Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/05-01/13**
Date: **30 May 2017**

THE APPEALS CHAMBER

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Geoffrey Henderson

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU AND NARCISSE ARIDO

PUBLIC WITH PUBLIC ANNEXES A-E AND
CONFIDENTIAL ANNEX F

Public redacted version of CORRIGENDUM

APPEAL BRIEF OF THE DEFENCE FOR MR FIDÈLE BABALA WANDU AGAINST THE CONVICTION DECISION

Source: Defence for Mr Fidèle Babala Wandu

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

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A. GENERAL INTRODUCTION

I. PRELIMINARY CONSIDERATIONS

1. The stigma hanging over the reputation of Mr Babala ("Appellant" or "Mr Babala") since 19 October 2016, when Trial Chamber VII[1] ("Chamber") issued its Conviction Decision, is unfair both factually and legally speaking from the viewpoint of article 66 of the Statute, which enshrines the principle of the presumption of innocence, allots the burden of proof and determines the evidentiary standard at trial. That stigma is the consequence of very grave irregularities – tantamount to procedural defects – that riddled the proceedings before Pre-Trial Chamber II from the outset, only to be subsequently compounded by the Trial Chamber. Moreover, in terms of substance, it is a glaring example of erroneous application of the standard of proof at trial.[2]

2. In lodging his appeal, in the light of what is underscored above, Mr Babala is calling on the Appeals Chamber ("this Chamber") to excise from the impugned Judgment the procedural, factual and legal dross that sullies it and reduces it to a mass of unjustifiable deductions founded on manifestly erroneous logic. It takes its place alongside all the proceedings before the Appeals Chamber whose nature and purpose are "corrective" – to borrow the Chamber's own term employed in *Lubanga.*[3] The aim of Mr Babala's appeal, filed under article 81(1)(b) of the Statute, is the rectification of the procedural flaws and errors of fact and law perpetrated against him in a judgment that took no account whatsoever of the real grounds for his involvement – along with the reasons for and the limits to it – in the process of assistance provided to Mr Bemba in the Main Case.[4] The findings to which the Chamber's

[1] ICC-01/05-01/13-1989-Red, "Judgment".
[2] The standard laid down in article 66(3) of the Statute.
[3] ICC-01/04-01/06-T-364-ENG, p. 4, line 17.
[4] See Section A-III, para. 8, of this Appeal Brief.

deliberations led concerning Mr Babala – namely that he was the accomplice of the co-perpetrators of the common plan – are purely and simply unreasonable.

3. The Appellant's involvement in the instant case ("Article 70 Case") was triggered by the procedural errors committed at the aforementioned levels of Court proceedings. Had those errors not been committed, the Appellant would not have been convicted. They led to blatant errors of fact and law that needlessly subjected the Appellant to the ordeal of criminal prosecution. It is therefore right and proper to demonstrate – by means of a rigorous application of the standard of review and oversight that is appropriate to identifying such errors – how the Trial Chamber erred in the Appellant's regard. The firmly established jurisprudence of the International Criminal Court ("ICC" or "Court") is highly instructive in that respect: clear ICC guidelines for such a review are set out in *Lubanga*[5] and *Ngudjolo*.[6] After a brief discussion of those guidelines (II), the Defence for the Appellant will divide the subject matter forming the substance of this Appeal Brief (III).

4. [REDACTED]

II. PRINCIPLES FOR THE ASSESSMENT OF GROUNDS OF APPEAL BY THE APPEALS CHAMBER. BRIEF DISCUSSION OF THE STANDARD OF REVIEW FOR PROCEDURAL ERRORS AND ERRORS OF FACT AND LAW

5. The criteria for the review of a judgment delivered under article 74 of the Statute and submitted to appeal were set out by the Appeals Chamber in its judgment on the Prosecutor's appeal against Ngudjolo's acquittal, which reflected the lessons learned from the *Lubanga* appeals judgment.[7] In the Chamber's words:

[5] ICC-01/04-01/06.
[6] ICC-01/04-02/12.
[7] ICC-01/04-01/06-T-364-FRA, pp. 1-25. See in particular p. 9, lines 4-11, where the Chamber reviews the reasonableness of the Trial Chamber's findings of fact. See also p. 14, lines 15-19.

> III. STANDARD OF REVIEW
> 18. Pursuant to article 81(1)(a) of the Statute, in an appeal against an acquittal decision, the Prosecutor may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law. Article 83(2) of the Statute further establishes that the Appeals Chamber may only interfere with an acquittal decision if "the decision […] appealed from was materially affected by error of fact or law or procedural error".
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> 19. The Appeals Chamber recalls that in its recent *Lubanga* A 5 Judgment, it held that much of the principles regarding the standard of review in relation to appeals arising under article 82(1) of the Statute are also applicable to an appeal against a conviction decision pursuant to article 81(1) of the Statute. The Appeals Chamber considers that the standard of review as set out in the Lubanga A 5 Judgment has equal application for an appeal against an acquittal decision.
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> 20. Accordingly, with respect to legal errors, the 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". Furthermore, a decision is "'materially affected by an error of law' if the Trial Chamber 'would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error'" (footnotes omitted).
>
> 21. Regarding procedural errors, "an allegation of a procedural error may be based on events which occurred during the pre-trial and trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a decision of acquittal if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have substantially differed from the one rendered". […]
>
> 22. With respect to the standard of review for factual errors, the Appeals Chamber previously held in relation to appeals pursuant to article 82 of the Statute that "it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the 'misappreciation of facts', the Appeals Chamber has also stated that it 'will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it'" (footnotes omitted).
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> 23. The Appeals Chamber notes that in assessing an alleged error of fact, the Appeals Chambers of the *ad hoc* tribunals apply a standard of reasonableness, thereby according a similar margin of deference to the Trial Chamber's findings as that established by the Appeals Chamber in appeals pursuant to article 82 of the Statute. […].[8]

6. Paragraph 21 of the Judgment of 27 February 2015 is of utmost relevance to the pertinent question of the procedural errors affecting the impugned Judgment –

[8] ICC-01/04-02/12-271-Corr, pp. 9-11.

a question that was incorrectly decided by the Pre-Trial Chamber and dismissed offhand by the Trial Chamber. The question will be discussed below, but for the time being it suffices to note that this Chamber has no reason to depart from its existing practice concerning the review of judgments delivered under article 74 of the Statute by Trial Chambers. Those standards of review must be applied to the Judgment of 19 October 2016 – which abounds with procedural flaws and errors of fact and law – on the ground of the unreasonableness of the Appellant's conviction and also on any ground that affects the fairness or reliability of the proceedings.

7. A convicted person may make an appeal on the latter ground (as may the Prosecutor on that person's behalf) pursuant to article 81(1)(b)(iv) of the Statute. Referring to this ground, legal scholars posit that "[t]he apparent intention was to include a 'catch-all' provision in the case of appeals by or on behalf of the convicted person, to ensure that any miscarriage of justice would be capable of correction on appeal".[9] In the absence of clarification in the *travaux préparatoires* of the Statute, it has been suggested that:

> [TRANSLATION] The authors of the Rome Statute may have intended to distinguish between situations in which procedural errors may be attributed to the Chamber (insufficient reasoning or procedural flaws, for example) and those where such errors, while not exactly imputable to the Chamber, affect the reliability of proceedings all the same.[10]

With regard to the standard applicable to this ground, one author remarks:

> Because this ground of appeal is somewhat amorphous, there is probably no one standard of review that governs. The standards of review of one of the other grounds of appeal is likely to be applied by analogy, depending on the particular circumstances of the case.[11]

The Trial Chamber's approach to evidence, in terms of both the procedure for admitting evidence during the trial and its use of evidence in the Judgment,

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[9] C. Staker, "Appeal and Revision" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, p. 1466, para. 37.
[10] L. Trigeaud, "Article 81", in J. Fernandez and X. Pacreu (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Volume II, pp. 1736-1737.
[11] C. Staker, "Appeal and Revision" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, p. 1466, para. 38.

heaps legal error upon procedural flaw. In view of the complexity of the matter and the legal issues that it raises, the Defence invokes this ground under article 81(1)(b) of the Statute.

III. DIVISION OF THE SUBJECT MATTER

8. The substance of this Appeal Brief is divided into four chapters, each corresponding to a category of grounds of appeal: (B) the first ground of appeal consists of the procedural errors that seriously marred the impugned Judgment; (C) the second ground of appeal relates to the Chamber's approach to evidence during the trial and in the Judgment; (D) the third ground of appeal deals with the proliferation of errors of fact in the impugned Judgment; and (E) the last ground of appeal concerns the errors of law with which the Judgment is strewn. (F and G) The discussions close with an overall conclusion that questions the legal value of the Judgment from the viewpoint of the standard of proof at trial.

B. PROCEDURAL ERRORS AFFECTING THE JUDGMENT OF 19 OCTOBER 2016

9. A good many submissions – applications of the parties and decisions of the Pre-Trial and Trial Chambers alike – have addressed procedural errors occurring at the various stages of proceedings preceding appeal and a number of different rulings have already been delivered. The question now arises as to their relevance at the appeals stage and, accordingly, as to the relevance of (a) the irregularities tainting the impugned Judgment and (b) litigation concerning irregularities in judicial process at the stages preceding appeal. The Appellant was caught up in the investigations of two members of the Defence team in the Main Case, whose immunities and privileges were waived after proceedings had been brought. The telephone conversations of the two counsels were tapped while their privileges were fully intact. The Appellant's

conviction for having aided in the commission of the offence of corruptly influencing witnesses under articles 25(3)(c) and 70(c) of the Statute is, as seen above, the result of grave procedural errors committed in respect of the Accused in the Main Case and the members of his team and also of the subsequent factual and legal errors in the Article 70 Case that flagrantly violate the standard of proof as provided for under article 66(3) of the Statute. Accordingly, it is appropriate (I) to devote a first section to examining the relevance of this matter by looking at the issues of (II) Independent Counsel, (III) the immunities of the Defence team and, lastly, (IV) the improper acquisition of Western Union records.

I. RELEVANCE OF PROCEDURAL ERRORS

10. The question of the procedural errors seriously affecting the pre-trial and trial stages was not resolved by the Conviction Decision ("Judgment"). It remains wide open, and parties who consider that they have been adversely affected by the Judgment have grounds to bring appeals. The Defence for Mr Babala ("Defence") hereby does so.

11. Strong arguments made in the Appeals Chamber's Judgment of 27 February 2015 in *Ngudjolo*[12] deserve to be taken into consideration here as they explain the relevance of the issue to the Appellant's conviction with crystal clarity. In its key findings, in paragraph 3, the Chamber writes:

> The Appeals Chamber recalls that, in the context of interlocutory appeals, it has held that procedural errors that may have arisen prior to an impugned decision, but which are "germane to the legal correctness or procedural fairness of the Chamber's decision" may be raised on appeal. The Appeals Chamber considers that the aforementioned also applies if the impugned decision is a "decision under article 74". Article 81(1)(a)(i) of the Statute expressly provides that the Prosecutor may appeal a procedural error in relation to a "decision under article 74 [of the Statute]". Furthermore, article 83(2) of the Statute presupposes that a decision pursuant to article 74 of the Statute may be "materially affected by […] [a] procedural error". The Appeals Chamber considers that the impugned decision itself will only rarely contain procedural errors. Rather, it is likely that any procedural errors are committed in the proceedings leading up to a decision under

[12] ICC-01/04-02/12-271-Corr.

> article 74 of the Statute. Accordingly, it must be possible to raise procedural errors on appeal pursuant to article 81(1)(a)(i) of the Statute in relation to decisions rendered during trial, and such errors may lead to the reversal of a decision under article 74 of the Statute, provided that it is materially affected by such errors. The Appeals Chamber considers that to decide otherwise would deprive the parties of the ability to raise procedural errors on appeal. In the view of the Appeals Chamber, this is irrespective of whether the proceedings before the Trial Chamber took place on an *ex parte* basis or not.

12. The Chamber was responding to the Ngudjolo Defence team's submission that the Prosecutor's appeal was inadmissible because decisions taken during pre-trial and trial proceedings were *res judicata*. In paragraph 21, the Appeals Chamber continues:

> Regarding procedural errors, "an allegation of a procedural error may be based on events which occurred during the pre-trial and trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a decision of acquittal if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have substantially differed from the one rendered". [Footnote omitted]

II. APPOINTMENT OF INDEPENDENT COUNSEL

13. At the request of the Prosecution – which allegedly had reasonable grounds to investigate members of the Defence team in the Main Case – Pre-Trial Chamber II appointed an independent counsel,[13] who was instructed to screen their conversations, which had been illegally recorded during the material period.
14. This Chamber will find no provision formally establishing such an organ in any of the Court's core legal texts. It is in essence a judge-created, *extra legem* institution that contravenes the principle of legality underlying proceedings before the Court.
15. The Defence submits that the question is relevant because of the failure of pre-trial and trial judges to hear and examine the Defence teams' arguments on their merits. The Pre-Trial Chamber denied the Defence leave to challenge the

[13] ICC-01/05-52-Red2.

decision to appoint an independent counsel, a decision that was issued in the context of *ex parte* proceedings;[14] in the decision confirming the charges, the Pre-Trial Chamber considered that the Single Judge had already ruled on the matter.[15] The Trial Chamber followed suit by confirming the appointment of the Independent Counsel at the beginning of the trial by renewing his mandate based on the Pre-Trial Chamber's rationale.

16. The Defence submits that the institution, mandate and actions of Independent Counsel are procedurally flawed because:

a. The institution of Independent Counsel is *extra legem*;

b. Independent Counsel did not carry out his mandate in a neutral fashion. He was biased in his selection of conversations, choosing only those capable of showing a violation of article 70;[16]

c. By the same token, he removed the conversations from their context and provided legally erroneous characterizations. His improperly broad interpretation and his misplaced observations on each conversation led the Prosecution to believe it could identify knowledge and intent on the part of Mr Babala. For example, Independent Counsel said in respect of a conversation that took place on 17 October 2013:

> [REDACTED].[17]

d. Independent Counsel did not have access to confidential information in the Main Case and did not have first-hand knowledge of events. Nonetheless, he considered himself in a position to evaluate the so-called "instructions" given by Mr Kilolo to his interlocutors (that is, witnesses), which "were not

[14] ICC-01/05-01/13-187.
[15] ICC-01/05-01/13-749, paras. 13-14.
[16] ICC-01/05-52-Red2, para. 7: "The appointed counsel would have to review and screen all relevant recordings, with a view to identifying those providing elements which might be relevant for the limited purposes of the Prosecutor's investigation […]"; ICC-01/05-59-Conf-Anx-tENG, p. 4 [REDACTED].
[17] ICC-01/05-01/13-421-Conf-Anx, pp. 22-23.

necessarily consistent with the true facts"[18] and deduce on that basis that Mr Kilolo was corruptly influencing them.

17. Here, the Defence refers verbatim and in full to the explanations provided in its closing brief as to how Mr Babala became involved in the instant case as a result of inappropriate deductions made by Independent Counsel.[19] Given the Prosecution and Trial Chamber's slavish adherence to Independent Counsel's interpretations and their consideration of those interpretations as *res judicata*, that institution has had an overwhelmingly negative impact on Mr Babala's interests.

18. The Defence submits that Independent Counsel's appointment and the manner in which he performed his duties are tainted with procedural errors owing to the recording of the conversations before Mr Kilolo and Mr Mangenda's immunities had been removed.

III. VIOLATION OF THE PRIVILEGES AND IMMUNITIES OF MEMBERS OF THE DEFENCE TEAM IN THE MAIN CASE

19. The Appellant has suffered as a result of the prosecutions unlawfully brought against Lead Counsel and the Case Manager of the Defence team in the Main Case. Those prosecutions infringed their immunity from legal process as provided in article 48(4) of the Statute, article 23 of the Headquarters Agreement between the International Criminal Court and the Host State, and article 18 of the Agreement on the Privileges and Immunities of the International Criminal Court. Notwithstanding the absence of a decision of the Presidency of the Court on waiving their immunity, the Single Judge decided at a single stroke to appoint Independent Counsel and to wire-tap their telephone conversations.[20] The Presidency decision to waive their immunities was issued on 20 November 2013, after all the procedural steps – each as unlawful as the

[18] See, for example, ICC-01/05-66-Conf-tENG, para. 9(ii) and (iii).
[19] ICC-01/05-01/13-1901-Conf-tENG, paras. 5, 151, 256 and 282.
[20] ICC-01/05-52-Conf.

last – had been taken, and it dealt merely with the issuance and execution of a warrant of arrest for the two Defence team members and their placement in detention.[21] The waiving of immunities cannot authorize prior investigations and prosecutions. The infringement emerges quite clearly from the summary table appended to this Appeal Brief, which enumerates the main filings of the parties and the Chambers' decisions on them.[22]

20. As in the question of the Independent Counsel, the Defence teams were not permitted to raise the question before the lower Chambers, it being considered that, first, they did not have the *locus standi* to challenge *ex parte* proceedings and, second, that their submissions on the point had already been presented and therefore did not need to be re-examined.[23]

IV. UNLAWFUL ACQUISITION OF THE WESTERN UNION RECORDS

21. On 14 July 2016, the Trial Chamber found that

> the internationally recognised right to privacy has been violated[24] […] which stems in this case from the fact that the rulings by national courts authorising the order to communicate the Western Union records were ruled unlawful and overturned by two higher court rulings.[25]

22. The Western Union records were obtained by means of fraud under Austrian law and a breach of internationally recognized human rights orchestrated by the Office of the Prosecutor without prior judicial authorization. The summary table appended illustrates that point, showing, through the transparent exchanges on the subject, the circumstances in which the irregularities were uncovered, the reactions of the parties and the decisions of the Chamber, which dismissed the issue on the grounds that, although the right to privacy had been

[21] ICC-01/05-68, para. 13: "[…] The immunity of counsel and the case manager is therefore waived to the extent necessary for the issuance and execution of the arrest warrant against them for alleged crimes committed against the administration of justice and for their potential detention on remand pending investigation or prosecution of those offences."
[22] See Annex D.
[23] ICC-01/05-01/13-187, ICC-01/05-01/13-749, para. 13.
[24] ICC-01/05-01/13-1948, para. 28.
[25] *Ibid.*, para. 33.

infringed, the violation was not so severe as to taint the fairness of the proceedings.[26]

23. It is the Defence's view that the Chamber's position encourages the parties to act in procedural bad faith, something that the authors of the Court's core legal texts would certainly not find acceptable. To take but a single example, regulation 17 of the Regulations of the Office of the Prosecutor provides that:

> The Office shall ensure compliance with the Staff Rules and Regulations and Administrative Instructions of the Court in order to ensure that its staff members uphold the highest standards of efficiency, competence and integrity.

24. It ensues from the foregoing that travelling to a State Party such as Austria under the pretext of prosecuting the Accused for genocide[27] in order to obtain the Western Union records quickly by bypassing normal legal channels is far from upstanding conduct and verges on a lack of integrity. Such conduct infringes human rights and warrants sanction by this Chamber in defence of the principles of good faith, integrity and fairness.

25. The Defence submits that the Trial Court committed a procedural error in its admission of the Western Union records into evidence and its finding that the seriousness of the infringement of rights had not reached the level required under article 69(7) of the Statute. The Defence here refers to its submissions on that point presented to the Trial Chamber.[28]

26. Having found that the Western Union records had been obtained in breach of internationally recognized human rights, the Chamber should have excluded them and refused to rely on the fruit of the poisonous tree when establishing the facts in respect of Mr Babala so as to safeguard the fairness of the proceedings. Since the Western Union records formed the basis for the Prosecution's application for obtaining recordings of all Mr Bemba's non-privileged telephone calls from the Detention Centre and all of Mr Kilolo

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[26] *Idem*.

[27] See Annex C, p. 1, first line; p. 2, first line; p. 6, last line.

[28] ICC-01/05-01/13-1785-Conf; see also ICC-01/05-01/13-1791-Conf-Corr, ICC-01/05-01/13-1795-Conf, ICC-01/05-01/13-1796-Conf, ICC-01/05-01/13-1928-Corr.

and Mr Mangenda's communications, including with the Appellant,[29] those "fruit" should likewise be excluded.

27. Capitant gives three meanings for the French word *régularité* ["reliability" in the English versions of articles 81(1)(b)(iv) and 83(2) of the Statute].[30] In a broad sense, *régularité* means:

> "[TRANSLATION] compliance with rules, nature of that which complies with the law, in particular with formal requirements. From a civil procedural standpoint, it applies to a document that has been duly drawn up (without defects of form or substance). Lastly, the quality of being constant in periodicity."

28. A condition for the admissibility of evidence in criminal proceedings, reliability requires "good faith"[31] in seeking and obtaining evidence establishing that the actions of which a person is accused constitute an offence. It should not be confused with legality, also a condition for the admissibility of evidence, which "[TRANSLATION] relates to the express prescriptions and prohibitions of the law, and the reliability of evidence, which concerns the substantive rules and general principles of criminal procedure".[32] The concept underpinning the "[TRANSLATION] theory of admissible criminal evidence[33] (according to which

[29] ICC-01/05-46; ICC-01/05-52-Conf.

[30] G. Cornu, *Vocabulaire juridique de l'association Henri Capitant,* p. 792.

[31] For a conceptual approach to good faith, see the interesting work of De Valkener, C., *La tromperie dans l'administration de la preuve pénale. Analyse des droits belge et international complétée par des éléments de droits français et néerlandais,* pp. 109-118, para. 5, on the principle of good faith in the collection of evidence. This work cites a long line of judicial decisions, mainly from the European Court of Human Rights, on unlawfully obtained evidence.

[32] See J. du Jardin, *La preuve en droit pénal et le respect des droits de la défense. Conclusions avant Cass. 13 mai 1986*, pp. 491-494; J. du Jardin, *De quelques aspects de l'évolution récente du droit de la preuve en matière pénale*, pp. 145-157; I. Wattier, *L'instruction : des principes généraux*, in *La loi belge du 12 mars 1998 relative à l'amélioration de la procédure au stade de l'information et de l'instruction,* p. 42; H. D. Bosly, *La régularité de la preuve en matière pénale*, pp. 121-128 especially pp. 122-126; A. Masset, *Limites de certains modes de preuve,* pp. 159-199, quoted by J.P. Kilenda Kakengi Basila, *Le contrôle de la légalité des actes du magistrat dans l'administration de la justice criminelle en République Démocratique du Congo,* p. 46.

[33] F. Kuty, *L'exigence de loyauté dans la recherche de la preuve pénale*, pp. 254-268; F. Kuty, *Regard sur la provocation policière et ses conséquences*, pp. 10-12; F. Kuty, *Lorsque Strasbourg déclare que la provocation policière vicie ab initio et définitivement tout procès pénal*, pp. 1155-1156; F. Kuty, *Doit-on admettre avec la Cour de cassation que «La circonstance que le dénonciateur d'une infraction en a eu connaissance en raison d'une illégalité n'affecte pas la régularité de la preuve qui a été obtenue ultérieurement sans aucune illégalité ?»*, pp. 489-501.

the judge's appreciation may not be founded on illegal[34] or unfair[35] evidence), good faith is the requirement that honest means must be used in the administration of justice. According to Kuty, good faith in criminal proceedings

> [TRANSLATION] denotes a mindset that must be present among the various officers of the court at all stages of criminal proceedings, imbuing them with respect for human dignity, the rights of the defence and the morality and dignity that are required in legal proceedings.[36]

29. The Court cannot concur with breaches of national laws committed on the pretext of obtaining at any cost evidence serving to polish the cases of the parties arguing before it. In the instant case, Austrian law was broken by the Prosecutor and the Western Union representative, P-0267. Permitting such breaches equates to allowing the Prosecution to employ dishonest means of every description when bringing international criminal proceedings. Such was not the aim of the authors of the Court's core legal texts. That is underscored by article 21(c) of the Statute providing:

> Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

30. The requirement that the Office of the Prosecutor must have high moral standards is spelled out in article 42(3) of the Statute. Under article 64(9)(a), the Trial Chamber may rule on the admissibility or relevance of evidence.

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[34] F. Kuty, *L'exigence de loyauté dans la recherche de la preuve pénale*, pp. 256-257: "[TRANSLATION] Evidence characterized as illegal violates a legal or regulatory provision, whether of a substantive or procedural nature or of national or international origin. In particular, this is the case with a violation of a provision of the European Convention on Human Rights or the International Covenant on Civil and Political Rights, a violation of professional secrecy, privacy of correspondence, or provisions on the suppression of documentary evidence, and so forth. Similarly, it applies in the case of a violation of a procedural rule ensuring the proper conduct of various duties relating to inquiry and investigation, whether stipulated in an international instrument, the Code of Criminal Procedure or in particular legislation or regulations."

[35] *Ibid.*, p. 257: "[TRANSLATION] On the other hand, evidence obtained through an act of bad faith will be characterized as unfair. It is thus a matter of regard for the values considered essential for the proper administration of justice that are not laid down in a text. Accordingly, evidence obtained in violation of a general principle of law, respect for human dignity or the rights of the defence has been obtained through bad faith and hence will be characterized as unfair."

[36] *Ibid.*, p. 266

The Defence was hence justified in contesting the admissibility of the Western Union records before the Trial Chamber.[37] The Defence was also right to point out that the Austrian courts, with sole jurisdiction in the matter, had taken judicial notice of the irregularities in the acquisition of the records.[38] Logically, such circumstances place the ICC Chambers in a situation of connected jurisdiction, and they must defer to national decisions on the lawfulness of their proceedings.

31. The Trial Chamber paid scant regard to the Austrian decisions showing unambiguously that the Prosecution had obtained the Western Union records by irregular means. The Prosecution's conduct is blameworthy nevertheless. Failure to punish it by excluding evidence obtained by irregular means is equivalent to condoning its vague attempts to undermine human rights in judicial proceedings. That could in future lead to the Prosecution encouraging national judicial authorities to infringe their domestic laws and even the Statute, even while the Court, whose core legal texts they have ratified, applies the highest standards of human rights.

32. The Trial Chamber infringed article 69(7) of the Statute providing that:

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
> (a) The violation casts substantial doubt on the reliability of the evidence; or
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

33. It is clear that, had it not been for those procedural errors, the Appellant would not have been drawn into the Article 70 Case and would not have been convicted. Apart from these procedural flaws that affect the Judgment from a formal point of view, Mr Babala was victim of flagrant errors of fact and law tainting all decisions delivered in his respect.

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[37] ICC-01/05-01/13-1785-Conf; ICC-01/05-01/13-1791-Conf-Corr, ICC-01/05-01/13-1795-Conf, ICC-01/05-01/13-1796-Conf, ICC-01/05-01/13-1928-Corr.
[38] CAR-D24-0005-0001, CAR-D24-0005-0013.

