

Separate opinion
Judge Christine Van den Wyngaert and Judge Howard Morrison

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I. INTRODUCTION

1. In this opinion, we write separately to either complement today’s Judgment or to address points that were discussed at the hearing in January but that were not addressed in the Judgment.

2. Although we regret that despite our best efforts, the judges in this Appeal have not been able to reach unanimity, we accept that it is a fact of judicial life that judges do not always agree. This is true for national courts and tribunals, and perhaps even more for international courts, where the panels consist of judges from different legal

backgrounds who must interpret and apply a body of the law that is relatively new and often open to diverging approaches and views. The ICC statute is full of “constructive ambiguities” that have displaced the discussion from the political level (the drafters of the Rome Statute) to the judicial level (the judges of the ICC). Unsurprisingly, some of these discussions remain alive and explain why it is sometimes difficult to reach unanimity. The ICC is far from unique in this respect. Both of us experienced this as judges at the ICTY and one of us also as an *ad hoc* judge at the International Court of Justice¹. It is not different in the present case.

II. CONCERNS ABOUT THE EVIDENCE AND OPACITY OF THE REASONING OF THE CONVICTION DECISION

3. Although this is not a separate ground of appeal, we have noted that many of the accused’s complaints about the Conviction Decision are based upon concerns about the quality and sufficiency of the evidence that was used by the Trial Chamber to convict Mr Bemba. Considering the central importance of this topic, not only for the outcome of this case but indeed for the work of the Court in general, we deem it important to highlight some of our major concerns about the evidence, before addressing the topics that were discussed in the Judgment and during the hearing.

4. We note that our dissenting colleagues do not share our concerns in this regard. While we fully respect their views, it is important to recognise that the strong divergence in how we evaluate the Conviction Decision is not just a matter of difference of opinion, but appears to be a fundamental difference in the way we look at our mandates as international judges. We seem to start from different premises, both in terms of how the law should be interpreted and applied and in terms of how we conceive of our role as judges. While we do not presume to speak for our colleagues, it is probably fair to say that we attach more importance to the strict application of the burden and standard of proof. We also seem to put more emphasis on compliance with due process norms that are essential to protecting the rights of the accused in an adversarial trial setting.

¹ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, “Judgment”, 14 February 2002, I.C.J. Reports 2002, p. 3. In this case, which was about two major issues (universal jurisdiction and immunities), the judges only ruled on immunities, and eleven addressed the issue of universal jurisdiction in their individual opinions.

5. Some may find our approach overly demanding and may think that it undervalues considerations of substantive justice. It is true that the strict application of, for example, the standard of proof, may in some cases lead to the acquittal of persons who may actually be guilty of the crimes they were charged with. Similarly, stressing that a person can only be convicted for crimes he or she was properly charged with (and received adequate notice of) may, in some cases, result in an accused going unpunished, even if he or she may in fact bear some form of criminal responsibility. While such instances are regrettable, we believe that they are the price that must be paid in order to uphold fundamental principles of fairness and the integrity of the judicial process. Ending impunity is only meaningful if it happens in full accordance with the values and principles that underpin the criminal justice process in an open and democratic society. The presumption of innocence and the corresponding benefit of the doubt in favour of the accused are central to our understanding of the rule of law. We therefore see it as our duty as appellate judges to intervene if we identify significant problems with the manner in which a Trial Chamber has analysed the evidence or applied the standard of proof. Indeed, what distinguishes judgments from reports of special investigation commissions, NGOs and the media is precisely the strength and quality of the evidential foundations of judicial findings of fact. In times where it has become ever more difficult to distinguish facts from “fake news”, it is crucial that the judiciary can be relied upon to uphold the highest standards of quality, precision and accuracy. It is in this light that the Judgment and this opinion should be understood.

6. A major concern we have is about the opacity of the Conviction Decision in terms of outlining the evidentiary basis for many of the findings. The decision is replete with cross-reference upon cross-reference and the reader is often left to speculate about which specific items of evidence the Trial Chamber relied upon for a particular finding. It is difficult to reconcile this with the requirement of article 74 (5) of the Statute to give a “full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.” It is indeed incumbent upon a Trial Chamber to ensure that the evidentiary basis for its factual findings is set out “fully”, which means that its reasons for making a particular finding must be clear, comprehensive and comprehensible.

7. An example is the Trial Chamber's finding in relation to the existence of a widespread or systematic attack against a civilian population (article 7 of the Statute), which is found in paragraphs 688-89 of the Conviction Decision. This finding sends the reader on a complex journey in search of the Trial Chamber's evidentiary basis. In the section dealing with the widespread nature of the attack [paragraphs 688-689], we find no reference to any specific evidence. Instead, the reader is referred to a previous section [VI(E)(1)(a)]. However, the relevant paragraphs [paragraphs 671-672] do not contain any evidentiary analysis either. Instead, the reader is referred to yet another section of the Conviction Decision [this time it is V(C)(14), paragraph 563]. Arrived at the said section, the reader finds a short passage with a very large footnote attached to it. This passage-with-footnote is a crucial paragraph in the Conviction Decision, which contains numerous references to this paragraph in order to sustain other findings. A further look into this footnote reveals several problems.

1. *Hearsay and anonymous hearsay*

8. The footnote contains additional cross-references to still other parts of the Conviction Decision and a multitude of references to evidence. A large number of these references relate to hearsay or anonymous hearsay without any specific indication as to the source of the information. Whereas hearsay is not per se inadmissible before the Court, this does not mean that it is permissible to make findings beyond a reasonable doubt on this basis, especially when the Trial Chamber does not seem to have tried to establish the reliability of the source of the information. Although the Trial Chamber accepted the need to be cautious when relying on hearsay evidence,² it appears that in practice it often threw its own caution to the wind.

9. For example, the footnote refers to a large number of *procès-verbaux d'audition*, i.e. unsworn statements made by individuals before a CAR magistrate, on which the Trial Chamber relied for its finding about the scale and magnitude of the attack.³ We note, in this regard, that this type of witness statement is not

² Conviction Decision, para. 238: "The Chamber took a cautious approach in assessing evidence originating from hearsay. It did not rule out such evidence ab initio, instead assessing the weight to be accorded to it, taking into account the context and conditions in which such evidence was obtained, and with due consideration of the impossibility of questioning the information source in court."

³ Conviction Decision, para. 266 and ICC-01/05-01/08-2012, paras 67-69.

considered to have great evidentiary value in the legal systems that are based upon the French model, such as the CAR. While it is true, as observed by the Prosecutor during the hearing, that article 69 (8) of the Statute provides that, when ruling on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law,⁴ this does not mean that such considerations are irrelevant when attributing evidentiary weight. Indeed, if local magistrates would not consider such *procès-verbaux* as strong evidence for the truth of their content, we believe it is wrong for the Court to place so much confidence in them. In any event, we do not believe that the fact that the out-of-court statements were authenticated by the person who took them offers any guarantee about the reliability of their content. None of the individuals who gave statements to the CAR magistrate appeared before the Chamber or were otherwise examined by any party in these proceedings. It is also worth highlighting that the statements are extremely terse (usually not more than a few lines) and contain little to no indication about how the victims identified their alleged attackers. It is entirely inappropriate, in our view, to accept these claims as proof of their content.

10. Apart from the *procès-verbaux*, the footnote contains a number of references which appear to all be based on essentially the same source of information. It does therefore not seem to be the case that the information is in any sense appropriately corroborated. For other items of evidence that are referenced in the footnote the source is unknown, making it entirely impossible to evaluate their evidentiary weight.⁵

⁴ Transcript of 11 January 2018, ICC-01/05-01/08-T-374-ENG, p. 59, line 1 to p. 67, line 21; p. 87, line 25 to p. 88, line 13.

⁵ When the evidence is analysed properly, it is only possible to identify seven witnesses who speak directly about the number of criminal acts. The vast majority of this testimony is based on (anonymous) hearsay. The same applies to the documentary evidence the Trial Chamber relied upon. It is true that the evidence shows that a large number of crimes were reported, but this cannot, in our view, prove beyond reasonable doubt that they actually took place, let alone that the MLC was solely responsible for them. We note, in this regard, that CAR-OTP-0030-0002 - Projet CAF/02/004 "Assistance humanitaire aux femmes et filles victimes de viols et de violences inhérents aux conflits armés du 25 octobre 2002 – Rapport d'activités 25 novembre 2002 au 31 décembre 2003, which explicitly states that the reported crimes were committed by "des Hommes de Jean-Pierre BEMBA et les hommes en tenue (rebelles et militaires centrafricains)" [emphasis added], without, however, providing any indication as to how this was established or providing any indication as to the proportion of crimes committed by the respective groups.

