were: the language spoken by the perpetrators;¹⁹⁵ their uniforms;¹⁹⁶ the MLC's presence (whether exclusive or not) in the area at the time of the act;¹⁹⁷ the *modus operandi* and overall motives of the MLC;¹⁹⁸ and identifications by witnesses, especially where the witnesses "had repeated and ongoing

¹⁹⁵ Judgment, para. 627. Also see paras. 467 (P119), 472 (P87), 481 (P47) and 488 (P23); footnote 1421 (P80); and paras. 496 (P69), 514 (P73), 516 (P42), 533 (V2) and 546 (V1).

¹⁹⁶ The Trial Chamber established that MLC soldiers were provided with CAR military uniforms upon their arrival in the CAR (Judgment, para. 626). In several instances it therefore took into account the uniforms worn by perpetrators, according to victims and/or witnesses, as evidence of their being MLC. See Judgment, paras. 496 (P69: "army uniforms"); 514 (P73: "military uniforms"); 515 (P22: "military uniforms with no insignia"); 533 (V2: "CAR military uniforms without insignia"); 545 (P29: "military uniforms, without insignia"); 467 (P119: "new military uniforms like those worn by the CAR army"); 546 (V1: "She could [...] distinguish MLC troops from CAR soldiers as the latter, *inter alia*, had stripes on their uniforms"). On this criterion, see in particular Document in Support of the Appeal, para. 468 and Prosecution Response, para. 349.

¹⁹⁷ The Legal Representative notes that the Trial Chamber made findings, in the section of the Judgment entitled "Facts", as to the MLC's arrival and movements in the CAR during the 2002-2003 Operation. According to the Trial Chamber's findings, the MLC arrived in the CAR on 26 October 2002 (Judgment, para. 458) and the last rebels withdrew from Bangui on 30 October 2002 (Judgment, para. 460). On 30 or 31 October 2002, having passed through the northern neighbourhoods of Bangui, the MLC advanced to PK12, but "[the] rebels had already retreated" (Judgment, para. 485). The MLC then pursued and engaged the rebels on the road to PK22, arrived in PK22 before 15 November 2002, and captured the area soon after (Judgment, para. 520). In the latter half of February 2003, the MLC entered Sibut, past which the rebels had already withdrawn (Judgment, para. 531). Finally, on 5 and 6 March 2003, the MLC carried out a "punitive" attack on Mongoumba. The MLC was the only force there (Judgment, para. 543). The Trial Chamber's identification of several victims and/or witnesses' attackers was supported by its factual findings as to the MLC's "often exclusive" presence in an area or locality. Given the dates of various incidents, the Trial Chamber found that they had taken place when the MLC was the only armed group in the area. See Judgment, para. 487 (P23, on events that occurred in "early November 2002, when **the MLC was the only armed group in PK12**"); para. 496 (P69, on crimes perpetrated "[t]he day after [the MLC's] arrival in **PK12, when the MLC was the only armed group in and around PK12**"); para. 510 (P79, on crimes perpetrated "[s]everal days after the MLC arrived in PK12, **when there was no other armed group in PK12**"); para. 462 (P68, at the end of October 2002: "[t]hey were the **only** armed group P68 saw in the area" of Bondoro); paras. 480-481 (P47, on acts committed at the Port Beach naval base, "**after the MLC were in control of Bangui**", "at the end of October or beginning of November 2002"); para. 502 (P108, on acts committed "[t]he day after they arrived in **PK12**"); para. 508 (P110, on events that occurred "the day after their arrival in **PK12**"); para. 508 (P22, on crimes committed "[o]n or around 6 or 7 November 2002", i.e. "one week after the MLC's arrival in **PK12**"); para. 514 (P73, on events that occurred "after they arrived in **PK12**" and in particular "at the end of November"); para. 522 (P75, on events that occurred "after **the MLC arrived in the vicinity [of PK22] in November 2002**"). On this criterion, see Document in Support of the Appeal, para. 472, and Prosecution Response, paras. 353-355.