V. UNDERESTIMATION OF TECHNICAL ERRORS AND FAULTS IN THE RECORDINGS OF CONVERSATIONS AT THE DETENTION CENTRE AND THE UNACCEPTABLE ATTEMPT BY THE CHAMBER TO CORRECT THEM BY ITSELF

34. The Defence teams of Mr Bemba[39] and Mr Babala[40] have each filed submissions explicitly pointing out the technical faults in the recordings of conversations at the Detention Centre. The Chamber specifically dealt with that question in paragraphs 226 and 227 of the Judgment. It found that the conversations had been affected by significant technical difficulties, warranting a case-by-case analysis and a circumspect approach in respect of their probative value.[41] The Chamber states that

> […] where discrepancies appear plausible, the Chamber refrained from relying on the recordings. Otherwise, the Chamber did not rely solely on the audio recordings and transcription/translation concerned; it relied on such items only if corroborated by other evidence.[42]

However, the Chamber's findings regarding individual conversations demonstrate that the converse is true.

35. The Chamber made a procedural error in relying on CAR-OTP-0074-0610,[43] CAR-OTP-0074-0478,[44] CAR-OTP-0074-0697,[45] CAR-OTP-0074-0590,[46] CAR-OTP-0074-0636,[47] CAR-OTP-0074-0624,[48] CAR-OTP-0074-0628,[49] CAR-OTP-00074-0490,[50] CAR-OTP-0074-0514,[51] and CAR-OTP-0087-2093[52] in

[39] ICC-01/05-01/13-1902-Conf-Corr2, paras. 202-209.
[40] ICC-01/05-01/13-1901-Conf-tENG, paras. 122-129.
[41] Judgment, para. 227.
[42] *Idem*.
[43] ICC-01/05-01/13-1203-Conf-Anx, pp. 79-80; ICC-01/05-01/13-1199-Conf-AnxA, p. 25.
[44] *Ibid.*, pp. 20-21; *Ibid.*, p. 10.
[45] *Ibid.*, pp. 39-40; *Ibid.*, p. 16.
[46] *Ibid.*, pp. 73-75; *Ibid.*, p. 24.
[47] *Ibid.*, pp. 87-89; *Ibid.*, p. 27.
[48] *Ibid.*, pp. 91-92; *Ibid.*, p. 28.
[49] *Ibid.*, pp. 92-93; *Ibid.*, p. 29.
[50] *Ibid.*, pp. 132-133; *Ibid.*, p. 8.
[51] ICC-01/05-01/13-1203-Conf-Anx, p. 83; ICC-01/05-01/13-1244-Conf-AnxI, pp. 94-98; ICC-01/05-01/13-1199-Conf-AnxA, pp. 41-42; ICC-01/05-01/13-1245-Conf, para. 78.
[52] ICC-01/05-01/13-1203-Conf-Anx, pp. 135-137; ICC-01/05-01/13-1199-Conf-AnxA, p. 42.

the Appellant's respect despite the technical difficulties mentioned. The *sui generis* approach taken by the Chamber[53] means that it is impossible for the Appellant to find out on what grounds the Chamber concluded that the evidence in question was admissible and had probative value, and that this consideration outweighed the prejudice that its use had caused to the two interlocutors.

36. Recognizing the inadequacies in demonstrating the authenticity of the recordings of Mr Bemba and Mr Babala from the Detention Centre and the lingering doubts in their regard, the Chamber – instead of having regard to the fundamental principle of *in dubio pro reo* – chose to "correct" the shortcomings in the Prosecution's case. The Chamber took it upon itself to act as an expert witness for the Office of the Prosecutor to dispel the doubts hanging over those conversations:

1) The Chamber conducted voice recognition exercises to resolve doubts concerning the identity of the speakers in conversations;[54]
2) It confirmed the authenticity of the call logs merely on the basis that a recording lasted for the same time as noted in the transcript;[55]
3) The Chamber worked with the transcripts and translations provided by the Office of the Prosecutor,[56] paying no regard (as is evident from the lack of references) to all the examples and objections provided by the Defence teams, [57] including expert evidence from D20-1, demonstrating their unreliability.

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[53] See section D-I-2, para. 76 *et seq*., of this Appeal Brief.
[54] Judgment, para. 220.
[55] See, for example, Judgment, para. 403: "The call log reflects a connection […] for approximately 9 minutes […].The relevant audio recording, submitted by the Prosecution, lasts 9:11 minutes and thus duly corresponds to the call log entry concerned." The Defence cites herein the translation of the draft of the Judgment sent by the Registry to the parties by email, email of the Chief of the Counsel Support Section, entitled "RE: French translation of the Judgement", forwarded to the parties and Trial Chamber VII on 7 December 2016 at 12.30.
[56] Judgment, para. 216.
[57] See Section B-VI, para. 43 *et seq*., of this Appeal Brief.

37. The Chamber maintained that, despite the technical difficulties relating to the conversations, specific passages taken from a conversation may be reliable. In fact it is how these extracts were used that is problematic. Since the language used by Mr Bemba and Mr Babala was intended to keep the content of their conversations confidential from their country's secret services,[58] it is not at all obvious what the phrases mean. Trying to understand isolated phrases without knowing and understanding the context in which they were uttered is a guessing game that is far from the standard of proof required of the Chamber.

38. Regrettably, the Chamber had no choice but to play that guessing game when drawing its conclusions in respect of the conversation that took place on 16 October 2012.[59] The Chamber stated that, because of the technical problems affecting the recording of the conversation, it

> cannot, with certainty, establish the reference point for the first part of Mr Babala's statement: "*Non, non ce n'est pas ça, il faut que cela se fasse quand même parce que c'est très important* [No, it's not that, it needs to be done though because it's very important]". However, the Chamber is satisfied that Mr Babala's statement, "*C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien* [It's the same thing as for today. You'll see that it's good to give people sugar]", stands on its own and can be relied upon.[60]

The Chamber explicitly stated that it did not know exactly what Mr Babala was talking about, but made the inference that, because the speakers were talking in code, "*la même chose comme pour aujourd'hui* [it's the same thing as for today]" and "*donner du sucre aux gens* [give people sugar]" referred to the transfers made by the Appellant to D-57's wife. What in the conversation could lead the Chamber to believe that it concerned transfers? Furthermore, how could the Chamber know that it referred to D-57? What light did use of the terms "*whisky*", "*collègue d'en haut* [colleague from up there]" and "Bravo Golf" shed for the Chamber? None whatsoever. The Chamber's reasoning is devoid of

[58] ICC-01/05-01/13-1901-Conf-tENG, paras. 40-41, 142-149.
[59] Judgment, para. 267.
[60] *Ibid.*

logic and reflects a highly dangerous degree of inference, filling the gaping probative void with suppositions and conjectures.

39. The Chamber committed an error by simultaneously finding that the transcripts of conversations were unreliable because of the misalignment of the speakers' utterances and drawing on those very transcripts to make sense of what Mr Babala said. This contradictory argument renders its decision void. By adopting this approach, the Chamber at once infringed both the standard of proof and its own duty to provide adequate reasons for its decisions.

40. What is more, the Chamber took it upon itself to interpret the conversations, attributing subjects and meanings to the speakers' exchanges despite the lack of clarity of their words, without providing any cogent reasons for its approach. The results of those interpretations were then used to verify the authenticity of the conversations and the identities of the speakers. That circular reasoning runs contrary to the rights of the defence and the obligations of the Chamber. Similarly, in paragraph 220 the Chamber said that the speakers and dates were confirmed by the fact that the conversations dealt with specific events, such as the forthcoming testimony of particular witnesses in the Main Case, that can be tied to specific points in time.

41. That approach also runs contrary to the safeguards provided by the Chamber in compensation for the technical difficulties affecting the recordings: "Otherwise, the Chamber did not rely solely on the audio recordings and transcription/translation concerned; it relied on such items only if corroborated by other evidence." [61] The Chamber did not refer to a single other piece of evidence in support of its "interpretation" of the Appellant's words as referring to a transfer to D-57 made with a view to corrupting him. Not a single element in the conversation as a whole, the extract selected by the Chamber or even any of the other conversations can be considered as plausibly demonstrating beyond reasonable doubt that Mr Babala "was aware of D-64's and D-57's

[61] Judgment, para. 227.

status as witnesses in the Main Case and the importance of paying witnesses shortly before their testimony at the Court".[62]

42. One phrase removed from its context can have very many meanings. It does not befit the Chamber to invent and construe what a speaker *could have meant* over and above their sense. By adopting such an approach, the Chamber breached the principle of *in dubio pro reo* and the standard of proof applicable to it. Similarly, the Chamber used these conversations and the contexts it had created to invent explanations for the coded language. Having done so, the Chamber then found Mr Babala guilty on the basis that his use of code terms showed that (i) he knew the internal details of the Main Case; and (ii) he intended to conceal his involvement in the common plan. The Chamber did not justify even its chain of thought regarding the coded language and how it reached the conclusion that a particular code was used to express one idea and not another.

VI. CONSIDERATION GIVEN BY THE CHAMBER TO THE SUBJECTIVE TRANSLATIONS AND TRANSCRIPTIONS OF RECORDINGS OF CONVERSATIONS FROM THE DETENTION CENTRE PROVIDED BY THE OFFICE OF THE PROSECUTOR

43. The Defence teams have repeatedly pointed out (i) the unreliability of the conversations between Mr Bemba and Mr Babala obtained from the Detention Centre; (ii) the imprecision of the transcripts and translations of those conversations; and (iii) the lack of objectivity in the editing and preparation of those transcripts and translations coming from the Office of the Prosecutor and not from a neutral organ of the Court.

44. The Chamber agreed with the opinion of the Expert Witness D20-1, according to whom the technical problems affecting the recordings made it impossible to produce an exact transcription of their content since the order in which

[62] *Ibid.*, para. 267.

utterances were made could not be re-established.[63] Despite this determination of lack of reliability, the Chamber decided it would rule on the reliability of statements on a case-by-case basis. That notwithstanding, the Chamber relied on transcripts of the conversations, working with the English versions of the French translations provided by the Office of the Prosecutor.[64] That approach is problematic, in particular given the failure to make a determination on each item.[65]

45. Although the Chamber decided that it could not trust the order of statements indicated in the transcripts, it nevertheless relied on words removed from their context and a speaker's isolated utterances. That attitude betrayed the Chamber's scant regard for the Defence submissions alerting it to errors in how words spoken and recorded had been transcribed and then translated by the Office of the Prosecutor. It is not a question of the order but the distortion of words. For example, the Prosecution had transcribed [REDACTED] instead of [REDACTED],[66] and translated [REDACTED] when Mr Babala can be heard very clearly saying [REDACTED] in the recording.[67] Out of 12 conversations in French between Mr Babala and Mr Kilolo, only four transcripts seem to be error-free.[68]

46. Despite such difficulties, the Chamber used only the English translations prepared by the Office of the Prosecutor for its analysis of the conversations, without addressing the problems posed by the French transcripts on which those translations were based.[69]

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[63] *Ibid.*, para. 226: "Nevertheless, as a consequence of the inaccuracy of the recordings in their temporal representation of the original telephone conversations, derivative transcriptions and translations of the audio material are equally considered unreliable."
[64] *Ibid.*, footnote 361.
[65] See Section C-II, para. 53 *et seq.*, of this Appeal Brief.
[66] Compare CAR-OTP-0080-1336 with CAR-OTP-0082-0576, p. 0576_01.
[67] CAR-OTP-0082-0596, p. 0598_01, CAR-OTP-0080-1360. See on this point ICC-01/05-01/13-1901-Conf-tENG, paras. 126-127.
[68] On this point, see ICC-01/05-01/13-1073-Conf, para. 36.
[69] Judgment, footnote 361: "This and the following translations into English of text originally in French are official Court translations".

47. According to decisions issued by the International Tribunal for the former Yugoslavia (ICTY), transcriptions of audio evidence must be produced by a neutral body such as the Registry.[70] However, in the instant case, a section of the Office of the Prosecutor, a party to the proceedings, took on that task. [REDACTED].[71]

48. By deliberately disregarding these irregularities and using the (official) English translations of erroneously translated and/or transcribed French versions, the Chamber committed procedural errors affecting its assessment of that evidence (recordings from the Detention Centre) in its entirety. The Prosecution is not just a party to the proceedings, but a biased party. The assumption that transcripts and translations are correct merely because they were provided by the Prosecution is misguided and must be corrected, especially in the light of obvious errors demonstrating malicious intent.[72]

C. THE TRIAL CHAMBER'S APPROACH TO EVIDENCE: A GROUND AFFECTING THE FAIRNESS AND RELIABILITY OF THE PROCEEDINGS AND THE JUDGMENT

I. BRIEF PROCEDURAL BACKGROUND

49. On 24 September 2015, the Trial Chamber stated the approach it would take to assessing evidence:

> The Chamber determines that, as a general rule, these proceedings will be conducted more efficiently if the Chamber defers its assessment of the admissibility of evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted at that time, though it may

[70] ICTY, *Tolimir*, *Decision On Tolimir's Motions For Access To Confidential Material In The Krstić Case And The Blagojević And Jokić Case With Partially Dissenting Opinion Of Judge Kwon*, paras. 14 and 16.
[71] ICC-01/05-01/13-597-Conf-AnxB, n180.
[72] See, for example, the transcription of the words [REDACTED] (as heard in CAR-OTP-0080-1336) as [REDACTED] (CAR-OTP-0082-0576, p. 0576_01), or [REDACTED] (CAR-OTP-0080-1360) when the words spoken are clearly [REDACTED] (CAR-OTP-0082-0596). This is all the more serious given that the first transcription of the latter conversation was correct but then amended to make it more incriminating – ICC-01/05-01/13-1901-Conf-tENG, paras. 126-127.

> not necessarily discuss these aspects for every item submitted in the final judgment.[73]

That was because the Chamber considered that:

> (i) [T]he Chamber is able to more accurately assess the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial;[74]
>
> (ii) [A] significant amount of time is saved by not having to assess an item's relevance and probative value at the point of submission and again at the end of the proceedings […] An extensive discussion and ruling on admissibility of evidence also risks infringing the principle of expeditious proceedings and the accused's right to be tried without due delay;[75]
>
> (iii) [T]here is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately;[76]
>
> (iv) [T]he Chamber always retains the discretion to rule on admissibility related issues upfront when appropriate.[77]

50. As a result, the Chamber stated in the same decision that it would not deliver any decisions on the relevance and/or admissibility of the 1,028 items submitted at that stage by means of three Prosecution "bar table" requests; it ruled only that the items had all been formally submitted and discussed within the meaning of article 74(2) of the Statute.[78] The Defence teams for Mr Babala and Mr Arido unsuccessfully sought leave to appeal that procedure.[79]

51. The Chamber followed the same approach in its rulings on the other Prosecution[80] and Defence[81] "bar table" requests, thus recognizing 2,254 items as formally submitted.[82]

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[73] ICC-01/05-01/13-1285, para. 9.
[74] *Ibid.*, para. 10.
[75] *Ibid.*, para. 11.
[76] *Ibid.*, para. 12.
[77] *Ibid.*, para. 13.
[78] *Ibid.*, para. 16.
[79] Joint request ICC-01/05-01/13-1317, see paras. 8-12; dismissed by ICC-01/05-01/13-1361, paras. 7-8.
[80] ICC-01/05-01/13-1480, ICC-01/05-01/13-1524.
[81] ICC-01/05-01/13-1858; ICC-01/05-01/13-1772.
[82] Whether through bar table or other requests according to e-Court.

52. The Chamber recalled its approach to assessing evidence in the Judgment.[83] Contrary to expectations, no decision on the admissibility of evidence was issued at any stage of proceedings. No trace is visible in the Judgment itself.

[83] Judgment, paras. 189-194.

II. THE TRIAL CHAMBER'S APPROACH OF DEFERRING ANY DECISIONS ON THE ADMISSIBILITY OF EVIDENCE UNTIL THE JUDGMENT VIOLATES THE RIGHTS OF THE DEFENCE AND IS CONTRARY TO THE PREVIOUS JUDGMENTS OF THE APPEALS CHAMBER

53. The practice followed during the trial caused prejudice to the rights of the defence, in particular the right to be tried fairly and impartially and to be able to prepare a defence, which are protected in article 67 of the Statute. The Trial Chamber's approach made it impossible for the parties to know what evidence had and had not been admitted. On the one hand, it prevented the Prosecution from knowing whether the evidence that it had submitted was enough to prove its case and whether it had discharged the burden of proof, [84] a subject on which the Prosecution expressed its dissatisfaction before closing its case.[85] On the other hand, this circumstance had serious repercussions for the rights of the defence. Since it did not know what evidence had been admitted, the Defence was forced to invest time and resources in responding to all the evidence submitted. It had to work completely in the dark as to what evidence would be ruled admissible by the Chamber.

54. In the words of Judge Ozaki:

> The defence has the right to know with certainty what the evidence against the accused actually is. **The principle of judicial certainty militates in favour of providing the defence with focussed, clearly delineated evidence so that it can**

[84] This risk was recognized by Judge Henderson in his dissenting opinion on a decision in *Gbagbo and Blé Goudé* establishing the same approach to evidence: "A decision that as a general rule defers the admission of the evidence to the deliberation stage hardly assists the Prosecution in determining whether it has discharged its evidential burden at the close of its case, let alone at the conclusion of the evidentiary stage of proceedings", ICC-02/11-01/15-405-Anx, para. 8.

[85] ICC-01/05-01/13-T-37-CONF-ENG, p. 55, lines 17-25: "MR VANDERPUYE: I would also, I would also add this caveat, that to the extent the documents have been deemed formally submitted, and we do recognize the Chamber's position with respect to making a determination of the admissibility of documents, we would prefer and it is our position that we should have at least prior to resting on the direct case, the Prosecution's direct case, a decision on the admissibility of these documents to determine whether in fact we have sufficient evidence to have proven our case on the record and admitted in the case. At the very latest, however, we would submit that that decision should be forthcoming in advance of the closing submissions that may follow in this case." The Chamber delivered an oral decision stating merely that it had already indicated how it would proceed with regard to evidence without replying to the Prosecution's concerns, p. 58, lines 6-19.

> **exercise its rights from the commencement of the trial, rather than only at the end of it**.[86]

Judge Henderson also explained the risks that such an approach holds for the Defence:

> In my respectful view, the rights of the accused are also undermined where decisions on admissibility are deferred. The notion of a fair hearing goes beyond the terms catalogued in Article 67 of the Statute, which identifies those listed as minimum guarantees. At the close of the case for the Prosecution, the accused must make an informed decision on how he elects to proceed; options which include whether to stay silent or to give evidence and if so, to what he would wish to respond. In the context of adversarial proceedings, this requires a proper assessment of the evidence led and admitted, not what may be admitted. **Lack of certainty impeded the ability of the accused to prepare their cases, undermining the fairness of the proceedings**.[87]

55. Similarly, this approach affected and still affects the efficiency and quality of closing submissions as the parties had to cover every eventuality in respect of evidence instead of focusing on essential points.[88]

56. Furthermore, an admissibility decision during the trial would have allowed the parties to submit other items of evidence with the aim of demonstrating the same fact as an excluded item.[89] It is also submitted that, by deferring any admissibility decision until the Judgment, the Chamber missed the opportunity to request submission of any evidence considered necessary for the determination of the truth, as provided for in article 69(3) of the Statute,

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[86] ICC-01/05-01/08-1028, para. 16, emphasis added.

[87] ICC-02/11-01/15-405-Anx, para. 9, citing examples from decisions of the ICTY and the Extraordinary Chambers in the Courts of Cambodia (ECCC) in which Chambers affirmed the impact and importance of timely, simultaneous admissibility decisions allowing the parties to prepare their respective cases adequately (see footnote 18). Emphasis added.

[88] ICC-02/11-01/15-405-Anx, para. 10: Judge Henderson stated that during closing submissions, "Counsel for each party is then entitled to address the Chamber in an attempt to persuade its members to its understanding of the facts and evidence and, in so doing, make reference to the most cogent parts of their respective cases, while at the same time identifying evidential gaps and weaknesses in their opponents' case. In particular, the accused, who have the last say, must know the evidence that has been admitted in the respective cases against them. Just how the parties can meaningfully achieve this objective in the absence of certainty as to what evidence is or is not being considered as admitted into evidence is questionable at the very least. Indeed, in the context of these proceedings, not only does such an approach undermine the effectiveness of the closing speeches, it renders them inefficient, as parties will be forced to address the Chamber in such a manner so as to cover all eventualities concerning the evidence".

[89] See, on this point, ICC-02/11-01/15-405-Anx, paras. 14-15.

because any lacunae in the admitted evidence could not be identified until the deliberations stage of the proceedings.[90]

57. Lastly, the Defence respectfully submits that this approach supposedly favoured the speed and efficiency of the proceedings but did so at the cost of the rights of the accused. Yet the Appeals Chamber has already warned that this is not permissible within the legal framework of the ICC: "While expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements";[91] and

> [U]nder article 64(2) of the Statute, the Chamber must always ensure that the trial "is fair and expeditious and conducted with full respect for the rights of the accused […]". In particular, if a party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its discretion to defer consideration of this issue with its obligations under that provision.[92]

58. It should also be borne in mind that the advantages of the approach in terms of efficiency and speed are far from apparent. Although the charges in the instant case concern offences that are a far cry from the "core crimes" in the Statute, it would be a misapprehension to consider it a "little" case.[93] Apart from the fact that it involves the largest number of accused persons in any ICC case, the present case includes an impressive 7,682 items of non-testimonial evidence. The Prosecution's list of evidence consists of 2,305 items,[94] of which 1,218[95] were submitted through "bar table" requests. The lists of the five Defence teams total over 1,500 items. That contrasts with cases concerning offences against the administration of justice heard by the ad hoc tribunals.[96] The absence of clarity

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[90] ICC-02/11-01/15-405-Anx, para. 22.
[91] ICC-01/05-01/08-1386, para. 55.
[92] *Ibid*, para. 37.
[93] See, for example, ICC-01/05-01/13-T-48-Red-FRA, p. 7, lines 25-28: "[TRANSLATION] [T]his case has been heavily contested. More than 850 Defence filings, more than 490 Prosecution filings, more than 370 written decisions, half of them rendered by this Chamber alone."
[94] ICC-01/05-01/13-1196-Conf-AnxA.
[95] ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Red, ICC-01/05-01/13-1310-Red, ICC-01/05-01/13-1498-Red, ICC-01/05-01/13-1784-Red.
[96] See, for example: ICTY, *Hartmann*, IT-02-54-R77.5, Case Information Sheet: two Prosecution witnesses and 11 items of incriminating evidence; two Defence witnesses and 67 items of exculpatory evidence; *Beqaj*, IT-03-66-T-R77, Judgement on contempt allegations, 27 May 2005, paras. 77-80: three

and lack of certainty as to whether items of evidence had been admitted or not were therefore magnified by the remarkable amount of documentary evidence.[97]

59. Rather than result in the expected efficiency gains, the thousands of documents with which the instant case is awash forced (i) the Defence to use its time and already stretched resources to analyse, investigate and respond in its case and closing submissions to items of evidence that would be ultimately excluded by the Chamber; and (ii) the parties to submit a larger amount of evidence in an attempt to cover all eventualities.[98]

60. The approach also created risks for the Chamber. Judge Ozaki puts it well:

> Even though the judges of this Court are all highly qualified individuals and are professional judges who operate according to very high standards, in my view, increasing the amount of documentation in the case record may create potential problems caused by the sheer volume and possible incompatibility of the material's content, thereby increasing the risk of confusion in the drafting of the judgment in the case.[99]

Prosecution witnesses and 14 items of incriminating evidence; no witnesses or evidence presented by the Defence; *Simić et al.*, Judgement in the matter of contempt allegations against an accused and his counsel, paras. 9, 13-15: one Prosecution witness, four Defence witnesses, eight incriminating testimonies, six exculpatory statements submitted by the two accused; *Šešelj*, IT-03-67-R77.3, Public redacted version of 'Judgement' issued on 31 October 2011, 31 October 2011, paras. 10-11: no Prosecution witnesses, 72 items of incriminating evidence; five Defence witnesses and four exculpatory documents; *Maglov*, IT-00-36-R77, Case Information Sheet: five Prosecution witnesses and 17 items of incriminating evidence; five items of exculpatory evidence; *Haraqija and Morina*, IT-04-84-R77.4, Case Information Sheet: four Prosecution witnesses and 32 items of incriminating evidence; three Defence witnesses and nine items of exculpatory evidence (for Haraqija alone); *Haxhiu*, IT-04-84-R77.5, Case information sheet: one Prosecution witness and nine items of incriminating evidence, eight items of exculpatory evidence; *Vujin*, IT-94-1-A-R77, Case information sheet: 12 Prosecution witnesses and eight Defence witnesses.

[97] For example, Judgment, para. 209: "This case involves a high number of items of non-oral evidence […]".

[98] On this point, see ICC-02/11-01/15-405-Anx, paras. 1, 11, 14, 21-22.

[99] ICC-01/05-01/08-1028, para. 28.

III. THE TRIAL CHAMBER INFRINGED ARTICLE 74(5) OF THE STATUTE, RULE 64(2) OF THE RULES OF PROCEDURE AND EVIDENCE, AND THE PREVIOUS JUDGMENTS OF THE APPEALS CHAMBER BY REFUSING TO ISSUE RULINGS ON THE ADMISSIBILITY OF ALL ITEMS OF EVIDENCE ON A CASE-BY-CASE BASIS

61. The difficulties concerning the relevance and consequences of deferring any decision on the admissibility of evidence until the Judgment were aggravated by the Chamber's utter failure to rule on those matters. In other words, it did not merely defer that decision, it shelved it altogether.

62. First, despite the Chamber's indication that it would discuss testimonies and evidence "to an extent which provides a full and reasoned statement of its findings on the evidence and conclusions",[100] such a discussion is conspicuous by its absence from the impugned Judgment. While it is stated in a long line of decisions that a Chamber does not need to list all the evidence taken into consideration during its deliberations, the Court's Appeals Chamber has been equally clear in its judgments that, regardless of the stage in proceedings, sooner or later a Chamber *will have* to rule on the relevance, probative value and potential prejudice of each item of evidence: "[I]rrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings […]".[101] That stands in stark contradiction to the approach of the Trial Chamber, which explained in the impugned Judgment that it had taken account of all evidence recognized as formally submitted and that "as long as the judgment remains 'full and reasoned' it need not discuss therein every item of evidence submitted during trial".[102] It would seem that the Chamber considered that the duty of ruling on the admissibility of every

[100] Judgment, para. 195.
[101] ICC-01/05-01/08-1386, para. 37.
[102] Judgment, para. 193.

item of evidence on a case-by-case basis either did not exist or did not apply to it.