2. *Large amount of circumstantial evidence and disregard for the “beyond a reasonable doubt” standard*

11. We are also concerned about the fact that the Trial Chamber relied on a large amount of circumstantial evidence in relation to a number of key findings. Again, the Trial Chamber stated the correct principle that circumstantial evidence can only lead to findings beyond a reasonable doubt when the proposed inference is the only plausible one,⁶ but has often failed to adhere to this principle in its actual analysis.

12. For example, in paragraphs 676 to 684, the Conviction Decision lists eight circumstantial factors that it considered cumulatively proved the existence of a policy to attack a civilian population. We are far from persuaded that there was sufficient evidence to support the eight ‘factors’ that were relied upon. In this regard, it is sometimes argued that only the material facts must be established beyond a reasonable doubt and that it is unnecessary to establish subsidiary facts to the same standard.⁷ While this is legally correct, it does not mean that the quality of the evidence for subsidiary facts is irrelevant from an evidentiary point of view. This is especially true in relation to circumstantial evidence. By definition, drawing inferences from circumstantial evidence only adds uncertainty. Therefore, if the factual basis of the circumstantial evidence is weak, the inferences drawn from it will be even weaker.

13. This brings us to the key problem we have with the Trial Chamber’s finding of an undefined policy⁸, which is that it does not come anywhere near to being the only possible inference that can be drawn from the eight factors the Trial Chamber refers to.⁹ The fact that senior MLC officers did not do enough to stop the troops from misbehaving can also be explained in several ways and certainly does not compel the conclusion that they deliberately did not intervene so that the troops would engage in criminal conduct. Incompetence, cowardice, indifference (or, most likely, a combination thereof) could reasonably offer an equally plausible explanation for the officers’ passivity.

⁶ Conviction Decision, para. 239: “Nothing in the statutory framework prevents the Chamber from relying on circumstantial evidence. When based on the evidence available, there is only one reasonable conclusion to be drawn therein, the Chamber has concluded that particular facts have been established beyond reasonable doubt.”

⁷ See further *infra*, paras 66 - 68. of this Opinion.

⁸ See further *infra*, para 69 et seq. of this Opinion

⁹ Conviction Decision, para. 676 et seq.

14. We are indeed deeply concerned about the Trial Chamber's application of the "beyond a reasonable doubt standard". Under this standard, the Prosecution's narrative must not only be the best possible explanation of the evidence that is in the case record, it must be the only plausible explanation. As long as there are other plausible explanations, taking into consideration what the evidence has proved and what is still unknown, it is not possible to enter a finding beyond a reasonable doubt. With the greatest respect for our colleagues of the Minority, we are firmly of the view that many of the findings in the impugned Conviction Decision fail to reach this threshold, despite the fact that the Trial Chamber correctly defined the standard when setting it out in the abstract.¹⁰ We strongly believe that the Appeals Chamber cannot turn a blind eye to such obvious evidentiary problems on the basis of a deferential standard of review. The deferential standard set out in the jurisprudence of the Court does not require judges of the Appeals Chamber, if they come to the conclusion that a particular finding by the Trial Chamber fails to meet the "beyond a reasonable doubt" threshold, to ignore this and to refrain from drawing the necessary conclusions. Anything less would make appellate review a pointless rubberstamping exercise, which is not what articles 81 and 83 of the Statute plainly require.

15. It may be considered that the above criticisms are overly 'atomistic' and that we should have appreciated that the Trial Chamber evaluated the evidence 'holistically'. If so, and with the greatest of respect, holistic fact-finding should not be an excuse or a reason for making findings beyond a reasonable doubt on the basis of a collection of weak evidence. When the Appeals Chamber says that the Trial Chamber must analyse the evidence holistically,¹¹ all this means is that the evidentiary weight of individual items of evidence should not be determined in isolation, but rather in conjunction with other relevant evidence. It is also true that the credibility and evidentiary weight of specific items of evidence is not determinative. What matters is how strong and convincing the totality of the relevant evidence in relation to a particular fact is. That said, analysing evidence holistically

¹⁰ Conviction Decision, para. 216 : "When a Chamber concludes that, based on the evidence, there is only one reasonable conclusion to be drawn from particular facts, the conclusion is that they have been established beyond reasonable doubt. The Appeals Chamber has elaborated upon this standard: The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence."

¹¹ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121, para. 22.

cannot cure the weakness of individual items of evidence and a number of weak arguments for a proposition do not and cannot ever combine into a strong reason for accepting it.

16. Moreover, the fact that Trial Chamber is not required to make explicit reference to all items of evidence it considers in relation to a particular proposition does not mean that the Trial Chamber is free to pass over contradictory evidence in silence. With respect, we do not think it is acceptable to say to the parties that if the Trial Chamber does not reference a particular item of evidence they should simply assume that the Chamber considered it unreliable.¹² Whereas it may well be the case that the Trial Chamber did find problems with the reliability of the evidence in question, it is still incumbent upon it to provide cogent reasons for this conclusion.

17. This brings us to a point, which, although not formally arising from the Conviction Decision, did come up in this case. We are referring to the vexed question as to whether or not Trial Chambers are under an obligation to make admissibility ruling in relation to each and every item of evidence that is submitted during the trial. In an interlocutory appeal earlier in this case,¹³ the Appeals Chamber decided that Trial Chambers have the option to either rule on admissibility at the moment of submission or to postpone such rulings until the deliberation phase. More recently, the Appeals Chamber in the sister case of *Bemba et al.* went significantly further by holding, by majority, that Trial Chambers do not have to make individual admissibility rulings at all.¹⁴

18. Whereas this may have been unproblematic in the context of a case relating to offences against the administration of justice. We are of the opinion that it is not appropriate in cases relating to article 5 of the Statute. In this respect we agree with our colleagues Eboe-Osuji¹⁵ and Henderson.¹⁶ Not only is it necessary to rule on the

¹² Conviction Decision, para. 227, referring to ICTY, Appeals Chamber, *Prosecutor v. Kvočka et al.*, “Judgement”, 29 February 2005, IT-98-30/1, para. 23.

¹³ Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence’”, 3 May 2011, ICC-01/05-01/08-1386.

¹⁴ Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’”, 8 March 2018, ICC-01/05-01/13-2275.

¹⁵ Separate Opinion of Judge Osuji regarding the present Judgment.

admissibility of all evidence submitted by the parties, the Trial Chamber must also apply the admissibility criteria of article 69 (4) of the Statute sufficiently rigorously to avoid crowding the case record with evidence of inferior quality. We are confident that, if this had been done in the present case, many of the problems that we have identified in this section would not have arisen.

III. CONCERNS ABOUT THE DEFINITION OF THE SCOPE OF THE CHARGES

19. This was the first case in which the Appeals Chamber had to address the scope of the charges under article 74(2) of the Statute, which states that the conviction decision shall not exceed the “facts and circumstances described in the charges”. The question pertains to the procedural architecture of the International Criminal Court, in which the Prosecutor formulates the charges (article 61(3)(a) of the Statute), the Pre-Trial Chamber confirms the charges (article 61(7) of the Statute) and the Trial Chamber convicts or acquits, based on “the facts and circumstances described in the charges” (article 74 (2) of the Statute). The International Criminal Court system is indeed different from the system of the *ad hoc* tribunals where no Pre-Trial Chamber exists and where the Trial Chamber can decide about amendments to the charges in the course of the trial. There is also no equivalent to Regulation 55 of the Regulations of the Court at the *ad hoc* tribunals, since there it is the sole responsibility of the Prosecutor to formulate the indictment and he or she can ask the Trial Chamber to amend the indictment during the course of the trial.

20. There has been much litigation concerning different aspects of the notion “charges”, including the *formulation* of the charges by the Prosecutor (article 61 (3) (a) of the Statute and Regulation 52 of the Regulations of the Court,¹⁷ and *notice* to the accused (article 67 (1) (a) of the Statute),¹⁸ the *confirmation* of the charges by the Pre-Trial Chamber (art.61(7))¹⁹, the *amendment* of the charges by the Pre-Trial

¹⁶ *Supra* note 15, ICC-01/05-01/13-2275-Anx.

¹⁷ Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, “Decision on the confirmation of charges”, 16 December 2011, ICC-01/04-01/10-465, paras 81 -83; Pre-Trial Chamber II, *Prosecutor v. Ruto et al.*, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-01/11-373, para. 97 et seq.

