Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański

Table of contents

I. INTRODUCTION

1. We respectfully disagree with the decision of our colleagues, Judge Van den Wyngaert, Judge Eboe-Osuji and Judge Morrison ("the Majority"), to discontinue the proceedings with respect to a number of criminal acts and to reverse the conviction of Mr Bemba with respect to the remainder of the criminal acts. We would have confirmed the Conviction Decision. Specifically, we disagree with the conclusions reached by the Majority in relation to the second ground of appeal concerning the scope of the charges and with its assessment of whether Mr Bemba failed to take all necessary and reasonable measures to prevent, repress or punish the commission of crimes by his subordinates. We also disagree with the standard of appellate review which the Majority adopts with respect to factual findings, a matter that we will address first. We will then explain why we are unable to join the Majority in relation to the second ground of appeal and its conclusions on the third ground of appeal, regarding necessary and reasonable measures. Thereafter, we will address the remaining grounds of appeal raised by Mr Bemba, which, in our view, do not warrant reversal of the Conviction Decision either. In relation to the grounds of appeal that are not addressed by the Majority, we wish to note that the views expressed in this opinion are not necessarily in contradiction with the views the Majority Judges may have. When examining the various grounds of appeal, we are guided by the standard of appellate review that has been applied by the Appeals Chamber so far, including in respect of alleged factual errors.

II. STANDARD OF REVIEW FOR ALLEGED FACTUAL ERRORS

2. In its first judgment on a final appeal before this Court, the Appeals Chamber stated its standard of review in relation to alleged factual errors as follows:

> [W]hen a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual finding.[1]

3. This standard of review, which accords a margin of deference to a trial chamber's factual findings,[2] was based on the Appeals Chamber's consistent jurisprudence regarding the

[1] *Lubanga* Appeal Judgment, para. 27.
[2] *Lubanga* Appeal Judgment, para. 22.

standard of review for factual errors in interlocutory appeals[3] and the consistent jurisprudence of the appeals chambers of the *ad hoc* international criminal tribunals.[4] We are not aware of any appellate chamber of an international or internationalised court or tribunal in the field of international criminal law that would apply a different standard of review. In our opinion, a different standard of review would also not be appropriate for such jurisdictions.

4. We therefore note with concern that the Majority has adopted a number of modifications to the standard of appellate review for alleged errors of fact. In our view, these modifications are unwarranted and contrary to the corrective model of appellate review and, in some aspects, potentially inconsistent with the Statute. In addition, the modifications appear to lead to inconsistencies, which will make it difficult for anyone to understand the standard of review that the Majority has followed.

5. We recall at the outset that the Appeals Chamber does not change its jurisprudence lightly. Article 21 (2) of the Statute provides that "[t]he Court may apply principles and rules of law as interpreted in its previous decisions". The Appeals Chamber is therefore not obliged to follow its previous interpretations of principles and rules of law. However, as the Appeals Chamber has previously held, "absent 'convincing reasons' it will not depart from its previous decisions".[5] This caution against readily departing from the previous jurisprudence ensures "predictability of the law and the fairness of adjudication to foster public reliance on its decisions".[6] In our view, predictability of the law is essential for any court, especially for the ICC, that has a complex legal framework and only a limited number of cases; parties and participants should be able to assume that the interpretation of the law by the Appeals Chamber will not be changed lightly. In our view, the Majority does not provide any reason for departing from the established standard of appellate review for alleged factual findings, which has been applied in all judgments on final appeals before the Court, including the *Bemba et al.* Appeal Judgment of 8 March 2018. They do not give reasons for this departure, despite the standard of review being a fundamental question for the appellate process with significant implications for the parties and participants. Furthermore, the Majority does not

[3] *Lubanga* Appeal Judgment, paras 21-22.
[4] *Lubanga* Appeal Judgment, paras 23-27.
[5] *Gbagbo* OA 6 Decision on Victims Participation, para. 14.
[6] *Gbagbo* OA 6 Decision on Victims Participation, para. 14. *See also* *Bemba* OA 2 Decision on Victims Participation, para. 16.

cite to any authority in support of its propositions, which makes it all the more difficult to engage with the modifications they adopt and understand the reasons for their adoption.

6. In our view, the standard of review applied so far (we will refer to it as "the conventional standard") ensures that miscarriages of justice resulting from factual errors made by a trial chamber are avoided and the rights of the convicted person fully protected, while it also recognises the different roles of the trial chambers on the one hand, and the Appeals Chamber on the other hand. In respect of the latter, the Appeals Chamber has previously acknowledged that the trial chamber is better positioned than the Appeals Chamber to assess the reliability and credibility of evidence.[7] The trial chamber does not only have the advantage of observing witnesses as they testify, but it also benefits from exposure to the totality of evidence as it is presented by the parties at trial. The trial chamber's advantage *vis-à-vis* the Appeals Chamber in terms of exposure to evidence is particularly significant in light of the kind of cases tried by international and internationalised courts and tribunals. The cases before such courts are typically very large. For instance, during the trial in the present case, the Trial Chamber heard 77 witnesses and admitted 733 items of evidence.[8] It heard extensive submissions from the parties and participants on factual allegations and conducted hearings during which the evidence was presented over a period of almost four years, with the transcripts of these hearings running into thousands of pages.

7. While the Appeals Chamber in an appeal against a conviction has access to the trial record and can therefore consult the transcripts of the witnesses' testimony and documentary evidence and study the parties' and participants' submissions before a trial chamber, this does not replace the specific familiarity with the evidential record that the trial chamber enjoyed, resulting from its hearing of all witnesses and seeing the case unfold. The Appeals Chamber does not benefit from such extensive exposure to the evidence and the parties' and participants' arguments and it is unlikely that the Appeals Chamber, by merely reading the trial record, could ever attain the same level of familiarity with the case as the trial chamber. In our view, it is therefore natural for the Appeals Chamber to give a margin of deference to the findings of the trial chamber. If the Appeals Chamber were to assess all evidence *de novo*, according no deference to the first-instance findings, the appellate proceedings would

[7] *Lubanga* Appeal Judgment, para. 24.
[8] Conviction Decision, para. 17.

necessarily turn into a second trial. That would pose the risk of inaccuracy, given the Appeals Chamber's above-mentioned limitations with respect to review of evidence. It could also lead to inordinate delays in the examination of appeals, contrary to the person's right to be tried without undue delay.

8. We therefore are unable to agree with the Majority's proposition that the margin of deference which the Appeals Chamber gives to factual findings of the trial chamber "must be approached with extreme caution".[9] We also find it difficult to understand what this should mean in practice. The obvious alternative for giving deference to the trial chamber's factual findings is a *de novo* review of all evidence. It is not clear, however, whether the Majority's choice for "extreme caution" means that it is prepared to carry out such review. At least in the present case, it appears that the Majority's review of evidence was, in fact, very limited, as will be discussed in more detail below. In addition, despite its reference to caution, the Majority seems to endorse the Appeals Chamber's previous ruling that it will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber.[10]

9. Under the conventional standard of review, the Appeals Chamber determines "whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question".[11] The Appeals Chamber will interfere only where it cannot discern how the trial chamber's conclusion could have reasonably been reached from the evidence before it.[12] This is in line with the corrective model of appellate proceedings.[13] We note that the Majority seems to depart from this standard and indicates that the Appeals Chamber may interfere with the factual finding also "whenever the failure to interfere may occasion a miscarriage of justice".[14] However, more explanation would have been helpful to better

[9] Majority Judgment, para. 38.
[10] Majority Judgment, para. 42, referring to *Lubanga* Appeal Judgment, para. 27.
[11] *Lubanga* Appeal Judgment, para. 27.
[12] *Lubanga* Appeal Judgment, para. 21.
[13] *Lubanga* Appeal Judgment, para. 56. *See also*, regarding the proceedings before the ICTY, *Vasiljević* Appeal Judgment, para. 5: "The appeals procedure provided for under Article 25 of the Statute is corrective and does not give rise to a *de novo* review of the case"; *Šešelj* Appeal Judgment, para. 12.
[14] Majority Judgment, para. 40. We note that the term "miscarriage of justice", used by the Majority, appears in the ICTY Statute. However, pursuant to article 25 (1) (a) of that Statute, the ICTY Appeals Chamber shall hear appeals on the grounds of "an error of fact which has occasioned a miscarriage of justice". Therefore, at the ICTY, it must be an error committed by the trial chamber, which occasions a miscarriage of justice. The

understand the nature of this test and the reason for this apparent departure from the conventional standard.

10. The Majority also refers to "serious doubts" which "a reasonable and objective person can articulate" about the accuracy of a given finding.[15] According to the Majority, once the Appeals Chamber is satisfied, on the basis of such "serious doubts", that the trial chamber may have not respected the standard of proof, it may find that an error of fact was made.[16] We submit that this is a standard that accords little or no deference to the trial chamber's findings and therefore cannot be reconciled with the conventional standard of appellate review.

11. The Majority also seems to accord itself the power (or rather the duty, given the use of the word "must") to overturn findings, which "can reasonably be called into doubt".[17] In our opinion, this is potentially at odds with the language of article 83 (2) of the Statute, which requires that an error must materially affect the decision. If the Majority is to be understood as saying that an erroneous factual finding automatically should lead to overturning a conviction, this would be incompatible with that statutory requirement. Before overturning a conviction on the basis of a doubt, the Appeals Chamber would first have to assess the material effect of that doubt on the impugned decision, pursuant to article 83 (2) of the Statute.

12. We note that the standard of reasonableness reflected in the conventional standard of review is based on the understanding that sometimes, more than one reasonable factual conclusion can be made on the basis of the available evidence, for instance because of differences in the credibility assessment of witnesses. The Statute implicitly recognises this by stipulating that decisions of a trial chamber, including on factual findings, may be taken by majority.[18] Thus, a trial chamber may convict an accused even if one of the judges of that chamber is of the view that guilt has not been established beyond reasonable doubt. In such a situation, it is conceivable that both the majority and the dissenting judge have reached

---

Majority, in contrast, seems to put forward that the Appeals Chamber's failure to intervene would occasion a miscarriage of justice.

[15] Majority Judgment, para. 45.
[16] Majority Judgment, para. 45.
[17] Majority Judgment, para. 46.
[18] *See* article 74 (5) of the Statute.

reasonable factual conclusions[19] and the Appeals Chamber may find no error in the trial chamber's factual finding on which the conviction rests. To succeed with an allegation of a factual error, the appellant must show that the impugned finding is one that no reasonable trial chamber would have made.[20] In determining whether the trial chamber's factual finding was one that was open to a reasonable trier of fact, the Appeals Chamber will necessarily have regard to the views of the dissenting judge; nevertheless, the mere fact that one of the three judges of the trial chamber adopted a different view would not necessarily lead to the conclusion that the trial chamber's finding was erroneous, in accordance with the conventional standard of review.

13. If, on the other hand, one were to address the same situation against a "serious doubts" standard, it would arguably be difficult to uphold any factual finding against an accused made by a majority of the trial chamber: the existence of such a dissent would almost automatically lead to "serious doubts" as to the correctness of the trial chamber's finding (unless the dissenting judge is shown not to be "a reasonable and objective person"). In our view, this is an indication that the "serious doubts" standard espoused by the Majority in this case is incompatible with the Statute because the Statute accepts that decisions by the trial chambers may be taken by majority. For that reason, we are unable to agree with the "serious doubts" standard of the Majority.[21]

14. It is also significant to note that, when hearing an appeal, the Appeals Chamber does not apply the evidentiary standard of beyond reasonable doubt directly, which the Majority's view, in effect, implies. If the Appeals Chamber were to assess the Trial Chamber's findings in light of this standard, it would be conducting a *de novo* trial, which, in our view, is not its function. The Appeals Chamber's review is corrective and only assesses the reasonableness

[19] *See* *Kupreškić et al.* Appeal Judgment, para. 30: "It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence"; *Krnojelac* Appeal Judgement, para. 12: "It is accepted […] that two reasonable triers of fact might reach different but equally reasonable findings".

[20] *See* *Krnojelac* Appeal Judgement, para. 12: "A party suggesting only a variation of the findings which the Trial Chamber might have reached […] has little chance of a successful appeal, unless it establishes beyond any reasonable doubt that *no* reasonable trier of fact *could have* reached a guilty finding" (emphasis in original).

[21] *See* *Ntawukulilyayo* Appeal Judgment, para. 15: "The Appeals Chamber notes that, in support of many of his submissions, Ntawukulilyayo refers to the Dissenting Opinion of Judge Akay. The Appeals Chamber recalls that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, both of which are reasonable. It is only when the evidence relied on by the Trial Chamber could not have been accepted by any reasonable trier of fact, or where the evaluation of the evidence is wholly erroneous, that the Appeals Chamber can substitute its own finding for that of the Trial Chamber" (footnotes omitted).

of the impugned findings. In doing so, the Appeals Chamber should take account of the beyond reasonable doubt standard – as is indeed reflected in the standard that was adopted in *Lubanga* – but only to the extent that this was the standard which the Trial Chamber was under a duty to follow. As a result, the Appeals Chamber's task is to assess whether no reasonable trier of fact could have been satisfied beyond reasonable doubt as to the impugned finding.

15. We would like to emphasise at this juncture that the conventional standard of review for factual findings by no means results in a "hands-off" approach by the Appeals Chamber in its assessment of allegations of factual errors. Rather, the conventional standard of review requires the Appeals Chamber to carefully consider the impugned factual finding and the underlying evidence, as well as the trial chamber's analysis thereof, with a view to determining whether the finding was reasonably reached, bearing in mind the demanding standard of "beyond reasonable doubt" applicable before the trial chamber. The Appeals Chamber must not turn a blind eye to shortcomings in the factual findings. Nevertheless, mindful of the inherent advantage of the trial chamber in assessing the credibility and probative value of evidence, resolving any contradictions therein and contextualising it with other evidence, as well as the Appeals Chamber's own limitations in attaining the same level of familiarity with the evidential record, the Appeals Chamber should, in our view, not intervene merely because it has a "doubt", even if it is a "serious" one, as to the correctness of the trial chamber's finding. While such an approach may appear, on its face, to better protect the interests of the accused person, it leads, in reality, to the very real risk of incorrect decision making at the appellate level. The conventional approach to the standard of review assists in mitigating such risks, while also protecting the accused person against wrongful convictions that are the result of erroneous factual findings.

16. We also note with concern that the Majority appears to have modified the requirement of substantiation of arguments on appeal, stating that it suffices for the appellant "to identify sources of doubt about the accuracy of the trial chamber's findings".[22] The Majority considers that the duty to substantiate errors in the conviction decision "should not lead to a

[22] Majority Judgment, para. 66.

reversal of the burden of proof".[23] We respectfully submit that these propositions conflate two distinct notions – the burden of proof before the trial chamber and the burden of substantiation of arguments on appeal. While the former is on the Prosecutor and relates to the presumption of innocence at trial, the latter is on the appellant and relates to the assessment of arguments on appeal.[24] As the ICTY Appeals Chamber has noted:

> [T]he presumption of innocence does not apply to persons convicted by Trial Chambers pending the resolution of their appeals. This interpretation of the Appeals Chamber's jurisprudence is further consistent with the standard of review applicable in appellate proceedings whereby the appealing party has the burden of showing an error of law or of fact that invalidates the trial judgement, or leads to a miscarriage of justice, rather than attempting to initiate a trial *de novo*. This burden is clearly different from the one operative at trial, where the presumption of innocence does apply and the Prosecution has to prove its case beyond reasonable doubt.[25] [Footnotes omitted.]

17. Thus, in appellate proceedings of the corrective type, like the ones before this Court and other international and internationalised tribunals, the principle of "*ei incumbit probatio qui dicit non qui negat*"[26] applies. In our view, if appellants were not required to substantiate the errors they allege and how these errors affect the impugned decision, they would be able to disagree with just about any finding of the trial chamber and formulate countless alternative conclusions, in order to obstruct the proceedings. The Majority seems to be willing to accept such obstruction by stating that the Appeals Chamber is *obliged* to "independently review the trial chamber's reasoning" whenever the appellant identifies "sources of doubt".[27] This could have serious consequences on the duration of appellate proceedings and the accused person's right to a trial without delay.

18. We note with concern that the standard of "serious doubts" guided the Majority's analysis of the Trial Chamber's findings on necessary and reasonable measures with the unfortunate result of reversing the impugned findings seemingly with little or no regard to the statutory requirement that errors of fact warranting reversal must be ones that materially affect the decision. In our respectful opinion, this is therefore not only a case of a misinterpretation of the standard of appellate review, but also one of misapplication of article

[23] Majority Judgment, para. 66.
[24] *See* *Vasiljević* Appeal Judgment, para. 12.
[25] *Delić* Decision on Outcome of Proceedings, para. 14.
[26] The burden of the proof lies upon him who affirms not he who denies.
[27] Majority Judgment, para. 66.

83 (2) of the Statute. As we will show later in this opinion, the Majority does not appear to conduct a comprehensive review of the Trial Chamber's findings and the evidence upon which it relied to satisfy itself that the errors it found materially affected the Conviction Decision. As a result, we have the impression that the Majority did not apply even its own standard fully. Even if the Majority were to be understood as requiring an assessment, under the standard of beyond reasonable doubt, of the accuracy of the Trial Chamber's findings, it fails to do that as well. Rather than engaging with all the evidence on which the Trial Chamber relied to reach an impugned factual finding, with a view to determining whether this finding could be reached beyond reasonable doubt, the Majority considers individual items of evidence. Thus, any conclusion that the Majority reaches can, in our view, only be impressionistic and provides an insufficient basis to overturn findings of the Trial Chamber.

III. SECOND GROUND OF APPEAL: "THE CONVICTION EXCEEDED THE CHARGES"

A. Introduction

19. The Majority appears to proceed on the understanding that the "facts and circumstances described in the charges" referred to in article 74 (2) of the Statute are the equivalent of the statement of facts, "which provides a sufficient legal and factual basis to bring the person[s] to trial" under regulation 52 (b) of the Regulations of the Court.[28] The Majority finds that, "in the present case, the 'facts and circumstances' [under article 74 (2) of the Statute] were described, in relation to the crimes, at the level of individual criminal acts".[29] This is derived from their view that "[s]imply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52 (b) of the Regulations of the Court and does not allow for a meaningful application of article 74 (2) of the Statute".[30] As a result, the Majority considers it necessary to compare the detailed factual allegations in the charges – the individual criminal acts committed by MLC troops – and the factual basis for the conviction in order to assess whether the conviction exceeded the scope of the charges in the present case.

[28] Majority Judgment, paras 104, 110.
[29] Majority Judgment, para. 111.
[30] Majority Judgment, para. 110.

20. We regret that we are unable to agree with the Majority's interpretation of article 74 (2) of the Statute and its approach to delineating the scope of the charges in the present case. In our view, article 74 (2) of the Statute is aimed at ensuring a separation between the prosecutorial function of determining the scope of a case and the judicial function of fact-finding within the scope of the case brought by the Prosecutor. Given its purpose, which we will discuss in more detail later in this opinion, article 74 (2) of the Statute is generally not concerned with the level of detail of the charges. We consider that it is for the Prosecutor to define the factual scope of a case and that the identification of the broad parameters of a case may suffice to serve article 74 (2)'s purpose of delineating the jurisdiction of the trial chamber.

21. Our opinion that it is possible for the facts and circumstances to be described in the charges at a broad level for the purposes of article 74 (2) of the Statute during the early stages of a case is also linked to our understanding of the confirmation of charges process and the role of the pre-trial chamber. In our view, the pre-trial chamber is tasked with determining whether there is a case to be tried – "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged"[31] – and not with confirming or crystallising the totality of the factual allegations underpinning these charges for the purposes of the trial. Again for this purpose, we consider that the pre-trial chamber may confirm the crimes charged in a broad manner depending on the nature of the charges brought by the Prosecutor.

22. For these reasons, as explained in more detail below, we would have found that Mr Bemba's conviction did not exceed the facts and circumstances described in the charges that were brought against him. Consequently, we would not have discontinued the proceedings with respect to the criminal acts which the Majority finds to exceed "the facts and circumstances described in the charges".

B. Article 74 (2) of the Statute

23. Article 74 (2) provides in relevant part:

[31] Article 61 (7) of the Statute.

> The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

24. Although the ordinary meaning of this provision is clear, we find it useful to examine the drafting history, which sheds light on the purpose of its inclusion in the Statute. The proposal to include the above principle was introduced by the Argentinian delegation in 1996 in a working paper on the Rules of Procedure phrased as follows: "[t]he judgement shall not exceed the facts and circumstances described in the indictment or in its amendment, if any".[32] In a note to this addition, Argentina submitted that this provision "states the principle of congruence between the indictment and the judgement: the tribunal cannot decide on facts which have not been included in the indictment or in its amendment".[33]

25. From the foregoing, we consider it to be clear that the relevant sentence of article 74 (2) of the Statute was introduced to enshrine in the Rome Statute the "principle of congruence". In ensuring that the final decision of the court reflects the facts for which the accused was brought to trial, this principle serves the essential function of limiting the jurisdiction of the trial chamber to the charges brought by the Prosecutor.[34]

26. This interpretation of article 74 (2) of the Statute is also supported by a holistic reading of the Statute. Indeed, the division of prosecutorial and judicial functions stipulated in article 74 (2) of the Statute with respect to the scope of the decision rendered by a trial chamber at the end of the trial, mirrors the division of functions between the Prosecutor and the pre-trial chamber during the initiation of prosecutions before the Court. In this regard, we note that articles 58 and 61 of the Statute vest the Prosecutor with exclusive authority to frame the charges, with the role of the pre-trial chamber being restricted, under article 61 (7) of the Statute, to confirming the charges, declining to confirm the charges or adjourning the hearing and requesting the Prosecutor to consider amending a charge or providing further evidence or conducting further investigation with respect to a particular charge. Read together, we consider these provisions to reflect adherence to the accusatorial principle. They are aimed at

---

[32] Argentinian Working Paper.
[33] Argentinian Working Paper, at p. 12. The subsequent draft proposals did not substantially change the original text. *See* Compilation of Proposals, p. 224; Zutphen Report, 4 February 1998, p. 121; 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court, pp. 115-116; Report on the Establishment of an International Criminal Court Vol III, p. 119.
[34] *See*, for example, R. Vogler and B. Huber (eds), Criminal Procedure in Europe, Duncker and Humblot, 2008, pp. 556-557.

ensuring that responsibility for framing the charges and determining the scope of the criminal trial remains with the Prosecutor throughout the proceedings, subject to the confirmation or non-confirmation of the charges by the pre-trial chamber.

27. We further consider that the Prosecutor has discretion to formulate the charges in a manner appropriate to the type of case she wishes to bring. From the perspective of article 74 (2) of the Statute, it is important that the charges are described in a way that enables the chamber, as well as the parties and participants, to determine with certainty which sets of historical events, in the course of which crimes within the jurisdiction of the Court are alleged to have been committed, form part of the charges, and which do not. This delineation can be made based on specific criminal acts; however, depending on the case, the delineation may also be made based on broader parameters, for instance, by specifying a period of time and a geographical area over which criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims. The Prosecutor's discretion in the manner in which she formulates the charges is informed by the specific circumstances of the given case, for instance the number of criminal acts in cases of mass criminality and the mode of responsibility alleged. For instance, in cases where command responsibility is alleged for mass crimes committed by the accused's subordinates, the focus of the case will generally be the accused person's ability and failure to exercise control properly, and the detail of the individual criminal acts alleged will generally be less material to the description of the charges under article 74 (2) of the Statute than in cases, for example, where the accused is alleged to have directly perpetrated those acts.

28. If the Prosecutor decides to bring a broadly defined case, she may still have to list or refer to specific criminal acts in order to comply with the accused person's right under article 67 (1) (a) of the Statute to be informed in detail of the charges. However, this does not limit the scope of the case to those criminal acts – other criminal acts not mentioned in the document containing the charges may still fall within the – broadly described – facts and circumstances of the charges. More factual detail may be required to comply with the accused person's right to be informed of the charges than that necessary to determine the factual scope of the case for the purposes of article 74 (2) of the Statute.

29. In the present case, the document containing the charges defined the scope of the charges by way of temporal, geographical and other factual parameters. For instance, in

relation to the charge of murder as a crime against humanity, the charge was formulated as follows:

> Count 7 (Murder constituting a Crime against Humanity)
>
> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed crimes against humanity, by the killing of men, women and children civilians in the Central African Republic […]. [Footnote omitted.][35]

30. While the document containing the charges listed a number of examples of specific criminal acts, it made it clear that the charges "include, but are not limited to" those acts.[36]

31. The document containing the charges specified that the crimes charged were committed "during [the MLC troops'] advance and withdrawal from the CAR".[37] It provided the date and place of entry of the MLC troops to the territory of the CAR,[38] and described the participation of the MLC troops in fighting in and around Bangui,[39] as well as their subsequent movement along two routes[40] and withdrawal from the CAR.[41]

32. We are therefore of the view that the charges in the present case were formulated broadly. They were not limited to the specific individual criminal acts mentioned in the Amended Document Containing the Charges and in the Confirmation Decision. The charges encompassed acts of murder, rape and pillaging committed by the MLC troops in the CAR from on or about 26 October 2002 to 15 March 2003. However, contrary to the Majority's suggestion that "a territory of more than 600,000 square kilometres" was covered by reference to the territory of the CAR,[42] in our view, the temporal and geographical scope of the charges was further specified by reference to the description of the advance through and withdrawal from the CAR of the MLC troops, and thus covered a relatively restricted area, limited to several specified localities and two axes between other specified localities. We consider this description of the facts and circumstances described in the charges to be adequate from the perspective of article 74 (2) of the Statute in the circumstances of this case,

---

[35] Corrected Revised Second Amended Document Containing the Charges, p. 34.
[36] Corrected Revised Second Amended Document Containing the Charges, pp. 32-34.
[37] Corrected Revised Second Amended Document Containing the Charges, para. 21.
[38] Corrected Revised Second Amended Document Containing the Charges, para. 17.
[39] Corrected Revised Second Amended Document Containing the Charges, para. 18.
[40] Corrected Revised Second Amended Document Containing the Charges, para. 19.
[41] Corrected Revised Second Amended Document Containing the Charges, para. 21.
[42] Majority Judgment, para. 103.

also bearing in mind that Mr Bemba was charged with command responsibility under article 28 (a) of the Statute and was alleged to have been distant from the actual commission of crimes by MLC troops.

C. Role of the pre-trial chamber

33. As indicated earlier, the role of the pre-trial chamber and the functions of the confirmation proceedings are relevant to our interpretation of article 74 (2) of the Statute. We underline that the primary function of the confirmation proceedings is, pursuant to article 61 (7) (a) of the Statute, to determine whether to "commit the person to a Trial Chamber for trial". As the Appeals Chamber has previously held, "[article 61 of the Statute] clearly shows that the confirmation of charges hearing exists to separate those cases and charges which should go to trial from those which should not, a fact supported by the drafting history".[43]

34. According to the language of article 61 (7) of the Statute, the pre-trial chamber's enquiry in the confirmation proceedings is directed at confirming "crimes". Where specific criminal acts are alleged to support a more broadly described charge, the pre-trial chamber must consider these acts in so far as it may serve its enquiry into whether there is sufficient evidence to establish substantial grounds to believe that the person committed the *crimes charged*. In such a case, allegations of such criminal acts are primarily vehicles to prove a broader allegation and it may therefore not be necessary for the pre-trial chamber to assess all criminal acts put forward by the Prosecutor. The pre-trial chamber may then, as it did in the present case, rely on all or some of those acts to confirm the crimes charged. The correctness of this approach is confirmed by the provisions regulating the time limits applicable during the confirmation proceedings, which may not always allow for a detailed and comprehensive enquiry by the pre-trial chamber in relation to all individual criminal acts aimed at establishing the crimes charged.[44] Therefore, we consider that, at this stage of proceedings, the pre-trial chamber's consideration of the detailed underlying factual allegations should be limited to that which is necessary to allow it to execute its function of determining whether

[43] *Mbarushimana* OA4 Judgment, para. 39.
[44] For instance, rule 121 (3) of the Rules requires that the Prosecutor provide to the Pre-Trial Chamber and the person a description of the charges and a list of evidence "no later than 30 days before the date of the confirmation hearing". Furthermore, pursuant to regulation 53 of the Regulations of the Court, "[t]he written decision of the Pre-Trial Chamber setting out its findings on each of the charges shall be delivered within 60 days from the date the confirmation hearing ends".

the charges should be confirmed. Finding otherwise would create a laborious fact-finding process prior to trial that is not required by the provisions of the Statute and would be incompatible with judicial efficiency.

35. We note that the Pre-Trial Chamber in confirming the charges in the present case largely conformed to the approach outlined above. It did not confirm or decline to confirm criminal acts but rather referred to "relying" or declining "to rely" on certain criminal acts for the purpose of confirming a charge, which it understood to be broader than the listed criminal acts.[45] Given the manner in which the Prosecutor formulated the charges in the present case, we are of the view that the Pre-Trial Chamber interpreted and executed its mandate appropriately.

36. Our consideration of this procedural framework leads us to the view that, if charges are formulated broadly and are confirmed as such by the pre-trial chamber, the Prosecutor may rely on individual criminal acts not relied on for the purposes of the confirmation proceedings. However, these criminal acts must remain within the scope of the charges as confirmed, so as to comply with article 74 (2) of the Statute. The accused's right to receive detailed information of the charges promptly, under article 67 (1) (a) of the Statute, as well as his or her right to have adequate time for the preparation of the defence, under article 67 (1) (b) of the Statute, must also be respected. In this regard, we note that article 67 (1) (a) of the Statute and other provisions relating to notice of the charges, including article 61 (3) of the Statute, rule 121 (3) of the Rules and regulation 52 of the Regulations of the Court, apply also during the pre-trial phase of proceedings and put emphasis on the level of detail of the information that must be provided. The question of whether notice given of further factual allegations violates the rights of the accused must be assessed in light of the accused's right to be informed promptly and in detail of the charges against him or her, also balancing the accused's rights to have adequate time and facilities for the preparation of his or her defence and to be tried without undue delay under article 67 (1) (b) and (c) of the Statute. Thus, the potential for the Prosecutor to rely on more detailed factual allegations, including additional individual criminal acts at trial is limited by the rights of the accused.

[45] *See e.g.* Confirmation Decision, paras 140, 169, 338.

37. In the present case, we note that the individual criminal acts relied upon by the Trial Chamber for the purposes of the conviction were either confirmed by the Pre-Trial Chamber or were otherwise notified to Mr Bemba. All of these acts fell within the scope of the charges in the sense that they were acts of murder, rape or pillaging committed by MLC forces from on or about 26 October 2002 to 15 March 2003, during the movement of the troops through the territory of the CAR.

38. We note that Mr Bemba has not argued in his appeal that his right to be informed of the charges under article 67 (1) (a) of the Statute was infringed by the timing and manner in which notice of the charges was given, and we do not consider it necessary to address these questions in more detail for present purposes. To the extent that Mr Bemba can be understood to argue that he was wrongly convicted for the individual criminal acts introduced during the trial through the evidence of V1 and V2, because he only received notice of those acts after the commencement of the trial,[46] we note that at trial he did not raise any objection to the introduction of the evidence of V1 or V2 on the grounds that he had received insufficient notice of the allegations presented. He only objected to this evidence on the basis that it would be cumulative of other evidence[47] and that its introduction would delay the trial.[48] Therefore, we would have dismissed this argument *in limine*.

D. Conclusion

39. In view of the foregoing, we disagree with the Majority that the charges in the present case were formulated too broadly to amount to a meaningful description of the charges within the meaning of article 74 (2) of the Statute. As demonstrated above, article 74 (2) of the Statute is concerned with congruence between the charges and the conviction, rather than with the level of detail of the charges. Consistent with the Prosecutor's discretion to formulate charges, she may do so at a broader level and this does not affect the pre-trial chamber's function of confirming the crimes charged and committing the person for trial. In the present case, the charges were delineated by temporal, geographical and other factual parameters; they were further specified by reference to the description of the advance through and withdrawal from the CAR of the MLC troops. In these circumstances, we find that the

[46] Appeal Brief, paras 122-123.
[47] Mr Bemba's Response to Victims' Application to Present Evidence, paras 26-30.
[48] Mr Bemba's Response to Victims' Application to Present Evidence, para. 36.

facts and circumstances were properly described in the charges, taking into account the mode of criminal responsibility charged, the remote position of the accused to the crimes charged and the number of criminal acts alleged. Given the broad formulation of the charges, we are satisfied that the conviction did not exceed the facts and circumstances described in the charges, within the meaning of article 74 (2) of the Statute.

40. We would therefore have concluded that Mr Bemba failed to show that the Trial Chamber committed a legal error and would have rejected the second ground of appeal.

IV. THIRD GROUND OF APPEAL: "MR BEMBA IS NOT LIABLE AS A SUPERIOR"

A. "Mr Bemba took all necessary and reasonable measures"

1. Introduction

41. In our view of the present case, three core aspects of the Trial Chamber's reasoning supported the conclusion that "Mr Bemba failed to take all necessary and reasonable measures within his power to prevent or repress the commission of crimes". First, the Trial Chamber acknowledged that "Mr Bemba took a few measures over the course of the 2002-2003 CAR Operation", but noted that all "were limited in mandate, execution, and/or results".[49] Second, the Trial Chamber found that the MLC troops continued committing crimes throughout the 2002-2003 CAR Operation,[50] and that consistent information regarding these crimes was brought to Mr Bemba's attention.[51] Third, the Trial Chamber considered the measures taken "in light of his extensive material ability to prevent and repress the crimes".[52] Based on this assessment, the Trial Chamber concluded that the measures taken "patently fell short of 'all necessary and reasonable measures' to prevent and repress the commission of crimes within his material ability".[53]

42. Regarding Mr Bemba's failure to submit the matter to the competent authorities, the Trial Chamber noted that "he had ultimate disciplinary authority over the MLC contingent in the CAR", but failed to empower the full and adequate investigation and prosecution of

[49] Conviction Decision, paras 719-720.
[50] Conviction Decision, paras 671, 677, 688.
[51] Conviction Decision, paras 708-717, 726.
[52] Conviction Decision, paras 729-730.
[53] Conviction Decision, para. 731.

allegations of crimes internally within the MLC and "made no effort to refer the matter to the CAR authorities, or cooperate with international efforts to investigate the crimes".[54]

43. As explained in detail below, we have reviewed the Trial Chamber's findings in light of the arguments raised by Mr Bemba on appeal and we are unable to identify any error in the Trial Chamber's findings or any unreasonableness in the overall conclusions. We would therefore have rejected Mr Bemba's arguments and confirmed the findings and conclusions of the Trial Chamber.

44. The Majority reaches an alternative conclusion based on an analysis that we are unable to accept and find to be deeply flawed. Regarding the measures actually taken by Mr Bemba, the Majority finds that the Trial Chamber: (i) paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba's ability to take measures;[55] (ii) treated Mr Bemba's motivations as determinative of the adequacy or otherwise of the measures;[56] and (iii) failed to establish that Mr Bemba purposively limited the mandates of the commissions and inquiries.[57]

45. In our view, the first error identified is based on an erroneous assessment of a limited part of the evidentiary record and the uncritical acceptance of Mr Bemba's unsubstantiated argument, which does not point to any attempts to investigate that were in fact made and proved impossible. The second error identified is not argued by Mr Bemba and appears to reflect the Majority's subjective view of the Trial Chamber's reasoning, which has no basis in the Conviction Decision, as will be further explained below. Regarding the third error identified, we consider the Majority's position to misconstrue the nature of criminal liability under article 28 of the Statute. Notably, in faulting the Trial Chamber for failing to make findings as to whether the shortcomings in the measures that Mr Bemba took could be attributed to him and whether he purposively limited the mandates of the commissions and inquiries that he set up,[58] the Majority seems to lose sight of the focus of article 28 of the Statute, namely holding a commander responsible for his failures and not for his actions.

[54] Conviction Decision, para. 733.
[55] Majority Judgment, para. 171.
[56] Majority Judgment, para. 178.
[57] Majority Judgment, para. 181.
[58] *See infra* IV.A.6.

46. Regarding the continuation of the crimes in spite of the measures taken, we note that the Majority casts doubt on the Trial Chamber's findings regarding the scale and duration of the crimes.[59] Similarly, although it acknowledges the relevance of a commander's effective control over the troops and his or her knowledge of the crimes to an assessment of whether that commander took all necessary and reasonable measures,[60] the Majority expresses "concerns" regarding the Trial Chamber's findings as to Mr Bemba's effective control and knowledge of the crimes,[61] but does not resolve either of these questions. Finally, although the Majority appears to criticise what it views as the Trial Chamber's failure to assess *in concreto* what Mr Bemba should have done in the circumstances, it does not itself conduct such an assessment. This approach unfortunately results in issues essential to the determination of whether Mr Bemba took all necessary and reasonable measures being left unresolved for the purposes of this appeal. We consider that any concerns regarding the Trial Chamber's findings should have been resolved by the Majority based on its own review of the evidentiary record of the present case. In the absence of such a review and a positive determination of the issues, it is unclear to us how the Majority could proceed to overturn the findings of the Trial Chamber and enter an acquittal.

47. The Majority appears to have considered that, given its modification of the standard of review, it was not required to review the evidentiary record comprehensively and should simply overturn the factual findings of the Trial Chamber in case of doubt. The implementation of this modified standard in practice demonstrates that it produces results that are incompatible with the aims of achieving justice. Effectively, it led the Majority to overturn the Trial Chamber's factual findings based on its assessment of a small fraction of the evidence, namely: (i) P36's statement that the Mondonga Inquiry was composed of CAR and MLC officials;[62] (ii) the statement in the Zongo Commission Report that the composition of the Mondonga Inquiry was mixed;[63] (iii) Mr Bemba's statement that he wrote to the CAR Prime Minister and D48's testimony that a decision was taken to send such a letter;[64] and (iv) five items of evidence that, in the Majority's view, demonstrate the weakness of the hundreds

[59] Majority Judgment, para. 184.
[60] Majority Judgment, paras 167-168.
[61] Majority Judgment, para. 32.
[62] Majority Judgment, para. 172.
[63] Majority Judgment, para. 172.
[64] Majority Judgment, paras 174-175.

of items of evidence relied upon by the Trial Chamber to establish that the MLC committed a widespread attack against the civilian population in the CAR.[65] The Majority does not engage in any meaningful way with the factual findings entered by the Trial Chamber, or demonstrate any awareness of the evidence on which these findings were based.[66] In view of its limited assessment of the evidence, it is perhaps unsurprising that the Majority had doubts about the Trial Chamber's factual findings and overall conclusion. However, we reiterate our view that doubts are not a sufficient basis to reverse factual findings of the Trial Chamber, in particular in the absence of any consideration of the relevant evidence. What is required is a determination of whether a reasonable trier of fact could have reached the finding in question, based on the evidence that was before the Trial Chamber.

48. For us, the key question, both during the trial and on appeal, is whether the measures that Mr Bemba took were commensurate with all the necessary and reasonable measures that were within his power. The enquiry in the present case was two-fold: whether Mr Bemba failed to take all necessary and reasonable measures within his power to: (i) prevent or repress the commission of crimes; and (ii) submit the matter to the competent authorities for investigation or prosecution. In the circumstances of the present case, we consider that these questions could only be properly answered with due regard to the scale and duration of the crimes committed, Mr Bemba's knowledge thereof and the full range of measures available to him in the circumstances, based on the extent of his control over the troops. We regret that the Majority limited its analysis to the measures that Mr Bemba took and disregarded the limitations in those measures identified by the Trial Chamber. We consider that its confined examination of this isolated aspect of the case led it to an erroneous conclusion.

49. In this chapter, we will address each of the errors identified by the Majority and explain the reasons for our disagreement therewith. We will conclude by addressing the remaining arguments raised by Mr Bemba which, in our view, are without merit.

---

[65] Majority Judgment, para. 183.

[66] Conviction Decision, paras 719-734. The findings of the Trial Chamber relating to Mr Bemba's reactions to the public allegations of crimes (Conviction Decision, section V.D) are based, *inter alia*, on various aspects of the testimony of P36, P45, D16, P213, P33, P23, P81, P42, P38, D48, P15, D21, P173, V2, P44, the Bomengo case file (EVD-T-OTP-00393/ CAR-DEF-0002-0001); a letter sent by Mr Bemba to the president of the FIDH (EVD-T-OTP-00391/CAR-DEF-0001-0152); a letter sent by General Cissé to Mr Bemba (EVD-T-OTP-00584/CAR-OTP-0033-0209); and the Zongo Report (EVD-T-OTP-00392/CAR-DEF-0001-0155).

2. Scope of assessment

50. We note with approval the Majority's finding that the scope of the duty to take all necessary and reasonable measures is intrinsically connected to a commander's material ability to prevent, repress or punish crimes.[67] The Majority further states that "it is not the case that a commander must take each and every possible measure at his or her disposal"; that "it is not the case that a commander is required to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility"; that "[i]n assessing reasonableness, the Court is required to consider other parameters, such as the operational realities on the ground at the time faced by the commander";[68] that "[c]ommanders are allowed to make a cost/benefit analysis when deciding which measures to take, bearing in mind their overall responsibility to prevent and repress crimes" and that "[t]his means that a commander may take into consideration the impact of measures to prevent/repress criminal behaviour on ongoing or planned operations and may choose the least disruptive measure as long as it can be reasonably expected that this measure will prevent/repress the crimes".[69] While these statements may be relevant to the assessment of reasonableness of measures which the commander should have taken and may not, as such, be incorrect, we consider that the qualifiers of "necessary" and "reasonable" in article 28 (a) (ii) of the Statute are sufficient to understand the extent of a commander's duty. What constitutes "necessary and reasonable measures" is not primarily a matter of substantive law, but of evidence, to be determined on a case-by-case basis and therefore the necessity and reasonableness of measures depend on the specific circumstances of a given case.[70]

51. One of the Majority's key findings is that "[j]uxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not in and of itself show that the commander acted unreasonably at the time".[71] It then states that "[t]he Trial Chamber must specifically identify what a commander should have done *in concreto*".[72] It is not immediately apparent to us that an assessment of what a commander should have done is any

[67] Majority Judgment, para. 167.
[68] Majority Judgment, paras 169-170.
[69] Majority Judgment, para. 170.
[70] *Blaškić* Appeal Judgment, para. 72; *Halilović* Appeal Judgment, para. 63.
[71] Majority Judgment, paras 7, 170.
[72] Majority Judgment, paras 7, 170.

less hypothetical than what a commander could have done in response to the crimes committed, given that any such assessment necessarily involves consideration of measures that were *not* in fact taken. Nevertheless, we agree with the approach elucidated in the sense that the assessment of what measures are necessary and reasonable must be based on a full consideration of the circumstances in which the commander found him or herself at the relevant time.

52. To the extent that the Majority suggests that the Trial Chamber failed to conduct such an assessment, we consider such criticism to be unfounded. A proper reading of the Conviction Decision shows that the Trial Chamber in fact conducted such an assessment based on the wealth of evidence on the available measures considered necessary and reasonable in the circumstances prevailing at the time. The list of measures set out by the Trial Chamber is a reflection of its findings on effective control, which were challenged by Mr Bemba during trial and on appeal. Therefore, and contrary to the Majority's position,[73] it was not difficult for Mr Bemba to attempt to "disprove" them. The Trial Chamber went on to assess what the impact would have been had Mr Bemba taken the available measures and found that, under the circumstances, he was obligated to take these measures.[74] Therefore, having found that the measures that Mr Bemba took were insufficient, the Trial Chamber clearly identified *in concreto* what *other* measures Mr Bemba should have taken to prevent, repress or punish the commission of crimes by his subordinates.

53. Finally, it is striking that, having determined how the assessment of necessary and reasonable measures should be carried out and having apparently found that the Trial Chamber failed to satisfy this requirement, the Majority does not itself carry out the assessment it deems necessary. This may be a result of the application of the standard of "serious doubts", which the Majority advocates and which apparently exempts it from the obligation to either enter its own factual findings, or remit the matter to the Trial Chamber. In our view, it is incompatible with the interests of justice that issues material to the assessment of guilt should be left unresolved in this manner at the conclusion of the appeals proceedings.

[73] Majority Judgment, para. 170.
[74] Conviction Decision, para. 738.

3. Purported limitations on Mr Bemba's ability to order investigations into crimes committed by MLC troops in the CAR

54. The Majority maintains that the Trial Chamber "paid insufficient attention to the fact that the MLC troops were operating in a foreign country, with the attendant difficulties on Mr Bemba's ability [...] to take measures".[75] We are unable to agree with this conclusion, which, in our view, uncritically accepts Mr Bemba's submissions on the facts and the evidence, pays scant regard to the findings and analysis of the Trial Chamber and is the result of an erroneous application of the accepted standard of appellate review. For the reasons explained below, we consider that Mr Bemba's submission that his ability to order investigations into crimes was limited is entirely speculative and clearly contradicted by the evidentiary record. The Majority assesses a limited part of the evidence to enter its own factual finding without consideration of the totality of findings, reasoning and evidence relied upon by the Trial Chamber.

55. We note that the Trial Chamber expressly considered Mr Bemba's submissions as to the difficulties he faced in implementing relevant investigatory measures, but found these arguments to be unpersuasive.[76] As the Trial Chamber noted in response to these arguments, Mr Bemba "could and did create commissions and missions in reaction to allegations of crimes, two of which operated on CAR territory at the height of the 2002-2003 CAR Operation".[77] In these circumstances, it is clear that the Trial Chamber considered Mr Bemba's arguments and rejected them.

56. Moreover, we consider that the Trial Chamber's conclusion was not unreasonable. Indeed, Mr Bemba's submission that his ability to order investigations into crimes in the CAR was limited is contradicted by the evidence considered as a whole and he fails to demonstrate that the Trial Chamber erred in this regard. The Trial Chamber relied upon evidence from P36, P45, P173, and CHM1 that "Mr Bemba, not the CAR authorities, had primary authority to decide whether to sanction MLC troops or launch an investigation related to their activities in the CAR".[78] It outlined its concerns regarding the credibility of three of the witnesses and reliability of their evidence but noted, *inter alia*, that, on this point,

[75] Majority Judgment, para. 171.
[76] Conviction Decision, para. 732.
[77] Conviction Decision, para. 732. *See also* paras 719-720, 722, 725.
[78] Conviction Decision, para. 447.

their testimony was internally consistent, that they corroborated each other and that their testimony was further corroborated by the testimony of CHM1 and by the disciplinary and investigative measures that were actually taken by Mr Bemba and the MLC hierarchy.[79] The Trial Chamber weighed this evidence against the testimony of other witnesses who testified that the CAR authorities had disciplinary authority over the MLC troops. It found that evidence to be, in various ways, lacking reliability, and, "absent corroboration by other credible and reliable evidence", did not rely on it insofar as it suggested that "Mr Bemba and the MLC did not have primary disciplinary authority over the MLC contingent in the CAR".[80] The Trial Chamber also reasoned that, in so far as the "evidence supports the proposition that the CAR authorities had some, but not primary or exclusive," disciplinary or investigative authority over the MLC forces, it was "not inconsistent with the corroborated and reliable evidence that Mr Bemba and the MLC had ultimate disciplinary authority" over the MLC contingent in the CAR.[81] Mr Bemba's submission that no consideration was given to the constraints on his disciplinary authority by the Trial Chamber therefore has no merit.

57. We note that Mr Bemba argues that the Trial Chamber ignored the testimony of two witnesses (P36 and D48), which he considers relevant to the limitations on his ability to order investigations into crimes in the CAR.[82] However, regarding P36's testimony on the "mixed" composition of the Mondonga Inquiry (i.e. composed of MLC members and CAR members), we note that P36 merely states that it was "normal" for a commission to be comprised of Central Africans because it would ease the functioning of such a commission, in that they "would have easier contact with people and they could provide guidance, or they could guide the Congolese persons within the commission with regard to addresses, the language as well, with regards to relations with the other Central Africans, their compatriots".[83] This does not support the broad proposition that Mr Bemba's material ability to order investigations in the CAR was impeded. On the contrary, by identifying ways in which to overcome logistical difficulties (such as by having a mixed national composition), we consider that P36's testimony actually confirms that it was possible for Mr Bemba to order the required investigations, thereby lending support to the Trial Chamber's finding.

[79] Conviction Decision, para. 447.
[80] Conviction Decision, para. 448.
[81] Conviction Decision, para. 448.
[82] Appeal Brief, paras 349, 350.
[83] Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Red2-Eng, p. 39, lines 15-19.

58. We are also unpersuaded by Mr Bemba's reliance on the testimony of D48 to support his submission that his power to enter the CAR to order investigations was limited.[84] The witness stated that "[t]he [Zongo] [C]ommission was not able to investigate cases of rape, because it had no mandate whatsoever to go into the CAR, and it seems to me that it would be going out on a limb to say that such a commission could investigate rapes committed on the soil of a foreign nation. That wouldn't be possible".[85] Contrary to Mr Bemba's submission that this evidence was ignored, the Trial Chamber took D48's testimony into account, including the excerpt cited by Mr Bemba, in relation to the putative limits of his disciplinary powers over the MLC forces in the CAR.[86] The Trial Chamber expressly noted that D48, along with a number of other witnesses, had stated that the CAR authorities had disciplinary authority over the MLC troops, but it found that "certain issues cast substantial doubt upon the reliability of this evidence", including the "inconsistencies in D48's testimony, as well as his apparent lack of knowledge of matters relating to the 2002-2003 CAR Operation and functioning of the MLC, which a person in his position could be expected to know".[87]

59. Mr Bemba has made no effort to substantiate his argument that the evidentiary analysis and conclusions of the Trial Chamber were flawed. Mr Bemba argues that the idea that MLC soldiers were able to "insert themselves into a warzone" in a third state to conduct an investigation is unreasonable, especially as victims are unlikely to voluntarily submit to an interview with foreign armed soldiers, in addition to other logistical difficulties.[88] He submits that "the MLC's ability to take measures within CAR territory was limited, and dependent on cooperation with the CAR authorities".[89] However, Mr Bemba does not specify how actual measures that he took or attempted to take to investigate MLC crimes on the CAR territory during the height of the CAR conflict were affected by the limitations to which he alludes. To this extent, Mr Bemba's submissions that his ability to order investigations into crimes in the CAR was limited are speculative.

---

[84] Appeal Brief, para. 350.
[85] Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 47, lines 14-17.
[86] Conviction Decision, para. 448, fn. 1247.
[87] Conviction Decision, para. 448.
[88] Appeal Brief, para. 347.
[89] Appeal Brief, para. 348.

60. In our view, therefore, the Trial Chamber reasonably assessed the evidence on this question and Mr Bemba has not identified any error in the reasoning or conclusions of the Trial Chamber such that would establish a misappreciation of the limitations on the MLC's jurisdiction and competence to investigate crimes in the CAR or Mr Bemba's disciplinary authority over his troops.

61. In contrast, the Majority's understanding that Mr Bemba's ability to take measures was beset by difficulties appears to be based on Mr Bemba's submission, supported by P36's testimony regarding the mixed composition of commissions.[90] The Majority "notes that the Trial Chamber did not expressly refer to this aspect of P36's testimony, despite its significance and direct relevance to the issues at hand",[91] but does not find that the Trial Chamber erred in failing to refer to and explain its assessment of this particular item of evidence.

62. In our view, the Majority's approach is flawed in several respects. A trial chamber is not obliged to address each and every item of evidence relevant to a particular factual finding.[92] The question is not whether the evidence was "significant" or "relevant", but whether it was "of such importance" that it should have been addressed, "lest it become impossible to determine – based on the reasoning provided and the evidence in question – how the trial chamber reached the conclusion it did".[93] For the reasons set out above, we do not consider that P36's testimony on this point was relevant to the question at hand; it certainly was not of such importance that the Trial Chamber was required to address it in its reasoning on this point.