¹⁹⁸ Judgment, paras. 564 and 676: "after General Bozizé's rebels had departed an area, MLC soldiers searched 'house-to-house' for remaining rebels, raping civilians, pillaging their belongings, and occasionally killing those who resisted. Often, multiple perpetrators were involved in the same incidents of murder, rape, or pillaging". The Trial Chamber also found that the MLC "targeted civilians [...] in and around schools, homes, fields, and roads" in such areas (Judgment, para. 563). On the *modus operandi*, see Document in Support of the Appeal, paras. 475 and 477, and Prosecution Response, paras. 360 and 361.

interactions with the MLC and other armed forces, and were therefore able to distinguish between them”¹⁹⁹ and/or where the perpetrators identified themselves.²⁰⁰

86. The Legal Representative considers it appropriate to bring to the Appeals Chamber’s attention a number of additional observations on the language criterion. The Trial Chamber established that the language commonly spoken by MLC troops was Lingala.²⁰¹ Some spoke in French at times, but with a DRC accent.
87. In its Document in Support of the Appeal, the Defence alleges that the Trial Chamber brushed aside evidence that the attackers in many cases spoke Sango.²⁰² The Legal Representative notes that the Defence cites evidence from the testimony of several witnesses in court, including **P23**, **P110** and **P112**, but the excerpts cited by the Defence are truncated. These witnesses addressed the matter of the attackers speaking Sango in greater depth at other points in their testimony. **P23**, **P110** and **P112** confirmed that the Banyamulengués spoke Lingala, not Sango. Those who spoke in Sango were already in the CAR before the MLC arrived, doing “[TRANSLATION] odd jobs” such as shining shoes.²⁰³
88. The Legal Representative accordingly submits that the Trial Chamber did not err in using Lingala as a criterion to identify perpetrators as MLC. The statements of numerous victims and/or witnesses are material in this regard,²⁰⁴

¹⁹⁹ Judgment, para. 695. See also, in particular, para. 480 (“**P47**, a mechanic for a river transport company that ferried MLC troops to the CAR”); paras. 471 and 472 (**P87**); and paras. 496 and 498 (**P69**). For more on this criterion, see Defence, Document in Support of the Appeal, paras. 473-474, and Prosecution Response, paras. 356-358 and 365.

²⁰⁰ Judgment, para. 467 (**P119**: “telling her that they were sent by ‘Papa Bemba’”); para. 546 (**V1**: “[t]he soldiers [...] informed V1 that their ‘President’ was ‘Mr Bemba’”).

²⁰¹ Judgment, para. 627.

²⁰² Document in Support of the Appeal, para. 469.

²⁰³ **P23**: see T-53-CONF-FRA, 39:26 to 40:8; **P110**: see T-126-CONF-FRA, 43:15-18 and 45:8-12. See also **P112**: see T-129-CONF-FRA, 53:10 to 54:2.

²⁰⁴ **P87**: see T-44-CONF-FRA, 23:10 to 24:4; **P68**: see T-48-CONF-FRA, 21:22-28; **P81**: see T-51-CONF-FRA, 14:17-21; **P82**: see T-55-CONF-FRA, 13:14-16; **P80**: see T-58-CONF-FRA, 33:13-17; **P42**: see T-61-CONF-FRA, 14:27 to 15:2; **P73**: see T-64-CONF-FRA, 30:17-18; **P79**: see T-70-CONF-FRA,

as the Trial Chamber itself noted on several occasions. Its findings were, as a consequence, adequately reasoned.

89. **In conclusion**, having regard to the foregoing, the Legal Representative submits that the Trial Chamber committed no errors in its assessment of the evidence identifying the perpetrators.

(VII) The scope of involvement of the Legal Representatives of Victims in the proceedings

(A) Questioning of witnesses by the Legal Representatives of Victims

90. In its Document in Support of the Appeal, the Defence takes issue with Trial Chamber III's regulation of questioning by the Legal Representatives. In the Defence's appreciation, the Legal Representatives circumvented the requirement to seek leave before asking additional questions upon completion of the Prosecution examination, without having specified the nature and details of the questions or how the victims' personal interests were affected.²⁰⁵
91. The Defence contends in addition that the Legal Representatives' extensive use of follow-up questions removed any meaningful distinction between the Prosecution and the Legal Representatives, so that the latter acted as "a second (and third) Prosecutor".²⁰⁶
92. The Legal Representative submits that, contrary to the Defence's contention and as the regularly followed practice shows, the Legal Representatives were not given *carte blanche* to question witnesses. The Legal Representatives invariably sought leave from the Trial Chamber before questioning any witnesses by way

22:23-26; **P29**: see T-82, 29:22-25; **P119**: see T-92-CONF-FRA, 41:17-25; **V1**: see T-220-CONF-FRA, 17:22-27; **P29**: see T-77-CONF-FRA, 6:5-7; **P38**: see T-33-CONF-FRA, 50:18-27. Also see ICC-01/05-01/08-3078-Conf, paras. 159-166.