¹⁸ Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the Filing of a Summary of the Charges by the Prosecutor”, 21 October 2009, ICC-01/04-01/07-1547.

¹⁹ Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the confirmation of charges”, 29 January 2007, ICC-01/04-01/06-803; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, “Decision on the confirmation of charges”, 16 December 2011, ICC-01/04-01/10-465

Chamber (article 61 (9) of the Statute)²⁰ and the *modification* of the legal characterisation of the charges by the Trial Chamber (Regulation 55 of the Regulations of the Court).²¹ Most of the litigation was about the distinction between the so-called “material facts” (the facts that need to be established in order to enter a conviction) and “subsidiary facts” (that is, intermediate findings that support the material facts)²² and the question of the “trial-readiness” of the Prosecution. There has not been, as yet, an appellate decision on the scope of the charges under article 74(2) of the Statute.²³

21. In this case, a number of criminal acts were added after the Confirmation Decision was issued without following the procedure required in article 61(9) of the Statute. This would have required an amendment of the charges (article 61(9) of the Statute). It was not sufficient for the Prosecutor to have added these additional crimes by including them in auxiliary documents, let alone by implication through the disclosure of evidence. This is also why the criminal acts put forward by the Victims cannot be considered to be part of the facts and circumstances of the charges in this case.

²⁰ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, 8 December 2009, ICC-01/04-01/06-2205, para 75 *et seq*; Appeals Chamber, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Prosecutor’s appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 13 December 2013, ICC-01/09-01/11-1123, para. 25 *et seq*.

²¹ Appeals Chamber, *Prosecutor v. Germain Katanga*, “Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’”, 27 March 2013, ICC-01/04-01/07-3363.

²² Whereas the Appeals Chamber has not endorsed the terminological distinction between “material” and “subsidiary” facts (Appeals Chamber, *Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 16 December 2013, ICC-02/11-01/11 (OA5), this terminology has also been used in the Court’s practice. For example, see Pre-Trial Chamber II, *Prosecutor v. Ruto et al.*, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-01/11-373, para. 47-48) and it also figures in the Manual (Chambers Practice Manual, third edition, dated May 2017, Chapter V(2)). This was also the terminology used during the hearing by the Prosecutor (Transcript of 9 January 2018, ICC-01/05-01/08-T-372-Red2ENG, p. 36, line 1; p. 49, lines 3-18; p. 53 to p. 65).

²³ The only precedent is a decision of Trial Chamber II in the *Katanga* case where, the Prosecutor also argued that the criminal acts mentioned in the charges were only *samples* (Katanga and Ngudjolo, Office of the Prosecutor, “Réponse de l’Accusation à la question posée par la Chambre de première instance II lors de l’audience du 1er octobre 2009”, 6 October 2009, ICC-01/04-01/07-1513). The Trial Chamber radically rejected this approach. (Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, 21 October 2009, ICC-01/04-01/07-1547, paras 22, 23).

22. At the appeal hearing, it became clear why the Prosecution had not deemed it necessary to seek confirmation for these additional criminal acts. The Prosecution argued that the criminal acts (which it referred to as “underlying acts”) were only evidence, not material facts to be established beyond a reasonable doubt. For the Prosecution, it was not even necessary for the Trial Chamber to enter findings beyond a reasonable doubt in relation to these individual acts²⁴. This would have meant that, not only at confirmation but also in the Conviction Decision, the criminal responsibility of the accused would be based on abstract categories of crimes, merely illustrated by a number of “examples”, rather than on an exhaustive list of criminal acts.

23. We disagree fundamentally with this approach and we regret the lack of clarity in the impugned decision, not only in relation to the scope of the charges, but also in relation to the scope of the conviction. A conviction “by sample” would be unacceptable for many reasons, not in the least because it would make a meaningful appellate review all but impossible.²⁵ Because the disposition made no reference to even an approximate number of murders, rapes and acts of pillaging that the Trial Chamber found to be established,²⁶ it created the impression that the Trial Chamber had convicted the accused for *all* acts of murder, rape and pillaging committed by MLC soldiers in the CAR between on or about 26 October 2002 and 15 March 2003, i.e. covering a time frame of more than 4 months and a geographical area of more than 600,000 square kilometres.

24. Although the Trial Chamber was not explicit on this point, the methodology it adopted creates the impression that it accepted the broader allegations of widespread MLC criminality on the basis of some specific examples, but without making any explicit findings in this regard, let alone pointing to the existence of reliable

²⁴ Transcript of 9 January 2018, ICC-01/05-01/08-T-372-Red2-ENG, p. 55

²⁵ For example, a Trial Chamber enters a conviction by sample for ‘all murders that happened in The Hague between 1 January and 30 May 2018’, relying on “reliable evidence from various sources, including testimony as corroborated by media-articles and NGO reports” that there were 27 murders in that period (A-Z) However, the Trial Chamber only had specific evidence and only made findings beyond reasonable doubt about three ‘sample’ murders (A, B, and C). For the other murders (D-Z) there was some weak evidence, and the Trial Chamber only stated that it had no doubts that there were ‘many more’ murders, but without making any explicit findings. The Appeals Chamber could, of course, review the findings in relation to A, B, and C. But even if the Appeals Chamber found that there was not enough evidence for all three of them, the conviction for D-Z would, in principle, still stand and could not be overturned on appeal.

²⁶ See Conviction Decision, para. 752.

evidence that could have supported such broad findings. For instance, in Section VI.A., the Conviction Decision explicitly discusses a few examples of alleged murders which it did not consider proved as well as three cases of murders which it did. The Trial Chamber then went on to discuss, for each of these three instances, the civilian status of the victims and the identity of the perpetrators. However, in the final paragraph of the Section, the Chamber found “beyond reasonable doubt that MLC soldiers committed the war crime of murder and the crime against humanity of murder in the CAR between on or about 26 October 2002 and 15 March 2003.”²⁷

25. The Majority’s finding in the present Judgment that Mr. Bemba was properly convicted only in respect of a limited number of criminal acts (one murder, the rape of 20 persons and five acts of pillaging.)²⁸ is in line with the Court’s jurisprudence. The Appeals Chamber has previously held that the facts described in the charges are “the factual allegations which support each of the legal elements of the crime charged”²⁹ and that “the underlying criminal acts form an integral part of the charges against the accused [...]”.³⁰ Indeed, it cannot be otherwise: this Court will often deal with cases involving the commission of multiple acts of murder, rape etc. While it may therefore be convenient to summarise or group these acts by way of geographical and temporal parameters, it is the *criminal acts* that form the basis of criminal responsibility and that must be established at trial beyond a reasonable doubt. Thus, the alleged criminal acts are not a mere illustration of the charges. On the contrary, they are an integral component thereof, which must be pleaded by the Prosecutor and confirmed by the Pre-Trial Chamber.³¹

26. It has been suggested that when the accused is charged for his or her role as a senior commander, who was far removed from the crimes on the ground, it is not necessary to be specific about the criminal acts for which he or she is held

²⁷ Conviction Decision, para. 630.

²⁸ Para. 119 of the present Judgment.

²⁹ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, 8 December 2009, ICC-01/04-01/06-2205, para. 90, fn. 163.

³⁰ The Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, dated 1 December 2014, ICC-01/04-01/06-3121, para. 123.

³¹ *Supra* note 30., para. 123.

responsible.³² The underlying assumption, it seems, is that when commanders are not on the ground, the link between their personal acts and conduct and the criminal acts is more tenuous and therefore the defendant does not need to be informed in the same level of detail. With respect, we do not share this view.

27. First, the fact that the link between the conduct of the accused and that of the physical perpetrators is more indirect does not mean that it should not be equally strong. To the contrary, if it were permissible to convict someone for an unspecified series of crimes, there would be a real risk that the accused might be held responsible for crimes he or she had no sufficient connection with. This risk is especially great in cases, like the present one, where the accused may not have stood in a direct and vertical hierarchical relationship to the physical perpetrators. Second, the accused should be in a position to challenge the veracity of this link. Since the Rome Statute eschews all forms of strict criminal responsibility, it must be established which role the accused played in bringing about each of the crimes that were allegedly committed by his subordinates. This is only possible if the criminal acts in question are identified, both in terms of time and space and in terms of the identity of the physical perpetrators, if not by name or function, then at least by the unit to which they belong.