63. Next – and in further contradiction to the above-mentioned jurisprudence of the Appeals Chamber – the Chamber delivered general preliminary findings on categories of evidence that were not rulings on admissibility, instead of ruling on each item: (i) oral testimony;[103] (ii) Western Union records;[104] (iii) telephone communications;[105] and (iv) recordings from the Detention Centre.[106] Not all evidence is covered by those categories, and a number of items[107] are not even mentioned. The Chamber cannot be considered therefore to have discharged its duty to issue a reasoned decision on the evidence, as required under article 74(5) of the Statute, by means of these broad assertions. This is underscored by failure to accompany those assertions with an indication of the items to which the findings apply.[108]

64. What is still more serious is that arguments valid in respect of *some* items of evidence are applied to all items in the category concerned, even where that is inappropriate. For example, in respect of the telephone communications, the Chamber found that "**some** communications and logs do have inherent indicia of authenticity", "**some** call logs bear the corporate watermarks of the telecommunications provider" and "**some** of the Detention Centre communications begin with persons identifying themselves as the ICC when connecting Mr Bemba's calls".[109] The examples selected by the Chamber were used to establish the authenticity of *all* the communications; no regard was had

[103] Judgment, paras. 202-205 for the explanation of the approach to assessing testimony; the Chamber also ruled on the credibility of the following witnesses: D-57 (p. 103); D-64 (p. 115); D-55 (pp. 129-131); D-2, D-3, D-4 and D-5 (pp. 139-145); D-23 (pp. 195-196); D-29 (pp. 235-237); D-15 (pp. 253-255); D-54 (p. 281).
[104] *Ibid.*, paras. 210-212.
[105] *Ibid.*, paras. 213-225.
[106] *Ibid.*, paras. 226-227.
[107] From 7,655 items of evidence disclosed and 2,254 recognized as formally submitted, only 354 were mentioned in the Judgment. Only two of the items from the Babala Defence list of evidence (285) were quoted, and 275 items from the Prosecution list of evidence (2,305 items). See Annex E.
[108] For example, Judgment, para. 220, footnote 232: "*For example,* […]."
[109] *Ibid.*, para. 21, emphasis added.

to the call logs that did not bear indicia of authenticity, despite Defence objections to items that it had singled out.[110]

65. According to the Appeals Chamber:

> a Chamber must explain with sufficient clarity the basis of its decision. In other words, it must identify which facts it found to be relevant in coming to its conclusion. […] [R]ulings on the admissibility of evidence must be made on an **item-by-item** basis. This analysis must be reflected in the reasons. […] [I]t must be clear from the reasons of the decision that the Chamber carried out the required **item-by-item** analysis, and how it was carried out.[111]

66. Even a close examination of the Judgment, however, fails to reveal what evidence was admitted or not. Are we to understand that if the Chamber mentions an item in its analysis of the facts that means it was admitted? In that case, what of the objections raised by the parties concerning particular items? What of the Chamber's duty to provide a statement of reasons for its decision?

67. The Chamber's refusal to rule on the admissibility of evidence is plainly contrary to its duty of giving reasons for any rulings it makes on evidentiary matters[112] and of providing a full and reasoned statement of its findings on the evidence.[113] The Appeals Chamber was clear: "[The Chamber] will <u>have to consider</u> the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings".[114] Yet Trial Chamber VII did not comply with these requirements.

68. Annex E provides a detailed picture of the number of items subject to a ruling on admissibility in the Judgment (namely 13), albeit without a statement of reasons. Some 325 items were mentioned in the Judgment without a finding on their admissibility. Only 275 of the 2,305 items on the Prosecution's list were

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[110] For example, ICC-01/05-01/13-1244-Conf-AnxI, pp. 84-86 (CAR-OTP-0074-0087), pp. 87-89 (CAR-OTP-0079-0456), pp. 89-92 (CAR-OTP-0079-0220), pp. 92-94 (CAR-OTP-0079-0221), pp. 94-96 (CAR-OTP-0074-0513), pp. 102-103 (CAR-OTP-0074-0586), pp. 106-108 (CAR-OTP-0074-0065), pp. 108-109 (CAR-OTP-0074-0066), pp. 130-132 (CAR-OTP-0077-1026); ICC-01/05-01/13-1401-Conf-Anx, pp. 2-3, 12-13; ICC-01/05-01/13-1513-Conf-Anx, pp. 11-12.

[111] ICC-01/05-01/08-1386, para. 59, emphasis added [footnotes omitted].

[112] Rule 64(2) of the Rules of Procedure and Evidence.

[113] Article 74(5) of the Statute.

[114] ICC-01/05-01/08-1386, para. 37.

referred to in the Judgment, and only two of the 285 on the list of the Babala Defence. Uncertainty as to their admissibility is therefore even greater.

IV. THE TRIAL CHAMBER'S APPROACH TO EVIDENCE THROUGHOUT THE PROCEEDINGS AND IN THE JUDGMENT CAUSED SERIOUS PREJUDICE TO THE DEFENCE AND HAD A DETRIMENTAL EFFECT ON THE COURT'S WORK

69. The combined approach to evidence during the trial and in the Judgment was such that no one knew what evidence had been found admissible. Mr Babala was left in ignorance of what incriminating and exculpatory evidence had been admitted. A number of items were identified as potentially highly prejudicial. First, the deferment of the decision on potential prejudice in itself undermined the proceedings since, as Judge Henderson put it,

> potential prejudice is best assessed before the trial concludes. Indeed, this is the only way that such potential prejudice can be averted or, depending on the circumstances, adequately remedied. After the conclusion of the hearing, exclusion is the most readily available remedy. However, exclusion cannot change the course of the trial once it has concluded.[115]

Second, the fact that no findings were issued on the Defence arguments concerning the prejudice caused by particular items prevents the Defence from raising substantive objections on appeal. The Appeals Chamber itself is placed in difficulty. Without knowing what evidence was admitted and for what reasons the Trial Chamber considered that the prejudice caused by using certain items of evidence was outweighed by their probative value, how can the Appeals Chamber assess whether the Trial Chamber's finding was reasonable? The Trial Chamber's approach impedes this Chamber's proper review of the impugned Judgment.

70. This matter is of particular significance to the Appeals Chamber and the Court since the approach used by Trial Chamber VII has begun to be adopted in other cases, such as *Gbagbo and Blé Goudé* and *Ongwen*. The difficulties encountered in

[115] ICC-02/11-01/15-405-Anx, para. 24.

those cases, the subject of the parties' objections, demonstrate the method's unsuitability when measured against the high standards of the International Criminal Court.[116] The ramifications of the approach are most visible in the instant case as its impact on the proceedings and the judgment are clearest at the end of the case.

71. Lastly, the lack of any clarity concerning evidence and the impact on the rights of the defence and on the proceedings undermine the Court's image and the credibility of proceedings. Justice must not only be done; it must be seen to be done. In the instant case, the Defence was submerged by documentary evidence, in contradiction with the nature of the "bar table" motion as an exceptional procedure, and its responses and objections to each of the 1,218 items submitted through Prosecution "bar table" requests remained unheeded. The Chamber delivered its Judgment in the absence of prior decisions on the evidence.

72. For these reasons, the Defence respectfully requests that the Appeals Chamber rule both the approach to evidence and the failure to rule on admissibility contrary to article 74(5) of the Statute, rule 64(2) of the Rules of Procedure and Evidence, and its own firmly established practice.

D. ERRORS OF FACT IN THE JUDGMENT OF 19 OCTOBER 2016

I. ERRORS OF FACT DUE TO THE OMISSION OF RELEVANT FACTS

73. The act of judgment requires judges first to identify the relevant facts without which they cannot hope to re-establish the physical reality of the case before them. In criminal proceedings, "relevant facts" must be understood to mean all the information that is necessary to gauge the *actus reus* and *mens rea* of the person suspected of having committed an offence. Some legal theorists rightly

[116] For example, in *Gbagbo and Blé Goudé:* ICC-02/11-01/15-405-Anx, ICC-02/11-01/15-485, ICC-02/11-01/15-498-AnxI; in *Ongwen*: ICC-02/04-01/15-625, ICC-02/04-01/15-701, para. 9.

see the judge as someone digging a tunnel and signposting both the facts and the law along the way.[117]

74. In the instant case, which placed the Appellant in the dock alongside members of Mr Bemba's Defence team – with whom he had no ties – it was imperative for the Chamber to examine closely how he came to be in contact with them and their client during the trial stage of the Main Case. In the view of the Defence, that was of categorical importance given the Prosecution's duty under article 54 of the Statute to investigate incriminating and exonerating circumstances equally. Had it done so, the Chamber would have taken an interest in how the team truly functioned and (1) would have noted that it suffered from being denied legal assistance paid by the Court. (2) Accordingly, a financing system needed to be put in place to provide the Accused with an effective and efficient defence. (3) When the Article 70 Case came to light, the Prosecution and Chamber's examination of the false scenario would have made plain that the Appellant was excluded from it. (4) Proper use was not made of Mr Nginamau's testimony, yielding information essential to the Appellant's defence, just as (5) the operation of the telephone system at the Scheveningen Detention Centre was not correctly and accurately described, to the detriment of the Appellant.

1) THE COURT'S REFUSAL TO OFFER MR BEMBA LEGAL AID

75. The Chamber omits to mention an obvious fact with an impact on the circumstances of the case: no organ of the Court ever rendered a decision recognizing Mr Bemba as indigent.[118] The absence of such a decision meant he did not receive any legal aid from the Court. His assets were frozen, so he had to come to a special arrangement with the Registry with a view to enabling him, like all other accused persons, to exercise his right to an effective and

[117] W. Van Gerven, *La politique du juge. Essai sur la mission du juriste dans la société,* pp. 68 and 112 cited by J.P. Kilenda Kakengi Basila, *op. cit.,* p. 654.
[118] ICC-01/05-01/08-76.

efficient defence.[119] A different story was told by the Prosecution[120] to the two Chambers. In its application for leave to carry out intrusive investigations into Mr Bemba's Defence team, the Prosecution misled judges by falsely arguing that no plausible explanation for the payments made by Mr Babala seemed possible, despite numerous checks.

2) *SUI GENERIS* FINANCING OF MR BEMBA'S DEFENCE

76. It is undisputable common knowledge that Mr Bemba received no legal assistance.[121] His team relied on a *sui generis* payment scheme whereby the Court advanced funding for Mr Bemba's Defence on the understanding that the Court would be reimbursed out of his frozen assets as soon as possible. In 2009, Trial Chamber III noted the difficulties faced by the Defence team in preparing for trial as a result of Mr Bemba's assets being frozen.[122] That funding was, however, inadequate since it was insufficient to cover the costs of the team's investigations on the ground. The matter was brought to the attention of Trial Chamber VII, supported by copious evidence[123] [REDACTED]. It was an example of the natural duty of solidarity shown by human societies when a member of their group is in difficulty.

77. After Mr Bemba's father died, Mr Babala came into the picture, becoming, as the Defence team for Mr Kilolo put it, "*le point focal* [the focal point]",[124] responsible for channelling the sums received from different sources to the team and to the Detention Centre to cater for Mr Bemba's basic needs.

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[119] On this point see ICC-01/05-01/13-1902-Conf-Corr2, paras. 170-175; ICC-01/05-01/13-1901-Conf-tENG, paras. 15-20, 50, 110, 185-188, 211.

[120] "The accused person has already declared himself to be indigent and therefore deserving legal aid. That is established." (ICC-01/05-01/08-T-303-Red3-ENG, p. 9, lines 15-16); "[Kilolo and Mangenda] are also receiving funds from BABALA, [REDACTED], and [REDACTED], possibly on behalf of the Accused, which would belie his official status as indigent." (ICC-01/05-44-Conf-Red2, para. 21)

[121] ICC-01/05-01/08-76.

[122] ICC-01/05-01/08-568.

[123] For example, CAR-D20-0005-0212; 0214; 0232; 0249; 0251; 0270; 0280; 0288; 0762, p. 0764; 0305. For comments on this evidence, see ICC-01/05-01/13-1901-Conf-tENG, paras. 13-20, 110-114 and 185-198.

[124] On this point, see ICC-01/05-01/13-600-Conf-Corr2, para. 136.

Mr Babala repeatedly transferred money at regular intervals with Mr Bemba's agreement. Those transfers were made in response to Mr Kilolo's various requests and were, of course, first approved by Mr Bemba, the sole beneficiary. The Appellant's role consisted of no more than making the money collected from Mr Bemba's friends and families available to the Defence team in the Main Case. It is apparent, therefore, that the transfers and the related conversations with Mr Bemba were not necessarily of a criminal, or even illegal, nature. The Chamber failed to take into account the facts of the situation and concluded that the opposite was true. [125]

78. Had the Prosecution investigated incriminating and exculpatory circumstances – as article 54(1) requires – it would have directed the Pre-Trial Chamber's attention to that state of affairs. Nor would it have argued that the transfers made by the Appellant were intended to influence Main Case witnesses corruptly. Accordingly, the Pre-Trial Chamber would not have ordered the Registry to transfer to the Prosecution all of Mr Bemba's non-privileged conversations, including those with Mr Babala and, therefore, would not have subjected Mr Babala to these proceedings.

79. Had the Trial Chamber taken account of these circumstances in the Judgment, it would have been able to understand the context in which Mr Babala's actions took place and would not have rushed into finding that the conversations between Mr Bemba and Mr Babala concerning the transfers were indicia of a plan to corruptly influence witnesses.[126]

3) FALSE SCENARIO UNCOVERED BY INDEPENDENT COUNSEL

80. The process that the Chamber termed "illicit coaching of witnesses" was brought to light by Independent Counsel, who was tasked by the Single Judge of the Pre-Trial Chamber with screening the telephone conversations between

[125] See Section D-II, para. 1, paras. 89 *et seq*., of this Appeal Brief.
[126] Judgment, para. 691.

members of the Defence in the Main Case.[127] One of the reports produced in connection with that instruction uncovered the "false scenario".[128] Specifically, this was a scheme contrived by two of the alleged co-perpetrators of the common plan to have their "fees" paid by their client. Described in detail by Independent Counsel and admitted by one of the co-perpetrators,[129] the scheme was designed without Mr Bemba's knowledge and specifically excluded Mr Babala.[130] However, a conversation between the creators of the scenario and Mr Babala was identified by the Chamber as an indication of the Appellant's knowledge and intent in respect of the corrupt influencing of witnesses. This point will be discussed below.

81. It is therefore unfortunate that the Chamber did not give consideration to the false scenario in a manner favourable to the Appellant, who was drawn into the present case by the inappropriate deductions made by Independent Counsel. He considered – with the Chamber and Prosecution regrettably following his lead – that the false scenario pointed to previous incidences of the corrupt influencing of witnesses, of which Mr Babala was probably aware. From a purely logical viewpoint, it must be asked how the Appellant could have known about a false scenario which he had not been involved in creating. By failing to take equal account of the "false scenario" and its authors' intention to hide its details from the Appellant, the Chamber committed an error of fact that led to Mr Babala's unjust conviction.

82. Nothing in the Prosecution's examination of witnesses revealed the slightest involvement of Mr Babala in the corrupt influencing of D-57 and D-64.[131] Those two witnesses repeated the statements they had given to the Prosecution investigators. They said that they had received, through members of their

[127] ICC-01/05-52-Conf.
[128] ICC-01/05-01/13-421-Conf with annex. See in particular ICC-01/05-01/13-421-Conf-Anx, pp. 22-31, 34-45, 47-50, 75-77, 84-86 [REDACTED]. Read the whole report and its annex.
[129] ICC-01/05-01/13-1900-Conf, paras. 103-107.
[130] CAR-OTP-0082-1324 (audio), CAR-OTP-0074-1032 (audio).
[131] ICC-01/05-01/13-1901-Conf-tENG, paras. 96-97, 193-194.

families, sums of money that a brother from Kinshasa had sent at Mr Kilolo's request. Absolutely nothing had happened that would implicate Mr Babala in the lies they told to the Chamber. Similarly, the cross-examination by the Defence for Mr Kilolo[132] also showed that Mr Babala had played no role in influencing the witnesses. Yet the Chamber failed to take account of that testimony in a manner favourable to the Appellant.

4) MR NGINAMAU'S TESTIMONY BEFORE THE CHAMBER

83. What emerged from the questioning of Mr Nginamau merely served to highlight what the Prosecution already knew from the improperly obtained Western Union records:[133] transferring sums at Mr Babala's request was one of the routine tasks that he carried out at regular intervals. The fact that the Appellant asked his driver to perform such tasks is not a sign of his intention to conceal the transfers, as the Chamber concludes.[134] It in no way underscores the Appellant's participation in a criminal scheme alongside the members of the Bemba Defence seeking to influence D-57 and D-64. It follows that the Chamber's failure to give regard to the circumstances described by Mr Nginamau prompted and strengthened its perception of them as an indication of Mr Babala's guilt, leading to his conviction.

5) FAILURE TO TAKE INTO ACCOUNT THE WAY IN WHICH THE TELEPHONE COMMUNICATION SYSTEM OPERATES AT THE DETENTION CENTRE

84. The Appellant had telephone conversations with Mr Bemba on several occasions. Mr Bemba would usually contact the Detention Centre switchboard when he wanted to talk to the Appellant. Mr Babala would then receive a

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[132] *Ibid.*, para. 96.

[133] *Ibid.*, para. 94.

[134] Judgment, para. 272: "Thereafter, Mr Babala, who admits having acted at Mr Kilolo's behest, arranged for the money transfer through another person. As a result, the Chamber concludes that, as with other witnesses, Mr Kilolo and Mr Babala arranged the money transfer to D-64 in a manner intended to conceal any link between the witness and the Main Case Defence."

telephone call informing him that Mr Bemba was on the line. At his end of the call, the Appellant only ever spoke to Mr Bemba. It was not up to him to check whether he was being called on a privileged line or not – and he never did so. There is therefore no basis to implicate him in a circumvention of the Detention Centre's telephone communication system. Yet, the Judgment makes it apparent that the Chamber did not grasp the technical details of how the Detention Centre's telephone system worked; it seems not to have understood the difference between privileged and non-privileged lines.

85. For example, with regard to Witness D-64, the Chamber states that, on 16 October 2012, Mr Bemba and Mr Babala had a conversation on Mr Bemba's *privileged* line.[135] The first sign of the Chamber's mistake is its mention of the recording of that conversation and its content. A detainee's conversations on his or her privileged line are never recorded, as the Chamber explains itself in another section of the Judgment.[136] In support of its assertion, the Chamber speaks incorrectly of the telephone number [REDACTED] as "indicated in ICC documents as being Mr Bemba's privileged number".[137] Although the item referred to by the Chamber does give a list of telephone numbers with which Mr Bemba could have confidential (or "privileged") conversations,[138] the Chamber passes over the fact that the same telephone number is also shown on the list of non-privileged telephone numbers which Mr Bemba was allowed to contact.[139]

86. The Chamber also talks about "incoming and outgoing communications between Mr Bemba […] and other persons".[140] However, as the Detention Centre explains, anyone wishing to talk to Mr Bemba has to call the Detention

[135] *Ibid*., para. 265.
[136] *Ibid*., para. 736.
[137] *Ibid*., para. 265.
[138] CAR-OTP-0074-0079.
[139] CAR-OTP-0074-0075 [REDACTED]. Mr Babala's number appears in this list and not the one of privileged contacts, CAR-OTP-0074-0079.
[140] Judgment, para. 215.

Centre, which then calls the person back if that person appears on the list of approved contacts.[141] No one can call Mr Bemba's number (his extension) directly.

87. The reason why the distinction between privileged and non-privileged conversations is important is that the Chamber found that Mr Bemba and Mr Babala circumvented the Court's monitoring system by talking on a privileged line under the cover of using a telephone number registered to Mr Kilolo[142] and saw that as an attempt to conceal corrupt influencing of witnesses and a sign that the Appellant knew of it.

88. The Chamber found that Mr Bemba had abused his privileged line by circumventing the Detention Centre's monitoring system so that he could talk to Mr Babala.[143] The fact that the Chamber considers conversations conducted in keeping with the Detention Centre's rules as privileged conversations and found Mr Babala's actions to be criminal when they were not casts doubt on the accuracy of the Chamber's assessment of the facts and the evidence.

II. ERRORS OF FACT DUE TO THE ERRONEOUS ASSESSMENT OF PARTICULAR CIRCUMSTANCES

1) WRONGFUL CHARACTERIZATION OF THE APPELLANT'S ROLE OF FINANCIER AS CRIMINAL

89. The Bemba and Babala Defence teams have provided no end of explanations of the reasons for Mr Babala helping his long-standing friend by agreeing to transfer money.[144] Those explanations and the accompanying evidence were ignored by the Chamber, which seemed to regard the role of financier as an automatic indication that a crime was committed, failing to see the real situation.

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[141] ICC-01/05-01/08-T-303-Red3, p. 14, line 22, to p. 16, line 6.
[142] Judgment, paras. 736-739.
[143] *Ibid*., paras. 736-738.
[144] Section D-I-para. 2, para. 76 *et seq*., of this Appeal Brief; ICC-01/05-01/13-1901-Conf-tENG, paras. 16-17, 110-114; ICC-01/05-01/13-1902-Conf-Corr2, paras. 170-174.

90. More seriously still, even though they were fully acquainted with the facts, the Registry and Trial Chamber III did not raise those points when the Prosecution applied for leave to investigate Mr Babala and the Bemba Defence team on the grounds that there were no plausible reasons for the transfers.[145]

91. The Chamber used Mr Babala's requests for Mr Bemba's authorization to make payments as evidence for Mr Bemba's role in the common plan:

> Mr Bemba was involved in this payment scheme extensively. This is demonstrated by a significant body of evidence which proves that Mr Babala, who was Mr Bemba's financier, would seek authorisation from or inform Mr Bemba before making any payment to Mr Kilolo or other persons.[146]

In support of its conclusion that the transfers concerned Main Case witnesses, the Chamber relies on extracts of conversations that had been found unreliable and which the Defence had claimed were irrelevant to the Main Case.[147]

92. Since Mr Bemba had not been recognized as indigent but his assets had been frozen, Trial Chamber III had put in place a *sui generis* system used by the Registry to advance money to finance his Defence team. The Bemba and Kilolo Defence teams adduced evidence showing the difficulties encountered in the implementation of the system and the reasons leading Mr Babala to collect money from Mr Bemba's friends to transfer to his Lead Counsel for purposes that – to his understanding and knowledge – were legal.[148] Mr Bemba's words – quoted by the Chamber in paragraph 695 of the Judgment – concern *legal* actions that cannot be automatically considered illegal without any evidence corroborating the presumption of corrupt influencing of witnesses. To proceed otherwise could only lead to the drawing of erroneous conclusions from the facts in an attempt to resolve the lingering doubts over the meaning of those words *against* the Appellant – instead of applying the *in dubio pro reo* rule as laid down in the Statute. This is precisely what the Trial Chamber did.

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[145] ICC-01/05-01/13-1901-Conf-tENG, paras. 13-20.
[146] Judgment, para. 693.
[147] See Section B-V, para. 34 *et seq.*, of this Appeal Brief.
[148] See section D-I-para. 2, para. 76 *et seq.*, of this Appeal Brief.

93. The Chamber committed an error of law when it omitted to explain its reasons for distinguishing between the transfers to the Bemba Defence team that were criminal and those that were not. The transfers to Mr Mangenda can be explained by the deposits that he made at the Detention Centre. The Mangenda and Babala Defence teams[149] explained that the money transferred between the two men was meant to cover the expenses that Mr Bemba understandably incurred at the Detention Centre. Mr Bemba's account statements – supplied by the Registry, a neutral organ of the Court – show that clearly.[150] The question was raised during the pre-trial stage and nevertheless, for unexplained reasons, the Chamber continued to consider the transfers as related to illegal payments.[151]

94. In conclusion, the Chamber's approach to those points reflects a disregard for the true situation, which the Defence has reiterated from the outset, supported by evidence demonstrating that Mr Babala's reasons for transferring the money were not criminal. The Chamber committed an error of fact by failing to consider those facts. In the alternative, if the Chamber viewed the evidence provided on that point as inadequate, it nevertheless committed an error of law by construing the doubt over the reasons for *all* the transfers in a manner that disadvantaged the Appellant.

2) FLAWED INTERPRETATION AND DISTORTION OF CODED LANGUAGE

95. Since the beginning of the proceedings, Mr Bemba and Mr Babala have explained that they used coded language to keep their private and political discussions confidential. They did not start to use that type of language during the material period; as observed in the decisions of Pre-Trial Chambers II

[149] ICC-01/05-01/13-1901-Conf-tENG, paras. 195-198.
[150] ICC-01/05-01/13-218 and annex.
[151] Judgment, para. 695, conversation dated 30 November 2012 – [REDACTED].

and III, the two men had used code words since Mr Bemba's detention.[152] They did not stop in spite of the prosecutions and Mr Babala's withdrawal from his role of "*point focal*". In itself, the language is not criminal, as the two Pre-Trial Chambers affirmed.

96. The Trial Chamber committed an error of law in considering the decisions of the Pre-Trial Chambers irrelevant since they did not concern the actions at issue in the instant case. However, the Bemba and Babala Defence teams had relied on those arguments to show that the men had used coded language since at least 2008 and that use of the same codes both at that time and during the material period did not *in principle* constitute evidence of an attempt to conceal the corrupt influencing of witnesses.

97. The Chamber's reasoning in response to the Defence submissions violated Mr Babala's right to enjoy the same rights as if he were standing trial alone as provided in rule 136 of the Rules of Evidence and Procedure. The Chamber refuted the submissions on the basis of arguments that were relevant solely to Mr Kilolo and Mr Mangenda:

> The Chamber stresses that the accused did not simply continue to use coded language, as a matter of habit, since new code terms and code names were invented for the Main Case witnesses and introduced by Mr Kilolo and Mr Mangenda. Also, as will be addressed further below, the fact that Mr Mangenda insisted that Mr Kilolo brief Mr Bemba in codes cannot be explained with the necessity that Mr Bemba and Mr Babala used codes in discussions involving DRC politics. The Bemba Defence argument is therefore not tenable.[153]

What of Mr Babala? What were the coded terms used by Mr Bemba with Mr Babala, as well as by Mr Mangenda with Mr Kilolo and by Mr Bemba with Mr Kilolo or Mr Mangenda? The Chamber had nothing to say on that essential point.

98. What is more, the Chamber concluded that the use of code to ensure the confidentiality of political discussions cannot justify use of code to discuss questions relating to the Main Case: but which conversation did the Chamber

[152] ICC-01/05-01/13-1901-Conf-tENG, para. 41.
[153] Judgment, para. 748.

identify between Mr Bemba and Mr Babala concerning the Main Case? How could the Chamber conclude that such a conversation had taken place when it also stated that the order in which statements had been transcribed could not be relied upon? The Chamber took into consideration irrelevant facts (*viz.* the usage of code terms by Mr Mangenda and Mr Kilolo) when determining the pertinence of the coded language used by Mr Bemba and Mr Babala. It committed an error of law in its determination that particular conversations concerned the Main Case on the basis of conversations that it had found unreliable and incapable of clarifying the meaning and topic of discussions. Lastly, the Chamber committed an error of law by omitting to provide a statement of reasons for its decision and to explain its reasoning: which conversations were considered to relate to the Main Case? What code terms used by Mr Bemba and Mr Babala in their conversations concerned aspects of the Main Case? Were those aspects confidential? Were they linked to illegal actions? The Chamber is utterly silent on these points.