²⁰⁵ Document in Support of the Appeal, paras. 521 and 522.

²⁰⁶ *Ibid.*, para. 525.

of an application addressing the requirements laid down in article 68(3) of the Rome Statute – i.e. showing how the victims’ interests were affected and how Mr Bemba’s rights would not be prejudiced. The Trial Chamber consistently satisfied itself that these applications demonstrated an effect on the victims’ personal interests, and carefully evaluated the proposed questions after hearing any objections from the Defence.²⁰⁷

93. The Trial Chamber gave careful consideration to the Legal Representatives’ applications to question each witness. It issued oral and written decisions authorising some questions and not others, after having determined, *inter alia*, whether the questions were sufficiently linked to the personal interests of the victims.²⁰⁸
94. In order to expedite the proceedings, the Trial Chamber did not require the Legal Representatives of Victims to file a new application each time they wished to ask follow-up questions. As the Legal Representatives have already pointed out – in their past Response to the Defence Motion on the questioning of Defence witnesses by the Legal Representatives of Victims²⁰⁹ – the fact that the Trial Chamber did not issue written or explicit decisions on each follow-up question directed to a witness does not mean that those questions escaped its strict supervision. **Moreover, the Defence had the right to object to any follow-up questions or address them on redirect.** The Trial Chamber would

²⁰⁷ “[...] Before ruling on the merits of the applications, the Chamber will address a procedural issue regarding the timing for the filing of responses to applications by legal representatives to question witnesses. This is governed by Rule 91(3)(a) of the Rules, which allows the parties to make observations on the legal representatives’ applications ‘within a time limit set by the Chamber’. While the Chamber decided that legal representatives are required to file their applications to question witnesses ‘at least seven days before the witness is scheduled to testify’, the Chamber has never set such a time-limit for the filing of observations thereto and considers it appropriate to do so now. The Chamber decides that from now on, any observations on, or objections to, applications by legal representatives to question witnesses are to be submitted at least four days before the relevant witness is scheduled to testify. Any replies to those observations are to be filed at least two days before the witness is scheduled to testify”. ICC-01/05-01/08-1729, Trial Chamber III, 9 September 2011, paras. 13 and 14.

²⁰⁸ ICC-01/05-01/08-2751, para. 10.

²⁰⁹ ICC-01/05-01/08-2733-Conf.

have had to rule on any Defence objections before allowing the Legal Representatives of Victims to proceed with follow-up questioning.²¹⁰

95. The Legal Representative further submits that it was impossible to foresee precisely what follow-up questions might arise.²¹¹ To require the Legal Representatives to confine themselves to the questions initially set out in their applications would have been to curtail the victims' right to seek and obtain a determination of the truth from the Trial Chamber.
96. When applying to the Trial Chamber to question witnesses, the Legal Representatives of Victims based their prospective questions on the content of the witness files disclosed by the parties. But the Defence's witness files, by contrast with those of the Prosecution, contained no statements. They were simply summaries – and lacking in detail at that – of the topics on which the witnesses were scheduled to testify.²¹² The Trial Chamber addressed this problem by ordering the Defence to submit summaries containing additional information and enough detail to enable the Prosecution and the Legal Representatives of Witnesses to prepare their questions for Defence witnesses.²¹³ In most instances, therefore, the questions which the Legal Representatives submitted in their initial applications were covered by the Prosecution or Defence on direct examination. It was perfectly natural for the Legal Representatives to refrain from asking redundant, out-of-place questions

²¹⁰ See D04-06, T-329-CONF-FRA ET, 24 June 2013, p. 37, lines 9-19; D04-03, T-330-CONF-FRA ET, 25 June 2013, p. 41, lines 10-14; D-04-45, T-300-CONF-FRA ET, 22 March 2013, p. 19, lines 11-14; D04-18, T-320-CONF-FRA ET, 11 June 2013, p. 52, lines 16-26.