28. Finally, we want to shortly address the pragmatic concerns raised by those who argue that it would be unrealistic to expect the Prosecutor to have all her “underlying acts” ready by the time she submits the Document Containing the Charges (30 days before the date of the confirmation hearing) and for the Pre-Trial Chamber to analyse each underlying act to see whether it complies with the standard for confirmation within 60 days from the date the confirmation hearing ends. We are not convinced by such arguments. Indeed, to accept them would be to affirm that the confirmation process is unfit for purpose. We think that the challenges several Pre-Trial Chambers have experienced in the past were attributable more to the fact that the Prosecution was not fully prepared when it initiated confirmation proceedings than to the applicable deadlines.

29. While we understand that not everything can be set in stone before the trial commences, there is simply no point in confirming charges on the basis of samples

³² Transcript of 9 January 2018, ICC-01/05-01/08-T-372-Red2-ENG, p. 55, lines 13-17.

and/or incomplete evidence. This is because the proper identification of criminal acts in an exhaustive manner is crucial to allow a Trial Chamber to manage the trial proceedings and to allow the accused to prepare a meaningful defence, as well as to organise the participation and reparations of victims.

30. With regard to the latter, the broad and open-ended approach to the scope of the charges led the Trial Chamber to allow, very early in the case, more than 5000 victims to participate.³³ While we understand why so many persons thought that they might have had an interest in participating in these proceedings, it appears that the cart was put before the horse in this case. Victims of crimes that were not explicitly confirmed should never have been allowed to participate at the trial stage. The opposite approach can only lead to inflated expectations and bitter disappointment at the end of the trial.

IV. WAS THE CONCEPT OF COMMAND RESPONSIBILITY PROPERLY DEFINED?

1. *General approach*

31. The Judgment only addresses one aspect of Mr Bemba's third ground of appeal, in which he argues that he "is not liable as a commander", and concludes that the Trial Chamber erred when finding that he failed to take the necessary and reasonable measures within his power to prevent or repress the commission of crimes during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities.

32. In view of the fact that our esteemed colleagues also address other aspects of Mr Bemba's third ground of appeal, we wish to share some of our views on points that were not developed in the Judgment.

³³ In its first decisions (concerning that issue) of 22 February 2010 and of 12 July 2010, the Trial Chamber generally delineated its requirements for victim's application as follows: (i) the applicant was a natural or legal person; (ii) the applicant suffered harm, as a result of a crime within the jurisdiction of the Court; (iii) *the events described by the applicant constituted a crime charged against the Accused*; and (iv) there was a link between the harm suffered and the crimes charged (emphasis added). "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants", 22 February 2010, ICC-01/05-01/08-699, paras 35, 36, and 39, and "Corrigendum to 'Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings'", ICC-01/05-01/08-807-Corr, 12 July 2010, paras 21-24. The Trial Chamber referred to these requirements in its subsequent decisions.

2. *The concept of command responsibility*

33. Although command responsibility applies to all military commanders, we believe that it is not a one-size-fits-all offence. In particular, what is required of a commander, both in terms of how closely they should monitor the troops and in terms of what measures they are expected to take to prevent criminal behaviour, depends on how proximate they are to the physical perpetrators in the chain of command.³⁴ The primary obligation to prevent/repress/refer criminal behaviour rests upon the immediate commander of the physical perpetrator (that is, the platoon or section commander). This follows from the fact that article 28 of the Statute requires the commander to have *effective control*. It is simply impossible for senior commanders to control hundreds or thousands of individual troops effectively. This is the role of those who work closely with them in the field. Command responsibility is not strict liability for all the crimes that are committed by subordinates. It comports with the principle of individual criminal culpability that commanders can only be held accountable for the crimes of those they are commanding directly and whose conduct they can actually monitor. Importantly, unit commanders are not only responsible under international humanitarian law to ensure that their troops do not commit crimes and to ensure that they are sanctioned if they do, they are also responsible vis-à-vis their own superiors in this regard. Indeed, superior commanders delegate their authority to lower level commanders precisely for this reason. In principle, higher-level commanders are thus entitled to rely on lower level commanders to keep their troops in check and to deal with deviant behaviour.

³⁴ See ICRC Commentary of 1987 on article 86(2) Additional Protocol I to the Geneva Conventions, which states as follows:

a) The qualification of superior

3544 *This is not a purely theoretical concept covering any superior in a line of command, but we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1. Furthermore, only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However, it should not be concluded from this that this provision only concerns the commander under whose direct orders the subordinate is placed. The role of commanders as such is dealt with in Article 87 (Duty of commanders). ' The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.*

The ICRC Commentary of 1987 on article 87(1) Additional Protocol I to the Geneva Conventions provides that:

3554[...].it is self-evident that the obligation applies in the context of the responsibilities as they have devolved over different levels of the hierarchy, and that the duties of a non-commissioned officer are not identical to those of a battalion commander, and the duties of the latter are not identical to those of a divisional commander. [...]

34. The main responsibility of the higher-level commander is to make sure that the unit commanders are up to the task of controlling their troops. It is not the task of the higher-level commander to micro-manage all lower level commanders or to do their jobs for them. The duty of higher-level commanders is to ensure that those immediately under them comply with their obligations. If it turns out that one of them is unable/unwilling to control his/her troops, it is the responsibility of the higher-level commander to replace the failing lower level commander or to strengthen his/her authority. Strictly speaking, therefore, if a senior commander is held responsible for a crime committed by a soldier at the bottom of the chain of command, he or she is not blamed for not having supervised the individual soldier properly, but for not having monitored the superior(s) of the soldier adequately.

35. It is important not to get into a mind-set that gives priority to the desire to hold responsible those in high leadership positions and to always ascribe to them the highest levels of moral and legal culpability. Although article 28 of the Statute can very well be applied to senior commanders, it is not always the right tool to link them directly to the conduct of the physical perpetrators. Of course, it is the responsibility of every commander at every level of the chain of command to do what they can, within their own sphere of competence and authority, to avoid that crimes are committed. However, this is a shared responsibility, in which every commander has a specific role to play.

36. In short, what the law expects from commanders depends on where they find themselves on the hierarchical ladder. Article 28 of the Statute is broad and flexible enough to apply to commanders in different positions. However, in applying the test ((i) effective control, (ii) knowledge or should have known, and (iii) necessary and reasonable measures) the Court should abide by the principle that command responsibility is not strict liability and that we do not ask the impossible of the military commander. The Court should therefore resist the reflex of always holding the most senior commander criminally responsible, regardless of how proximate the superior-subordinate relationship actually was.

3. *Knowledge*

37. A substantial part of the appeal hearing was devoted to the mental element for command responsibility, more particularly the difference between the “knew” and

the “should have known” test and the application/applicability of Regulation 55 of the Regulations of the Court in this case. The parties and participants disagreed, and so do the judges in this appeal. We believe that actual knowledge of crimes and having information that put the commander on notice of potential criminal activity are fundamentally different and cannot be interchanged. We also think that it was impossible to apply regulation 55 of the Regulations of the Court in this stage of the proceedings.

a) Known and should have known are fundamentally different

38. Our esteemed colleagues, Judges Monageng and Hofmański, suggest, that article 28 of the Statute contains a single mental element, which encompasses both the knowledge and should have known standard. With the greatest of respect, we do not believe this is correct, and this for the following reason: we do not think it is possible to determine what steps a commander should have taken without knowing what he knew at the relevant time. Indeed, no one would expect a doctor to prescribe a treatment before he or she has made a diagnosis of the disease. The commander who ‘should have known’ is like a doctor who is confronted with symptoms but still has to make a diagnosis, whereas the commander who ‘knows’ has already made his diagnosis. In case of ‘should have known’ the question of which reasonable measures the commander should have taken does not arise because the commander is not being held accountable for having failed to take specific measures, but for not monitoring his or her subordinates adequately.

39. What the Prosecution must plead and prove therefore depends on which of the two alternatives the Prosecution alleges. If the Prosecutor alleges that the accused ‘should have known’, the questions that arise are (a) what information did the commander have at which point in time and (b) what did the commander do with this information, if anything? It should be noted, in this regard, that a commander may take all reasonable steps to follow up on the information and still not acquire actual knowledge of criminal activity. By contrast, if it is established that the commander had knowledge, the question that must be answered is: what would a reasonable commander in the position of the accused have done to prevent/repress/refer the criminal conduct of his/her subordinates in light of the information he/she actually had.