63. We note that the Majority assesses the evidence of P36, together with the statement found within the Zongo Commission Report to the effect that the Mondonga Inquiry was mixed in composition, and appears to conclude on this basis that the fact that the MLC troops were operating in a foreign country placed limitations upon Mr Bemba's ability to take measures.[94] We find the Majority's assessment of a limited part of the evidence to make a

[90] Majority Judgment, para. 172.
[91] Majority Judgment, para. 172.
[92] Majority Judgment, para. 53.
[93] Majority Judgment, para. 54.
[94] Majority Judgment, para. 173.

factual finding without considering the findings, reasoning and evidence relied upon by the Trial Chamber to be troubling, particularly in circumstances where the Trial Chamber found P36 to be a witness whose evidence should be analysed with "particular caution",[95] a finding which the Majority chose to ignore. Moreover, as outlined above, we find that the evidence that investigative commissions were composed of MLC and CAR officials does not support the broad conclusion that Mr Bemba's disciplinary authority or ability to investigate in the CAR was limited, but rather shows that any difficulties could be overcome.

64. For the foregoing reasons, we are unable to subscribe to the approach or conclusions of the Majority and would have rejected Mr Bemba's argument that the Trial Chamber "misappreciated the limitations on the MLC's jurisdiction and competence to investigate".[96]

4. Letter to the CAR Prime Minister

65. The Majority also faults the Trial Chamber for failing to address Mr Bemba's submission that he wrote to the CAR Prime Minister requesting an international commission of inquiry and the testimony of D48 presented in support thereof.[97] It is unclear to us how the Majority could determine that the Trial Chamber should have addressed an argument that a letter was sent without any examination of the evidence presented in support of the argument. In our view, the appropriate question is that raised by Mr Bemba – whether the Trial Chamber erroneously disregarded evidence that it should have considered.

66. We recall that a trial chamber is not under an obligation to refer to "every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision".[98] Similarly, a trial chamber's failure to refer to specific witness testimony will often not amount to an error, especially where there is significant contrary evidence on the record.[99]

67. With these principles in mind, we find that Mr Bemba's submission discloses no error on the part of the Trial Chamber. Mr Bemba relies on the witness's statement that it was

[95] Conviction Decision, paras 306-307. In particular, the Trial Chamber found, in response to Mr Bemba's complaints regarding P36's testimony, that the witness "was, at times, evasive or contradictory in an apparent attempt to distance himself from the events and understate his role and position within the MLC".
[96] Appeal Brief, paras 345-355.
[97] Majority Judgment, paras 174-175.
[98] *Bemba et al*. Appeal Judgment, para. 105.
[99] *Perišić* Appeal Judgment, para. 95.

decided that a letter should be sent to the CAR Prime Minister requesting an international commission of inquiry to be established.[100] However, we note that the witness also confirmed that he did not see the letter, and, in response to a question as to whether he recalled what the letter "should say", he indicated that he did not and reiterated instead the reasons behind the decision to send the letter.[101] The reasons given related to the witness's understanding that it was for the CAR authorities to investigate the events in the CAR and that the MLC could only make the relevant authorities aware of the issue.[102] As mentioned above, in relation to other aspects of D48's testimony, which suggested that the CAR authorities had disciplinary authority over the MLC troops, the Trial Chamber noted inconsistencies in his testimony and "his apparent lack of knowledge of matters relating to the 2002-2003 CAR Operation and functioning of the MLC, which a person in his position could be expected to know".[103] In light of the Trial Chamber's general concerns about the witness's credibility as to evidence suggesting that the CAR authorities had primary disciplinary authority over the MLC troops, we do not find it unreasonable for the Trial Chamber not to have specifically addressed D48's vague and inconclusive testimony suggesting that a letter was sent to the CAR authorities, particularly given that the letter was not adduced in evidence.

68. We regret that the Majority, having found that the Trial Chamber erred in failing to address Mr Bemba's argument that he sent a letter to the CAR authorities, did not carry out an assessment of the evidence with a view to determining whether the letter was actually sent. Instead, the Majority limits itself to the observation that Mr Bemba's allegation that he had sent the letter was not challenged by the Prosecutor.[104] On this basis, the Majority concludes that the Trial Chamber "erred by failing to take into account relevant considerations".[105] It is unclear from the foregoing whether the Majority accepts, on the basis of Mr Bemba's unchallenged assertion and without carrying out any evidentiary assessment, that a letter was in fact sent to the CAR Prime Minister, or whether the Majority considers that the Trial Chamber's failure to explain why it disregarded an argument is a sufficient reason to overturn

[100] Appeal Brief, fns 702-705, referring to Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 51, lines 5-8; lines 10-16; p. 55 lines 7-10.
[101] Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 51, lines 5-8; lines 10-16; p. 55, lines 4-10.
[102] Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 51, lines 14-15; p. 55 lines 7-10.
[103] Conviction Decision, para. 448.
[104] Majority Judgment, para. 175.
[105] Majority Judgment, para. 175.

its decision. We would find either approach to be wrong and consider it problematic that a factual matter is raised by Mr Bemba, not determined by the Majority, yet used by it as a basis to overturn the Conviction Decision.

69. Therefore, we disagree with the Majority's approach and conclusions and would have rejected Mr Bemba's argument that the Trial Chamber failed to consider relevant evidence regarding a letter that Mr Bemba purportedly sent to the CAR Prime Minister.

5. Motivation

70. We agree with the Majority that the motives of a commander are not, as argued by Mr Bemba, always irrelevant to the assessment of "necessary and reasonable measures".[106] However, we cannot agree with the Majority's determinations that the Trial Chamber took "an unreasonably strict approach" when considering Mr Bemba's motives, that its "preoccupation with Mr Bemba's motivations appears to have coloured its entire assessment of the measures that he took" and that "the Trial Chamber appears to have treated the motives as determinative, in and of themselves, of the adequacy or otherwise of the measures".[107] In our view, this reading of the Conviction Decision is incorrect and the use of speculative language to impute a reasoning that is not apparent from the plain wording of the decision itself is inappropriate.

71. As is clear from the Conviction Decision, the Trial Chamber engaged in an assessment of the measures taken by Mr Bemba and found them each to be wanting.[108] Taken together, the Trial Chamber found the measures Mr Bemba took to be "a grossly inadequate response to the consistent information of widespread crimes committed by MLC soldiers in the CAR of which Mr Bemba had knowledge".[109] The Trial Chamber found that the inadequacy of the measures was "aggravated by indications, as set out above, that they were not genuine, the manner in which such measures were executed, and the fact that only public allegations of crimes by MLC soldiers prompted any reaction, and then only to limited extent".[110] The indications that the measures were not genuine, which the Trial Chamber refers to as being "set out above", appear to be based on its assessment of the limited scope and result of the

[106] Majority Judgment, para. 176.
[107] Majority Judgment, paras 176, 178.
[108] Conviction Decision, paras 719-726.
[109] Conviction Decision, para. 727.
[110] Conviction Decision, para. 727.

measures taken which are set out in the preceding paragraphs of the Conviction Decision. The Trial Chamber subsequently noted "corroborated evidence" that these measures "were primarily motivated by Mr Bemba's desire to counter public allegations and rehabilitate the public image of the MLC".[111]

72. The Trial Chamber did not state, as the Majority claims, that "these motivations were a factor 'aggravating' the failure to exercise his duties" and did not employ the concept of an "aggravated omission" assessed by the Majority as giving the impression that "the Trial Chamber's evaluation of the adequacy of the measures taken by Mr Bemba was tainted by what it considered Mr Bemba's motivations to be".[112] Indeed, there is no suggestion in the Conviction Decision that the Trial Chamber had a "preoccupation with Mr Bemba's motivations" or found them to be determinative of the adequacy of the measures taken. Nothing in the paragraphs of the Conviction Decision referred to by the Majority at paragraph 178 of the Majority Judgment indicates that Mr Bemba's motivations were a "key factor" in, or "significantly affected" the Trial Chamber's assessment of the measures that Mr Bemba took.[113] We therefore disagree with the Majority's assessment and would have found no error in the Trial Chamber's examination of Mr Bemba's motives in the context of assessing whether he took all necessary and reasonable measures.

73. The Majority further considers that "the motivations that the Trial Chamber found established, namely, the broad desire to maintain the image of the MLC and counter public allegations are not in fact intrinsically 'negative' motivations, as the Trial Chamber *appears to have considered them*" and therefore concludes that the Trial Chamber "erred in considering that the motivations that it attributed to Mr Bemba were indicative of a lack of genuineness in adopting measures to prevent and repress the commission of crimes".[114] While we agree with the Majority that the motivations found to be established by the Trial Chamber are not intrinsically negative, we are of the view that the Majority misconstrues the Conviction Decision in finding that the Trial Chamber "appears to have considered" the motivations to be negative. In our view, the Trial Chamber does not find Mr Bemba's motivations to be negative or otherwise consider those motivations as negatively affecting its

[111] Conviction Decision, para. 728.
[112] Majority Judgment, para. 178.
[113] Majority Judgment, para. 178, referring to Conviction Decision, paras 555, 582, 604, 728.
[114] Majority Judgment, paras 179, 189 (emphasis added).

finding on Mr Bemba's failure to take necessary and reasonable measures. Rather, its analysis of Mr Bemba's motivations assists in explaining why these measures were taken, despite their shortcomings and despite the Trial Chamber's finding that they were not genuine. It concluded that Mr Bemba's "primary intention was not to genuinely take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes".[115] We do not consider this analysis to be irrelevant to the Trial Chamber's reasoning, although it is clearly not a core element thereof.

74. For the reasons set out below, we also do not find any merit in Mr Bemba's remaining argument that the Trial Chamber was unreasonable in determining that the existence of an ulterior motive on the part of Mr Bemba was the only reasonable inference available, which he bases on evidence that he "was motivated by a desire for a disciplined army, and that within the MLC discipline was prioritised".[116]

75. First, of the seven witnesses upon whom Mr Bemba relies to support his claim that he was motivated by a desire to ensure army discipline,[117] three provided testimony that supported the inference that was ultimately adopted by the Trial Chamber as to Mr Bemba's primary motives behind specific measures taken. Both P15 and P45 testified that the letter written by Mr Bemba to General Cissé served the purpose of demonstrating good faith and preserving the image of the MLC,[118] as the Trial Chamber noted.[119] P15 and P45 also testified that the eventual withdrawal from the DRC was prompted by political pressure, particularly in the context of the negotiations of the Sun City agreements.[120] P45 testified that the Mondonga Inquiry was motivated by a desire to counter media enquiries by convicting

[115] Conviction Decision, para. 728.
[116] Appeal Brief, para. 364.
[117] Appeal Brief, para. 364, fns 715-716.
[118] Conviction Decision, para. 604, referring to the evidence of **P45** (Transcript of 2 February 2012, ICC-01/05-01/08-T-204-Red-Eng, p. 39, line 18 to p. 42, line 1, stating that Mr Bemba wrote the letter *"in order to see how he was going to extricate himself from that trap"*); and **P15** (Transcript of 9 February 2012, ICC-01/05-01/08-T-209-Red-Eng, p. 42, lines 3-12; p. 44, lines 12-16; p. 45, lines 14-23; Transcript of 10 February 2012, ICC-01/05-01/08-T-210-Red2-Eng, p. 28, line 23 to p. 29, line 1, testifying, that the letter served to maintain the credibility and image of the MLC, demonstrating that the MLC did not remain indifferent or do nothing in response to allegations of violence or abuse).
[119] Conviction Decision, para. 728.
[120] Conviction Decision, para. 555, fn. 1703, referring to the testimony of, *inter alia*, **P15** (Transcript of 9 February 2012, ICC-01/05-01/08-T-209-Red-Eng, p. 20, line 13 to p. 21, line 19; p. 23, lines 2-14; p. 29, line 8 to p. 33, line 24); and **P45** (Transcript of 1 February 2012, ICC-01/05-01/08-T-203-Red2-Eng, p. 62, lines 11-15).

persons for minor offences.[121] Similarly, P36 testified that the court-martial was used to show that action was being taken to exculpate Mr Bemba from future responsibility.[122]

76. Second, the Trial Chamber's findings on Mr Bemba's primary motives were based on the corroborated testimony of several witnesses. In the context of the withdrawal from the CAR, the Trial Chamber concluded that this was motivated by international political pressure, drawing upon the testimony of P15,[123] P44,[124] P45,[125] and P213.[126] Similarly, testimony from P45,[127] P36,[128] and P213[129] supported the proposition that Mr Bemba acted to counter media allegations. In assessing the motives behind the correspondence of Mr Bemba and General Cissé, the Trial Chamber was persuaded by corroborated testimony of P15[130] and P45.[131] Based upon these multiple pieces of corroborated testimony it cannot be concluded that the Trial Chamber's finding with respect to Mr Bemba's primary motive was not one which no reasonable trier of fact could have made in the circumstances taken as a whole.

---

[121] Conviction Decision, para. 582, fn. 1797, referring to the testimony of **P45** (Transcript of 2 February 2012, ICC-01/05-01/08-T-204-Red-Eng, p. 39, line 19 to p. 40, line 3).
[122] Conviction Decision, para. 582, fn. 1797, referring to the testimony of **P36** (Transcript of 16 March 2012, ICC-01/05-01/08-T-216-Red2-Eng, p. 7, line 25 to p. 8, line 4). *See also* Conviction Decision, para. 582, fn. 1799, referring to the testimony of **P45** on the objective being to show that action was being taken (Transcript of 30 January 2012, ICC-01/05-01/08-T-201-Red2-Eng, p. 65, line 22 to p. 66, line 16; Transcript of 31 January 2012, ICC-01/05-01/08-T-202-Red2-Eng, p. 13, lines 9-10; p. 14, lines 3-20; and Transcript of 2 February 2012, ICC-01/05-01/08-T-204-Red-Eng, p. 9, lines 10-19; p. 15, lines 8-12; p. 19, line 11 to p. 20, line 4; p. 41, line 24).
[123] Conviction Decision, para. 555, fn. 1703, referring to Transcript of 9 February 2012, ICC-01/05-01/08-T-209-Red-Eng, p. 20, line 13 to p. 21, line 19; p. 23, lines 2-14; p. 29, line 8 to p. 33, line 24.
[124] Conviction Decision, para. 555, fn. 1703, referring to Transcript of 3 February 2012, ICC-01/05-01/08-T-205-Red-Eng, p. 29, lines 4-18; p. 55, lines 3-5, 11- 13, 16-25; p. 56, line 23 to p. 57, line 2; p. 56, lines 5-22; Transcript of 6 February 2012, ICC-01/05-01/08-T-206-Red-Eng, p. 13, lines 13-19; p. 14, lines 12-18.
[125] Conviction Decision, para. 555, fn. 1703, referring to Transcript of 1 February 2012, ICC-01/05-01/08-T-203-Red2-Eng, p. 62, lines 11-15.
[126] Conviction Decision, para. 555, fn. 1703, referring to Transcript of 16 November 2011, ICC-01/05-01/08-T-188-Red2-Eng, p. 24, lines 20-23; p. 25, lines 8-10; p. 26, lines 12-16.
[127] Conviction Decision, para. 582, fn. 1797, referring to Transcript of 2 February 2012, ICC-01/05-01/08-T-204-Red-Eng, p. 39, line 19 to p. 40, line 3.
[128] Conviction Decision, para. 582, fn. 1798, referring to Transcript of 16 March 2012, ICC-01/05-01/08-T-216-Red2-Eng, p. 7, line 25 to p. 8, line 4.
[129] Conviction Decision, para. 582, fn. 1798, referring to Transcript of 16 November 2011, ICC-01/05-01/08-T-188-Red2-Eng, p. 44, line 14 to p. 45, line 1.
[130] Conviction Decision, para. 604, fn. 1895, referring to, *inter alia*, Transcript of 9 February 2012, ICC-01/05-01/08-T-209-Red-Eng, p. 42, lines 3-12.
[131] Conviction Decision, para. 604, fn. 1895, referring to Transcript of 2 February 2012, ICC-01/05-01/08-T-204-Red-Eng, p. 39, line 18 to p. 42, line 1.

77. Third, the evidence given by D21 and P36 upon which Mr Bemba relies, to the effect that discipline was prioritised within the MCL,[132] was explicitly considered by the Trial Chamber, in conjunction with a wealth of other testimonial evidence relating to the discipline and training of the troops.[133] Based on its analysis of the totality of this evidence, the Trial Chamber concluded, *inter alia*, that "the training regime employed by the ALC was inconsistent, resulting in some soldiers receiving no or minimal training", that "[d]issemination of the Code of Conduct was also uneven and some MLC troops, including at least one high-ranking officer, who participated in the 2002-2003 CAR Operation, either did not receive training in or were not familiar with the Code of Conduct" and that Mr Bemba "failed to take any measures to remedy such deficiencies in training".[134] Mr Bemba disregards the Trial Chamber's evidentiary analysis and therefore fails to show any error on the part of the Trial Chamber.

78. In light of the foregoing, we are unable to subscribe to the approach or conclusions of the Majority and would have rejected Mr Bemba's arguments that the Trial Chamber erred in taking his motivations into account. We find the Majority's conclusion that the Trial Chamber "erred in considering that the motivations that it attributed to Mr Bemba were indicative of a lack of genuineness in adopting measures to prevent and repress the commission of crimes" to be unsupported by any reading of the Conviction Decision.[135] The Majority's conclusion also seems to be unsupported by its own analysis, which is confined to observations on the *appearance* that the Trial Chamber's view as to Mr Bemba's motivations coloured the entire assessment.

6. Shortcomings in the measures taken by Mr Bemba

79. The Majority finds that "the measures taken by a commander cannot be faulted merely because of shortfalls in their execution".[136] In our respectful view, this finding of the Majority is based on a misreading of the Trial Chamber's finding and a misinterpretation of the nature of criminal liability under article 28 of the Statute. In the Conviction Decision, the Trial Chamber considered the measures taken by Mr Bemba and found, *inter alia*, that they "were

[132] Appeal Brief, para. 364, fn. 716.
[133] Conviction Decision, paras 391-393.
[134] Conviction Decision, paras 736-737.
[135] Majority Judgment, para. 189.
[136] Majority Judgment, para. 180.

a grossly *inadequate response* to the consistent information of widespread crimes",[137] that they were "*minimal*",[138] and "*insufficient*".[139] The Trial Chamber assessed and considered the shortcomings of the measures that Mr Bemba took with a view to determining whether he had fulfilled his duty to take all necessary and reasonable measures to prevent, repress or punish crimes by the MLC. It is irrelevant for this purpose to whom the identified limitations were attributable – even if none of the limitations were attributable to Mr Bemba, in the Trial Chamber's assessment the measures were limited and, in view of these limitations, were insufficient to satisfy Mr Bemba's duty to take all necessary and reasonable measures.

80. Contrary to the Majority's position that the Trial Chamber "implies" that the limitations in the measures taken by Mr Bemba were attributed to Mr Bemba,[140] the only thing that was attributed to Mr Bemba by the Trial Chamber was his failure to take all necessary and reasonable measures at his disposal. Thus, it is irrelevant to this assessment whether (i) the shortcomings in the measures that Mr Bemba took "were sufficiently serious"; (ii) Mr Bemba "was aware of the shortcomings"; (iii) "it was materially possible to correct the shortcomings"; and (iv) "the shortcomings fell within his […] authority to remedy".[141] If the results of measures taken are unsatisfactory and a commander does not follow up with other measures that are available in the circumstances, it cannot be said that he or she has discharged his or her duty to prevent, repress or punish crimes committed by his or her subordinates. Because the Trial Chamber did not hold Mr Bemba responsible for the shortcomings in the measures that he took, it was also not required, as the Majority finds, to make a finding that "Mr Bemba purposively limited the mandates of the commissions and inquires".[142]

81. In light of the foregoing consideration, we are unable to subscribe to the approach or conclusions of the Majority under this heading.

[137] Conviction Decision, para. 727 (emphasis added).
[138] Conviction Decision, para. 727 (emphasis added).
[139] Conviction Decision, para. 729 (emphasis added).
[140] Majority Judgment, para. 181.
[141] Majority Judgment, para. 180.
[142] Majority Judgment, para. 181.

7. Failure to empower other MLC officials

82. Although not contested by Mr Bemba, the Majority finds that the Trial Chamber erred in faulting "Mr Bemba for having failed to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes".[143] The Majority supports this conclusion by noting that the Trial Chamber did not cite any evidence in support of its finding, that the finding appears to be in contradiction with its earlier finding that "Colonel Moustapha and the other MLC commanders also had some disciplinary authority in the field" and that "the Trial Chamber failed to explain what more Mr Bemba should have done to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes and how he fell short in that regard".[144] We cannot agree with the Majority's conclusion, which we find to be based on a misreading of the Conviction Decision.

83. In our view, the Trial Chamber's reference to Mr Bemba's failure to empower other officials "to fully and adequately investigate and prosecute allegations of crimes" is a reference to the measures that he had taken and its previous findings that these measures were not full, adequate or intended to be so. The Trial Chamber's conclusions on the shortcomings in the various investigations and missions established by Mr Bemba are summarised in the paragraphs preceding its conclusion and a full supporting evidentiary analysis is set out on pages 290 to 312 of the Conviction Decision. In our view, there is no contradiction between the Trial Chamber's finding concerning Mr Bemba's failure "to empower other MLC officials to *fully and adequately investigate and prosecute* allegations of crimes" and its finding that "Colonel Moustapha and the other MLC commanders also had *some* disciplinary authority in the field".[145] The fact that some commanders had some disciplinary authority in the field is not incompatible with the finding of the Trial Chamber that Mr Bemba failed to empower MLC officials to *fully and adequately* investigate and prosecute allegations of crimes. Indeed, there is no evidence in the record suggesting that MLC commanders actually *fully and adequately* investigated or prosecuted allegations of crimes.

84. Furthermore, it is unclear what additional evidence the Majority would have expected the Trial Chamber to cite, given that its finding concerns a failure to take other measures. In

[143] Majority Judgment, para. 182.
[144] Majority Judgment, para. 182.
[145] Majority Judgment, para. 182.

the absence of arguments from Mr Bemba challenging the Trial Chamber's findings or evidentiary analysis, we would not have found an error in the Trial Chamber's conclusion that Mr Bemba failed to submit the matter to the competent authorities for investigation and prosecution.

85. In light of the foregoing, we disagree with the Majority's assessment and conclusion and would not have addressed this issue, which responds to an erroneous interpretation of the Conviction Decision rather than any argument on the part of Mr Bemba.

8. Assessment vis-à-vis number of crimes committed

86. Although the point is not raised by Mr Bemba, the Majority considers it to be "evident that the assessment of a trial chamber of the measures taken by a commander also depends on the number of crimes that were committed".[146] The Majority concludes that "the Trial Chamber erred in failing to give any indication of the approximate number of the crimes committed and to assess the impact of this on the determination of whether Mr Bemba took all necessary and reasonable measures".[147] This conclusion appears to have been informed by its view that: (i) the actual number of individual criminal acts established beyond reasonable doubt in the instant case was comparatively low, with the majority of them occurring at the beginning of the 2002-2003 CAR Operation; and (ii) the evidence relied upon by the Trial Chamber to establish the widespread attack "on its face, appears for the most part very weak, often consisting of media reports including anonymous hearsay" and the Trial Chamber did not analyse this evidence, address its "potentially extremely low probative value", or give an indication of the approximate number of crimes that were committed at these locations.[148]

87. We agree with the Majority to the extent that, in the circumstances of the present case, the duration and scale of the crimes committed by the MLC troops were important factors in evaluating the adequacy of the measures taken by Mr Bemba, particularly from the perspective of his duty to prevent or repress the commission of crimes. The Trial Chamber found that Mr Bemba committed the war crimes and crimes against humanity of rape and murder based on a number of individual criminal acts presented as examples of the crimes

[146] Majority Judgment, para. 183.
[147] Majority Judgment, para. 189.
[148] Majority Judgment, paras 183-184.

committed.[149] It underlined that these acts were not "random or isolated" and constituted "only a portion of the total number of acts of murder and rape MLC soldiers committed".[150] It found that they perpetrated many other "acts of rape, murder, and pillaging against civilians" and, given the "number of victims and the geographical scope of the attack", the Trial Chamber was satisfied that the attack against the civilian population during the 2002-2003 CAR Operation was widespread.[151]

88. The Majority finds that the Trial Chamber erred in failing to give any indication of the approximate number of the crimes committed and to assess the impact of this on the determination of whether Mr Bemba took all necessary and reasonable measures.[152] We agree that it would have been preferable for the Trial Chamber to provide some analysis of the voluminous evidence it relied on to support this finding. Nevertheless, we are unable to conclude that the failure to provide such an evidentiary assessment amounted to an error because, in our view, the basis for the Trial Chamber's finding is apparent from a review of the evidence relied upon.

89. In this regard, we note the Trial Chamber's finding 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 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".[153] To support this finding, the Trial Chamber relied upon the direct and hearsay testimony of at least 24 witnesses, including P6 and P9, the CAR Prosecutor and Investigative Judge who investigated crimes committed during the 2002-2003 CAR Operation and testified as to the information they retrieved during their investigation, and P229, an expert witness called by the Prosecutor and the Head of the Psychiatric

[149] Conviction Decision, paras 624, 630, 633, 638.
[150] Conviction Decision, paras 671, 688.
[151] Conviction Decision, paras 671, 688-689.
[152] Majority Judgment, para. 184.
[153] Conviction Decision, para. 563, which incorporates by reference the sections of the Conviction Decision dealing with events in Bangui, PK12, PK13, PK22, Sibut, Mongoumba, Bossangoa, Bossembéle, and Damara, some of which incorporate by reference the sections of the Conviction Decision on the general conduct of MLC troops during the 2002-2003 CAR Operation and the public allegations of crimes and Mr Bemba's reactions thereto.

Department at the National Hospital Medical Centre of Bangui, who testified as to his work for various programmes of assistance for victims of sexual violence in Bangui, in the aftermath of the 2002-2003 CAR Operation, who presented information that he had obtained during the course of his work.[154] The Trial Chamber also relied upon over 200 statements or *procès-verbaux d'audition de victime* collected by P6 and P9 as well as three reports issued by FIDH and one report issued by Amnesty International following investigative missions conducted in the CAR during and subsequent to the 2002-2003 CAR Operation, containing accounts of victims of the MLC during this time.[155] This evidence shows that the number of reported victims of rape and murder by the MLC troops ranged between 500 and 815, but that the actual number of victims is estimated to be much higher because victims, in particular victims of rape, were reluctant to come forward.[156]

90. We note that much of the evidence relied upon by the Trial Chamber in these sections of the Conviction Decision are press releases, press articles and radio broadcasts, generally from *Le Citoyen*, RFI, AFP, AP, and the BBC. These reports and broadcasts were issued during the period between October 2002 and March 2003 and provide contemporaneous general information as the events unfolded as to the movements of the troops and the abuses of the MLC towards the civilian population. Although this evidence generally corroborates the evidence given by the witnesses and reports of the NGOs, we consider the weight of this evidence to be low given the purpose for which it was produced, its level of generality, and its hearsay nature.

---

[154] Conviction Decision, paras 461, 486, 520, 525, 527, 531, 534, 563, referring, *inter alia*, to Transcript of 4 April 2011, ICC-01/05-01/08-T-94-Eng, p. 28, lines 5-10; p. 47, lines 15 to 18;Transcript of 5 April 2011, ICC-01/05-01/08-T-95-Red-Eng, p. 3, line 22 to p. 4, line 8; p. 14, line 22 to p. 21, line 25; p. 22, line 8 to p. 23, line 14; p. 24, lines 3-10; p. 54, lines 8-16; p. 62, line 5 to p. 63, line 11; Transcript of 6 April 2011, ICC-01/05-01/08-T-96-Red2-Eng, p. 11, line 23 to p. 12, line 15; p. 21, lines 8-23; Transcript of 7 April 2011, ICC-01/05-01/08-T-97-Eng, p. 6, line 17 to page 7, line 9; Transcript of 3 May 2011, ICC-01/05-01/08-T-102-Red2-Eng, p. 16, lines 7-22; p. 42, line 22 to p. 46, line 11; Transcript of 4 May 2011, ICC-01/05-01/08-T-104-Red3-Eng, p. 7, line 7 to p. 8, line 3; page 27, lines 2-12; p. 29, line 15 to p. 30, line 7; Transcript of 14 April 2011, ICC-01/05-01/08-T-101-Eng, p. 23, line 21 to p. 25, line 5; p. 27, line 15 to p. 28, line 9; Transcript of 3 May 2011, ICC-01/05-01/08-T-102-Red2-Eng, p. 16, lines 8-22.

[155] EVD-T-OTP-00254 to EVD-T-OTP-00344 (CAR-OTP-0002-0002 to CAR-OTP-0002-0137); EVD-T-OTP-00395/CAR-OTP-0001-0034; EVD-T-OTP-00401/CAR-OTP-0004-0409; OTP-00442/CAR-OTP-0011-0503; EVD-T-OTP-00409/CAR-OTP-0004-0881.

[156] Conviction Decision, paras 461, 525, 563, referring, *inter alia*, to EVD-T-OTP-00409/CAR-OTP-0004-0881 at 0892, 0895-0902, 0943; EVD-T-OTP-00411/CAR-OTP-0004-1096 at 1102-1103, 1109, 1121, 1124; EVD-T-OTP-00442/CAR-OTP-0011-0503 at 0507, 0510, 0512-0516; CAR-OTP-0010-0120; Transcript of 4 May 2011, ICC-01/05-01/08-T-104-Red3-Eng, p.7, line 7 to p. 8, line 3; Transcript of 14 April 2011, ICC-01/05-01/08-T-101-Eng, p. 23, line 21 to p. 25, line 5.

91. Nevertheless, based on a review of the testimonial and documentary evidence relied upon by the Trial Chamber, we are satisfied that it was not unreasonable for it to find that MLC troops carried out a widespread attack against the civilian population in the CAR in the areas of the CAR in which they were present throughout the 2002-2003 CAR Operation.

92. We regret that the Majority, having found that the Trial Chamber erred in failing to give an indication of the approximate number of crimes committed, did not carry out an assessment of the evidence with a view to determining the extent of criminal activity in this case. Instead, the Majority limits itself to the observations that the evidence "on its face, appears for the most part very weak" and is of "potentially extremely low probative value".[157] The result is that the Majority raises, but leaves unanswered, the question of how extensive the criminal activity was in the present case.[158] Although the Majority notes that "the majority of the criminal incidents […] occurred at the beginning of the 2002-2003 CAR Operation, whereas little evidence was presented regarding specific criminal acts towards the end of the operation",[159] this finding, which directly contradicts the Trial Chamber's assessment, is not supported by reference to a single item of evidence. In its assessment of the cumulative impact of the errors it identifies, the Majority simply recalls that the Trial Chamber failed to properly establish how many crimes had been committed.[160] Given the Majority's conviction that an assessment of the measures taken by a commander *depends on* the number of crimes that were committed, it is unclear why it considered itself able to assess the sufficiency of the measures taken by Mr Bemba without any determination, on the basis of the evidence, of the scale and duration of the crimes in the present case.

93. The Majority also fails to consider that the Trial Chamber assessed the measures taken by Mr Bemba in light of "the consistent information of widespread crimes committed by MLC soldiers in the CAR of which Mr Bemba had knowledge" and found them to be "a grossly inadequate response".[161] While we will address in full Mr Bemba's knowledge of the

[157] Majority Judgment, para. 183.
[158] In accordance with the appellate standard of review, the Appeals Chamber is required in such instances to either order a new trial, remand the factual finding to the original trial chamber, or itself determine *de novo* the factual question at hand, analysing the relevant evidence that was before the trial chamber. *See* Majority Judgment, paras 55-56.
[159] Majority Judgment, para. 184.
[160] Majority Judgment, para. 192.
[161] Conviction Decision, para. 727.

crimes committed later in our opinion, it suffices for present purposes to note that the Trial Chamber found that Mr Bemba had direct knowledge that the MLC were committing or about to commit acts of rape, pillaging and murder *throughout the 2002-2003 CAR Operation*.[162] In our view, the Trial Chamber appropriately assessed the adequacy of the measures Mr Bemba took in light of the consistent information he received of the crimes committed throughout the relevant timeframe.

94. Finally, we must highlight an inexplicable inconsistency in the Majority's conclusions. All the arguments advanced by the Majority at paragraph 183 seem to relate to the conclusion that "the Trial Chamber erred in failing to give any indication of the approximate number of the crimes committed and to assess the impact of this on the determination of whether Mr Bemba took all necessary and reasonable measures".[163] However, the last sentence of this very same paragraph concludes that "[i]ndeed a finding that the measures deployed by a commander were insufficient to prevent or repress an extended crime wave, for example, five hundred crimes, does not mean that these measures were also insufficient to prevent or repress the limited number of specific crimes, for example 20 crimes, for which the commander is ultimately convicted".[164] The Majority seems to suggest that only the specific individual criminal acts for which the commander was ultimately convicted are relevant to an assessment of whether a commander has fulfilled his or her duty to take all necessary and reasonable measures. We cannot possibly agree with this conclusion. First, this conclusion is inconsistent with the Majority's own analysis which faults the Trial Chamber for having failed to give any indication of the approximate number of crimes committed making it "difficult to assess the proportionality of the measures taken".[165] Second, it is based on the Majority's misconceived notion of criminal charges, whereby the individual criminal acts constitute the entirety of the criminal charges brought against Mr Bemba in the present case. As previously indicated, the individual criminal acts were presented by the Prosecutor as examples of the criminality alleged to have been committed by the MLC troops during the 2002-2003 CAR Operation. In our view, the adequacy of the measures taken by Mr Bemba to

[162] Conviction Decision, paras 706-718; sections V (B) (2) (b), V (B) (2) (c), V (C) (14) and V (D) (1).
[163] Majority Judgment, para. 189.
[164] Majority Judgment, para. 183.
[165] Majority Judgment, para. 183.

prevent and repress the commission of crimes within the jurisdiction of the Court must be assessed in light of the scale and duration of the criminal activity alleged as a whole.

95. In light of the foregoing, we cannot agree with the approach or conclusions of the Majority regarding the Trial Chamber's analysis of the number of crimes committed and their duration, and the impact of this on the assessment of the measures taken by Mr Bemba. In our view, the scale and duration of the criminal acts established on the evidence in the present case, as well as Mr Bemba's knowledge thereof throughout the 2002-2003 CAR Operation, serve only to further highlight the inadequacy of the measures that he took.

9. Lack of adequate notice

96. The Majority Judgment proceeds on the understanding that, in order to establish that the accused failed to take all necessary and reasonable measures to prevent or repress the commission of the crimes or to submit the matter to the competent authorities for investigation or prosecution, the Prosecutor is obliged to specifically plead each and every factual allegation on the basis of which she seeks to establish this element.[166] In other words, according to the Majority, the Prosecutor is obliged to set out in the document containing the charges a list of hypothetical measures that the accused failed to take, presumably with a view to proving these individual and specific failings beyond reasonable doubt at trial. The Majority appears to go further and require that these factual allegations must be pleaded in a separate section of the charges dedicated solely to the itemisation of the accused's various failures to take action. The Majority does not cite any authority for this strict and compartmentalised approach to the charges and provides no reasoning as to why it considered this approach necessary to protect the rights of the accused in the circumstances of the present case.

97. In our view, the question of whether an accused alleged to have been a military commander was properly on notice of the alleged failure to take necessary and reasonable measures and the extent to which detail is required in this regard necessarily depends on the circumstances of each individual case. In this regard, it must be recognised that there is a logical link between the control that a commander has to exercise over his troops and the measures that he can take in respect of crimes committed by those troops. Furthermore, we

[166] Majority Judgment, paras 186-188.

agree with the approach adopted by the *ad hoc* tribunals, whereby the indictment is assessed as a whole in order to determine whether the accused was provided with adequate notice of the charges against him.[167]

98. In the present case, we are unable to agree with the Majority's conclusion that Mr Bemba "was not sufficiently notified" that the modification of troop deployment was a measure considered available to him by the Trial Chamber.[168]

99. The Prosecutor set out her factual allegations regarding the extent of Mr Bemba's authority and control over the MLC troops operating in the CAR in exhaustive detail in the document containing the charges.[169] Specifically, it was alleged that Mr Bemba "maintained *de facto* control over all three battalions of MLC troops operating in the CAR", "made the decision to order MLC troops into the CAR", "decided on which battalions to deploy", received daily reports on operations, "retained control of MLC forces through his direct involvement in strategic planning and tactical support of field operations", and gave orders which his subordinates obeyed.[170] The opening paragraph of the section of the document containing the charges addressing Mr Bemba's failure to take all necessary and reasonable measures within his power refers to the detailed allegations regarding Mr Bemba's broad powers as President of the MLC and Commander-in-Chief of the ALC.[171] Given the extensive nature of Mr Bemba's control, the Prosecutor alleged that he "had a wide scope and variety of necessary and reasonable measures at his disposal to address the crimes described", failed to adequately implement those measures and ultimately "delayed giving the order for withdrawal of battalions or units for at least a month".[172] It is clear from the foregoing that Mr Bemba was put on sufficient notice of the Prosecutor's allegations concerning his power to modify troop deployment and his failure to withdraw his troops in a timely manner. Therefore, it cannot be said that Mr Bemba was not on notice that re-deployment of troops was a measure at his disposal.

---

[167] *Prlić et al*. Appeal Judgment (Vol. III), para. 3140.
[168] Majority Judgment, para. 187.
[169] Corrected Revised Second Amended Document Containing the Charges, paras 60-71.
[170] Corrected Revised Second Amended Document Containing the Charges, paras 68-71.
[171] Corrected Revised Second Amended Document Containing the Charges, para. 91.
[172] Corrected Revised Second Amended Document Containing the Charges, paras 93, 96.

100. Regarding Mr Bemba's argument that he was not on notice of the sharing of information with the CAR authorities or others as a potential measure he ought to have taken,[173] we note that the Prosecutor alleged in the Document Containing the Charges, in the section addressing Mr Bemba's purported failure to take all necessary and reasonable measures, that it had been within Mr Bemba's power to "request the competent authorities to initiate investigations into troop discipline" and that he had "failed to […] refer the commission of the crimes to the competent authorities for investigation and prosecution".[174] Thus, we reject the argument that Mr Bemba had not received sufficient notice that it was alleged that sharing of information with the CAR authorities was a measure that he ought to have taken.

10. Other arguments raised by Mr Bemba

101. Mr Bemba argues that "[t]he Trial Chamber's findings on the adequacy of measures taken by Mr. Bemba do not refer to the agreement between Chad and the CAR to investigate allegations of crimes".[175] The Trial Chamber referred to the CAR/Chad agreement to establish an international commission of inquiry in the context of discussing the correspondence between Mr Bemba and General Cissé.[176] The Trial Chamber also referred to Mr Bemba's statement that "he expected an investigation to be initiated between Chad and the CAR".[177] In light of the foregoing, it is clear that Mr Bemba's submission is factually incorrect. Furthermore, the fact that there was an agreement between Chad and the CAR did not relieve Mr Bemba of his obligation to do all in his power to prevent, repress or punish the commission of crimes by his subordinates and therefore, in the circumstances of this case, nothing could have justified waiting for the outcome of any such investigation.[178] Therefore, his arguments are without merit.

102. Mr Bemba's submission that the Mondonga Inquiry was not limited to the initial days of the 2002-2003 CAR Operation[179] is not clearly established on the evidence and does not support the proposition that the Trial Chamber misappreciated evidence pertaining to its

[173] Appeals Hearing Transcript 10 January 2018, p. 76, lines 12-14.
[174] Corrected Revised Second Amended Document Containing the Charges, paras 91, 93.
[175] Appeal Brief, para. 365.
[176] Conviction Decision, para. 606.
[177] Conviction Decision, para. 609.
[178] Appeal Brief, para. 368.
[179] Appeal Brief, paras 372-373.

mandate. Even if the evidence of P36 as to the extended duration of the inquiry were accepted, there is no evidence that the inquiry was conducted differently or produced different outcomes in its later stages – the Trial Chamber found that the results of the inquiry were inadequate. Similarly, the Bomengo case file cover report is dated 27 November 2002 and gives no indication of how much longer suspects continued to be arrested.[180] Further, there is no evidence that suspects were later arrested, prosecuted, or punished as a result of the Mondonga Inquiry. Contrary to Mr Bemba's contention,[181] the evidence of D19 that he had been questioned during the inquiry as to rape and pillage supports, rather than contradicts, the Trial Chamber's finding that "investigators did not pursue various relevant leads, in particular, […] reports of rape".[182] This is because there is no evidence that any action was taken in respect of allegations of rape. Furthermore, in relying on the evidence of D19 – which as explained in any event supports the conclusions reached by the Trial Chamber – Mr Bemba does not address the fact that D19 is a witness whose evidence, according to the Trial Chamber, should be analysed with "particular caution".[183] More importantly, Mr Bemba ignores the Trial Chamber's explicit finding that D19's "evidence on issues related to the Mondonga Inquiry […] was evasive and contradictory" and its conclusion that "D19's testimony on this issue is unreliable".[184]

103. With regard to the Zongo Commission, Mr Bemba has not challenged the evidence upon which Trial Chamber relied to find that the Commission limited its investigation to allegations of pillaging, save to advance the general proposition that such findings were "inaccurate and unreasonable".[185] In these circumstances, we consider that Mr Bemba has not substantiated his argument and we would therefore have rejected it.

104. In relation to Mr Bemba's submissions as to the relevance of the Sibut Mission,[186] it is evident that the Trial Chamber evaluated and noted the limitations of this measure, including

[180] EVD-T-OTP-00393/CAR-DEF-0002-0001.
[181] Appeal Brief, para. 374.
[182] Conviction Decision, para. 720.
[183] Conviction Decision, paras 359-360.
[184] Conviction Decision, para. 585.
[185] Appeal Brief, para. 372. See Conviction Decision, para. 722 for its conclusions on the limited ambit of the Zongo Commission.
[186] Appeal Brief, paras 376-379.

that it was not an investigation.[187] It was therefore not unreasonable for the Trial Chamber to hold that it was not an effective measure to prevent or repress crimes by MLC troops, in that they were wholly inadequate in identifying perpetrators of the crimes committed. Mr Bemba's criticism of the FIDH Report as not founding a reasonable basis for him to take further measures is also without merit.[188] Mr Bemba's duty to investigate the actions of his troops was based on his actual knowledge of crimes – the FIDH's purported withdrawal of information from him would not relieve him of his duty to genuinely investigate the crimes. In this regard, we recall the Trial Chamber's findings, with which we agree for reasons explained below, that Mr Bemba had knowledge that crimes were being committed based upon multiple sources of information, including MLC intelligence reports and media reports.[189]

105. In light of the foregoing, we would have rejected Mr Bemba's remaining arguments.

11. Majority's assessment of material impact

106. We recall that the Trial Chamber's finding that Mr Bemba failed to take all necessary and reasonable measures was based on several findings which were, in turn, supported by a wealth of evidence.[190] We consider that the Majority fails to carry out a proper assessment of the material impact of the errors it identified in relation to both the overall conclusion that Mr Bemba failed to take all necessary and reasonable measures and the individual factual findings that support the conclusions.

107. First, where the Majority doubted that a particular factual finding was properly made, in accordance with the standard of review on appeal,[191] it should have itself assessed the evidence referred to by the parties and the Trial Chamber and evaluated whether there was a basis for the factual finding. Instead, as noted in our analysis above, the Majority sets out certain doubts it has in relation to some of the factual findings, fails to assess the evidence

[187] Conviction Decision, paras 723-725.
[188] Appeal Brief, paras 370-371.
[189] *See infra* IV.D.
[190] Conviction Decision, paras 719-734.
[191] Majority Judgment, paras 55-56.

relied upon by the Trial Chamber, and ultimately fails to reach a conclusion on those issues.[192]

108. Second, we note that a proper assessment of the material impact of the errors identified on the overall conclusion that Mr Bemba failed to take all necessary and reasonable measures would have involved consideration of all findings and evidence that supported the Trial Chamber's conclusion, including, in particular, the extent of Mr Bemba's material ability to take measures.[193] Although the Majority purports to carry out such an assessment at paragraphs 189-194 of the Majority Judgment, it focuses on the errors it identified. Indeed, the Majority does not consider in any way the other findings that informed the Trial Chamber's conclusion or the evidence on which they were based.

109. In our view, the Majority's misapplication of the standard of review led it to assess this case through the very narrow lens of Mr Bemba's arguments, to disregard the factual findings of the Trial Chamber and to ignore the evidence on which they were based.

12. Conclusion

110. In conclusion, we disagree with the Majority that it was unreasonable for the Trial Chamber to find that Mr Bemba failed to take all necessary and reasonable measures to prevent, repress or punish the commission of crimes. Rather than properly assessing all the measures at Mr Bemba's disposal and reviewing the reasonableness of the Trial Chamber's conclusions in light of all the evidence relied upon by it, the Majority appears to accept Mr Bemba's discrete arguments at face value without properly assessing their merits in light of the evidentiary analysis and findings of the Trial Chamber. Indeed, the Majority effectively identifies a number of doubts in relation to discrete factual findings of the Trial Chamber and thereafter concludes that the Trial Chamber's overall conclusion was unreasonable. In doing so, the Majority, in our view, misapplies the accepted standard of appellate review. It purports to have applied a modified standard of review, but then does it in contravention of the statutory requirement that for an error to warrant the Appeals Chamber's intervention, that error must materially affect the impugned decision. Furthermore, the Majority fails to analyse *all* the measures that Mr Bemba could have taken in light of his extensive material

[192] *See supra* 68, 92.
[193] Conviction Decision, paras 719-734.

ability to prevent, repress or punish the crimes committed by his subordinates. We cannot agree with the approach taken by the Majority, or with the conclusions reached under this heading. Therefore, we would have rejected Mr Bemba's arguments and confirmed the Trial Chamber's conclusion.

B. "Lack of effective control"

1. Overview of the Trial Chamber's findings

111. In the Conviction Decision, the Trial Chamber recalled that the Prosecutor had characterised Mr Bemba's position in this case as that of a person effectively acting as a military commander.[194] The Trial Chamber described this category as "individuals [who] are not formally or legally appointed as military commanders, but [who] will effectively act as commanders over the forces that committed the crimes".[195] The Trial Chamber considered that "the factors to be taken into consideration when determining a person's 'effective authority and control' and those establishing that a person 'effectively acted as a military commander' are intrinsically linked".[196]

112. The Trial Chamber held that "the term 'command' is defined as 'authority, especially over armed forces', and the expression 'authority' refers to the 'power or right to give orders and enforce obedience'".[197] It further found that the terms "command" and "authority" "denote the modalities, manner, or nature in which a military commander or person acting as such exercises control over his or her forces" but that in both cases "the required level of control remains the same".[198]

113. After recalling that the charges were based solely on Mr Bemba's 'effective authority and control' over the MLC troops who committed the crimes, and not on his 'effective command and control',[199] the Trial Chamber found that

> "effective control" requires that the commander have the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent

[194] Conviction Decision, para. 177.
[195] Conviction Decision, para. 177.
[196] Conviction Decision, para. 178.
[197] Conviction Decision, para. 180.
[198] Conviction Decision, para. 181.
[199] Conviction Decision, para. 182, referring to Decision on Mr Bemba's Challenge to the Second Amended Document Containing the Charges, para. 117.

> authorities. Any lower degree of control, such as the ability to exercise influence – even substantial influence – over the forces who committed the crimes, would be insufficient to establish command responsibility.[200] [Footnotes omitted.]

114. The Trial Chamber concurred with the Pre-Trial Chamber that

> "effective control" is "generally a manifestation of a superior-subordinate relationship between the [commander] and the forces or subordinates in a *de jure* or *de facto* hierarchical relationship (chain of command)". By virtue of his position, the commander must be senior in some sort of formal or informal hierarchy to those who commit the crimes. Whether or not there are intermediary subordinates between the commander and the forces which committed the crimes is immaterial; the question is simply whether or not the commander had effective control over the relevant forces.[201] [Footnotes omitted.]

115. The Trial Chamber considered that "the question of whether a commander had effective control over particular forces is case specific".[202] According to the Trial Chamber, "[t]here are a number of factors that may *indicate* the existence of 'effective control'" and "these have been properly considered as 'more a matter of evidence than of substantive law'".[203] The Trial Chamber considered that the factors may include:

> (i) the official position of the commander within the military structure and the actual tasks that he carried out; (ii) his power to issue orders, including his capacity to order forces or units under his command, whether under his immediate command or at lower levels, to engage in hostilities; (iii) his capacity to ensure compliance with orders including consideration of whether the orders were actually followed; (iv) his capacity to re-subordinate units or make changes to command structure; (v) his power to promote, replace, remove, or discipline any member of the forces, and to initiate investigations; (vi) his authority to send forces to locations where hostilities take place and withdraw them at any given moment; (vii) his independent access to, and control over, the means to wage war, such as communication equipment and weapons; (viii) his control over finances; (ix) the capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group; and (x) whether he represents the ideology of the movement to which the subordinates adhere and has a certain level of profile, manifested through public appearances and statements.[204] [Footnotes omitted.]

---

[200] Conviction Decision, para. 183.
[201] Conviction Decision, para. 184.
[202] Conviction Decision, para. 188.
[203] Conviction Decision, para. 188, referring to, *inter alia*, *Blaškić* Appeal Judgment, para. 69; *Strugar* Appeal Judgment, para. 254 (emphasis in original).
[204] Conviction Decision, para. 188.

116. The Trial Chamber considered that other factors may indicate a *lack* of effective control, including: "(i) the existence of a different exclusive authority over the forces in question; (ii) disregard or non-compliance with orders or instructions of the accused; or (iii) a weak or malfunctioning chain of command".[205]

117. As to the case at hand, and with reference to findings made in other parts of the Conviction Decision, the Trial Chamber noted the following factors:

- Mr Bemba was President of the MLC and Commander-in-Chief of the ALC and held the rank of Divisional General throughout the period relevant to the charges;[206]
- Mr Bemba had broad formal powers, ultimate decision-making authority, and powers of appointment, promotion, and dismissal;[207]
- Mr Bemba controlled the MLC's funding;[208]
- Mr Bemba had direct lines of communication with commanders in the field;[209]
- Mr Bemba had well-established reporting systems;[210]
- Mr Bemba received operational and technical advice from the MLC General Staff;[211]
- Mr Bemba could and did issue operational orders;[212]
- Mr Bemba had disciplinary powers and exercised those powers on at least four occasions during the relevant period;[213]
- Mr Bemba had the ability to send or withdraw troops to and from the CAR;[214]

---

[205] Conviction Decision, para. 190 (footnotes omitted).
[206] Conviction Decision, para. 697.
[207] Conviction Decision, para. 697.
[208] Conviction Decision, para. 697.
[209] Conviction Decision, para. 697.
[210] Conviction Decision, para. 697.
[211] Conviction Decision, para. 697.
[212] Conviction Decision, paras 697, 700.
[213] Conviction Decision, paras 697, 703.
[214] Conviction Decision, para. 697. At para. 704, the Trial Chamber recalls Mr Bemba's order to withdraw which was complied with.

- MLC troops were not "resubordinated" to the CAR authorities;[215]
- Mr Bemba continued to represent the MLC forces in the CAR in external matters;[216]
- Mr Bemba ordered the initial deployment and selected the units to be deployed;[217]
- Mr Bemba maintained regular and direct contact with commanders in the field and received operations and intelligence reports;[218]
- the MLC hierarchy in the DRC, controlled by Mr Bemba, continued to provide logistical support and equipment to the MLC troops in the CAR;[219]
- the MLC contingent in the CAR, with the small number of CAR troops frequently accompanying them, mainly operated independently of other forces in the field;[220]
- Mr Bemba's role was not diminished by the significant role played by the MLC General Staff.[221]

118. From the entirety of the evidentiary record, the Trial Chamber concluded that Mr Bemba effectively acted as a military commander and had effective control over the MLC troops deployed in the CAR during the time relevant to the charges.[222]

119. Mr Bemba submits that the Trial Chamber made several legal and factual errors in concluding that he had effective control over the MLC troops in the CAR during the 2002-2003 Operation.[223] These arguments will be addressed in turn.