99. Even supposing that the use of coded language gives rise to serious suspicions, that is not enough to establish Mr Babala's intent to hide illegal actions. In the words of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia: "Not even the gravest of suspicions can establish proof beyond reasonable doubt."[154]

3) WRONGFUL IMPUTATION TO THE APPELLANT OF KNOWLEDGE OF THE INTERNAL DETAILS OF THE MAIN CASE

100. The Chamber came to the following conclusion:

> The evidence must also be viewed in the light of the fact that Mr Babala was aware – to some extent – of internal details of the Main Case, including the identity of witnesses, and arranged or effected the money transfers to the co-accused and other persons.[155]

[154] ICTY, *Simić et al.*, Judgment in the matter of contempt allegations against an accused and his counsel, para. 90.
[155] Judgment, para. 885.

The Chamber refers to paragraphs 695 to 697 of its Judgment as its source for this finding. However, those three paragraphs present the Chamber's findings on Mr Bemba's involvement in the common plan, giving examples of the Appellant requesting Mr Bemba's permission to perform transfers. Nothing indicates, or even mentions, a degree of knowledge of the internal details of the matter.

101. The Chamber committed an error of fact in drawing a conclusion without any corroborating evidence. Moreover, it committed an error of law in its failure to provide a statement of reasons or explain its chain of deduction. At no point in the Judgment does the Chamber explain what persuaded it that Mr Babala was privy to the internal details known by the team. What details was he aware of? Who had informed him? When? Of which witnesses did he know the real identity? Were the identities of those witnesses protected by confidentiality? As regards the two witnesses, D-57 and D-64, to whom Mr Babala transferred money, there is nothing to show that he knew their identities or status – the transfers were made to the wife of one and the daughter of the other. The Chamber infringed the presumption of innocence in the Appellant's regard by interpreting the doubt to his disadvantage despite the principle of *in dubio pro reo*, by omitting to state the reasons for its decisions and by failing to explain its findings.

4) DISTORTION OF D-57'S TESTIMONY

102. D-57 gave evidence in French to the Chamber on 29 October 2015. When asked if he knew who had made the transfer performed on 16 October 2012,[156] the witness replied "[TRANSLATION] Unfortunately, I've forgotten the name of the brother who had sent the money […] I can't remember any more."[157] To refresh

[156] ICC-01/05-01/13-T-31-CONF-FRA, p. 21, lines 27-28.
[157] *Ibid.*, p. 22, lines 1 and 2.

the witness's memory, the Prosecution showed him a Western Union record[158] that showed a *single* name, that of Mr Babala. It then directed him to line 14, indicating the transfer made by Mr Babala to D-57's wife, and column W giving her name.

103. The Defence and the Chamber drew the Prosecution's attention to the fact that this type of "memory refreshing" was tantamount to putting a name into the witness's mouth.[159] When presented with the record indicating the payment made by Mr Babala to his wife, D-57 said, "[TRANSLATION] Yes, I think it's that name there, that name, Fidèle Babala".[160] It emerged from the discussion between the Prosecution and the witness that a person whom the witness had taken to be from Kinshasa, for reasons he did not explain, had called him and given him the necessary details to pick up money from Western Union, including the name of the sender, Mr Babala. The witness confirmed that the person to whom he had spoken had not introduced himself and that he could not know whether it was Mr Babala who had called him because he did not know Mr Babala:

> A. [TRANSLATION] Yes, I think it's that name there, that name, Fidèle Babala. But I wrote it down quickly and gave it to my wife since I was just about to leave for The Hague, and she went to get the money after I left.
>
> Q. You wrote down the name and you handed it to your wife. Who gave you that name, sir?
>
> A. [TRANSLATION] No, it was the same person who gave me the name. I… I took it down quickly and gave it to my wife since I was just about to leave for The Hague. Well, my wife got the money through Western Union after I left.
>
> Q. Just so that we're clear, are you saying that it was Mr Babala who gave you his name or was it someone else who gave you Mr Babala's name?
>
> A. [TRANSLATION] Well you know, **I didn't know Mr Babala, and he rang me from Kinshasa to… to give me that name, he was sending a bit of money in my wife's name**. That's what happened. I… I gave the name and passed it on to my wife. As I was just about to leave for The Hague, that's what happened.

[158] CAR-OTP-0073-0274, tab 31.
[159] ICC-01/05-01/13-T-31-CONF-FRA, p. 23, lines 5-16; p. 24, lines 19-28.
[160] *Ibid.*, p. 25, line 4.

> Q. **And if I could just ask, how do you know that it was Mr Babala who was calling you on the phone to give you Mr Babala's name? Did he introduce himself, anything like that?**
>
> A. [TRANSLATION] **No, he didn't introduce himself**. He gave the name and said he was sending… because I didn't know him. He gave the name because without the name, you can't pick up money from Western Union. To get the money, you need to give the names and everything. But I took down the name in a rush and wrote it on a scrap of paper. I gave it to my wife, and I was getting ready to come to The Hague. That's what happened.[161]

104. This is in line with the witness's statement when asked whether the same name meant anything to him without it being placed in front of him:

> [REDACTED].[162]

105. The doubt over the identity of the person who rang the witness is palpable and, in accordance with criminal law principles, that doubt must be construed in the Appellant's favour, and not to his disadvantage.

106. Contrary to the words delivered by the witness in the courtroom, the Chamber considered in its Judgment that "P-20 (D-57) testified before this Chamber that Mr Babala, whom he did not know of at the time, confirmed his name and the transfer to be made".[163] The witness's references to Mr Babala's call must be analysed bearing in mind that the witness did not know who had called him, that the caller had not introduced himself and that the witness did not know whether it was the same person who had made the transfer. It must also be taken into account that the caller's name was suggested to the witness by the Prosecution.[164]

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[161] ICC-01/05-01/13-T-31-CONF-FRA, p. 25, lines 4-27; ICC-01/05-01/13-T-31-CONF-ENG, p. 25, line 25, to p. 26, line 21, emphasis added.
[162] CAR-OTP-0077-0088, p. 0100, line 423, to p. 432.
[163] Judgment, para. 242, citing the English transcript (translation) of the testimony [footnotes omitted]. ICC-**01/05-01/13**-T-31-CONF-FRA, p. 25, lines 4-27 and ICC-**01/05-01/13**-T-31-CONF-ENG, p. 25, line 25, to p. 26, line 21. The Chamber refers to the same extract in footnote 292.
[164] On this point, see the Defence intervention objecting to the Prosecution's approach, ICC-**01/05-01/13**-T-31-CONF-FRA, p. 31, line 3, to p. 32, line 21.

E. ERRORS OF LAW VITIATING THE JUDGMENT OF 19 OCTOBER 2016

I. THE IMPUGNED JUDGMENT BREACHED THE PRINCIPLE OF LEGALITY IN CRIMINAL PROCEEDINGS

107. As the principle of legality in criminal proceedings is a basic rule of criminal law, any breach of it is the most serious ground of appeal that can be submitted against a judicial decision in criminal proceedings. It is a fundamental element of contemporary criminal judicial systems at the national and international levels, including those that grant judges the power to create offences.[165] Professor Ghica-Lemarchand rightly describes it as a "[TRANSLATION] founding principle of criminal law".[166]

108. The principle dictates that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law" and that no heavier penalty may be imposed "than the one that was applicable at the time the criminal offence was committed". It is laid down in, *inter alia*, articles 22 and 23 of the Statute, article 15 of the International Covenant on Civil and Political Rights, article 7 of the European Convention on Human Rights and article 49 of the Charter of Fundamental Rights of the European Union, which under article 21 of the Statute form part of the subsidiary law applicable by the Court.

109. The principle of legality in criminal proceedings has a direct corollary in the principle that criminal law provisions must be construed strictly. That principle is expressly laid down in article 22(2) of the Statute and by the well-established case-law of the European Court of Human Rights (ECtHR).

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[165] See J. Pradel, *Droit pénal comparé*, p. 692.
[166] C. Ghica-Lemarchand, *L'interprétation de la loi pénale par le juge*.

1) BREACH OF THE PRINCIPLE THAT CRIMINAL LAW PROVISIONS MUST BE STRICTLY CONSTRUED

110. The impugned Judgment breached the principle that provisions of criminal law must be strictly construed by repeatedly and exclusively using reasoning by analogy and induction, both forbidden in criminal cases, as its basis for the conviction and sentencing of Mr Babala.

111. This approach is in defiance of article 22(2) of the Statute, which clearly provides that "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

2) THE IMPUGNED JUDGMENT RELIED ON INTERPRETATION OR REASONING BY INDUCTION TO ESTABLISH MR BABALA'S RESPONSIBILITY

112. Inductive reasoning is by definition an intellectual process in which the thinker interprets a principle, law or general idea or draws a conclusion on the basis of his or her observations or the existence of one or several specific facts. In contrast to deductive reasoning, which, if based on correct premises always leads to a correct conclusion, inductive reasoning relies on probability-based logic and tends to lead to a conjecture or hypothesis, no matter how solid its underpinnings. For that reason, inductive reasoning is prohibited in criminal law.

113. In the same spirit as article 22(2) of the Statute, several judgments of the French Court of Cassation forbid interpretation by analogy or induction[167] unless that interpretation is performed in a manner that benefits the accused.[168]

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[167] On this point, see in particular Cass. crim., 9 August 1913, cited in M. Touillier, *L'interprétation stricte de la loi pénale et l'article 7 de la CESDH*; Cass. crim., 1 June 1977, No. 76-91999.

[168] Article 22(2) of the Statute. Similarly, case-law allows legal provisions that are favourable to the accused to be interpreted by analogy; such legal provisions consist of those that exempt the accused from punishment despite a finding of guilt, such as grounds for justification, immunity, statutory grounds for exemption from punishment, grounds for mitigating punishment and mitigating

114. In *X. Stanislas et al.*,[169] the Court of Cassation expressly states among the reasons for its judgment that:

> [TRANSLATION] Criminal law, which is subject to strict interpretation, must not be applied by analogy or induction; criminal courts may order penalties only if the constituent elements of a crime are present.

The same held true in *X. Roger*, where the Court of Cassation quashed and set aside the judgment of the Court of Appeal of Grenoble dated 18 June 1976 principally on the ground that "[TRANSLATION] a criminal court does not have the authority to use analogy or induction to remedy silences and shortcomings in a law, nor to extend its scope beyond the cases specifically enumerated therein"; and "[TRANSLATION] in criminal cases, laws must be restrictively interpreted".[170]

115. Yet, in the impugned Judgment, the Trial Chamber improperly reasoned by induction, leading it both to convict Mr Kilolo and to remedy the absence of a fundamental constituent element in the charges against Mr Babala, namely the element of knowledge and intent required under article 30 of the Statute. Such broad reasoning allowed the Chamber to underpin the allegation that Mr Kilolo had corruptly influenced Witnesses D-57 and D-64. It was also the only way in which it could render Mr Babala's participation in the offences against the administration of justice plausible despite his exclusion from the common plan. In illustration of this point:

a) WITNESS D-57

116. The Trial Chamber states at the end of paragraph 239 of the impugned Judgment:

> Third, and strikingly, similar amounts of money were given or transferred to other witnesses shortly before their testimonies in the Main Case, including D-2, D-3,

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circumstances. Strict interpretation must be applied to binding legal provisions, such as statutes and regulations creating offences or mandating punishment. See G. Croisant, *La loi pénale*.

[169] Cass. crim., 31 March 1992, No. 90-83938.

[170] Cass. crim., 1 June 1977, No. 76-91999.

> D-4, D-6, D-23, D-29 and D-64. Considering these circumstances, the Chamber is convinced that Mr Kilolo did not send the money as a gesture of kindness.

117. More seriously, the Chamber goes on to say in paragraph 250 of the impugned Judgment:

> Even though no intercept records exist in relation to D-57, the Chamber discerns a clear pattern discernible from instructions, as recorded in the evidence, that Mr Kilolo gave to other witnesses, such as D-2, D-3, D-15, D-23, D-54 and D-55, not to reveal that they had received any money or material benefits from the Main Case Defence. […]

118. The Chamber's reasoning here contravenes article 22(2) of the Statute: it states that it does not have any communication records relating to D-57 but infers that Mr Kilolo's conduct in respect of D-2, D-3, D-15, D-23, D-54 and D-55 must have extended to D-57. This is an example of reasoning by extension that is forbidden in criminal law generally and in above-cited article 22(2) of the Statute specifically.

119. Another blatant instance of inductive reasoning, and above all of the Trial Chamber's admission that its findings were based on probability, is provided in paragraph 251:

> [T]he Chamber finds it highly implausible that a significant number of witnesses would testify incorrectly – purely coincidentally – on exactly the same issue using similar language. As a result, the Chamber concludes that D-57's testimony was consistent with the instructions generally given to and followed by other Main Case Defence witnesses.

120. In law, the constituent elements of crimes must be interpreted strictly. Hence, the first step in interpretation must consist of establishing what actions match the specific definition of the legal text creating the crime and the second of demonstrating the mental element, which is to say "[TRANSLATION] the socially, even morally, blameworthy mindset or spirit,"[171] characterized by both the intent to perpetrate the crime and knowledge of the crime. Where those actions and that mental element do not exist or cannot be proved beyond the threshold established in article 66(3), judges cannot rely on previous or similar conduct to

[171] P. Bouzat, J. Pinatel, *Traité de droit pénal et criminologie*, quoted by R. Nyabirungu mwene Songa, *Traité de droit pénal général congolais*, p. 305.

infer their existence. They must acquit the accused at the very least on the basis of doubt. That is the wording and spirit of article 22(2).

121. The Chamber also uses inference to support its finding that the sequence of events (call witness – Mr Kilolo, transfer, call Mr Babala – witness) revealed close coordination between Mr Kilolo and Mr Babala,[172] and that, as a result, the Appellant knew that money was transferred with the aim of influencing D-57's testimony.[173]

b) WITNESS D-64

122. The Trial Chamber likewise based its reasoning in respect of D-64 on inductive logic. In paragraph 277 of the impugned Judgment it states:

> As explained in the context of D-57, and for the same reasons, considering that Mr Kilolo directed other witnesses, including D-2, D-15, D-26, D-54, and D-55 to incorrectly testify to a specific or lesser number of prior contacts with the Main Case Defence, the Chamber infers, as the only reasonable conclusion available on the evidence, that Mr Kilolo also instructed D-64 to conceal the real number of contacts with the Main Case Defence. Although no intercept records exist in relation to D-64, the Chamber infers from the clear pattern and nature of instructions concerning contacts given to D-64, when considered in conjunction with D-64's denial of contacts, in particular those shortly before his testimony, that Mr Kilolo also instructed D-64 prior to his testimony before Trial Chamber III to untruthfully testify on this point.

123. Similarly, in paragraph 278 it continues :

> For the same reasons, the Chamber also infers that Mr Kilolo instructed D-64 to deny having received money from the Main Case Defence. In particular, the Chamber again notes the pattern discernible from the explicit instructions, as recorded in the evidence, that Mr Kilolo gave to witnesses, such as D-2, D-3, D-15, D-23, D-54 and D-55, not to reveal that they had received any money from the Main Case Defence. Therefore, in the light of this pattern and D-64's denial of payments, the Chamber finds, as the only reasonable conclusion available on the evidence, that Mr Kilolo instructed D-64 to lie about the money transfers. [Footnote omitted].

124. In sum, the Trial Chamber admits in the first place that it does not have proof of the material and mental elements of Mr Kilolo's corrupt influencing of D-57 and D-64. However, it says in the second place that it relies on Mr Kilolo's

[172] Judgment, para. 253.
[173] *Ibid.*, para. 254.

observable conduct towards D-2, D-3, D-15, D-23, D-54 and D-55, which fulfils the material and mental elements of corrupt influencing. Lastly, in the third place it concludes that Mr Kilolo therefore influenced D-57 and D-64. Such reasoning is prohibited by article 22(2) of the Statute, the relevant criminal law texts, and national and international case-law.

125. The process of inference was extended to the mental element attributed wrongly to the Appellant: as in the case of D-57, the Chamber states that the sequence of events led it to conclude that Mr Babala knew that the transfer made by him to D-64 was meant to influence him corruptly,[174] despite the absence of any evidence to support that deduction.

126. Similarly, the Chamber reasoned by inference in its analysis of the coded language used by Mr Babala and Mr Bemba in their conversations, described in an earlier section of this Brief.[175] Likewise, the Chamber's hasty conclusion that Mr Babala was aware of internal details of the Main Case as an indication of his intent and knowledge in respect of the corrupt influencing of witnesses was rendered possible only by a misplaced inference; no evidence was put forward by the Chamber in justification of its position.[176]

[174] *Ibid*., para. 281.
[175] See Section D-II para. 2 and paras. 95 *et seq*., of this Appeal Brief.
[176] See Section D-II para. 3 and paras. 100 *et seq*., of this Appeal Brief.

3) THE IMPUGNED JUDGMENT LIKEWISE EMPLOYED INTERPRETATION OR REASONING BY ANALOGY

127. Interpretation or reasoning by analogy – which is broad by nature – is similarly prohibited in criminal law.

128. Given their duty to determine the truth,[177] when criminal court judges are characterizing the facts put to them, they must consider all actions that are defined by the law. However, above all they must have regard only to actions that truly are defined by the law and avoid liberal interpretation.

129. Reasoning by analogy is defined by the *Toupie* dictionary[178] as a specific type of inductive reasoning. It consists of relying on an analogy, a resemblance or an association of ideas between two situations, for example past/present or known/unknown, to draw a comparison and reach a conclusion by applying a characteristic of the first situation to the second situation. In other words, it consists of applying the solution found for one case to a similar case for which it was not envisaged because in both cases the reasons for adopting the solution are the same.

130. The Criminal Division of the French Court of Cassation has defined interpretation by analogy as an interpretation consisting of applying a legal text providing for a specific action or fact to a similar or analogous act or fact. That method consists of simply extending the scope of a law to a situation similar to that envisaged by the text. This type of interpretation is the direct opposite of restrictive interpretation and is therefore forbidden.[179]

131. Likewise, the ECtHR derived the principle of the strict interpretation of criminal law from article 7(1) of the ECHR in several of its judgments.[180] It ruled

[177] Article 69(3) of the Statute.
[178] *Toupictionnaire*, "Analogie".
[179] Cass. crim., 31 March 1992, No. 90-83938.
[180] See in particular ECtHR, *Kokkinakis v. Greece*, para. 52; *Dragotoniu and Militaru-Pidhorni v Romania*, para. 40.

in the *Coëme and others v. Belgium*[181] Judgment that "the principle of the legality of crimes and penalties embodied in Article 7 of the Convention prohibits the extensive interpretation of criminal law to the detriment of the accused, for example by analogy. Similarly, in the *Başkaya and Okçuoğlu v. Turkey* Judgment,[182] the ECtHR considered that the owner of a publishing house was convicted of disseminating propaganda against the indivisibility of the State on the basis of

> an extensive construction, by analogy, of the rule in the same subsection on the sentencing of editors. In these circumstances, the Court considers that the imposition of a prison sentence on the second applicant was incompatible with the principle "*nulla poena sine lege*" embodied in Article 7.

As a further example, in the *Kokkinakis v. Greece* Judgment of 25 March 1993, the ECtHR pointed out that

> Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.

132. However, the impugned Judgment is rife with interpretations by analogy which shaped the reasoning that bolstered the Trial Chamber's conviction, leading it to mistakenly find that Mr Babala participated in the offences against the administration of justice.

133. Such is the case, for instance, in paragraph 251 of the impugned Judgment, which states:

> Likewise, it also discerns a demonstrable pattern of instructing witnesses, such as D-2, D-15, D-26, D-54 and D-55, to testify to a specific and false number of prior contacts with the Main Case Defence. In particular, Mr Kilolo directed defence witnesses not to reveal contacts that occurred after the VWU cut-off date or shortly before their testimony. Accordingly, the Chamber infers, as the only reasonable conclusion available on the evidence, that Mr Kilolo also instructed D-57 to conceal the real number of contacts with the Main Case Defence for the following reasons. First, in all cases in which telephone intercepts or documentary evidence exist, Mr Kilolo instructed the witnesses, such as D-2, D-15, D-26, D-54 or D-55, on the topic

[181] ECtHR, *Coëme and others v. Belgium*, para. 145.
[182] ECtHR, *Başkaya and Okçuoğlu v. Turkey*, para. 42.

> of contacts […] [T]he Chamber finds it highly implausible that a significant number of witnesses would testify incorrectly – purely coincidentally – on exactly the same issue using similar language. As a result, the Chamber concludes that D-57's testimony was consistent with the instructions generally given to and followed by other Main Case Defence witnesses.

134. In paragraph 253, the Trial Chamber finds:

> […] that Mr Kilolo arranged the transfer of USD 665 to D-57 through Mr Babala shortly before D-57s testimony in the Main Case, so as to secure his testimony in Mr Bemba's favour. In an effort to conceal any links between the witness and the Main Case Defence, Mr Kilolo ensured that the transfer was made to D-57's wife. This concerted action demonstrates the close coordination between Mr Kilolo and Mr Babala in relation to this witness. Lastly, as with many other witnesses, the Chamber finds that Mr Kilolo also instructed D-57 to lie about the existence of payments and the extent of his contacts with the Main Case Defence.

135. Paragraph 272 contains the same reasoning:

> The Chamber observes again that there is a demonstrable pattern of Mr Kilolo effecting payments through third parties, as was done with D-57, in an effort to conceal them. As with other witnesses, such as D-57, D-3 and D-6, D-64 received USD 700 through a third person, namely his daughter. Further, as with, for example, D-3 and D-57, Mr Kilolo asked for the contact details of a person other than D-64. Thereafter, Mr Babala, who admits having acted at Mr Kilolo's behest, arranged for the money transfer through another person. As a result, the Chamber concludes that, as with other witnesses, Mr Kilolo and Mr Babala arranged the money transfer to D-64 in a manner intended to conceal any link between the witness and the Main Case Defence.

136. Paragraphs 890 to 893 also illustrate this reasoning by analogy. The Chamber relies on the conversation between Mr Babala and Mr Kilolo that took place on 22 October 2013, i.e. after the testimony of D-57 and D-64, with respect to whom Mr Babala has been found responsible, to infer that Mr Babala was aware of the unlawfulness of the transfers subsequently effected. Here are the paragraphs in full:[183]

> 890. The circumstances surrounding the above interactions clearly show that Mr Babala was aware of the purpose of the payments in October 2013 to Mr Kilolo and, in turn, the purpose of the payments to D-57 and D-64. Mr Babala was also aware of the status of D-57 and D-64 as Main Case Defence witnesses. Moreover, these conversations demonstrate that Mr Babala was well acquainted with the use of code for internal communications among the accused concerning Main Case matters.
>
> 891. Mr Babala's promotion of the "*après-vente*" service must also be viewed in the light of the 17 October 2013 conversation, when Mr Babala discussed with

[183] Judgment, paras. 890 and 891.

> Mr Kilolo the Article 70 warrant of arrest issued against Walter Osapiri Barasa for alleged witness interference in the case in the Kenya situation. This demonstrates all the more that Mr Babala was fully aware of the legal implications of his suggestion to render "*après-vente*" services and facilitate illicit defence witness payments in relation to witnesses D-57 and D-64.
>
> 892. Lastly, Mr Babala's acknowledgment on 22 October 2013 that he took risks as "*financier*" through his involvement in witness payments further highlights his awareness. In the Chamber's view, there would be no risk for Mr Babala in assisting in legitimate financial matters. Rather, Mr Babala's statement further indicates that he was aware of his involvement in illicit witness payments of D-57 and D-64 and feared negative repercussions.
>
> 893. As a result, the Chamber is convinced that Mr Babala lent his assistance with the aim of facilitating the offences of corruptly influencing witnesses D-57 and D-64. Considering his regular exchanges with Mr Bemba and Mr Kilolo, in particular his role as financier, viewed in the light of the evidence as a whole, the Chamber is satisfied that Mr Babala was aware that the payments were illegitimate and aimed at altering and contaminating the witnesses' testimony.

137. As Professor Ghica-Lemarchand has posited, as a rule, only one exception to the formal prohibition on interpretation by analogy is conceivable, since it is limited to an interpretation *in favorem* or *in bonam partem*, denoting an interpretation favourable to the person charged. Analogy is therefore often used to expand the conditions for excluding criminal responsibility.[184]

138. One additional error caused by a broad interpretation in the Judgment is the fact that the Registry measures limiting contact with witnesses are invoked against Mr Babala,[185] as if Mr Babala, a third party who was not part of the Bemba Defence team in any way, should have been aware of those measures. In the same vein, in *Pessino v. France*, the ECtHR recalled:

> [TRANSLATION] While it prohibits, in particular, the scope of existing offences from being extended to facts that did not previously constitute offences, it also dictates that criminal law should not be applied broadly to the detriment of the accused, such as by analogy. It follows that the law must clearly define the offences and the penalties they carry. This condition is satisfied where the defendant is able to identify, based on the terms of the relevant provision and, if necessary, the courts' interpretation thereof, the acts and omissions for which he or she may be held criminally responsible.[186]

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[184] C. Ghica-Lemarchand, *op. cit.*, *Ibid.*; See also J. Pradel, *Droit pénal comparé*, p. 100; R. Nyabirungu mwene Songa, *op. cit*, p. 82.
[185] See, in particular, Judgment, paras. 117-118.
[186] ECtHR, *Pessino v. France*, para. 28.

139. Essentially, the Trial Chamber itself admits that it does not have intercepts of the telephone communications — that is, the material element of the offence of corrupt influencing — between Witness D-57 and Mr Kilolo,[187] or between Witness D-64 and Mr Kilolo.[188] In other words, the Trial Chamber does not have proof of the existence of promises, offers or gifts, pressure, threats, acts of violence, scheming or contrivance on the part of Mr Kilolo with respect to Witnesses D-57 and D-64 aimed at persuading them to give false oral evidence under oath, false statements or false written attestations, or to refrain from giving or providing oral evidence under oath, statements or written attestations. Yet it finds nonetheless that Mr Kilolo committed the *actus reus* on the basis of the material acts presumed to be established in respect of Witnesses D-2, D-15, D-26, D-54 or D-55, that is, a general behaviour noted in Mr Kilolo's relationships with a certain number of witnesses. This reasoning constitutes a serious breach of the principle of legality in general and the principle that criminal law provisions must be strictly construed, as established by article 22(2) of the Statute. If the material acts constituting the corrupt influencing of Witnesses D-57 and D-64 could not be established as required with respect to Mr Kilolo, how can the Chamber apply them to Mr Babala, who must be aware of and support them? The Chamber has no trace of the conversations between Mr Kilolo and Mr Babala, not to mention any recordings that could be used as proof of the Appellant's knowledge and intent with regard to the alleged criminal motivation for the transfers in question. In the light of this deficiency, the conclusion that Mr Babala *was aware of* and *wished to* contribute to the corrupt influencing of the witnesses is unreasonable.