40. It is thus not true that the knowledge and ‘should have known’ standards both trigger the same obligations on the part of the commander. It follows that an accused would probably defend him- or herself differently, depending on whether he/she is accused under one standard or the other. Accordingly, we think that switching from one cognitive standard to the other after the trial has finished violates fundamental precepts of due process.

41. We are aware that in this case the Trial Chamber gave notice under Regulation 55 of the Regulations of the Court that it might recharacterise the charges from ‘knowledge’ to ‘should have known’.³⁵ However, even if Regulation 55 of the Regulations of the Court empowered the Appeals Chamber to recharacterise the facts and circumstances for the first time on appeal – which we do not think it does – we would refrain from doing so in this case, because we are of the view that the notice given by the Trial Chamber did not provide Mr Bemba with sufficiently specific information about the charges as re-characterised. In particular, the Trial Chamber did not explain precisely *when* Mr Bemba was alleged to have information about crimes such that would have triggered his responsibility to conduct further inquiries.³⁶ In the absence of such specific information, the notice under regulation 55 of the Regulations of the Court was defective and it would be unfair to convict Mr Bemba on the basis of the ‘should have known’ standard.

b) The concept of knowledge in article 28 of the Statute

42. During the hearing, the Prosecution argued that the definition of knowledge in article 30 did not apply to article 28. Instead, they proposed the notion of ‘unconvinced knowledge’, which seems to cover situations where a commander receives information, which he or she does not believe³⁷. Apart from lacking any serious legal or jurisprudential basis, the concept of knowledge without belief strikes us as absurd, especially in the context of article 28 of the Statute. Why would a

³⁵ Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 21 September 2012, ICC-01/05-01/08-2324.

³⁶ It is to be noted, in this regard, that the Defence specifically and repeatedly asked for additional information on the facts and circumstances of the recharacterised charges (ICC-01/05-01/08-2365-Red; ICC-01/05-01/08-2451-Red3 but both the Prosecution and the Trial Chamber refused to provide it. The Defence sought leave to appeal this refusal, which was rejected (ICC-01/05-01/08-2487-Red). The Defence obviously did not include this point in the present appeal, as the Trial Chamber held that it did not recharacterise the charges.

³⁷ Transcript of 10 January 2018, ICC-01/05-01/08-T-373-ENG, p. 13, line 17 to p. 19, line 8.

commander have to take action if he or she does not believe that his or her troops are about to or have committed crimes?

43. Of course, the Prosecutor is correct in the sense that a commander cannot escape responsibility simply by saying that he or she did not believe the information that was available to him or her. However, if a commander has genuine reasons to doubt the accuracy of a given source of information, this may absolve him or her from superior responsibility under the knowledge standard, even if the information later turns out to have been accurate. For example, when a commander receives contradicting information and there is no obvious way for him or her to determine which source is telling the truth without further investigation, it would be wrong, in our view, to qualify such situations as knowledge. That said, in some instances the information may be so clear and overwhelming that it would be unreasonable to doubt it, even though the commander may have good reasons to be sceptical about the objectivity of the source. In any event, the fact that a commander may have doubts about the accuracy of certain information does not mean that he or she should not have investigated further, in accordance with what is required under the ‘should have known’ standard. But this is, as we have shown, a different issue which does not properly arise in this appeal.

44. A different issue is *what* the commander must have knowledge of. Knowledge *ex ante* obviously cannot be the same as knowledge *ex post facto*. When troops are “about to commit”, all a commander can logically be aware of is information indicating that his/her subordinates have the intention to commit (a) crime(s). This information must be sufficiently specific. It is not enough for the commander to be aware of a generic risk that his or her troops may commit unspecified crimes. Such a risk is inherent in every military operation and cannot give rise to any obligation on the part of a commander, other than general measures to instil discipline, promote awareness of relevant rules of international humanitarian law, and promulgate and ensure compliance with appropriate rules of engagement. It is only when the commander becomes aware of more specific risks that cannot be adequately addressed by general measures that the issue arises of what the necessary and reasonable measures are that the commander is expected to take. Indeed, without

knowing what one is attempting to prevent it is virtually impossible to design meaningful measures.

45. Awareness of past misconduct or insubordination by particular subordinates or units may be an indication of an increased risk that these troops/units may be more likely to commit crimes. However, the Statute requires that the commander is aware that the subordinates are “about to” commit crimes. This connotes a certain imminence and specificity going well beyond general concerns about the level of discipline of particular troops/units. The one exception to the requirement that the commander must be aware of the identity of the soldier(s) or units and the nature of the criminal conduct in which they are about to engage exists when a pattern of criminal behaviour of certain subordinates is established, of which the commander is aware beyond reasonable doubt.

46. Knowledge *ex post facto* obviously must include (a) awareness that a crime within the jurisdiction of the Court was committed and (b) that the perpetrator was a subordinate of the commander in question. From a policy point of view, it should suffice that he or she is aware that there are ‘reasonable grounds to believe’ (article 58 of the Statute) that his or her subordinates committed crimes in order to trigger the commander’s obligation to refer the subordinates to the relevant authorities for possible investigation and prosecution. However, the language of articles 28 and 30 of the Statute requires that the commander is virtually certain of the guilt of his or subordinates³⁸ and article 22 (2) of the Statute obliges us to interpret substantive criminal law provisions strictly. Accordingly, simple awareness of allegations, even if substantiated with *prima facie* credible evidence, will usually not be sufficient to impute ‘knowledge’ in the sense of article 28 of the Statute. Such scenarios are thus more aptly captured under the ‘should have known’ standard.

47. In sum, it is not enough for a commander to be aware of general information about generic criminal conduct by his or her subordinates to find that the commander had knowledge of any of the actual crimes that were committed. Indeed,

³⁸ We note that the Appeals Chamber held that article 30 (2) (b) and (3) of the Statute encompasses the notion of “virtual certainty”. *Prosecutor v. Lubanga*, “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, 1 December 2014, ICC-01/04-01/06-3121, para. 447. Although this decision dealt with the question of awareness of ‘consequences’, we can see no reason why a lesser standard should apply to awareness of the existence of a particular circumstance. Indeed, if anything, the standard for awareness of events that have already happened should be even higher.

awareness that something is going on without having sufficiently clear and dependable information as to what is happening/has happened, when it is going to happen/has happened, or who is/was involved, is precisely the sort of scenario that is envisaged by the ‘should have known’ standard.

c) Charges and findings in relation to Mr Bemba’s knowledge are imprecise and lack a sufficient evidentiary basis

48. As the Pre-Trial Chamber in the case has rightly pointed out, failure to prevent and failure to refer criminal behaviour to the competent authorities are two separate violations of independent obligations. It is thus crucial that for every crime committed by a subordinate in respect of which a commander is held to account it is made clear in the Document Containing the Charges, in the confirmation decision as well as in the judgement under article 74 of the Statute whether the commander knew about it before, during or only after it was committed.

49. Regrettably, the Conviction Decision lumps everything together, as if Mr Bemba was at all times aware of everything that was going to happen and equally knew, after it had happened, who had committed the crimes. Accordingly, we are of the view that the Trial Chamber *erred in law* by not making specific findings which specific crimes Mr Bemba was aware and at which point in time. In particular, it was incumbent on the Trial Chamber to differentiate, for each crime in relation to which Mr Bemba was said to have failed in his supervisory duties, between knowledge prior, during or after the troops committed the crimes.

50. The Trial Chamber also *erred in fact* by relying on weak and vague evidence in relation to its findings on knowledge. For example, one contested issue was whether or not Mr Bemba and other senior MLC commanders believed that media reports about crimes being committed by MLC troops in the CAR were accurate. One particular issue is whether Mr Bemba believed RFI reports about crimes committed by the MLC. The Trial Chamber acknowledges that two witnesses testified that there were serious misgivings among senior MLC commanders about the objectivity and accuracy of RFI news reports. However, it then goes on to dismiss this testimony – which is the only evidence the Trial Chamber explicitly considered that is directly relevant on this topic – on the basis of the Trial Chamber’s own view that

the reports were correct and confirmed by other sources.³⁹ With respect, without cogent evidence about Mr Bemba's state of mind, we can see no justification for rejecting the only relevant evidence and to essentially impose the Chamber's own views on the matter retrospectively. Indeed, in the absence of countervailing evidence that might have shown that Mr Bemba did believe the RFI reports, he should enjoy the benefit of the doubt in this regard. It is also significant to note that, despite the Trial Chamber's reference to only two witnesses, there were in fact also other witnesses who stated that MLC members harboured doubts regarding the accuracy or even a bias on behalf of certain media outlets (for example P45, D48 or P36). One witness (P45) even specifically mentioned Mr Bemba's distrust towards the media in this regard. The Trial Chamber's selective and partial use of the available evidence for substantiating the finding of Mr Bemba's knowledge of the media reports, while ignoring other parts of the very same evidence, casts doubt as to whether the Trial Chamber has always adhered to the principle that the accused is entitled to the benefit of the doubt. Whatever the case may be, we are clearly of the view that the available evidence did not allow the Trial Chamber to enter a finding beyond reasonable doubt that Mr Bemba had knowledge of alleged criminal conduct by MLC troops on the basis of the fact that he received and believed media reports. Again, this does not necessarily mean that Mr Bemba should not have taken steps to investigate this matter further, but this is a matter that arises under the "should have known"-test, which falls outside the scope of the present appeal.