²¹¹ The Defence objected during a hearing in 2011, and the Trial Chamber reiterated its position: "[...] it's not the first time the Defence raises the same issue. The Chamber has already informed that legal representatives are allowed to put questions that arise from the transcript, because they cannot preview in advance the questions to be put in relation to the real-time transcript of today." ICC-01/05-01/08-T-104-Red-ENG WT, p. 50, lines 2-5.

²¹² "Public redacted version of 'Decision on measures to facilitate the continued presentation of evidence by the defence'", ICC-01/05-01/08-2482-Red, 14 December 2012, para. 17: "Accordingly, with a view to expediting the proceedings, the Chamber considers that in relation to the remaining witnesses, the defence should submit more detailed summaries, containing additional information and sufficient detail as to allow the prosecution and the legal representatives of victims to prepare more focused questions to pose to the upcoming witnesses".

²¹³ *Idem*.

and turn instead to follow-up questions based on the witness's testimony – and they were justified in doing so. It would have been impracticable to require the Legal Representatives to provide a list of follow-up questions in advance. Follow-up questions tend to arise on the spur of the moment, taking on relevance and meeting needs as and when the questions are put and the witnesses reply.²¹⁴

97. The Legal Representative submits, moreover, that the right to put follow-up questions was strictly regulated by the Trial Chamber. Contrary to the Defence's claim, the Trial Chamber did not systematically authorise the Legal Representatives to ask follow-up questions. The Legal Representatives' applications to ask follow-up questions were, in fact, handled on a case-by-case basis,²¹⁵ with the Trial Chamber reserving the right to refuse any irrelevant or leading questions.²¹⁶
98. The Trial Chamber also laid down certain conditions restricting the scope of the Legal Representatives' follow-up questions. It required them to show that the questions could not have been anticipated in their prior applications,²¹⁷ that they arose from the witness's testimony²¹⁸ and that they were not speculative.
99. Throughout the trial, the Defence made use of its right to object to the Legal Representatives' follow-up questions. The Trial Chamber, as supervisor and regulator of the proceedings, ruled on each Defence objection in a manner consistent with the rights of the accused and the standards of a fair hearing.
100. The Legal Representative recalls that the Defence attempted to challenge the victims' right to ask follow-up questions in its Motion on the questioning of

²¹⁴ T-329-CONF, p. 46, lines 5-13; p. 48, lines 8-23.

²¹⁵ T-243-CONF-FRA ET, 12 September 2012, p. 3, lines 14-16.

²¹⁶ T-243-CONF-FRA ET, p. 3, lines 20-23; T-234-Conf-FRA, lines 19-26.

²¹⁷ T-313, 3:13-19.

²¹⁸ 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.

witnesses by the Legal Representatives of Victims, arguing that the Trial Chamber made no case-by-case assessment of their relevance or justification.²¹⁹

101. In its Decision on the Motion, the Trial Chamber clarified that it had been mindful throughout the Defence's presentation of evidence to restrict the Legal Representatives to only those questions which were relevant to the interests of the victims they represented.²²⁰ It also emphasised that:

[a]lthough it is true that, in order to expedite the proceedings, the Chamber has not requested a new application each time the legal representatives wish to ask follow-up questions, the Chamber has closely monitored the nature of the follow-up questions and has requested clarification when the relationship of the questions to the personal interests of victims was not clear.²²¹

102. In view of the above, the Legal Representative submits that the Trial Chamber took due care to regulate the Legal Representatives' questions by subjecting them to scrutiny in the light of any objections from the parties to the trial.²²²

103. The Defence also alleges that systematic use of follow-up questions turned the victims into a "second" prosecution party, causing the trial to veer from the practices observed in other Chambers of the Court.²²³

104. The Legal Representative notes that the Legal Representatives of Victims before other Chambers did not have to submit to the bench the details of questions they intended to put to witnesses, as Trial Chamber III required them to do in the instant case. In *Lubanga*, for example, the Legal Representatives of Victims could apply to participate in witness questioning simply by stating the subjects they wished to ask questions about.²²⁴

²¹⁹ "Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims", ICC-01/05-01/08-2733-Conf.

²²⁰ "Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims", ICC-01/05-01/08-2751, para. 10.

²²¹ *Idem*.

²²² T-334-CONF, 47:3-49.

²²³ Document in Support of the Appeal, paras. 522-528.