[187] Judgment, para. 250.
[188] *Ibid.*, para. 277.

4) BREACH OF THE PRINCIPLE OF LEGALITY BY MEANS OF BROAD INTERPRETATION OF ARTICLE 25(3)(C) OF THE STATUTE

140. Article 25(3)(c), the article under which Mr Babala has been convicted, provides:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: […] For the purpose of[189] facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission […].

This article establishes the condition of the existence of a mental element. It defines the requisite intent. In paragraph 95 and in two sentences of paragraph 97 of the impugned Judgment, the Trial Chamber made an interesting theoretical argument about the nature of the intent required by article 25(3)(c) of the Statute. It is rightly mentioned in paragraph 95 that:

> The second argument lies in the enhanced *mens rea* requirement stipulated in Article 25(3)(c) of the Statute which provides an additional filter, as explained below. Suffice it to say here that the term 'purpose' found in the opening clause '[f]or the purpose of facilitating the commission of such a crime' in Article 25(3)(c) of the Statute goes beyond the ordinary *mens rea* standard encapsulated in Article 30 of the Statute and penalises such assistance only if a higher subjective element is satisfied on the part of the accessory.

141. In paragraph 97, it is mentioned that:

> Unlike other international instruments, Article 25(3)(c) expressly sets forth a specific 'purpose' requirement according to which the assistant must act ('for the purpose of facilitating the commission of such crime').[190] This wording introduces a higher subjective mental element and means that the accessory must have lent his or her assistance with the aim of facilitating the offence.

142. It would appear that article 25(3)(c) introduces what the literature refers to as specific intent (*dolus specialis*)[191] or very specific intent,[192] in which the agent's intent pertains to both the act and its consequences. With the words "[f]or the purpose of facilitating the commission of such a crime", the Statute clearly requires that the accessory must not only demonstrate the intention of carrying

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[189] Emphasis added.
[190] ICC-01/04-01/10-465-Red, paras. 274, 281.
[191] See, in particular, X. Pin, *Droit pénal général*, pp. 143-148; C. Neithardt, *Dol spécial du génocide et sa preuve*; *Droit.fr*, *Lexique juridique* "*Dol spécial*".
[192] R. Nyabirungu mwene Songa, *op. cit.*, pp. 308-309.

out an act that he or she knows to be prohibited by law, but also provide aid or assistance with the knowledge and intent of bringing about the commission of the material elements of the offence in all its facets, including the timing, the means and the aim(s).

143. Concerning the offence specifically ascribed to Mr Babala, that of corrupt influencing of witnesses, the timing of the act refers to the course of judicial proceedings, legal claim and/or legal defence; the means associated with the act are the promises, offers or gifts, pressure, threats, acts of violence, scheming or contrivance; and the aim of the act is to obtain false oral evidence under oath, false statements or false written attestations before an investigating or trial court or during a police investigation, or to ensure that false written oral evidence under oath, false statements or false written attestations are not given.[193]

144. De Frouville defines specific intent as "[TRANSLATION] specific wrongful intent that stands in addition to general intent. Usually, this specific intent comes in the form of an aim or objective that the perpetrator is seeking to achieve."[194] The phrase "for the purpose of" presupposes an aim or objective.

145. Consequently, the accessory must act with knowledge and intent in aiding and assisting with the principal perpetrator's commission of acts which take place in the course of judicial proceedings or a legal claim, and which involve promises, offers or gifts, threats, acts of violence, scheming or contrivance aimed at obtaining false statements or false written attestations before a court or ensuring that false statements or false written attestations are not given.

146. What the Trial Chamber seems to have wanted to say with the arguments described above is that article 25(3)(c) of the Statute requires the accessory to have the knowledge that his or her acts will bring about the offence of

[193] See Cabinet ACI, *La subornation de témoin, d'expert ou d'interprète*.
[194] O. de Frouville, *Droit international pénal*, p. 77.

corruptly influencing witnesses in its various material acts and the intent to bring about the offence's prohibited consequences. And the Chamber is right.

147. Yet, in comparing article 25(3)(c) and article 30 of the Statute, the Trial Chamber errs in concluding, in paragraph 98, in response to the Prosecution's Closing Brief, that:

> […] liability for aiding and abetting an offence requires proof that the accessory also had intent with regard to the principal offence pursuant to Article 30 of the Statute, which applies by default. This means that the aider or abettor must at least be aware that the principal perpetrator's offence will occur in the ordinary course of events. Finally, it is not necessary for the accessory to know the precise offence which was intended and which in the specific circumstances was committed, but he or she must be aware of its essential elements.

148. The terms of article 25(3)(c) effectively indicate that the accessory must be aware of the crime or specific offence that the principal perpetrator is envisaging or in the process of committing. In providing "For the purpose of facilitating the commission <u>of such a crime</u>,[195] aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission", the Statute is actually referring to a specific crime or offence – and not just its essential elements – given that articles 6 to 8 of the Statute itself define crimes – and not essential elements of criminality in general – and, moreover, there is no such thing in law as an attempt at the essential elements of criminality in general. It follows, therefore, that article 25(3)(c) refers to specific crimes or offences and that, once again, the Trial Chamber has erred in law.

149. In this respect, Professor Nyabirungu categorically underscores that "[TRANSLATION] criminal resolve is the third condition for punishable participation. It is the mental element thereof. When participants act, they must be aware that they are furthering the execution <u>of a specific offence</u>".[196] The mental element of criminal participation is not limited to mere

[195] Emphasis added.
[196] R. Nyabirungu mwene Songa, *op. cit*., p. 259. Emphasis added.

simultaneity or juxtaposition with the principal act. There must be a union, "a shared intention to accomplish a common design".[197]

150. According to Stefani and Levasseur, with regard to:

> [TRANSLATION] the mental element justifying the criminalization of accessoryship; the accessory must have willingly subscribed to the criminal design, and even though jurisprudence extends to the accessory actual aggravating circumstances of which the accessory had not been aware, it does not consider the accessory guilty where the offence committed was radically different from the offence initially envisaged (Cass. Crim. 13 January 1955, D. 1955.29, note Chavanne); it lies with the public prosecutor to prove that the accessory was aware that the weapon procured would be used for the crime committed.[198]

151. Nothing could be further from the truth than the claim that article 30 of the Court's Statute homogenizes, evens out or standardizes the mental element of all crimes provided for in the Statute, including offences against the administration of justice; that the intent – that is, "[TRANSLATION] that particular state of mind of the perpetrator of the act which characterizes criminal behaviour"[199] – is the same in all crimes and can be separated into two degrees: *dolus directus* in the first degree and *dolus directus* in the second degree,[200] which are in fact the variants of general intent.

152. De Frouville, who directly or indirectly inspired the drafting of paragraphs 26 to 30 of the impugned Judgment, posits that "*mens rea* may take various forms"[201] and that, in addition to general intent, there is also specific intent and fault. Each of the crimes and offences provided for in the Statute involves a specific degree of intent.

153. If that were not so, how could it be possible to characterize a number of offences in different ways even though they share the same material element? And specifically, how could genocide be distinguished from murder or premeditated murder, given that all three crimes involve the same material elements: killing one or more persons?

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[197] *Ibid*.
[198] G. Stefani, G. Levasseur, *Procédure pénale*, para. 296.
[199] O. de Frouville, *op. cit.*, p. 73.
[200] Judgment, para. 29 *et seq*.
[201] O. de Frouville, *op. cit.*, p. 75.

154. Article 30 of the Statute does indeed introduce the requirement of a mental element characterized by both knowledge and intent in order for there to be criminal responsibility before the Court, but it does not establish general intent as the standard mental element for all crimes.

155. This article, which is no doubt inspired by article 9 of the French Declaration of the Rights of Man and of the Citizen, establishes the principle of a requisite mental element for the characterization and punishment of the crimes and offences proscribed by the Statute of the Court.

156. This article means that:

> [TRANSLATION] beyond the issue of the actual commission of a criminal act, a person may be held accountable for that crime only on two conditions: the person is aware, that is to say that, at the time of the act, his or her mental capacities had not been altered to the point that he or she had lost all discernment or was deprived of the "capacity to appreciate the unlawfulness or nature of his or her conduct" (article 31 of the Rome Statute); and the act was committed in a certain frame of mind which in criminal law is considered to indicate guilt.[202]

Therefore, the position adopted by the Trial Chamber at the end of paragraph 97 and in paragraph 98 is erroneous. In the words of the Trial Chamber, "[m]indful of the twofold intent of the accessory (*viz.* firstly, the principal offence and, secondly, the accessory's own conduct), the Chamber clarifies that this elevated subjective standard relates to the accessory's facilitation, not the principal offence", and:

> Additionally, liability for aiding and abetting an offence requires proof that the accessory also had intent with regard to the principal offence pursuant to Article 30 of the Statute, which applies by default. This means that the aider or abettor must at least be aware that the principal perpetrator's offence will occur in the ordinary course of events. Finally, it is not necessary for the accessory to know the precise offence which was intended and which in the specific circumstances was committed, but he or she must be aware of its essential elements.

157. The offence of corruptly influencing a witness requires specific intent to the extent that the purpose of the material act of employing promises, offers, gifts, pressure, threats, acts of violence, scheming or contrivance in the course of judicial proceedings – or with a view to a legal claim or legal defence – is to

[202] O. De Frouville, *op. cit.*, p. 75.

persuade others either to provide false oral evidence under oath, false statements or false written attestations, or to refrain from providing oral evidence under oath, statements or written attestations.[203] According to the commentary on the Court's Statute, in corrupt influencing "[TRANSLATION] the witness wishes to tell the truth but is precluded from doing so through scheming aimed at[204] preventing it […]".[205]

158. By the same token, the Criminal Chamber of the French Court of Cassation has ruled that:

> [TRANSLATION] a conviction of corrupt influencing of witnesses must be entered against corporate executives who knowingly solicited testimonies from employees, threatening them with dismissal, with the aim of presenting them in labour court proceedings instituted by another dismissed employee,[206] who had previously produced written attestations from those employees, inasmuch as the appeal court, having acknowledged that the initial attestations were sincere, rightly concluded that testimonies contradicting them could only be false.[207]

159. Article 30 of the Statute cannot change the degree of the mental elements of the crimes or offences. Indeed, Stefani and Levasseur assert that "[TRANSLATION] the material act constitutes an offence only insofar as the mental element required by law for the offence in question[208] can be identified in respect of the perpetrator, and it lies with the prosecuting party to establish the existence of that mental element".[209] That is to say that each crime or offence involves a particular mental element.

160. Moreover, as Pre-Trial Chamber I so aptly noted in *Lubanga*, this provision (article 30 of the Court's Statute) is only residual in nature, as paragraph 1 begins with the words "Unless otherwise provided".[210]

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[203] Emphasis added.
[204] *Idem*.
[205] D. Dreyssé, "Article 70 : Atteintes à l'administration de la justice", in *Statut de Rome de la Cour pénale internationale, Commentaire article par article*, J. Fernandez, X. Pacreau (eds.), Volume II, p. 1604.
[206] Emphasis added.
[207] Cass. Crim., 28 June 2011, No. 10-88.795.
[208] Emphasis added.
[209] G. Stefani, G. Levasseur, *op. cit.*, para. 296.
[210] ICC-01/04-01/06-803, paras. 356-360.

161. In the light of the foregoing, the Trial Chamber was obliged to demonstrate that the Prosecution had proved that Mr Babala had aided Mr Kilolo with a view to persuading Witnesses D-57 and D-64 either to provide false oral evidence under oath, false statements or false written attestations, or to refrain from providing oral evidence under oath, statements or written attestations.

162. That proof should have demonstrated, first, that Mr Babala was aware of the acts noted in paragraph 107 of the Judgment, that is:

> Mr Kilolo […] illicitly coached the witnesses either over the telephone or in personal meetings shortly before the witnesses' testimony. The main focus of the illicit coaching activities was on (i) key points bearing on the subject-matter of the Main Case, and (ii) matters bearing on the credibility of the witnesses, such as their behaviour when testifying, their prior contacts with the defence, acquaintance with certain individuals and payments of money or promises received from the Main Case Defence. Mr Kilolo illicitly instructed, scripted and corrected the witnesses' expected testimonies also in the light of the evidence given by other defence witnesses. He rehearsed with the defence witnesses prospective questions of the victims' legal representatives which had been confidentially shared with the Main Case Defence, in the same order they would be put in court and provided the expected replies. Mr Kilolo maintained close contact with the witnesses shortly before and during their testimonies, sometimes late at night or early in the morning, so as to make sure that they complied with his instructions

and, second, that Mr Babala intended to support the offence that Mr Kilolo was committing or planned to commit and that the money transfers he effected served that purpose.

163. In concrete terms, in addition to specifying the shared intention, the Judgment should have also explained how Mr Babala was aware of (1) the transfer beneficiaries' status as witnesses; (2) the subjects of their testimony before the Court; (3) the timing of their testimony; and (4) the false oral evidence under oath, false statements or false written attestations that the witnesses were going to provide.

164. The demonstration of that shared intention and the evidence set out is lacking in the impugned Judgment. It cannot be supported by and limited to the phrase "*faire (donner) du sucre aux gens, vous verrez que c'est bien*" [you'll see that it's

good to give people sugar] drawn not from the conversation between Mr Kilolo and Mr Babala, but from the one between Mr Bemba and Mr Babala.

165. At the end of paragraph 115 of the Judgment, the Trial Chamber further asserts that:

> Aware of the exact circumstances and Mr Kilolo's motivation for the money transfer,[211] Mr Babala effected the transfer of USD 665 on the same day from Kinshasa. He then sent D-57's wife an SMS with the transfer number, the name of the transferor and the amount of money. At 11:56 (local time), D-57's wife collected the money at her place of residence. Mr Babala then called D-57's wife to verify that she had indeed received the money. Mr Kilolo further instructed the witness not to reveal in his testimony before Trial Chamber III the exact number of contacts with the witness or the payment of the money.[212]

The Chamber's assertion that Mr Babala was "aware of the exact circumstances and Mr Kilolo's motivation for the money transfer […]" is unjustified. The Chamber does not point to any evidence to support this.

166. First, and more importantly, the Chamber does not say how Mr Babala was aware of the exact circumstances and Mr Kilolo's motivation for the money transfer, insofar as the Chamber itself acknowledged and affirmed that it did not have intercepts of the communications between Mr Babala and Mr Kilolo. On what basis did the Chamber so confidently reach such a highly prejudicial conclusion? In the words of Professor Nyabirungu, legal modes of participation are "limiting and to be strictly construed. They do not allow any application by analogy."[213]

167. Second, the assertion contained at the end of paragraph 115 effectively specifies that it was after D-57's wife collected the money that Mr Kilolo gave the instruction not to reveal that money had been collected. Consequently, did Mr Babala's act of participation in the alleged corrupt influencing occur subsequently? In that case, taking into account the provisions of article 25(3)(c), can it be considered an act of participation that took place subsequent to the consummation of the offence?

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[211] Emphasis added.
[212] Emphasis added.
[213] R. Nyabirungu mwene Songa, *op. cit*., p. 256.

168. Referring to the jurisprudence of the ad hoc international criminal tribunals[214] without concerning itself with the existence of a provision comparable to article 25(3)(c) in their fundamental texts, the Trial Chamber responds in the affirmative in paragraph 96 of the Judgment, in these terms: "The assistance may be given before, during or after the offence has been perpetrated." The question is thus how to reconcile this position with the prepositional phrase "for the purpose of [facilitating the commission of such a crime]", which means "with the intention of" and which necessarily presupposes that the acts of assistance (of facilitation) took place before the principal acts (of commission).

169. The Trial Chamber commits an error of logic in referring to the jurisprudence of the ad hoc international criminal tribunals[215] as a basis for its decision despite the fact that the Chamber itself recognizes that none of the texts that found and govern the international criminal tribunals contain any provisions comparable to article 25(3)(c).

170. What is more, since Mr Kilolo allegedly gave his instructions after the money had been collected by D-57's wife, when did Mr Babala learn that Mr Kilolo had instructed the witness not to reveal the existence of the transfer? The Chamber itself admitted that it did not have any evidence substantiating the content of the conversations between Mr Babala and Mr Kilolo, not to mention that it was unable even to establish that such a conversation took place. On what was it relying, then? In any case, there is more than a doubt.

5) BREACH OF THE PRINCIPLE OF LEGALITY BY MEANS OF NON-COMPLIANCE WITH ARTICLE 30 OF THE STATUTE

171. For a conviction to be entered, article 30 of the Statute requires proof of the existence of the mental element, which includes both intent and knowledge. In this respect, Mr Babala must have known that he was participating in the

[214] Judgment, para. 96, footnotes 167-169.
[215] *Ibid.*, para. 98.

sabotage of the judicial process and he must have harboured the intention of doing so. Such knowledge and intent must be demonstrated through evidence.

172. As we have already underscored, a person cannot be held accountable for a crime within the jurisdiction of the Court — in this case, the offence against the administration of justice provided for and punishable under article 70 of the Statute — unless that person was aware, that is to say that, at the time of the act, his or her mental capacities had not been altered to the point that he or she had lost all discernment or was deprived of the "capacity to appreciate the unlawfulness or nature of his or her conduct" (article 31 of the Statute), and unless the person committed the act in a certain frame of mind which in criminal law is considered to indicate guilt.

173. Yet, the impugned Judgment does not demonstrate that Mr Babala intended to sabotage the judicial proceedings instituted against Mr Bemba before Trial Chamber III, or that he was even aware of the material acts alleged against Mr Kilolo.

A) NO PROOF OF THE APPELLANT'S CRIMINAL INTENT

174. According to the case law, the requirement of criminal intent is a general principle and its existence must be proved in cases in which the law does not provide for the prosecutor to do otherwise.[216] In the instant case, the Statute does not contain any presumptions of law that are unfavourable to the accused. Consequently, the onus of proof lies squarely with the Prosecution. Such is the import of article 66(2) of the Statute, which places the burden on the Prosecutor to prove the guilt of the accused. Moreover, as Stefani and Levasseur have asserted, where the criminal law requires aggravated intent (premeditation, for example) or specific intent, the onus is on the prosecutor to establish its existence in the specific case at hand.[217]

[216] R. Nyabirungu mwene Songa, *op. cit*., p. 305.
[217] G. Stefani, G. Levasseur, *op. cit*., para. 297.

175. In the case of the offence of corruptly influencing witnesses, intent is characterized by the intention to persuade others either to provide false oral evidence under oath, false statements or false written attestations, or to refrain from giving or providing oral evidence under oath, statements or written attestations with the aim of tainting the ongoing judicial process. In the instant case, the impugned Judgment does not contain any proof of Mr Babala's intention to facilitate Mr Kilolo's commission of the offence of corruptly influencing Witnesses D-57 and D-64.

176. In doing no more than confirm appearances, the Trial Chamber has failed to show – as required by article 30 of the Court's Statute – that, concerning the corrupt influencing of Witnesses D-57 and D-64, Mr Babala intended to take part in the enterprise of corrupt influencing attributed to Mr Kilolo; that, through his activity, he intended to interfere with the administration of justice or was aware that this would occur in the ordinary course of his activity; that Mr Babala was aware that Mr Kilolo's enterprise was aimed at sabotaging the judicial process or that the judicial process would be sabotaged in the ordinary course of that enterprise.

177. The impugned Judgment does not point to any evidence which shows that Mr Babala was aware – at the time the transfers were made to Witnesses D-57 and D-64 – that Mr Kilolo was corruptly influencing them or planned to do so. There is no evidence that firmly establishes that Mr Kilolo spoke with Mr Babala about the purpose of the transfers before he made them.

B) NO PROOF OF THE APPELLANT'S KNOWLEDGE

178. It is not sufficient to simply assert, as in paragraph 254 of the Judgment, that: "The Chamber […] finds that Mr Babala transferred USD 665 to D-57's wife shortly before her husband's testimony, knowing that the money was meant to ensure that D-57 would testify in the Main Case in Mr Bemba's favour." The point must also be made, on the basis of probative material in the record,

that Mr Babala knew that D-57 was a witness, that he had been called to testify on more or less specific dates – after the date of the transfer, that Mr Babala was aware of the mendacious account that D-57 was going to give the Chamber at Mr Kilolo's behest, and that he intended to participate in that enterprise with the aim of assisting Mr Bemba.

179. The same reasoning can be applied to paragraph 267 of the Judgment. The Chamber relies on a misinterpreted conversation to make exaggerated and unjustified inferences.

180. This is also the case in paragraph 272 of the Judgment, for example, in which the Chamber states:

> Thereafter, Mr Babala, who admits having acted at Mr Kilolo's behest, arranged for the money transfer through another person. As a result, the Chamber concludes that, as with other witnesses, Mr Kilolo and Mr Babala arranged the money transfer to D-64 in a manner intended to conceal any link between the witness and the Main Case Defence.

An assertion such as this is liable to seriously undermine the diligence and credibility of the Trial Chamber.

181. First of all, Mr Babala is heavily involved in political activities. It is possible that he was busy at the time that Mr Bemba's Defence team expressed an urgent need for money. So is it not possible that he sent his employee to make the transfer? Moreover, this was not the only time that Mr Babala had entrusted his employee with such a task, and, furthermore, the Chamber has no proof of communication between Mr Babala and Mr Kilolo implying or even simply suggesting that the latter had revealed the Defence strategy and witness status to the former. In this context, the Chamber's failure to take into account P-0272's testimony about how he was in the habit of carrying out these types of tasks for his employer remains important.[218]

182. As the Chamber recalled in paragraph 84 of its Judgment: "Article 25(3)(c) of the Statute establishes accessorial liability, holding responsible a person who assists the principal perpetrator of an offence." Did Mr Kilolo and Mr Babala

[218] See section D-I, paras. 73-74, and section D-I-4, para. 83, of this Brief.

have a conversation that proves the aid or assistance that Mr Babala was prepared to provide to him with the aim of corruptly influencing these two witnesses? Was Mr Babala aware of Trial Chamber III's decisions?[219] While it is not necessary for the offence to have been committed by a participant in the proceedings (paragraph 49), it is however necessary for that person to have known that he or she was involved in interfering with the proceedings in progress. In the instant case, what concrete evidence is there that proves beyond reasonable doubt that, at the time of the transfers in dispute, Mr Babala knew (paragraph 55, general intent or *mens rea*) that he was helping Mr Kilolo subvert the course of justice before Trial Chamber III? In paragraph 93 of the Judgment it is recalled that an individual shall be responsible for a crime if that individual knowingly aids, abets or otherwise assists, *directly and substantially*, in the commission of such a crime, including providing the means for its commission.

II. THE IMPUGNED JUDGMENT VIOLATED THE STANDARD OF PROOF AT TRIAL

183. Two principles govern the standard of proof before the Court: the burden of proof placed on the Prosecutor and the evidentiary standard of convincing the Chamber beyond reasonable doubt. Article 66(2) of the Statute provides that "[t]he onus is on the Prosecutor to prove the guilt of the accused"; and paragraph 3 of the same article provides that "[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."

184. Successful international prosecutions require solid prosecution evidence at trial. Yet it is not sufficient to simply submit items into evidence. It is also necessary to explain how they are relevant by showing how they support the prosecution's case. And that task lies with the Prosecutor alone.

[219] ICC-01/05-01/08-1016, ICC-01/05-01/08-1081-Anx, cited in footnote 86 of the Judgment.

185. Evidence is brought before a court to convince it of the existence or otherwise of a fact. It is the means by which a court is able to rule on the validity of a claim or allegation. "[TRANSLATION] To prove is to secure approval", Lévy-Bruhl wrote, in the knowledge that a court must make a determination one way or another.[220] Evidence is part of the proceedings. It brings into play various mechanisms, in particular the assignment of the *burden of proof* and the *degree of proof* required of the person bearing the burden.[221] In criminal matters, the Prosecutor bears the burden of proof but not its assessment, which falls to the court alone. The degree of proof "[TRANSLATION] corresponds to the probative value required by the court to accept the case of the party bearing the burden of proof. […] In criminal matters, this is proof beyond reasonable doubt, which is a very high standard."[222]

186. Proving something beyond reasonable doubt means proving it with certainty; the slightest doubt must weigh in favour of the accused. Such is the assertion made by Professor Jean Pradel, who notes that, when the evidence presented to the court is not absolutely certain, the court must find that the accused must be given the benefit of any lingering doubt.[223] Therefore, in making its case, the Prosecution must force itself, with complete objectivity, to present the Chamber trying the case with precise, sound, consistent and credible evidence that enables the Chamber to rule without doubt on the action to be taken with regard to the accused. There must not be any shadow of a doubt. This springs from the presumption of innocence, a cardinal principle in criminal law; article 66(1) of the Statute stipulates that everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. Article 66(2) further provides that the onus is on the Prosecutor to prove the guilt of the accused. The threshold of proof changes, rising with each stage of

[220] C. Fluet, *L'économie de la preuve judiciaire*, p. 1.
[221] *Ibid.*, p. 2.
[222] *Ibid.*, p. 3.
[223] J. Pradel, *Manuel de Procédure pénale*, p. 319.

the proceedings.[224] Born out of mere suspicions, proof in criminal matters reaches maturity — that is, it can lead to the accused's conviction — only when those suspicions become certainties. However, this is a long and laborious process. The Prosecution's work consists in building these suspicions into grave and consistent indicia, then into serious indicia of guilt, to culminate in certainties. Proving the guilt of the accused beyond reasonable doubt means convincing the judges not that it is probable that the accused is guilty, but that it is certain that the accused is guilty.

187. This rule – which is applicable in other treaty-based courts such as the ICTY,[225] the ICTR[226] and the SCSL[227] – requires the accused to be found guilty where a Chamber is convinced of his guilt beyond all reasonable doubt. In keeping with this standard, the Trial Chamber of the ICTY held in *Delalić*:

> 601. The general principle to be applied by the Trial Chamber is clearly, on the basis of this brief analysis, that the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.[228]

188. Also in *Delalić*, the Appeals Chamber upheld the accused's conviction in the event of a circumstantial case only where the finding it makes is the only reasonable one possible: "It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be

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[224] ICC-01/04-01/06-568, para. 56: "Steps leading *towards* prosecution, on the other hand, may be taken in the course of an ongoing investigation: pursuant to article 58(1) of the Statute, a warrant of arrest may be issued '[a]t any time after the initiation of an investigation' as long as the Pre-Trial Chamber, on the basis of the Prosecutor's application, is satisfied *inter alia* that there are 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'. The Pre-Trial Chamber may find 'reasonable grounds to believe' even before the conclusion of investigations on the basis of the sufficiency of the evidence or other information submitted by the Prosecutor. Similarly, the threshold for the confirmation of charges ('substantial grounds', article 61(7) of the Statute) is lower than for conviction ('beyond reasonable doubt', article 66(3) of the Statute) and may be satisfied before the end of the investigation."