4. *Causation*

51. The question of whether superior responsibility requires causation has been a live issue in legal writings for many years, and the present Judgment will unfortunately not give the long-awaited judicial answer, as the judges are divided and could only express themselves in opinions. We accept that there are plausible textual arguments for the view that article 28 of the Statute requires a causal link between the superior's omission and the commission of crime by a subordinate, which flows from the language of article 28 of the Statute and the terms "as a result of".⁴⁰ However, upon further analysis, we think that this position is difficult to

³⁹ Conviction Decision, paras 579-581.

⁴⁰ However, as observed by Judge Ozaki in her opinion, it is not possible to determine linguistically whether the expression "as a result of" pertains to the criminal responsibility of the commander or to the commission of the crimes. This is because the different language versions of the Statute have

maintain. We cannot agree with the theory of probabilistic causation, as developed by Judge Steiner in her concurring opinion and as accepted by our colleagues in the minority.

52. We do agree with the point made by many that a causation requirement cannot be upheld from a logical point of view. It is indeed not possible that an omission after a fact has occurred (that is, failure to refer criminal behaviour to the competent authorities) *causes* this fact. If causality were to be an element of article 28, then it would have to be accepted that a commander can *never* be held responsible for a single crime or for the first crime in a series on the basis of failure to refer the physical perpetrator to the competent authorities.

53. It has been suggested that a failure to punish the initial crime (in a series of crimes) may create a ‘culture of impunity’, which increases the risk of subsequent crimes. While this is theoretically possible, it is certainly not the case that every failure to refer a subordinate who is suspected of criminal activity to the competent authorities automatically induces future criminal conduct. For this to be the case, it would have to be shown that the perpetrators of the subsequent crimes knew about the initial crime, knew that the commander was aware of this crime and that he or she deliberately failed to take any measures to have the perpetrator held to account, and that this played a significant role in their decision to commit crimes themselves.

54. It should also be noted that article 28 of the Statute only requires commanders to refer criminal behaviour to the competent authorities and that it is the latter’s responsibility to prosecute and impose punishment. This will often create a time lag between the initial criminal act and any formal reaction by the authorities. More importantly, it also means that the commander is not directly responsible for which punishment, if any, is imposed on the physical perpetrator. Accordingly, a commander’s failure to refer criminal behaviour to the competent authorities can only be said to have a causal effect on subsequent crimes in very exceptional circumstances. This would mean that under an interpretation of article 28 of the Statute requiring causality as a *conditio sine qua non*, most cases involving a failure

different meanings. In particular, whereas the English, Russian, Arabic, and Spanish versions of article 28 are capable of being read as attaching the ‘result clause’ either to the criminal responsibility of the commander or to the commission of the crime; the French and Chinese versions appear to pertain more to the responsibility of the commander. [ICC-01/05-01/08-3343-AnxII, para. 11].

to refer subordinates suspected of criminal behaviour would fall outside the scope of this article. Such an interpretation would fall foul of the principle of effectiveness because it would lead to an absurd result: that is, that the chapeau of article 28 of the Statute would make it impossible to apply sub-paragraph (ii).

55. It is of no avail to argue, as the Pre-Trial Chamber and Judge Steiner did, that article 28 of the Statute does not provide a but/for causality test but instead only requires that the commander's omission increased the risk that subordinates would commit crimes. Although this theory of "probabilistic causation" may look convincing at first sight, we do not believe that it withstands critical analysis. The failure to take measures is a failure to *reduce* an existing risk that something will happen. If the superior does nothing, the risk that subordinates will commit a crime stays the same, his failure to act does not *increase* that risk. The responsibility of the commander is precisely to *decrease* the risk that his/her subordinates will commit crimes. Failing to reduce a risk can hardly be seen as causing the manifestation of said risk.

56. In sum, we are of the view that article 28 does not – and should not – require that the commander's failure caused his or her subordinates to commit crimes. This view is in line with the principle of strict interpretation enshrined in article 22 (2) of the Statute.

V. WERE THESE ACTS "CRIMES AGAINST HUMANITY"?

57. The acquittal in this case pertains to Mr Bemba's responsibility as a commander. This does not mean, quite obviously, that the crimes charged were not committed. The Trial Chamber indeed made findings beyond a reasonable doubt that a number acts of murder, pillaging and rape listed in paragraphs 624, 633 and 640 of the Conviction Decision were committed by MLC troops. Because of his acquittal on Ground III of the Appeal Brief (his responsibility as a commander, more particularly his failure to take reasonable and necessary measures), the question as to whether these crimes qualify as crimes against humanity (Ground IV of the Appeal Brief) remains unanswered in the Judgment.

58. As our esteemed colleagues, Judge Hofmański and Judge Monageng, take the view in their opinion that the crimes that were committed do qualify as crimes

against humanity, we wish to point out our own views. We are of the view that, on the evidence in this case, the crimes listed in the aforementioned paragraphs of the Conviction Decision cannot be characterised as crimes against humanity. First, we do not think that the evidence supports findings of a “widespread attack” and of “multiple commission”, second, we do not believe that the policy requirement under article 7(2) (a) of the Statute has been established on the evidence in this case.

1. *The requirements of a widespread attack and of multiple commission*

59. We agree with the Prosecutor that there is no connotation of scale beyond the minimum requirement of ‘multiple commission’. However, the fact that the Statute does not define the minimum number for “multiple commission” does not mean that there is no minimum threshold below which it is not possible to speak of crimes against humanity. Granted, this number may differ from one case to the other, depending on the circumstances (for example, depending on the size of the organisation, duration of the attack, territorial scope, size of civilian population within reach of the organisation, etc.). Nevertheless, that (variable) minimum number must be reached in each and every case. It does not matter, in this regard, whether the criminal acts took place in a single ‘incident’ or whether they were committed over a period of time. However, it is incongruous, in our view, to suggest that a ‘course of conduct’ can consist of only two criminal acts.⁴¹ To take such a view would qualify almost any serious human rights violation against a civilian as an ‘attack against the civilian population’, which is obviously absurd. For example, if three men abducted a woman and systematically raped her over the course of several days, nobody would seriously contend that such a series of crimes – horrific though it may be - should be characterized as an attack against a civilian population.

60. The Prosecutor is also correct in saying that the standard of proof applies to the existence of the ‘forest’ (that is, the course of conduct involving the multiple commission of acts referred to in article 7 (1) of the Statute) and not to the existence of individual ‘trees’ (that is, the individual crimes that together constitute ‘multiple

⁴¹ See amicus brief in *Gbagbo* (ICC-02/11-01/11-534, para. 11). Transcript of 11 January 2018, ICC-01/05-01/08-T-374-ENG, p. 36, line 23 to p. 38, line 6. For the reasons explained below, we do not think that there is any risk of subsuming the ‘widespread’ criterion into ‘multiple commission’, as they pertain to different aspects. The former relates to the geographical spread and the number of perpetrators involved, whereas the latter deals with magnitude only and applies to both widespread and systematic attacks.

commission’).⁴² However, this is beside the point. The real question is whether it is logically possible to prove the existence of a forest beyond a reasonable doubt without proving the existence of a sufficient (depending on how one defines a forest) number of trees beyond a reasonable doubt. Whereas trees exist independently of the forest, forests do not exist independently of the trees that constitute it.