²²⁴ ICC-01/04-01/06-220, ICC-01/04-01/06-2218.

105. The Legal Representative also notes that Trial Chamber III, in keeping with the case-law of the Court, never granted the victims the status of parties to the proceedings. In fact, it had to remind the Legal Representatives of their status as participants and of the unique role this placed them in.²²⁵ The Trial Chamber's approach to victim participation was no different from that developed in other cases. And there is no way the Trial Chamber's overruling of Defence objections to the Legal Representatives' follow-up questions can be construed as mandating the victims to play the role of the **prosecution** in the trial. Nor did the Legal Representatives ever complain of the Trial Chamber restricting their statutory rights when Defence objections to their questions were sustained.

106. Likewise, the Legal Representatives in this case were not granted leave to question Defence (or Prosecution) witnesses simply out of a "general interest in the outcome of the case or in the issues or evidence [before] the Chamber",²²⁶ as the Defence wrongly seeks to suggest. The Trial Chamber required the Legal Representatives to show how their proposed questions were relevant to the interests of the victims; if they could not, their applications would be dismissed. Trial Chamber III did not invent this rule; it is a statutory obligation underpinning all victim participation before this Court.

(B) Defence witnesses were not cross-examined three times

107. The Defence asserts that the Legal Representatives' questioning of its witnesses was designed to attack their credibility and character and to undermine the Defence case.²²⁷

108. The Legal Representative reiterates her observations on the "Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of

²²⁵ See, for example, ICC-01/05-01/08-1023, 19 November 2010, *op. cit.*, para. 17: "The Trial Chamber firstly recalls that victims are participants rather than parties to the trial and shall not be considered as a support to the prosecution."

²²⁶ Document in Support of the Appeal, para. 526.

²²⁷ *Ibid.*, paras. 529-530.

Victims”²²⁸ and submits that the questioning of witnesses on matters pertaining to their credibility is not the sole prerogative of the parties to the trial and may become necessary in the light of the evidence given and the victims’ personal interests – as defended by their Legal Representatives – especially when given testimony appears to go against those interests. Trial Chamber II, for example, has ruled that Legal Representatives of Victims “may be allowed to ask questions of fact that go beyond matters raised during examination-in-chief”.²²⁹ The same Chamber also prohibited the Legal Representatives of Victims from asking questions pertaining to a witness’s credibility “unless [they could] demonstrate that the witness gave evidence that [went] directly against the interests of the victims represented”.²³⁰ Trial Chamber I has also determined that in certain circumstances

it may be fully consistent with the role of the victims’ legal representatives to seek to press, challenge or discredit a witness, for example when the views and concerns of a victim conflicts with the evidence given by that witness, or when material evidence has not been forthcoming. Under such circumstances, it may be appropriate for the victims’ legal representatives to use closed, leading or challenging questions, if approved by the Chamber.²³¹

109. The Trial Chamber did not err in allowing the victims to ask questions pertaining to the credibility of Defence witnesses. It simply granted this right of the victims its true and meaningful sense in keeping with the spirit of the relevant case-law developed elsewhere before this Court.²³²

²²⁸ ICC-01/05-01/08-2733-Conf.

²²⁹ “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, ICC-01/04-01/07-1665-Corr, 1 December 2009, para. 90.

²³⁰ *Ibid.*, para. 90(c).

²³¹ “Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims”, ICC-01/04-01/06-2127, 16 September 2009, para. 28.

²³² The Appeals Chamber has determined as follows: “To give effect to the spirit and intention of article 68 (3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful. Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant. If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.” (“Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, ICC-01/04-01/06-1432 11-07-2008).

110. Recalling her previous observations on the issue, the Legal Representative further submits that the case-law thus far developed by the Trial Chambers of this Court does not prohibit Legal Representatives of Victims from using documents when questioning witnesses, as the Defence seems to claim. She likewise stresses that the use of documents, on the contrary, enables witnesses, the parties and the Trial Chamber to contextualise the questions asked and to verify that they are well-founded according to the Trial Chamber's prior determination. Either way, in this case, the Legal Representative did no more than ask General Seara questions about the Defence's own documents.
111. As for witness D50, the Defence has been careful to leave out the circumstances surrounding his questioning by the Legal Representative of Victims. This witness, who informed the Legal Representatives that he knew them by name as Central African lawyers, refused, as a Central African, to answer a question from the Legal Representative of Victims. It was entirely normal for the Legal Representative to press him to respond. There was nothing to stop the Defence, if it was not satisfied, from objecting as it had always done. Regardless, the Trial Chamber never took into account the personal opinions of the Legal Representatives in its ruling, as the Defence claims.
112. The Legal Representative takes the view that the Defence's allegation that its witnesses were cross-examined three times falls flat given the specific practice and facts of the case. The same practice was applied in the instant case without any complaint or objection from the Defence.