2. Conflation of the concepts of "effective control" and "overall command"

120. We note that many of the arguments advanced by Mr Bemba are, as indicated by the Prosecutor,[224] premised on his factual understanding of the case. In this regard, we note Mr

[215] Conviction Decision, para. 699.
[216] Conviction Decision, para. 702.
[217] Conviction Decision, para. 700.
[218] Conviction Decision, para. 700.
[219] Conviction Decision, para. 700.
[220] Conviction Decision, para. 700.
[221] Conviction Decision, para. 701.
[222] Conviction Decision, paras 697, 700.
[223] Appeal Brief, paras 129-226.
[224] Response to the Appeal Brief, paras 111, 113, 120.

Bemba's arguments that he only retained "residual aspects of command" and that his troops were committed to a multinational force under the operational control of the CAR authorities.[225] We will address Mr Bemba's challenges to the factual findings made in this regard by the Trial Chamber in the following sections. In order to determine whether the Trial Chamber *erred in law*, we will limit ourselves to analysing Mr Bemba's challenges to the legal test set out by the Trial Chamber with respect to effective control.

121. We agree with the Trial Chamber that "'effective control' requires that the commander have the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities".[226] We further concur with the Trial Chamber that "the question of whether a commander had effective control over particular forces is case specific".[227] Indeed, as held by the Trial Chamber, "[t]here are a number of factors that may *indicate* the existence of 'effective control'" and "these have been properly considered as 'more a matter of evidence than of substantive law'".[228] Mr Bemba does not challenge these findings of the Trial Chamber. In line with the Trial Chamber's determination, Mr Bemba submits that "'effective control' derives from the commander's ability to control the troops in question, and ensure compliance with the laws of war".[229] Mr Bemba also agrees that the indicators of effective control are more a matter of evidence than of substantive law.[230]

122. Nevertheless, relying on the expert evidence of General Seara (D53), Mr Bemba submits, for example, that it is not possible for a commander to assume responsibility for the three distinct levels of command – the strategic, the operational and the tactical;[231] nor is it possible for two separate forces to fight side by side whilst maintaining independent chains of command.[232] Further, according to Mr Bemba, in a multinational operation, troops put at the disposal of another state maintain some 'organic link' with their sending authority.[233] We recall that the Trial Chamber dismissed the expert evidence of D53 as inherently unreliable

[225] Appeal Brief, paras 176, 178-179, 181, 183-184, 198-199, 215.
[226] Conviction Decision, para. 183 (footnotes omitted).
[227] Conviction Decision, para. 188 (footnotes omitted).
[228] Conviction Decision, para. 188, referring to, *inter alia*, *Blaškić* Appeal Judgment, para. 69; *Strugar* Appeal Judgment, para. 254 (emphasis in original).
[229] Appeal Brief, para. 130. *See also* para.179.
[230] Appeal Brief, para. 183; Conviction Decision, para. 188.
[231] Appeal Brief, paras 136-141.
[232] Appeal Brief, paras 153-163.
[233] Appeal Brief, para. 177.

because of its factual basis[234] (Mr Bemba's challenge to this finding is dealt with elsewhere in the present opinion[235]). However, even assuming that the evidence had been treated as reliable by the Trial Chamber, it would only be tangentially relevant to determining Mr Bemba's effective control. This is because establishing effective control is a highly fact-sensitive exercise, with the key question being whether Mr Bemba, in the circumstances, had the material ability to prevent or repress the crimes, or punish the soldiers responsible for them.

123. Accordingly, we find Mr Bemba's argument that he had "overall command", but lacked effective control without legal merit. Although we agree with Mr Bemba that criminal responsibility does not attach to a military official merely on the basis of his "over-all command",[236] the Trial Chamber found that the term command "denote[s] the modalities, manner, or nature in which a military commander or person acting as such *exercises control* over his or her forces".[237] However, the "required *level of control* remains the same".[238] Thus, we find that, contrary to Mr Bemba's submission, the Trial Chamber did not conflate the concepts of overall command and effective control.

124. We further find that Mr Bemba's argument that the Trial Chamber erred in dismissing the effect of the transfer of operational control to the CAR authorities[239] to be without merit. As set out below, in carrying out its factual assessment, the Trial Chamber addressed the issue of operational control over the MLC troops in the CAR and concluded that Mr Bemba, and not the CAR authorities, had operational control.[240] The correctness or otherwise of this finding will be assessed in the following section.

125. We now turn to Mr Bemba's argument that the Trial Chamber erred in applying a "'checklist' of traditional criteria" and that these criteria "may not be appropriate or useful" in cases of non-linear actors operating across international boundaries.[241] We note that Mr Bemba does not indicate which factors in his view should have been considered by the Trial

[234] Conviction Decision, paras 368-369.
[235] *See infra* IV.C.3.
[236] *See in this regard Halilović* Appeal Judgment, para. 214.
[237] Conviction Decision, para. 181 (emphasis added).
[238] Conviction Decision, para. 181 (emphasis added).
[239] Appeal Brief, paras 132-144.
[240] Conviction Decision, paras 427-446.
[241] Appeal Brief, paras 130, 179, 180.

Chamber instead. Mr Bemba relies upon the SCSL *AFRC* Trial Judgment as authority for the proposition that traditional indicia of effective control may not be applicable in the circumstances of his case.[242]

126. In this regard, we note that, in identifying possible factors applicable "in a conflict characterised by the participation of irregular armies or rebel groups", the SCSL Trial Chamber set out a list of criteria it considered particularly relevant.[243] However, that trial chamber also noted that the "key traditional indicia of effective control remain central".[244] Furthermore, in assessing whether the accused had effective control over the troops committing crimes, the SCSL Trial Chamber applied the indicia of effective control generally applied in cases of command responsibility, such as the position of the commander[245] and the ability to issue and enforce orders.[246]

127. We note that in a case concerning actors operating across international borders, the traditional criteria have been applied.[247] The specificities of the particular case, such as the structure and functioning of the military groups involved, as well as the remoteness of the commander are part of the factual considerations that the Trial Chamber must assess in order to determine whether the accused had the material ability to prevent, repress or report the commission of crimes.[248] However, this does not prevent the Trial Chamber from considering various relevant indicators of effective control, regardless of whether they are deemed as "traditional" or "non-traditional".[249] This interpretation is in line with the Trial Chamber's finding, with which Mr Bemba concurred, that the indicators of effective control are more a matter of evidence than of substantive law.[250]

---

[242] In that case, the AFRC was found to have fought with the Revolutionary United Front (*AFRC* Trial Judgment, paras 169-172).
[243] *AFRC* Trial Judgment, para. 787.
[244] *AFRC* Trial Judgment, paras 788-789.
[245] *See e.g. AFRC* Trial Judgment, paras 2034-2035, 2070, 2072.
[246] *See e.g. AFRC* Trial Judgment, paras 1725, 1789-1805.
[247] The Special Court for Sierra Leone considered the traditional indicia in determining whether then Liberian President Charles Taylor had effective control of the AFRC and RUF in Sierra Leone (*Taylor* Trial Judgment, paras 6977-6986).
[248] *See* in this regard *Orić* Appeal Judgement, para. 20; *Popović et al.* Appeal Judgement, paras 1869, 1874, 1876.
[249] *See e.g. Halilović* Trial Judgment paras 743, 745-746.
[250] Appeal Brief, para. 183; Conviction Decision, para. 188.

128. In light of the foregoing considerations, we do not find any errors in the legal test set out by the Trial Chamber that effective control requires that the commander have the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities. Accordingly, we would have rejected Mr Bemba's arguments.

3. Mr Bemba did not have "operational control" over MLC troops in the CAR

(a) Finding that Mr Bemba was assisted by the MLC General Staff

129. We note that Mr Bemba presents an alternative factual hypothesis to that found to exist by the Trial Chamber; that it was the CAR CO, and not the MLC General Staff, that "was at the heart of operations", suggesting that it was the CAR CO that exercised operational control also over the MLC troops in the CAR.[251] We recall that in an appeal, the Appeals Chamber's duty is to review the reasonableness of the contested findings of the Trial Chamber, and not to assess the viability of alternative findings that the Trial Chamber could purportedly have made.[252] Accordingly, with respect to the argument that the Trial Chamber failed to establish any contact between Mr Bemba and the CAR Centre of Operations, we note that the Trial Chamber did not rely on any contact between Mr Bemba and the CAR Centre of Operations, to find that Mr Bemba had operational control over the MLC troops in the CAR.[253] To the contrary, the Trial Chamber found that the lack of organisation in the CAR military and the poor relationship between the MLC and CAR forces "weighs against the proposition that the MLC agreed to, or did, transfer operational command over MLC troops to the CAR authorities".[254] We therefore cannot discern any error in the Trial Chamber's omission to cite evidence in support of contact between Mr Bemba and the CAR CO, in circumstances where it made no finding to that effect.

130. Turning to Mr Bemba's argument that there was no evidentiary basis for the Trial Chamber's finding that the MLC General Staff "had a role in coordinating operations, monitoring the situation in the CAR, and reporting to Mr Bemba, and had the ability to

[251] Appeal Brief, para. 148.
[252] *See e.g.* *Bemba et al*. Appeal Judgment, paras 97, 900, 957, 1103, 1195, 1199, 1211, 1215, 1216, 1223-1225, 1232, 1260, 1267, 1282, 1518.
[253] Conviction Decision, para. 427.
[254] Conviction Decision, para. 444.

discuss with Mr Bemba or make comments or observations",[255] we find, for the reasons set out below, that the Trial Chamber's finding was not unreasonable.

131. In support of this finding,[256] the Trial Chamber referred to the testimony of P36 and to evidence concerning the general role of the General Staff in the MLC structure set out in section V (A) of the Conviction Decision.[257] Although the Trial Chamber did not specify which evidence in particular it was alluding to when referring to section V (A), it is noted that the role of the General Staff in the MLC structure is set out in paragraph 401 of the Conviction Decision, where the Trial Chamber found that:

> The General Staff, including the Chief of General Staff, gathered military intelligence, formed operational plans, advised Mr Bemba on operational and technical matters, and coordinated operations by implementing Mr Bemba's "orders", "initiatives", "instructions", "directives", and/or "intentions". The General Staff and commanders in the field reported to Mr Bemba frequently, either directly or via the Chief of General Staff. [258] [Footnotes omitted.]

132. In support of this finding, the Trial Chamber referred to the evidence of P15, P32, P45, P33, D49, D39, the MLC statute that was operative during the period of the charges,[259] as well as to another excerpt of the testimony of P36.[260]

133. We note that the part of P36's testimony to which the Trial Chamber referred at paragraph 446 of the Conviction Decision does not directly support the specific finding that the General Staff "had a role in coordinating operations, monitoring the situation in the CAR, and reporting to Mr Bemba, and had the ability to discuss with Mr Bemba or make comments or observations".[261] However, as noted above, the Trial Chamber also relied on evidence concerning the general role of the General Staff in the MLC structure set out in section V (A) of the Conviction Decision.[262] There, the Trial Chamber referred to other excerpts of P36's testimony that support the finding that the General Staff "had a role in coordinating

[255] Appeal Brief, paras 150-151.
[256] Conviction Decision, para. 446.
[257] Conviction Decision, fn. 1242.
[258] Conviction Decision, para. 401.
[259] EVD-T-OTP808/CAR-OTP-0069-0363; Conviction Decision, para. 706.
[260] Conviction Decision, fns 1050-1051.
[261] *See* Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Conf-Eng, p. 21, line 15 to p. 22, line 13; p. 77, lines 14-16 where P36 stated that [redacted].
Conviction Decision, para. 446, fn. 1242.

operations, monitoring the situation in the CAR, and reporting to Mr Bemba, and had the ability to discuss with Mr Bemba or make comments or observations".[263] The inconsistencies in the evidence of P36 were acknowledged by the Trial Chamber, which found him at times "evasive or contradictory in an apparent attempt to distance himself from the events and understate his role and position within the MLC".[264] Similarly, Mr Bemba's argument that some of the excerpts relate generally to the role of the MLC General Staff broadly and not particularly to the deployment of MLC troops to the CAR in 2002-2003[265] does not render the Trial Chamber's reliance on the evidence of P36 unreasonable – rather, this evidence could reasonably be relied upon to highlight the role of the MLC General Staff and its relationship with Mr Bemba, including during the 2002-2003 CAR Operation. This is particularly so given that [redacted] during the time relevant to the charges and [redacted].[266] As noted by the Prosecutor,[267] on the basis of the evidence before it, the Trial Chamber made a number of findings that lend further support to the Trial Chamber's finding that the General Staff assisted Mr Bemba in relation to the 2002-2003 CAR Operation.[268]

134. We observe that, as argued by the Prosecutor, witness P36 testified about: General Amuli's [redacted];[269] logistical support provided to the MLC contingent;[270] assistance provided by the CAR authorities;[271] [redacted]

[263] Conviction Decision, para. 401, fn. 1050, referring to Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 28, lines 2-16; Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Conf-Eng, p. 41, line 23 to p. 42, line 23; Transcript of 14 March 2012, ICC-01/05-01/08-T-214-Conf-Eng, p. 8, line 16 to p. 9, line 7; Transcript of 14 March 2012, ICC-01/05-01/08-T-214-Red2-Eng, p. 39, lines 13-20; Transcript of 16 March 2012, ICC-01/05-01/08-T-216-Conf-Eng, p. 22, lines 3-25; Transcript of 19 March 2012, ICC-01/05-01/08-T-217-Conf-Eng, p. 35, lines 19-23; and Conviction Decision, para. 401, fn. 1051, referring to Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 48, line 25 to p. 49, line 9; Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Conf-Eng, p. 36, lines 10-24.
[264] Conviction Decision, para. 307.
[265] Appeal Brief, para. 202.
[266] Conviction Decision, para. 390.
[267] Response to the Appeal Brief, para. 130.
[268] Conviction Decision, paras 425 (finding that the MLC General Staff provided military intelligence to Mr Bemba), 455 (finding that the General Staff had proposed units for deployment; finding that the General Staff implemented and monitored the deployment of troops and equipment).
[269] Response to the Appeal Brief, para. 131, referring to Transcript of 14 March 2012, ICC-01/05-01/08-T-214-Conf-Eng, p. 3, line 18 to p. 5, line 4; Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Conf-Eng, p. 21, line 24 to p. 22, line 7. In the Conviction Decision, the Trial Chamber did not rely on these parts of the testimony.
[270] Response to the Appeal Brief, para. 131, referring to Conviction Decision, paras 413-415, fns 1124-1126.
[271] Response to the Appeal Brief, para. 131, referring to Conviction Decision, para. 412, fns 1115, 1119.

reports of MLC crimes and measures in response;[272] [redacted] Mr Bemba to Bangui in November 2002 to meet with President Patassé;[273] and [redacted] the situation of MLC troops in the CAR.[274] We note that the Trial Chamber also found that the MLC Chief of General Staff "urged the MLC contingent in the CAR to exercise 'vigilance towards the civilian population who are doubtlessly hiding mutineers among them'", as stated by the Prosecutor.[275] In support of the latter finding, the Trial Chamber relied upon a message contained in the MLC Communication Logs in which Mr Bemba was copied.[276]

135. In light of the above, we consider that it was not unreasonable for the Trial Chamber to conclude that, although the MLC General Staff was "not significantly involved in planning operations, issuing orders, or intelligence", it "had a role in coordinating operations, monitoring the situation in the CAR, and reporting to Mr Bemba, and had the ability to discuss with Mr Bemba or make comments or observations".[277]

136. Moreover, we find that the fact that some of the assistance provided by the MLC General Staff may have taken place prior to the alleged crimes[278] is irrelevant to the Trial Chamber's finding that the MLC General Staff did assist Mr Bemba during the 2002-2003 CAR Operation.

137. In light of the foregoing, we would have found that it was not unreasonable for the Trial Chamber to conclude that Mr Bemba was assisted by the MLC General Staff. The Trial Chamber provided evidential support for its factual finding that Mr Bemba received assistance from the MLC General Staff, which Mr Bemba does not address in his submissions. Mr Bemba's arguments in that regard therefore warrant rejection.

(b) Finding that the MLC forces operated independently

138. We understand Mr Bemba to argue that: (i) the Trial Chamber found that the MLC troops acted entirely independently in the CAR; but (ii) that this finding was undermined and

[272] Response to the Appeal Brief, para. 131, referring to Conviction Decision, para. 425, fn. 1174.
[273] Response to the Appeal Brief, para. 131, referring to Conviction Decision, para. 591, fns 1834-1835.
[274] Response to the Appeal Brief, para. 131, referring to Conviction Decision, para. 596, fn. 1856.
[275] Response to the Appeal Brief, para. 131.
[276] Conviction Decision, para. 568, fn. 1765.
[277] Conviction Decision, para. 446.
[278] *See* Reply to the Response to the Appeal Brief, para. 25.

contradicted by other findings of the Trial Chamber, as well as the evidence relied upon.[279] We note, however, that the Trial Chamber's finding at paragraph 411 of the Conviction Decision, which it recalled at paragraph 700 of the Conviction Decision, does not suggest that there was no cooperation between the MLC contingent and other forces supporting President Patassé. To the contrary, the Trial Chamber noted that the MLC troops were frequently accompanied by a "relatively small number of CAR troops", who acted as guides and provided intelligence. In reaching this finding, the Trial Chamber relied, *inter alia*, on the testimony of P36, who had stated that an MLC company of about 150 to 200 soldiers would typically be accompanied by up to 30 CAR soldiers.[280] In addition, the Trial Chamber relied on the testimony of P45, P31, CHM1 and D19.[281] Mr Bemba does not challenge this Trial Chamber's finding.

139. Given that the Trial Chamber specifically acknowledged that CAR troops were accompanying the MLC troops to assist them, we see no contradiction between the Trial Chamber's finding that the MLC troops operated independently, and the finding that "[o]n 7 December 2002, the MLC, *along with other forces aligned with President Patassé,* seized Damara".[282] The Trial Chamber's conclusion was that such cooperation did not undermine the fact that the MLC troops were acting independently. Similarly, while it is correct that the Trial Chamber relied upon RFI radio broadcasts stating that "*CAR forces supported by the MLC* recaptured the towns of Sibut and Bozoum from General Bozizé's rebels",[283] evidence that in Bossangoa and Bossembelé the MLC troops were accompanied by forces responding to President Patassé,[284] and a wealth of evidence indicating that MLC troops were (as the Trial Chamber also found) supported by CAR troops,[285] this does not create a contradiction that would render the Trial Chamber's finding unreasonable. We note that a plain reading of the Trial Chamber's finding shows that the MLC troops were supported by the CAR troops during its operations and that CAR troops frequently accompanied them.[286] However, this

[279] Appeal Brief, paras 153-163.
[280] Conviction Decision, para. 411, fn. 1110, referring to Transcript of 14 March 2012, ICC-01/05-01/08-T-214-Red2-Eng, p. 43, lines 19-22; p. 46, lines 5-24.
[281] *See* Conviction Decision, para. 411, fn. 1110.
[282] Conviction Decision, para. 524 (emphasis added).
[283] Conviction Decision, para. 612 (emphasis added).
[284] Conviction Decision, para. 527, fn. 1590, referring to the testimony of P213 and P173.
[285] Conviction Decision, para. 411, fns 1110-1111.
[286] Conviction Decision, para. 411.

cooperation and assistance was limited, leading the Trial Chamber to conclude that MLC troops overall operated independently. Mr Bemba has not established that this conclusion was unreasonable. Furthermore, such unreasonableness does not result from the potentially different understanding of one of the items of evidence upon which the Trial Chamber relied, namely the logbook message from Colonel Moustapha dated 30 October 2002.[287] Mr Bemba merely presents a different way of interpreting the relevance of this item of evidence[288] – and in particular the absence of other similar messages – which is insufficient to establish an error.

140. In sum, we would have rejected Mr Bemba's arguments that the Trial Chamber erred when it found that the MLC troops acted independently.

(c) Finding that Mr Bemba sometimes issued orders

141. Mr Bemba challenges the Trial Chamber's purported finding that the issuance of orders was not determinative of the question of effective control.[289] Indeed, as noted above, "effective control" requires that the commander has the material ability to prevent or repress the commission of the crimes, or to submit the matter to the competent authorities.[290] We are of the view that, therefore, as a matter of law, it is not possible to find that a commander had effective control over his troops in the absence of that commander's power to issue and enforce orders. In this regard, we note the jurisprudence on command responsibility of other international tribunals, which has considered the power to issue and enforce orders relevant to the assessment of whether the accused had effective control.[291] As noted by Mr Bemba, in one of these cases, the power to issue orders was considered to be "crucial".[292] We find this jurisprudence persuasive and hereby adopt it.

---

[287] Conviction Decision, para, 411, fn. 1112 referring to EVD-T-OTP702/CAR-D04-0002-1514.
[288] Appeal Brief, para. 163.
[289] Appeal Brief, para. 172.
[290] *See supra* para. 121.
[291] *See e.g.* *Nizeyimana* Trial Judgment, paras 1526-1527; *Ndindiliyimana et al.* Trial Judgment, para. 1982; *Perišić* Appeal Judgment, paras 98-101; *AFRC* Trial Judgment, paras 1789-1805.
[292] *AFRC* Trial Judgment, paras 787, 789: "[I]n a conflict characterised by the participation of irregular armies or rebel groups, the traditional indicia of effective control provided in the jurisprudence may not be appropriate or useful. … Nonetheless, the key traditional indicia of effective control remain central**,** although they may be more loosely defined. **For example, the power of the superior to issue orders is crucial**, although these orders may be criminal in nature. Similarly, the superior must be capable of taking disciplinary action, even though the measures taken may be more brutal and arbitrarily utilised." [Emphasis added].

142. We note, however, that, contrary to what Mr Bemba suggests, the Trial Chamber did not hold that it was not determinative whether he had *power* to issue orders. Rather, at paragraph 700 of the Conviction Decision, the Trial Chamber found that whether "Mr Bemba issued direct operational orders to the MLC forces in the CAR" was not determinative. Thus, the Trial Chamber only found that it was, as such, irrelevant whether Mr Bemba actually *made use* of his power to issue orders. This approach does not disclose an error of law. In addition, the Trial Chamber noted in the same paragraph that "nonetheless […] Mr Bemba did issue such orders".

143. Turning to the remainder of Mr Bemba's arguments, we note, first, that the finding that Mr Bemba was sometimes issuing direct operational orders to the units in the field is not incompatible with the finding that, on other occasions, Mr Bemba was issuing orders through the chain of command.[293] In this regard, we recall the Trial Chamber's finding that the MLC General Staff played a significant role in, *inter alia*, implementing Mr Bemba's orders.[294] Mr Bemba has failed to show an error in the Trial Chamber's finding that the MLC General Staff provided assistance to Mr Bemba during the time relevant to the charges.[295] As to Mr Bemba's argument that many of the Trial Chamber's findings cited by the Prosecutor in response concern only the DRC,[296] we note that the findings of the Trial Chamber refer to at least one of these orders – the deployment of troops and equipment at the commencement of the 2002-2003 CAR Operation – which was directly relevant to the 2002-2003 CAR Operation.[297] We therefore reject Mr Bemba's argument that the proposition that he could give orders through the chain of command is without evidentiary basis. In light of the foregoing, Mr Bemba's argument that the Trial Chamber introduced the idea that Mr Bemba was commanding on a "part-time" basis,[298] is also rejected, alongside the corresponding argument that Mr Bemba did not have due notice of the Trial Chamber's theory of command.[299] For the same reason, we consider that the principle of unity of command invoked by Mr Bemba is inapposite.[300] Whether or not a properly organised military

[293] *See* Appeal Brief, para. 166.
[294] *See e.g.* Conviction Decision, paras 401, 446, 455, 701.
[295] *See supra* IV.B.3(a).
[296] Reply to the Response to the Appeal Brief, para. 30.
[297] Conviction Decision, para. 455.
[298] Appeal Brief, para. 167.
[299] Appeal Brief, para. 170.
[300] Appeal Brief, para. 166.

organisation should adhere to that principle is irrelevant to the question of whether, on the evidence before the Trial Chamber, it was not unreasonable to conclude that Mr Bemba gave orders.

144. Turning to Mr Bemba's challenges to the Trial Chamber's reliance on the testimony of P169,[301] we note that the excerpts upon which the Trial Chamber relied support the finding that Mr Bemba sometimes issued orders directly to the units in the field, and that Colonel Moustapha relayed and implemented them. Notably, the witness stated that "[t]he decisions sometimes came from Mr Jean-Pierre Bemba. Sometimes Moustapha would take the decision himself, and sometimes in collaboration with some of the members of the Government of the Central African Republic".[302] However, and contrary to Mr Bemba's submission,[303] P169 was not the sole witness relied upon to find that Mr Bemba sometimes issued orders directly.

145. The Trial Chamber relied upon the testimony of P36, P33, P213, P45, P6, P15, P178 and P173.[304] The testimony of several of these witnesses corroborates the evidence provided by P169 that Mr Bemba was sometimes issuing operational orders *directly* to the units in the field, which were relayed and implemented by Colonel Moustapha.[305] P36 testified that Mr Bemba would give orders directly to Colonel Moustapha and [redacted].[306] Similarly, P213 testified that on one occasion, he heard Mr Bemba ordering Colonel Moustapha to execute certain people.[307] P33 testified that Mr Bemba had direct contact with the MLC troops in the CAR, [redacted].[308] P45 testified that he could hear Mr Bemba instructing commanders in the field through the "phonie" system and that he

[301] Appeal Brief, paras 168-169.
[302] Conviction Decision, fn. 1184, referring to Transcript of 7 July 2011, ICC-01/05-01/08-T-140-Red2-Eng, p. 21, lines 1-4.
[303] Appeal Brief, para. 168.
[304] Conviction Decision, fns 1184-1185.
[305] Conviction Decision, fns 1184-1185.
[306] Conviction Decision, fn. 1184, referring to, *inter alia*, Transcript of 16 March 2012, ICC-01/05-01/08-T-216-Conf-Eng, p. 22, line 11 to p. 23, line 16.
[307] Conviction Decision, fn. 1184, referring to, *inter alia*, Transcript of 16 November 2011, ICC-01/05-01/08-T-188-Red2-Eng, p. 8, lines 5-12.
[308] Conviction Decision, fn. 1184, referring to, *inter alia*, Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Conf-Eng, p. 49, line 17 to p. 50, line 13.

could also hear some commanders complain about Mr Bemba issuing instructions that were not coded.[309] P178 testified that the orders received by Colonel Moustapha came from Mr Bemba.[310] P173 testified that while President Patassé had the power to give orders regarding matters of intelligence, orders concerning the advancing or the withdrawal of the troops were coming directly from Mr Bemba.[311] Mr Bemba does not address this evidence in his appeal brief.

146. Furthermore, while the testimony of P6 and P15, to which the Trial Chamber also referred, do not seem to corroborate the fact that Mr Bemba was sometimes issuing orders *directly* to the units in the field,[312] they provide some indication that Mr Bemba issued orders through the chain of command.

147. In sum, we reject Mr Bemba's argument that the only witness providing information relevant to the Trial Chamber's finding that Mr Bemba was sometimes issuing orders directly to the units in the field was P169.[313] We also do not find it unreasonable that the Trial Chamber relied upon the testimony of P169 in support of its finding, given the other evidence that was before it.

148. With respect to Mr Bemba's argument that there was no physical or documentary evidence of operational orders issued by Mr Bemba,[314] we recall our previous findings that, based on the evidence before it, a) it was not unreasonable for the Trial Chamber to conclude that Mr Bemba sometimes issued orders directly to the units in the field, which were relayed and implemented by Colonel Moustapha,[315] and b) it was not unreasonable for the Trial Chamber to conclude that MLC General Staff implemented Mr Bemba's orders such as the

[309] Conviction Decision, fn. 1184, referring to, *inter alia*, Transcript of 30 January 2012, ICC-01/05-01/08-T-201-Red2-Eng, p. 34, line 24 to p. 35, line 13.
[310] Conviction Decision, fn. 1185, referring to, *inter alia*, Transcript of 30 August 2011, ICC-01/05-01/08-T-150-Red2-Eng, p. 40, lines 22-23; Transcript of 1 September 2011, ICC-01/05-01/08-T-151-Red2-Eng, p. 68, lines 1-4; Transcript of 2 September 2011, ICC-01/05-01/08-T-152-Red2-Eng, p. 61, lines 9-10; Transcript of 6 September 2011, ICC-01/05-01/08-T-154-Red2-Eng, p. 56, line 18 to p. 57, line 5.
[311] Conviction Decision, fn. 1185, referring to, *inter alia*, Transcript of 24 August 2011, ICC-01/05-01/08-T-145-Red2-Eng, p. 4, line 23 to p. 5, line 8.
[312] Conviction Decision, fn. 1184, referring to Transcript of 7 April 2011, ICC-01/05-01/08-T-97-Eng, p. 20, lines 21-25 (witness P6) and Transcript of 8 February 2012, ICC-01/05-01/08-T-208-Conf-Eng, p. 32 lines 17-22; p. 49, lines 5-19 (witness P15).
[313] Appeal Brief, paras 168-169.
[314] Appeal Brief, para. 193.
[315] *See supra* IV.B.3(c).

monitoring and deployment of troops and equipment.[316] The lack of physical or documentary evidence of any operational orders from Mr Bemba to the MLC contingent does not, in itself, call the reasonableness of the Trial Chamber's finding as to the issuance of such orders into question, given that other evidence was before the Chamber. Therefore, Mr Bemba's argument in this regard warrants rejection.

(d) Conclusion in relation to the finding that Mr Bemba had operational control over the MLC troops in the CAR

149. Having rejected the totality of arguments raised by Mr Bemba, we would have found that it was not unreasonable for the Trial Chamber to conclude that Mr Bemba had operational control over the MLC troops in the CAR.

4. The findings on the remaining indicia of effective control are also flawed

150. Mr Bemba contests the adequacy of the other indicia of effective control upon which the Trial Chamber relied, namely the findings: (1) that Mr Bemba ordered the MLC deployment to the CAR; (2) that Mr Bemba had regular and direct contact with commanders and received operations and intelligence reports; (3) with respect to logistics; (4) that Mr Bemba retained primary disciplinary authority; (5) with respect to the representation of MLC forces in external matters; (6) and with respect to the withdrawal of the troops.[317]

151. We recall that effective control is established by demonstrating the commander's ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities.[318] Furthermore, the factors relevant to demonstrate this ability are more a matter of evidence than of substantive law.[319]

(a) Finding that Mr Bemba ordered the MLC's deployment to the CAR

152. Mr Bemba challenges the Trial Chamber's finding that he had made the decision to intervene in the CAR primarily by seeking to establish that the Trial Chamber unreasonably rejected the evidence of D49, who had testified that the decision had actually been taken by

[316] *See supra* IV.B.3(a).
[317] Appeal Brief, paras 186-223.
[318] *See supra* para. 121.
[319] *See supra* para. 121.

the MLC's G3 and the Chief of General Staff.[320] We do not consider that the Trial Chamber erred when in noting the evidence of D49 it did not discuss whether his account was further corroborated by D39's testimony. We recall that D39 testified before the Trial Chamber that "senior leaders within the movement had decided to provide assistance" – testimony the Trial Chamber referenced in the Conviction Decision.[321] The witness also mentioned [redacted].[323] It is the latter statement that the Trial Chamber, in Mr Bemba's submission, failed to address.[324] We consider, however, that D39's testimony does not specifically address the question of whether the decision to intervene in the CAR was made by Mr Bemba or by the MLC's G3 and Chief of General Staff. Accordingly, we do not consider that the Trial Chamber erred by not referring to it in the context of its analysis of D49's testimony.

153. As to the Trial Chamber's analysis of D49's testimony itself, Mr Bemba submits that D49 [redacted] than the witnesses relied upon by the Trial Chamber, citing for example P213 and P32.[325] However, the Trial Chamber referred to certain inconsistencies in the testimony of D49.[326] In light of the Trial Chamber's general concerns about the credibility of D49[327] and the inconsistencies identified in his testimony with respect to the process leading up to the decision to deploy troops to the CAR,[328] we do not find it unreasonable for the Trial Chamber not to have relied on this testimony. In this regard, we also note that the majority of the witnesses relied upon by the Trial Chamber [redacted].[329]

[320] Conviction Decision, para. 454.
[321] Conviction Decision, para. 453, fn. 1268, referring to Transcript of 22 April 2013, ICC-01/05-01/08-T-308-Conf-Eng, p. 33, line 14-21.
[322] Transcript of 22 April 2013, ICC-01/05-01/08-T-308-Conf-Eng, p. 33, line 14 to p. 34, line 25.
[323] Transcript of 22 April 2013, ICC-01/05-01/08-T-308-Conf-Eng, p. 34, lines 6-7.
[324] Appeal Brief, para. 189.
[325] Appeal Brief, para. 191.
[326] Conviction Decision, fn. 1273.
[327] Conviction Decision, para. 454.
[328] Conviction Decision, fn. 1273.
[329] **P213** testified that he was present in the meeting where the decision to send MLC troops to the CAR was taken (Transcript of 14 November 2011, ICC-01/05 -01/08-T-186-Red2-Eng, p. 31, line 1 to p. 33, line 8). **P36**

154. With respect to the evidence of [redacted], we note that, as pointed out by the Prosecutor,[330] the meeting mentioned by this witness was held in January 2003 and therefore after the deployment of the MLC troops to the CAR.[331] We also note that [redacted].[332] We do not consider it unreasonable for the Trial Chamber not to have relied on [redacted], as this testimony does not corroborate that of D39 and D49.

155. In light of the foregoing, we would have found that it was not unreasonable for the Trial Chamber to conclude that Mr Bemba ordered the MLC deployment to the CAR.

(b) Finding that Mr Bemba had contact with commanders and received operations and intelligence reports

156. We note that several of Mr Bemba's arguments against the Trial Chamber's finding that he had contact with commanders and received operations and intelligence reports are premised, once again, on his contention that operational control of the MLC troops in the CAR had been transferred to the CAR authorities.[333] Having found that the Trial Chamber did not err in finding that Mr Bemba retained operational control over the MLC troops in the CAR throughout the 2002-2003 CAR Operation, we would have dismissed these arguments.

157. As to Mr Bemba's argument that the "receipt of information concerning the morale of troops, or casualties suffered, or general reports on operations […] do not themselves establish 'effective control'",[334] we note that, in finding that Mr Bemba had effective control

---

[redacted] (Conviction Decision, para. 446). **P33** testified that he knew that Mr Bemba took the decision to intervene in the CAR [redacted] (Transcript of 8 September 2011, ICC-01/05-01/08-T-158-Conf-Eng, p. 32, line 1 to p. 34, line 2). **P44** testified that only Mr Bemba could have taken the decision to intervene the CAR (Transcript of 3 February 2012, ICC-01/05-01/08-T-205-Red2-Eng, p. 31, line 20 to p. 32, line 2; p. 58, lines 19-22). **P45**, a member of the MLC, testified that he was informed by the MLC Chief of General Staff that the decision had been taken to intervene in the CAR and that this decision had been taken by Mr Bemba (Transcript of 30 January 2012, ICC-01/05-01/08-T-201-Red2-Eng, p. 4, lines 4-5; p. 56, lines 3-15; Transcript of 2 February 2012, ICC-01/05-01/08-T-204-Red-Eng, p. 68, lines 14 to p. 70, line 2). **P15**, [redacted], testified that [redacted] of the decision and understood that [redacted], as it was a decision left to Mr Bemba (Transcript of 7 February 2012, ICC-01/05-01/08-T-207-Conf-Eng, p.10, lines 14-17; Transcript of 8 February 2012, ICC-01/05-01/08-T-208-Conf-Eng, p. 47, line 25 to p. 48, line 3). **P32** [redacted] testified that Mr Bemba took the decision to deploy troops to the CAR (Transcript of 23 September 2011, ICC-01/05-01/08-T-165-Red2-Eng, p. 57, lines 1-16).

[330] Response to the Appeal Brief, para. 143.

[331] Conviction Decision, para. 529, fns 1596-1599.

[332] Conviction Decision, para. 284, and references provided in fns 666-667.

[333] Appeal Brief, paras 181, 207.

[334] Appeal Brief, para. 181. *See also* para. 198.

over the MLC troops in the CAR during the 2002-2003 CAR Operation, the Trial Chamber did not rely solely on Mr Bemba's receipt of information from the field. To the contrary, as noted above, the Trial Chamber relied on several factors that it considered relevant to establish Mr Bemba's ability to prevent, repress or report the commission of crimes by his subordinates.[335] Therefore, Mr Bemba's argument that the receipt of information from the field does not in itself demonstrate effective control is inapposite.

158. We recall the Trial Chamber's uncontested finding that the indicators of effective control are more a matter of evidence than of substantive law.[336] As noted above, what needs to be determined is whether the accused had the material ability to prevent, repress or report the commission of crimes by his subordinates.[337] Accordingly, in carrying out its factual assessment, a trial chamber may consider various factors in determining whether the accused had that material ability. We note, for example, that other internationalised tribunals have considered the receipt by the accused of information concerning the conduct of his subordinates as a relevant factor in assessing the existence of effective control.[338]

159. In light of the foregoing considerations, we would have found that the Trial Chamber did not err in considering Mr Bemba's receipt of information concerning the conduct of his subordinates as a relevant factor in establishing Mr Bemba's material ability to prevent, repress or report the commission of crimes by his subordinates; that is, Mr Bemba's effective control over the MLC troops in the CAR.

160. Turning to the remainder of Mr Bemba's arguments, we recall that Mr Bemba submits that the finding that Mr Bemba and Colonel Moustapha regularly communicated "with

---

[335] *See supra* paras 117-118.
[336] Appeal Brief, para. 183; Conviction Decision, para. 188.
[337] *See supra* para. 121.
[338] In the *Krnojelac* Trial Judgment, in assessing the accused's position, the Trial Chamber considered the fact that the accused subordinates were "required to report to the [accused] with respect to the management of their areas of responsibility" (para. 97). In the *Hadžihasanović and Kubura* Trial Judgment, in assessing the *de facto* link between a force and the units subordinated to it, the Trial Chamber noted that "there is no evidence indicating that the mujahedin sent combat reports or other reports on their activities to those in charge of the combat in which they took part" (para. 795). Similarly, in the *AFRC* Appeal Judgment, the Appeals Chamber noted that in establishing effective control of Mr Kamara, the Trial Chamber considered evidence that he had "received reports from both the operations commander and the provost marshal" (para. 266, referring to *AFRC* Trial Judgment, paras 1924, 1925). In the *Strugar* Trial Judgment, the Trial Chamber considered as a relevant factor to establish the accused's material ability to prevent the commission of crimes the fact that the accused's unit received "regular combat reports from the units directly subordinated to it, […], which were compiled on the basis of reports from their subordinate units down to the level of battalion" (para. 393).

Colonel Moustapha reporting the status of operations and the situation at the front […] is not available on the evidence".[339] Mr Bemba specifically challenges the Trial Chamber's reliance on P169 and P173, who are, in his submission, the only witnesses who testified to the content of Mr Bemba's communications with Colonel Moustapha.[340]

161. We note that the testimony of P169 and P173 was not the only relevant evidence upon which the Trial Chamber relied to find that Colonel Moustapha reported the status of operations and the situation at the front to Mr Bemba.[341] At least three of the witnesses relied upon by the Trial Chamber – CHM1, P213 and P-178 – corroborate the testimony of P169 and P173. In these circumstances, we find that, despite some inconsistencies in the testimony of P169[342] and the general concerns as to the credibility of P169 and P173, which the Trial Chamber recalled in reaching its finding,[343] it was not unreasonable for the Trial Chamber to conclude that Mr Bemba was regularly communicating with Colonel Moustapha; nor was it unreasonable for it to conclude that the latter was reporting the status of operations and the situation at the front.

162. As to Mr Bemba's argument concerning gaps between the reports contained in the MLC Communication Logs,[344] we note that the Trial Chamber relied on the reports contained in the MLC Communication Logs in combination with other evidence that established that Mr Bemba was receiving reports orally.[345] In these circumstances, we find that, while it would have been desirable for the Trial Chamber to explain in more detail the basis upon

---

[339] Appeal Brief, para. 195.
[340] Appeal Brief, paras 196-198.
[341] **CHM1**, [redacted], testified that Colonel Moustapha was coordinating the troops in the field and he would report to Mr Bemba (Conviction Decision, fn. 1152, referring to, *inter alia*, Transcript of 18 November 2013, ICC-01/05-01/08-T-353-Red-Eng, p. 57, lines 7-20); **P21**3, [redacted] similarly testified that Colonel Moustapha was reporting to Mr Bemba about the situation in the field (Conviction Decision, fn. 1152 referring to, *inter alia*, Transcript of 16 November 2011, ICC-01/05-01/08-T-188-Red2-Eng, p. 6, lines 16-22; p. 7, line 3 to p. 8, line 12); **P15** testified that Mr Bemba had satellite communications with Colonel Moustapha but did not specify the content of their discussions (Conviction Decision, fn. 1152, referring to, *inter alia*, Transcript of 9 February 2012, ICC-01/05-01/08-T-209-Conf-Eng, p. 6, lines 8-13); **P-178** testified that Colonel Moustapha reported to Mr Bemba that a riverboat had been hijacked (Conviction Decision, fn. 1152, referring to, *inter alia*, Transcript of 1 September 2011, ICC-01/05-01/08-T-151-Red2-Eng, p. 63, lines 3-7); **P33** testified [redacted] (Conviction Decision, fn. 1152, referring to Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Conf-Eng, p. 49, line 14 to p. 50, line 13; Transcript of 14 September 2011, ICC-01/05-01/08-T-161-Conf-Eng, p. 17, line 17 to p. 18, line 17).
[342] Appeal Brief, para. 196 and references included therein.
[343] Conviction Decision, para. 420.
[344] Appeal Brief, para. 200.
[345] Conviction Decision, para. 423.

which it relied on the MLC Communication Logs, it was not unreasonable for the Trial Chamber to have relied, in combination with other evidence, on the messages contained in the MLC Communication Logs to find that Mr Bemba was receiving operations reports. We are also not persuaded by Mr Bemba's argument that he was not reading the messages, despite being copied.[346] Although the message referred to by Mr Bemba could be interpreted as an indication that he may not have been reading all the messages, it was not unreasonable for the Trial Chamber to conclude that, on the basis of the information contained in the MLC Communication Logs, Mr Bemba was *receiving* this information.[347]

163. Turning to Mr Bemba's challenges relating to intelligence reports, we shall first address the finding that Mr Bemba received information about the combat situation, troop positions and politics.[348] We accept the argument[349] that the excerpts of P36's testimony upon which the Trial Chamber relied in support of this finding relate to the MLC generally or the DRC, but not to information from the CAR.[350] In this respect, we note that the Mambasa road to which the witness referred is located in the DRC. In these circumstances, we consider that it would have been desirable for the Trial Chamber to explain the basis upon which it relied on these aspects of P36's evidence. As to the excerpts of P33's testimony upon which the Trial Chamber relied, it also appears that they do not relate specifically to the CAR, but to the *modus operandi* of the MLC's intelligence service.[351] Nevertheless, we do not consider that the Trial Chamber's finding was unreasonable, given that there is no indication that the *modus operandi* differed as far as intelligence reports from the CAR were concerned.

164. We consider that, taken on its own, the excerpts of P33's testimony upon which Mr Bemba relies could raise doubts as to P33's knowledge.[352] However, the testimony must be

---

[346] Appeal Brief, para. 201.
[347] Conviction Decision, para. 424.
[348] Conviction Decision, para. 425.
[349] Appeal Brief, para. 202.
[350] Conviction Decision, fn. 1172, referring to Transcript of 14 March 2012, ICC-01/05-01/08-T-214-Red2-Eng, p. 17, line 18 to p. 19, line 1.
[351] Conviction Decision, fn. 1172, referring to Transcript of 9 September 2011, ICC-01/05-01/08-T-158-Red2-Eng, p. 47, lines 4-15; Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Red2-Eng, p. 8, line 20 to p. 9, line 6.
[352] Appeal Brief, para. 204, referring to Transcript of 15 September 2011, ICC-01/05-01/08-T-162-Conf-Eng, p. 50, lines 8-11 ("Well, I can't remember it very well now. I don't know Central African Republic. I've never been to Bangui. It would be very difficult for me to do this. These were names that were [redacted] of the territory and [redacted]. That's it"); Transcript of 16 September 2011, ICC-01/05-01/08-T-163-Conf-Eng, p. 13, lines 3-7 ("Bangui was not part of [redacted]

understood in its context: immediately before the evidence reproduced above, the witness indicated [redacted].[353] The inability of P33 to recall the details of the reports or his unawareness of Mr Bemba's visit to the CAR[354] is a matter that goes to the weight to be attributed to his testimony by the Trial Chamber in light of the time that elapsed since the alleged crimes were committed and other material factors. This does not, in and of itself, render his testimony unreliable. Thus, it was not unreasonable for the Trial Chamber to rely on his testimony. We do not consider that the [redacted][355] renders the Trial Chamber's reliance on this testimony unreasonable. This, too, is a matter of the weight to be attached to the evidence, in view of the testimony of P33 that [redacted].[356]

165. We are also unpersuaded by Mr Bemba's argument that the Trial Chamber failed to explain how, during Mr Bemba's visit to the CAR, he learnt of information about the combat situation, or troop movements.[357] In the Conviction Decision, the Trial Chamber noted that Mr Bemba had visited the CAR "on a number of occasions, including in November 2002 *when he met with the MLC troops*".[358] We do not find it unreasonable that the Trial Chamber considered Mr Bemba's visit and meeting with the MLC troops in the CAR as factors suggesting that Mr Bemba received operations and intelligence reports regarding the situation in the field and the conduct of his subordinates directly from commanders, given that it found that the commanders were providing such information.[359]

166. In light of the foregoing, we would have found that it was not unreasonable for the Trial Chamber to conclude that after the deployment of the MLC troops to the CAR, Mr Bemba

---

[redacted] on military operations, as far as I'm concerned. So everything that [redacted] in this regard was an add-on, if you like. [redacted] the situation in Bangui").

[353] Transcript of 15 September 2011, ICC-01/05-01/08-T-162-Conf-Eng, p. 50, lines 5-8.
[354] Appeal Brief, para. 204.
[355] Appeal Brief, para. 205.
[356] Appeal Brief, para. 205, fn. 382, referring to Transcript of 15 September 2011, ICC-01/05-01/08-T-162-Conf-Eng, p. 29, line 5 to p. 30 line 12 (*see specifically* p. 29, lines 14-24).
[357] Appeal Brief, para. 207.
[358] Conviction Decision, para. 426 (emphasis added).
[359] *See supra* IV.B.4(b).

maintained regular, direct contact with senior commanders in the field on the state of operations, and received numerous detailed operations and intelligence reports.

(c) Finding on provision of logistical support

167. We note that Mr Bemba does not argue that the provision of logistical support is never relevant to the determination of whether an accused exercised effective control. Indeed, we note that the Court and international and internationalised tribunals have considered logistical support as a relevant factor in this assessment.[360] However, Mr Bemba argues that the Trial Chamber attached too much weight to this factor when finding that he had effective control over the MLC troops in the CAR, in particular since the Trial Chamber also found that logistics and support were provided by the CAR authorities.[361] We are not persuaded by this argument. First, it must be underlined that the Trial Chamber did not rely only on the provision of logistical support to establish Mr Bemba's effective control. Rather, it was merely one of several factors the Trial Chamber took into consideration.[362] The fact that the CAR authorities were also providing logistical support to the MLC troops does not render irrelevant the provision of support by Mr Bemba as indicia of effective control. The jurisprudence of the ICTY and ICTR to which Mr Bemba refers in a footnote[363] does not appear to be relevant to the issue at hand – rather, it concerns specific factual scenarios in which it was concluded that effective control had not been established.[364]

---

[360] *AFRC* Trial Judgment, para. 788: "The Trial Chamber considers that indicia which may be useful to assess the ability of superiors in such irregular armies to exercise effective control over their subordinates, include that […] the superior had independent access to and/or control of the means to wage war, including arms and ammunition and communications equipment". In the *Musema* Trial Judgment, in finding that Musema exercised de facto control over his employees, the Trial Chamber found that "Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes." (para. 880). In the *Ntaganda* Decision on the Confirmation of Charges, Pre-Trial Chamber II considered the fact that Mr Ntaganda had armed civilians as a relevant factor establishing his effective control over them (para. 166).

[361] Appeal Brief, paras 209-210.

[362] *See supra* paras 117-118.

[363] *See* Appeal Brief, para. 210, fn. 389, referring to the *Hadžihasanović and Kubura* Trial Judgment, *Čelebići* Trial Judgment and *Bagosora and Nsengiyumva* Appeal Judgment.

[364] In the *Hadžihasanović and Kubur*a case, the defence had argued that the fact that logistics had been provided by a chain of command different from the one the accused was part of demonstrated that the accused had no effective control over the perpetrators of crimes (*Hadžihasanović and Kubura* Trial Judgment, para. 1735). The ICTY Trial Chamber rejected this argument, finding that the provision of logistical support by a different chain of command "may in no way alter that finding [the accused's exercise of effective control], and indicates only that there was coordination, or even partial delegation of responsibility among the civilian and military authorities in order to settle certain material issued regarding the functioning of the detention centre" (*Hadžihasanović and Kubura* Trial Judgment, para. 1742). Mr Bemba also relies upon the *Čelebići* Trial

168. In sum, we would have found that the Trial Chamber did not err in considering the logistical support by Mr Bemba to the MLC troops in the CAR during the 2002-2003 CAR Operation as a relevant factor in establishing Mr Bemba's ability to prevent, repress or punish the commission of crimes by his subordinates; that is, that he had effective control.

(d) Finding that Mr Bemba retained primary disciplinary authority

169. We note that Mr Bemba's primary contention is that the Trial Chamber failed to address CHM1's testimony under cross-examination, which, in his view, undermines the portion of CHM1's testimony upon which the Trial Chamber relied to corroborate the testimony of three other witnesses.[365] We note that in the passage of CHM1's testimony upon which the Trial Chamber relied, the witness stated that he [redacted].[366] In the passage of the testimony to which Mr Bemba refers on appeal, the witness stated that people in the CAR reported abuses by MLC soldiers to the CAR authorities.[367] We do not consider that the failure to refer to this testimony amounted to an error on the part of the Trial Chamber. The fact that people in the CAR would report instances of abuses to the CAR authorities is not incompatible with a finding that the *primary* disciplinary authority remained with Mr Bemba; nor does it contradict CHM1's other

---

Judgment, in which the provision of logistics was considered in the context of the accused person's position. In that case, the Trial Chamber found that "[b]y his appointment as co-ordinator, [Delalić] was not a superior to anyone and he had no subordinates under him" and continued that Delalić "never enjoyed any status of appointment as command authority or superior authority in the armed forces […] by virtue of his appointment as co-ordinator" (*Čelebići* Trial Judgment, para. 663). In this context, the Trial Chamber noted that "[t]he primary responsibility of [Delalić] in his position as co-ordinator was to provide logistical support for the various formations of the armed forces", "his duties were confined to problems between the civilian and military authorities" and he "was, therefore, not in a position of command or a superior in relation to those who worked with him to carry out his duties of providing supplies or repairing much-needed facilities of electric supply" (*Čelebići* Trial Judgment, para. 664). In the *Bagosora and Nsengiyumva* Appeal Judgment, the ICTR Appeals Chamber reversed the Trial Chamber's finding that Nsengiyumva had effective control over the civilian assailants that killed Alphonse Kabiligi, finding that, while the Trial Chamber explicitly referred to Nsengiyumva's involvement in the arming and training of civilians both before and after the killing Kabiligi, it had failed to explain how Nsengiyumva's activities in this regard gave him effective control over the civilian who had killed Alphonse Kabiligi as there was no evidence that these were the same civilians as the civilians Nsengiyumva had earlier armed and trained (*Bagosora and Nsengiyumva* Appeal Judgment, paras 329, 375). The ICTR Appeals Chamber also reversed the Trial Chamber's finding that Nsengiyumva had effective control over the civilians involved in the attack at Mudende University (*Bagosora and Nsengiyumva* Appeal Judgment, para. 375). As with the killing of Alphonse Kabiligi, the Appeals Chamber stated that the Trial Chamber did not explain how his involvement in the distribution of weapons and training of civilians in 1993 and 1994 amounted to effective control over the civilians involved in the attack at Mudende University, given that there was no evidence that these were the same civilians (*Bagosora and Nsengiyumva* Appeal Judgment, para. 375).