[225] ICTY, Rules of procedure and evidence, Rule 87(A).

[226] ICTR, Rules of procedure and evidence, Rule 87(A).

[227] SCSL, Rules of procedure and evidence, Rule 148(A).

[228] ICTY, *Delalić et al*, Judgement, para. 601.

acquitted."[229] The Appeals Chamber prefers a broad application of this criterion, which must encompass the examination of all the facts that must found a guilty verdict.[230] It is for this reason that it stated that each constituent element of each crime must be proven beyond reasonable doubt;[231] each fact on which the conviction relies must be proven beyond reasonable doubt;[232] and each element of all the modes of liability presented in the charges must also be proven beyond reasonable doubt.[233]

189. In *Kupreškić*, the Appeals Chamber disagreed with the Prosecution's argument based on an attempt to establish the evidence of the attack as a constituent element of persecution by reference to the standard of probative value rather than the standard of proof beyond reasonable doubt. In its view, the evidence concerned "a material fact integral to the crime of persecution",[234] since the accused persons' conviction hinged upon their participation in the attack on the house.

190. According to legal scholars, proof beyond reasonable doubt cannot be conceptualized in terms of probabilities; an accused cannot be convicted

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[229] ICTY, *Delalić et al*, Judgement on Appeal, para. 458: "A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him — here that he participated in the second beating of Gotovac. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."

[230] *Ibid*., para. 458.

[231] ICTY, *Stakić*, Judgement on Appeal, para. 219: "A Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime (as defined with respect to the relevant mode of liability) beyond a reasonable doubt. This standard applies whether the evidence evaluated is direct or circumstantial."

[232] ICTR, *Ntagerura et al*, Judgement on Appeal, para. 175: "The Appeals Chamber recalls that the presumption of innocence requires that each fact on which an accused's conviction is based must be proved beyond a reasonable doubt. The Appeals Chamber agrees with the Prosecution's argument that 'if facts which are essential to a finding of guilt are still doubtful, notwithstanding the support of other facts, this will produce a doubt in the mind of the Trial Chamber that guilt has been proven beyond a reasonable doubt.' Thus, if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction." See also *Blagojević and Jokić*, Judgement on Appeal, para. 226.

[233] STSL, *Brima et al*, Judgement on Appeal, para. 98; ICTR, *Ntagerura et al*, Judgement on Appeal, paras. 174-175.

[234] ICTY, *Kupreškić et al*, Judgement on Appeal, para. 226.

because it is more probable than not that he or she committed the crimes for which he or she is held to account. The test is whether there is a reasonable doubt, that is, a doubt to which a reason which is not fanciful can be assigned. If such doubt exists, the accused must be acquitted.[235]

191. As Rohan has written, American and Canadian courts have adopted a definition close to that propounded in English and Australian law and at the ICTY. She and her co-authors explain that the Prosecution's evidence must have firmly convinced the judge or jury of the guilt of the accused and that, conversely, after having examined the evidence, a member of the bench or jury should not be in a position to say, in all conscience, that he or she is not convinced of the truth of the charges.[236] Thanks to its inclusion in article 66(3) of the Rome Statute, this criterion has become the customary standard of proof in international criminal trials.[237] It was applied by the post-war military tribunals. In *Pohl,* the American military tribunal defined doubt as follows:

> It is such a doubt as, after full consideration of all the evidence, would leave an unbiased, reflective person charged with the responsibility of decision, in such a state of mind that he could not say that he felt an abiding conviction amounting to a moral certainty of the truth of the charge.[238]

The International Tribunal at Nuremberg did not hold back in applying this concept in its judgment acquitting Schacht and von Papen.[239]

192. Similarly, with regard to proof, David considers that:

> [TRANSLATION] In practice, chambers do rely on evidence which goes "beyond reasonable doubt", that is, proof such that those factors which may affect the conviction of a judge lead to the conclusion that "of course it is possible but not in the least probable". Then, in order to refute the accused's guilt, the defence must "present evidence which is such as to cast reasonable doubt" on the prosecution

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[235] J.R.W.D. Jones, S. Powles, *International Criminal Practice*, p. 722, paras. 8.5.612 to 8.5.615.
[236] C. Rohan, "Reasonable Doubt Standard of Proof in International Criminal Trials", in K. Khan, C. Buisman, C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice*, p. 654.
[237] J.R.W.D. Jones, S. Powles, *International Criminal Practice*, p. 722, paras. 8.5.612 to 8.5.615.
[238] *United States v. Pohl et al*, (1948) 5 TWC, p. 965, United States Military Tribunal, cited by W. Schabas, "Article 66", *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer (ed.), p. 1240.
[239] *France et al v. Göring et al*, (1946) 22 IMT 203, 13 ILR 203, cited by W. Schabas, "Article 66", *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer (ed.), p. 1240.

> case, because *in dubio pro reo* — a saying which some consider applicable to both factual and legal issues.[240]

193. In *Delalić*, the Trial Chamber further stated the threshold of proof required of the Defence:

> 603. Whereas the Prosecution is bound to prove the allegations against the accused beyond a reasonable doubt, the accused is required to prove any issues which he might raise on the balance of probabilities. In relation to the charges being laid against him, the accused is only required to lead such evidence as would, if believed and uncontradicted, induce a reasonable doubt as to whether his version might not be true, rather than that of the Prosecution. Thus the evidence which he brings should be enough to suggest a reasonable possibility. In any case, at the conclusion of the proceedings, if there is any doubt that the Prosecution has established the case against the accused, the accused is entitled to the benefit of such doubt and, thus, acquittal.

194. In Europe, the standard of proof beyond reasonable doubt is frequently applied when the European Commission and the European Court consider violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms. P. Tavernier notes:

> [TRANSLATION] Several cases concern the principle of presumption of innocence set forth in article 14(2): "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The Committee adopted a broad construction of this principle in its general comments: "No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial." This drafting can encompass judicial authorities as well as administrative and public authorities.[241]

195. At the European Court of Human Rights, evidence is evaluated according to the standard of proof beyond reasonable doubt. Accordingly:

> [TRANSLATION] with the Judgment of 18 January 1978 in *Ireland v. United Kingdom*, the Court adopted the standard of proof "beyond reasonable doubt", admitting that such proof could arise from a series of indicia, or unrefuted presumptions, which are sufficiently serious, specific and consistent. The Court thus contents itself with prima facie evidence to assess the credibility of allegations. Hence, the

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[240] E. David, *Eléments de droit pénal international et européen*, p. 858 with bibliographical notes.

[241] P. Tavernier, *Le droit à un procès équitable dans la jurisprudence du comité des droits de l'homme des Nations Unies*, p. 12.

> Strasbourg Court takes a minimalistic approach to the matter to be proven with respect to the applicant, who consequently faces a lighter burden.[242]

196. As to the burden of proof, ICTY case law is clearly settled. The burden of proof is borne by the Prosecution.[243] Article 66(2) of the Rome Statute stipulates that "[t]he onus is on the Prosecution to prove the guilt of the accused".

1) VIOLATION OF THE RULE PLACING THE BURDEN OF PROOF ON THE PROSECUTION (ARTICLE 66(2) OF THE STATUTE)

197. Under the presumption of innocence and the benefit of the doubt accruing to the accused, judges in criminal matters are obliged to present full proof of guilt and demonstrate the Prosecution's truth in no uncertain terms.[244] Such is the meaning of the aforementioned article 66(2).

198. Judges in criminal cases — who are not parties to the proceedings and whose mission is to arbitrate between the accused and the Prosecution — must demonstrate active neutrality when evaluating evidence. In this regard, articles 64(2) and 69(4) require the Chamber to ensure a fair trial, which turns on the rule of the burden of proof.

199. Article 67(1)(i) of the Statute guarantees the accused the right "[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." The Statute does not provide for any presumptions of law in favour of the Prosecution. Therefore, the burden of proof it bears is not minimized in any way. It is total.

200. Without, of course, expressly saying as much, the Trial Chamber (whose conduct speaks for itself) reversed the burden of proof by placing the onus on the Appellant to prove the lawfulness or unlawfulness of the transfers he made

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[242] L. Dutheil-Warolin, *La Cour européenne des droits de l'homme aux prises avec la preuve de violations du droit à la vie ou de l'interdiction de la torture : entre théorie classique aménagée et innovation européenne*, pp. 334-335; see also ECtHR, *Salman v. Turkey*, 27 June 2000, pp. 845-856, and read the observations of E. Van Nuffel, *L'appréciation des faits et leur preuve par la Cour européenne des droits de l'homme dans les affaires mettant en cause les forces de sécurité accusées d'homicides et d'actes de torture : le doute raisonnable et l'inhumain*, pp. 856-885.

[243] ICTY, *Limaj et al*, Judgement, para. 10; *Haradinaj et al*, Judgement, para. 7.

[244] H. Roland, L. Boyer, *L'administration de la preuve : les parties et la charge de la preuve*.

and the lack of knowledge and intent on his part. In this regard, the transfers Mr Babala made to Witnesses D-57 and D-64 were not the only ones he made. He had made a number of transfers in the past, always at the behest of Lead Counsel,[245] including to Mr Kokate and Mr Arido. Those transfers were never deemed controversial by the Chamber, which has not explained why the same cannot be said of the transfers made to Witnesses D-57 and D-64.

201. As proof of Mr Babala's good faith, even Mr Arido, a potential Defence witness, was unknown to Mr Babala. It was during his stay at the Detention Centre in Scheveningen that he first met Mr Arido, who informed him of the real reason for the transfer. To Mr Babala's knowledge, all of the transfers he made contributed to the functioning of the Defence team in the Main Case. That is the one and only reason why Mr Bemba sought out his services following the death of his father, Mr Bemba Saolona.

202. In transferring the moneys in dispute at Mr Kilolo's behest, Mr Babala was involved in making ordinary, lawful transfers. At that time, he was not aware that he was helping anyone sabotage the judicial process in the Main Case. Neither the Prosecution —which bears the burden of proof — nor the Trial Chamber were able to distinguish between the lawful and unlawful payments made by Mr Babala or describe Mr Babala's level of knowledge and intent with regard to the unlawfulness of the transfers.

203. From the outset, in the allegations it made at each stage of the proceedings, the Prosecution repeatedly sought to depict the coded language used by the accused persons, in particular between Mr Bemba and Mr Babala, as fraudulent. The Defence challenged this fact, citing, first, the decision of the Pre-Trial Chamber, which found nothing fraudulent in the language;[246] second, the fact that over 90 per cent of the conversations between Mr Bemba and Mr Babala concerned political, private and family-related subjects and

[245] ICC-01/05-01/13-1901-Conf, paras. 189-194.
[246] ICC-01/05-01/08-475, paras. 73-74.

nonetheless took place in coded language, and, lastly, the reason for choosing to use this language: to maintain the confidentiality of their conversations [REDACTED].

204. Since that allegation was disputed by the Defence, it could not be considered established. The Prosecution had an obligation to prove the allegation at issue. Nothing was done and the Chamber went along with it all the same. Therefore, the burden of proof concerning the interpretation of the codes was reversed.

A) REVERSAL OF THE BURDEN OF PROOF AS REGARDS THE INTERPRETATION OF THE CODES

205. Proof of the allegation disputed by the Defence was provided not by the Prosecution, but rather by the Chamber, which, in paragraph 748 of its Judgment, responds in these terms:

> The Prosecution alleges that in order to conceal their plan, the co-perpetrators used coded language in their communications. The Bemba Defence argued that Mr Bemba and Mr Babala conversed in coded language out of fear that the DRC authorities might intercept their communications since Mr Babala, a resident in Kinshasa, is a political opponent to the current government. The Chamber understands that this explanation makes reference to the use of coded language in discussions between the long-time political allies about political affairs in the DRC. However, this does not explain (i) the use of coded language by Mr Bemba and Mr Babala when discussing matters arising from the proceedings before the Court; and (ii) the fact that Mr Kilolo and Mr Mangenda, who are not involved in DRC politics, used the same coded language in communications with Mr Bemba or among themselves. The Chamber stresses that the accused did not simply continue to use coded language, as a matter of habit, since new code terms and code names were invented for the Main Case witnesses and introduced by Mr Kilolo and Mr Mangenda. Also, as will be addressed further below, the fact that Mr Mangenda insisted that Mr Kilolo brief Mr Bemba in codes cannot be explained with the necessity that Mr Bemba and Mr Babala used codes in discussions involving DRC politics. The Bemba Defence argument is therefore not tenable.

206. Yet the Chamber did not prove that the words "*C'est la même chose comme pour aujourd'hui. Faire du sucre aux gens, vous verrez que c'est bien*. [It's the same thing as for today. You'll see that it's good to give people sugar]" concerned the case pending before Trial Chamber III or Witnesses D-57 and D-64.

207. The Trial Chamber reiterated its position, recalling that:

> Mr Babala communicated in codes when referring, for example, to Mr Kilolo ('*Collègue d'en Haut*'), D-57 ('*C'est la même chose comme pour aujourd'hui'*), and the monies to be paid ('*kilos*' or '*grands*'). The Chamber does not accept the Babala Defence explanation that these codes were legitimate as the two accused were talking about political issues. The content of the intercepts clearly shows that the code was used for matters related to the Main Case, not Mr Bemba's or Mr Babala's political work. In the Chamber's estimation, there was no need to speak in codes and to abuse the privileged line in order to discuss legitimate defence witnesses' payments. Rather, the evidence shows that Mr Babala actually underlined to Mr Bemba the importance of paying certain witnesses (in this case, D-57 and D-64) in connection with their testimonies in court.[247]

208. The Chamber did not explain, however, how the statement "*C'est la même chose comme pour aujourd'hui* [It's the same thing as for today]" referred to Witness D-57. The Chamber falsely asserted that the speakers made references to "*Whisky*", "*Collègue d'en haut*" and "*Bravo Golf*" throughout the conversation. The term "*Whisky*" was mentioned twice; in fact, it was mentioned once and then repeated because the connection was poor. The term "*Collègue d'en haut*" was also mentioned once and repeated twice, for the same reason. The Chamber did not make any incriminating arguments as to the term "*Bravo Golf*".

[247] Judgment, para. 884.

B) REVERSAL OF THE BURDEN OF PROOF IN THE CHAMBER'S FINDING REGARDING NUMBER [REDACTED]

209. Mr Bemba's privileged contacts at the Detention Centre included the Congolese phone number referred to as "[REDACTED]", registered in Mr Kilolo's[248] name as an alternate phone number used during missions.[249] On the one hand, the Chamber had been given evidence proving this fact. On the other, the Chamber had been made aware of the Prosecution theory that number [REDACTED] was registered under the name "*Babala bis*" on a SIM card whose owner, according to Independent Counsel, could not be identified. No information is available regarding the date the number was registered. Mr Kilolo never gave any testimony acknowledging that the SIM card belonged to him, and none of his testimony explained how he stored numbers in his diary.

210. On the basis of the clarifications obtained from the phone operator,[250] the Defence teams for Mr Bemba and Mr Babala filed submissions demonstrating the existence of several reasonably possible options: in view of the evidence obtained from the Detention Centre showing that number [REDACTED] was used by Mr Kilolo during his missions, and the clarification obtained from the phone operator, it is entirely possible that, when leaving Belgium or Europe, Mr Kilolo would activate automatic call forwarding to his number [REDACTED] to avoid roaming charges.[251]

211. This Chamber erred in law by ignoring both the evidence submitted by the Bemba Defence team which substantiates that number [REDACTED] was registered with the Detention Centre under Mr Kilolo's name,[252] and the evidence produced by the Appellant's Defence in support of its theory.[253]

[248] CAR-OTP-0074-0079; CAR-OTP-0074-0067, pp. 0071-0072.
[249] CAR-D20-0006-0480. See ICC-01/05-01/13-1901-Conf, paras. 167, 171.
[250] CAR-D22-0005-0003. See ICC-01/05-01/13-1901-Conf, para. 163.
[251] ICC-01/05-01/13-1901-Conf, para. 167; CAR-D20-0006-0480.
[252] ICC-01/05-01/13-1902-Conf-Corr2, paras. 128-131 with footnotes.
[253] ICC-01/05-01/13-1901-Conf, paras. 160-167 with footnotes.

Furthermore, the Chamber refused to consider that the theory put forward by both Defence teams had been corroborated by the Prosecution expert when he testified before the Chamber.[254] The Chamber simply relied on the Prosecution's claims on the basis of a report from Independent Counsel, in the absence of any other corroborating evidence.

212. According to article 66(2) of the Statute, the burden of proof lies with the Prosecutor.

213. International jurisprudence is abundantly clear that, under the standard of proof beyond reasonable doubt, there must be only one reasonably possible conclusion. Having noted that a doubt existed in the Prosecution's theory, the Chamber should have concluded that the allegation that Mr Bemba and Mr Babala had circumvented the Detention Centre's monitoring system by using a privileged telephone line under Mr Kilolo's name had not been proved beyond reasonable doubt.

214. In paragraph 737 of its Judgment, however, the Chamber concluded that:

> Mr Bemba, who was in detention at the time relevant to the charges, directed the commission of the offences from the ICC Detention Centre, using his privileged telephone line with his counsel to talk unmonitored and candidly not only with Mr Kilolo but also with Mr Mangenda and Mr Babala, and other individuals not entitled to legal privilege, including witnesses.

It did so in the absence of any evidence that could allow a reasonable observer to draw conclusions about the said conversations.

215. Nothing in the case file substantiates the Prosecution theory that Mr Babala used number [REDACTED]. Nothing shows that Mr Bemba and Mr Babala spoke using that number. There is no evidence or recording that could enlighten the Chamber and the parties as to the content of the conversations in question.

216. It is generally accepted in international jurisprudence that:

> An inference drawn from circumstantial evidence to establish a fact that is material to the conviction or sentence cannot be upheld on appeal if another reasonable

[254] *Ibid.*, para. 162 and footnote 305.

> conclusion consistent with the non-existence of that fact was also open on that evidence, given that such inference should be the only reasonable one.[255]

217. The Chamber's finding that the Defence arguments refuting the Prosecution's theory about number [REDACTED] are unconvincing demonstrates that the Chamber applied the wrong standard of proof, placing the burden of proof on the Defence. The onus is not on the Defence to establish the facts. All the Defence was required to do was show that the Prosecution theory was not the only reasonably possible interpretation, which it did. In expecting the Defence to establish the facts beyond reasonable doubt, the Chamber reversed the burden of proof, placing the Defence in the position of having to show how exactly number [REDACTED] had been used. Failing which, the Chamber would lend credence to the Prosecution theory. By employing this faulty reasoning, the Chamber erred both in fact and in law.

218. In finding that it was proved beyond reasonable doubt that Mr Babala had used number [REDACTED], the Chamber has filled in the gaps in the Prosecution's case and compensated for its failure to prove that allegation beyond reasonable doubt. This is a violation of the Appellant's right to be tried on the basis of the evidence, his right to a fair and impartial trial, his right to be presumed innocent and his right to the benefit of any remaining doubt under the universally accepted principle of *in dubio pro reo*.

219. These serious violations on the part of the Trial Chamber are damaging to the prestige of the Court and are grounds for overturning the Trial Chamber's findings on these points.

[255] ICTY, *D. Milošević*, Judgement on Appeal, para. 20.

2) VIOLATION OF THE "BEYOND REASONABLE DOUBT" STANDARD SET OUT IN ARTICLE 66(3) OF THE STATUTE

220. The fundamental question is whether, in accordance with paragraphs 2 and 3 of article 66 of the Statute of the Court taken together, the Prosecutor has proved beyond reasonable doubt that Mr Babala participated, as an accessory, in the offence of corruptly influencing Witnesses D-57 and D-64 attributed to Mr Kilolo. In other words, whether the evidence adduced and the Prosecution's arguments in that respect lead to the logical and legal conclusion that Mr Babala transferred money to Witnesses D-57 and D-64 for the purpose of facilitating Mr Kilolo's illicit coaching of Witnesses D-57 and D-64 in an effort to persuade them either to provide false oral evidence under oath, false statements or false written attestations, or to refrain from giving or providing oral evidence under oath, statements or written attestations in order to obtain Mr Bemba's release.

221. The answer to that question is an unequivocal "no". The offences with which Mr Babala is charged have not been proved beyond reasonable doubt.

222. Lawmakers have not defined "reasonable doubt".

> [TRANSLATION] Under the ordinary meaning of the adjective "reasonable", reasonable doubt should be understood as a sensible, well-considered, judicious and rational doubt, based on evidence presented during the trial, on uncertainties, contradictions, inconsistencies and grey areas remaining in the prosecution case.[256]

223. > [TRANSLATION] A reasonable doubt is not an imaginary or frivolous doubt, and it must not be based on empathy or prejudice. It must instead be based on logic and common sense. It must have a rational link to the evidence or lack of evidence. Even if you believe that the accused is probably or likely to be guilty, that is not sufficient. In that case, you must give the accused the benefit of the doubt and acquit him, since the prosecution has not succeeded in convincing you that he is guilty beyond reasonable doubt.[257]

224. The Defence underscores that this fundamental rule, enshrined in article 66(3) of the Statute, applies not only to the ultimate question of guilt but also to the

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[256] J-P. Fofe Djofia Malewa, *La preuve des faits similaires devant la Cour pénale internationale : mécanisme sous surveillance*, pp. 343-369, especially p. 345.

[257] ICTR, *Ntagerura et al*, *Conclusions de la Défense du Lieutenant Samuel Imanishimwe*, para. 1197, quoted in ICC-01/04-01/07-3265-Corr2-Red, p. 9, para. 27.

consideration of each of the constituent elements of each crime and the mode of individual criminal liability alleged against the accused, and of any fact which is indispensable for the conviction.[258] In this regard, the Appeal Chambers of the ad hoc criminal tribunals have ruled that:

- each element of each crime included in the charges (as defined with respect to the relevant mode of liability) must be proved beyond a reasonable doubt;[259]
- each element of each of the modes of liability presented in the charges must be proved beyond reasonable doubt;[260]
- if one of the facts is not proved beyond reasonable doubt, the chain will not support a conviction;[261] in other words, a conviction cannot be entered because it has not been justified.

225. In following these jurisprudential requirements, the Trial Chamber was correct in noting that the standard of proof required by article 66(3) of the Statute is the highest standard in the Court's founding instrument.[262] This requisite standard of proof is a legal requirement designed to ensure justice and, in particular, that innocent persons are not convicted.

226. Proof beyond reasonable doubt requires a higher degree of certainty than proof based on the balance of probabilities or proof based simply on sufficient or serious grounds to believe that an act occurred.[263] This standard based on reason and common sense is intended to ensure that innocent persons are not convicted by the Trial Chamber. Reasonable doubt is doubt that remains after

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[258] ICTY, *Halilović*, Judgement on Appeal, para. 125; *Blagojević and Jokić*, Judgement on Appeal, para. 226; ICTR, *Ntagerura et al*, Judgement on Appeal, para. 170; *Kupreškić et al*, Judgement on Appeal, para. 226, quoted in ICC-01/04-01/07-3265-Corr2-Red, para. 28, footnote 25.
[259] ICTY, *Stakić*, Judgement on Appeal, para. 219.
[260] ICTR, *Ntagerura et al*, Judgement on Appeal, paras. 174-175; SCSL, *Brima et al*, Judgement on Appeal, para. 98.
[261] ICTR, *Ntagerura et al*, Judgement on Appeal, para. 75; ICTY, *Blagojević and Jokić*, Judgement on Appeal, para. 226.
[262] Judgment, para. 187.
[263] A-M. La Rosa, "La preuve", in *Droit international pénal*, H. Ascensio, E. Decaux, A. Pellet (eds.), p. 775, para. 31.

every effort has been made to dispel doubt and uncover the truth. In this instance, the Statute calls for conviction beyond reasonable doubt.

227. In the instant case, the Chamber made no effort to understand the meaning of the phrase "*C'est la même chose comme pour aujourd'hui* [It's the same thing as for today]" or to dissect the meaning of the phrase "*Donner du sucre aux gens, vous verrez que c'est bien* [You'll see that it's good to give people sugar]". No grammatical analysis, teleological analysis or linguistic evaluation was carried out in respect of this. The Chamber did, however, recognize that one could not rely on the conversation as a whole to uncover the meaning of the phrases, because the recording was unreliable on account of the technical problems encountered. The Chamber drew conclusions as to the meaning of the phrase that were unjustified and at odds with the applicable standard.[264]

228. The Appeals Chamber – referring to the findings of the Appeals Chamber of the ICTR and drawing on the fundamental principles applicable to all criminal cases under Canadian law – may well have specified that "[t]he reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice", but it underscored that doubt must "have a rational link to the evidence, lack of evidence or inconsistencies in the evidence".[265] This means that proof of guilt must be established with a degree of credibility or veracity that leaves no reasonable doubt**.** Article 66(3) of the Statute is clear: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."

229. In the instant case, the Chamber itself admitted that it does not have at its disposal the content of the conversation between Mr Babala and Mr Kilolo.[266] Nor does it have the content of the conversation between Mr Bemba and Mr Kilolo concerning Witnesses D-57 and D-64, or the key to decrypting the expression "*Donner du sucre aux gens, vous verrez que c'est bien* [You'll see that

[264] See section B-V, para. 34 *et seq*., of this Brief.
[265] ICTR, *Rutaganda*, Judgement on Appeal, para. 488.
[266] In particular, Judgment, para. 250.

it's good to give people sugar]". Nor is it able to connect this statement to the Prosecutor's case against Mr Bemba before Chamber III, since the conversation from which the statement was taken concerns [REDACTED].[267] Fundamentally, the Chamber does not establish that the only reasonable conclusion that can be drawn from the expression "*Donner du sucre aux gens, vous verrez que c'est bien* [You'll see that it's good to give people sugar]" is the one it has drawn.

230. Without question, there is no proof that Mr Babala was aware of the status of Witnesses D-57 and D-64, of Chamber III's directions concerning restrictions on contact with witnesses and, especially, of the purpose of the transfers he made. What is more, Mr Babala was not aware — and the Chamber has not established any proof to the contrary — of the subjects on which Witnesses D-57 and D-64 were to testify, the date on which they were to appear in court, or their supposed false testimonies. There is thus a contradiction between the Chamber's clarification at the end of paragraph 47 of the Judgment ("Likewise, payments to witnesses must be assessed in the light of their purpose and whether the perpetrator has adhered to the Court's applicable directions and guidelines") and the findings of the Judgment resulting in Mr Babala's conviction.

231. The Chamber has demonstrated culpable laziness in not even attempting to find out how long the conversation between Mr Babala and Mr Kilolo lasted, and in so doing has shut the door on any consideration of the possible scenarios. In accordance with article 69(3) of the Statute, it was up to the Chamber to play an active role in seeking out evidence, including, in particular, adducing the recordings of the conversation in question. The Chamber must not reward the Prosecution for its failings by gratuitously convicting the Appellant.

[267] ICC-01/05-01/13-1901-Conf, para. 220; ICC-01/05-01/13-596-Conf-Corr2, para. 49.