61. The Pre-Trial Chamber in this case had indicated that the term ‘widespread’ encompasses the large-scale nature of the attack, in the sense that it “should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.⁴³ The Pre-Trial Chamber in the *Katanga* case, said that the term “widespread” refers to either an attack carried out over a large geographic area, or an attack in a small geographic area, but directed against a large number of civilians. We agree. In our view, the term should be given its ordinary and natural meaning, which refers to geographical distribution and/or the implication of a large number of perpetrators.⁴⁴ Importantly, it is not directly concerned with the number of incidents and/or victims, which falls under the ‘multiple commission’ element that applies equally to widespread and systematic attacks.⁴⁵

62. We are far from convinced that either the ‘multiple commission’ or the ‘widespread’ threshold has been reached on the evidence accepted by the Trial Chamber in this case even if, for the purposes of the contextual elements, the Trial Chamber could also rely on crimes which were not included in the charges but which it found to be established beyond a reasonable doubt.

63. We are equally unpersuaded by the Prosecutor’s argument, also discussed during the hearing, that the Court should take into account the pillages as a factor in the assessment of the ‘multiple commission’ requirement on the basis of article

⁴² Transcript of 11 January 2018, ICC-01/05-01/08-T-374-ENG, p. 52, lines 15-24; p. 53, line 18 to p. 57, line 17.

⁴³ Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424, para. 83.

⁴⁴ Oxford English Dictionary

⁴⁵ As the majority of Trial Chamber II correctly pointed out in the *Katanga* Judgment, the *existence* of an attack against a civilian population is a separate question from the *characterisation* of such an attack. ICC-01/04-01/07-3436, paras 1097-1098.

7(1)(k) (“other inhumane acts”) This argument distorts the language and nature of article 7(1)(k) of the Statute. The Elements of Crimes state quite clearly that the *actus reus* must be of a similar character to any of the other acts contained in article 7(1)(a)-(i). Footnote 30 to the Elements of Crimes further clarifies that ‘similarity’ is evaluated on the basis of the “nature and gravity” of the act. This implies that Chambers should apply the *ejusdem generis* principle when deciding whether certain conduct qualifies under article 7(1)(k). Given that the other crimes contained in article 7(1) are all crimes against the physical integrity or liberty of persons, property crimes are excluded from the purview of crimes against humanity. Article 7(1)(k) is a residual clause designed to capture conduct similar to the other crimes listed in article 7(1) that would otherwise fall through the cracks. It is not a clause to dramatically widen the scope of crimes against humanity. And in any event, the provisions of article 7 must be interpreted strictly (article 22(2)).

64. One of the central findings of the Conviction Decision is contained in paragraph 563, where the Trial Chamber found that there was “consistent and corroborated evidence that MLC soldiers committed many acts of rape and murder against civilians throughout the 2002-2003 CAR operation”. However, closer inspection of the relevant footnote reveals that the evidence in question consists mainly of documentary and testimonial hearsay evidence. As set out above⁴⁶, we have grave concerns about excessive reliance on hearsay evidence, especially if the reliability of the source of the information cannot be established. We also reject the Trial Chamber’s apparent conclusion that weak testimonial evidence can somehow be corroborated by weak documentary evidence, especially if one or both are based on (anonymous) hearsay.⁴⁷

65. The Prosecutor argues that Mr Bemba’s criticism of the Trial Chamber’s approach in relation to its findings on the ‘multiple commission’ requirement is

⁴⁶ Paragraph 3 and seq. of this Opinion.

⁴⁷ Paragraph 563 of the Conviction Decision states that “there is reliable evidence from various sources, including testimony, as corroborated by media articles, NGO reports, and the *procès verbaux d’audition de victime* submitted to the Bangui Court of Appeals, that MLC soldiers committed many acts of murder and rape, and many acts of pillaging [...]”. Closer analysis of the actual evidence reveals that with the exception of one witness, who testified on a very narrow issue, all the testimonial evidence referred to by the Trial Chamber is based on hearsay.

premised on a mistaken approach to the fact-finding process.⁴⁸ The Prosecutor even goes so far as to brand as “absurd” the suggestion that the Trial Chamber should not have relied on weak evidence because “it did not prove, in isolation, a fact which is not a material fact.”⁴⁹ Of course, she is right in saying that the Chamber must make its assessment on the basis of all the admitted evidence. Where the Prosecutor goes wrong, we think, is that she seems to believe that it is permissible for a Trial Chamber to evaluate all the evidence together, even if different items of evidence pertain to different instances of criminal conduct.

66. In particular, the Prosecutor makes the mistake of considering that the *legal elements* as such are the *material facts*. This cannot be correct: the ‘multiple commission’ and ‘widespread’ requirements are legal elements, which must be substantiated by way of material facts, and those material facts must be concrete (that is, have a time and place, identified victims and perpetrators, etc.)⁵⁰. Each of these material facts must be proved to the relevant standard. This means that there must be sufficient evidence for each individual instance of criminal conduct that is alleged to be part of the ‘course of conduct involving the multiple commission of [criminal] acts’. The Prosecutor’s approach would suggest that one could prove a pattern of killings without proving a single specific death. This is wrong, because a ‘course of conduct’ does not exist independently from the individual criminal acts, it is merely the sum of these acts.⁵¹

67. The Prosecutor’s appeal to the ‘holistic’ approach cannot counteract the absence of clear and convincing evidence. There is indeed a difference between claiming that one has ‘twenty’ coins and that one has ‘many’ such coins. However, in the end one can only legally prove that one has ‘many’ coins by defining how much ‘many’ is and then presenting evidence to prove the existence of each individual coin. It is thus certainly not true that a ‘piecemeal’ approach would lead the Chamber to exclude potentially relevant evidence. On the contrary, the Prosecutor’s proposed ‘cumulative’ approach creates the risk that the Chamber may consider evidence that

⁴⁸ “Prosecution Response to ‘Appellant’s submissions on the contextual elements of crimes against humanity, pursuant to ICC-01/05-01/08-3564’”, ICC-01/05-01/08-3578-Red, 27 November 2017, para 39.

⁴⁹ Ibid.

⁵⁰ Transcript of 11 January 2018, ICC-01/05-01/08-T-374-ENG, p.51, lines 2-12.

⁵¹ Para. 60 et seq. of this Opinion.

is not relevant or has no evidentiary weight to speak of and make findings under the illusion of corroboration. As indicated above, the dangers of the Prosecution's suggested approach are illustrated by the impugned Conviction Decision. We refer to our concerns expressed above about the opacity of the reasoning, the reliance on (anonymous) hearsay evidence and the findings beyond a reasonable doubt based on dubious circumstantial evidence.⁵²

68. More importantly, from an appellate point of view, the Prosecutor's version of the 'holistic' approach would make it almost impossible for the Appeals Chamber to scrutinise the Trial Chamber's findings. For example, the section dealing with contextual elements does not contain any finding about specific criminal acts beyond the sample of crimes listed in paragraphs 624, 633 and 640, which are, in and of themselves, insufficient to sustain a finding that there was 'multiple commission'. Instead, the Chamber simply states that "MLC soldiers committed many acts of murder and rape, and many acts of pillaging against civilians over a large geographical area, including in and around Bangui, PK12, PK22, Bozoum, Damara, Sibut, Bossangoa, Bossembélé, Dékoa, Kaga Bandoro, Bossemptele, Boali, Yaloke, and Mongoumba."⁵³ This sentence suggests that more crimes were committed at these locations than were identified in the aforementioned paragraphs. However, there is no indication about even the approximate number and nature of those additional crimes. There is also no indication of how the Trial Chamber determined that the perpetrators of these crimes were members of the MLC. It is thus far from clear how the Trial Chamber could have made any findings beyond a reasonable doubt on this crucial point.

2. *The policy requirement was not established*

69. We agree with the Prosecutor that the organisational policy does not need to be formalised and that it can be inferred from the manner in which the attack occurs. However, that does not mean that the policy does not need to be described or identified. Nowhere in the Conviction Decision is the content of the policy defined, other than by reference to the fact that an attack against the civilian population was committed. One might criticise this as an example of circular reasoning. The fact that many crimes against civilians were committed does not, in and of itself, elevate

⁵² Para. 3 et seq. of this Opinion.

⁵³ Conviction Decision, para. 563.

those crimes to crimes against humanity. We agree with Judge Ozaki that “while a pattern of violence may be relevant from an evidentiary perspective, it does not itself constitute a policy”.⁵⁴

70. Moreover, the eight factors on which the Trial Chamber relies (paragraph 676 et seq. of the Conviction Decision) are either irrelevant to the finding of an organisational policy or weak, because they are geared to prove something that is not a “policy” in the way this term should be understood. For example, the Trial Chamber relied on the MLC troops’ modus operandi advancing through the country and committing crimes, with practically no features that would make it indicative of a policy. Another factor relied on by the Trial Chamber is the so-called ‘self-compensation’ of MLC troops, which, apart from the fact that it relates to pillaging, which is not a crime listed in article 7 of the Statute, does not point to the existence of a policy and does not distinguish them from other groups committing the crime of pillaging. Indeed, there is not the slightest indication that the MLC deliberately underpaid its troops or did not provide them with sufficient resources in order to cause them to engage in looting.