[365] Appeal Brief, paras 211-213.

[366] Conviction Decision, para. 447, fn. 1243, referring to the testimony of CHM1.

[367] Appeal Brief, para. 212, referring to Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Red-Eng, p. 7, line 25 to p. 8, line 20.

testimony, according to which, CHM1 was lacking [redacted].

170. We further note that, as pointed out by the Prosecutor,[368] the Trial Chamber did not reject the testimony of witnesses P36, P45 and P173 as a whole, but decided that particular caution was required in analysing their evidence.[369] In this regard, we recall that corroboration by witness CHM1 was not the only consideration that led the Trial Chamber to rely on the testimony of these witnesses. In deciding to rely on the evidence proffered by witnesses P36, P45 and P173, the Trial Chamber also took into account: (i) the fact that their testimony were internally consistent and generally corroborated one another; (ii) the fact that they were further corroborated by the disciplinary and investigative measures taken by Mr Bemba and the MLC hierarchy; and (iii) the fact that they were consistent with the Trial Chamber's findings concerning Mr Bemba's authority over discipline within the MLC generally.[370] The Trial Chamber also noted that the evidence of these witnesses was further corroborated by "the disciplinary and investigative measures Mr Bemba did in fact take, as well as the Chamber's findings concerning authority over operations and strategy within the MLC generally and over the MLC contingent in the CAR".[371] Mr Bemba fails to address these findings on appeal.

171. In light of the foregoing, we would have found that Mr Bemba has failed to demonstrate how the fact that witness CHM1 does not corroborate the evidence of witnesses P36, P45 and P173 renders the Trial Chamber's reliance on these witnesses evidence unreasonable. Accordingly, we would have rejected Mr Bemba's arguments.

172. As to the argument that, in any event, in the circumstances of the case, Mr Bemba's retention of primary disciplinary power was not indicative of his material ability to prevent, repress or punish the commission of crimes by his subordinates,[372] we note that, as with many of his arguments, Mr Bemba premises his submissions on the assumption that the Trial Chamber conflated the concepts of command and effective control and that the operational

[368] Response to the Appeal Brief, para. 156.
[369] Conviction Decision, paras 307, 310, 329.
[370] Conviction Decision, para. 447.
[371] Conviction Decision, fn. 1243.
[372] Appeal Brief, paras 214-215.

control of the MLC troops in the CAR had been transferred to the CAR authorities. We recall our above finding that the Trial Chamber did not err in setting out the legal test for effective control and that it was not unreasonable in concluding that Mr Bemba retained operational control over the MLC troops in the CAR.[373] Accordingly, Mr Bemba's argument warrants rejection. We consider that the retention of disciplinary authority is indeed a relevant indicator of effective control and note that other international or internationalised tribunals have followed the same approach, which in some cases included consideration of whether disciplinary actions by the accused had been taken.[374] As set out above, in this case Mr Bemba's retention of primary disciplinary authority was established, *inter alia*, on the basis of his "establishment of commissions of inquiry, powers of arrest, and the convening of courts-martial".[375]

173. In sum, we would have found no error in the Trial Chamber's consideration of Mr Bemba's retention of disciplinary authority over the MLC troops in the CAR during the 2002-2003 CAR Operation as indicia of effective control.

(e) Finding that Mr Bemba represented MLC forces in external matters

174. We understand Mr Bemba to argue that he was not sufficiently put on notice that his involvement in external matters could be relied upon as a factor indicating that he had the material ability to prevent, repress or punish the commission of crimes by his subordinates; that is, that he had effective control of the MLC troops in the CAR.[376] However, it is clear that Mr Bemba's argument is not supported by the procedural history of this case.[377]

---

[373] *See supra* IV.B.2-IV.B.3.
[374] *See e.g.* *Blaškić* Trial Judgment, paras 724-725; *Perišić* Appeal Judgment, para. 108; *Halilović* Appeal Judgment, para. 182; *AFRC* Trial Judgment, para. 789; *Strugar* Trial Judgment, paras 406, 408, 410; *Krnojelac* Trial Judgment, para. 102; *Čelebići* Trial Judgment, para. 767.
[375] Conviction Decision, para. 703.
[376] Appeal Brief, paras 216-218.
[377] In the Confirmation Decision, the Pre-Trial Chamber found that "throughout the 2002-2003 intervention in the CAR, Mr Jean-Pierre Bemba retained his effective authority and control over the MLC troops deployed in the CAR" (Confirmation Decision, para. 466); the Pre-Trial Chamber based this finding on "Disclosed Evidence relating to the elements developed hereafter which show that Mr Jean-Pierre Bemba notably resorted to his *de jure* and *de facto* control over the MLC" (Confirmation Decision, para. 466); the Pre-Trial Chamber referred, *inter alia*, to statements made by Mr Bemba to different media outlets (Confirmation Decision, paras 469-470); the Pre-Trial Chamber also referred to a joint statement made by President Patassé together with Mr Bemba announcing the gradual withdrawal of the MLC troops from the CAR (Confirmation Decision, para. 477); in determining whether Mr Bemba knew that crimes were being committed or about to be committed by his troops, the Pre-Trial Chamber made reference to the correspondence between Mr Bemba and the UN representative in

Therefore, we would have found that Mr Bemba was sufficiently put on notice that his representation of MLC forces in external matters was a factor considered relevant to a finding of effective control. Accordingly, it would have been unnecessary to address the question of whether indicators of effective control form part of the "material facts underlying the charges".[378]

175. Finally, we note that international and internationalised tribunals have considered an accused's representation of troops in external matters as an indicator of effective control.[379] Although this factor taken in isolation would not be sufficient to establish a commander's material ability to prevent, repress or punish the commission of crimes by his or her subordinates, we are of the view that it can be of relevance to a finding of effective control when considered together with other indicia.

176. In sum, we would have found no error in the Trial Chamber's reliance on Mr Bemba's representation of MLC forces in external matters as indicia of effective control.

(f) Finding that Mr Bemba ordered the withdrawal of troops

177. In respect of the argument that the Trial Chamber failed to address directly relevant evidence that indicated that the withdrawal of the MLC troops had been ordered by President Patassé,[380] we note that Mr Bemba's argument[381] is factually incorrect as far as the interview

---

the CAR (Confirmation Decision, para. 487); in the document containing the charges, the Prosecutor referred to Mr Bemba's "role as the ALC's Commander in Chief, nationally and internationally, by attending meetings with foreign representatives and ambassadors to discuss the MLC's activities" (Corrected Revised Second Amended Document Containing the Charges, para. 28); similarly, in alleging that Mr Bemba was a military commander or person effectively acting as a military commander, the Prosecutor asserted that Mr Bemba "acted, both internally and externally, as the ultimate MLC authority in both political and military matters" (Corrected Revised Second Amended Document Containing the Charges, para. 58); the Prosecutor also referred to the joint statement made by President Patassé together with Mr Bemba announcing the gradual withdrawal of the MLC troops from the CAR (Corrected Revised Second Amended Document Containing the Charges, para. 70); the Prosecutor also referred to Mr Bemba making public declarations on several occasions "claiming authority for maintaining discipline over the troops deployed to the CAR" in support of her allegations that Mr Bemba had the material ability to prevent future crimes, repress ongoing crimes and submit the matter to competent authorities for investigation and prosecution (Prosecutor's Updated Summary Presentation of Evidence, paras 70, 76, 80-81); the Prosecutor further made reference to Mr Bemba's contacts with external actors "such as the United Nations", including the correspondence exchange with the UN representative in the CAR (Prosecutor's Updated Summary Presentation of Evidence, paras 87, 91).

[378] Response to the Appeal Brief, para. 158 (emphasis omitted).

[379] *See e.g.* *Kordić and Čerkez* Trial Judgment, para. 424; *Bagosora and Nsengiyumva* Appeal Judgment, para. 452. *See also* *Orić* Trial Judgment, para. 312, referring to *Kordić and Čerkez* Trial Judgment, para. 424; *Ndindiliyimana et al.* Trial Judgment,paras 1931, 1974-1975; *AFRC* Trial Judgment, para. 788; *Krnojelac* Trial Judgment, para. 102; *Čelebići* Trial Judgment, para. 749.

[380] Appeal Brief, para. 220.

with President Patassé is concerned: at footnote 1705 of the Conviction Decision, after setting out the evidence on which it relied for its finding that in early 2003 Mr Bemba declared his decision to withdraw, the Trial Chamber addressed the interview in question as follows:

> *See contra* EVD-T-OTP-00443/CAR-OTP-0013-0005 at 0006, an interview reproduced in an issue of Le Citoyen, dated 24 February 2003, in which President Patassé stated that the question of the withdrawal of the MLC troops was up to him as the Commander-in-chief and that no one could impose it on him.[382]

178. Thus, contrary to Mr Bemba's argument, the Trial Chamber did note the interview given by President Patassé referred to by Mr Bemba. Although it would have been desirable for the Trial Chamber to set out the reasons for the basis on which it decided not to rely on this piece of evidence, we consider that in light of the other, contradictory, and in the Trial Chamber's view, more credible evidence, the Trial Chamber was not unreasonable. Furthermore, Mr Bemba does not explain why the Trial Chamber's conclusion was unreasonable.

179. As to the argument that the Trial Chamber erred by failing to address the testimony of D65,[383] Mr Bemba refers to an excerpt of the testimony where the witness stated that President Patassé had ordered the withdrawal of the MLC troops from the CAR.[384] However, as noted by the Prosecutor, the witness clarified immediately thereafter that he was referring to the intervention of MLC troops in the CAR in 2001, rather than the 2002-2003 CAR Operation that is at issue in the present case.[385] Thus, we consider that the Trial Chamber did not err by not referring to the evidence proffered by D65, given that it was not relevant.

180. As to Mr Bemba's submission that the Trial Chamber did not address the evidence of D19 that "Colonel Moustapha would not have been able to follow an order from Mr Bemba to withdraw from the CAR, as the order would have had to come from the Central Africans",[386] we note that in the Conviction Decision, the Trial Chamber considered the evidence proffered by D19 that "President Patassé ordered, through General Bombayake, the

---

[381] Appeal Brief, paras 219, 221.
[382] Conviction Decision, fn. 1705.
[383] Appeal Brief, paras 220-221.
[384] Appeal Brief, para. 220 referring to Transcript of 18 September 2012, ICC-01/05-01/08-T-247-Conf-Eng, p. 34, lines 5-16.
[385] Response to the Appeal Brief, para. 161.
[386] Appeal Brief, para. 221, referring to Transcript of 12 March 2013, ICC-01/05-01/08-T-292-Conf-Eng, p. 39, line 12 to p. 40, line 14.

withdrawal of MLC troops from the CAR, and that, when Colonel Moustapha informed Mr Bemba, Mr Bemba told him to do what he was told".[387] However, the Trial Chamber decided not to rely on the evidence of this witness because the account "was contradicted by some of [D19's] prior recorded statements";[388] because of the Trial Chamber's general concerns regarding this witness;[389] because of the Trial Chamber's specific doubts regarding related portions of D19's testimony;[390] and because of the absence of corroboration by other credible and reliable evidence.[391] In light of the foregoing, we consider that, contrary to Mr Bemba's submission, the Trial Chamber did address the "directly relevant evidence that Patassé ordered the withdrawal of the MLC troops" proffered by witness D19 but decided not to rely thereon for reasons related to the credibility of the witness and the reliability of the testimony provided by the witness. Mr Bemba merely disagrees with the Trial Chamber's assessment of the evidence, without indicating in what way the decision not to rely on this witness' evidence was unreasonable. In these circumstances, we would have rejected Mr Bemba's argument.

181. Mr Bemba further argues that the Trial Chamber erred in refusing the admission of a series of AFP and IRIN media reports that, in his view, "show that the decision to withdraw the MLC troops was not taken unilaterally by Mr Bemba", and then declining to rely on the testimony of defence witnesses absent corroboration by other credible and reliable evidence.[392] Mr Bemba specifically refers to a request made for the admission of five news articles, which the Trial Chamber rejected.[393] In his request, Mr Bemba argued, *inter alia*, that because "the Trial Chamber's approach to the admission of evidence has created a one-sided record of the contemporaneous press reports and media articles created at the time of the events", he requested admission of a "number of additional press reports and materials which document in a coherent and corroborated manner, 'the other side of the story'".[394] Having reviewed the articles in question, we consider that, while they provide information of

[387] Conviction Decision, para. 557.
[388] Conviction Decision, fn. 1711, referring to EVD-T-OTP759/CAR-OTP20-0263_R03 at 0276 and EVD-T-OTP753/CAR-OTP20-0191_R02 at 0209 and 0211.
[389] Conviction Decision, fn. 1712, referring to section IV (E) (7) (c).
[390] Conviction Decision, fn. 1713, referring to section V (B) (2) (c).
[391] Conviction Decision, para. 557.
[392] Appeal Brief, para. 222.
[393] Appeal Brief, para. 222, fn. 407.
[394] Defence Request for Admission of Media Reports, para. 7.

the political situation during the negotiations between the CAR authorities and the rebels prior or contemporaneous to the withdrawal of the MLC troops from the CAR, none of them directly addresses the question of who took the ultimate decision and ordered the withdrawal. Therefore, even if one assumed for the sake of argument that the Trial Chamber erred by not admitting the articles in question,[395] Mr Bemba has not established that the articles are corroborative of evidence that President Patassé, and not Mr Bemba, had ordered the withdrawal of MLC troops from the CAR. Therefore, we would have rejected Mr Bemba's argument.

182. As to Mr Bemba's submission that the Trial Chamber failed to address his argument that an order to withdraw troops cannot be considered an indication of effective control because effective control must be established as existing at the time of the commission of the crimes (and therefore before the troops are withdrawn),[396] we note that the Trial Chamber deduced Mr Bemba's "authority to […] withdraw [the troops] at any given moment" from the fact that he actually gave such an order.[397] In our view, it was not unreasonable to deduce the existence of such authority from the fact that Mr Bemba gave the order to withdraw; nor was it unreasonable to rely on such authority as an indication of effective control. We note in this regard that the Trial Chamber relied upon factors and facts that would demonstrate that Mr Bemba had effective control over the MLC troops in the CAR *throughout the 2002-2003 CAR Operation*, during which the crimes charged were allegedly committed, and during which Mr Bemba is alleged to have failed to exercise control properly. For that reason, we see no need to discuss the question of whether effective control gained after the commission of the crimes in question would be sufficient to give rise to liability under article 28 of the Statute.

[395] We note that the Trial Chamber rejected Mr Bemba's request to admit these news articles as evidence on the basis of the following considerations: Mr Bemba missed the applicable deadlines for the submission of any remaining material; Mr Bemba's failure to justify the late submission under regulation 35 (2) of the Regulations; the fact that Mr Bemba had ample opportunity to respond to the potential admission of media articles by submitting additional media articles; and the fact that the majority of the information contained in the news articles is also provided in other documents previously admitted into evidence (Defence Request for Admission of Media Reports, paras 16-29). It follows that, contrary to Mr Bemba's submission, the duplicative nature of the evidence proposed by Mr Bemba was but one of the reasons based on which his request was rejected.
[396] Appeal Brief, para. 223.
[397] Conviction Decision, paras 188, 704.

183. Having rejected the totality of the arguments advanced by Mr Bemba, we would have found that it was not unreasonable for the Trial Chamber to conclude that Mr Bemba took the decision to withdraw the MLC troops from the CAR and to rely on it as an indication that he had the material ability to prevent, repress or punish the commission of crimes by his subordinates; that is, that he had effective control over these troops.

5. Conclusion

184. Having rejected the totality of arguments raised by Mr Bemba, we would have found that it was not unreasonable for the Trial Chamber to conclude that Mr Bemba had effective control over the MLC troops in the CAR.

C. "Evidence dismissed or ignored"

185. Mr Bemba submits that the Trial Chamber erroneously dismissed evidence of direct relevance to the central question of the command of the MLC contingent in the CAR.[398] He contends that the Trial Chamber could not have concluded that he was liable as a commander had it considered this evidence.[399] Mr Bemba argues that the fact that such evidence does not appear in the reasoning of the Trial Chamber constitutes an error of law which should result in the reversal of the Conviction Decision.[400] Mr Bemba refers to five factors,[401] which are considered separately below.

1. The 2001 intervention

186. Mr Bemba submits that the Trial Chamber ignored relevant facts concerning the CAR intervention by the MLC in 2001.[402] We note that the Trial Chamber did not expressly address the evidence of witness D18, most of which is referenced by Mr Bemba[403] – that at the time of the 2001 intervention of the MLC/ALC in the CAR: (i) there was no contact between Mr Bemba and the person in charge of the coordination of the MLC troops during their 2001 intervention;[404] (ii) the hierarchical superior of the person in charge of the

[398] Appeal Brief, para. 228.
[399] Appeal Brief, para. 228.
[400] Appeal Brief, para. 228.
[401] Appeal Brief, paras 228-286.
[402] Appeal Brief, paras 229-232.
[403] Appeal Brief, para. 230.
[404] Transcript of 5 June 2013, ICC-01/05-01/08-T-317-Red-Eng, p. 38, lines 11-17. *See also* p. 38, lines 7-10.

coordination of the MLC troops was the General Chief of Staff of the FACA,[405] who gave him operational orders;[406] (iii) the ALC troops were under the orders of the FACA General Staff and not Mr Bemba;[407] (iv) suplies were provided by the FACA;[408] and (v) it was the CAR Minister of Defence and Chief of General Staff who signalled to the ALC troops that their mission in the CAR was complete.[409]

187. We note that Mr Bemba is not right when he states that the Conviction Decision "makes no reference to the 2001 intervention".[410] The Trial Chamber expressly referred to the 2001 intervention on more than one occasion[411] and to evidence that D18 gave in relation to Mr Bemba's role in that intervention.[412] Indeed, as observed by the Prosecutor,[413] the Trial Chamber expressly noted that "MLC troops were involved in military operations in the CAR in 2001", stating that evidence from that and other operations had been relied upon "insofar as it is relevant to Mr Bemba's general authority over military operations and strategy".[414] Even if the Trial Chamber did not directly point the specific passages of D18's evidence to which Mr Bemba refers at footnotes 419 to 424 of the Appeal Brief, it did cite to other passages of evidence given by D18 in certain of the transcripts referred to by Mr Bemba at footnote 425. Therefore, even using Mr Bemba's own standard, he has not established that the Trial Chamber "completely disregarded" or did not address evidence pertaining to the 2001 intervention.[415]

188. Mr Bemba's argument could be understood as being that the Trial Chamber erred by not explaining why the evidence regarding the 2001 operation did not affect its findings on effective control during the 2002/2003 CAR Operation.[416] In this regard, we cannot discern any error in the approach of the Trial Chamber. The Trial Chamber explained the basis for its

[405] Transcript of 5 June 2013, ICC-01/05-01/08-T-317-Red-Eng, p. 38, lines 18-25.
[406] Transcript of 5 June 2013, ICC-01/05-01/08-T-317-Red-Eng, p. 46, lines 16-22.
[407] Transcript of 5 June 2013, ICC-01/05-01/08-T-317-Red-Eng, p. 45, lines 3-14.
[408] Transcript of 5 June 2013 ICC-01/05-01/08-T-317-Red-Eng, p. 46, lines 2-10.
[409] Transcript of 5 June 2013, ICC-01/05-01/08-T-317-Red-Eng, p. 46, line 23 to p. 47, line 4. *See also* p. 40, lines 13-17.
[410] Appeal Brief, para. 231.
[411] *See* Conviction Decision, paras 295, 398.
[412] Conviction Decision, fn. 706, referring to Transcript of 6 June 2013, ICC-01/05-01/08-T-318-Red-Eng, p. 17, line 4 to p. 20, line 1; p. 25, line 20 to p. 26, line 6.
[413] Response to the Appeal Brief, para. 164.
[414] Conviction Decision, para. 398.
[415] *See* Mr Bemba's arguments in this respect at para. 227 of the Appeal Brief.
[416] Appeal Brief, paras 229-232, when read with para. 228.

findings on effective control in the Conviction Decision, and in particular Mr Bemba's exercise of operational command and also discussed evidence that could potentially contradict these findings.[417]

189. Furthermore, we note that the Trial Chamber specifically referred to the evidence of D18, among a considerable amount of other evidence cited, to support its findings that, during the 2002-2003 CAR Operation (which forms the subject-matter of the charges in the present case), Mr Bemba, *inter alia*, commanded military operations, issued orders to the units in the field, including by communicating orders directly to commanders in the field, and followed the progress of operations closely, although he did not direct operations at the tactical level.[418] As such, even assuming that Mr Bemba's version of events is correct in relation to the 2001 intervention, the same witness – D18 – upon whom he relies to make his argument also gave evidence about Mr Bemba's role in relation to the 2002-2003 CAR Operation. That evidence differs from the evidence Mr Bemba alleges D18 gave about Mr Bemba's role in relation to the 2001 intervention. Furthermore, we recall that we have already addressed – and dismissed – Mr Bemba's arguments regarding the Trial Chamber's findings on his effective control during the 2002-2003 CAR Operation.[419]

190. Finally, with respect to Mr Bemba's argument that the Trial Chamber ignored his submissions in relation to the 2001 intervention,[420] we note that Mr Bemba refers to only three disparate paragraphs[421] of his closing brief, which contains a total of 1,070 paragraphs.[422] In this regard, we recall that it is to be presumed that the Trial Chamber

[417] *See* Conviction Decision, paras 427 et seq.
[418] Conviction Decision, para. 399, fns 1045-1047.
[419] *See supra* paras 120-184.
[420] Appeal Brief, para. 231.
[421] Mr Bemba's Closing Brief paras 627, 787, 860: *See* Appeal Brief, para. 231, fn. 426.
[422] The first paragraph (Mr Bemba's Closing Brief, para. 627) appears at the end of a section headed "Unity of Command is an essential component of a multinational military structure" (Mr Bemba's Closing Brief, p. 208. The section is made up of paras 608-628) and seems to be made as a subsidiary argument to the other submissions in that section. The second paragraph (Mr Bemba's Closing Brief, para. 787) appears within a section headed "Mr Bemba did not retain effective authority over the MLC troops" (Mr Bemba's Closing Brief, p. 252. The section is made up of paras 716-803) under a sub-heading pertaining to the provision of logistics by the Central African authorities (Mr Bemba's Closing Brief, p. 276). The paragraph focusses on the the 2002-2003 CAR Operation, with the reference to the 2001 operation appearing in only the final sentence of that paragraph, in which Mr Bemba submits that his version of events was "rendered even more likely" by what had occurred in 2001. The third paragraph (Mr Bemba's Closing Brief, para. 860) appears within a section headed "Mr Bemba did not have actual knowledge that the crimes with which he is charged would occur", (Mr Bemba's Closing Brief, p. 299. The section is made up of paras 829-896) under a sub-heading that "Media reports were

evaluated all the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence.[423] In our view, this evidence was not of such importance that it should have been addressed in the Conviction Decision. This is particularly so, considering the wealth of evidence upon which the Trial Chamber relied to conclude that Mr Bemba had effective control over the MLC troops in the CAR during the 2002-2003 CAR Operation.

191. In sum, we would have found that Mr Bemba has failed to demonstrate any error in respect of the manner in which the 2001 intervention was addressed by the Trial Chamber.

2. The Contested Items

(a) Relevant part of the Conviction Decision

192. In the Conviction Decision, the Trial Chamber assessed the authenticity of 13 documents that Mr Bemba argues were from the FACA military archives and which demonstrated the resubordination of the MLC troops[424] ("Contested Items") and found that they should not be given any weight.[425] This was further to the Trial Chamber having considered the testimony and demeanour of CHM1, who it called to testify to the authenticity of the documents,[426] and having concluded that the evidence of this witness about the Contested Items was "consistent, credible, and reliable".[427] In finding that seven documents allegedly signed by General Gambi should not be given any weight,[428] the Trial Chamber considered it to be "of particular relevance" that CHM1 had impugned the authenticity of those documents, given that the witness was well-placed to authenticate them.[429] The Trial Chamber also relied on the evidence of CHM1 in coming to its conclusion that no weight should be given to three documents allegedly signed by, or on behalf of General Regonessa[430] and a document allegedly signed by President Patassé.[431] In addition, the Trial Chamber decided not to attach any weight to two documents allegedly signed by Jean-Jacques

---

mixed and vague" (Mr Bemba's Closing Brief, p. 309). The paragraph focusses on the testimony of [redacted] that RFI had made false allegations against members of his contingent.

Bemba et al. Appeal Judgment, para. 105.

[424] Appeal Brief, paras 233-234.

[425] Conviction Decision, paras 273-297.

[426] Appeal Brief, para. 233.

[427] Conviction Decision, para. 276.

[428] Conviction Decision, paras 278-286.

[429] Conviction Decision, para. 285. *See generally* Conviction Decision, paras 277-286.

[430] Conviction Decision, paras 287-291.

[431] Conviction Decision, paras 292-293.

Demafouth and Francois Bozizé respectively,[432] on the basis of testimony that it had heard, including from CHM1, as well as other factors, including the relevance of the documents.[433]

(b) Analysis

193. Mr Bemba raises several specific arguments in support of his overall submission that the Trial Chamber erred when it found that no weight should be given to the Contested Items.[434] We shall address these arguments in turn. We recall that, as the trier of fact, the trial chamber enjoys discretion in determining whether and how much weight it should afford to specific items of evidence. The Appeals Chamber should only intervene with the Trial Chamber's assessment if it has been demonstrated that no reasonable trial chamber could have decided to attach no weight to the Contested Items.[435]

(i) The manner of questioning of CHM1

194. The Trial Chamber found the evidence of CHM1 about the Contested Items to be "consistent, credible, and reliable".[436] We find that Mr Bemba has not substantiated his argument that the manner in which CHM1 was questioned during the investigation should have led the Trial Chamber not to rely on the testimony CHM1 gave, when assessing the authenticity of the Contested Items.[437] Mr Bemba has not demonstrated that it was improper for CHM1 to be interviewed by members of the Office of the Prosecutor in the manner that he describes. While he challenges the way that the interview of CHM1 had been conducted as "not neutral" (because the interviewer had mentioned that the Contested Items emanated from the Defence of Mr Bemba and that he was asked to verify whether they were authentic),[438] we do not consider that disclosing the origin of the documents or the purpose of the questioning means that the Trial Chamber was unreasonable in relying on his in-court testimony. In this regard, we also note that the Trial Chamber did not refer to the record of the 2012 interview.

[432] Conviction Decision, paras 294, 296-297.
[433] Conviction Decision, paras 294-296.
[434] Appeal Brief, paras 233-259.
[435] *Bemba et al*. Appeal Judgment, para. 91.
[436] Conviction Decision, para. 276.
[437] Appeal Brief, paras 236-237.
[438] Appeal Brief, para. 236.

195. As to Mr Bemba's argument[439] concerning the manner in which the Presiding Judge of the Trial Chamber questioned CHM1 in relation to one of the Contested Items,[440] we recall that the Presiding Judge [redacted], following which Counsel for Mr Bemba objected to this way of questioning, which the Presiding Judge noted.[441] We consider that Mr Bemba has not demonstrated that this particular question by the Presiding Judge affected the probative value of the answers given by the witness or the conclusions drawn by the Trial Chamber.

196. Furthermore, we do not find any error with regard to what Mr Bemba characterises as "the witness [being] prompted to repeat the assertions previously made about each document".[442] We note that the passage in question refers to only one document. Therefore, Mr Bemba fails to substantiate his argument that CHM1 was prompted by the Trial Chamber to repeat assertions previously made about "each document".

197. In the circumstances set out above, we find that Mr Bemba has not demonstrated that the manner of questioning by the Trial Chamber casts doubt upon the probative value of the evidence given and therefore that it rendered the Trial Chamber's reliance on the testimony unreasonable.

198. In relation to CHM1's [redacted][443] we note that Mr Bemba was already in possession of a copy of CHM1's [redacted],[444] to which Mr Bemba refers in his submissions on appeal.[445] Given this, Mr Bemba fails to demonstrate the significance and need for CHM1 [redacted] at the time that he gave evidence.

[439] Appeal Brief, para. 237.
[440] EVD-T-D04-00062/CAR-D04-0003-0132.
[441] Transcript of 18 November 2013, ICC-01/05-01/08-T-353-Red-Eng, p. 25, lines 1-14.
[442] Appeal Brief, para. 238.
[443] Appeal Brief, para. 237.
[444] EVD-T-OTP-00858/CAR-OTP-0069-0010.
[445] *See e.g.* Appeal Brief, paras 235-236, 239.

199. Insofar as Mr Bemba makes reference to CHM1 having an interest in avoiding [redacted],[446] this is a point that was open for him to make to the Trial Chamber. In any event, we note that, before CHM1 gave the substance of the evidence to the Trial Chamber, the Presiding Judge specifically raised the issue [redacted].[447] Furthermore, in setting out its approach to oral evidence, the Trial Chamber explained that "[i]n assessing a witness's credibility, the Chamber has considered the individual circumstances of each witness, including […] any involvement in the events under consideration, the risk of self-incrimination […] and/or motives for telling the truth or providing false testimony".[448] This suggests that the Trial Chamber was aware, from the outset, [redacted] and would therefore have borne this in mind in assessing the reliability of that evidence.

200. In sum, we would have rejected the arguments relating to the manner of questioning of CHM1.

(ii) General Gambi's rank

201. The Trial Chamber recalled the evidence of CHM1 that General Gambi was only appointed *Chef d'Etat-Major* on 16 January 2003 and was only promoted to the rank of Brigadier-Général in May 2003, and that therefore he did not have the rank of Brigadier-Général on the dates mentioned in any of those documents.[449] The Trial Chamber further noted that Presidential Decrees referred to General Gambi being "appointed or confirmed" as *Chef d'Etat-Major des Armées* on 16 January 2003 and promoted to the rank of Général de Brigade on 31 May 2003.[450] The Trial Chamber found that General Gambi was the Chief of General Staff (*Chef d'Etat-Major*) from January 2003.[451]

[446] Appeal Brief, para. 235.
[447] [redacted].
[448] Conviction Decision, para. 229.
[449] Conviction Decision, para. 284, fn. 666.
[450] Conviction Decision, para. 284.
[451] Conviction Decision, para. 405.

202. We note that the part of the transcript of the evidence of P31 – Colonel Lengbe - to which both Mr Bemba and the Prosecutor refer in their submissions[452] arose in the context of P31 testifying about the time at which he had set up the operational command post,[453] which he had earlier stated was in October 2002.[454] We further observe that P31 testified that he left the CAR on 25 November 2002.[455] He then gave evidence that, at the time that he returned to the CAR in May 2003, the Chief of Staff (*Chef d'Etat-Major*) was General Gambi.[456]

203. In light of the above, we do not regard P31's use of the term "General" Gambi in his evidence to be capable of rendering unreasonable the Trial Chamber's finding that General Gambi was Chief of General Staff from January 2003.[457] Indeed, it is noteworthy that, in the passage referred to by the parties, Colonel Lengbe expressly states that, at the time that it was set up in October 2002, General Gambi came to the operational command centre but that "[i]t wasn't under his orders. It was under the orders of the Chief of Staff".[458] It was therefore not unreasonable for the Trial Chamber to conclude that the Chief of Staff at that time was not General Gambi. This is in clear contrast to what was said about the situation in May 2003, when Colonel Lengbe returned to the CAR, at which time he gave evidence that the Chief of Staff then was General Gambi. In any event, there is nothing in the evidence of Colonel Lengbe that was referred to by Mr Bemba that clearly states that General Gambi was Chief of Staff prior to January 2003; nor is there anything that renders unreasonable the Trial Chamber's conclusion in that regard.

204. Furthermore, we do not consider that the evidence of witness P36 that he did not remember the former Chief of General Staff but only remembered General Gambi in that role[459] renders unreasonable the conclusion of the Trial Chamber that General Gambi was appointed to that position in January 2003. The passage of the evidence of witness P36,

---

[452] Appeal Brief, para. 244; Response to the Appeal Brief, para. 168, referring to Transcript of 4 November 2011, ICC-01/05-01/08-T-182-Eng, p. 19, lines 2-8.
[453] Transcript of 4 November 2011, ICC-01/05-01/08-T-182-Eng, p. 17, line 17 to p. 19, line 1. *See also* Conviction Decision, para. 406.
[454] Transcript of 4 November 2011, ICC-01/05-01/08-T-182-Eng, p. 12, line 25 to p. 13, line 2; p. 13, lines 7-10.
[455] Transcript of 4 November 2011, ICC-01/05-01/08-T-182-Eng, p. 10, lines 11-13. *See also* Conviction Decision, para. 406.
[456] Transcript of 4 November 2011, ICC-01/05-01/08-T-182-Eng, p. 10, lines 16-23.
[457] *See* Conviction Decision, para. 405.
[458] Transcript of 4 November 2011, ICC-01/05-01/08-T-182-Red-Eng, p. 19, lines 2-8. *See also* p. 12, lines 16-20; p. 12 line 25 to p. 13, line 2; p. 13, lines 7-10.
[459] Appeal Brief, para. 244, fn. 460, referring to Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Red2-Eng, p. 49, line 21 to p. 50, line 3.

which is cited by Mr Bemba in this respect[460] is immediately followed by statements that (i) [redacted], which was found by the Trial Chamber to have been at the beginning of November 2002,[461] [redacted];[462] and (ii) [redacted], which he accepted when questioned by Mr Bemba's counsel, could have been in January 2003.[463] There is therefore nothing in the passage cited by Mr Bemba that could render unreasonable the Trial Chamber's conclusion that General Gambi was appointed to the role in January 2003.

205. Moreover, we do not consider that the testimony of CHM1 regarding the relationship he had with Colonel Lengbe renders unreasonable the conclusion of the Trial Chamber that General Gambi was appointed as Chief of Staff in January 2003.[464] In the transcripts of evidence cited by Mr Bemba, CHM1 recalled [redacted].[465] However, CHM1 was unable to remember who had been the head of the operational command post from January to March 2003.[466] In the passage cited by the Prosecutor,[467] and contrary to the findings of the Trial Chamber,[468] CHM1 stated that Colonel Lengbe left the CAR in March 2003 rather than in November 2002.[469] That also potentially explains why CHM1 [redacted]. Immediately after accepting that he [redacted] while the latter was at the operational command post, CHM1 continued that: "[redacted].[470] Furthermore, in the transcript referred to by the Prosecutor,[471] CHM1 stated that those officers who had left the country, which included Colonel Lengbe, would have been reintegrated into the CAR armed

[460] Appeal Brief, para. 244.
[461] Conviction Decision, para. 590, fn. 1833, referring to, *inter alia*, Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Conf-Eng, p. 15, lines 18-19.
[462] Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Conf-Eng, p. 50, lines 4-7.
[463] Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Conf-Eng, p. 50, lines 7-23.
[464] Appeal Brief, para. 245.
[465] Appeal Brief, fns 463-464.
[466] Appeal Brief, fn. 462, referring to Transcript of 18 November 2013, ICC-01/05-01/08-T-353-Red-Eng, p. 32, lines 6-8.
[467] Response to the Appeal Brief, fn. 577.
[468] Conviction Decision, para. 406.
[469] Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Red-Eng, p. 17, line 24 to p. 18, line 2.
[470] Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Red-Eng, p. 24, line 25 to p. 25, line 1.
[471] Response to the Appeal Brief, fn. 577, referring to Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Red-Eng, p. 17, line 17 to p. 18, line 18.

forces upon their return[472] (at which time, as seen above, Colonel Lengbe had testified that General Gambi was Chief of Staff, and may therefore have had contact with him at that time).[473]

206. In the above circumstances, it was not unreasonable for the Trial Chamber to find that General Gambi had been appointed as Chief of Staff in January 2003 and promoted to the rank of general later in that year, and to take this into account when assessing the authenticity of the Contested Items.

(iii) Document EVD-T-D04-00066/CAR-D04-0003-0137

207. Document EVD-T-D04-00066/CAR-D04-0003-0137 is a letter, dated 25 November 2002, allegedly signed by General Gambi as the *Chef d'Etat-Major des Armées* of the CAR to the Commander of the MLC, requesting the placement of the MLC's battalion at the disposal of the "*Etat-Major des Armées Centrafricaines*" for counter-offensive operations in the CAR.[474]

208. We understand Mr Bemba to raise two arguments in respect of this document: that CHM1 actually did identify the signature on the document as that of General Gambi[475] and that there were unexplained inconsistencies between the witness's testimony before the Trial Chamber and the interview record.[476] We observe that, in the passages cited by the Trial Chamber,[477] the witness stated that the signature had been fraudulently scanned or cut and pasted into the document, i.e. that it was General Gambi's signature, but that it was fraudulently placed on the document. We find that, based on this testimony, it is not unreasonable to conclude that the witness did not "recognise" the signature, in the sense that it had not been authentically placed on the document. We note that the Trial Chamber, in the impugned passage,[478] was referring to several documents at the same time, which may explain the somewhat ambiguous choice of words. We also do not see any significant

[472] Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Red-Eng, p. 18, lines 3-18.
[473] *See*, in this latter connection, Transcript of 4 November 2011, ICC-01/05-01/08-T-182-Eng, p. 10, lines 16-23.
[474] *See* Conviction Decision, para. 277 (c).
[475] Appeal Brief, para. 239.
[476] Appeal Brief, para. 242.
[477] Conviction Decision, para. 284, fn. 665, and references therein.
[478] Conviction Decision, para. 284.

difference between the witness's testimony before the Trial Chamber and the interview record.[479]

209. As to the argument that CHM1's testimony criticising the authenticity of the document significantly varied from the criticism in the interview record,[480] we consider that the fact that CHM1 did not repeat exactly what was said in the interview in the evidence before the Trial Chamber did not render unreasonable the Trial Chamber's finding that CHM1 was a credible witness. It was also not unreasonable for the Trial Chamber to find, that based upon the evidence CHM1 gave, it could be satisfied that the document in question should not be accorded any weight. The essence of CHM1's evidence – both in interview and before the Trial Chamber – was that the document was false. This is particularly the case because significant aspects of the evidence were similar.[481]

210. Equally, a purported explanation by Mr Bemba that the fact that the Coat of Arms was said to indicate the falsity of the document "may illustrate nothing more than the document being a photocopy of an incomplete original"[482] is both speculative and insufficient to render the conclusion of the Trial Chamber unreasonable.

211. In sum, we would have rejected the arguments relating to document EVD-T-D04-00066/CAR-D04-0003-0137.

(iv) Document EVD-T-D04-00069/CAR-D04-0003-0140

212. Document EVD-T-D04-00069/CAR-D04-0003-0140, is a *message-porté*, dated 8 November 2002, allegedly signed by General Gambi as the CAR *Chef d'Etat-Major* and addressed to the "Commandant du Génie Militaire", containing an "urgent order to take all

[479] Before the Trial Chamber the witness stated [redacted], and during the interview with members of the Office of the Prosecutor he had stated that it was not his signature (EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0033).
[480] Appeal Brief, para. 242.
[481] The initial reason that CHM1 gave in the interview for stating that the document was false was that General Gambi was not a General in 2002. Second, CHM1 referred both in the interview and in the evidence before the Trial Chamber to the addressees of the document being noted in the wrong place, namely that they should have appeared at the top, as opposed to at the bottom, of the document. *See* EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0032-0034; Conviction Decision, fn. 666 (iii); Transcript of 21 November 2013, ICC-01/05-01/08-T-356-Red-ENG, p. 47, lines 8-10.
[482] Appeal Brief, para. 242.

measures to ensure that sanitary facilities, electricity, sleeping facilities, storage, weapons, and ammunition [were] ready" at a specific location for the MLC battalion.[483]

213. We do not find any merit in Mr Bemba's arguments in respect of document EVD-T-D04-00069/CAR-D04-0003-0140[484] for the following reasons. First, it is not correct to say that, in the interview with members of the Office of the Prosecutor in 2012, CHM1 referred only to irregularities with General Gambi's rank and position.[485] Contrary to Mr Bemba's overall argument that CHM1's evidence about General Gambi and the contents of the documents differed significantly between CHM1's 2012 interview and CHM1's testimony,[486] before the Trial Chamber, CHM1 re-stated the essence of what was previously expressed to the Prosecutor, testifying that the signature on the document was not General Gambi's, that the stamp, subject-matter and form of the document led to the conclusion that it was a forgery and that General Gambi was neither Chief of Staff nor a Brigadier General at the time that General Gambi had purportedly signed the document.[487] Each of those factors was expressly taken into account by the Trial Chamber in coming to its conclusion that the document should not be given any weight.

214. Furthermore, the fact that, in evidence before the Trial Chamber, CHM1 also referred to the military commander for engineering not being responsible for clothing or lodging,[488] does not render the conclusion of the Trial Chamber as a whole unreasonable.[489]

215. In sum, we would have rejected the arguments relating to document EVD-T-D04-00069/CAR-D04-0003-0140.

---

[483] *See* Conviction Decision, para. 277 (a).
[484] Appeal Brief, para. 240.
[485] CHM1 commenced by stating that [redacted] (EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0034). CHM1 further stated that [redacted] (EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0034). CHM1 also stated that [redacted] (EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0034). One of the reasons that was given in relation to the first document that was shown concerned issues with [redacted] (EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0028-0029, 0031).
[486] Appeal Brief, para. 239.
[487] Conviction Decision, fns 646 (i), 647, 648, and references therein.
[488] Appeal Brief, para. 240.
[489] The Trial Chamber stated that this was a "further" matter that CHM1 "noted" (Conviction Decision, para. 278).

(v) Document EVD-T-D04-00065/CAR-D04-0003-0136

216. Document EVD-T-D04-00065/CAR-D04-0003-0136 is a *message-porté*, dated 20 November 2002, allegedly signed by General Gambi as the CAR *Chef d'Etat-Major* addressed to all unit commanders, containing an urgent and confidential message informing all unit commanders that the MLC had been deployed with the FACA troops in counter-offensive operations in the CAR under the command and control of the *Chef d'Etat-Major*.[490]

217. Contrary to the submissions of Mr Bemba, it is not correct to allege that CHM1's evidence was "significantly different"[491] from what was said in CHM1's interview with the Prosecutor in 2012. Indeed, significant points were made by CHM1 both in the interview and in the testimony before the Trial Chamber and were referred to by the Trial Chamber in coming to its conclusions.[492] It is also incorrect to state that "the main focus" of CHM1's criticism of this document was "the use of XX rather than STOP as a form of punctuation".[493] Indeed, this was only one of the several reasons that CHM1 gave in the interview with the Prosecutor for concluding that the document was a forgery;[494] and there is nothing that indicates to us that this point was a particularly central one. The fact that CHM1 did not repeat this point in evidence to the Trial Chamber therefore appears to us to be of no consequence when considering the reasonableness of the Trial Chamber's conclusion.

218. Furthermore, we find no merit in Mr Bemba's argument that CHM1 preferred, in evidence, "to point out imaginary spelling mistakes".[495] The word "Destinataire" appears in its singular form in the part of the document to which CHM1 was referring to in the evidence.[496] The word "Destinataires" appears elsewhere in the document, but that was clearly not the part of the document that CHM1 was referring to when the point was made in the evidence.

---

[490] *See* Conviction Decision, para. 277 (b).
[491] Appeal Brief, para. 239.
[492] The following points were made by CHM1: [redacted]. *See* EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0026-0032 and Conviction Decision, fns. 646 (ii), 649-653, 665 (ii), 666 (ii), and references therein.
[493] Appeal Brief, para. 241.
[494] EVD-T-OTP-00858/CAR-OTP-0069-0010 at 0026-0032.
[495] Appeal Brief, para. 241.
[496] Transcript of 18 November 2013, ICC-01/05-01/08-T-353-Red-Eng, p. 36, line 14.

219. In sum, we would have rejected the arguments relating to document EVD-T-D04-00065/CAR-D04-0003-0136.

(vi) Document EVD-T-D04-00063/CAR-D04-0003-0133

220. Document EVD-T-D04-00063/CAR-D04-0003-0133 is a *message-porté*, dated 7 January 2003, allegedly signed by the CAR *Chef d'Etat-Major* addressed to the "*Commandant du Quatrième Bureau*", "containing an urgent order to provide the MLC with logistical resources, six vehicles for the transportation of troops, ten jeeps, and fuel".[497]

221. We do not find the Trial Chamber's conclusion not to attach any weight to this document to be unreasonable when read together with its later finding that the CAR authorities, "in particular, the USP",[498] provided support to the MLC including vehicles and fuel. We note that, in his evidence before the Trial Chamber, CHM1 stated that the army did not have any jeeps – and that the mention of putting ten jeeps at the disposal of the MLC was therefore further evidence that the document was fabricated.[499] The Trial Chamber did not expressly find that the FACA provided jeeps to the MLC (as opposed to this being done by the USP which was, according to the Trial Chamber, independent of, and better equipped than the FACA[500]). As such, we do not find any later findings that the Trial Chamber made in relation to the provision of vehicles and fuel to render unreasonable its conclusion in respect of this document. In any event, we note that the issue of the provision of vehicles and fuel was only one of several grounds on the basis of which CHM1 based his conclusion that the document was forged.[501]

222. In sum, we would have rejected the arguments relating to document EVD-T-D04-00063/CAR-D04-0003-0133.

---

[497] *See* Conviction Decision, para. 277 (e).
[498] Conviction Decision, para. 412.
[499] Transcript of 18 November 2013, ICC-01/05-01/08-T-353-Red-Eng, p. 35, lines 5-21. *See also* Conviction Decision, fn. 662, referring to Transcript of 18 November 2013, ICC-01/05-01/08-T-353-Red-Eng, p. 35, lines 5-21. We note that fn. 662 of the Conviction Decision wrongly refers to CHM1 testifying, in this part of the evidence, that the FACA had "'Sovamags', 'Samus', and a few utility vehicles, specifically 4-by-4 Toyotas". However, this does not detract from the point that is relevant for present purposes, namely that CHM1 testified that the FACA did not have any jeeps at the relevant time – a factor which is correctly stated by the Trial Chamber during the course of this footnote.
[500] Conviction Decision, para. 407.
[501] Conviction Decision, para. 282, and references therein.

(vii) Document EVD-T-D04-00058/CAR-D04-0003-0128

223. Document EVD-T-D04-00058/CAR-D04-0003-0128 is an "*Autorisation Gouvernementale*" dated 17 January 2003, from the CAR "*Ministère de la Défense Nationale*", signed "on behalf of General Regonessa (containing a hand-written signature over a hand-written text reading 'P.O G' y.s. Yangongo'), with instructions for the implementation of an integrated command between the FACA-USP and the MLC and authorising that the MLC be given weapons, uniforms, and operational radio frequencies".[502]

224. We do not consider that Mr Bemba has demonstrated that the conclusion of the Trial Chamber not to give document EVD-T-D04-00058/CAR-D04-0003-0128 any weight[503] was unreasonable. We observe that the document purports to be an instruction to integrate the FACA-USP forces with those of the MLC. Mr Bemba has not demonstrated that it was unreasonable for the Trial Chamber to accept CHM1's evidence that such an instruction would be given by the Minister of Defence rather than by someone else on his behalf, particularly given that the Trial Chamber proceeded to refer to the Presidential Decrees, which supported the evidence of CHM1 that it was Lieutenant-Colonel Bouba who was the Ministre Délégué at the relevant time, as opposed to the purported signatory of the document, General Yangongo.[504] In light of its reference to those Presidential Decrees, we do not regard the conclusion of the Trial Chamber in this regard to be unreasonable, even though Colonel Lengbe gave evidence stating that General Yangongo was the delegated Minister.[505] We further note that, contrary to the submissions of Mr Bemba,[506] there is no express reference to General Yangongo regularly fulfilling the Minister's role in the part of the transcript of Colonel Lengbe cited by Mr Bemba in this context.

225. Furthermore, the arguments raised by Mr Bemba stating that there is "no reason to suppose" that someone other than the delegated Minister could sign the letter on behalf of the Minister, or that it is appropriate to question why someone would attempt to forge General Yangongo's signature if they had already managed to forge that of General Regonessa,[507] are

[502] *See* Conviction Decision, para. 287 (a).
[503] Conviction Decision, para. 291.
[504] Conviction Decision, para. 288.
[505] Appeal Brief, para. 247.
[506] Appeal Brief, para. 247.
[507] Appeal Brief, para. 248.

speculative and unsubstantiated. Mr Bemba also neither addresses, nor therefore casts doubt upon, the other reasons put forward by CHM1 and accepted by the Trial Chamber.[508]

226. In sum, we would have rejected Mr Bemba's arguments regarding document EVD-T-D04-00058/CAR-D04-0003-0128.

(viii) Document EVD-T-D04-00059/CAR-D04-0003-0129

227. Document EVD-T-D04-00059/CAR-D04-0003-0129 is a *message-porté*, dated 2 February 2003, allegedly signed by President Patassé, as President of the CAR, to the "Général, Directeur l'Unité de Sécurité Présidentielle", which contained an "urgent order to take command and organization of the FACA and the MLC for all counter-offensive military operations". The *message-porté* used the language "Honneur Vous Informer".[509]

228. We do not consider that Mr Bemba has demonstrated that the conclusion of the Trial Chamber not to give document EVD-T-D04-00059/CAR-D04-0003-0129 any weight[510] was unreasonable. We find no merit in Mr Bemba's submission that "apparent breaches of protocol" in the language used in the document was "the sum total" of CHM1's observations in respect of this document.[511] Moreover, we do not consider the conclusion of the Trial Chamber not to give the document any weight to be unreasonable, even if other aspects of the document which Mr Bemba argues demonstrate its authenticity were not specifically challenged.[512] The reasons that were given were sufficient for the Trial Chamber to reach its conclusion. Mr Bemba puts forward factors that he submits should have led the Trial Chamber to reach a different conclusion, but he does not demonstrate that the Trial Chamber acted unreasonably in arriving at its conclusion in the circumstances set out above.

---

[508] Conviction Decision, para. 288.
[509] *See* Conviction Decision, para. 292.
[510] Conviction Decision, para. 293.
[511] Appeal Brief, para. 249. The Trial Chamber took into account the evidence that CHM1 had given that the document was a fabrication and the reasons that he gave for that conclusion. which included (i) the manner in which the President would in fact have acted had he wished to order the Director of the USP to take command and organisation of the FACA and the MLC for all counter-offensive military operations; (ii) that the President would not have "informed" a subordinate, but would rather have taken the decision or issued a Presidential instruction to that effect; (iii) [redacted] that the command of the FACA was to be transferred to the Director of the USP; and (iv) that, had such an order been made, he would have been notified of such an order by the President and the Minister of Defence (Conviction Decision, para. 292).
[512] Appeal Brief, para. 250.

229. In sum, we would have rejected Mr Bemba's arguments regarding document EVD-T-D04-00059/CAR-D04-0003-0129.

(ix) Eight documents dated January or February 2003

230. Mr Bemba submits that eight documents from January and February 2003 are consistent with other evidence in the case,[513] referring to documents EVD-T-D04-00058/CAR-D04-0003-0128, EVD-T-D04-00059/CAR-D04-0003-0129, EVD-T-D04-00063/CAR-D04-0003-0133, EVD-T-D04-00060/CAR-D04-0003-0130, EVD-T-D04-00061/CAR-D04-0003-0131, EVD-T-D04-00062/CAR-D04-0003-0132, EVD-T-D04-00067/CAR-D04-0003-0138[514] and EVD-T-D04-00068/CAR-D04-0003-0139.[515]

231. We observe that Mr Bemba generally submits that the eight documents dated January or February 2003 are consistent with other evidence in the case.[516] We consider, however, that, in and of itself, this is not a basis upon which Mr Bemba can contend that the conclusion of the Trial Chamber not to give them any weight was unreasonable. The fact that documents are written in a way which makes them consistent with other evidence in the case does not, without more, demonstrate that those documents are authentic. Mr Bemba would therefore have needed to make further and more specific arguments about why the Trial Chamber's conclusion not to attach any weight to the documents was unreasonable beyond their consistency with other evidence. Mr Bemba fails to do this in relation to four of those documents (EVD-T-D04-00060/CAR-D04-0003-0130, EVD-T-D04-00061/CAR-D04-0003-0131, EVD-T-D04-00062/CAR-D04-0003-0132 and EVD-T-D04-00068/CAR-D04-0003-0139). He has therefore failed to demonstrate that the conclusion of the Trial Chamber in relation to these documents was unreasonable.