232. An offence is a reality, an indivisible whole, and proof of its existence must be established by means of a consistent approach. Without the content of Mr Bemba and Mr Babala's conversation regarding Witnesses D-57 and D-64, and without the content of Mr Bemba and Mr Kilolo's conversation regarding those same witnesses, how could the Chamber have proof of the mental element of Mr Babala's participation in the offence attributed to Mr Kilolo in the conversation with Mr Bemba? The Chamber makes unfounded assertions and draws conclusions by analogy, e.g. at the end of paragraph 242: "The Chamber finds that this course of events demonstrates the close coordination between Mr Kilolo and Mr Babala in relation to witness contact and payments", as it fails to mention the evidence on which its conclusion is based. Is it simply the act of effecting the transfer and contacting the beneficiary to provide the particulars and ensure receipt? What could be more normal?

233. Criminal judges have the delicate job of striking the right balance between ensuring effective punishment and safeguarding individual rights.[268] Through its Statute, the law of the ICC is a wise compromise between, on the one hand, the need to punish serious crimes that shock the conscience of the international community, without which there can be no lasting peace, security or well-being in the world, and, on the other hand, the need to respect the rule of law, especially criminal law and internationally recognized human rights, without which there can be no justice.

234. When questioned by the Chamber about the definition and constituent elements of the common plan, the Prosecution was unable to formulate a response with respect to the Appellant. The Chamber consequently observed that Mr Babala was not part of the common plan. But it added that, even without being part of the common plan, Mr Babala aided both Mr Kilolo[269] and

[268] C. Ghica-Lemarchand, *L'interprétation de la loi pénale par le juge*.
[269] Judgment, para. 870.

the co-perpetrators of the common plan (Mr Bemba, Mr Kilolo and Mr Mangenda) [270] in corruptly influencing Witnesses D-57 and D-64. The Chamber claims to have identified a recurring pattern developed by the members of the Defence team named in this case, which involved approaching witnesses shortly before their testimony and even giving them gifts before they gave testimony at trial.[271] This was allegedly the case with D-57 and D-64, in particular.

235. As regards the acts ascribed to the Appellant, the question now is whether he was aware of that pattern and its purpose. The case file was scoured for a shred of irrefutable evidence of the Appellant's knowledge of the pattern and its purpose. Unable to produce any, the Prosecution, with the Chamber's uncritical acquiescence, made connections that were not, in actual fact, logical. First, the Prosecution took for granted that the money transfers to D-57 and D-64 coincided with their departure for The Hague to testify before the Chamber. It explained that that was when Mr Kilolo asked the Appellant to effect the transfers at issue. Then the Prosecution, joined by the Chamber also in this regard, pointed to a conversation between the Accused in the Main Case and the Appellant in which the statement "*donner du sucre aux gens vous verrez que c'est bien* [you'll see that it's good to give people sugar]" was made.[272] Then, the Prosecution, with the Chamber constantly close on its heels, mentioned another conversation between Mr Kilolo and Mr Babala in which the latter[273] appeared to criticize the former for neglecting "*le service après-vente* [the after-sales service]".[274] Lastly, the Chamber went even further by stating in the Judgment that it could not be excluded that Mr Bemba, Mr Babala and Mr Kilolo had not addressed the issue of corruptly influencing witnesses in their conversations. We shall return to this point.

[270] *Ibid*., para. 879.
[271] *Ibid*., paras. 380(v), 397, 439, 523, 526, 527, 691 and 702.
[272] *Ibid*., para. 882.
[273] *Ibid*., para. 887.
[274] *Ibid*., para. 888.

236. Three observations are called for here: (1) no logical connection can be drawn between D-57 and D-64's testimonies and the "*sucre* [sugar]"; (2) there is no possible link between these two witnesses and the "*service-après-vente* [after-sales service]"; and (3) the Chamber's speculations are incompatible with article 66(3) of the Statute.

1) AS REGARDS "*SUCRE* [SUGAR]"

237. The money transfers to the [REDACTED] witnesses were made at Mr Kilolo's behest.[275] There is nothing – either preceding or following those transfers – that proves beyond reasonable doubt that Mr Babala consulted with Mr Kilolo on their purpose. It is unreasonable for the Chamber to take it for granted that the two spoke about corrupt influencing in the absence of any proof to that effect. These money transfers are in keeping with those effected by the Appellant at the behest of Lead Counsel without being aware of any specific purpose other than contributing to the operating costs of the team in the Main Case. The most concrete example is that of Mr Arido, a potential witness in the Main Case at the time,[276] to whom the Appellant transferred in excess of EUR 4,000 using the same process. Yet, the Appellant had never seen Mr Arido outside the Detention Centre. He had never approached Mr Arido before then. It was also at the Detention Centre that the Appellant learned that the money transferred to Mr Arido was remuneration for the expert reports[277] he had prepared for Mr Bemba's Defence team and that he was even a potential witness for them. What evidence shows, beyond reasonable doubt, that the Appellant was aware that D-57 and D-64 were witnesses and that they were due to testify at trial? To take the Chamber's reasoning seriously would be to consider the Appellant an accessory to corrupt influencing of witnesses in respect of all those to whom he transferred money at Mr Kilolo's behest. And that is unreasonable.

[275] ICC-01/05-01/13-1901-Conf, para. 118 with footnote.
[276] Judgment, paras. 372, 439, 440.
[277] *Ibid.*, para. 677.

238. In paragraph 700 of its Judgment, the Chamber asserted that the Appellant advised Mr Bemba to give money to D-64 ("*donner du sucre aux gens* [give people sugar]"), as had been done in relation to D-57's wife earlier the same day. It added that, on the following day, 17 October 2012, the day of D-64's travel to The Hague, Mr Babala's driver illegitimately transferred USD 700 in two transactions to D-64's daughter.[278] Was it advice in that instance? Quite unexpectedly, the Chamber refrains from quoting the content of that conversation verbatim, which would have enabled the parties and this Chamber to properly evaluate the subject of the conversation between the two accused persons. It also has not been proved that the Appellant was aware of the unlawful purposes of the payments that Mr Kilolo asked him to make. In any case, there is clearly some doubt as to the specific subject of their discussions, since Mr Babala never had any knowledge of the circumvention of the ICC Detention Centre's monitoring system, contrary to the assertion made by the Trial Chamber.[279] The Chamber does not even cite any evidence of the transfers that Mr Babala and Mr Kilolo used to make unlawful payments.[280]

2) AS REGARDS "*LE SERVICE APRÈS-VENTE* [THE AFTER-SALES SERVICE]"[281]

239. Here, too, in order to maintain the links that would make the Appellant an accessory to the corrupt influencing of witnesses, the Chamber took a speculative approach without being certain of the facts it laid out.

240. Contrary to the Chamber's assertions, the conversations of 21 and 22 October 2013 mentioned in paragraphs 798 and 799 of the Judgment do not concern the corrupt influencing of witnesses. They concern the false scenario that also singled out Mr Babala. Like Independent Counsel, whose lead it was

[278] *Ibid*., para. 700.
[279] *Ibid*., para. 701.
[280] *Ibid*., para. 703.
[281] *Ibid*., paras. 410, 887, 888, 891.

clearly following, the Chamber drew the erroneous conclusion that the money transferred by the Appellant in this context was used to ensure *le service après-vente* [the after-sales service]. In reality, the money was dishonestly extracted from Mr Bemba and Mr Babala. This was not assistance provided by Mr Babala as a financier for the purpose of corruptly influencing witnesses. The appellant, at any rate, was not aware of this. It is perfectly understandable why, in its presentation of the facts, the Chamber wittingly concealed the false scenario which is a cleverly orchestrated fabrication intended to extract money from Mr Bemba. In reality, from a legal standpoint, this false scenario is an impossible offence that excludes Mr Babala's participation in any event. Springing from a direct conversation between the people involved, the false scenario illustrates Mr Babala's exclusion from the enterprise in question.[282]

241. As matters stand, as regards both "*sucre* [sugar]" and "*service après-vente* [after-sales service]", the evidence in the record does not demonstrate, beyond reasonable doubt, that these terms are associated with the [REDACTED] witnesses' testimony in the Main Case. The Trial Chamber attempts to weave a logical connection with disparate threads that are completely detached from one another and hence illogical. The Chamber did not rely on any objective grounds in determining, beyond reasonable doubt, that the Appellant and Mr Kilolo were speaking about the witnesses and the content of their testimonies. It is quite evident that Mr Babala, who was not part of the Defence team, was unaware of its strategy. He was not clued up as to the confidential, *ex parte* material in the record. For example, the Appellant was unaware of Trial Chamber III's orders to refrain from contacting witnesses after the VWU cut-off date.[283] The Chamber's only proof to the contrary is an altogether vague and imprecise assertion on this subject. The Appellant did not contact any witness for the Bemba Defence to discuss the case and was not directly or

[282] *Ibid*., para. 801.
[283] On this subject, see Judgment, para. 445.

indirectly involved in any way in illicit witness coaching. There is no evidence establishing, beyond reasonable doubt, any dealings between the Appellant, Mr Bemba and the members of his team to concoct an exculpatory account to present to Trial Chamber III.

242. With more specific regard to D-57 and D-64, there is no evidence showing that the Appellant had a hand in the content of the testimony at issue given at trial. The money was transferred to them for the same reason and by the same means as for Mr Arido. The Appellant was not aware that they were witnesses. As tellingly stated by the Chamber itself, with regard to D-64 in particular: "As was seen in relation to other witnesses, such as D-64 and P-272, senders may execute transfers without necessarily knowing the recipient and *vice versa*".[284] This is precisely the case of the Appellant and the [REDACTED] witnesses, who knew nothing of each other. The only people who transferred money to these witnesses at Mr Kilolo's behest are the Appellant and his driver.

A) TOTAL EXCLUSION FROM THE COMMON PLAN

243. The Trial Chamber correctly observes that Mr Babala was not part of the common plan.[285] This holds particularly true in that no evidence singles him out as having negotiated the implementation of such a plan with the aim of sabotaging the judicial process in the Main Case. What is more, this plan, whose specifics are unclear, is merely putative. It certainly is not clear what instructions or directions were specifically given by Mr Bemba with the aim of dictating a particular testimony or position taken before the Chamber. Mr Babala played no role in this process, and the Chamber itself finds that the plan does not concern him. From this perspective, he could not have been fully aware that he was in any way aiding a fraudulent process whose existence and details he knew nothing about.

[284] Judgment, para. 472.
[285] *Ibid*., paras. 682, 683, 687, 802-804.

B) THE IMPOSSIBILITY THAT ASSISTANCE WAS GIVEN

244. In its opening statement and throughout the trial, the Prosecution depicted Mr Babala as the plan's financier, the person who made the necessary funds available to Mr Kilolo to ensure the success of the plan to sabotage the judicial process in the Main Case. Yet the Prosecution was unable to prove this over the course of the trial. This is evidenced by its inability to give a clear answer to the Chamber, which, through Judge de Brichambaut, raised the question of the constituent elements of the common plan and the proof that they actually existed.[286]

245. It is unreasonable to interpret and consider that, with respect to Mr Babala, the money paid to D-57 and D-64 was their slice of the pie for not telling the truth at trial. First of all, none of the Prosecution witnesses revealed that they had spoken with him to that effect or had received gifts or donations from him for that purpose. Likewise, there was no evidence establishing criminal connivance between Mr Babala and Mr Kilolo in that respect. Moreover, nothing in the conversations between D-57 and D-64[287] and Mr Kilolo suggested that they planned to give false testimony after the money was transferred to them by Mr Babala. Instead, the Chamber clearly impugns the motives of Mr Kilolo, who intended the money transfers as fraternal aid for the families of the brothers who had agreed to travel for Mr Bemba's defence. It is plain for

[286] *Ibid*., para. 681: "The Chamber notes the Prosecution's failure in its closing statements to clearly articulate a definition of what it considered to be the common plan between Mr Bemba, Mr Kilolo and Mr Mangenda, for the purposes of assessing their responsibility under Article 25(3)(a) of the Statute. That being said, the Chamber is satisfied that, on its reading of the evidence, Mr Bemba, Mr Kilolo and Mr Mangenda jointly committed the offences of corruptly influencing the 14 witnesses and presenting false evidence as part of an agreement or common plan." In the view of the Defence, there has been a violation of article 66(2) of the Statute, which places the burden of proof on the Prosecutor alone. As a matter of principle, it is not the Chamber's job to do the Prosecutor's work.

[287] Regarding the payments they received (USD 665 and USD 700), see in particular para. 690 of the Judgment. Contrary to what is stated in para. 693 of the Judgment, Mr Babala was not aware that he was making unlawful transfers. This is a distortion of his role as financier. It was the financing system used by Mr Bemba's Defence in the Main Case that drew Mr Babala into the money transfer process and made him the "financier" – a proper financier. Pre-Trial Chamber VII fails to bring this to the fore, in particular in paras. 695, 696 and 699-700.

the Chamber to see, moreover, that these two witnesses' alleged lie had nothing to do with the offences alleged against Mr Bemba. It concerned only issues that did not have any real bearing on Mr Bemba's guilt or innocence. The Prosecution and all other parties to the proceedings had already been informed by Mr Bemba's Defence of all of the subjects on which the witnesses in question were to testify. And in any event, Mr Babala was not aware of this. In this regard, the Chamber writes:

> As the Chamber explained in the context of D-57 and D-64, it notes that other witnesses called by the Main Case Defence were told to deny any payments, including those for legitimate purposes, upon Mr Kilolo's instruction. The Chamber considers that this demonstrates a pattern of conduct on the part of Mr Kilolo.[288]

246. In paragraph 818 of its Judgment, the Chamber states:

> […] The Chamber notes that no direct evidence exists that Mr Bemba also directed or instructed false testimony regarding (i) the nature and number of prior contacts of the witnesses with the Main Case Defence, (ii) payments and material or non-monetary benefits received from or promised by the Main Case Defence, and/or (iii) acquaintances with other individuals. […][289]

It is difficult to see, therefore, how Mr Babala could have advised Mr Bemba to corruptly influence the witnesses by assisting him with regard to this. This Chamber will not find any such evidence incriminating Mr Babala, who is a victim of the false scenario that wrongly led to his being found criminally liable in a case whose ins and outs were unknown to him, as all he did was lend a hand to the President of the MLC, in full transparency, in accordance with the law, public order and accepted moral standards. Like Mr Babala, certain members of Mr Bemba's biological family also made transfers. They

[288] Judgment, paras. 501, 523: "Second, the payment of USD 649.34 clearly exceeded the relocation costs of D-29's child. Instead, the amount transferred falls within the consistent range of payments that Mr Kilolo illicitly arranged for other witnesses, including D-23, D-57 and D-64. The payment is thus consistent with the clear pattern of payments by Mr Kilolo for the purpose of influencing their testimonies." See also paras. 526 and 538, in which this pattern and the pattern of illicit coaching, namely with respect to Witnesses D-57 and D-64, are attributed to Mr Kilolo alone. Mr Babala was unaware of these activities. See also Judgment, para. 707.
[289] *Ibid.*, para. 818.

never had any trouble with the law. This is yet another example of the unreasonableness of the Chamber's findings in respect of Mr Babala.

247. Even though it convinced itself of Mr Kilolo's *mens rea* in order to establish his essential contributions to the common plan,[290] the Chamber did not identify any action coordinated between Mr Babala and him that clearly shows that he drew the Appellant into the corrupt influencing of D-57 and D-64. There is no evidence sufficiently establishing the fact that, at the time of the transfers at issue, Mr Babala was aware that he was assisting Mr Kilolo in committing offences against the administration of justice. Mr Babala was unaware that (i) the recipients were witnesses who were due to testify before the Court; and (ii) these two witnesses would give false testimony concerning the money received and the number of contacts they had with the Main Case Defence. Nothing that is said to that effect in paragraphs 852, 853, 854, 855, 859, 860, 862 and 863 of the Judgment with regard to the co-perpetrators of the common plan in any way concerns Mr Babala, who is the ghost in this process. This holds especially true considering that, in paragraph 877 of the impugned Judgment, the Chamber itself specifically states:

> […] **The Chamber reiterates that, as it does not make any findings with regard to the truth or falsity of matters relating to the merits of the Main Case, the false evidence given by the witnesses as relevant to this case relates only to (i) the nature and number of prior contacts with the Main Case Defence, (ii) payments or monetary or non-monetary benefits given or promised by the Main Case Defence, and/or (iii) acquaintance with other individuals. No evidence established a link between Mr Babala and the false evidence of the witnesses on any of these three points. Notably, even though Mr Babala held the role of financier, no evidence sufficiently establishes that Mr Babala assisted in the presentation of the untruthful accounts of witnesses with regard to payments**.

Yet, such is the case with D-57 and D-64, who are among the 14 witnesses. The conversation between Mr Babala and Mr Kilolo – mentioned in paragraph 888 of the impugned Judgment – in which Mr Kilolo speaks about the "*trois-là* [three there]," does not allude to D-57 and D-64.

[290] *Ibid.*, para. 835.

248. As a result, the Chamber's conclusions ceased to be reasonable when, in paragraph 878 of its Judgment, the Chamber abruptly changed course and asserted:

> However, on the evidence, the Chamber is convinced that Mr Babala provided material assistance to Mr Bemba, Mr Kilolo and Mr Mangenda in their corrupt influencing of Witnesses D-57 and D-64 pursuant to Article 70(1)(c) of the Statute.

The flaw in its reasoning is glaring. While the Chamber does not hold Mr Babala in any way accountable for assisting with the corrupt influencing of the 14 witnesses, including D-57 and D-64, it does hold him accountable in respect of the latter two despite the fact that they are among the 14 witnesses with respect to whom the Chamber excluded Mr Babala's assistance. An objective examination of the facts of the instant case leads to several possible reasonable conclusions which call into question the legal value of the case.

3) MORE THAN ONE CONCLUSION IS POSSIBLE

249. Not only are the Chamber's conclusions with regard to Mr Babala questionable from a logical standpoint, more importantly they violate the standard of proof required at trial insofar as they could lead to several other possible and even plausible conclusions.

250. The conversation containing the statement "*C'est la même chose comme pour aujourd'hui. Faire [Donner] du sucre aux gens, vous verrez que c'est bien* [It's the same thing as for today. You'll see that it's good to give people sugar]" concerns "*Whisky*" – who is identified as [REDACTED]. Why should this statement be associated with the corrupt influencing of Witnesses D-57 and D-64, who are not mentioned earlier or later in the conversation, and not with "*Whisky*" or [REDACTED], who are mentioned? Moreover, how is it that the numbers mentioned in the conversation – which, according to the Prosecution, represent amounts of money – do not match the amounts transferred on that date to the witness, whose status as such was, moreover, completely unknown

to the Appellant? Furthermore, how can it be explained that, according to an objective grammatical analysis, the beginning of the statement "*Non, non ce n'est pas ça, il faut que cela se fasse quand même parce que c'est très important* [No, it's not that, it needs to be done though because it's very important.]" refers to something that has not yet happened, whereas the transfer had been made before the conversation even took place? If we consider the part of the sentence that the Chamber put aside, it then becomes apparent that "*faire du sucre aux gens, vous verrez que c'est bien* [you'll see that it's good to give people sugar]" could concern [REDACTED] – unless we accept that the Chamber has supernatural powers that enable it to divine the unsaid. In that case, under the duty to provide reasoning imposed by the Court's founding text, the Chamber is obliged to demonstrate this.

4) ILLOGICAL FINDINGS IN THE IMPUGNED JUDGMENT

251. In paragraph 942, the Trial Chamber asserts:

> The Chamber recalls that, on the evidence, no direct or indirect link exists between Mr Babala's assistance to the co-perpetrators as financier and the giving of false evidence by D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64. The Chamber is therefore unable to conclude beyond reasonable doubt that Mr Babala aided, abetted or otherwise assisted in the giving of false testimony.

However, in paragraph 878, the Chamber previously found:

> However, on the evidence, the Chamber is convinced that Mr Babala provided material assistance to Mr Bemba, Mr Kilolo and Mr Mangenda in their corrupt influencing of witnesses D-57 and D-64 pursuant to Article 70(1)(c) of the Statute. Having analysed the evidence as a whole, the Chamber considers that Mr Babala's accessorial assistance can only be linked to D-57 and D-64, to whom Mr Babala transferred an illegitimate payment himself or through a third person.

252. The corrupt influencing of witnesses, defined as:

> The use of promises, offers, gifts, pressure, threats […] in the course of judicial proceedings in order to persuade others either to provide false oral evidence under oath, false statements or false written attestations, or to refrain from providing [such] oral evidence under oath, statements or written attestations

refers, in its positive sense, to incitement to give false testimony. Logically, corrupt influencing of witnesses cannot be established without first

demonstrating the intention to obtain false oral evidence under oath, false statements or false written attestations, in other words, and in this case, false testimony. Consequently, by the Trial Chamber's own admission, an accessory who has in no way aided or abetted the giving of false testimony by the designated witnesses cannot be prosecuted for corruptly influencing those same witnesses. How could the *mens rea* of the corrupt influencing of witnesses be established if it "presupposes that the perpetrator intended to obtain a false written attestation".[291]

5) THE FAILURE TO PENALIZE THE PROSECUTION'S INABILITY TO PROVE THE ALLEGATIONS AGAINST THE APPELLANT

253. The penalty for the Prosecution's inability to prove its allegations beyond reasonable doubt is obviously the acquittal of the accused. As we stated earlier, in criminal matters the generally accepted rule is that the accused must be given the benefit of the doubt. This inability on the part of the Prosecution resulted in a dearth or complete lack of reasoning in the Judgment. The Trial Chamber, uncritically seconding the Prosecution's baseless allegations, churned out a series of reasons that were ambiguous, unreal, incomplete or totally non-existent – e.g. "aware of the exact circumstances and Mr Kilolo's motivation for the money transfer"[292] or "knowing that"[293] – without offering any justification.

III. LACK OF REASONING IN THE IMPUGNED JUDGMENT AGAINST THE APPELLANT

254. The Trial Chamber also erred in law with regard to the lack of reasoning in its Judgment. Article 74(5) provides that decisions issued under article 74 shall "contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions […]". This duty to provide reasons for judgment

[291] Cass. Crim., 11 December 1991, No. 91-80.597.
[292] Judgment, para. 115.
[293] *Ibid.*, paras. 118, 254, 281, 879-880 and 936.

derives from the basic text governing the Court and is a right of the defence. In this regard, the Appeals Chamber has held that "a Chamber must explain with sufficient clarity the basis of its decision. In other words, 'it must identify which facts it found to be relevant in coming to its conclusion'."[294]

1) THE OBLIGATION TO PROVIDE REASONS FOR THE JUDGMENT

255. Under the obligation to provide reasons for judicial decisions, the Chamber has a duty to respond to the parties' duly filed briefs and written submissions so that the accused can understand what lawmakers consider to be an offence and what the case is against him. The statement of reasons thus forms the basis of a judicial decision. In comparative law, specifically Belgian law, article 780 of the Judicial Code stipulates that, in order to be valid, a judgment must contain the reasons for the decision as well as operative provisions.[295] In French law, the first paragraph of article 485 of the Code of Criminal Procedure provides that "[TRANSLATION] all judgments must contain reasons and operative provisions". This means that judgments that do not contain reasons, or that contain insufficient reasons, are declared void. Such judgments are subject to being set aside.

256. This rule emerges from article 593 of the Code of Criminal Procedure, which provides:

> [TRANSLATION] Judgments of the investigating chamber, and final judgments not subject to appeal, shall be declared void if they do not contain the reasons for the decision or if the reasons are insufficient and do not enable the Court of Cassation to conduct a review and determine whether the operative provisions comply with the law. The same applies where a ruling has been omitted or refused with regard to one or more requests of the parties or one or more submissions of the Public Prosecutor's Office.[296]

257. Under these provisions, the Criminal Chamber of the French Court of Cassation, which reviews the existence and quality of the reasoning set out in

[294] ICC-01/05-01/08-1386, para. 59.
[295] Belgian Judicial Code, Act of 10 October 1967.
[296] Art. 593 of the French Code of Criminal Procedure.

criminal court decisions, censures those decisions which contain insufficient or conflicting reasons. As the Consultative Council of European Judges (CCJE) stated in its Opinion No. 11 issued in 2008 to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions:

> The statement of the reasons not only makes the decision easier for the litigants to understand and be accepted, but is above all a safeguard against arbitrariness. Firstly, it obliges the judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful; secondly, it enables society to understand the functioning of the judicial system.[297]

In addition to violating statutory requirements at the expense of the Appellant's rights, the Judgment's lack of reasoning also tarnishes the image of the Court, since *not only must justice be done, it must also be seen to be done.*

2) DISREGARD OF ARTICLES 74(2) AND 74(5) OF THE STATUTE

258. The second paragraph of article 74 of the Statute of the Court requires the Trial Chamber to base its decision solely on its evaluation of the evidence submitted and discussed before the Chamber at trial, and on the entire proceedings. Paragraph 5 of the same article sets out the requirements for the judgment, one of which is a full and reasoned statement of the Chamber's findings on the evidence and conclusions. The impugned Judgment is characterized by a gaping lack of reasoning in establishing the facts and reaching the conclusion that Mr Babala was aware of the internal details of the case.

a) LACK OF REASONING IN THE ESTABLISHMENT OF THE FACTS

259. The purpose of providing the reasons for a judgment in criminal matters is threefold: first, it safeguards the accused from arbitrariness; second, it obliges the bench to align their decision with the body of evidence in the case and demonstrate rigorous reasoning in making a determination; and, third, it

[297] French Court of Cassation, *L'obligation de motiver*.

provides the person or persons who believe they have been unjustly called to account with the support they need to make a tenable argument against the decision.

260. The statement of reasons must not be insufficient or contradictory in any way, and it must establish the offence of which the accused is convicted, including as regards each of its constituent elements, both material and as to intent.[298] For example, in French comparative law, the Criminal Chamber of the French Court of Cassation ensures that decisions effectively contain a statement of reasons. This is not so in the case of a judgment that simply states that "[TRANSLATION] the proceedings and the evidence adduced at trial show that the accused effectively committed the offences with which he has been charged" [299] or that "[TRANSLATION] the facts have been sufficiently established".[300] Nor is this so in the case of decisions drafted on a form with pre-printed particulars not making any reference to the establishment of an official report or the circumstances of the offence in question.[301] The Judgment is teeming with these types of insufficiencies, as in the case of the assertion cited above, which appears in paragraph 242 of the Judgment.[302]

261. Paragraph 115 of the Judgment, for example, reads: "At some time before the witness's travelled to the seat of the Court, Mr Kilolo called D-57 and informed him that he would send 'a little bit of money'. In so doing, Mr Kilolo hoped to motivate the witness to testify in favour of Mr Bemba."[303] The proof that Mr Kilolo corruptly influenced Witness D-57 belongs to the realm of beliefs and probabilities. How could the Chamber discern Mr Kilolo's hopes?