71. The Trial Chamber also relied upon Mr Bemba’s failure to take all reasonable and necessary measures to prevent/repress/refer the crimes as a factor in support of the existence of a policy (paragraph 684 of the Conviction Decision). Even if the Majority in this appeal had accepted that Mr Bemba had failed to take all reasonable and necessary measures, we would still not have been convinced that he was guilty of crimes against humanity on this basis: whereas a State or organisational policy may, in exceptional circumstances, be implemented by a failure to take action (footnote 6 to the Introduction to the Elements of Crimes), this failure must be deliberate and “consciously aimed at encouraging such attack.” There is no evidence to suggest that this was the case here and, as the Elements of Crimes make clear, it would be entirely inappropriate to assume such intentions from the absence of action on behalf of the MLC. Otherwise, any finding of responsibility under article 28 of the Statute would have to be seen as supporting the existence of an organisational policy to commit crimes against humanity, which would be absurd given the nature of superior responsibility.

⁵⁴ ICC-01/05-01/08-3343-AnxII, para.30.

72. Finally, to avoid any confusion, we reiterate our view that evidence of a looting spree in an armed conflict may be indicative of some kind of coordination, but not necessarily of an organisational policy in the sense of article 7 (2) (a) of the Statute. This is because the policy must necessarily be aimed at committing crimes listed in article 7 (1) of the Statute and not war crimes or other forms of criminality. We do not want to belittle the great harm that acts of pillaging may have caused to the victims. Pillaging is indeed a war crime, but not a crime against humanity.⁵⁵ Interpreting this notion in the way the Trial Chamber did in this case amounts to an impermissible lowering of the threshold and a trivialisation of the crime against humanity.

VI. CONCLUSION

73. Our esteemed colleague in the Majority, judge Eboe-Osuji, was of the view that, rather than acquitting Mr Bemba, he should have been sent for retrial to a newly composed Trial Chamber. For us, this is not an option, given the fact that Mr Bemba, who now benefits from the presumption of innocence again, has already been in the Court's detention for over ten years. Ordering a retrial at this stage would inevitably prolong these proceedings by several more months, if not years.⁵⁶ In light of the scope and nature of the charges, this would be excessive in our view. We are also concerned that ordering a retrial after such a long time would create a perverse incentive for the Trial Chamber to arrive at a conviction in order to 'justify' the extended detention.⁵⁷ In addition, we would not find it fair to give the Prosecutor a "second chance" to prosecute this case, given the serious problems we have detected in the Prosecution case.

74. We anticipate that some will find our position on the interpretation of articles 7 and 28 of the Statute as well as our approach to fact-finding as too demanding on the Prosecutor. There was undeniable suffering on the part of the many victims of violence and cruelty at the hands of persons or groups that are related to the accused.

⁵⁵ We do not exclude that, in specific circumstances, pillaging might qualify as crimes against humanity as a form of 'persecution'. However, as there is no mention of persecutory intent in this case, we will not consider this point any further.

⁵⁶ Given the likelihood that the new Trial Chamber may wish to use regulation 55 of the Regulations of the Court in order to change for the knowledge to 'should have known' standard, the new trial would involve a lot more than simply a new panel of judges reviewing the existing case record.

⁵⁷ Given that Mr Bemba was convicted under article 70 of the Statute, it may be unrealistic to expect that the Trial Chamber would release him pending retrial.

However, it should never be forgotten that international criminal law is concerned with individual responsibility and culpability and not with righting socio-historical wrongs.

75. An acquittal may mean that hundreds or perhaps thousands of potential victims see their claims for reparation evaporate. We recognise that this will generate disappointment and frustration. We are not blind to the human drama. Yet, this may not be a factor in the decision whether or not to convict an accused. It is emphatically not the responsibility of the International Criminal Court to ensure compensation for all those who suffer harm as a result of international crimes. We do not have the mandate, let alone the capacity and the resources, to provide this to all potential victims in the cases and situations within our jurisdiction. For this reason we question the wisdom of limiting the possibility of offering compensation to victims of article 5 of the Statute crimes to those who – often by twist of fate – find themselves eligible claimants based on the charges brought by the Prosecutor. In other words, we do not propose to deny victims of crimes the possibility to seek individual compensation from the individuals that are convicted by the court. What we do suggest is that we stop viewing the International Criminal Court's reparation procedures as (part of) a mechanism to restore social justice and to heal the wounds of societies that have been torn apart by aggression, genocide, crimes against humanity or war crimes. Only if we do that will it be possible to manage victims' expectations and can we relieve International Criminal Court prosecutors and judges from potential pressure that is currently imposed upon them to secure convictions at all cost.

76. The quality of a criminal court will indeed not be measured by the number of its convictions, but by the fairness of its proceedings.⁵⁸ And as his Excellency Judge Anthony Thomas Aquinas Carmona, president of the Republic of Trinidad and Tobago, stated in his solemn address on the occasion of the opening of the Judicial Year the International Criminal Court in January 2018:

⁵⁸ Mark S. Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 *NEW ENG. L. REV.* 949, 949 (2003) (quoting Richard J. Goldstone, *Address before The Supreme Court of the United States, 1996 CEELI Leadership Award Dinner* (Oct. 2, 1996)) ("[History will judge the Tribunals for the former Yugoslavia and Rwanda on the fairness or unfairness of their proceedings.]").

“An Acquittal is sometimes viewed as failure to reward the victim. The process is not perceived to be as important as the result. This perception that a conviction is an indication that the Court is doing its work and that, of an acquittal, the reverse is true must be disbanded. There is no such thing as an endemic right to a guilty verdict. The endemic right lies in a just verdict”.⁵⁹

77. Today’s acquittal will disappoint many who have been waiting for years for someone to be held to account for the crimes that were committed against the population of the Central African Republic. Such disappointment is understandable, especially because the ICC was established precisely to bring justice to situations that would otherwise fall beyond the reach of the rule of law. However, this desire to bring justice should never come at the price of abandoning the basic principles of the rule of law. This means that the legal definitions should not be stretched beyond the text of the Statute and the Elements of Crimes. It also means that the standard of proof should be applied strictly and that the evidence must be evaluated with appropriate neutrality and rigour. A conviction that is based on weak and insufficient evidence benefits no one. It certainly does nothing to uphold the rule of law.

78. Justice can only be done when the right person is held responsible for the right charges, after a fair trial and on the basis of robust evidence. Mr Bemba’s acquittal simply means that we have found that the Conviction Decision failed to comply with one or more of these precepts. It is not excluded that if the Prosecutor had brought different charges or if she had found stronger evidence, it would have been possible to hold Mr Bemba criminally responsible for his failure as a commander in relation to some or all of the crimes that were committed by MLC soldiers in the CAR. However, it would be entirely inappropriate to speculate in this regard and we cannot turn back the clock. All we are allowed to conclude today is that the charges that were brought, when properly construed, were not sufficiently supported by the evidence that was submitted.

79. Today’s Judgment is thus neither a victory, nor a failure. It is the conclusion that a dispassionate application of the Statute compels us to accept. This does not mean that emotionally we do not empathise with the pain and loss of the victims.

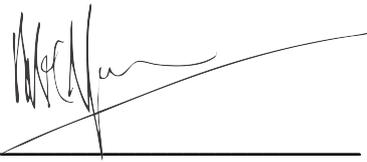
⁵⁹ His Excellency Judge Anthony Thomas Aquinas Carmona, president of the Republic of Trinidad and Tobago, Address at the International Criminal Court’s Inaugural Ceremony for the Opening of the Judicial Year 2018, 18 January 2018 in the International Criminal Court, p.12

However, even if Aristotle's dictum that law should be reason, free from passion, may strike us in the 21st century as somewhat inhuman, it remains true more than two thousand years later that, as humans, we can only hope to establish the rule of law if we discipline ourselves to be guided by rationality and resist the urge to allow emotions to determine judicial decisions.

Done in both English and French, the English version being authoritative.



Judge Christine Van den Wyngaert



Judge Howard Morrison

Dated this 8th day of June 2018

At The Hague, The Netherlands