---

[513] Appeal Brief, para. 251.
[514] Document EVD-T-D04-00067/CAR-D04-0003-0138, is an "Autorisation Gouvernementale", dated 19 January 2003, from the CAR 'Ministère de la Défense', allegedly signed by 'Général Maurice Regonessa', containing an instruction to General Yangongo and the commander of the Bataillon Amphibie to organize, on the CAR side of the river at Port Beach, the crossing of the Oubangui River by a MLC reinforcement battalion (*See* Conviction Decision, para. 287 (b)).
[515] Document EVD-T-D04-00068/CAR-D04-0003-0139, is an Autorisation Gouvernementale, dated 19 January 2003, from the CAR "Ministère de la Défense Nationale", allegedly signed by "Général Maurice Regonessa", authorising, *inter alia*, an MLC battalion to set up its base at specific location in the north of Bangui (*See* Conviction Decision, para. 287 (c)).
[516] Appeal Brief, paras 251-254.

232. Mr Bemba has also failed to demonstrate that the conclusion of the Trial Chamber was unreasonable in relation to three further documents that are dated January or February 2003, for reasons that have been set out above when considering the specific submissions that Mr Bemba makes in respect of those documents (EVD-T-D04-00058/CAR-D04-0003-0128, EVD-T-D04-00059/CAR-D04-0003-0129 and EVD-T-D04-00063/CAR-D04-0003-0133).[517]

233. In respect of document EVD-T-D04-00067/CAR-D04-0003-0138, we note the series of reasons given by the Trial Chamber as to why it concluded that it would not attach weight to this document.[518] The fact that CHM1 could not definitively state whether or not the signature was that of General Regonessa or not does not render unreasonable the conclusion of the Trial Chamber based upon the reasons that it gave.[519] Furthermore, contrary to the submissions of Mr Bemba,[520] we also do not accept that CHM1 conceded in evidence that there was no basis for suggesting that the document was not genuine: CHM1 provided the series of reasons set out by the Trial Chamber as to why CHM1 believed that the document was a fabrication.[521] While Mr Bemba refers to a passage where the answer of the witness suggests that he confirmed the authenticity of the document, the passage directly following it indicates that the witness had misunderstood the question, which was formulated in the double negative.[522] In light of the foregoing, Mr Bemba has failed to demonstrate that the Trial Chamber's conclusion not to attach weight to document EVD-T-D04-00067/CAR-D04-0003-0138 was unreasonable.

234. In sum, we would have rejected the arguments relating to the eight documents dated January or February 2003.

---

[517] *See supra* paras 224 et seq., paras 228 et seq., and paras 221 et seq., respectively.
[518] Conviction Decision, para. 289.
[519] Appeal Brief, para. 253
[520] Appeal Brief, para. 253.
[521] Conviction Decision, para. 289, and references therein.
[522] The passage of the transcript relied upon by Mr Bemba to make this assertion reads as follows: "Q. Let's be clear, Mr Witness, you have absolutely no basis for suggesting that that document is anything other than genuine, do you? A. Indeed. Q. Thank you for that -- A. (Overlapping speakers) ... Q. Thank you -- A. Because [redacted] -- and as I said, these are fraudulent documents. Q. Yes. But you now -- you now say you've got no basis for suggesting that, [redacted] A. This document's a forgery." (Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Red-Eng, p. 50, lines 7-20).

(x) Documents EVD-T-D04-00075/CAR-D04-0003-0141 and EVD-T-D04-00064/CAR-D04-0003-0134

235. Document EVD-T-D04-00075/CAR-D04-0003-0141, is a *note de service*, dated 4 June 2001, from the *Etat-Major des Armées Centrafricaines* and allegedly signed by "François Bozizé", "stating that the allied troops (Libyan and MLC) were engaged in supporting the FACA to liberate areas held by the rebels".[523]

236. The second document at issue, document EVD-T-D04-00064/CAR-D04-0003-0134, is a message-porté, "from the CAR *Ministère de la Défense* addressed to the *Directeur Général de l'Intendance*, apparently signed by 'Jean-Jacques Demafouth'. The message contains an order purportedly made on the instruction of the President for the *Directeur Général de l'Intendance* to take over the subsistence allowance of the MLC troops".[524]

237. As found above, Mr Bemba has not established that it was unreasonable for the Trial Chamber to consider that the fact that the 2001 campaign may have been conducted in a way does not cast doubt upon the 2002-2003 CAR Operation having been carried out in another way, in particular, if the other evidence presented demonstrated to the Trial Chamber beyond reasonable doubt that Mr Bemba did have effective control in respect of that latter operation.[525] As such, given that documents EVD-T-D04-00075/CAR-D04-0003-0141 and EVD-T-D04-00064/CAR-D04-0003-0134 related to the 2001 campaign, there was nothing unreasonable about the conclusion of the Trial Chamber that they should not be given any weight.

(xi) Overall Conclusion in relation to the Contested Items

238. In sum, and for the reasons given above, we would have concluded that Mr Bemba has failed to demonstrate that the Trial Chamber acted unreasonably in not giving any weight to the Contested Items.

3. Expert witness General Jacques Seara

239. In our view, Mr Bemba has failed to demonstrate that the Trial Chamber acted unreasonably in deciding not to attach any weight to General Seara's evidence. The Trial

[523] *See* Conviction Decision, para. 296.
[524] *See* Conviction Decision, para. 294.
[525] *See supra* IV.C.1.

Chamber explained that many of the documents referred to in his report were the Contested Items, to which it did not attach any weight for reasons explained elsewhere in the Conviction Decision.[526] The Trial Chamber further explained that General Seara also relied on many of the prior statements of witness D19, in relation to whom the Trial Chamber had set out "its significant concerns relating to aspects of [D19's] evidence, and, in particular, notes the inconsistencies between [D19's] testimony and [D19's] prior statements".[527] The Trial Chamber specifically recalled General Seara's testimony that, had he "been given false documents, he would have follow[ed] 'a false line of reasoning'".[528]

240. We have also carefully considered each of the passages relied upon by Mr Bemba in his submissions on appeal in the context of arguing that the Trial Chamber should have relied upon General Seara's expert opinion on the realities of conflict, in light of his knowledge, experience and military doctrine.[529] However, we observe that Mr Bemba merely cites paragraphs of General Seara's report in making this argument;[530] he does not demonstrate how the passages that he highlights assist his overall case, or why the Trial Chamber was unreasonable in not considering those specific passages, or indeed how those passages would have led the Trial Chamber to arrive at a different conclusion in relation to its findings on effective control. We note in this context that some of the sections of the report to which Mr Bemba refers relate to the various levels of command and command structures in multi-national operations. We have already addressed, and dismissed, Mr Bemba's argument that the Trial Chamber erred in this regard.[531] He has therefore not demonstrated that the Trial Chamber committed any error.

241. Finally, contrary to Mr Bemba's submission,[532] we consider that having admitted General Seara's report into evidence, the Trial Chamber was not bound to consider it. There is clearly an important distinction between the admissibility of evidence and the weight to be given to evidence once it has been admitted. For the reasons set out above, we would have

[526] Conviction Decision, paras 368, 369.
[527] Conviction Decision, para. 368.
[528] Conviction Decision, para. 368, fn. 932, referring to Transcript of 17 August 2012, ICC-01/05-01/08-T-232-Red2-Eng, p. 4, lines 9-12.
[529] Appeal Brief, para. 266.
[530] Appeal Brief, para. 266, fn. 516.
[531] *See supra* IV.C.3.
[532] Appeal Brief, para. 266.

dismissed Mr Bemba's arguments that the Trial Chamber erred in deciding not to attach any weight to General Seara's report.

4. CHM1's evidence on command

242. We understand Mr Bemba to raise three principal arguments in relation to the manner in which the Trial Chamber assessed the evidence of CHM1.

243. First, Mr Bemba submits that CHM1 was primarily requested to give evidence by the Trial Chamber [redacted].[533] However, despite having [redacted] concerning cooperation between the MLC and the CAR authorities, Mr Bemba alleges that CHM1's evidence "merits scarcely more than a handful of footnotes in Chapter V of the Judgment" and that this constitutes an error.[534]

244. We cannot accept Mr Bemba's submissions on this point. In the Conviction Decision, there was extensive reference to the testimony of CHM1.[535] Indeed, far from meriting "scarcely more than a handful of footnotes in Chapter V of the Judgment", CHM1's testimony in fact appears in 36 footnotes solely in the part of that Section headed "Forces Present in the CAR during the 2002-2003 CAR Operation", during the course of which a total of 93 citations to the transcripts of the testimony are specifically referenced. There is further reference to the evidence of CHM1 in other parts of Section V of the Conviction Decision.[536] Given those facts, we are surprised about the manner in which Mr Bemba presented his

[533] Appeal Brief, para. 267.
[534] Appeal Brief, para. 269.
[535] In relation to its finding that it was a relatively small number of CAR troops that supported the MLC, the Trial Chamber footnoted, *inter alia*, to evidence given by CHM1, which it summarised as stating that "only the USP cooperated with the MLC and that MLC troops were mostly involved in combat, while the USP provided support on two of the three roads where the MLC were involved in operations" (Conviction Decision, fn. 1110). The Trial Chamber found that MLC commanders and the CAR authorities cooperated and coordinated, but that CHM1, among others, testified that command throughout the 2002-2003 CAR Operation remained with the MLC hierarchy, summarising the evidence in this respect as being that "the Chief of General Staff never issued an order to Colonel Moustapha, but instead Colonel Moustapha would brief the Chief of General Staff" (Conviction Decision, para. 427, fns 1182, 1183). *See also* Conviction Decision, paras 405, 407, 408, 410, 412, 413, 416, 420, 423, 434, 447, 450, 529, 459, 460, 527, 562, 563, fns 1062-1067, 1078-1083, 1085, 1086, 1091, 1100, 1101, 1116, 1119-1121, 1125, 1126, 1139, 1152, 1162, 1207-1209, 1243, 1258, 1596-1600, 1297, 1301, 1589, 1607, 1618, 1721, 1722, 1734, 1736, 1739.
[536] *See e.g.* Conviction Decision, paras 379, 459, 460, 527, 531, 534, 560, 562, 563, fns 960, 962, 1297, 1301, 1589, 1607, 1618, 1721, 1722, 1734, 1736, 1739.

submissions on these points. If they were to be made at all, those submissions should have been prepared with considerably more care.

245. Second, Mr Bemba submits that the various parts of CHM1's evidence that he sets out are "devastating" to the findings that the MLC troops acted independently, that he had effective control and that the MLC troops were not re-subordinated.[537] We are not persuaded by these arguments. None of the submissions made, or passages of CHM1's testimony cited in the footnotes of the Appeal Brief, demonstrates that the findings of the Trial Chamber were unreasonable. We observe that Mr Bemba has not pointed to any part of the evidence of CHM1 in which the latter expressly stated either that MLC troops were re-subordinated or that Mr Bemba did not have effective control over those troops. We further observe that Mr Bemba has not demonstrated that the evidence of CHM1 rendered unreasonable the finding of the Trial Chamber that the MLC troops and the CAR troops that accompanied them operated independently of other armed forces in the field.[538] In arriving at that conclusion, the Trial Chamber did not find that the MLC troops acted alone (expressly recognising that they were accompanied by CAR troops), or that there was no co-operation and coordination with the CAR authorities.[539]

246. In relation to certain of the more specific parts of the evidence to which Mr Bemba refers, we note that they potentially support, rather than undermine, the findings made by the Trial Chamber. In support of his argument that the MLC did not operate independently of other forces in the field, Mr Bemba cites to a passage in which CHM1 testified that "the MLC never participated in the meetings" that occurred daily among senior officials of the CAR, but that "the person who was responsible for **co-ordination** with the MLC" did take part in those meetings.[540] On the basis of such evidence, it was not unreasonable for the Trial Chamber to

---

[537] Appeal Brief, para. 276.
[538] Conviction Decision, para. 411.
[539] Conviction Decision, para. 699: "[T]he MLC forces, including the MLC contingent in the CAR, communicated and co-operated with the CAR authorities throughout the 2002-2003 CAR Operation. Indeed, the Chamber considers that such liaison is logical in a situation where a contingent of foreign forces is unfamiliar with the terrain and enemy. While the exact level of assistance and whether it persisted throughout the entirety of the 2002-2003 CAR Operation is unclear, the Chamber considers that it is reasonable to conclude that it was a regular feature of the operations. However, the Chamber recalls that the MLC troops were not 'resubordinated' to the CAR military hierarchy, insofar as this would imply that Mr Bemba's authority over the MLC contingent in the CAR was displaced" (footnotes omitted).
[540] Appeal Brief, para. 271, fn. 526, referring to Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Red-Eng, p. 69, lines 8-11 (emphasis added).

have concluded that the MLC co-ordinated and co-operated with CAR forces, but was not re-subordinated to them: indeed, their absence from the high-level meetings of CAR officials can reasonably be seen to lend credence to, rather than render unreasonable, this conclusion.

247. In support of its finding that "command, throughout the 2002-2003 CAR Operation, remained with the MLC hierarchy",[541] the Trial Chamber referenced eleven separate passages of the transcripts of CHM1's evidence. Indeed, what is notable about the quotation upon which Mr Bemba relies to introduce his argument that the evidence of CHM1 was "entirely incompatible with the Trial Chamber's theory on command"[542] is the part of that quotation that Mr Bemba deliberately omits (replacing it with "…"). According to Mr Bemba, CHM1 replied to a question of who was ultimately in command of the MLC forces in the CAR, by stating: "… The MLC units on conducting operations with the presidential security unit, they would talk to one another and you would see Libyans and the MLC forces, the MLC were fighting in the field with soldiers from the presidential security unit".[543] Yet it is the omitted part that is of significance, as it provides a clear answer to the question asked where CHM1 stated "that the commander of the MLC detachment in the CAR was Colonel Moustapha".[544] CHM1 testified elsewhere that Colonel Moustapha's superior was Mr Bemba[545] and that he [redacted].[546] The arguments of Mr Bemba that CHM1's evidence was "entirely incompatible" with the Trial Chamber's theory on command are therefore wholly unsubstantiated.

248. It is equally unclear to us how the references by Mr Bemba to the passages of CHM1's evidence [redacted][547] render unreasonable the Trial Chamber's conclusion on command. One of those passages is expressly cited by the

[541] Conviction Decision, para. 427.
[542] Appeal Brief, para. 270.
[543] Appeal Brief, para. 270.
[544] Transcript of 18 November 2013, ICC-01/05-01/08-T-353-Red-Eng, p. 59, lines 3-6.
[545] Transcript of 18 November 2013, ICC-01/05-01/08-T-353-Red-Eng, p. 70, lines 22-24.
[546] Transcript of 20 November 2013, ICC-01/05-01/08-T-355-Red-Eng, p. 66, lines 7-12. *See also* Conviction Decision, fn. 1183, referring to Transcript of 20 November 2013, ICC-01/05-01/08-T-355-Conf-Eng, p. 19, lines 11-14; p. 65, line 24 to p. 66, line 12 ("testifying that the Chief of General Staff never issued an order to Colonel Moustapha, but instead Colonel Moustapha would brief the Chief of General Staff").
[547] The two passages cited by Mr Bemba refer to [redacted] (Appeal Brief, para. 275).

Trial Chamber when referencing the meeting that occurred at Gbadolite in January 2003; and the other passage appears on the same page as two other passages cited by the Trial Chamber in coming to its conclusions about the meeting.[548] The Trial Chamber found that Mr Bemba had detailed knowledge of the situation on the ground, specifically referencing part of CHM1's testimony in so finding, in which the latter had stated [redacted].[549] In light of this and other statements,[550] we again cannot discern how the evidence of CHM1 was, as argued by Mr Bemba, "entirely incompatible with the Trial Chamber's theory on command".[551] We do not find that Mr Bemba has demonstrated any unreasonableness in respect of the Trial Chamber's conclusions.

249. Certain points raised by Mr Bemba in his arguments which, taken in isolation, could potentially be relevant to a finding that he did not exercise effective control, were expressly referred to by the Trial Chamber.[552] Yet, notwithstanding those findings, the Trial Chamber

[548] Conviction Decision, para. 529: "Shortly after 16 January 2003, on President Patassé's orders, the FACA Chief of General Staff, General Antoine Gambi, travelled with three or four others from the General Staff and USP to meet with Mr Bemba in Gbadolite. At this meeting, the FACA Chief of General Staff and Commander Bemondombi of the CAR CO informed Mr Bemba of the operational situation in the field, focusing on the rebels' advance towards Bangui, and with a view to causing Mr Bemba to change his strategy and provide additional ammunition and reinforcements to repel the rebel advance. **Mr Bemba provided detailed information regarding the positions held by MLC troops, demonstrating greater knowledge than the FACA officials about the situation on the ground.** Senior MLC members including the ALC Chief and other members of the General Staff accompanied Mr Bemba to the meeting; before he took the decision to send reinforcements, the CAR delegation left the room while Mr Bemba discussed the situation with his staff. After the meeting in Gbadolite, around the end of January or the beginning of February 2003, the FACA received weapons, ammunition, and reinforcements" (emphasis added and footnotes omitted).

[549] Conviction Decision, para. 529, fn. 1598, referring to a part of CHM1's evidence which read as follows: "JUDGE KUNIKO OZAKI: [redacted] THE WITNESS (Interpretation): [redacted]" (Transcript of 21 November 2013, ICC-01/05-01/08-T-356-Red-Eng, p. 21, lines 20-25).

[550] Transcript of 21 November 2013, ICC-01/05-01/08-T-356-Red-Eng, [redacted] (where CHM1 stated that [redacted]"). *See also* Transcript of 21 November 2013, ICC-01/05-01/08-T-356-Red-Eng, p.14, lines 6-9 (where CHM1stated that he took that decision "with the commander of his detachment in Bangui and the USP, which was co-ordinating the situation and supporting the MLC soldiers on the various fronts").

[551] Appeal Brief, para. 270.

[552] In particular, the Trial Chamber referred to orders concerning logistics being made [redacted] (Conviction Decision, fn. 1207, referring to, *inter alia*, to a part of CHM1's evidence that includes the passage relied upon by Mr Bemba at para. 271, fn. 527 of the Appeal Brief (Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Conf-Eng, p. 69, line 18 to p. 71, line 1). More generally, *see also* Transcript of 22 November 2013, ICC-01/05-01/08-T-357-Conf-Eng, p. 71, lines 10-17; p. 82, lines 1-2 (stating that the USP fed and clothed MLC soldiers); Conviction Decision, para. 412, fns 1119, 1121 (including

found that Mr Bemba had effective control, based upon the totality of the evidence and the evidence of CHM1 in relation to the first two of the three points set out by Mr Bemba.[553]

250. We also do not find the other arguments raised by Mr Bemba to have demonstrated that the conclusions of the Trial Chamber were unreasonable. That CHM1 stated that the USP, rather than the FACA, was leading the operations together with MLC forces[554] and that General Gambi had informal meetings with Colonel Moustapha[555] does not assist Mr Bemba in his arguments for reasons already explained above (in relation to the Trial Chamber's findings that there was co-ordination between the MLC contingent and CAR forces, without this undermining its overall conclusion that Mr Bemba was in effective control of the MLC forces). For similar reasons, the fact that CHM1 referred to the MLC troops being "placed at the disposal" of the CAR Government and that they had to be taken to the front[556] is also simply in line with the overall finding of the Trial Chamber that Mr Bemba took the decision to send troops to the CAR to assist President Patassé and that there was co-ordination with CAR forces during the operation.[557] Yet neither of those factors prevented the Trial Chamber from finding that Mr Bemba remained in effective control of his forces, or renders that finding unreasonable.

251. Mr Bemba has also not demonstrated how any of the remaining passages of the evidence of CHM1 that he cites in the Appeal Brief and that have not been expressly

---

references to the relevant parts of the passage of CHM1's evidence cited by Mr Bemba at para. 273, fn. 536 of the Appeal Brief (Transcript of 19 November 2013, ICC-01/05-01/08-T-354-Red-Eng, p. 45, lines 6-7, 9-10)). The CAR authorities provided the MLC soldiers with weapons and ammunition (Conviction Decision, para. 412, fn. 1118, which does not cite to CHM1 in this regard, but does cite to the evidence of other witnesses in relation to this conclusion). Mr Bemba refers to the MLC being supplied with arms by the FACA at para. 275,fn. 543 of the Appeal Brief).

[553] The Trial Chamber referenced thirteen separate passages of the transcripts of CHM1's evidence in four of the eleven fns to para. 412 of the Conviction Decision, specifically in relation to the findings that the CAR authorities – in particular the USP – provided the MLC with uniforms, vehicles, food and money. This specific finding was referred to by the Trial Chamber when arriving at its overall conclusion that Mr Bemba exercised effective control over the MLC contingent in the CAR (Appeal Brief, para. 270).

[554] Appeal Brief, para. 270.

[555] Appeal Brief, para. 272.

[556] Appeal Brief, para. 275, fn. 544.

[557] Conviction Decision, paras 427, 453.

addressed above – all of which have been carefully read by us – renders unreasonable the conclusions of the Trial Chamber.[558]

252. In light of the above, we find that, while Mr Bemba would clearly have desired the Trial Chamber to have come to a different conclusion after considering CHM1's evidence, he has neither demonstrated that the Trial Chamber overlooked relevant evidence nor that the findings of the Trial Chamber, based upon the totality of the relevant evidentiary record, were unreasonable as a result of that evidence.

253. The third and final argument that Mr Bemba raises in relation to CHM1's evidence is that "the Trial Chamber's failure to discuss explicitly and analyse his evidence on central aspects of command, particularly given his direct knowledge of such matters, constitutes a failure to provide a reasoned opinion".[559] In light of the above findings, we cannot find any basis on which to find that the Trial Chamber failed to provide a reasoned opinion. The Trial Chamber cited to the evidence of CHM1 on numerous occasions in support of its factual findings in the sections of the Conviction Decision which analysed effective control. Reading those citations together with the text of the Conviction Decision makes it clear that the Trial Chamber relied upon evidence provided by CHM1 on those areas within CHM1's knowledge to reach its findings. Although it would have been desirable for the Trial Chamber to quote and discuss the passages of CHM1's evidence upon which it relied in the text of the Conviction Decision itself, rather than referring to those passages by way of references to the transcripts of CHM1's evidence in footnotes, the basis of the Trial Chamber's conclusions, and the evidence upon which it relied to reach those conclusions, is clear from the text of the

[558] Such passages include the following evidence: (i) about who attended meetings, which included the Minister of the Interior who was responsible for administration of the territory and the police; (ii) that there were complaints from the population about rapes and looting, which were passed on to the FACA; (iii) that the Chief of Staff reported to the Minister of Defence who, in turn, reported to the President; (iv) that the local population complained about alleged crimes to their own (i.e. the CAR) government "which was in place and who had made the MLC troops come" (it is noted that CHM1 did not expressly state that this fell outside the responsibility of the MLC); (v) that the CCOP was an organ of the operational command chain; (vi) that CHM1 testified that General Gambi met with the Minister of Defence and the President, who gave instructions "with regards to support of the troops; in particular, provision of food in the field"; (vii) that the CAR operational command centre followed the position of troops in the field and that this was brought to the attention of CHM1; and (viii) that FACA maps did not show the position about various militias who were present and that CHM1 did not know those positions (this passage does not expressly state that the MLC did not know about the forces at President Patassé's disposal, or where they were deployed, but, even if it had, it would not alter the overall conclusion expressed in the above text of this Dissenting Opinion).
[559] Appeal Brief, para. 276.

Conviction Decision when read together with the footnotes. The circumstances are therefore very different from those in the *Perišić* Appeal Judgment to which Mr Bemba refers, in which it was held that, given the paucity of relevant evidence and the credible testimony contrary to its conclusions, it was not sufficient for the trial chamber simply to note the existence of that testimony.

5. Evidence of Witness P36

254. For the reasons that follow, we are not persuaded by Mr Bemba's arguments that the Trial Chamber's approach to the evidence of P36 "was flawed".[560]

255. Mr Bemba has not demonstrated that P36's evidence "undermines the Trial Chamber's finding that Mr. Bemba had effective control over the MLC troops in the CAR".[561] First, contrary to his submissions, Mr Bemba has not substantiated his argument that P36 testified that the CAR authorities commanded the MLC forces in a manner that undermined Mr Bemba's effective control in the passage of his evidence to which Mr Bemba refers to make this submission.[562] Taken at its highest, according to the testimony, P36 is of the opinion that had there been various forces at President Patassé's disposal (of which P36 had no personal knowledge), there would have had to have been co-ordination between them and that it would have been necessary to have a co-ordination centre for that purpose. The evidence of P36, in addition to that of other witnesses, was expressly referenced by the Trial Chamber in arriving at the conclusion that "[w]hile there was cooperation and coordination between the MLC commanders and the CAR authorities, CHM1, P15, FACA Colonel Thierry Lengbe (P31), P33, P36, P151, P169, P173, P178, and P213 all testified that command, throughout the 2002-2003 CAR Operation, remained with the MLC hierarchy".[563] Similarly, the related arguments that Mr Bemba raises, relying upon two further passages of the evidence of P36, do not in any way alter the Trial Chamber's findings as to Mr Bemba's effective control.[564]

---

[560] Appeal Brief, paras 277-286.
[561] Appeal Brief, para. 277.
[562] Appeal Brief, fn. 547, referring to Transcript of 20 March 2012 ICC-01/05-01/08-T-218-Red-Eng, p. 44, line 1 to p. 46, line 21.
[563] Conviction Decision, para. 427 (footnotes omitted).
[564] Appeal Brief, para. 282, fns 561, 562, in which Mr Bemba argues that P36 testified that the information that the MLC received from Bangui amounted to little more than keeping in contact and did not contain an

256. It is also apparent that the subsequent general argument of Mr Bemba – that "[u]nlike the other witnesses to whom 'particular caution' was applied, the Trial Chamber did not consider P36's evidence and then determine whether or not it was corroborated by other credible and consistent proof", instead giving itself "carte blanche to rely on P36 when [the testimony that was presented by P36] inculpated Mr Bemba"[565] – is without merit. The Trial Chamber expressly considered and explained why it found P36's evidence to be reliable concerning the fact that command throughout the 2002-2003 CAR Operation remained with the MLC hierarchy, notwithstanding its concerns about P36's credibility which it had earlier expressed (and to which it footnoted).[566] More generally, we note that the Trial Chamber expressly made very similar statements in relation to why it found the evidence of P36 to be reliable in four of the other passages to which Mr Bemba cites to make his argument that the Trial Chamber did not do this.[567]

257. There is equally little merit in Mr Bemba's subsequent general argument that the Trial Chamber disregarded or misstated the evidence of P36 when it was inconsistent with its findings.[568] To make this argument, Mr Bemba refers to three passages of the Conviction Decision and four passages of the transcripts of the evidence of P36.[569] In respect of these passages, we observe that Mr Bemba does not explain in what way the Trial Chamber either disregarded or misstated the evidence of P36. He simply makes that assertion and footnotes to several passages of the Conviction Decision and transcripts of evidence. This is done without any accompanying submissions to the Appeals Chamber which explain the difference between what the Trial Chamber found and what specific evidence contradicted those findings, in what manner they did so, how and why that rendered the findings of the Trial

---

acknowledgment of operational orders; and that the General Staff knew that Colonel Moustapha was working in close cooperation with the authorities in Bangui, but not in what way.

[565] Appeal Brief, para. 279.

[566] Conviction Decision, para. 427, fn. 1186.

[567] *See* Appeal Brief, para. 279, fn. 549, referring to, *inter alia*, paras 413 (concerning the equipment the MLC troops brought to the CAR), 420 (concerning regular communications between Mr Bemba and Colonel Moustapha), 427 (the finding that command remained with the MLC hierarchy, as set out in the above text), 447 (concerning the Trial Chamber's finding that Mr Bemba held primary disciplinary authority over the MLC contingent in the CAR), 455, 456 (concerning the commencement of MLC operations in the CAR) of the Conviction Decision, all of which contain very similar explanations as to why the Trial Chamber found the evidence of P36 to be reliable notwithstanding its previously expressed concerns about his credibility.

[568] Appeal Brief, para. 279.

[569] Appeal Brief, para. 279, fn. 550.

Chamber unreasonable and what the material effect of any such unreasonable findings was.[570] As such, the arguments of Mr Bemba are unsubstantiated and do not require further consideration.

258. We are also not persuaded by Mr Bemba's assertion that "[t]he most significant misstatement" relates to the MLC General Staff's "consultative role in Mr. Bemba's command of the troops in the CAR", in respect of which "[t]he only evidence cited is that of [P36]".[571] Contrary to Mr Bemba's arguments, P36's evidence was not the only evidence cited for the Trial Chamber to reach this conclusion. The footnote to the last sentence of paragraph 446 of the Conviction Decision[572] cites to two passages of the transcripts of P36's testimony and "the evidence concerning the general role of the General Staff in the MLC structure" included in Section V(A) of the Conviction Decision.[573] Section V(A) of the Conviction Decision – headed "General Structure of the MLC" – spans 21 paragraphs covering Mr Bemba's role within the MLC/ALC, the composition and attributes of the ALC, communications, military operations and strategy and discipline.[574] In light of the foregoing, the argument of Mr Bemba that the MLC General Staff's "consultative role" was based upon the evidence of P36 alone is clearly incorrect.

259. Mr Bemba has also not demonstrated that the findings of the Trial Chamber were unreasonable in respect of other matters raised by him.[575] At paragraph 281 of the Appeal Brief, Mr Bemba refers to various matters about which he alleges P36 testified that the MLC General Staff had no information.[576] Yet he fails to demonstrate that the Trial Chamber acted

[570] The relevant part of para. 279 of the Appeal Brief reads: "Rather, the Trial Chamber gave itself a *carte blanche* to […] disregard (or misstate) [P36's] evidence when incompatible with its findings". Fn. 550 of the Appeal Brief, which accompanies that text, simply reads: "Judgment, paras. 391-393, 399, 599. *See also* T-213-CONF-ENG, 49:16-51:20; T-214-CONF-ENG, 47:14-22; T-217-CONF-ENG, 41:13-21; 44:18-46:3".
[571] Appeal Brief, para. 280.
[572] This paragraph reads as follows: "[a]ccordingly, on the basis of the corroborated and reliable evidence set out above, the Chamber finds that Mr Bemba had operational control over the MLC contingent in the CAR throughout the 2002-2003 CAR Operation. The MLC General Staff, although not significantly involved in planning operations, issuing orders, or intelligence, also had a role in coordinating operations, monitoring the situation in the CAR, and reporting to Mr Bemba, and had the ability to discuss with Mr Bemba or make comments or observations." (footnotes omitted).
[573] Conviction Decision, fn. 1242.
[574] Conviction Decision, paras 382-403.
[575] *See* Appeal Brief, para. 281.
[576] The Prosecutor points out that other passages of the transcripts of evidence of P36 cast doubt upon Mr Bemba's submissions that the MLC General Staff did not have any information about certain issues. *See e.g.*

unreasonably in failing to give that evidence more weight, nor how, had it done so, that would have materially affected the Conviction Decision, in particular the finding that Mr Bemba had effective control. At paragraph 399 of the Conviction Decision, the Trial Chamber found that Mr Bemba had authority over strategic military decisions, such as commencing military operations and that "Mr Bemba could, and often did, communicate orders or instructions directly to commanders in the field without going through the hierarchy, with the General Staff usually being informed and following-up afterwards, if required".[577] As such, even if for the sake of argument Mr Bemba's submission that [redacted] more generally did not have contemporaneous knowledge of certain matters were correct, Mr Bemba has not demonstrated how this would render unreasonable the finding of the Trial Chamber that Mr Bemba had effective control over the MLC forces. We recall also that the Trial Chamber specifically acknowledged that the MLC General Staff may not always have had full knowledge.[578]

260. In light of the above, we do not find that Mr Bemba has established any error in respect of the manner in which the Trial Chamber assessed the evidence of P36. We further note that Mr Bemba argues that the Trial Chamber "did not address Defence submissions on the evidence concerned".[579] However, Mr Bemba does not elaborate which Defence submissions the Trial Chamber allegedly failed to address – and we are therefore in no position to consider any such submissions. The submissions raised on appeal do not establish any error on behalf of the Trial Chamber; and Mr Bemba's argument that the Trial Chamber allegedly failed to address (potentially other) submissions of his is wholly unsubstantiated.

6. Conclusion

261. Having rejected the totality of arguments raised by Mr Bemba, we would have found no merit in Mr Bemba's submission that the Trial Chamber erroneously dismissed evidence of direct relevance to the central question of the command of the MLC contingent in the CAR.

Response to the Appeal Brief, para. 175, fn. 618 (citing fn. 411, at which the Prosecutor had referred to Conviction Decision, para. 453, fn. 1268, referring to various transcripts of the evidence of P36).

[577] Conviction Decision, para. 399, *inter alia*, fn. 1046. *See* Response to the Appeal Brief, para. 175, fn. 616, referring to, *inter alia*, Response to the Appeal Brief, para. 129, at which the Prosecutor argues that Mr Bemba often communicated orders directly to field commanders, with the General Staff informed afterwards, referring to Conviction Decision, para. 399, fn. 1046.

[578] Conviction Decision, para. 446.

[579] Appeal Brief, para. 286.

D. "Mr Bemba did not have actual knowledge of the alleged crimes"

1. Introduction

262. The next component of the ground of appeal concerning command responsibility concerns the required mental element on the part of Mr Bemba (as a military commander or person effectively acting as such) as to knowledge of the crimes committed by forces under his effective control in accordance with article 28 (a) (i) of the Statute. Mr Bemba argues that the Trial Chamber erred in its application of the law and in its assessment of the facts in finding that "throughout the 2002-2003 [CAR] Operation, [he] knew that the MLC forces 'were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging'".[580] He argues that the Trial Chamber conflated the legal standards of knowledge set out in article 28 of the Statute, ignored relevant evidence and misappreciated evidence.[581] The Prosecutor argues that the Trial Chamber's overall conclusion on Mr Bemba's knowledge was based on the evidence as a whole, against which Mr Bemba's "piecemeal challenges to specific evidence" are unsustained.[582] The Victims' Representative argues that the facts as established by the Trial Chamber demonstrate that Mr Bemba had the requisite knowledge of the crimes pursuant to article 28 (a) (i) of the Statute.[583]

2. The Trial Chamber conflates the "actual knowledge" standard with the "constructive knowledge" (should have known) standard

(a) The Legal Error

(i) Relevant Part of the Impugned Decision

263. The Trial Chamber found, with respect to the "knew" standard in article 28 (a) (i) of the Statute, that actual knowledge cannot be presumed; it must be established through "direct or indirect (circumstantial) evidence" (examples being admissions by the accused or statements made).[584] The Trial Chamber held that, when proof of an accused's state of mind is accepted by inference, that inference must be the only reasonable conclusion available based on the

[580] Appeal Brief, para. 322.
[581] Appeal Brief, paras 287-324.
[582] Response to the Appeal Brief, paras 179, 188.
[583] Victims' Observations, paras 56, 58.
[584] Conviction Decision, para. 191.

evidence, and such inference must relate directly to the personal knowledge of the accused.[585] The Trial Chamber set out the indicia that may indicate knowledge as including: orders to commit crimes; the fact that the accused was informed personally that his forces were involved in criminal activity; the number, nature, scope, location, and timing of the illegal acts, and other prevailing circumstances; the type and number of forces involved; the means of available communication; the *modus operandi* of similar acts; the scope and nature of the commander's position and responsibility in the hierarchical structure; the location of the command at the time; and the notoriety of illegal acts, such as whether they were reported in media coverage of which the accused was aware (in respect of the latter, the Trial Chamber stated that "[s]uch awareness may be established by evidence suggesting that, as a result of these reports, the commander took some kind of action").[586]

264. The Trial Chamber concluded beyond reasonable doubt that Mr Bemba knew that "forces under his effective authority and control were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape and pillaging" during the 2002-2003 CAR Operation.[587] Whereas the Trial Chamber had previously indicated in its Regulation 55 Decision, issued in the course of the trial, that it might alter the legal characterisation of the facts so as to consider the "alternate form of 'knowledge'" under article 28 (a) (i) of the Statute, namely whether Mr Bemba "should have known", owing to the circumstances at the time, that the forces under his effective command and control were committing or about to commit the crimes charged, as opposed to whether Mr Bemba "knew" that this was the case, the Trial Chamber ultimately found it unnecessary in the Conviction Decision to consider that alternate standard in light of its factual findings that Mr Bemba knew that the MLC forces were committing or about to commit crimes.[588]

(ii) Analysis

265. We recall that in order to be held liable pursuant to article 28 (a) of the Statute, it must be established that the accused commander had the requisite mental element, as set out in sub-paragraph (i) of the above mentioned article, namely, that the accused commander either "knew, or owing to the circumstances at the time, should have known" that forces under his

[585] Conviction Decision, para. 192.
[586] Conviction Decision, para. 193.
[587] Conviction Decision, para. 717.
[588] Conviction Decision, paras 196,718.

or her effective command and control or effective authority and control were committing or about to commit crimes within the jurisdiction of the Court. Article 28 (a) (i) of the Statute thus distinguishes, on its face, between two standards of knowledge; where the accused, on the one hand, *knew* (actual knowledge) and, on the other hand, where the accused *should have known* owing to the circumstances at the time, that the forces were committing or about to commit the crimes in question. Mr Bemba asserts that the Trial Chamber misdirected itself as to the law and considered the facts against the wrong mental element: whereas it had purported to carry out an assessment of whether Mr Bemba "knew" of the crimes of MLC troops, it had, in fact, carried out an assessment of whether Mr Bemba "should have known".[589] We are not persuaded by Mr Bemba's argument. Liability under article 28 (a) of the Statute is triggered irrespective of which of the two standards is satisfied. As long as it is established that the commander, owing to the circumstances at the time should have known that the forces under his effective control were committing or about to the commit the crimes charged, the mental element of article 28 of the Statute is satisfied. We note that, in particular as far as commanders removed from the crime scene are concerned, it will be often difficult to neatly distinguish between knowledge of the (imminent) commission of crimes and the 'should have known' standard. Given that it is irrelevant for the commander's criminal liability whether he or she 'knew' of the subordinates' crimes, of 'should have known' of them, there is therefore no reason to require a trial chamber to make a clear distinction between the two standards. For that reason, Mr Bemba's argument should have been rejected.

266. Mr Bemba's argument that the Trial Chamber was confined to assess the facts it found to have been established against the "knew" standard after declining, in the Conviction Decision, to re-characterise the charges to the "should have known" standard, further to its Regulation 55 Decision, also fails.[590] In light of the preceding paragraph, an assessment by the Trial Chamber of the alternative standard within the mental element of article 28 (a) (i) of the Statute would not have required notification of a change in the legal characterisation of facts pursuant to regulation 55 of the Regulations, given that article 28 (a) (i) of the Statute establishes, in effect, a unitary standard for the mental element and that the difference between the "knew" and the "should have known" standards has no practical consequence for

[589] Appeal Brief, paras 292-296.
[590] Appeal Brief, para. 292.

the purpose of triggering liability under article 28 (a) of the Statute, leaving aside any significance concerning culpability or aggravating factors in terms of sentencing.

267. To the extent that Mr Bemba is raising an issue of notice, we recall that the Trial Chamber gave the parties notice that a change in the legal characterisation of the facts from knew to should have known was being contemplated in its Regulation 55 Decision. While for the reasons set out above resort to regulation 55 of the Regulations of the Court was unwarranted, the Regulation 55 Decision nevertheless enabled Mr Bemba to make submissions on that second mental element. Therefore, it was open to the Trial Chamber to consider both the "knowledge" and the "should have known" standards.

268. To the extent that Mr Bemba could be understood as arguing that a commander's knowledge may not be inferred and thus appears to take issue with the Trial Chamber's determination that knowledge may be founded on circumstantial evidence, we reject the argument. We recall that the Trial Chamber found that actual knowledge may be established through direct or circumstantial evidence, but could not be presumed.[591] In reaching its conclusion, the Trial Chamber cited the Confirmation Decision and jurisprudence of the ICTY and ICTR.[592] We do not consider this issue controversial. The jurisprudence of the ICTY and the ICTR on superior responsibility has long established that actual knowledge cannot be presumed on the existence of certain facts.

269. The jurisprudence clearly demonstrates, however, that knowledge can be established by either direct evidence or by circumstantial evidence. In the *Čelebići* Trial Judgment, the ICTY Trial Chamber rejected the prosecution's submissions as to "the existence of a rule of presumption where the crimes of subordinates are a matter of public notoriety, are numerous, occur over a prolonged period, or over a wide geographical area".[593] In respect of knowledge, the *Čelebići* Trial Chamber found that "in the absence of direct evidence of the superior's knowledge of the offences committed by his subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence".[594] This finding was

[591] Conviction Decision, para. 191.
[592] Conviction Decision, fns 437-439.
[593] *Čelebići* Trial Judgment, paras 384, 386. *See also* para. 379.
[594] *Čelebići* Trial Judgment, para. 386.

not disturbed on appeal[595] and has since been cited in ICTY, ICTR and SCSL jurisprudence.[596] Moreover, we note that the *Galić* Appeal Judgment expressly dismissed the challenge of the accused superior (a challenge identical to Mr Bemba's) to the Trial Chamber's holding that his knowledge of offences committed by his subordinates may be established through circumstantial evidence.[597] Indeed, we see no reason why the knowledge element of article 28 of the Statute should not be capable of being established through circumstantial evidence – just as any other objective or mental element of the crimes under the Court's jurisdiction and the attendant modes of liability.[598]

270. Further, and in so far as Mr Bemba is arguing that a commander's lack of geographical proximity to the location of the commission of crimes by forces under his control would prevent his acquisition of the requisite standard of knowledge,[599] we consider that whether knowledge has been established beyond reasonable doubt must be determined based on the evidence that was put before the Trial Chamber; there is no basis for the proposition that, as a matter of law, a geographically remote commander cannot have knowledge of his or her subordinates' crimes.[600]

271. Turning to Mr Bemba's argument that the legal error stemming from the conflation of the two mental elements led the Trial Chamber to disregard the effect that corroborated denials of crimes would have had on his level of knowledge,[601] we consider that this submission does not allege an error of law. Whether, in view of potentially conflicting evidence, knowledge of the commander has been established beyond reasonable doubt is a

---

[595] Neither party challenged on appeal the Trial Chamber's conclusions on the legal standard of "actual knowledge" (*Čelebići* Appeal Judgment, paras 220, 224).
[596] *See* e.g. *Aleksovski* Trial Judgment, para. 80; *Halilović* Trial Judgment, para. 66; *Blaškić* Trial Judgment, para. 307; *AFRC* Trial Judgment, para. 792.
[597] *Galić* Appeal Judgment, paras 171-173, 180-182. We also note that the *Hadžihasanović and Kubura* Appeals Judgment rejected, in light of the factual assessment undertaken by the Trial Chamber which demonstrated otherwise, the Prosecutor's antithetical argument that by requiring that the accused's knowledge be established "with certainty", the Trial Chamber in that case had "ignored that knowledge may be established through direct or circumstantial evidence, which allows for an inference that the superior 'must have known' of his subordinates' criminal acts", *Hadžihasanović and Kubura* Appeal Judgment, paras 282-287.
[598] *See* *Lubanga* Appeal Judgment, para. 22.
[599] Appeal Brief , paras 287-289.
[600] In *Ntabakuze*, the ICTR Appeals Chamber dismissed the accused's arguments that he could not have known of the commission of crimes *inter alia* because he was geographically removed from the crime site and stated that there was no need for the accused to have been present when the crimes were committed, noting evidence of extensive radio communications between the accused and his men (*Ntabakuze* Appeal Brief, paras 14-144; *Ntabakuze* Appeal Judgment, paras 199-200).
[601] Appeal Brief, paras 293-296.

question of fact. We note that the *Čelebići* Appeals Judgment emphasised that the assessment of the mental element should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.[602]

272. Consequently, we reject Mr Bemba's argument that the Trial Chamber conflated the "knowledge" and "should have known" standards. We shall proceed to consider Mr Bemba's remaining arguments regarding the Trial Chamber's finding on Mr Bemba's knowledge.

(b) The evidence that was erroneously ignored

273. The essence of Mr Bemba's arguments is that, in its assessment of Mr Bemba's knowledge, the Trial Chamber failed to address evidence that there had been corroborated denials that crimes were being committed from his trusted senior MLC advisers with direct knowledge of the situation on the ground (referring to documentary evidence and testimony from P6, P15, D19, D21 and D48), which would have corrupted all the information Mr Bemba was receiving.[603] Thus, he alleges that the Trial Chamber failed to provide a reasoned opinion in this regard.

274. We recall that a trial chamber is required under article 74 (5) of the Statute to provide a "full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions" and that failure to comply with this provision amounts to a procedural error.[604] If particular items of evidence that are, on their face, relevant to a given factual finding of a trial chamber are not addressed in the reasoning, the Appeals Chamber "will have to determine whether they were of such importance that they should have been addressed".[605] We also recall that "[i]t must be clear from the Trial Chamber's decision which facts it found to have been established beyond reasonable doubt and how it assessed the evidence to reach these factual findings".[606]

275. In his closing brief, Mr Bemba argued that he was receiving active denials of the commission of crimes from multiple sources.[607] We note that the Trial Chamber did not

[602] *Čelebići* Appeal Judgment, para. 239; *Krnojelac* Appeal Judgment, para. 156.
[603] Appeal Brief, paras 297-308.
[604] *Bemba et al.* Appeal Judgment, para. 102; Majority Judgment, para. 55.
[605] *Bemba et al.* Appeal Judgment, para. 106; Majority Judgment, para. 54.
[606] *Bemba et al.* Appeal Judgment, para. 104.
[607] Mr Bemba's Closing Brief, paras 853, 896.

directly address the effect that such denials might have had on Mr Bemba's state of knowledge in the Conviction Decision. However, for the reasons set out below, we find that, in the circumstances, this did not amount to a failure to provide a reasoned opinion.

276. Whereas the Trial Chamber did not refer to D19's evidence that Mr Bemba did not discuss allegations of crimes with Colonel Moustapha, we note that the Trial Chamber assessed the credibility of D19 generally and found parts of the evidence unreliable regarding Mr Bemba's direct involvement in the 2002-2003 CAR Operation and deserving of particular caution.[608] The Trial Chamber specifically stated its concerns with respect to, *inter alia*, inconsistencies concerning *communications* between Mr Bemba and Colonel Moustapha (*i.e.* the very issue in question).[609] Moreover, the Trial Chamber relied on corroborated testimony from D49, P45 and P15 that Mr Bemba and senior MLC officials *did* discuss media allegations of MLC crimes in the CAR.[610] Thus, the Trial Chamber set out its approach to D19's testimony and explained on which evidence it relied to reach its findings; in these circumstances, it was not unreasonable for the Trial Chamber not to refer to D19's evidence that Colonel Moustapha did not discuss allegations of crimes with Mr Bemba.

277. We further note that, whereas the Trial Chamber did not refer to denials from President Patassé contained in two pieces of evidence when finding that Mr Bemba knew of the crimes charged, it relied on information contained in these two pieces of evidence for other purposes. This indicates that the Trial Chamber considered these pieces of evidence. The Trial Chamber

---

[608] With regards to D19, the Trial Chamber found parts of D19's evidence unreliable. It considered that "with regard to issues that go to Mr Bemba's direct involvement in the 2002-2003 CAR Operation or operational control, as well as certain other discrete issues such as D19's personal involvement in and role during the events, [D19's] testimony was not credible. Two key examples include (i) D19's implausible testimony with respect to the Operations Report, which the Chamber found to be entirely not credible, and (ii) the inconsistencies and contradictions within and between [the] testimony and [D19's] prior statements to the Prosecution regarding operational control during the 2002-2003 CAR Operation. On these issues, the Chamber found D19's demeanour and testimony to demonstrate evasion, and a lack of spontaneity and impartiality. Accordingly, the Chamber considers that particular caution is required in analysing D19's evidence". (Conviction Decision, paras 359-360 (footnotes omitted)).

[609] Conviction Decision, para. 359, fn. 911. In relation to "direct communication between Mr Bemba and Colonel Moustapha", the Trial Chamber found that D19 gave "unclear and evasive testimony" when confronted with inconsistencies between the prior statements (that Colonel Moustapha and Mr Bemba discussed operations daily) and testimony (that Colonel Moustapha and Mr Bemba only communicated two or three times during the 2002-2003 CAR Operation). The Trial Chamber concluded that it was unable to rely on D19's testimony that Colonel Moustapha only communicated two or three times during the 2002-2003 CAR Operation and found on the basis of corroborated evidence that Colonel Moustapha and Mr Bemba regularly communicated, which the former reporting the status of operations and the situation at the front. (Conviction Decision, paras 421-422).

[610] Conviction Decision, para. 582.

used the first piece of evidence[611] – a transcript of an RFI programme of 5 December 2002 containing an interview with President Patassé – in five instances to corroborate evidence (including testimonial evidence), that the MLC troops had committed acts of pillaging, rape, and murder against civilians in Bangui, PK12, PK22, and Yembe and it also relied on this evidence to find that "[f]rom the early days and throughout the 2002-2003 CAR Operation, as noted by a number of witnesses, international media outlets – particularly [RFI], but also others, […] consistently reported allegations that MLC soldiers were committing acts of pillaging, rape, and murder against the civilian population in the CAR".[612] It is thus clear that the Trial Chamber did not ignore this piece of evidence. While the Trial Chamber did not specifically address President Patassé's statement during the interview that allegations of murder, rape and pillaging in PK12 were "lies yet again",[613] we do not consider that this passage was of such significance that failure to address it in the reasoning amounted to a procedural error.

278. The Trial Chamber used the second piece of evidence[614] – an article of an interview with President Patassé published by "*Le confident*" on 24 February 2003 – to support its finding that "[l]ocal CAR media outlets – whose reports in French were accessible to the MLC troops and others in the CAR – also regularly and consistently reported allegations of crimes committed by the MLC troops in the CAR".[615] Referring to the same passages of the interview Mr Bemba alleges were ignored, the Trial Chamber found that in the article in question President Patassé "recognised that rapes were committed by Mr Bemba's soldiers (in Bangui), affirmed that Mr Bemba went to Bangui and punished those responsible, and that those crimes are 'the consequences of war'".[616] Thus, the Trial Chamber did not ignore this piece of evidence.

279. Turning to the formal denials of crimes that Mr Bemba was receiving in the form of reports, it cannot be said that the Trial Chamber ignored this evidence either. Rather, we note

[611] EVD-T-OTP-00576/CAR-OTP-0031-0099.
[612] Conviction Decision, para. 461 and fn. 1304 (referring to Gobongo and Mabo); para. 486, fn. 1408; para. 520, fn. 1567; para. 563, fn. 1736; para. 576, fn. 1777 respectively.
[613] CAR-OTP-0056-0287 at 0290. We note that the Prosecution does not address this article, stating that "[t]he Chamber did not rely on EVD-T-OTP-00576/CAR-OTP-0031-0099", Response to the Appeal Brief, fn. 663.
[614] EVD-T-OTP-00448/CAR-OTP-0013-0161.
[615] Conviction Decision, para. 577.
[616] Conviction Decision, para. 577, fn. 1780. Mr Bemba refers to EVD-T-OTP-00448/CAR-OTP-0013-0161 at 0162-0163 at fn. 590 of his Appeal Brief.

that the Trial Chamber evaluated the reports in question, relied on aspects of them and voiced concerns as to their credibility. With respect to the Mondonga Inquiry, which had been set up in response to media allegations of MLC crimes in the CAR, the Trial Chamber found flaws in the investigation process. For example, it noted that the Mondonga Inquiry did not address the responsibility of commanders, the investigators did not question the suspects about the crime of murder or pursue reports of rape.[617] The Trial Chamber also noted that Mr Bemba was copied on the subsequent "Bomengo case file",[618] which contained "detailed information on acts of pillaging and rape attributed to MLC soldiers".[619] Thus, it cannot be said that the Trial Chamber ignored this evidence.