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[298] *Ibid*.
[299] For a recent application: Cass. Crim., 28 September 2010, No. 10-81.493.
[300] Cass. Crim., 10 November 2004, No. 04-83.541.
[301] Cass. Crim., 26 November 1990, No. 90-81.974; Cass. Crim., 9 December 1992, No. 92-80.721.
[302] See, in particular, Judgment, paras. 115, 118, 254, 281, 879, 888, 936.
[303] Emphasis added.

b) LACK OF REASONING IN THE CONCLUSION THAT MR BABALA WAS AWARE OF THE INTERNAL DETAILS OF THE CASE

262. In paragraph 115 of the impugned Judgment, the Trial Chamber states: "Aware of the exact circumstances and Kilolo's motivation for the money transfer, Mr Babala effected the transfer of USD 665 on the same day from Kinshasa." In paragraph 118, it says: "Mr Babala had instructed him to do so in consultation with Mr Kilolo, knowing that the money was being paid to motivate the witness to give certain testimony." In paragraph 254, it reiterates: "The Chamber further finds that Mr Babala transferred USD 665 to D-57's wife shortly before her husband's testimony, knowing that the money was meant to ensure that D-57 would testify in the Main Case in Mr Bemba's favour."

263. Yet nowhere in the Judgment does the Chamber explain how, by what means or at what point Mr Babala learned that the transfer he made was intended to facilitate Mr Kilolo's commission of the offence of corruptly influencing witnesses. There is not a shred of evidence in the record that supports that conclusion. Neither D-57 nor D-64 confirms that they know Mr Babala. Witness D-272 says he is unaware of the motivations for the transfers he made. The Chamber's assertions and findings regarding the mental element of Mr Babala's participation in Mr Kilolo's alleged corrupt influencing of Witnesses D-57 and D-64 are not supported by any evidence other than the Prosecution's speculations. The Prosecution possesses every compromising conversation and exchange between the accused persons, except, strangely enough, the ones between Mr Babala and Mr Kilolo concerning the transfers at issue. The evidentiary void is immeasurable and could never lead to the conclusion that Mr Babala participated in the offences ascribed to him.

c) THE CHAMBER'S LACK OF REASONING CONCERNING THE CODES

264. The Chamber also failed in its duty to provide reasons for its conclusions concerning the use of codes between Mr Babala and Mr Bemba. The Prosecution submitted lengthy interpretations as to the codes and their meanings.[304] Those interpretations were challenged by the Defence, which demonstrated that the Prosecution's explanations were inconsistent and its arguments incoherent.[305]

265. The importance of the codes lies in the fact that the Prosecution submits its interpretation of these words as proof of the Appellant's knowledge and intent. Yet, as the jurisprudence of the ICTY points out, "when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence".[306]

266. Nowhere in the Judgment does the Chamber state its reasoning as regards its interpretation of the codes it takes under consideration. Which code relates to the witnesses? Which code concerns the Main Case? On what method, reasoning or key did the Chamber base its acceptance of the meaning proposed by the Prosecution? What evidence in the case corroborates that meaning? These are just a few of the questions the Chamber should have answered in its Judgment. Instead, the Chamber simply found that the use of the codes "*Whisky*", "*Collègue d'en haut*" and "*Bravo Golf*" was proof that Mr Babala had been discussing a money transfer to D-57.[307] In this regard, the Defence recalls its previous arguments relating to the Chamber's flawed assessment of the use of the codes.[308]

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[304] ICC-01/05-01/13-1110-Conf-AnxA; ICC-01/05-01/13-1113-Conf-AnxA; ICC-01/05-01/13-1170-Conf-AnxA; ICC-01/05-01/13-1498-Conf-AnxA.
[305] ICC-01/05-01/13-1901-Conf, paras. 142-149.
[306] ICTY, *Vasilijević*, *Judgement*, para. 120.
[307] Judgment, para. 267.
[308] See section D-II-para. 2, para. 95 *et seq*., of this Brief.

d) THE CHAMBER'S LACK OF REASONING CONCERNING THE ITEMS ADMITTED INTO EVIDENCE

267. The jurisprudence of the Appeals Chamber makes it explicit that Chambers have a duty to provide clear and transparent reasons for their evaluation of each piece of evidence submitted to it "correctly"[309] — regardless of the stage of the proceedings, be it at the time of submission or at a subsequent point in the trial: "A Chamber shall give reasons for any rulings it makes on evidentiary matters" under rule 64(2) of the RPE; and

> a Chamber must explain with sufficient clarity the basis of its decision. In other words, 'it must identify which facts it found to be relevant in coming to its conclusion'. […] rulings on the admissibility of evidence must be made on an item-by-item basis. This analysis must be reflected in the reasons. […] it must be clear from the reasons of the decision that the Chamber carried out the required item-by-item analysis, and how it was carried out.[310]

268. In its Closing Brief filed with the Trial Chamber,[311] the Defence not only provided a point-by-point rebuttal of the allegations against Mr Babala in paragraph 263 of the Prosecution's Pre-Trial Brief, with probative material cited in support,[312] it also argued, with the same rigour of evidence, in particular, that (1) the Defence teams for Mr Kilolo and Mr Bemba had attested to Mr Babala's lack of knowledge about the internal Defence matters in the Main Case and his lack of access to confidential information; and (2) the Defence teams for Mr Bemba, Mr Kilolo and Mr Mangenda had confirmed the purpose of the money transfers made by Mr Babala.[313]

269. The Trial Chamber failed to respond to the Defence's duly substantiated rebuttals or the submissions of the accused persons' Defence teams, or even explain why the Prosecution's allegations had prevailed or on what evidence they were based. The Defence therefore reiterates and resubmits to the distinguished Chamber all of the arguments set out in its Closing Brief, which

[309] ICC-01/05-01/08-1386, para. 55.
[310] *Ibid.*, para. 59.
[311] ICC-01/05-01/13-1901-Conf.
[312] *Ibid.*, pp. 72-87.
[313] *Ibid.*, pp. 63-72.

should be considered to be repeated here in full and to form an integral part of this Brief.

270. As set out above,[314] Trial Chamber VII has seriously breached its duty to give the reasons for its decision through an explanation of its position on the evidence in general, during the trial, and, specifically, as regards each finding against the Appellant.

F. THE LEGAL VALUE OF THE JUDGMENT OF 19 OCTOBER 2016 IS HIGHLY QUESTIONABLE

I. THE CHAMBER'S HERMENEUTIC ERRORS

271. Accessoryship is one mode of criminal participation. It requires the accessory to have knowledge of the commission of a particular offence and the intention of contributing thereto by one of the means provided for by law.

272. In the instant case, the question is whether Mr Babala, with specific regard to D-57 and D-64, knew at the time he made the money transfers at issue that Mr Kilolo was corruptly influencing them or was going to corruptly influence them. What evidence could support this claim? Before the order relating to the transfers, did Mr Kilolo speak with Mr Babala about the purpose of the transfers in question? As the Chamber recalls in paragraph 84 of its Judgment, "Article 25(3)(c) of the Statute establishes accessorial liability, holding responsible a person who assists the principal perpetrator of an offence." Did Mr Kilolo and Mr Babala have a conversation proving the aid or assistance that Mr Babala was prepared to provide to him with the aim of corruptly influencing the two witnesses in question? Was Mr Babala aware of Trial Chamber III's decisions prohibiting witness coaching[315] and relating to the Familiarisation Protocol[316] referenced in footnote 86 of the Judgment? While it is not necessary for the offence to have been committed by a participant in the

[314] See Section C of this Brief.
[315] ICC-01/05-01/08-1016.
[316] ICC-01/05-01/08-1081.

proceedings (paragraph 49 of the Judgment), it is however necessary for that person to have known that he or she was involved in interfering with the ongoing proceedings. What concrete evidence is there in the instant case that shows beyond reasonable doubt that, at the time of the transfers in dispute, Mr Babala knew (paragraph 55, general intent or *mens rea*) that he was helping Mr Kilolo pervert the course of justice before Trial Chamber III? In paragraph 93 of the Judgment it is recalled that an individual shall be responsible for a crime if that individual knowingly aids, abets or otherwise assists, *directly and substantially*, in the commission of such a crime, including providing the means for its commission. That is not the case with Mr Babala, whose transfers were all lawful.

273. With regard to the findings of fact, in paragraph 100, the Chamber recalls that it is bound by the Decision on the Confirmation of Charges. It even adds that the said decision authoritatively delimits the factual scope of the instant case. Although, as the Chamber further expounds, it is informed by the factual allegations as described by the Pre-Trial Chamber, as regards the Defence, nothing prohibits the Chamber, when evaluating the evidence, from taking into consideration certain relevant facts proved by the Defence with the aim of defeating the Prosecution case. Such is the case of the funding for Mr Bemba's Defence team, which plainly shows why Mr Bemba brought in Mr Babala to work in a healthy capacity with the members of his team.[317]

274. In reference to the agreement, paragraph 103 of the Judgment states:

> The agreement was made in the course of the Main Case among the three accused at the latest when the Main Case Defence arranged for the testimony of D-57, and involved the corrupt influencing of, at least, 14 defence witnesses, together with the presentation of their evidence. The agreement among the three accused manifests itself in their concerted actions with each other and with others, including Mr Babala and Mr Arido.

275. Nothing in the case file shows any such concerted action between Mr Babala and the three co-perpetrators with regard to the testimony of D-57 and D-64.

[317] ICC-01/05-01/13-1901-Conf, paras. 16-20, 184-194.

The latter were never illicitly coached in relation to their testimony on the substance of the Main Case. They received no coaching on their account of the offences with which Mr Bemba was charged. No account was dictated to them. There is no mention anywhere of the instructions (paragraph 107 of the Judgment) that Mr Kilolo allegedly received from Mr Bemba regarding D-57 and D-64.

276. Paragraph 107 of the Judgment reads:

> The main focus of the illicit coaching activities was on (i) key points bearing on the subject-matter of the Main Case, and (ii) matters bearing on the credibility of the witnesses, such as their behaviour when testifying, their prior contacts with the defence, acquaintance with certain individuals and payments of money or promises received from the Main Case Defence.

277. The Judgment appears to ascribe to Mr Kilolo certain acts that he never carried out in his contacts with the two witnesses. However, the use of the coordinating conjunction "and" appears to suggest that D-57 and D-64 received the same treatment from Mr Kilolo with Mr Babala's assistance. This is not the case. Not all that is described in paragraph 107 of the Judgment ever concerned both witnesses in full. This is also true of the assertions made in paragraph 108 in relation to Mr Mangenda. The facts are fallacious as regards D-57 and D-64. The Chamber is making fully unwarranted generalizations that have no proven link with the specific facts alleged against the two witnesses.

278. Was Mr Babala aware of "the abuse of the Registry's privileged line in the ICC Detention Centre" (paragraph 109 of the Judgment)? That act cannot be ascribed to him.

279. Did Mr Babala know that the three co-perpetrators had relied on him even though he was not part of the common plan?[318] How could Mr Babala have made efforts in furtherance of a plan of which he was unaware? This betrays the Chamber's flawed logic (paragraph 112 of the Judgment). In that paragraph, the Chamber simply asserts that "Mr Babala was in regular telephone contact with Mr Bemba and was his financier, transferring money at

[318] Judgment, para. 112.

his behest." The Judgment does not enlighten the Defence on this point. The Defence expected the Chamber to specify the nature and content of the contacts in order to determine whether they could be considered accessorial acts with respect to the alleged corrupt influencing of Witnesses D-57 and D-64. Likewise, in the same paragraph, the Chamber states that:

> Mr Babala discussed possible remedial measures and was fully included in their discussions. Tellingly, Mr Babala encouraged Mr Kilolo to ensure '*le service après-vente*', *i.e.* to pay witnesses after their testimonies before Trial Chamber III.

280. These reasons for the Judgment are inadequate. They echo the Prosecution's allegations without a second thought. The Defence would have liked to hear more from the Chamber on this point, including the exact references of these discussions and their content in full, to determine whether they correspond to the accessorial acts attributed to Mr Babala. When did these discussions take place? What do they concern?

281. With specific regard to D-57, the Chamber excels in making unsubstantiated assertions which impugn Mr Babala's motives. For example, in paragraph 115 of the Judgment, the Chamber alleges:

> […] In doing so, Mr Kilolo hoped to motivate the witness to testify in favour of Mr Bemba. […] Aware of the exact circumstances and Mr Kilolo's motivation for the money transfer, Mr Babala effected the transfer of USD 665 on the same day from Kinshasa. […]

This is a prime example of an attack on motives. The Chamber fails to prove these exact circumstances. Paragraph 115 of the Judgment does not contain one iota of evidence. Nothing establishes the content of Mr Babala's alleged conversations with the co-perpetrators about sending the funds in question. The Chamber cannot convict Mr Babala of metaphysical crimes.

282. The same can be said of the Chamber's allusions to "*sucre* [sugar]" in the conversations between Mr Babala and Mr Bemba (paragraph 117 of the Judgment). The Chamber draws an unjustified link between sugar and money. The Defence, once more, expected the entire conversation between the two speakers to be quoted so that their statements could be accurately assessed. Nothing proves, beyond reasonable doubt, that the USD 665 was the "*sucre*". Mr Babala did not know that the money was paid to motivate the witness to give certain testimony (paragraph 118). Which testimony?

II. THE UNREASONABLE EVALUATION OF THE EVIDENCE

283. As regards the evaluation of the evidence, in paragraph 199 the Chamber states that it also draws upon the submissions of the parties as contained in the record of the case, except when the parties indicated their intention to abandon a particular position during the course of trial. The question, therefore, is whether the Chamber took into consideration the statements made by the respective Defence teams for Mr Arido and Mr Kilolo regarding Mr Babala's status in relation to the team he supervised. This does not appear to be the case. No reasons are given for that omission.

1) AS REGARDS THE ADMISSIBILITY OF THE WESTERN UNION RECORDS

284. These records were obtained improperly, in violation of Austrian law. For all of the reasons set forth above, this Chamber must set aside the decisions of the Chamber referenced in footnotes 222 and 223.

2) AS REGARDS THE SYNCHRONIZATION OF THE TELEPHONE COMMUNICATIONS BETWEEN MR BEMBA AND MR BABALA FROM THE DETENTION CENTRE[319]

285. The Chamber errs in minimizing[320] the technical faults identified in these recordings. It asserts to that end that this problem does not concern the question of whether a specific topic, name or location was mentioned during a conversation. It is indeed necessary to know, on the basis of these recordings, in what way the topic, name or location were mentioned. Given the overlaps in question, in the Defence's opinion, the content of the speech cannot be complete and logical. The Defence doubts that the Chamber reviewed each and every excerpt within a telephone conversation to be relied upon, as it claims to have done.[321]

3) AS REGARDS THE WITNESSES

a) WITNESS D-57

286. The Chamber acknowledges the credibility of this witness[322] (paragraph 231) and his wife, P-242.[323] It is convinced that there were regular telephone contacts between Mr Kilolo and D-57 before his testimony.[324] Yet there is no evidence that Mr Kilolo and Mr Bemba spoke about D-57 with Mr Babala, which could lead to the conclusion, beyond reasonable doubt, of criminal connivance to corruptly influence that witness.

287. What was the subject of the telephone call Mr Babala made to D-57 on 16 October 2012 (paragraph 238)? The Chamber remains silent on this point. Did Mr Babala know that the transfer of USD 665 took place on the VWU

[319] *Ibid.*, paras. 226-227.
[320] *Ibid.*, para. 227.
[321] *Idem*.
[322] *Ibid.*, para. 231.
[323] *Ibid.*, para. 232.
[324] *Ibid.*, para. 235.

contact cut-off date?[325] What evidence proves this beyond reasonable doubt, and hence implicates Mr Babala in the process of corruptly influencing witnesses, as is the case of what allegedly happened in respect of D-2, D-3, D-4, D-6, D-23, D-29 and D-64 (receipt of money shortly before their testimony)[326] (paragraph 239 and paragraph 250). Was Mr Babala aware that such practices had been put in place by Mr Kilolo? And what evidence shows this?

288. The Chamber is convinced that the money paid to D-57 was used to motivate him to testify to particular matters in favour of Mr Bemba.[327] The Judgment provides no reasons in this respect. It is imprecise, since it does not say exactly which matters, and (according to Mr Kilolo) this "aid" had a different purpose.

289. In paragraph 242 of the Judgment (last three lines), the Chamber concludes that the course of events demonstrates the close coordination between Mr Kilolo and Mr Babala in relation to witness contact and payments. This finding is unreasonable given that the Chamber provides no evidence of such coordination or the content of the relevant conversations.

290. It is difficult to make the argument – as the Chamber does after prefacing it with "[e]ven though no intercept records exist"[328] – that Mr Babala knew that Mr Kilolo had instructed Witness D-57 to lie about having received money transfers. Mr Babala is neither involved in nor tied to the demonstrable pattern of instructing witnesses (D-2, D-15, D-26, D-54 and D-55) to give a specific and false number of prior contacts with the Main Case Defence.[329] Mr Babala had nothing to do with that pattern. He did not contribute to it. Rather, he knew that all the money he transferred at Mr Kilolo's behest was used to satisfy the legitimate needs of the Defence team in the Main Case. In his submissions before the Pre-Trial Chamber, which were in large part reiterated before the Trial Chamber, Mr Kilolo explained the extent of Mr Babala's involvement.

[325] *Ibid*., para. 239.
[326] *Ibid*., paras. 239 and 250.
[327] *Ibid*., para. 240.
[328] *Ibid*., para. 250.
[329] *Ibid*., para. 251.

291. Even though Mr Kilolo had arranged to transfer USD 665 through Mr Babala shortly before D-57's testimony in the Main Case, so as to secure his testimony in Mr Bemba's favour, nothing proves, beyond reasonable doubt, that there was concerted action or close criminal coordination between Mr Kilolo and Mr Babala in relation to the corrupt influencing of that witness.[330] Mr Babala does not deny the coordination involved in that transfer. But it was not criminal coordination. There is no evidence that proves Mr Babala was aware of the illegitimate and illicit purposes of the transfer.

b) WITNESS D-64 (PARAGRAPHS 255 TO 281)

292. With regard to this witness, the same reflections can be made in respect of Mr Babala. Because he was busy with his parliamentary activities, the transfers were made by his driver, Mr Nginamau (paragraph 259).

293. The Chamber notes the conversation between Mr Babala and Mr Bemba (paragraph 265) dated 16 October 2012 (see also paragraph 700 of the Judgment) on his privileged line. Did Mr Babala know that the line was privileged? The Chamber also notes that the entire recording suffered from misalignment problems (unnatural silence and overlapping of speech).[331] The Chamber even claims to have treated the recording with utmost caution. In our view, it did not do so. Beginning in paragraph 267, for example, the Chamber oddly finds a logical connection between the two speakers' statements even though it asserts that it cannot establish with certainty the reference point for the first part of the statement "*Non, non, ce n'est pas ça, il faut que cela se fasse quand même parce que c'est très important.* [No, it's not that, it needs to be done though because it's very important.]" The Chamber further adds, oddly enough, that Mr Babala's statement "*C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien.* [It's the same

[330] *Ibid.*, para. 253.
[331] *Ibid.*, para. 266.

thing as for today. You'll see that it's good to give people sugar.]" stands on its own and can be relied upon. Why does the Chamber rely on two statements with no logical connection? The mention of *Whisky*, the *Collègue d'en haut* and *Bravo Golf* bears no logic. This is especially true given that, even though the *Collègue d'en haut* was mentioned on several occasions, no connection of any kind can be established between Mr Babala and *Bravo Golf*. With this thought process, the Chamber is effectively making unjustifiable inferences that betray flawed logic. It interprets these statements, which are conflicting to begin with, as advice from Mr Babala to Mr Bemba on the importance of paying witnesses shortly before their testimony. As the Chamber sees it, Mr Babala was aware of the importance of paying witnesses shortly before their testimony at the Court (paragraph 267). That is what you call an attack on motives. One has to wonder how Mr Babala, who was not part of the common plan, could be aware of the importance of paying witnesses for that purpose. These are unjustifiable inferences and flawed logic on the part of a Chamber which, in principle, must be convinced beyond reasonable doubt.[332]

294. One point is not open to dispute: Mr Babala's contacts with the witnesses were limited to D-57 and D-64. They were made only to communicate the code number the witnesses needed to withdraw the funds transferred — nothing unusual for money transfers. This is a lawful practice that is not criminal in any way. Mr Babala had no other contact with the other 12 witnesses.[333]

4) AS REGARDS THE EVIDENTIARY DISCUSSION ON MODES OF LIABILITY[334]

295. Mr Babala is excluded from the common plan.[335] From the standpoint of legal rationale alone, the question is whether a person can be excluded from the

[332] *Ibid*., paras. 271-272, 278, 280-281.
[333] *Ibid*., paras. 282-667.
[334] *Ibid*., paras. 668 *et seq*.
[335] *Ibid*., paras. 112, 681-682, 800, 802-803, 875-878.

common plan and at the same take part in it by means of one of the modes provided for by law.[336]

296. Mr Babala's role as financier is misrepresented by the Chamber.[337] Mr Babala was not aware that he was making unlawful transfers. The money transfer scheme that required Mr Bemba's prior authorization was legitimate, since he was the sole beneficiary of the money collected.[338]

297. The extracts from the telephone conversations quoted in paragraph 695 of the Judgment do not show that Mr Babala had any criminal intent material to the enterprise of corruptly influencing witnesses. The specific dates cited (2 March 2012, 28 September 2012, 30 November 2012, 26 April 2013 and 6 May 2013) do not coincide with any of the money transfers to the Defence witnesses in the Main Case. Similarly, as regards the dates of 25 May 2012 and 29 April 2013, the Chamber does not mention any problematic money transfers.

G. OVERALL CONCLUSION

298. The legal value of the impugned Judgment is highly questionable. The guilty verdict reached by Trial Chamber VII in respect of Mr Babala on 19 October 2016 does not follow any sound legal logic with regard to the relevant facts that should reasonably be considered on the basis of the evidence in the record. This verdict appears to have been the end result of an effort to force factual connections where there are none, and to disentangle facts with respect to which the Chamber has vainly attempted to give a veneer of consistency with the aim of inferring something that clearly appears difficult to prove against Mr Babala — his *mens rea* in carrying out the offences ascribed to him.

299. Given that he had nothing to do with the common plan, Mr Babala could not have aided the co-perpetrators in any way with the corrupt influencing of

[336] *Ibid*., para. 682.
[337] *Ibid*., para. 693.
[338] *Ibid*., paras. 699, 703.

Witnesses D-57 and D-64.[339] There is no evidence that proves, beyond reasonable doubt, the Appellant's alleged accessoryship in the instant case. This holds especially true considering that, in this respect, at one point the Chamber asserts that Mr Babala aided Mr Kilolo in corruptly influencing the two witnesses[340] and, at another point it finds that he aided the co-perpetrators, without exception, in corruptly influencing the said witnesses.[341] From the perspective of the standard of proof, one has to wonder what concrete evidence the Chamber relied on in reaching a conclusion (guilty verdict) which in reality appears to be utterly unreasonable.

300. Whereas the literature holds that criminal cases are intrinsically "imbroglios" whose mystery the court must unravel,[342] the Judgment convicting Mr Babala is an imbroglio in itself. It is riddled with inconsistencies and contradictions which, in terms of legal rectitude, do not stand up to logical scrutiny. This Chamber may seek but it will not find the only possible reasonable conclusion drawn by the Trial Chamber in reaching a guilty verdict in respect of the Appellant.

301. According to the Chamber, Mr Bemba was prosecuted as the "mastermind" who worked from the Detention Centre to arrange the sabotage of the judicial process[343] in the Main Case, but he was unaware of the three facets of the false testimony given by his witnesses.[344]

302. The same Chamber also excludes Mr Babala from the alleged common plan, correctly acknowledging, moreover, that he did not in any way assist the co-perpetrators of the common plan in corruptly influencing the 14 witnesses, including D-57 and D-64.[345]

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[339] *Ibid*., para. 877.
[340] *Ibid*., para. 936.
[341] *Ibid*., para. 879.
[342] C. Horomtallah, *La présomption d'innocence*, Recueil Penant, p. 261.
[343] ICC-01/05-01/13-T-10-Red-FRA, p. 39, lines 22-27, and p. 76, lines 2-4.
[344] Judgment, para. 818.
[345] *Ibid*., para. 878.

303. It follows that anyone with an ounce of logic and common sense is at pains to understand how the Appellant can be cleared of any participation in the alleged common plan and at the same time considered an accessory to acts which, by the Chamber's own admission, are not proven. What concept in criminal law characterizes such a situation? What legal category does it fall under? How is it possible to be both guilty and not guilty with regard to the same set of facts?

304. The Trial Chamber's failure to apply the standard of proof at trial is so total and glaring that the Judgment of 19 October 2016 should be reversed, the charges against Mr Babala should be dismissed, and he should be acquitted.

305. To sum up, Mr Babala was found guilty by dint of a flawed and circuitous line of reasoning based on the Chamber's inferences and suppositions in the absence of evidence; the material facts were misappreciated by the Chamber; and, regrettably, facts relevant to an understanding of the Appellant's actions were omitted.

306. Mr Babala's *actus reus* is proved by unlawfully obtained Western Union records; these documents must be rejected in full under article 69(7) of the Statute. His *mens rea* is inferred by the Chamber from an extract of a recorded conversation that the Chamber itself admits is unreliable; the many possible meanings behind an isolated phrase cannot under any circumstances, and without corroboration, be considered to satisfy the criteria of proof beyond reasonable doubt. As indicia of Mr Babala's knowledge and intent, the Chamber relies on elements that are not criminal in themselves, and it is unable to identify or demonstrate how they are criminal the case at hand (for example, the codes); alternatively, the Chamber considers that the Defence has not proved the contrary beyond reasonable doubt, thus reversing the burden of proof.

307. The foregoing paragraphs highlight a number of errors justifying the reversal of the impugned Judgment. In view of all these errors, Mr Babala must be

acquitted in order to uphold his fundamental rights as an accused and preserve the Court's image as the pinnacle of criminal justice, applying the highest standards of justice.

308. All in all, the Chamber simply disentangled the facts from which it misguidedly inferred Mr Babala's alleged *mens rea* in a case in which he merely provided lawful general assistance with the Defence's operational needs. It is impossible to draw one reasonable conclusion alone from the conversations between Mr Babala and Mr Bemba.

IN ACCORDANCE WITH THE STANDARD OF PROOF AT TRIAL AND THE FUNDAMENTAL PRINCIPLES OF JUSTICE, THE APPELLANT MUST BE ACQUITTED.

AND JUSTICE SHALL BE DONE.

RESPECTFULLY SUBMITTED.

[signed]
Jean-Pierre Kilenda Kakengi Basila
Lead Counsel for Mr Fidèle Babala Wandu

Dated this 29 May 2017

At Denderleeuw (East Flanders, Belgium)