(C) The Defence's allegation of leading and repetitive questions

113. The Defence claims that the Legal Representatives habitually asked leading questions²³³ in breach of an express prohibition from the Trial Chamber, although it deliberately fails to mention or acknowledge that when all such

²³³ Document in Support of the Appeal, para. 530.

questions were directed to its witnesses it had the opportunity to object but did not do so. As the Legal Representative has already stressed, the Trial Chamber painstakingly monitored the Legal Representatives' questions put to witnesses and the way they put them, ensuring that the questions were not repetitive, irrelevant or otherwise inappropriate.²³⁴ On several occasions, the Trial Chamber threw out questions that it found to be speculative or irrelevant to the charges against the Accused.

114. Moreover, the examples cited by the Defence as proof that the Legal Representatives asked leading questions do not appear to establish or support the conclusion that such questions alone somehow led to an unfair trial.
115. The Defence also claims that the Legal Representatives were regularly allowed to put lengthy extracts from the testimony of other witnesses to Defence witnesses with a view to contradicting their evidence.
116. This Chamber should dismiss the argument alleging that Defence witnesses – whom, to the Legal Representative's knowledge, the Trial Chamber never designated as vulnerable – felt exhausted or agitated. The Legal Representative submits that the victims in this case – who suffered serious crimes and were vulnerable – managed to give coherent evidence in court despite forceful questioning by the Defence.
117. In conclusion, the Legal Representative submits that the way in which the Trial Chamber ensured victim participation was consistent with the previous practice of other Trial Chambers of this Court. Moreover, the Defence had the opportunity to challenge the basis for each right granted to the victims when it was expressed. Since the Defence regularly took this opportunity, as we have seen, the system in place fulfilled the requirements of a fair trial. The Legal

²³⁴ "Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims", ICC-01/05-01/08-2751.

Representative submits that any assessment of trial fairness must focus on one essential question: whether or not the accused was truly afforded the opportunity to address the allegations levelled against him or her.²³⁵

118. The intention of the drafters of the Rome Statute to give victims a role in international criminal trials is not incompatible with the right of the accused to a fair hearing. In its repeated challenges to the way in which victim participation before the Trial Chamber was accommodated, the Defence would appear not to take into account the spirit of the core legal texts of this Court. The ICC is founded on a threefold system of representation (Defence, Office of the Prosecutor and Legal Representatives of Victims) that is no longer up for debate because the core texts make express provision for it.
119. The conventional parties to the proceedings are not alone in their entitlement to a fair trial. Within the governing framework of the Court, such as the States Parties established it, the right to a “fair hearing” should, by any likely standard, be interpreted to extend to victims. Fairness is about the trial as a whole and applies to all of the participants in the proceedings. A rigid acceptance of it would, in the end, only yield an unfair trial inconsistent with the human rights standards that the ICC strives to uphold. It is inconceivable that the Chamber should be so oblivious to the fundamental rights of certain participants in the proceedings before it as to set in motion a process which takes no account of the requirements of a fair trial.
120. The Defence has failed to show that the Trial Chamber erred in granting the victims the right to participate in the proceedings on the basis of the case-law developed by other Chambers of this Court.

²³⁵ See also ICTY, Case T-02-54-AR73.5, “Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber’s Decision dated 30 September 2003 on Admissibility of Evidence-in-chief in the Form of Written Statements”, 30 September 2003, para. 16: “The fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him.”

121. The Legal Representative accordingly requests that all of the Defence's allegations be dismissed and that the Judgment of 21 March 2016 be confirmed outright.

IN THE LIGHT OF THE AFORESAID, the Legal Representative of Victims respectfully requests the Appeals Chamber to take these observations into account when ruling on the Defence appeal.

[signed]

Ms Douzima-Lawson Marie-Edith

Dated this 17 January 2017

At The Hague, Netherlands