280. There are also indications that the Trial Chamber did not consider the report of the Zongo Commission, set up following allegations that pillaged goods from the CAR were entering the DRC through Zongo,[620] to be independent and reliable, since it lamented, *inter alia*, that the Commission was composed of only MLC officials and that its report did not refer to testimony from soldiers, although it had the capacity to call them.[621] The testimony of D48 on the subject of the Zongo Commission generally was not ignored by the Trial Chamber, which expressly noted his apparently narrow definition of pillaging.[622] The Trial Chamber found that, whereas the final report of the Zongo Commission was unable to establish that the pillaging was attributable to MLC soldiers, "it did include further information indicating that pillaging had been committed by MLC soldiers in the CAR and that pillaged goods crossed from the CAR to the DRC near Imese and Dongo".[623] Thus, the Trial Chamber considered the evidence in question and explained how it assessed it.

281. With respect to the Sibut Mission set up following media allegations of crimes by MLC soldiers committed in Bozoum and Sibut,[624] the Trial Chamber clearly articulated its apprehension with respect to the Mission's findings[625] and with what it considered defects in

[617] Conviction Decision, para. 589.
[618] *See* Conviction Decision, para. 586.
[619] Conviction Decision, para. 712.
[620] Conviction Decision, paras 601, 713.
[621] Conviction Decision, paras 601, 602, 713, 722.
[622] Conviction Decision, para. 602.
[623] Conviction Decision, paras 603, 713, 722.
[624] Conviction Decision, paras 612-614, 725.
[625] Conviction Decision, para. 531.

its methods.[626] The Trial Chamber noted that the Mission was not an investigation, that the reporters only spoke to a narrow selection of interviewees, and that the interviews were conducted in the presence of armed soldiers and in an atmosphere of coercion.[627] With respect to the Mission's findings, the Trial Chamber noted that some accounts given in the video of the Sibut Mission in evidence "suggest[ed] that the MLC did not commit crimes in Sibut".[628] However, the Trial Chamber stated that it had "doubts as to the reliability of this video" and noted that some interviewees "actually corroborate other evidence of the commission of crimes by MLC forces in Sibut".[629] Ultimately, it found that those interviewed "largely refuted allegations of crimes by MLC soldiers, but some also claimed that the MLC soldiers committed abuses against civilians in Sibut, in particular, pillaging".[630] In these circumstances, we find that the Trial Chamber did not ignore the findings of the Sibut Mission. The Trial Chamber assessed the video of the mission in question and found it unpersuasive.

282. Furthermore, the Trial Chamber did not ignore evidence in relation to Sibut from P15 and D21 that the MLC soldiers were not responsible for the crimes committed. The Trial Chamber expressly noted that D21's account that General Bozize's soldiers were generally responsible for the abuses and that any "misbehaviours" by the MLC officers had already been addressed was partially corroborated by the account of "P15, who testified that the Sibut Mission did not discover any civilian abuse attributable to the MLC".[631]

283. In sum, we reject Mr Bemba's argument that the Trial Chamber failed to provide a reasoned opinion by ignoring evidence. The presentation by Mr Bemba of the existence of denials of crimes, whilst relevant to the Trial Chamber's assessment of *mens rea*, does not automatically negate the media and NGO reports that the Trial Chamber relied upon to corroborate actual knowledge, as Mr Bemba appears to argue. It is for the Trial Chamber to assess the evidence before it and determine its weight.

[626] Conviction Decision, paras 615, 725.
[627] Conviction Decision, para. 725.
[628] Conviction Decision, para. 531.
[629] Conviction Decision, para. 531.
[630] Conviction Decision, para. 715.
[631] Conviction Decision, para. 615.

3. The facts as found by the Trial Chamber do not support a finding of knowledge

284. We recall that the Trial Chamber concluded that Mr Bemba knew that forces under his effective authority and control were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape and pillaging during the 2002-2003 CAR Operation, on the basis of factual findings, including: the notoriety of the crimes; Mr Bemba's position; the available channels of communication; the regular contact between Mr Bemba and the MLC officials in the CAR; general sources of information of crimes by MLC soldiers (including media, NGO, and MLC intelligence reports), and Mr Bemba's direct knowledge of allegations of murder, rape and pillaging by MLC soldiers.[632] Mr Bemba challenges aspects of the Trial Chamber's findings in support of his contention that the facts found by the Trial Chamber do not support a finding that Mr Bemba had actual knowledge of crimes of MLC troops.[633] We shall address these arguments in turn.

(a) The findings on RFI's reporting misstate the evidence

(i) Relevant Part of the Impugned Decision

285. The Trial Chamber found that "international media outlets – particularly [RFI], but also others, like the BBC, AP, the IRIN, and the Voice of America – consistently reported allegations that MLC soldiers were committing acts of pillaging, rape, and murder against the civilian population in the CAR" throughout the 2002-2003 CAR Operation.[634] It further found that "[l]ocal CAR media outlets" also "regularly and consistently reported allegations of crimes committed by the MLC troops in the CAR".[635]

286. With respect to the reliability of RFI reports, the Trial Chamber considered testimony from D18 that RFI had retracted "certain allegations" it made against the MLC before the 2002-2003 CAR Operation, but considered that the same witness also stated that "everyone knew that, during the 2002-2003 CAR Operation, crimes were committed".[636] The Trial Chamber also considered the testimony of P15 that RFI reporting was "often 'excessive'" and that within the MLC there was "considerable suspicion regarding the impartiality of RFI and

[632] Conviction Decision, para. 717.
[633] Appeal Brief, paras 309-324.
[634] Conviction Decision, para. 576.
[635] Conviction Decision, para. 577.
[636] Conviction Decision, para. 579.

the truth of its reports".[637] It found that, "[h]owever, an analysis of media reports published throughout the conflict demonstrates that the information on crimes by MLC soldiers from other media outlets was generally consistent with that reported by RFI".[638] In conclusion, the Trial Chamber found the testimony of D18 and P15 "insufficient to support any suggestion that Mr Bemba or others contemporaneously following RFI's allegations of crimes committed during the 2002-2003 CAR Operation disbelieved such reports"; the evidence of D18 and P15 did not undermine the reliability of such reports.[639]

(ii) Analysis

287. Mr Bemba's argument is that, on the one hand, the Trial Chamber's reliance on the consistency of press content in the media as to MLC crimes is inapposite, given its dependence on syndicated reports and, on the other hand, the Trial Chamber ignored the mistrust with which he (and others within the MLC) viewed RFI, as well as evidence corroborating RFI's history of false reporting against the MLC from: witnesses D48, D49, D21 and P33, the Sibut Mission and an MLC Communication Logs.[640]

288. With respect to the assertion that the syndication of reporting undermines the Trial Chamber's finding that the content of media reports from outlets other than RFI were generally consistent with press reports issued by RFI,[641] we note that Mr Bemba's argument concerning syndication and consistency is premised on the assumption that the Trial Chamber relied solely on RFI material directly or through syndication. In this regard, we note three points. First, the Trial Chamber did not rely solely on material from RFI. For example, the Trial Chamber relied on articles by the AP[642] and IRIN.[643] Second, the Trial Chamber did not only refer to syndicated media reports which cite the allegedly biased RFI as their original source. Rather, the Trial Chamber relied on syndicated reports sourced from media outlets

[637] Conviction Decision, para. 580.
[638] Conviction Decision, para. 580.
[639] Conviction Decision, para. 581.
[640] Appeal Brief, paras 309-316.
[641] Appeal Brief, para. 311.
[642] Conviction Decision, fn. 1777, referring to EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0669 to 0671, an AP article published on 8 November 2002, "describing allegations of rape and pillaging by MLC soldiers in Bangui".
[643] Conviction Decision, fn. 1777, referring to EVD-T-OTP-00438/CAR-OTP-0011-0293, an IRIN Africa article, dated 31 October 2002, "stating that the MLC forces were accused of widespread pillaging, particularly in the northern neighbourhoods of Bangui".

other than RFI, as also noted by Mr Bemba.[644] For example, the Trial Chamber relied on one article from the BBC, which cites 'Misna' as its source, [645] and another from the BBC, which cites Gabonese Africa No 1 Radio as its source.[646] Third, the Trial Chamber did not rely solely on syndicated news reports. We note in this vein a BBC article published on 1 November 2002 which did not stipulate any other media outlets as its source.[647] It is thus clear that the Trial Chamber did not rely solely on material from RFI, syndicated or otherwise. It follows therefrom that it was not unreasonable for the Trial Chamber to rely on the consistency of content in the international media reports, given our satisfaction that a perusal of the international media reports cited demonstrate that they were indeed consistent with one another with respect to their reports on MLC crimes.

289. We turn now to the arguments of RFI's false reporting and its reputation amongst the MLC.[648]

290. We note that the Trial Chamber assessed RFI's retraction of a story published in 2001, as relayed by D18.[649] It also assessed the suspicion with which the RFI was viewed within the MLC, as relayed by P15, but found that other media outlets were generally consistent with RFI. As such, the Trial Chamber did not dismiss outright evidence pertaining to RFI's standing and its false reporting against the MLC, but it weighed this evidence against the existence of reports from other media outlets generally giving the same information as RFI and found wanting the suggestion that Mr Bemba did not believe RFI. The Trial Chamber also relied on CAR media outlets that also consistently reported allegations of crimes committed by MLC troops in the CAR.[650] Having determined above that the Trial Chamber

[644] Appeal Brief, para. 311.
[645] Conviction Decision, fn. 1777, referring to EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0669, a BBC article published on 6 November 2002, "mentioning complaints raised by inhabitants of the northern suburbs of Bangui about rape and pillaging allegedly committed by the MLC soldiers, stating that local politicians considered the CAR government responsible for the situation because of its alliance with the MLC, and reporting that the CAR government had announced that the MLC contingent would leave the CAR in two or three days".
[646] Conviction Decision, fn. 1777, referring to EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0675-0676, a BBC article published on 16 November 2002, "referring to reports of 'atrocities' allegedly committed by MLC troops".
[647] Conviction Decision, fn. 1777, referring to EVD-T-OTP-00821/CAR-OTP-0030-0274, a BBC News article published on 1 November 2002, "reporting allegations of serious violence and pillaging by MLC soldiers in the northern suburbs of Bangui".
[648] Appeal Brief, paras 310, 312-316.
[649] Conviction Decision, paras 579, 581.
[650] Conviction Decision, para. 577.

did not act unreasonably in drawing the conclusion that there was consistency amongst the international media with respect to its reporting on MLC crimes,[651] we find that the Trial Chamber was not unreasonable in reaching the conclusion it reached.

291. With respect to the testimony of D49, D21 and P33, which Mr Bemba argues was ignored,[652] we note that, whereas these witnesses did refer to false allegations of cannibalism being reported in the press, they did not refer to these allegations as having been made expressly by RFI in the passages of testimony cited by Mr Bemba.[653] Thus, these particular excerpts of the testimony of D49, D21 and P33 do not assist Mr Bemba with corroborating arguments that RFI specifically was partial when it came to reporting on matters concerning the MLC. Furthermore, we note that RFI was not the only media outlet to have carried or broadcast reports of allegations of cannibalism by the MLC. In this regard, we note an article by AFP of 17 February 2003, which was cited by the Trial Chamber in the Conviction Decision, albeit for other purposes, containing *inter alia* reports of the MLC engaging in acts of cannibalism.[654]

292. Furthermore, none of the four witnesses referred to by Mr Bemba challenge the reliability of RFI's reporting regarding the commission of the crimes of rape, murder and pillaging. In fact, with respect to the testimony of D48, which Mr Bemba argues was similarly ignored by the Trial Chamber,[655] we note that the Trial Chamber actually relied on an excerpt of the said passage of ignored testimony, in order to support its finding that the press consistently reported allegations that MLC troops were committing acts of pillaging, rape and murder.[656] The Trial Chamber referred to a statement made by D48 during

---

[651] *See supra* IV.D.3(a).
[652] Appeal Brief, paras 312-314.
[653] For D49 see Transcript of 21 November 2012, ICC-01/05-01/08-T-272-Red2-Eng, p. For D49 see , Transcript of 21 November 2012, ICC-01/05-01/08-T-272-Red2-Eng, p. 60, line 11 to p. 62 line 13. For P33 see Transcript of 15 September 2011, ICC-01/05-01/08-T-162-Red-Eng, p. 6, line 18 to p. 7, line 4. For D21 see Transcript of 12 April 2013, ICC-01/05-01/08-T-306-Conf-Eng, p. 83, lines 7-22.
[654] EVD-T-OTP-00407/CAR-OTP-0004-0667, at 0684, an AFP article from 17 February 2003 reporting on cannibalism committed by the MLC, cited by the Trial Chamber at fns 1304, 1777.
[655] Appeal Brief, para. 312.
[656] At fn. 1776 of the Conviction Decision, the Trial Chamber refers to the transcripts of the testimony of D48, Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 70, lines 15-16. Mr Bemba also refers to this particular transcript of D48's testimony at fn. 611 of the Appeal Brief, alleging that the Trial Chamber ignored the testimony set out in Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p.70 line 9 to p.71, line 19. The lines of the transcript the Trial Chamber referred to are subsumed within the passages of the transcript cited to by Mr Bemba.

examination by the Defence in response to a question concerning RFI reports alleging cannibalism on the part of the MLC.[657] The following question was put to D48: "Sir, you were telling us earlier this morning about the RFI reports, and you said during the course of your evidence about those radio reports that there were even reports that the MLC had indulged in cannibalism; do you remember that?", to which the witness replied: "What I said exactly was that RFI were broadcasting a lot of different reports and that there was information which was relating to pillaging, to rape, murder […]".[658]

293. Mr Bemba claims that the Trial Chamber ignored the MLC Communication Logs.[659] We note that while the MLC Communication Logs does record the surprise of the commander who authored it at having heard the allegations of cannibalism broadcasted by RFI, it is insufficient to corroborate that allegations by RFI *per se* were viewed with suspicion amongst the MLC.

294. In light of the above, we find that the Trial Chamber did not act unreasonably by not referring to witnesses D48, D49, D21 and P33 and the MLC Communication Logs in finding that there was insufficient evidence to support a finding that Mr Bemba would have disbelieved RFI's reports.[660]

295. With respect to the alleged disregard of evidence from the Sibut Mission showing false reporting by RFI,[661] the Trial Chamber, in fact, referred to the excerpts of the video of the Sibut Mission that Mr Bemba alleges were ignored.[662] While the Trial Chamber did not specifically address the statement of a civil servant who appeared in the video to which Mr Bemba refers, we do not consider that this statement was of such significance that it had to be expressly addressed. This is so given that the Trial Chamber specifically addressed in its

---

[657] Conviction Decision, fn. 1776.
[658] Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 70, lines 9-16.
[659] Appeal Brief, para. 312.
[660] *See* Conviction Decision, para. 581.
[661] Appeal Brief, para. 316.
[662] Mr Bemba argues that the Trial Chamber ignored EVD-T-D04-00008/CAR-DEF-0001-0832 (a video recording) at 00:39:20 to 00:42:18 at para. 315 of the Appeal Brief. In the Conviction Decision, the Trial Chamber refers to 00:38:20 to 00:42:15 of the video recording at fn. 1941 of the Conviction Decision to support its finding that armed soldiers were circulating close to the population whilst interviews are conducted. We note that between 00:42:16 and 00:42:18 (the difference between Mr Bemba's citations to the video and the Trial Chamber's citations) there is applause.

reasoning the more direct evidence of D18 and D15 regarding the perception of RFI reports within the MLC.[663]

296. In sum, Mr Bemba's arguments relating to the Trial Chamber's reliance on RFI reports are rejected.

(b) The Trial Chamber's reliance on the Mongoumba attack misstates the evidence

(i) Relevant Part of the Impugned Decision

297. As one of the factors for concluding that Mr Bemba had the requisite knowledge,[664] the Trial Chamber relied upon its finding that Mr Bemba "knew of the punitive attack on Mongoumba, where only civilians were present", which the Trial Chamber considered "indicative that Mr Bemba knew that his forces would commit crimes against civilians in the course of the attack".[665] The Trial Chamber found that the MLC attacked Mongoumba on 5 March 2003 in retaliation for the seizure, by FACA forces in Mongoumba, of goods being taken by MLC troops on two boats to Dongo, DRC and the alleged detention of some MLC soldiers.[666] The Trial Chamber concluded that when Colonel Moustapha, who was in Zongo at the time, learnt of the said seizure and detention which had taken place at the beginning of March 2003, he transmitted an order to his troops to carry out a "punitive operation against Mongoumba".[667] The Trial Chamber found that the MLC was the only armed force in Mongoumba during the attack as "[b]y 5 March 2003, the FACA soldiers and local policemen had left Mongoumba, returning to Bangui or seeking refuge in the forest".[668] The Trial Chamber noted that there was reliable evidence that the MLC committed acts of pillaging, rape and murder against civilians in Mongoumba.[669]

298. The Trial Chamber was unable to conclude that Mr Bemba ordered the attack on Mongoumba on the basis of direct witness testimony on this point from P169.[670] However,

---

[663] Conviction Decision, para. 581.
[664] Conviction Decision, para. 717.
[665] Conviction Decision, para. 716.
[666] Conviction Decision, paras 536, 544.
[667] Conviction Decision, paras 536, 537, 540, 542.
[668] Conviction Decision, paras 536, 543, 716.
[669] Conviction Decision, paras 543, 563.
[670] Conviction Decision, para. 540. The Trial Chamber was unable to rely on P169's evidence on this point "[i]n light of (i) the particular caution with which it must approach the evidence of P169; (ii) the discrepancies within

following the consideration of the diverging accounts given by P169 and P178[671] as to whom Colonel Moustapha first spoke before "passing on the order to carry out a punitive operation against Mongoumba",[672] the Trial Chamber recalled its findings concerning Mr Bemba's authority over military operations and strategy, which it found consistent with the testimony given by P169 and P173 to the effect that Mr Bemba was the only person in a position to have ordered the attack on Mongoumba.[673]

299. Relying on "authenticated records of Mr Bemba's Thuraya device" and authenticated records of Colonel Moustapha's Thuraya number, the Trial Chamber found that Mr Bemba made a call of approximately 13 minutes to Colonel Moustapha the day before the attack at 21.15 and made calls to him 16 times for a total of at least 17 minutes on the day of the attack.[674] The Trial Chamber noted that, "[a]lthough many of these calls lasted for only a few seconds, the record demonstrates that (i) Mr Bemba and Colonel Moustapha communicated between 4 and 5 March 2003, and (ii) Mr Bemba persevered in trying to reach Colonel Moustapha after calls which lasted only a few seconds or failed to connect".[675] The Trial Chamber therefore found that "the only reasonable conclusion is that Mr Bemba knew of the attack on Mongoumba, but took no preventative or remedial action".[676] The Trial Chamber ultimately decided that Mr Bemba "knew that his forces would commit crimes against civilians in the course of the attack" on Mongoumba, which was later confirmed in media reports.[677]

(ii) Analysis

300. Mr Bemba does not appear to contest on appeal the occurrence of the attack on Mongoumba, the finding that all other armed forces had left the area prior to the attack, or the

---

the testimony as to his source of knowledge and assertions; (iii) the deduction and inference which founded the conclusion that Colonel Moustapha had the conversations with Mr Bemba, and (iv) the absence of corroboration as to who ordered the attack, the Chamber is unable to rely on P169's testimony that Mr Bemba ordered the attack on Mongoumba during the specific phone call he testified about" (footnotes omitted).

[671] Conviction Decision, paras 538-540, 542.

[672] Conviction Decision, paras 540, 452.

[673] Conviction Decision, para. 541. *See also* paras 538-539.

[674] Conviction Decision, para. 541. The Chamber states at para. 420 of the Conviction Decision that the numbers of Mr Bemba's and Colonel Moustapha's Thuraya device (which are used in its finding on the Mongoumba attack) have been authenticated – "Authenticated records of Thuraya numbers belonging to Mr Bemba and Colonel Moustapha indicate that Mr Bemba called Colonel Moustapha's number 126 times between 4 February 2003 and 15 March 2003". These devices were authenticated by witness and documentary evidence.

[675] Conviction Decision, para. 541 (footnotes omitted).

[676] Conviction Decision, para. 541 (footnotes omitted). *See also* para. 420.

[677] Conviction Decision, para. 716.

finding that the call logs relied upon by the Trial Chamber were from his Thuraya device.[678] We will thus not consider these issues.[679] His principal submission is rather, that, based on the evidence before it, no reasonable trial chamber could have concluded that its finding as to his knowledge of the attack was the only reasonable conclusion.[680]

301. We recall that the Trial Chamber concluded that the only reasonable inference that could be drawn from the evidence is that Mr Bemba knew of the attack on Mongoumba during which the MLC were the only armed force present,[681] but took no preventative or remedial action.[682] The Trial Chamber based its finding on the position of Mr Bemba at the time within the MLC, and the Thuraya contact logs of the number it authenticated as belonging to Mr Bemba.[683] From those call logs, the Trial Chamber relied on Mr Bemba's "constant contact with Colonel Moustapha the day before and the day of the attack" to be "indicative" that he "knew that his forces would commit crimes against civilians in the course of the attack".[684]

302. The crux of Mr Bemba's argument is that the Trial Chamber's finding that he had knowledge of the attack on Mongoumba makes "too many leaps".[685] Indeed, the Trial Chamber's conclusion regarding Mr Bemba's knowledge rests on a number of key inferences drawn from the evidence surrounding the attack on Mongoumba. The first inference is that Mr Bemba communicated directly with Colonel Moustapha before the attack, an inference based on the Thuraya call logs, Mr Bemba's responsibilities and the nature of the MLC chain

[678] The issues concerning authentication were contested at trial. *See* Mr Bemba's Closing Brief, paras 740-747.
[679] At para. 318, fn. 627, of the Appeal Brief, Mr Bemba references paras 740-747 of Mr Bemba's Closing Brief. In those specific paragraphs referenced, Mr Bemba had argued, *inter alia*, the following: the phone records - admitted by majority (and specifically used by the Trial Chamber in the Conviction Decision to find that Mr Bemba had knowledge of the Mongoumba attack (EVD-T-OTP-00591/CAR-OTP-0055-0893) - had not been authenticated by a witness; there is no indication that the phone number in question was used by Mr Bemba, or even by the MLC; the phone logs are incomplete (without explanation from the Prosecutor - starting three months after the conflict began) and should be treated with caution; the phone records show limited contact and no indication as to content; the attribution to Colonel Moustapha of a number allegedly frequently dialled by Mr Bemba stems solely from witness P178; and the Prosecution is asking the Trial Chamber to draw an inference of guilt from circumstantial evidence, but its conclusion is not the only reasonable inference available. By merely referencing the authentication argument set out in his closing brief in a footnote in his appeal brief (fn. 627), Mr Bemba has not substantiated his argument on appeal. Thus, we shall not address the arguments concerning authentication and completeness.
[680] Appeal Brief, paras 317-320.
[681] Conviction Decision, paras 536, 543, 716.
[682] Conviction Decision, paras 541, 543
[683] Conviction Decision, paras 420, 541.
[684] Conviction Decision, para. 716.
[685] Appeal Brief, para. 320.

of command.[686] The second is that Mr Bemba and Colonel Moustapha discussed the Mongoumba attack during those communications. The third is that Mr Bemba knew that the attack would be on civilians. The question is whether each inference was reasonable in and of itself and if so whether the ultimate conclusion drawn from those inferences combined was reasonable.

303. As previously noted, Mr Bemba does not contest on appeal the authentication of the Thuraya call logs as belonging to his Thuraya device or as having dialled a Thuraya number authenticated as belonging to Colonel Moustapha. He contests the finding that such call logs demonstrated that his Thuraya device connected with Colonel Moustapha's Thuraya device is sufficient evidence to establish that he and Colonel Moustapha actually spoke to one another and discussed an attack on the civilians of Mongoumba.

304. Taking the first and second inferences drawn by the Trial Chamber, that the Thuraya call logs demonstrate that Mr Bemba and Colonel Moustapha communicated before the attack on Mongoumba and discussed the attack, the Thuraya call logs must be seen in the context of the impending military operation in Mongoumba. We find that the Trial Chamber was not unreasonable in concluding that the heightened Thuraya activity with Colonel Moustapha on the evening before the attack and on the day of the attack demonstrate that Mr Bemba knew that his forces were about to attack Mongoumba. The mode of contact in question is consistent with the Trial Chamber's finding that Colonel Moustapha regularly communicated with Mr Bemba by Thuraya,[687] and the fact of communication taking place between Commander Moustapha and Mr Bemba prior to the attack is consistent with the Trial Chamber's findings on the MLC command structure and its method of planning of a military operation.[688] Furthermore, the Trial Chamber accepted testimony from P169 and P173 that Mr Bemba was the sole person in a position to have ordered the attack on Mongoumba in line with his authority over military operations and strategy within the MLC. This is also consistent with the finding of the Trial Chamber, confirmed on appeal, that Mr Bemba had operational control of the MLC forces in the CAR, which includes the troops dispatched to attack Mongoumba. Morevoer, the Trial Chamber relied on the evidence of

[686] *See supra* IV.B.
[687] Conviction Decision, para. 420.
[688] *See supra* IV.B.

P169, that [redacted]. [689]

305. As to the third inference, it was not unreasonable to infer that Mr Bemba knew that all other armed groups had left the area by 5 March 2003. The Trial Chamber found that Colonel Moustapha would report the "status of operations and the situation at the front" to Mr Bemba.[690] The Trial Chamber further found that Mr Bemba maintained regular, direct contact with senior commanders in the field on the state of operations, and additionally received numerous detailed operations and intelligence reports.[691] Moreover, the Trial Chamber found that the MLC troops had a certain modus operandi – they would first confirm that General Bozize's rebels had departed an area by the absence of retaliatory fire and by using scouts, before proceeding into the area.[692]

306. In sum, Mr Bemba has not demonstrated that no reasonable trial chamber could have reached the Trial Chamber's findings and his argument should have been rejected.

(c) No reasonable Trial Chamber could have found that Mr Bemba had knowledge that the MLC were committing murder

(i) Relevant Part of the Impugned Decision

307. The Trial Chamber concluded that Mr Bemba knew that MLC forces were committing or were about to commit "the crimes against humanity of murder and rape, and the war crimes of murder, rape and pillaging".[693] The Trial Chamber reached this conclusion, *inter alia*, based on its finding that there was "consistent and corroborated evidence that MLC soldiers committed many acts of rape and murder against civilians during the 2002-2003 CAR Operation".[694] The Trial Chamber found that Mr Bemba received reports of allegations

[689] Conviction Decision, para. 538, referring to, *inter alia*, Transcript of 1 July 2011, ICC-01/05-01/08-T-136-Red2-Eng p. 34, lines 17-21, Transcript of 4 July 2011, ICC-01/05-01/08-T-137-Red2-Eng, p. 49, lines 15-17.
[690] Conviction Decision, paras 420, 423.
[691] Conviction Decision, para. 700.
[692] Conviction Decision, para. 564.
[693] Conviction Decision, para. 717.
[694] Conviction Decision, para. 671. *See also* Conviction Decision, para. 563 finding 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". The Evidence is set out in fn. 1736.

of crimes, including the killing of civilians, carried out by the "Banyamulengués" and MLC troops in the CAR *via* both military and civilian intelligence services, primarily in reliance upon the evidence of witnesses P33 and P36.[695] Furthermore, the Trial Chamber found that international and national media consistently reported allegations of crimes committed by MLC troops in the CAR, including murder.[696] It found that Mr Bemba followed, discussed and reacted to the international media reports throughout the 2002-2003 CAR Operation and that the national media reports, in French, were accessible to the MLC troops in the CAR.[697] The Trial Chamber found that "[m]any media reports contained detailed accounts from alleged victims and, while not necessarily providing specific information on the identities of the individual perpetrators, they generally identified them as 'Banyamulengués', 'Bemba's men', or 'MLC soldiers'".[698] The Trial Chamber found that article 28 of the Statute does not require that the commander knew the identities of the specific individuals who committed the crimes and that it was unnecessary to establish that the accused mastered every detail of each crime committed.[699]

(ii) Analysis

308. Mr Bemba submits that the Trial Chamber's findings regarding his knowledge of the commission of murders by MLC soldiers are unreasonable as, on the one hand, the Trial Chamber erred by assessing the evidence relating to crimes of murder, rape and pillage together, rather than identifying specific reports of murder and, on the other hand, failed to consider information that contradicted the reports of MLC crimes, including the Sibut Mission findings.[700]

309. We concur with the Trial Chamber that article 28 of the Statute neither requires that a commander knew the identities of the specific individuals who committed the crimes, nor that he mastered every detail of each crime committed.[701] Nevertheless, whilst the commander

[695] Conviction Decision, paras 425, 708. The relevant transcripts in fn. 1175 are Transcript of 14 March 2012, ICC-01/05-01/08-T-214-Conf-Eng, p. 50, lines 10-21 and Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Conf-Eng, p. 15, line 22 to p. 16, line 16. The rest refer to looting and communications.
[696] Conviction Decision, paras 576, 577, 709.
[697] Conviction Decision, paras 576, 577, 709.
[698] Conviction Decision, para. 578.
[699] Conviction Decision, para. 194.
[700] Appeal Brief, paras 321-324.
[701] Conviction Decision, para. 194. *See also* *Krnojelac* Appeal Judgment, para. 155; *Čelebići* Appeal Judgment, para. 238.

need not to have known specific details, in line with the jurisprudence of the ICTY, it must be shown that the commander knew or, owing to the circumstances at the time, should have known that "offences such as those charged"[702] were being committed or about to be committed by his or her subordinates. It is insufficient that the accused was aware of general criminal behaviour.[703]

310. We turn now to the evidence upon which the Trial Chamber concluded that Mr Bemba had knowledge of murder. Whereas Mr Bemba argues that the majority of the media and intelligence reports the Trial Chamber found him to have been receiving do not mention murder,[704] he ignores the reports which refer to allegations of murder committed by MLC troops (as set out below). Indeed, in stating that the intelligence reports refer "almost exclusively to theft, looting and harassment", that the media reports "regularly refer to only pillage and/or rape", and that there were "no credible reports of murder", Mr Bemba appears to admit that there were at least some reports of murder.[705]

311. We recall that the Trial Chamber relied on several media articles or radio programmes from international (predominantly RFI) media outlets which made allegations of crimes committed by MLC troops.[706] Whilst the Trial Chamber did not specify which particular report it was using to corroborate each category of crime, and taking into account apparent instances of duplication, we note that the following reports mention the murder or killing of civilians: (1) a "*communiqué de presse*" issued in Paris by the former CAR Prime Minister, Mr Jean-Paul Ngoupande, dated 2 November 2002, containing allegations of crimes, including "massacres" committed by MLC troops in the northern parts of Bangui, CAR;[707] (2) an RFI programme from 4 November 2002, stating that Bangui inhabitants had reported crimes including killings of Chadians by Mr Bemba's troops; [708] (3) a BBC article published on 5 November 2002, in part setting out the text of the aforementioned RFI report of 4 November 2002 pertaining to the alleged killing of 15 Chadian civilians by MLC soldiers in

[702] *Strugar* Trial Judgment, paras 416-417. *See also Hadžihasanović and Kubura* Trial Judgment, para. 106.
[703] *Orić* Appeal Judgement, paras 57-60; *RUF* Trial Judgment, para. 309.
[704] Appeal Brief, para. 323.
[705] Appeal Brief, para. 323.
[706] Within the Trial Chamber's block citation of evidence in fn. 1777, we identified the cited international media reports as relating to allegations of murder. The Prosecutor referred to same pieces of evidence to support its argument that the Trial Chamber properly found that Mr Bemba knew that murder was being committed.
[707] EVD-T-OTP-00846/CAR-OTP-0004-0874.
[708] EVD-TOTP-00575/CAR-OTP-0031-0093, track 6, from 00:05:49 to 00:08:24,

Bangui;[709] (4) an RFI programme dated 5 December 2002,[710] including allegations of killings by MLC troops; (5) an RFI programme, dated 5 December 2002, containing allegations of, *inter alia*, killings, committed by the Banyamulengués" or "Mr Bemba's men"[711] (which duplicates the RFI programme of 5 December 2002[712] in that it is a *Le Citoyen* article of 6 December 2002 which reproduces the text of the RFI programme of 5 December 2002); (6) an RFI programme dated 15 December 2002, containing allegations of *inter alia* massacres committed by the MLC; [713] (7) two tracks of an RFI programme from 13 February 2003,[714] "reporting crimes in Damara, *inter alia*, mass murders allegedly committed by MLC soldiers"; and (8) an RFI programme from 19 February 2003, referring to the recapture of Bossangoa by the MLC forces and mentioning Chadians who had been massacred.[715] We note that, whereas the Trial Chamber also refers to an RFI programme from 14 March 2003, as reporting on murder and pillaging in Mongoumba, the report does not appear to make any reference to murder. [716]

312. The aforementioned media articles leave no doubt as to the perpetrators of the acts in question, referring to for example "*les troupes envoyées par Jean-Pierre Bemba*",[717] and "Jean-Pierre Bemba's men",[718] and we do not find unreasonable the Trial Chamber's finding that there was no "confusion" as to the identity of the alleged perpetrators of the murders in the media reports.[719]

313. With respect to Mr Bemba's corresponding argument concerning the credibility of RFI's reporting, we recall that we have rejected the submission that the Trial Chamber was

[709] EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0667 to 0668.
[710] EVD-T-OTP-00576/CAR-OTP-0031-0099, transcribed in (French at EVD-T-CHM-00040/CAR-OTP-0036-0041 at 0041-0048) English at CAR-OTP-0056-0287 at 0290-0293.
[711] EVD-T-OTP-00400/CAR-OTP-0004-0345 at 0346-0348.
[712] EVD-T-OTP-00576/CAR-OTP-0031-0099.
[713] EVD-T-OTP-00578/CAR-OTP-0031-0106, track 3 at 00:09:46 to 00:12:07.
[714] EVD-T-OTP-00579/CAR-OTP-0031-0116, transcribed in (French at EVD-T-CHM-00042/CAR-OTP-0057-0243) and English at CAR-OTP-0058-0003 at 0005 and 0009
[715] EVD-T-OTP-00582/CAR-OTP-0031-0124, track 2, from 00:10:30 to 00:12:45. Transcribed in French at CAR-OTP-0057-0344 and English at CAR-OTP-0057-0403 at 0405 *[0405 is cited in the Sibut section at footnote 1921) 0407 speaks of killings]*.
[716] EVD-T-OTP-00583/CAR-OTP-0031-0136, track 1, transcribed and translated into English at EVD-T-OTP-00734/CAR-OTP-0056-0300 at 0303.
[717] EVD-T-OTP-00846/CAR-OTP-0004-0874 at 0874.
[718] EVD-T-OTP-00575/CAR-OTP-0031-0093 at 00.60 to 07.40; *See also* EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0667-0668.
[719] Conviction Decision, para. 578.

unreasonable to have dismissed his claim that he had reason to disbelieve RFI's media reports on the ground of RFI's alleged bias against the MLC.[720] We therefore find that it was not unreasonable for the Trial Chamber to have relied on RFI's media reports of murder in establishing Mr Bemba's knowledge, given its finding, undisturbed on appeal, that the reliability of the reports was not in doubt.[721] We further note that reports of murder were made by international media outlets other than RFI, for example by the BBC, which in an article published on 1 November 2002 reported about the killings of Chadians in Bangui.[722]

314. We also note the Trial Chamber's reliance on its finding that Mr Bemba responded by telephone and in writing to the receipt of the NGO investigative report by the FIDH on war crimes committed in the CAR, which detailed testimonial allegations of crimes committed by MLC troops, including murder,[723] describing the actions he had taken or would take in response to media allegations of crimes perpetrated by the MLC.[724]

315. With respect to the intelligence reports, the Trial Chamber heard evidence that such reports contained allegations of crimes committed by MLC troops in the CAR, including killings. Notably, P33 stated, in the passages of transcript relied upon by the Trial Chamber that the reports mentioned killings had taken place, stating that the intelligence reports would refer to acts of looting and rape, and also mention individuals who had been assassinated in the course of the looting.[725] P33 linked the killings to the looting, stating: "because there were civilians who would resist when their property was being looted and they were allegedly killed on … such occasion".[726] Although P33 stated that the intelligence reports referred to murders being committed in the course of looting, we find that they present sufficient evidence of allegations of murder. Moreover, whilst Mr Bemba denied the receipt of such intelligence reports containing allegations of crimes in the CAR, we have found above that

[720] *See supra* IV.D.3(a).
[721] Conviction Decision, para. 581.
[722] Conviction Decision, para. 576, fn. 1779, referring to EVD-T-OTP-00821/CAR-OTP-0030-0274.
[723] Conviction Decision, paras 607-611, referring to FIDH Report entitled "Crimes de guerre en République Centrafricaine ; Quand les éléphants se battent, c'est l'herbe qui souffre", EVD-T-OTP-00391/CAR-OTP-0001-0034. *See* 0048-0057.
[724] Conviction Decision, para. 610, referring to EVD-T-OTP-00391/CAR-DEF-0001-0152.
[725] Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Red2-Eng, p. 16, lines 2-5.
[726] Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Red2-Eng, p. 16, lines 5-7.

the Trial Chamber was not unreasonable in concluding that Mr Bemba received such reports.[727]

316. We turn now to Mr Bemba's argument that the Trial Chamber failed to consider the existence of evidence which would cast doubt on its finding that Mr Bemba had knowledge of murders being committed by the MLC, particularly the Sibut Mission set up in response to media reports of MLC crimes in Sibut and Bozoum, including murder.[728] Mr Bemba does not point the Appeals Chamber to any specific evidence of denials of murder by the interviewees. Even assuming that there were such denials, Mr Bemba's argument cannot be sustained. With respect to the Sibut Mission, we have determined above that the Trial Chamber did not ignore the Mission's findings.[729] The Trial Chamber noted that, whilst a video of the Sibut Mission in evidence "suggest[ed] that the MLC did not commit crimes in Sibut", it had "doubts as to the reliability of this video".[730] Thus, the Trial Chamber did not ignore the denials of crimes in the video of the Sibut Mission, but found that they did not undermine its finding that Mr Bemba had knowledge of allegations of MLC murders. Mr Bemba has neither demonstrated that the Trial Chamber overlooked relevant evidence nor that the findings of the Trial Chamber were unreasonable as a result of that evidence. Moreover, we note, from its preceding analysis, that the events in Sibut were but one element that the Trial Chamber relied upon in reaching its decision that Mr Bemba had knowledge of the commission of murder.

317. Having considered the evidence relied upon by the Trial Chamber to establish that Mr Bemba knew that MLC soldiers were committing murder, we would have rejected the argument that the Trial Chamber did not identify concrete evidence of murder as opposed to rape or pillaging being perpetrated by MLC. Having so found, we also conclude that it was not unreasonable for the Trial Chamber to have found that there was sufficient evidence to support a finding of actual knowledge of murder.

[727] *See supra* Section IV.B.4(b).
[728] Conviction Decision, para.715. Appeal Brief, para. 324.
[729] *See supra* para. 295.
[730] Conviction Decision, para. 531.

4. Conclusion

318. Having rejected Mr Bemba's argument with respect to the Trial Chamber's conclusions on the mental element of article 28 (a) (i) of the Statute, we find that it was not unreasonable for the Trial Chamber to conclude that Mr Bemba knew that MLC troops were committing or about to commit acts of murder, rape and pillage.

E. "The finding on causation is invalid"

319. Mr Bemba challenges the Trial Chamber's finding that the "crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging committed by the MLC forces in the course of the 2002-2003 CAR Operation were a result of Mr Bemba's failure to exercise control properly",[731] raising three sets of arguments, which we shall address in turn (the failure to define the applicable legal standard, the conflation of the legal elements, and challenges to factual findings).[732] First, however, an overview of the relevant part of the Conviction Decision will be provided.

1. Overview of the relevant part of the Conviction Decision

320. In the Conviction Decision, the Trial Chamber concurred with the Pre-Trial Chamber's finding in the Confirmation Decision that the relevant passage of article 28 (a) of the Statute did not require 'but-for' causation between the superior's failure to exercise control properly and the crimes committed by his or her subordinates.[733] In reaching this conclusion, the Trial Chamber recalled article 28 (a) of the Statute, which stipulates that a superior is responsible for crimes committed "as a result of his or her failure to exercise control properly", and stated that it had had regard to the "particular nature" of superior responsibility as well as "practical and legal considerations".[734] Nevertheless, the Trial Chamber found that it was a "core principle of criminal law" that there be some form of "personal nexus" between the individual and the crime for which he or she is held responsible.[735] The Trial Chamber found that the "nexus requirement would clearly be satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would

[731] Conviction Decision, para. 741.
[732] Appeal Brief, paras 381-388, 389-393, 394-413.
[733] Conviction Decision, paras 210-212, referring to Confirmation Decision, paras 425-426.
[734] Conviction Decision, paras 210-212, referring to Confirmation Decision, paras 425-426.
[735] Conviction Decision, para. 211.

have prevented the crimes".[736] While the Trial Chamber found this standard to be "higher than that required by law", it declined to elaborate on the matter further in light of the factual findings in this case.[737] Elsewhere in the Conviction Decision the Trial Chamber described superior responsibility as "a distinct mode of liability from those found under Article 25" of the Statute and as a "form of *sui generis* liability".[738] Judge Steiner noted in this regard that she "would adopt the word 'additional' instead of '*sui generis*'".[739]

321. Judge Steiner, in her separate opinion to the Conviction Decision, agreed with the Pre-Trial Chamber's finding that what was required was a showing that the "commander's omission increased the risk of the commission of the crimes charged".[740] In her view, it was necessary that there was a "high probability" that the crime would have been prevented or not have been committed, had the commander discharged his duties.[741] Judge Ozaki, in her separate opinion, stated that, while she also believed that a nexus between the commander's failure to exercise control properly and the commission of the crimes was required,[742] it was necessary to establish that the resulting crimes were reasonably foreseeable.[743]

322. As to the facts of the case, the Trial Chamber found that, had Mr Bemba taken certain measures, the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging committed by MLC troops "would have been prevented or would not have been committed in the circumstances in which they were" and that, therefore, they were the "result of Mr Bemba's failure to exercise control properly".[744] As for the measures that Mr Bemba should have taken, the Trial Chamber identified remedying deficiencies in training of the MLC troops; promulgating a "clear and complete Code of Conduct"; issuing clear and consistent orders to troops not to commit crimes; ensuring that crimes that had been committed were investigated and punished; sharing information with the CAR authorities; ensuring that troops received adequate payment and rations; redesigning military operations

[736] Conviction Decision, para. 213.
[737] Conviction Decision, para. 213.
[738] Conviction Decision, paras 173-174.
[739] Conviction Decision, fn. 388.
[740] Separate Opinion of Judge Steiner, para. 23, referring to Confirmation Decision, para. 425.
[741] Separate Opinion of Judge Steiner, para. 24.
[742] Separate Opinion of Judge Ozaki, para. 9.
[743] Separate Opinion of Judge Ozaki, para. 23.
[744] Conviction Decision, para. 741.

in such a way that the opportunities for the commission of crimes were minimised; and withdrawing the MLC troops at an earlier stage.[745]

2. Failure to define the applicable standard

323. In respect of the argument that the Trial Chamber erred in law by failing to define the "result of"-element of article 28 (a) of the Statute,[746] we recall that, according to article 74 (5) of the Statute, the Trial Chamber's decision at the end of the trial "shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions". In our view, the requirement to provide a reasoned statement relates to both factual and legal findings.[747] We note in this regard the jurisprudence of the ECtHR, according to which the right to a fair trial under article 6 of the ECHR mandates that courts "indicate with sufficient clarity the grounds on which they based their decision", as it is "this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him".[748] Similarly, in *Taxquet v. Belgium*, the Grand Chamber of the ECtHR held that, "[w]hile courts are not obliged to give a detailed answer to every argument raised […], it must be clear from the decision that the essential issues of the case have been addressed".[749] International and internationalised criminal courts and tribunals have also emphasised the importance of sufficient reasoning.[750] Generally, it must be "comprehensible how the chamber evaluated the evidence and reached its factual and legal conclusions".[751]

324. Turning to the case at hand, we note that the Trial Chamber, although not defining the "result of"-element of article 28 (a) of the Statute in the Conviction Decision, made it clear that, based on the facts it found to have been established, namely that, but-for the failure of Mr Bemba to act, the crimes "would have been prevented or would not have been committed

[745] Conviction Decision, paras 737-740.
[746] Appeal Brief, paras 381-388.
[747] *See* O. Triffterer and A. Kiss, "Article 74: Requirements for the decision", in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: A Commentary* (Beck *et al.*, 3rd ed., 2016), p. 1851, n. 68: "In circumstances where the law needs interpretation, such interpretation must be developed in the judgment to the extent necessary" (footnote omitted).
[748] *Hadjianastassiou v. Greece*, para. 33.
[749] *Taxquet v. Belgium*, para. 91 (references omitted).
[750] *See, e.g.* ICTY, Appeals Chamber, *Prosecutor v. Anto Furundžija,* "Judgment", 21 July 2000, IT-95-17/1-A, para. 69; *Kunarac et al.* Appeal Judgment, para. 41; ICTY, Appeals Chamber, *Prosecutor v. Nikola Šainović et al.*, "Decision on Interlocutory Appeal from Trial Chamber Decision Granting *Nebojsa Pavković*'s Provisional Release", 1 November 2005, IT-05-87-AR65.1, para. 11; *Nikolić* Sentencing Appeal Judgment, para. 96; *Nuon Chea and Khieu Samphân* Appeal Judgment, paras 202-208.
[751] *Nuon Chea and Khieu Samphân* Appeal Judgment, para. 207.

in the circumstances in which they were", that element was satisfied as the relevant facts underlying Mr Bemba's failure to exercise control properly fulfilled a standard that was "higher than that required by law".[752] Two of the three judges of the Trial Chamber attached separate opinions to the Conviction Decision, in which they explained their respective views on the interpretation of the "result of"-element.[753] Therefore, while the judges of the Trial Chamber were apparently unable to reach an agreement on the precise interpretation of the "result of"-element, they all agreed that it was fulfilled in the case at hand, based on the facts that the Trial Chamber found to have been established. While this approach did not contribute to clarity, it is nevertheless comprehensible on which factual and legal bases Mr Bemba was convicted.

325. We do not consider that the Trial Chamber's approach violates the *lex certa* requirement of article 22 (2) of the Statute. Without prejudice to the issue of whether article 22 (2) of the Statute applies to modes of liability, this principle does not require that judgments and decisions be written in a particular way; rather, the provision sets out an interpretative principle. Therefore, Mr Bemba's argument that the Trial Chamber erred by failing to define the "result of"-element of article 28 (a) of the Statute is rejected.

3. Conflation of legal elements and the issue of "causation"

(a) Overall construction of article 28 (a) of the Statute

326. With respect to Mr Bemba's arguments regarding the alleged conflation of the "result of"-element with the "all necessary and reasonable steps" element in article 28 (a) of the Statute,[754] we consider that these arguments require us to consider at the outset the overall construction of article 28 (a) of the Statute, including the argument of the Prosecutor that the Trial Chamber misinterpreted the "result of"-element because "article 28 does not require proof of a causal contribution to the crimes".[755]

327. Mr Bemba argues that the Prosecutor may not raise on appeal the question of whether article 28 (a) of the Statute requires causation because (i) it goes beyond the scope of the ground of appeal; and (ii) at trial, the Prosecutor accepted that causation was indeed an

[752] Conviction Decision, paras 213, 741.
[753] *See* Separate Opinion of Judge Steiner, paras 4-9, 16-24; Separate Opinion of Judge Ozaki, paras 2-23.
[754] Appeal Brief, paras 389-392.
[755] Response to the Appeal Brief, para. 224

element of superior liability.[756] We are not persuaded by this argument as Mr Bemba's submission that the Trial Chamber conflated the legal elements of article 28 (a) is predicated on the assumption that the "result of"-element is indeed a separate element of that provision. As such, it is clearly encompassed by the question on appeal and requires determination by the Appeals Chamber. This is irrespective of the Prosecutor's position on this issue at trial. Mr Bemba's argument should have therefore been rejected and we will therefore examine the Prosecutor's submissions.

328. The question of whether superior responsibility under article 28 (a) of the Statute requires that the superior's omission caused the subordinates' crimes turns on the interpretation of the "result of"-element in the *chapeau* of the provision, which reads, in relevant part, as follows (emphases added):

> A military commander […] shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control […], as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander […] either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander […] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

329. As noted above,[757] the Trial Chamber found that the term "result of" in the *chapeau* of article 28 (a) of the Statute linked the failure to exercise control properly with the phrase "crimes within the jurisdiction of the Court committed by forces under [the superior's] effective control", thus requiring that it be established that the crimes in question were committed as a result of the failure to exercise proper control. The Prosecutor proposes an alternative interpretation of the "result of"-element, according to which the element merely explains why the superior is held criminally responsible for the crimes committed by his or her subordinates – namely because of his or her failure to exercise control properly over his

[756] Reply to the Response to the Appeal Brief, paras 42-49.
[757] *See supra* IV.E.1.

subordinates.[758] Based on such interpretation, the "result of"-element would not suggest the need to establish that the superior's failure to control his or her subordinates properly caused the commission of crimes by them.

330. In our view, the relevant passage of the *chapeau* of article 28 (a) of the Statute is indeed open to two readings. The correct interpretation of this provision is to be identified by applying the principles of interpretation set out in Articles 31 *et seq*. of the Vienna Convention on the Law of Treaties.[759] Accordingly, the starting point for any interpretation must be the ordinary meaning of the terms of the treaty "in their context and in the light of its object and purpose".[760]

331. We note that the text of article 28 (a) of the Statute – at least in its English version – strongly suggests that it has to be established that the superior's failure to exercise control properly caused the commission of crimes by his or her subordinates. Moreover, we observe that, unlike other provisions in the Statute, article 28 of the Statute explicitly stipulates a nexus requirement by stating that the crimes of the subordinates be committed "as a result of" the commander's failure to exercise control properly. As to the argument that requiring causation for liability under article 28 of the Statute renders that provision largely redundant because the conduct in question "would almost always be punishable more simply under article 25(3)(c) or (d)(ii), which require a limited contribution, including by omission",[761] we consider that the argument fails to take into account that the mental elements differ and are actually significantly lower for article 28 than for any form of liability under article 25 (3) of the Statute.[762]

332. As to the argument that requiring causation is not compelling given that not only failure to take necessary and reasonable measures to *prevent* crimes leads to criminal responsibility under article 28, but also failure to repress and to punish crimes, in relation to which causation cannot be required as a matter of logic, the Pre-Trial Chamber explained:

---

[758] Response to the Appeal Brief, para. 220.
[759] *See* *DRC* OA3 Judgment, para. 6.
[760] Article 31 (1) of VCLT.
[761] Response to the Appeal Brief, para. 234 (footnotes omitted).
[762] *See* D. Robinson, "How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution", 13 Melbourne Journal of International Law (2012), p. 1, at p. 8.

> [A]rticle 28(a)(ii) of the Statute refers to three different duties: the duty to prevent crimes, repress crimes, or submit the matter to the competent authorities for investigation and prosecution. The Chamber considers that a failure to comply with the duties to repress or submit the matter to the competent authorities arises during or after the commission of crimes. Thus, it is illogical to conclude that a failure relating to those two duties can retroactively cause the crimes to be committed. Accordingly, the Chamber is of the view that the element of causality only relates to the commander's duty to prevent the commission of future crimes. Nonetheless, the Chamber notes that the failure of a superior to fulfil his duties during and after the crimes can have a causal impact on the commission of further crimes. As punishment is an inherent part of prevention of future crimes, a commander's past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future.[763]

333. To overcome this problem, the Pre-Trial Chamber considered that, as far as the duties to repress and to punish are concerned, causation needs to be demonstrated in respect of subsequent crimes that were committed because of the failure to punish earlier crimes.[764] This is indeed a convincing approach.[765] As to the argument that requiring causation would lead to significant gaps in the responsibility of superiors, we consider that this argument is unpersuasive. Notably, holding a superior "criminally responsible for crimes within the jurisdiction of the Court" committed by his or her subordinates pursuant to article 28 of the Statute without causation would be incompatible with the culpability principle, which the ICTY Appeals Chamber has fittingly summarised as follows:

> The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).[766]

---

[763] Confirmation Decision, para. 424 (footnotes omitted).
[764] We note that in the academic literature, a variation of this approach has been proposed, namely requiring causation in respect of the resulting impunity (*see* B. Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem* (2008), p. 207; G. Mettraux, *The Law of Command Responsibility* (2009), p. 82). Such an argument would, however, not be reconcilable with the text of article 28 of the Statute, which speaks of resulting *crimes.*
[765] We note that a variation of this approach has been proposed in the academic literature, namely that, in cases of failure to repress or punish, it is necessary to show that prior to the commission of the crimes in question, the superior fell short of his or her supervisory obligations, resulting in the commission of the crimes (*see* O. Triffterer, "Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?", 15 *Leiden Journal of International Law* (2002), p. 179, at p. 203; V. Nerlich, "Superior Responsibility under Article 28 ICC Statute", 5 *Journal of International Criminal Justice* (2007), p. 665, at p. 678; C. Meloni, *Command Responsibility in International Criminal Law* (2010), p. 178). We are not persuaded by this approach because, if a prior dereliction of duty has to be established, liability could almost certainly be based on the failure to prevent the crimes in question; the additional criminalisation of the failure to repress and to punish would be redundant.
[766] *Tadić* Appeal Judgment, para. 186.

334. In keeping with this principle, holding a commander "criminally responsible for crimes within the jurisdiction of the Court" committed by subordinates is only justified and indeed justifiable if there is a personal nexus between the crime and the superior – it would be irreconcilable with basic tenets of criminal law if a superior were to be held responsible for crimes to which he or she has no connection.[767] We recall that, in relation to the forms of liability set out in article 25 (3) of the Statute, the Appeals Chamber found that "the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question".[768]

335. Finally, we note that the jurisprudence of the ICTY to which the Prosecutor refers has rejected causation as a requirement for superior responsibility under customary international law.[769] We observe in this regard that the provision on superior responsibility in the ICTY Statute differs significantly from article 28 of the Statute.[770] Importantly for the question at hand, it does not include the "result of"-element. In addition, the ICTY jurisprudence postdates the adoption of Rome Statute and it therefore could not have influenced the drafting of article 28 of the Statute. We consider further that interpreting the "result of"-element as requiring causation is in keeping with the principle of strict construction recognised in article 22 (1) of the Statute.

336. In sum, we find that the Trial Chamber was correct in finding that the "result of"-element requires a showing that the superior's failure to exercise control properly caused the commission of crimes by his or her subordinates. We shall now turn to the question of what exactly this requirement entails. We recall that in the Conviction Decision itself, the Trial Chamber did not specifically define the requisite standard of causation, while noting that the

---

[767] We therefore do not agree with the finding of the ICTR Trial Chamber in the *Mpambara* Case that "Article 6 (3) of the [ICTR] Statute [on superior responsibility] creates an exception to this principle in relation to a crime about to be, or which has been, committed by a subordinate" (*see* ICTR, Trial Chamber, *Prosecutor v. Jean Mpambara*, "Judgment", 11 September 2006, ICTR-01-65-T, para. 26).
[768] *Lubanga* Appeal Judgment, para. 468.
[769] Response to the Appeal Brief, para. 249, referring to *Čelebići* Trial Judgment, para. 398; *Kordić and Čerkez* Trial Judgment, para. 445; *Blaškić* Appeal Judgment, para. 77; *Kordić and Čerkez* Appeal Judgment, para. 832; *Halilović* Trial Judgment, para. 78; *Hadžihasanović and Kubura* Appeal Judgment, para. 40; *Orić* Appeal Judgment, Partially Dissenting Opinion of Judge Liu, para. 32; *Popović et al.* Trial Judgment, para. 1044.
[770] Article 7 (3) of the ICTY Statute reads as follows: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

"nexus requirement would clearly be satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes".[771] The Trial Chamber found, however, that "such a standard is […] higher than required by law".[772] The Trial Chamber agreed with the Pre-Trial Chamber's assessment that the result-element in article 28 (a) of the Statute "does not require the establishment of 'but-for' causation between the commander's omission and the crimes committed",[773] noting in this regard "the particular nature of superior responsibility".[774]

337. We note that causation in the context of domestic criminal law is often couched in terms of the 'but-for'/*conditio sine qua non*-formula, according to which a causal relationship between an action and a criminal result exists if the result would not have occurred, in its concrete form, but-for the person's action.[775] In case of omissions, this formula is sometimes adapted in the sense that causation between a person's omission and the result is established if the result would not have occurred, in its concrete form, had the person carried out the act omitted. As noted by the Trial Chamber, this requires an assessment of a hypothetical or fictive scenario.[776] Therefore, although there must be a logical basis for this assessment, causation in cases of omission cannot be determined with empirical precision. This is because there will always be several hypothetical scenarios that could be considered, even if some of them are highly unlikely.

338. The same applies to the liability of the commander under article 28 (a) of the Statute. Here, it has to be determined whether, had the commander carried out control properly, the crimes of his or her subordinates would not have been committed, or, at least, would not have been committed in the same manner. Yet, in almost all such cases it will be possible to conceive of hypothetical scenarios in which, despite all the best efforts of the commander, the crimes would have been committed because of some unforeseen – albeit perhaps highly

[771] Conviction Decision, para. 213.
[772] Conviction Decision, para. 213.
[773] Conviction Decision, para. 211.
[774] Conviction Decision, para. 212.
[775] *See e.g.* United Kingdom, Court of Appeals, *R. v Pagett* [1983] EWCA Crim 1 (03 February 1983).
[776] Conviction Decision, para. 212; *see also* K. Ambos, "Superior Responsibility", in: A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, pp. 842-843.

unlikely – intervening event. In addition, at issue here is whether the commander's omission led to crimes being committed by his or her subordinates – that is, by acts carried out by other individuals capable of making their own decisions – and this potentially against the orders of their commander. Applying a strict 'but-for'-test to establish causation would disregard the specificities of liability under article 28 (a) of the Statute, if not of causation in the context of omissions more generally.

339. Nevertheless, in our view, it may only be said that the subordinates' crimes are the *result* of the commander's failure to exercise control properly if there is a close link between the commander's omission and the crimes. Based on a comparative assessment of domestic approaches to causation in cases of omission, Judge Steiner, in her separate opinion, concluded that the "result"-element would be established if "there is a *high probability* that, had the commander discharged his duties, the crime would have been prevented or it would not have been committed by the forces in the manner it was committed".[777] In our view, this test indeed is appropriate in the circumstances. It will ensure that responsibility only arises when there is a demonstrably close link between the commander's omission and the crimes committed by his or her troops. At the same time, under this test, possible, yet highly unlikely hypothetical scenarios would not preclude a finding of causation. We will assess Mr Bemba's further arguments on the basis of this understanding of causation under article 28 (a) of the Statute.

(b) Conflation of elements

340. Having determined that causation is indeed an element of liability under article 28 (a) of the Statute, we shall now determine whether the Trial Chamber indeed conflated this element with the "necessary and reasonable measures"-element, as alleged by Mr Bemba. We recall that in the section on causation, the Trial Chamber stated that it incorporated by reference its findings regarding Mr Bemba's failure to take all necessary and reasonable measures within his power to prevent and repress the commission of the crimes, and submit the matter to the competent authorities.[778] The Trial Chamber listed a series of measures which Mr Bemba could have taken, which in its view "would have deterred the commission of crimes, and generally diminished, if not eliminated, the climate of acquiescence – which is

[777] Separate Opinion of Judge Steiner, para. 24.
[778] Conviction Decision, para. 737.

inherent where troops have inadequate training, receive unclear orders, and/or observe their commanders committing or collaborating in crimes – surrounding and facilitating the crimes committed during the 2002-2003 CAR Operation".[779] The Trial Chamber ultimately found that "Mr Bemba's failures in this regard directly contributed to, *inter alia*, the continuation and further commission of crimes".[780]

341. We have found that the causation requirement in article 28 of the Statute is satisfied where it is established that, had the commander exercised control properly, there is a high probability that the crimes would have been prevented. We note that, in the context of an omission, causation is necessarily an assessment that entails consideration of what would or might have happened, had the commander taken the measures that could have been expected of him. The element of causation is thus intrinsically and inextricably linked to the Trial Chamber's assessment of the adequacy of the measures taken by the commander and the feasibility and efficacy of the measures the commander failed to take. For that reason, we see no error in the Trial Chamber's use of a comparative list of measures to illustrate that the crimes would have been prevented, had Mr Bemba taken these measures. Thus the argument that the Trial Chamber erroneously conflated the "measures" and "causation" elements of article 28 of the Statute should have been rejected.

342. We now address Mr Bemba's challenges to the factual findings on the basis of which the Trial Chamber found that the crimes were a result of the failure to exercise control properly.[781]

4. Whether the Trial Chamber misstated the evidence and its findings

343. Mr Bemba argues that the Trial Chamber misstated "the evidence and its own findings to conclude that the crimes 'were a result of Mr Bemba's failure to exercise control properly'".[782] He argues that the factors relied upon by the Trial Chamber to establish causation are without evidential basis.[783]

[779] Conviction Decision, para. 738.
[780] Conviction Decision, para. 738.
[781] Appeal Brief, paras 394-413.
[782] Appeal Brief, para. 394.
[783] Appeal Brief, para. 394-413.

(a) Findings related to compensation of MLC troops

344. We note that the Trial Chamber found that, "as they did not receive adequate payment and rations from their superiors, some MLC soldiers applied the so-called and unofficial 'Article 15', a term which predates the 2002-2003 CAR Operation and means that soldiers were to do what was necessary in order to 'make ends meet'".[784] It observed that "[m]any witnesses testified that, when applying 'Article 15', MLC soldiers in the CAR secured – including by acts of murder, rape, and pillaging – compensation, in cash and kind, from the civilian population".[785] The Conviction Decision also detailed the use to which the MLC troops put the pillaged items either to meet their immediate needs or following transportation back to the DRC.[786]

345. Mr Bemba supports his argument that the MLC troops had sufficient rations by reference to the testimony of five witnesses, P66, P63, P9, P31, and D19.[787] Having considered the excerpts of the witnesses' testimony, we find that only D19 testified to the sufficiency of the rations. [redacted].[788] However, we note that the Trial Chamber found that "with regard to issues that go to Mr Bemba's direct involvement in the 2002-2003 CAR Operation or operational control, as well as certain other discrete issues such as D19's personal involvement in and role during the events, [D19's] testimony was not credible".[789] The Trial Chamber found that particular caution was required when analysing D19's evidence[790] and Mr Bemba has not advanced any argument to show that this assessment was erroneous.

346. We note that the evidence of the remaining witnesses to which Mr Bemba refers does not touch upon the sufficiency or otherwise of the rations or payments provided to the MLC troops. P63 testified to witnessing food being brought to the MLC troops and seemed to

---

[784] Conviction Decision, para. 565.
[785] Conviction Decision, para. 565.
[786] Conviction Decision, para. 566.
[787] Appeal Brief, para. 395.
[788] Transcript of 4 March 2013, ICC-01/05-01/08-T-289-Red2-Eng, p. 13, line 18. In the excerpt of testimony to which Mr Bemba refers, [redacted]: Transcript of 30 November 2012, ICC-01/05-01/08-T-279- Conf-Eng, p. 33, lines 7-15.
[789] Conviction Decision, para. 359.
[790] Conviction Decision, para. 360.

indicate that President Patassé provided their supplies.[791] The other witnesses relied upon by Mr Bemba, P31 and P9, claimed that the MLC troops were paid by the CAR authorities rather than being provided with rations.[792] In any event, none of the evidence cited provided any indication of whether the rations or payment provided were sufficient.

347. On the other hand, P42, P45, P47, P36, P33, P173, P110, P32, P112, P209 and D21, whose testimony was relied upon by the Trial Chamber, all stated that the MLC troops were not paid, were not provided with sufficient supplies, or supplemented their provisions by stealing from the local population.[793] P42, P112, V1 and P73 also testified that the MLC troops cooked and ate what they stole immediately.[794]

348. Having considered the evidence relied upon by the Trial Chamber together with the testimony of D19 cited by Mr Bemba, we find that Mr Bemba has failed to show that the Trial Chamber erroneously disregarded contradictory evidence or erred in finding that the MLC soldiers did not receive adequate payment and rations. In light of the circumstances and behaviour of the MLC troops described by the Trial Chamber,[795] we consider that it was not unreasonable to find that the risk that the soldiers would pillage or rape for self-compensation, and murder those who resisted, would have been reduced, if not eliminated, had they received adequate payment and rations.[796]

---

[791] Transcript of 25 May 2011, ICC-01/05-01/08-T-116-Red2-Part1-Eng, p. 30, line 23 to p. 31, line 7.
[792]Transcript of 4 November 2011, ICC-01/05-01/08-T-182-Eng, p. 29, line 23 to p. 30, line 2; Transcript of 9 May 2011, ICC-01/05-01/08-T-106-Red3-Eng, p. 50, line 15 to p. 53, line 13.
[793] Transcript of 11 February 2011, ICC-01/05-01/08-T-64-Red2-Eng, p. 11, line 19 to p. 12, line 5; p. 16, lines 2-17; p. 35, line 8 to p. 38, line 2; p. 38, lines 4-6; Transcript of 3 February 2012**,** ICC-01/05-01/08-T-205-Red-Eng, p. 37, lines 7-19; Transcript of 30 January 2012, ICC-01/05-01/08-T-201-Red2-Eng, p. 47, lines 2-11; Transcript of 28 October 2011, ICC-01/05-01/08-T-177-Eng, p. 51, lines 1-6; Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 30, lines 6-10; Transcript of 16 March 2012, ICC-01/05-01/08-T-216-Red2-Eng, p. 11, lines 5-15; Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Red2-Eng, p. 39, lines 10-19; Transcript of 23 August 2011, ICC-01/05-01/08-T-144-Red2-Eng, p. 34, line 21 to p. 35, line 2; p. 66, lines 12-24; Transcript of 10 June 2011, ICC-01/05-01/08-T-126-Red2-Eng , p. 6, line 13 to p.7, line 4; Transcript of 23 September 2011, ICC-01/05-01/08-T-165-Red2-Eng, p. 41, lines 13-21; p. 58, lines 4-17; Transcript of 15 June 2011, ICC-01/05-01/08-T-129-Red3-Eng, p. 29, line 23 to p.30, line 3; Transcript of 7 June 2011**,** ICC-01/05-01/08-T-123-Red2-Eng, p. 17, lines 3-14; Transcript of 12 April 2013, ICC-01/05-01/08-T-306-Red2-Eng , p. 64, lines 15-20.
[794] Transcript of 11 February 2011, ICC-01/05-01/08-T-64-Red2-Eng, p. 16, lines 2-17; Transcript of 15 June 2011, ICC-01/05-01/08-T-129-Red3-Eng, p. 29, line 23 to p. 30, line 3; Transcript of 2 May 2012, ICC-01/05-01/08-T-221-Eng, p. 11, line 25 to p. 12, line 3; Transcript of 21 February 2011, ICC-01/05-01/08-T-70-Red2-Eng, p. 33, lines 14-15; p. 45, lines 1-12.
[795] Conviction Decision, paras 565-566.
[796] Conviction Decision, para. 739.

(b) Findings related to training regime of MLC soldiers

349. The Trial Chamber found that most MLC soldiers received rapid training,[797] and that certain soldiers were not trained by the MLC, for example those who joined from other armed groups.[798] It took account of evidence from P15, P36, P33, P32 D49 and D39 that training differed depending on the rank and experience of the person.[799] The Trial Chamber concluded that the MLC's training regime was inconsistent, resulting in certain MLC soldiers receiving no or minimal training.[800]

350. Mr Bemba argues that soldiers with prior experience incorporated into the MLC from other armed groups did not need training.[801] We consider that the need to provide further training for troops incorporated into the MLC from other armed groups or the adequacy of their prior training is not at issue. The central question is whether the MLC troops operating during the 2002-2003 CAR Operation were adequately trained in, and properly informed of, their obligations towards the civilian population.

351. In this regard, we observe that the Trial Chamber, in finding the MLC's training programme to be inconsistent, suggested that it did not uniformly include the MLC Code of Conduct, which set out certain offences against the civilian population that were prohibited.[802] The Trial Chamber noted *inter alia* the testimony of P45, D49, D16, D21 and D36 who testified that soldiers were trained on military discipline and the MLC Code of Conduct and/or that this was reinforced by political commissioners and commanders in the

---

[797] Conviction Decision, para. 391, referring to Transcript of 7 February 2012, ICC-01/05-01/08-T-207-Red2-Eng, p. 48, lines 5-13; Transcript of 23 September 2011, ICC-01/05-01/08-T-165-Red2-Eng, p. 62, line 21 to p. 63, line 1; Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Red2-Eng, p. 61, lines 8-24; Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 50, lines 12-24.
[798] Conviction Decision, para. 391, referring to Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Red2-Eng, p. 33, lines 13-18; p. 61, lines 8-24; Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 50, lines 12-24; Transcript of 31 January 2012, ICC-01/05-01/08-T-202-Red2-Eng, p. 32, lines 15-21; p. 33, lines 3-11; Transcript of 25 February 2013, ICC-01/05-01/08-T-284-Red2-Eng , p. 11, line 12 to p. 12, line 1.
[799] Conviction Decision, para. 391, referring to Transcript of 7 February 2012, ICC-01/05-01/08-T-207-Red2-Eng, p. 53, lines 6-20; Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 50, lines 12-24; Transcript of 9 September 2011, ICC-01/05-01/08-T-158-Red2-Eng, p. 11, lines 20-23; Transcript of 23 September 2011, ICC-01/05-01/08-T-165-Red2-Eng, p. 42, lines 18-25; p. 62, line 21 to p. 63, line 1; Transcript of 26 February 2013, ICC-01/05-01/08-T-285-Red2-Eng, p. 35, lines 8-20; Transcript of 23 November 2012, ICC-01/05-01/08-T-274-Red2-Eng, p. 37, lines 18-24; Transcript of 22 April 2013, ICC-01/05-01/08-T-308-Red2-Eng , p. 36, lines 19-24.
[800] Conviction Decision, para. 736.
[801] Appeal Brief, para. 397.
[802] Conviction Decision, paras 391-392.

field.[803] However, the Trial Chamber also noted: (i) P33's testimony that the MLC Code of Conduct was not enforced or properly disseminated and was not presented in any of the three training programmes that he underwent;[804] (ii) the testimony of P213, who did not recognise the MLC Code of Conduct when it was presented to him in Court, although he said that they learned about it theoretically;[805] (iii) P45's testimony that the group of political educators was eliminated before September 2001,[806] that the MLC Code of Conduct was drafted in French and field commanders were instructed to disseminate it in the vernacular languages to troops on the ground who were living in extremely difficult conditions and did not always comply with it,[807] that the former Zairean troops were ill-disciplined and exerted a negative influence on the troops and that a mistake was made in abandoning the idea of the MLC's own training of young officers;[808] and (iv) the testimony of D19, whom the Trial Chamber found to demonstrate evasiveness in his explanation of his lack of knowledge of the MLC Code of Conduct when presented with it in Court.[809] The Trial Chamber concluded that "some MLC troops, including at least one high-ranking officer, who participated in the 2002-2003 CAR Operation, either did not receive training in or were not familiar with the Code of Conduct".[810]

352. Mr Bemba takes issue with the Trial Chamber's finding that he could have "taken measures to ensure consistent and adequate training of MLC troops" and the implication that the training was inadequate.[811] He argues that the assertion that the MLC training was

[803] Conviction Decision, fn. 1012, referring to, *inter alia*, Transcript of 30 January 2012, ICC-01/05-01/08-T-201-Red2-Eng, p. 42, line 20 to p. 43, line 11; Transcript of 19 November 2012, ICC-01/05-01/08-T-270-Red2-Eng, p. 41, line 2 to p. 43, line 7; Transcript of 26 November 2012, ICC-01/05-01/08-T-275-Red2-Eng, p. 23, line 15 to p. 24, line 6; Transcript of 8 April 2013, ICC-01/05-01/08-T-301-Red2-Eng, p. 43, lines 6-19; Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng , p. 51, lines 8-20.
[804] Conviction Decision, fn. 1012, referring to, *inter alia*, Transcript of 12 September 2011, ICC-01/05-01/08-T-159-Red2-Eng, p. 61, line 8 to p. 63, line 16.
[805] Conviction Decision, fn. 1012, referring to, *inter alia*, Transcript of 15 November 2011, ICC-01/05-01/08-T-187-Red2-Eng, p. 51, lines 7-10.
[806] Conviction Decision, fn. 1012, referring to, *inter alia*, Transcript of 31 January 2012, ICC-01/05-01/08-T-202-Red2-Eng, p. 40, lines 6-7.
[807] Conviction Decision, para. 393, referring to, *inter alia*, Transcript of 30 January 2012, ICC-01/05-01/08-T-201-Red2-Eng, p. 43, lines 12-25.
[808] Conviction Decision, para. 391, referring to, *inter alia*, Transcript of 31 January 2012, ICC-01/05-01/08-T-202-Red2-Eng, p. 32, lines 15-21; p. 33, lines 3-11.
[809] Conviction Decision, para. 393, referring to, *inter alia*, Transcript of 4 March 2013, ICC-01/05-01/08-T-289-Red2-Eng, p. 33, line 19 to p. 36, line 19; p. 39, lines 6-25.
[810] Conviction Decision, paras 393, 736.
[811] Appeal Brief, para. 398, referring to Conviction Decision, para. 738.

inadequate has no basis in the Trial Chamber's findings.[812] However, we consider it to be clear from the discussion immediately preceding this finding that the inadequacies in question were *inter alia* the failure to disseminate the MLC Code of Conduct properly, and to uniformly train the troops on their obligations towards the civilian population.[813] We consider that Mr Bemba has not identified any error in this finding and has, therefore, not shown any error on the part of the Trial Chamber in concluding that the training of the MLC soldiers was inadequate.

(c) Findings related to the MLC Code of Conduct

353. We note the Trial Chamber's finding that the MLC Code of Conduct did not explain in detail the "infractions" of murder and rape of civilians or other persons, in particular the meaning of the phrases "civilians" and "other persons" or the concept of protected persons generally.[814] However, the Trial Chamber did not recall this finding when determining that crimes of MLC troops were the result of Mr Bemba's failure to exercise control properly.[815] Thus, we would have rejected Mr Bemba's argument in this regard.[816]

354. We also note that the Trial Chamber found that the MLC Code of Conduct did not include any particular prohibition on pillaging and relied on this for the purposes of its finding that the training of the troops was inadequate.[817] Mr Bemba highlights that the MLC Code of Conduct lists theft as a type of conduct that must be referred to the court martial, alongside murder, kidnapping, rape, treason, terrorism, and insubordination, demonstrating the seriousness with which the MLC viewed this conduct.[818] He contends that no one reading the code could think that pillage was condoned.[819]

355. We further note that although several distinct property offences are included, these appear to prohibit the appropriation of property for personal use, while not excluding such

[812] Appeal Brief, para. 398.
[813] Conviction Decision, paras 736-738.
[814] Conviction Decision, para. 392.
[815] *See* Conviction Decision, para. 736.
[816] Appeal Brief, para. 400.
[817] Conviction Decision, paras 736-738.
[818] Appeal Brief, para. 401.
[819] Appeal Brief, para. 401.

appropriations for the use of the MLC generally.[820] As noted by the Trial Chamber, one of the listed property offences is the failure to verify and safeguard the spoils of war, which in the absence of any further explanation is ambiguous in its terms.[821] Based on the foregoing, and in light of the Trial Chamber's findings regarding the large scale pillaging carried out by MLC soldiers with the tacit approval of the MLC hierarchy and the failure to prevent and repress the commission of the crimes,[822] we find that the Trial Chamber did not err in drawing negative inferences from the MLC Code of Conduct's failure to specify that pillaging was prohibited.

356. To this extent, evidence demonstrating that pillaging or theft was punished in practice would not have led to a different conclusion regarding the specific prohibition of pillaging in the MLC Code of Conduct.[823] We concur with the Prosecutor in that the Trial Chamber's finding in this respect was not for the purpose of merely determining whether pillaging was specifically prohibited as a matter of law, but whether said prohibition was communicated in a manner that would have reduced the likelihood of the commission of crimes.[824] The statement of the Trial Chamber regarding pillaging has to be read alongside the uneven dissemination of the MLC Code of Conduct, and inadequacies and inconsistencies in the training of MLC troops. The punishment statistics of the court martial, the MLC Communication Logs,[825] and witness testimony adverted to by Mr Bemba, and to which we have had regard, would not mitigate the deficiencies in the MLC Code of Conduct which the Trial Chamber found existed.

(d) Findings related to the supervision of MLC soldiers

357. The thrust of the arguments made by Mr Bemba in this section of the Appeal Brief is on the supposed lack of factual or evidentiary basis for the Trial Chamber's conclusion that Mr Bemba himself "could have", *inter alia*, "ensured adequate supervision" of MLC troops, and its placement on a list of measures which the Trial Chamber found "would have deterred the

[820] "Code de Conduite de l'ALC", 1 January 1999, EVD-T-OTP-00700/CAR-DEF-0001-0161 at 0163-0164, listing, *inter alia*, the following disciplinary faults and offences: 4.9 (b), misappropriation of money and food for personal use; 4.9 (c), the seizure of food for personal use instead of material necessary for the war effort; 4.9 (d) failure to verify and safeguard the spoils of war in the camp; and 5.5 (h), misappropriation and fraud.
[821] Conviction Decision, para. 392.
[822] Conviction Decision, paras 639-646, 737.
[823] EVD-T-OTP-00700/CAR-DEF-0001-0161.
[824] Response to the Appeal Brief, para. 269.
[825] EVD-T-OTP-00702/CAR-D04-0002-1514; EVD-T-OTP-00703/CAR-D04-0002-1641.

commission of crimes, and generally diminished, if not eliminated, the climate of acquiescence – which is inherent where troops have inadequate training, receive unclear orders, and/or observe their commanders committing or collaborating in crimes – surrounding and facilitating the crimes committed during the 2002-2003 CAR Operation".[826]

358. As to Mr Bemba's challenge that there is no discussion as to why 'supervision' was his duty and not that of the operational commander on the ground,[827] we find this objection to be without merit. We note that the impugned statement does not suggest that it was Mr Bemba's duty to supervise the soldiers on the ground. Rather, the Trial Chamber found that Mr Bemba should have *ensured* that soldiers were properly supervised. We also recall that the level of subordination or the accused's particular position in the hierarchy of the chain of command is irrelevant so long as it can be said that a commander had effective control,[828] which the Trial Chamber found in respect of Mr Bemba.

359. Regarding Mr Bemba's argument that the impugned statement about supervision is without evidential basis, we do not regard this statement as intended by the Trial Chamber to be a specific legal finding. The Trial Chamber clearly prefaces this part of the judgment with qualifying language to the effect of "could have" and "*inter alia*"[829] and the statement regarding supervision is to be found in the midst of a series of suggestions that the Trial Chamber indicated could have prevented or suppressed the commission of the crimes with far greater effectiveness. We recall our finding above that an assessment of whether the crimes were the result of failure to exercise control properly requires consideration of what measures were at the commander's disposal in the circumstances.[830]

360. Moreover, we find that the statement regarding inadequacy on the part of Mr Bemba in terms of supervision is sufficiently rooted in the overall factual findings made by the Trial Chamber. For example, the Trial Chamber notes that there was no evidence that Mr Bemba took any measures in response to information transmitted internally within the MLC of crimes committed by MLC soldiers from, for example, the MLC intelligence services,[831] and

[826] Conviction Decision, para. 738.
[827] Appeal Brief, para. 404.
[828] *Strugar* Trial Judgment, paras 362-363.
[829] Conviction Decision, para. 738.
[830] *See supra* IV.E.3(b).
[831] Conviction Decision, para. 727.

that his reactions were limited to general, public warnings to his troops not to mistreat the civilian population.[832]

(e) Findings related to the punishment of MLC troops

361. Mr Bemba's argument is that the Trial Chamber unreasonably ignored certain pieces of evidence and particular information in concluding that he could have, *inter alia*, "ensured that MLC commanders and soldiers implicated as committing or condoning such crimes were, as appropriate, tried, removed, replaced, dismissed, and punished"[833] and in concluding that "clear training, orders, and hierarchical examples indicating that the soldiers should respect and not mistreat the civilian population would have reduced, if not eliminated, crimes motivated by a distrust of the civilian population […]".[834]

362. Contrary to Mr Bemba's submissions that measures had been taken against the only MLC troops identified as committing crimes, we recall that the Trial Chamber found that the measures that Mr Bemba took were all "limited in mandate, execution, and/or results" and did not find Mr Bemba to have pursued all relevant leads. For example, the Trial Chamber found that the information contained in the Bomengo case file indicated that investigators did not pursue relevant leads, in particular the responsibility of commanders and reports of rape.[835]

363. With respect to his arguments that the Trial Chamber ignored evidence that those committing crimes faced serious consequences, including the death penalty, Mr Bemba refers to the instruction he sent to all ALC brigade commanders instigating the death penalty as punishment for particular crimes, including civilian killings and rape ("Instruction")[836] and to the record of such executions in the MLC Communication Logs,[837] demonstrating that MLC soldiers who were found to have committed the crimes of rape and murder were executed. However, we do not find that this information was disregarded by the Trial Chamber. The Trial Chamber referred to the Instruction in establishing that Mr Bemba retained disciplinary

[832] Conviction Decision, para. 726.
[833] Conviction Decision, para. 738.
[834] Conviction Decision, para. 739.
[835] Conviction Decision, para. 720.
[836] Appeal Brief, para. 408.
[837] Appeal Brief, para. 408.

authority over the MLC troops in the CAR.[838] Regarding the allegedly ignored report of an execution recorded in the MLC Communication Logs, we note that the Trial Chamber in fact referred to the very same execution[839] to find that "[d]uring the trial, the members of the court-martial reported on its activities to Mr Bemba".[840] Thus, the Trial Chamber clearly considered these items of evidence – albeit in a different context. We do not consider that it was unreasonable for the Trial Chamber not to refer to these items of evidence in the context of determining whether the crimes of MLC troops were the result of Mr Bemba's failure to exercise control properly.

364. With respect to Mr Bemba's argument that the Trial Chamber ignored a document setting out the punishment statistics of the courts martial wherein reference was made to two offending soldiers being executed, we note that indeed no mention was made of this document in the Conviction Decision. However, despite the fact that it did not refer to this document, the Trial Chamber was evidently aware that the death penalty was passed as punishment for certain crimes committed by MLC troops, not least from the Instruction and MLC Communication Logs discussed above but from its express reference to other executions of MLC troops having taken place.[841] Even though it refers to these executions in the context of assessing Mr Bemba's disciplinary authority over MLC troops in the CAR, the Trial Chamber was clearly aware that MLC troops were said to have faced execution for the commission of certain crimes – the point that Mr Bemba is seeking to make.

365. The same is true of the passage of D49's testimony, which Mr Bemba argues was ignored by the Trial Chamber, and wherein the witness refers to MLC troops who had been "convicted, or sentenced to death […], for having broken the code of conduct, for having killed or for having committed excesses."[842] The Trial Chamber referred to the passages of D49's testimony which encompass those to which Mr Bemba directs the Appeals Chamber,

---

[838] Conviction Decision, para. 403, fn. 1058. *See generally* Conviction Decision, paras 447-449.
[839] Referring to the same page of the MLC Communication Logs to which Mr Bemba refers (*i.e.* p. 1650) the Trial Chamber notes the "message dated 23 December 2002 at 09.30, from the President of the court-martial to the Chief EMG ALC, with Mr Bemba copied for information, confirming the execution of the convicted soldier and requesting the courts martial's return as of the following day", Conviction Decision, para. 597, fn. 1861.
[840] Conviction Decision, para. 597, fn. 1861. *See also* Conviction Decision, para. 402, fn. 1057 also, referring to p. 1650 of the MLC communication log to make the point that "[a]t the unit level, disciplinary measures taken were reported to the Chief of General Staff".
[841] Conviction Decision, para. 597, fn. 1861.
[842] Appeal Brief, para. 408, fn. 782, referring to Transcript of 19 November 2012, ICC-01/05-01/08-T-270-Red2-Eng, p. 42, lines 2-4.

using it to support its finding that the training received by MLC troops "did not follow a consistent or clear rubric, and could touch upon various military matters, such as weapons, tactics, discipline, ideological information, and/or the Code of Conduct".[843] Whilst the Trial Chamber did not specifically note the witness's testimony regarding the use of the death penalty as punishment, it was aware of the use of the death penalty as noted in the paragraphs above.

366. With respect to Mr Bemba's argument that the MLC Code of Conduct provided not only for the punishment of certain conduct, but also criminalised the failure to report and punish crimes,[844] we refer to our determination above regarding the MLC Code of Conduct.[845]

367. We turn now to Mr Bemba's argument that the Trial Chamber ignored evidence from witnesses D16 and D48 showing that "[s]ignificant resources" were spent on establishing a judicial system;[846] that judges and prosecutors were appointed,[847] and bar associations were asked to send Defence counsel to represent suspects;[848] and that the court-martial operated publicly[849] and was mobile, conducting trials *in situ*.[850] An examination of the Conviction Decision reveals that the Trial Chamber cited some but not all of the witness evidence to which Mr Bemba refers.[851] However, we do not find the Trial Chamber to have overlooked significant evidence, given that the aforementioned facts that Mr Bemba is seeking to demonstrate were not contested by the Trial Chamber which recognised that within the MLC:

---

[843] The Trial Chamber refers to the following passage of the testimony of D49: Transcript of 19 November 2012, ICC-01/05-01/08-T-270-Red2-Eng, p. 41, line 2 to p. 43, line 7 (Conviction Decision, para. 391, fn. 1012).
[844] Appeal Brief, para. 408
[845] *See supra* IV.E.4(c).
[846] Appeal Brief, para. 408, referring to Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 18, lines 1-18.
[847] Appeal Brief, para. 408, referring to Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 12, line 6 to p. 13, line 11; p. 17, lines 3-20.
[848] Appeal Brief, para. 408, referring to Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 17, lines 3-12.
[849] Appeal Brief, para. 408, referring to Transcript of 26 November 2012, ICC-01/05-01/08-T-275-Red2-Eng, p. 41, lines 8-12; Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 61, line 11.
[850] Appeal Brief, para. 408, referring to Transcript of 26 November 2012, ICC-01/05-01/08-T-275-Red2-Eng, p. 16, lines 6-11.
[851] The Trial Chamber refers to the same excerpt of D48's testimony at para. 402, fn. 1053 of the Conviction Decision (with refers to Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 12, line 3 to p. 13, line 2) and to the testimony of witness D16 at para. 402, fn. 1052 of the Conviction Decision (which refers to Transcript of 26 November 2012, ICC-01/05-01/08-T-275-Red2-Eng, p. 15, line 5 to p. 16, line 11).

there was "a court-martial, convened to deal with crimes when required"; there were "disciplinary councils" within the units which could reprimand breaches of the military rules"; that the MLC adopted and controlled the pre-existing court-system in the territory of the DRC;[852] that officials such as judges, were appointed to the court-martial;[853] and that the court-martial had operated publicly.[854]

368. Lastly, we turn to Mr Bemba's criticism that the Trial Chamber whitewashed the MLC's history of instilling its troops with respect for the civilian population,[855] in respect of which Mr Bemba refers to the allegedly unchallenged and corroborated evidence of P15, D21 and D39 pertaining to the support that the MLC enjoyed from the civilian population due to its disciplined troops. These three witnesses indeed stated during their testimony that the MLC had a good reputation for discipline amongst its troops, which was, according to P15, an advantage in the subsequent negotiations[856] and, according to D21 and D39, supported by the fact that the MLC won the elections in the DRC in 2006.[857]

369. However, Mr Bemba does not demonstrate how the testimony of these witnesses contradicts the findings of the Trial Chamber as to the inadequacies of the training undertaken by the MLC troops.

370. As a result of the foregoing, we do not find the Trial Chamber to have overlooked relevant considerations.

(f) Findings related to the withdrawal of MLC troops

371. It is recalled that in its assessment as to who had effective control of the MLC troops in the CAR, the Trial Chamber noted that Mr Bemba retained the "power and authority" to

[852] Conviction Decision, para. 402.
[853] Conviction Decision, para. 402. The witness evidence cited by the Trial Chamber in this respect also refers to the appointment of the prosecutor and other officials, for example it expressly notes the evidence of D16 to find that "members of the court-martial, magistrates, judges, prosecutors, registrars, and defence counsel were appointed by the 'MLC executive' and the national secretary" (Conviction Decision, para. 402, fn. 1054). At para. 597 of the Conviction Decision, the Trial Chamber also noted the appointment of the Presiding Judge and Prosecutor to the Gbadolite Court-Martial.
[854] At para. 597 of the Conviction Decision, the Trial Chamber noted that the Gbadolite Court-Martial sat in public and that the trial and judgment were broadcast over the radio.
[855] Appeal Brief, para. 409.
[856] Transcript of 10 February 2012, ICC-01/05-01/08-T-210-Red2-Eng, p. 49, line 21 to p. 50, line 8.
[857] Transcript of 8 April 2013, ICC-01/05-01/08-T-301-Red2-Eng, p. 34, line 16 to p. 35, line 19; Transcript of 22 April 2013, ICC-01/05-01/08-T-308-Red2-Eng, p. 50, lines 13–23.

withdraw the MLC troops and ultimately gave the order to withdraw from the CAR (which was complied with) in March 2003.[858] Then, in its assessment of whether Mr Bemba took necessary and reasonable measures to prevent, repress or punish the commission of crimes, the Trial Chamber characterised withdrawal as "one key measure at Mr Bemba's disposal".[859] It further noted evidence that Mr Bemba "first acknowledged, in November 2002, shortly after the arrival of the MLC troops in the CAR, that he was considering and had the ability to withdraw the troops". It went on to state, "[h]owever, it was not until March 2003 that the MLC troops were withdrawn on Mr Bemba's order".[860]

372. Finally, in its assessment on causation, the Trial Chamber noted that:

> consistent with evidence of a *modus operandi*, most of the crimes were committed when the MLC was the only armed group in the area. […] The redesign of […] military operations – for example, avoiding primarily civilian areas, not ordering military operations against areas where only civilians were present, and otherwise limiting contact with civilians – would have minimised the opportunity for the commission of the crimes.[861]

373. The Trial Chamber stated that "Mr Bemba ultimately ended the commission of crimes by MLC soldiers by withdrawing them from the CAR in March 2003".[862] It observed that had Mr Bemba withdrawn his troops earlier, a possibility it found that Mr Bemba had acknowledged as early as November 2002, "crimes would have been prevented".[863]

374. Mr Bemba's submissions as to the relevance of troop withdrawal to the Trial Chamber's determinations on command responsibility raise two issues. First, that the Trial Chamber misdirected itself in "requiring, as a matter of law" that a commander withdraw his troops in circumstances where they are alleged to have engaged in criminal conduct as "the only way to avoid criminal liability";[864] second, that troop withdrawal was not a feasible measure which could have been undertaken by Mr Bemba in the circumstances and was thus

---

[858] Conviction Decision, paras 704, 730. *See also* paras 555, 556, 559.
[859] Conviction Decision, para. 730.
[860] Conviction Decision, para. 730. With respect to the statement regarding the readiness to withdraw in November 2002, the Trial Chamber refers to EVD-T-OTP-00444/CAR-OTP-0013-0053 at 0053-0054 and to sections V (D) (1) and V (D) (3)).
[861] Conviction Decision, para. 740.
[862] Conviction Decision, para. 740.
[863] Conviction Decision, para. 740.
[864] Appeal Brief, para. 410.

an inappropriate measure for the Trial Chamber to have taken into account given that the MLC were participating in a multinational operation in the CAR.

375. As to the first issue, we do not understand the Trial Chamber to have effectively imposed a legal duty upon a commander to withdraw his troops in the event that he or she becomes aware of allegations that they are committing or are about to commit crimes. We note its earlier findings that whether a commander has taken necessary and reasonable measures to discharge his duty to prevent, repress or punish subordinate perpetrators, is a question of fact; intrinsically connected to the commander's material power.[865] This approach was adopted by the Trial Chamber in the instant case and it is apparent, as noted above, that the trier of fact engaged in a fact-sensitive assessment of the measures at the disposal of Mr Bemba so as to fully discharge his duties as a commander. It is further recalled that we have found no factual error in the Trial Chamber's finding, in the context of the effective control assessment, that Mr Bemba had the material power to deploy and withdraw his troops to and from the CAR.[866]

376. Whilst it may be conceivable that, in appropriate circumstances, the failure to withdraw, in and of itself, could give rise to criminal responsibility on the part of a commander, we note that this was not the approach adopted by the Trial Chamber in the instant case, which found that Mr Bemba's failure to take a range of measures, of which withdrawal formed part, was causally related to the commission of crimes by his troops in the CAR. The Trial Chamber also found that Mr Bemba could have redesigned his military operations (falling short of outright withdrawal) so as to avoid primarily civilian areas or otherwise limited contact with them, thereby minimising the opportunity for the commission of crimes.[867] Far from holding Mr Bemba responsible for his failure in one particular respect (that is, timely withdrawal), as averred, the Trial Chamber arrived at its conclusion based upon an assessment of multiple failures in Mr Bemba's exercise of his duties and an assessment as to the causal link thereto.

377. As to the pertinence of withdrawal in the Trial Chamber's analysis, if a commander had the power to deploy his troops and in doing so endangered a civilian population, then it is

[865] Conviction Decision, para. 197.
[866] *See supra* IV.B.4(a); IV.B.4(f).
[867] Conviction Decision, para. 740.

also relevant to the necessary and reasonable measures and causation assessment whether and to what extent such commander exercised the power available to him to redeploy his troops (either wholly or partially) so as to remove this source of endangerment. Whilst the duty to take necessary and reasonable measures is a case-specific assessment, we note that this line of reasoning is supported by the jurisprudence of the ICTY in *Strugar*, where it was held that the failure of the commander to ensure the timely withdrawal of his troops from the vicinity of a protected object contributed to the finding that he did not take all necessary and reasonable measures to prevent the subsequent shelling of such object.[868] In sum, we find no fault in the Trial Chamber's conclusions as to the relevance of Mr Bemba's ability to withdraw the troops, either wholly or partially, in its assessment of the necessary and reasonable measures open to a commander.

378. Regarding the second implication of Mr Bemba's submission, that it was unfeasible in the circumstances for him to effect the earlier withdrawal of his troops, we consider that the feasibility of a commander adopting a particular measure is indeed of significance in the necessary and reasonable measures assessment. However, aside from stating that he was unable to withdraw the MLC troops having answered President Patassé's call for assistance, Mr Bemba fails to further substantiate his claim that withdrawal in November 2002 was unfeasible and that the Trial Chamber's finding in this regard was erroneous. We would have, accordingly, rejected his argument.

[868] ICTY, Trial Chamber, *Prosecutor v. Pavle Strugar*, "Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule *98 Bis*", IT-01-42-T, 21 June 2004, para. 101 (The Chamber found that "[w]ith respect to the issue of necessary and reasonable measures to stop a violation after it has begun, the evidence could support findings that after he was informed of the attack the Accused failed to take a number of measures available to him as a commander, i.e. issuing an order to stop the violation immediately and withdraw the unit from this position; send his high-ranking officers or go personally to the field command; and if his orders were still not obeyed, detain the perpetrator and refer the case to the military prosecution" (footnotes omitted)); *Strugar* Trial Judgment, para. 427 (The Trial Chamber found that the implication of the Accused's order to attack Srđ was the shelling of the Old Town and in dismissing the defence argument that the attack on Srđ continued despite an alleged order to cease the attack as the troops were experiencing enemy fire, the Chamber stated that "[w]hile the troops approaching Srđ were exposed to fire, that situation could only worsen as they got closer to Srđ. In the finding of the Chamber it is apparent that the attacking troops on Srđ could have been withdrawn at any stage of the day, especially at around 0700 hours, with less risk to them than in pursuing the attack. Instead they pressed home the attack until after 1400 hours" (footnote omitted)). *See also* *Strugar* Trial Judgment, para. 421.

F. Conclusion

379. Having rejected the totality of Mr Bemba's arguments, we would have rejected the third ground of appeal.

V. FIRST GROUND OF APPEAL: "THIS WAS A MISTRIAL"

380. Mr Bemba argues that his right to a fair trial was vitiated by procedural errors related to the investigation into offences against the administration of justice under article 70 of the Statute. He submits that: (i) the extent, timing and content of the Prosecutor's *ex parte* communications with the Trial Chamber regarding suspected witness interference by the Defence prejudiced the Trial Chamber's consideration of defence evidence;[869] (ii) the failure to disclose within a reasonable time a suspected scheme of witness interference that impacted on the credibility of a large number of defence witnesses prejudiced the presentation of the defence case;[870] and (iii) the transmission of privileged and confidential defence information to the Prosecutor during the presentation of the defence case violated his rights.[871]

381. The Prosecutor argues that this ground of appeal should be dismissed *in limine* as it fails to show an error in the reasoned analysis of the Trial Chamber in relation to these issues, and raises irrelevant matters relating to the proceedings against Mr Bemba, former members of his defence team, a political ally of Mr Bemba and a potential defence witness for offences against the administration of justice under article 70 of the Statute ("Article 70 Case").[872] We shall address these objections first. We will then address Mr Bemba's additional evidence request related to this ground of appeal, following which we shall address the substance of Mr Bemba's submissions.

A. Whether Mr Bemba's arguments should be dismissed *in limine*

1. Approach to the determinations by the Pre-Trial Chamber in the Article 70 Case

382. The Prosecutor submits that the Trial Chamber's "deferral of all procedural and substantive matters associated with the article 70 investigation to an independent Pre-Trial

[869] Appeal Brief, paras 51-75.
[870] Appeal Brief, paras 76-92.
[871] Appeal Brief, paras 93-106.
[872] Response to the Appeal Brief, paras 14-24.

Chamber's supervision" was a "bulwark of fairness in this trial".[873] She argues that the Appeals Chamber should only consider the fairness of *this trial* and "should not entertain issues concerning the article 70 investigative measures […] unless Bemba clearly shows the issues are relevant to the fairness of *these proceedings*".[874]

383. We are not persuaded by the Prosecutor's submission. We note that the Article 70 Case arose from allegations of the corruption of defence witnesses in the present case *inter alia* by Mr Bemba and former members of his defence team, and prompted intrusive investigations into the former members of the defence team. In the circumstances of this case, we consider it appropriate to take into account relevant developments in the investigation and prosecution of the Article 70 Case in making our determination as to whether there was an impact on the rights of Mr Bemba in this case.

2. Approach to the determinations by the Trial Chamber

384. By reference to the Appeals Chamber's jurisprudence, the Prosecutor submits that parties on appeal are required to show an error in the Trial Chamber's approach or findings in relevant decisions, and that arguments that repeat those made before the Trial Chamber without showing such error may be dismissed *in limine*.[875] She highlights that, in the present case, the Trial Chamber "addressed Bemba's concerns about the article 70 investigation and ancillary matters" and that Mr Bemba's submissions on appeal fail to engage with the Trial Chamber's reasoned analysis on these issues.[876] The Prosecutor contends that for that reason, "much of the first ground of appeal should be dismissed *in limine*".[877]

385. Mr Bemba replies that his appeal relates to "the procedure followed by the Trial Chamber in its totality" and that he is entitled to base his arguments on "the error in the procedure *actually followed* by the Trial Chamber, rather than errors in the abuse of process decision itself".[878]

[873] Response to the Appeal Brief, para. 22.
[874] Response to the Appeal Brief, para. 24 (emphasis in original).
[875] Response to the Appeal Brief, paras 19-21.
[876] Response to the Appeal Brief, paras 14-18.
[877] Response to the Appeal Brief, para. 20.
[878] Reply to the Response to the Appeal Brief, para. 7 (emphasis in original).

386. We recall that when making an appeal on a ground of unfairness under article 81 (1) (b) (iv) of the Statute, the appellant is required to set out not only how it was that the proceedings were unfair, but also how this affected the reliability of the conviction decision.[879] If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance. We also recall the finding by the Appeals Chamber in the *Lubanga* case that

> in circumstances where a Trial Chamber has already addressed and disposed of the substance of allegations that a trial should have been stayed owing to violations of fair trial rights, the Appeals Chamber's role is not to address these allegations *de novo*. Rather, the Appeals Chamber must review the findings of the first-instance Chamber in the relevant decision.[880]

387. We consider that, consistent with the above determination and the above-mentioned requirement of substantiation, appellants are required to identify alleged errors in relevant decisions of a trial chamber, to the extent that those decisions deal with matters which the appellants then raise on appeal.

388. We note that the issues raised by Mr Bemba under the first ground of appeal were raised before the Trial Chamber, notably in his Request for Relief for Abuse of Process.[881] The question of whether Mr Bemba has properly challenged the findings of the Trial Chamber on appeal will be considered below, bearing in mind that compliance with the requirement of substantiation will depend on the nature of the arguments raised on appeal.

(a) *Ex parte* communications before the Trial Chamber regarding suspected witness interference

389. In his Request for Relief for Abuse of Process before the Trial Chamber, Mr Bemba made detailed submissions on the Trial Chamber's delay in determining that it had no competence over the Prosecutor's requests for judicial authorisation for investigative measures,[882] and on the extent of the *ex parte* information concerning the article 70 investigation that the Prosecutor had provided to the Trial Chamber.[883] He argued that "[a] reasonable observer could only conclude that there was a deliberate effort to taint the entirety of the Defence case, and that this would inevitably impact on the objective appearance of the

[879] Majority Judgment, para. 60.
[880] *Lubanga* Appeal Judgment, para. 155.
[881] Mr Bemba's Request for Relief for Abuse of Process.
[882] Mr Bemba's Request for Relief for Abuse of Process, paras 96-100.
[883] Mr Bemba's Request for Relief for Abuse of Process, paras 96-99.

Judges' ability to assess the credibility of Defence witnesses in a fair manner".[884] Based *inter alia* on these arguments, Mr Bemba requested that the Trial Chamber stay the proceedings and order his immediate release.[885]

390. The Trial Chamber focused on the issue of impartiality and found Mr Bemba's argument that "the appearance of the impartiality of the proceedings has been contaminated" to be without merit.[886] It reiterated that its judgment pursuant to article 74 (2) of the Statute would be based solely on evidence submitted and discussed before it at trial.[887] It concluded that Mr Bemba had failed to demonstrate an objective lack of impartiality on the part of the Trial Chamber and found that the threshold for a stay of proceedings had not been met.[888]

391. We consider that the difficulties inherent in a judge assessing his or her own biases or the appearance of bias in respect of proceedings in which he or she is involved are self-evident.[889] In the present case, the Trial Chamber rejected Mr Bemba's argument that the appearance of the impartiality of the proceedings had been compromised and emphasised that it was composed of professional judges who would be sufficiently capable of assessing the value of any allegations brought before it and disregarding them as necessary. [890]

392. In view of the nature of Mr Bemba's allegations in the present case and the Trial Chamber's focus, in the Decision on Mr Bemba's Request for Relief for Abuse of Process, on the issue of its own impartiality, we consider that it would be inappropriate to apply a standard of review, the outcome of which is predominantly – let alone exclusively – determined by appellate deference to the findings of the Trial Chamber. In these circumstances, it would set the threshold unfairly high to lean heavily upon the appellant to identify an error in the Trial Chamber's reasoning. Therefore, in the circumstances of this

[884] Mr Bemba's Request for Relief for Abuse of Process, para. 112.
[885] Mr Bemba's Request for Relief for Abuse of Process, p. 35.
[886] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 102.
[887] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 105.
[888] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 115.
[889] In this regard, we note that requests for the disqualification of judges due to the existence of grounds giving rise to reasonable doubts regarding their impartiality, under article 41 of the Statute, are addressed to the Presidency rather than to the Chamber responsible for the proceedings in question. Although the challenged judge is entitled to present his or her comments on the matter, he or she is precluded from participating in the decision on disqualification.
[890] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 105.

case, we will consider *de novo* Mr Bemba's arguments that the integrity of the trial was compromised by the extent, content and timing of the *ex parte* submissions.

(b) Failure to disclose within a reasonable time a suspected scheme of witness interference to the Defence

393. In his Request for Relief for Abuse of Process before the Trial Chamber, Mr Bemba argued that the Prosecutor violated her disclosure obligation by failing to disclose "information concerning alleged improprieties that impacted on the credibility of Defence witnesses".[891]

394. In its Decision on Mr Bemba's Request for Relief for Abuse of Process, the Trial Chamber noted that the Prosecutor had not applied to it for a ruling as to whether relevant information or material had to be disclosed under rule 77 of the Rules, and therefore failed to satisfy the requirements of rule 81 (2) of the Rules.[892] The Trial Chamber found, however, that Mr Bemba failed to demonstrate any prejudice to the fairness of the trial as a result of the non-disclosure.[893]

395. We note that Mr Bemba's first ground of appeal challenges the Trial Chamber's determination that no prejudice resulted from the Prosecutor's non-disclosure of information affecting the credibility of defence witnesses.[894] Mr Bemba argues that the Trial Chamber's reasoning "reflects a profound misunderstanding of the far-reaching prejudice caused by the Prosecution's non-disclosure of information highly germane to the choice of witnesses".[895] He emphasises that "this information was withheld from the Defence for 16 months, including during the crucial period that Defence witnesses were being chosen and presented".[896] He highlights measures that he could have taken to adapt his defence strategy had he had access to the information withheld.[897] Therefore, we reject the Prosecutor's request to dismiss *in limine* Mr Bemba's arguments regarding the alleged non-disclosure of information affecting the credibility of defence witnesses.

---

[891] Mr Bemba's Request for Relief for Abuse of Process, paras 91-95.
[892] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 83.
[893] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 90.
[894] Appeal Brief, para. 87, referring to Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 87.
[895] Appeal Brief, para. 88.
[896] Appeal Brief, para. 88.
[897] Appeal Brief, para. 89.

(c) Transmission of privileged and confidential defence information to the Prosecutor

396. In his Appeal Brief, Mr Bemba contends that, during the article 70 investigation, privileged or otherwise confidential telephone communications of Mr Bemba's lead counsel, Mr Aimé Kilolo Musamba ("Mr Kilolo") and the Defence's case manager, Mr Jean-Jacques Mangenda Kabongo ("Mr Mangenda") were obtained from national authorities and provided to the Prosecutor.[898] He argues that "[t]he 'crime-fraud exception' [to privilege] was not properly or strictly applied" during the review process established by the Single Judge of Pre-Trial Chamber II responsible for the Article 70 Case ("Single Judge") to filter the intercepted communications.[899] Mr Bemba further submits that the protracted investigation and intrusive monitoring of two members of the Defence and Mr Bemba by members of the Prosecution responsible for the prosecution of the case against him during the presentation of the defence case undermined the fairness of the trial.[900]

397. We note that Mr Bemba raised the argument that privileged or confidential communications had been disclosed to the Prosecutor on a number of occasions during the trial.[901] In its decisions on those applications, the Trial Chamber reiterated that the Pre-Trial Chamber was the competent judicial authority to make determinations on investigative measures requested by the Prosecutor in relation to an article 70 investigation.[902] As a result, it considered that

> it would be inappropriate for it to review the legality of investigative measures ordered by the Single Judge of Pre-Trial Chamber II. To find otherwise would allow an accused to challenge the legality of decisions of a Chamber through a route not envisioned in the statutory framework, with the effect that the same concrete legal and factual issue could come to be addressed before two different chambers of the Court simultaneously. In this vein, the Chamber reiterates its view that it "does not consider it in the interests of justice for matters which may be central to the charges before the Pre-Trial Chamber to be litigated in parallel before the Trial Chamber". The Chamber will therefore not enter into analysis of the legality of the decisions of the Single Judge.[903]

---

[898] Appeal Brief, paras 93-106.
[899] Appeal Brief, para. 98.
[900] Appeal Brief, para. 102.
[901] Mr Bemba's Request for Interim Relief, paras 2, 50, 56; Mr Bemba's Urgent Request for Disclosure and Injunctive Relief, paras 1-7; Mr Bemba's Request for Relief for Abuse of Process, paras 50-58; 67-81.
[902] Decision on Mr Bemba's Request for Interim Relief, para. 15; Decision on Mr Bemba's Urgent Request for Disclosure and Injunctive Relief and Addendum, para. 21
[903] Decision on Mr Bemba's Request for Interim Relief, para. 16.

398. The Trial Chamber thus confined itself to a consideration of whether Mr Bemba's claim that he suffered prejudice as a result of the Article 70 Case was substantiated.[904] In each decision, the Trial Chamber found that Mr Bemba had failed to substantiate his arguments, which were impermissibly speculative.[905]

399. The circumstances of the present appeal are unusual in the sense that decisions taken in separate proceedings against Mr Bemba are alleged to have caused prejudice in the case at hand. We note that the Trial Chamber's caution in addressing decisions of the Pre-Trial Chamber in the Article 70 Case was fully warranted in view of the respective roles of the two chambers and the stages of the proceedings, not least because the Trial Chamber lacked review powers over the Pre-Trial Chamber. However, we do not consider that a similarly limited approach is warranted on our part in view of the Appeals Chamber's role regarding its powers of review in final appeals.

400. Accordingly, in Section C below, we will consider Mr Bemba's arguments regarding the transmission of privileged or confidential information in order to determine whether: (i) privileged or confidential information was in fact provided to the Prosecutor; and (ii) Mr Bemba was prejudiced as a result of the disclosure of such information to the Prosecutor. First, however, we will address Mr Bemba's request for the admission of evidence.

B. Mr Bemba's Additional Evidence Request

401. Mr Bemba requests the admission of 23 documents into evidence on appeal. The Majority dismissed Mr Bemba's request,[906] as it did not address the first ground of his appeal. As we shall address Mr Bemba's arguments under this ground of appeal and as Mr Bemba submits that these 23 documents relate to that ground,[907] we shall address his request at this juncture.

[904] Decision on Mr Bemba's Request for Interim Relief, para. 18; Decision on Mr Bemba's Urgent Request for Disclosure and Injunctive Relief and Addendum, para. 23; Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 18.
[905] Decision on Mr Bemba's Request for Interim Relief, para. 20;
[906] Majority Judgment, para. 72.
[907] Additional Evidence Application, para. 14.

1. Mr Bemba's submissions before the Appeals Chamber

402. According to Mr Bemba, the 23 documents fall into three categories, namely: (i) Western Union documents obtained by the Prosecutor while the trial was ongoing ("Category 1"); (ii) documents relating to the funding of Defence investigations ("Category 2"); and (iii) intercepted telephone conversations that came into the possession of the Prosecutor during the trial ("Category 3").[908] He submits that these "documents are relevant to the impact that the Prosecution's article 70 investigations had on the fairness of the Main Case" and "provide important chronology and context to the narrative underpinning a central ground of appeal".[909] He notes that the documents "reflect the information that was in the Prosecution's possession", including "privileged and confidential information", as well as information "that was used as the basis for extensive *ex parte* submissions to the Trial Chamber".[910] He contends that the documents came into his possession "after the close of the evidence in the present proceedings" and that their admission "causes no party prejudice".[911]

2. The Prosecutor's submissions before the Appeals Chamber

403. The Prosecutor submits that Mr Bemba's request for the admission of additional evidence should be dismissed *in limine* as it attempts to conflate the Article 70 Case with the Bemba case[912] and fails to meet the criteria for the admission of additional evidence on appeal.[913] She argues that Mr Bemba has not addressed "the importance of this material, and the proposed impact […] that it could have on the verdict",[914] and has failed to show that the proffered documents are even relevant to the appeal.[915] In addition, the Prosecutor submits that Mr Bemba has failed to show "convincing reasons why these documents were not presented at trial", noting that these documents were in the parties' possession during the trial yet Mr Bemba failed to exercise due diligence and produce them before the Trial Chamber.[916]

[908] Additional Evidence Application, paras 12-13.
[909] Additional Evidence Application, paras 14-15.
[910] Additional Evidence Application, para. 14.
[911] Additional Evidence Application, para. 16.
[912] Prosecutor's Response to the Additional Evidence Application, paras 1, 12, 19, 29.
[913] Prosecutor's Response to the Additional Evidence Application, paras 2, 8.
[914] Prosecutor's Response to the Additional Evidence Application, para. 14.
[915] Prosecutor's Response to the Additional Evidence Application, paras 10-11, 24, 29.
[916] Prosecutor's Response to the Additional Evidence Application, paras 13, 20, 25, 32.

3. Mr Bemba's reply

404. Mr Bemba replies that the Prosecutor's submission that his application be dismissed *in limine* "is contrary to the procedure already foreseen by the Appeals Chamber and should be rejected on that basis alone".[917] He argues that the Prosecutor's assertions that the documents to be admitted are "irrelevant to the Main Case", or the appeal, are contrary to the ways in which the Prosecution has called for reliance on the "'related case' to draw inferences prejudicial to the accused".[918] Mr Bemba contends that his application is in a proper form, that the Prosecutor's submissions as to the relevance and availability of the material should be dismissed and that there is no absolute requirement that each piece of proffered material could have changed the verdict.[919] Mr Bemba maintains that there is a "difference between evidence intended to undermine a factual finding and information tending to show that the proceedings were unfair", and that there is no reason to treat the latter with the same stringency.[920]

4. Observations of the Victims' Representative

405. The Victims' Representative argues that the Appeals Chamber has not in the past distinguished between its consideration of additional evidence linked with grounds of appeal alleging procedural unfairness and those linked with alleged errors of fact.[921] She submits that Mr Bemba has not provided any legal basis or reasoning for the difference of approach that he advances, and that he has not identified the criteria that would apply to the consideration of such evidence.[922] The Victims' Representative submits that a sufficient justification for the Additional Evidence Request has not been provided.[923] She argues that the Category 1 documents and Category 2 documents are not relevant, and that the Category 3 documents relate to matters outside the scope of the appeal and are not relevant.[924]

5. Analysis

406. Article 69 (4) of the Statute provides:

---

[917] Reply to the Prosecutor's Response to the Additional Evidence Application, para. 6.
[918] Reply to the Prosecutor's Response to the Additional Evidence Application, para. 9.
[919] Reply to the Prosecutor's Response to the Additional Evidence Application, paras 10-18.
[920] Reply to the Prosecutor's Response to the Additional Evidence Application, para. 18.
[921] Victims' Observations on the Additional Evidence Application, para. 18.
[922] Victims' Observations on the Additional Evidence Application, para. 19.
[923] Victims' Observations on the Additional Evidence Application, para. 25.
[924] Victims' Observations on the Additional Evidence Application, paras 28, 30, 32, 33.

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

407. Article 83 (1) of the Statute provides that for the purposes of appeals against, *inter alia*, a decision under article 74, the "Appeals Chamber shall have all the powers of the Trial Chamber". Rule 149 of the Rules provides that "rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber". Rules 63 and 64 of the Rules set out the general provisions regarding evidence and the procedure relating to the relevance or admissibility of evidence, respectively. Rule 63 (1) of the Rules states that "[t]he rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers".

408. Regulation 62 of the Regulations of the Court, entitled "Additional evidence presented before the Appeals Chamber", provides in its relevant part that

> [a] participant seeking to present additional evidence shall file an application setting out:
>
> (a) The evidence to be presented;
>
> (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.

409. We recall that the Appeals Chamber has previously held that the criteria of relevance, probative value and potential prejudicial effect under article 69 (4) of the Statute apply to the admission of evidence at the appellate stage of proceedings.[925] In respect of the criterion of relevance, the Appeals Chamber has found that proposed additional evidence must be relevant to a ground of appeal raised by the appellant.[926]

410. Furthermore, the Appeals Chamber has found that, given the distinct features of this stage of proceedings, other criteria may also be taken into account.[927] Focusing on the corrective nature of proceedings and the principle that evidence should, as far as possible, be presented before the Trial Chamber, which has the primary responsibility for evaluating the

[925] *Lubanga* Appeal Judgment, para. 54.
[926] *Lubanga* Appeal Judgment, paras 74, 93, 112.
[927] *Lubanga* Appeal Judgment, para. 55.

evidence, the Appeals Chamber has found that: (i) it will generally not admit additional evidence on appeal unless there are convincing reasons why such evidence was not presented at trial, including whether there was a lack of due diligence; and (ii) it must be demonstrated that the additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part.[928] The Appeals Chamber has further found "that it is within its discretion to admit additional evidence on appeal despite a negative finding on one or more of the above-mentioned criteria, if there are compelling reasons for doing so".[929] The Appeals Chamber has also found that additional evidence on appeal may relate to questions of whether the proceedings appealed from were unfair and that such "an evaluation will depend on the circumstances of the case and the evidence sought to be admitted".[930]

411. We note that the Category 1 and Category 2 documents, which relate to Western Union transactions and the Defence funding of investigations, are referenced in the part of the Appeal Brief setting out the "[s]equence of relevant events".[931] However, Mr Bemba does not subsequently develop his arguments on the basis of this evidence; they are therefore not relevant to the first ground of appeal within the meaning of article 69 (4) of the Statute. Accordingly, the Additional Evidence Application insofar as it relates to the Category 1 and Category 2 documents is rejected.

412. The Category 3 documents are transcripts of intercepted telephone conversations that came into the possession of the Prosecutor during the trial.[932] We find that: (i) these documents are relevant to the first ground of appeal;[933] (ii) they are probative of Mr Bemba's argument that the Prosecutor had access to confidential or privileged information during the trial; and (iii) their admission would not cause prejudice.

413. Although Mr Bemba submits that the documents were disclosed only after the close of evidence in the proceedings before the Trial Chamber,[934] we note that they were disclosed *before* the Conviction Decision was issued and, importantly, before Mr Bemba's Request for

[928] *Lubanga* Appeal Judgment, paras 56-59.
[929] *Lubanga* Appeal Judgment, para. 62.
[930] *Lubanga* Appeal Judgment, para. 60.
[931] Appeal Brief, paras 17-21, 33.
[932] Additional Evidence Application, para. 13.
[933] Appeal Brief, paras 93-99, 108.
[934] Additional Evidence Application, para. 16, fn. 14.

Relief for Abuse of Process was filed. In the Additional Evidence Application, Mr Bemba has not provided an explanation as to why he failed to submit the documents to the Trial Chamber.

414. We note the seriousness of the arguments raised by Mr Bemba on appeal – that members of the Prosecutor's team working on the case against him were privy to privileged and confidential information, thereby vitiating the fairness of the proceedings.[935] We further note that the documents sought to be adduced do not relate to the question of whether the Trial Chamber erred in its appreciation of the facts or the law relating to the charges against him, but rather raise the question of whether the proceedings appealed were unfair in a way that affected the reliability of the Conviction Decision. In view of the circumstances of the present case, and in order to allow for a proper consideration of Mr Bemba's arguments on appeal regarding the alleged breach of his fair trial rights, we would have decided to exercise our discretion to admit the Category 3 documents.

415. Accordingly, we will consider these documents below for the purpose of determining Mr Bemba's arguments that the Prosecutor had access to confidential or privileged information during the trial.

C. Whether the Prosecutor's *ex parte* submissions and alleged disclosure violations compromised Mr Bemba's right to a fair trial

1. Relevant procedural background

416. On 15 November 2012, during the presentation of the defence case, the Prosecutor informed the Trial Chamber that her office was "conducting an investigation into potential payments to Defence witnesses […]".[936] She requested the Trial Chamber, *inter alia*, to order the Registry to disclose the record of payments made to defence witnesses who had testified or would testify at trial.[937] The Prosecutor made her request on an *ex parte* basis for "the

[935] Appeal Brief, para. 104.
[936] Prosecutor's Request for Records of Payments to Defence Witnesses, para. 1.
[937] Prosecutor's Request for Records of Payments to Defence Witnesses, para. 5 (a).

reason that awareness at this stage by the Defence and the public of the information contained in this application would compromise the ongoing investigation".[938]

417. On 26 November 2012, the Registrar filed observations *ex parte* on the Prosecutor's request, in which she provided the record of all payments effected by the Registry to defence witnesses.[939]

418. On 3 December 2012, the Trial Chamber, in an *ex parte* decision, noted that the Registrar had already provided the Prosecutor with most of the information sought and found that a decision on the Prosecutor's request regarding the record of payments was no longer necessary.[940]

419. On 20 March 2013, the Prosecutor filed *ex parte* with the Trial Chamber an official notification of an ongoing investigation into "potential offences against the administration of justice" under article 70 of the Statute and rule 165 of the Rules by "close associates" of Mr Bemba, "members of the Defence team, and possibly the Accused himself", and requested judicial authorisation for certain investigative measures.[941]

420. On 9 April 2013, the Trial Chamber held an *ex parte* Prosecutor and Registry only status conference in order to, *inter alia*, obtain additional information relating to the Prosecutor's notification.[942]

421. On 26 April 2013, the Trial Chamber found, in an *ex parte* decision, that it had no competence over the Prosecutor's requests for judicial authorisation for investigative measures into offences under article 70 of the Statute and that such requests should be brought before the Pre-Trial Chamber.[943] The Pre-Trial Chamber conducted subsequent proceedings with respect to the Prosecutor's investigation. No notice of the ongoing

[938] Prosecutor's Request for Records of Payments to Defence Witnesses, para. 4.
[939] Registrar's Observations on Payments to Defence Witnesses. The Trial Chamber had ordered the Registrar to provide observations on the Prosecutor's Request for Records of Payments to Defence Witnesses, but had not instructed the Registry to provide the information sought: Decision requesting Registry Observations.
[940] Decision on Registry's Observations on the Prosecutor's Request Relating to Article 70 Investigations, paras 4-5.
[941] Prosecutor's Notice of Article 70 Investigation and Request for Judicial Assistance, paras 1, 38.
[942] Transcript of 9 April 2013, ICC-01/05-01/08-T-303-Red3-Eng, p. 1, lines 12-14.
[943] Decision on Prosecutor's Request for Judicial Assistance, paras 12, 14, 16, 22.

proceedings was provided to Mr Bemba at the time. The Trial Chamber was not involved in any further proceedings in respect of the allegations under article 70 of the Statute.

422. On 20 November 2013, Judge Cuno Tarfusser, the Single Judge of Pre-Trial Chamber II issued arrest warrants against Mr Bemba, among others.[944] Mr Bemba was notified of the arrest warrant on 23 November 2013,[945] and the Prosecutor subsequently commenced the disclosure of material in the Article 70 Case.[946] In view of the apparent lack of restrictions on the access of the Defence in the present case to documents disclosed in the Article 70 Case,[947] that counsel gained access to documents material to the preparation of the Defence in the present case. In addition, disclosure was effected in the regular manner.[948]

2. Submissions before the Appeals Chamber

423. Mr Bemba submits that the Trial Chamber "heard extensive *ex parte* submissions that Defence witnesses were lying, and that those lies had been procured by the Defence and (probably) Mr. Bemba".[949] He contends that the *ex parte* submissions and the Prosecutor's "reminders to the Trial Chamber about the allegations" during her cross-examination of defence witnesses "damaged the fairness of proceedings by prejudicing the […] Trial Chamber against the Defence and its evidence".[950] The Prosecutor contends that trial chambers have discretion to determine whether applications are kept *ex parte* and that the use of *ex parte* submissions in the present case was appropriate and strictly circumscribed.[951] She argues that the *ex parte* submissions were limited to the "minimum necessary information for the legitimate [investigative] purpose pursued", she was careful to stress the limited evidentiary basis for her submissions and did not make any "*ex parte* submissions to the Chamber concerning the credibility of specific witnesses".[952] Regarding the impact of the *ex parte* submissions on the Trial Chamber's assessment of "the credibility of the Defence witnesses affected", the Victims' Representative observes that the Conviction Decision was

[944] Article 70 Arrest Warrants.
[945] Registrar's Information on Implementation of Mr Bemba's Article 70 Arrest Warrant, pp. 3-4.
[946] *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Transcript of 4 December 2013, ICC-01/05-01/13-T-2-Red-Eng, p. 16, lines 19-22.
[947] Decision on Contact with Defence Witnesses, para. 26.
[948] *See e.g.* Prosecutor's Disclosure Note.
[949] Appeal Brief, para. 59. *See also* paras 62-63, 65-66.
[950] Appeal Brief, paras 67, 71.
[951] Response to the Appeal Brief, paras 30-48.
[952] Response to the Appeal Brief, paras 41-42.

issued over four months after the Pre-Trial Chamber rendered its confirmation decision in the Article 70 Case, confirming the charges of corruptly influencing the witnesses concerned.[953]

3. Analysis

424. We note that, under the first ground of appeal, Mr Bemba argues, *inter alia*, that: (i) the Prosecutor's *ex parte* submissions regarding the article 70 investigation violated his right to a fair trial;[954] and (ii) the basis for the Prosecutor's suspicions in respect of witnesses called by the Defence should have been disclosed much earlier.[955] While the two arguments are raised in separate sections, we consider that they are closely related. Accordingly, the arguments will be addressed together below in order to determine: (i) whether it was appropriate for the Prosecutor to make her *ex parte* submissions to the Trial Chamber and whether she breached her disclosure obligations, and (ii) if so, whether those irregularities rendered the proceedings unfair.

(a) The alleged irregularities in the proceedings

425. Mr Bemba's first argument appears to be that *ex parte* proceedings should be prohibited or, if they are exceptionally allowed, there must be a prompt notification to the other party.[956]

426. We note that the applicable law expressly provides for *ex parte* proceedings.[957] For instance, rule 134 (1) of the Rules provides:

> Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an *ex parte* procedure, served on the other party. […]

427. Rule 81 (2) of the Rules provides that requests for the authorisation of non-disclosure of otherwise disclosable material for the protection of further or ongoing investigations shall be heard on an *ex parte* basis.

428. The Appeals Chamber has previously held that a chamber has "the discretion […] to determine, within the framework of the applicable law, whether applications by participants

[953] Victims' Observations, para. 20.
[954] Appeal Brief, paras 51-75.
[955] Appeal Brief, paras 76-92.
[956] Appeal Brief, paras 52-57.
[957] *See* regulation 23*bis* of the Regulations of the Court.

are kept *ex parte* or are made *inter partes* and whether or not to hold proceedings on an *ex parte* basis".[958] The Appeals Chamber has further held:

> The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for *ex parte* proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognized human rights standards, as required by article 21 (3) of the Statute.[959]

429. Therefore, we consider that *ex parte* proceedings are not subject to a general prohibition. However, we underline that *ex parte* submissions may be used only to the extent that they are strictly necessary. Further, the interests in favour of withholding certain information from the accused must be carefully balanced against the interests of maintaining proceedings *inter partes*. Whether *ex parte* proceedings are acceptable, and for how long such submissions can be withheld from the other party, will depend on the specific circumstances of the case and, in particular, the risk of prejudice to the fair trial of an ongoing case.

430. In the present case, the *ex parte* submissions concerned an investigation into alleged witness interference, which coincided with the examination of defence witnesses who were implicated. The Prosecutor notified the Trial Chamber of the existence of the investigation on 15 November 2012,[960] and the proceedings relating to this investigation continued before the Trial Chamber until it determined that it had no competence over the matter on 26 April 2013.[961] We note that the relevant filings were not made available to Mr Bemba until after the warrant of arrest was issued on 23 November 2013.[962] It thus appears that the Trial Chamber took the view that the protection of the ongoing investigation required that the proceedings remain *ex parte* during this time. However, in the absence of any overt consideration of the question, we are unable to assess whether the Trial Chamber weighed the reasons advanced

---

[958] *Lubanga* OA3 Judgment, para. 66.
[959] *Lubanga* OA3 Judgment, para. 67.
[960] Prosecutor's Request for Records of Payments to Defence Witnesses, para. 1.
[961] Decision on Prosecutor's Request for Judicial Assistance, paras 12, 14, 16, 22. The Trial Chamber invited the Prosecutor to inform it when its decision of 26 April 2013 could be issued in redacted form (Decision on Prosecutor's Request for Judicial Assistance, para. 22 (ii)).
[962] Transcript of 28 November 2013, ICC-01/05-01/08-T-359-Eng, p. 12, lines 17-22; Order on the reclassification of documents, para. 6; Second order on the reclassification of documents, para. 4.

for withholding the information from Mr Bemba against the risk that non-disclosure of the information would violate his rights, and what the outcome of such an assessment would have been.

431. Mr Bemba further contends that the Prosecutor's *ex parte* submissions could have been made to a Pre-Trial Chamber and notes that the Trial Chamber subsequently determined that they should have been made to the Pre-Trial Chamber.[963]

432. We note that the *ex parte* submissions of the Prosecutor concerned an investigation into alleged witness interference. In her initial filing before the Trial Chamber in respect of this matter, filed confidentially and *ex parte* on 15 November 2012, the Prosecutor informed the Trial Chamber that her office was "conducting an investigation into potential payments to Defence witnesses" and referred to article 70 of the Statute.[964] In her *ex parte* notification to the Trial Chamber of 20 March 2013, the Prosecutor clarified that her office was investigating "offences against the administration of justice under Article 70 of the Rome Statute […] and Rule 165 of the Rules of Procedure and Evidence".[965] Similarly, at the *ex parte* status conference held on 9 April 2013, in response to a query as to the purpose of the investigation,[966] the Prosecutor explained that "[they were] relying on Article 70 of the Rome Statute" and that "this might be offences against the administration of justice".[967] The submissions of the Prosecutor were thus not concerned with the ongoing proceedings against Mr Bemba for alleged war crimes and crimes against humanity, but with investigative needs relating to the suspicions of offences under article 70 of the Statute and the individual criminal responsibility of the persons suspected of the commission of such offences.

433. In view of the purpose of the investigation conducted by the Prosecutor, which appears to have been clear already from the first *ex parte* submission, we consider that the requests in question should have been directed to the Pre-Trial Chamber. We note in this regard that the Trial Chamber itself eventually decided that it was not competent to consider the Prosecutor's

[963] Appeal Brief, paras 58, 68.
[964] Prosecutor's Request for Records of Payments to Defence Witnesses, para. 1.
[965] Prosecutor's Notice of Article 70 Investigation and Request for Judicial Assistance, para. 1.
[966] Transcript of 9 April 2013, ICC-01/05-01/08-T-303-Red3-Eng, p. 12, lines 15-21.
[967] Transcript of 9 April 2013, ICC-01/05-01/08-T-303-Red3-Eng, p. 18, lines 5-8.

request in March 2013 for judicial orders in relation to the ongoing investigation of offences under article 70 of the Statute.[968]

434. We also note that the Trial Chamber's decision on the lack of competence was only rendered after the Trial Chamber received the second written submission and held an *ex parte* status conference. In view of the clearly articulated purpose of the investigation conducted by the Prosecutor, the Trial Chamber should have alerted the Prosecutor to its lack of competence earlier. If it had doubts as to the purpose of the ongoing investigation, it could have sought explanation from the Prosecutor.

435. Turning to Mr Bemba's arguments regarding the Prosecutor's failure to disclose information, we note that while Mr Bemba refers to the disclosure of information or to "revealing the basis of [the Prosecutor's] suspicions",[969] his arguments appear to concern the disclosure of material pursuant to rule 77 of the Rules, on which Mr Bemba in fact relies. We shall therefore proceed on this basis.

436. We note that neither the parties[970] nor the Trial Chamber[971] disagree that the items obtained through the article 70 investigation were material to the preparation of the defence, within the meaning of rule 77 of the Rules.

437. Rule 77 of the Rules reads:

> The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

438. Rule 81 (2) of the Rules provides:

> Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the

[968] Decision on Prosecutor's Request for Judicial Assistance, para. 22(i).
[969] Appeal Brief, p. 34.
[970] Appeal Brief, para. 86; Response to the Appeal Brief, para. 49 ("Bemba was informed of material information within a reasonable time").
[971] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 83.

> matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

439. We find that the Prosecutor, being in possession of the material gathered in the course of the article 70 investigation, should have applied to the Trial Chamber for a ruling pursuant to rule 81 (2) of the Rules, as to whether that material or information had to be disclosed to the Defence, or could be withheld from disclosure until the completion of the investigation or another point in time. The Prosecutor did not do so.[972] As a result, the Prosecutor withheld the material from disclosure without the Trial Chamber's authorisation for a significant period of time, thereby breaching rules 77 and 81 (2) of the Rules.

440. For the foregoing reasons, we would have found that: (i) until the notification of the article 70 arrest warrants, the Trial Chamber does not appear to have considered the question of whether the *ex parte* submissions made by the Prosecutor should be revealed to Mr Bemba or weighed the risk of prejudice to his rights; (ii) given the nature of the investigation conducted by the Prosecutor, she should have addressed her requests to the Pre-Trial Chamber, rather than the Trial Chamber; and (iii) the Prosecutor breached rules 77 and 81 (2) of the Rules by withholding material from disclosure without the authorisation of the Trial Chamber. We shall turn to the assessment of whether the irregularities identified above rendered the proceedings unfair, within the meaning of article 83 (2) of the Statute.

(b) Whether the proceedings were unfair due to the *ex parte* submissions and the alleged disclosure violations

441. We are unpersuaded by Mr Bemba's argument that where *ex parte* submissions relate to a matter in respect of which the judge is the "decider of fact", "prejudice should be presumed",[973] a principle apparently derived from the case-law of courts of the United States of America. As discussed earlier, *ex parte* proceedings are not prohibited and, under the Court's legal framework, judges of a Trial Chamber are expected to rule on issues relating to the substance of the case on an *ex parte* basis, notably in respect of the authorisation of non-disclosure of material to the defence, as per the aforementioned rule 81 (2) of the Rules.

[972] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 83; Response to the Appeal Brief, para. 53.
[973] Appeal Brief, para. 57. *See also* para. 113.

However, pursuant to article 74 (2) of the Statute, the judges are expected to base their decision on the guilt or innocence of an accused person "only on evidence submitted and discussed […] at the trial". The presumption of prejudice to which Mr Bemba refers does not appear to be compatible with these principles. We will therefore proceed to examine Mr Bemba's arguments regarding the alleged prejudice in accordance with the applicable standard of appellate review.

442. Regarding the content of the *ex parte* submissions, we recall that the Trial Chamber received the following *ex parte* submissions related to the ongoing investigation: the Prosecutor's filing of 15 November 2012;[974] the Registry's report detailing amounts paid to witnesses called by Mr Bemba;[975] the Prosecutor's notification of the investigation under article 70 of the Statute;[976] and the submissions made at the status conference of 9 April 2013.[977] We note that, in the *ex parte* filings, the Prosecutor informed the Trial Chamber of "potential offences against the administration of justice" by "possibly the Accused himself".[978] The Prosecutor requested that the Trial Chamber order the Registrar to provide to her the "record of the payments effected by the Registry to Defence witnesses who have testified or who are testifying in the future".[979] The Prosecutor mentioned three defence expert witnesses, D53, D59 and D60, as recipients of payments.[980] The Prosecutor's Notice of Article 70 Investigation and Request for Judicial Assistance of March 2013 contained detailed information about the alleged payments and identified nine (potential) witnesses for the Defence as being tainted, one of whom, D59, had already been identified in the Prosecutor's filing of November 2012.[981] Further information was provided during the *ex parte* status conference of 9 April 2013, when the Prosecutor spoke of money transfers to

[974] *See supra* para. 416.
[975] *See supra* para. 417.
[976] *See supra* para. 419.
[977] *See supra* para. 420.
[978] Prosecutor's Notice of Article 70 Investigation and Request for Judicial Assistance, paras 1, 8.
[979] Prosecutor's Request for Records of Payments to Defence Witnesses, paras 1, 5.
[980] Prosecutor's Request for Records of Payments to Defence Witnesses, para. 1.
[981] Prosecutor's Notice of Article 70 Investigation and Request for Judicial Assistance, paras 7-26. *See also* Annex A to that filing.

witnesses of "a total of more than €100,000"[982] and suggested that Mr Bemba could be implicated.[983]

443. Mr Bemba submits that the *ex parte* submissions "could not have failed to impact, consciously or unconsciously, the Trial Chamber's view of [the affected] witnesses' credibility".[984] He argues that the "Trial Chamber's first impression of 23 of the Defence's 34 witnesses was formed under the cloud of these allegations".[985] We consider that Mr Bemba seems to assume that the information about the Prosecutor's general suspicion, as summarised above, must have clouded the Trial Chamber's impression of all further witnesses who would appear for Mr Bemba. We are not persuaded by this argument. Contrary to what Mr Bemba suggests, it cannot be assumed that knowledge of such suspicions – which were identified as such – tainted the Trial Chamber's view of the defence case as a whole and that it therefore treated all defence witnesses with suspicion. As noted above, there are instances where the Trial Chamber may be called upon to consider on an *ex parte* basis matters that may relate to an ongoing case, while it is required of the judges of the Trial Chamber to base their decision under article 74 of the Statute only on evidence submitted and discussed at the trial.

444. Mr Bemba further argues that the Trial Chamber reprimanded the Defence for a question regarding payments to a witness for the Prosecution, although it did not reprimand the Prosecutor for similar questions to Mr Bemba's witnesses.[986] We note, however, that the Trial Chamber addressed a similar argument brought by Mr Bemba and found that its reprimand concerned the tone of the Defence's question to the witness, rather than its content.[987] We note that the Presiding Judge's intervention with respect to the Defence's question, following an objection from the Prosecution, indeed focused on the tone of the

[982] Transcript of 9 April 2013, ICC-01/05-01/08-T-303-Red3-Eng, p. 9, lines 24-25.
[983] Transcript of 9 April 2013, ICC-01/05-01/08-T-303-Red3-Eng, p. 23, lines 17-22: "We know precisely what we are looking for. […] It is sufficient for me to hear Mr Bemba telling Mr Babala 'Have you given the $1,000 to Mr X who is coming to testify next week?' If I have just that information then I can come back to you and tell you 'This is a recording that confirms the payment of money by -- through Western Union and which in turn confirms what a witness told us.'"
[984] Appeal Brief, para. 75.
[985] Appeal Brief, paras 72-73.
[986] Appeal Brief, para. 71.
[987] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 110.

question, which the Presiding Judge found to be offensive.[988] In addition, Mr Bemba does not argue that he made similar objections to the Prosecution's questions to his witnesses and that his objections were rejected. We would therefore have found that the manner in which the Trial Chamber conducted the proceedings during the cross-examination of his witnesses by the Prosecution does not indicate "disparate treatment".[989]

445. We further note that, in the Decision on Mr Bemba's Request for Relief for Abuse of Process, the Trial Chamber held that, during the *ex parte* proceedings, it "took no decisions, made no assessment – even on a preliminary basis – of the merit of any allegations or information put before it, and reached no conclusions as to the Prosecution's allegations or on any other matter".[990] Indeed, it expressly stated that "any information, allegations, or submissions made before it not based upon evidence admitted in the *Bemba* case [would] not be taken into consideration".[991] The Trial Chamber reiterated that statement in the Conviction Decision.[992] We note that Mr Bemba has not pointed to any specific aspect of the Trial Chamber's treatment of the witnesses concerned that would call these declarations into question.

446. As regards Mr Bemba's argument that the Trial Chamber's bias is demonstrated by its assessment of the credibility of the fourteen witnesses implicated in the Article 70 Case,[993] we note that, while the Trial Chamber found that one of these witnesses was "not credible

[988] Transcript of 8 September 2011, ICC-01/05-01/08-T-157-Red2-Eng, p. 53, line 11 to p. 54, line 5: "How much money, if applicable, did you get or do you expect to get in the context of your testimony?
PRESIDING JUDGE STEINER: Maître Badibanga, you have the floor, but I have already the answer to this question.
MR BADIBANGA: (Interpretation) Your Honour, yes. Of course we do object to these particularly insulting questions first of all in respect of the witness, whose integrity is being questioned on an imaginary basis and I really don't see any element that could possibly justify the position of the Defence. It is also very insulting towards the Office of the Prosecution, whose integrity is being questioned, and we can under no circumstances whatsoever accept that.
PRESIDING JUDGE STEINER: Maître Badibanga, if there is any system to compensate the witness for the days the witness spent in The Hague, this is an issue that relates only to VWU and will be the same that will apply for the Defence witnesses when the Defence witnesses come. So the tone in which the question was posed to the witness is offensive and the Chamber does not accept this kind of question. Have you finished your questioning, or do you have something else?
MR KILOLO: (Interpretation) I have finished, your Honour, and I have already provided the reference number for the document that we used to base our last question on, which of course do not seek to offend the Office of the Prosecutor".
[989] Appeal Brief, para. 71.
[990] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 103.
[991] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 105.
[992] Conviction Decision, para. 258.
[993] Appeal Brief, paras 72, 74, 110.

and that his testimony as a whole [was] unreliable",[994] and that "particular caution" was required in analysing the evidence of others,[995] it indicated that it had reached these conclusions because these witnesses' responses to questions had been, for instance, illogical,[996] contradictory[997] or inconsistent.[998] With respect to other witnesses affected by the alleged interference, although the Trial Chamber did not make general assessments of their credibility or the reliability of their testimony, it held that it was unable to rely on their evidence with respect to specific issues for reasons of the witnesses' stated lack of knowledge of an issue, or the existence of consistent and corroborated evidence to the contrary of what they testified.[999] The Trial Chamber's observations are not linked to the *ex parte* submissions, but rather to the trial record. Therefore, Mr Bemba's contention that the Trial Chamber's view of the credibility of these witnesses was influenced by the *ex parte* submissions cannot stand. Furthermore, Mr Bemba has neither challenged nor demonstrated any error in the Trial Chamber's assessments save to say that the Trial Chamber was influenced by the *ex parte* submissions.[1000] In the absence of such a challenge or demonstration, Mr Bemba's argument that the Trial Chamber's assessments were influenced by the *ex parte* submissions fails.

447. Turning to the argument that, had Mr Bemba been made aware of the suspicions earlier, he could have adjusted his defence strategy,[1001] we recall that the Trial Chamber considered

[994] Conviction Decision, para. 374.
[995] Conviction Decision, paras 351, 353, 358, 362, 371, 376, 378.
[996] Conviction Decision, paras 348, 352, 370, 375, 377.
[997] Conviction Decision, para. 348.
[998] Conviction Decision, paras 352, 357, 361, 372.
[999] For instance, the Trial Chamber held that it was unable to rely on the evidence of witnesses D4 and D6 that the MLC troops were under the command of the CAR authorities, because those witnesses testified that "they were not in a position to know about communications between Mr Bemba and Colonel Moustapha or the internal organization of the MLC contingent in the CAR", and the Trial Chamber therefore "doubt[ed] the ability of these witnesses to conclude that the CAR authorities had operational command over the MLC contingent in the CAR"; Conviction Decision, paras 428, 430. The Trial Chamber also doubted the relevant portions of the evidence of witness D13, as "he (i) admitted that he had no knowledge about communications by Thuraya, which he claimed were used after the MLC passed PK12, i.e. for the majority of the 2002-2003 CAR Operation; and (ii) testified that 'I don't know who was superior to the other, higher level than the other, but I know that there was communication'"; Conviction Decision, paras 429, 431 (footnotes omitted). The Trial Chamber also expressed doubts about the reliability of D13's testimony in relation to the issue of operational command over the MLC contingent in the CAR in the face of credible and reliable contradictory evidence; Conviction Decision, paras 457, 557. Similarly, having considered the evidence of, among others, witnesses D13, D23, D26 and D29 relating to crimes allegedly committed in the CAR by forces other than the MLC (Conviction Decision, para. 695, fn. 2127), the Trial Chamber found that, for a number of reasons, this could not undermine its findings, based, *inter alia*, on "consistent and corroborated evidence" that the perpetrators of the crimes charged were MLC soldiers; Conviction Decision, para. 695.
[1000] Appeal Brief, para. 75.
[1001] Appeal Brief, paras 78, 89. *See also* para. 107.

submissions that are in substance the same as those made under the present ground of appeal. In the Decision on Mr Bemba's Request for Relief for Abuse of Process, the Trial Chamber noted that the Prosecutor had not applied to it for a ruling as to whether relevant information or material had to be disclosed under rule 77 of the Rules, and therefore failed to satisfy the requirements of rule 81 (2) of the Rules.[1002] The Trial Chamber observed, however, that despite having had ample opportunity to make submissions as to any alleged prejudice and to seek any relevant remedy, Mr Bemba "waited almost five months before including submissions on the issue in a request for a stay of proceedings".[1003] As regards Mr Bemba's inability to test the veracity of the Prosecutor's allegations of witness interference by putting them to the witnesses during their testimony, the Trial Chamber noted that the Prosecutor only put "open-ended questions to Defence witnesses regarding issues affecting credibility" and that Mr Bemba "was not precluded from following up by a lack of information".[1004] The Trial Chamber also noted that the material in question was neither submitted nor admitted into evidence.[1005] The Trial Chamber concluded that Mr Bemba failed to demonstrate any prejudice to the fairness of the trial.[1006]

448. We consider that, contrary to Mr Bemba's suggestion, the Trial Chamber's reasoning did not amount to a "profound misunderstanding of the far-reaching prejudice"[1007] that the non-disclosure had caused. While an earlier disclosure of the fact that the Prosecutor suspected the commission of offences under article 70 of the Statute might have led Mr Bemba to prepare his defence differently, it would be speculative to assume that it would have led the Trial Chamber to assess the credibility of the witnesses concerned or the reliability of their testimony differently. In particular, in its Conviction Decision, the Trial Chamber chose not to rely on the allegations of interference, and its reservations as to the credibility of the witnesses implicated in the Article 70 Case appear to have been based on factors unrelated to that case. Therefore, even if Mr Bemba had been able to explore with his witnesses the question of payments, including by recalling them, there is no indication that

[1002] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 83.
[1003] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 84.
[1004] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 87.
[1005] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 87.
[1006] Decision on Mr Bemba's Request for Relief for Abuse of Process, para. 90.
[1007] Appeal Brief, para. 88.

this could have affected the Trial Chamber's assessment of the witnesses' credibility or the reliability of their testimony.

449. Furthermore, we note that Mr Bemba did not seek to recall any of the affected witnesses, although the possibility of recalling witnesses was open to him. Indeed, the Trial Chamber granted Mr Bemba's request to recall another witness following the close of evidence, ruling that "in exceptional circumstances a case may be reopened to permit the presentation of 'fresh' evidence".[1008] Mr Bemba's decision not to recall the witnesses or to present fresh evidence goes against his contention that, had he received timely disclosure, he could have replaced the witnesses affected. We would therefore have found his argument to be unsubstantiated.

(c) Conclusion

450. In sum, we consider that there were irregularities in relation to the article 70 investigation, but we would not have found that they rendered the proceedings unfair. We would therefore have rejected Mr Bemba's arguments.

D. Whether privileged and otherwise confidential information from the Defence was shared with the Prosecution

1. Relevant procedural background

451. During the Article 70 Investigation, recordings of telephone intercepts of Mr Bemba's lead counsel, Mr Kilolo, and Mr Bemba's defence team's case manager, Mr Mangenda, were obtained from national authorities.[1009] The Single Judge responsible for the Article 70 Case appointed an independent counsel to conduct a review of these recordings to ensure that "privilege would be strictly maintained on all such recordings which would not offer elements of interest or relevance for the purposes of the Prosecutor's investigation" ("Independent Counsel").[1010]

[1008] Decision on request to recall P169, para. 25.
[1009] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence.
[1010] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence, para. 7.

2. Submissions before the Appeals Chamber

452. Mr Bemba submits that "[t]he 'crime-fraud exception' [to privilege] was not properly or strictly applied" during the review process established by the Single Judge.[1011] Mr Bemba contends that, as a result, privileged or otherwise confidential material from the Defence was provided to the Prosecution.[1012] The Prosecutor affirms that she did not access "information still bound by privilege", but that this point is in any event irrelevant to the appeal, as Mr Bemba fails to show how his interests in this case, rather than in the Article 70 Case, were adversely affected.[1013] The Victims' Representative submits that in its ruling on the issue of the Prosecutor's alleged access to privileged communications, the Trial Chamber noted that Mr Bemba had failed to substantiate that there was prejudice to the fairness of the proceedings.[1014]

3. Analysis

(a) Relevant legal framework

453. We note that a number of provisions ensure the protection and confidentiality of privileged communications between accused persons and their legal counsel as an essential precept of the right to a fair trial. Article 67 (1) (b) of the Statute provides accused persons with the right to "have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the[ir] choosing in confidence". Article 69 (5) of the Statute relating to evidence provides that "[t]he Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence".

454. Rule 73 (1) of the Rules adds:

> 1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:
>
> (a) The person consents in writing to such disclosure; or
>
> (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

[1011] Appeal Brief, para. 98.
[1012] Appeal Brief, paras 99, 104.
[1013] Response to the Appeal Brief, paras 60, 67.
[1014] Victims' Observations, para. 30.

455. Rule 81 (1) of the Rules provides that "[r]eports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure".

456. Provisions guaranteeing the right of the accused to communicate freely with their legal counsel are also to be found in the Regulations of the Court and the Regulations of the Registry. Regulation 97 of the Regulations of the Court provides as follows:

> 1. A detained person shall be informed of his or her right to communicate fully, where necessary with the assistance of an interpreter, with his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68.
>
> 2. All communication between a detained person and his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68 and interpreters shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre.

457. In relation to restrictions on contact with a detained person, regulation 101 (2) and (3) of the Regulations of the Court provides, in relevant part:

> 2. The Prosecutor may request the Chamber seized of the case to prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel, if the Prosecutor has reasonable grounds to believe that such contact:
>
> […]
>
> (b) Could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation;
>
> […].
>
> 3. The detained person shall be informed of the Prosecutor's request and shall be given the opportunity to be heard or to submit his or her views. In exceptional circumstances such as in an emergency, an order may be made prior to the detained person being informed of the request. In such a case, the detained person shall, as soon as practicable, be informed and shall be given the opportunity to be heard or to submit his or her views.

(b) Whether the review process put in place in the Article 70 Case resulted in a violation of privilege in the main case

458. We note that Mr Bemba does not dispute the limitation on the protection of privileged communications that was articulated by the Single Judge responsible for the Article 70 Case. The Single Judge found:

> The statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(1)(b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when - as in the present case - the counsel seems to be an accomplice in the scheme. This behaviour is to be regarded as an abuse of the statutory right and entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer-client communications as a matter of course.[1015]

459. We consider that this interpretation is supported by the wording of rule 73 (1) of the Rules, which protects communications between a person and his or her legal counsel only to the extent that they are made "in the context of the professional relationship" between them.[1016] As the Appeals Chamber has previously found, "communications between a person and his or her legal counsel that are made in furtherance of criminal activities are not privileged in the legal framework of the Court".[1017] We consider that communications that serve to further offences against the administration of justice under article 70 of the Statute cannot be said to fall within the context of the protected professional relationship between a person and his or her legal counsel and are therefore not protected under rule 73 (1) of the Rules. Nevertheless, in order to ensure that there is no undue restriction on the right of the accused to communicate freely with counsel of his or her choosing in confidence and interference with the protection of privilege, a rigorous procedure must be put in place to differentiate between genuinely privileged communications and those that further criminal activity.

460. We note that the procedure for preventing disclosure of privileged documents was established at an early stage of the article 70 investigation when the suspects in that case were not yet aware of the existence of the proceedings.[1018] An independent counsel was tasked by the Single Judge with reviewing the recordings of the intercepted communications with a view to identifying and delivering to the Prosecutor "those providing elements which might be relevant for the limited purposes of [her] investigation".[1019] The Single Judge found that "privilege would be strictly maintained on all such recordings which would not offer

[1015] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence, para. 3.
[1016] *Bemba et al.* Appeal Judgment, para. 432.
[1017] *Bemba et al*. Appeal Judgment, para. 435.
[1018] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence, para. 7.
[1019] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence, para. 7.

elements of interest or relevance for the purposes of the Prosecutor's investigation".[1020] [redacted]. [1021]

461. Mr Bemba focuses his complaints on three separate aspects of the procedure established.

462. First, Mr Bemba argues that confidential information was also provided to the Prosecutor as a result of the defective review procedure.[1022] Mr Bemba does not specify what he means by "confidential" in this context, but gives the example of "conversations between Counsel and actual or prospective witnesses", referencing three such intercepted communications in support of his submission.[1023] Regardless of whether such communications are considered to be confidential or privileged, we note that they are not subject to such protection insofar as and to the extent that the communications were in furtherance of a criminal scheme. Consequently, conversations between counsel and actual or prospective witnesses with a view to furthering a criminal scheme were not considered to be protected by confidentiality and were disclosed to the Prosecutor. The specific documents identified by Mr Bemba will be discussed below in light of the above criterion for disclosure.

463. Second, Mr Bemba highlights that "the Independent Counsel in practice almost always disclosed conversations in their entirety", rather than limiting the disclosure to the information that was deemed to be not covered by privilege.[1024] We note that Mr Bemba identifies one intercepted communication that he alleges was erroneously disclosed in its entirety, which will be discussed below.

[1020] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence, para. 7.
[1021] ICC-01/05-T-2-Conf-Eng, p. 11, line 13 to p. 12, line 9; ICC-01/05-T-3-Conf-Eng, p. 2, lines 7-13; p. 4, lines 10-18; p. 5, lines 10-15; p. 8, lines 4-24.
[1022] Appeal Brief, para. 99.
[1023] Appeal Brief, para. 99.
[1024] Appeal Brief, para. 99.

464. Third, Mr Bemba argues that the mandate of the Independent Counsel to identify communications "relevant to the case" was too broad and that his work was not meaningfully supervised by the Single Judge.[1025]

465. We accept that the review of privileged materials and disclosure to the Prosecutor proceeded in the manner described by Mr Bemba.[1026] Although the Single Judge determined that privilege is "forfeit whenever an accused uses such right with a view to furthering a criminal scheme", and that the "scope of [the exception to privilege] must be determined in light of, and limited by, the specific reasons warranting such exception",[1027] he appointed an independent counsel to separate privileged communications from those "providing elements which *might be relevant* for the limited purposes of the Prosecutor's investigation […]".[1028] The Single Judge indicated that "[a]ny question or issue which may arise in connection with the aforementioned review would have to be promptly submitted […] for [his] determination", but did not undertake to judicially review the work of the Independent Counsel.[1029] Mr Bemba has not demonstrated that judicial review of the work of the Independent Counsel was necessary or that the procedure adopted insufficiently protected his rights in this respect.

466. However, we note that the Single Judge's instruction to the Independent Counsel to separate information "which might be relevant" to the Prosecutor's investigation is potentially much broader than his finding that privilege is forfeit when used "to further […] a criminal scheme". For instance, communications tending to exonerate the suspects could be considered to be "relevant to the investigation", although they may be privileged or confidential. In order to ensure that the right of the accused to communicate freely and in confidence with counsel of his choosing was fully respected, we consider that the Single Judge should have provided clear and unambiguous instructions to the Independent Counsel as to scope of the applicable privilege. In the absence of such clear instructions, we consider

[1025] Appeal Brief, paras 97-98.
[1026] Order Filing Recordings and Reports from the Dutch Investigating Judge in the Record of the Case, pp. 3-4; Decision Filing Material Provided by the Dutch Judicial Authorities in the Record of the Case, p. 4.
[1027] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence, paras 3, 6.
[1028] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence, para. 7 (emphasis added).
[1029] Decision Granting Prosecutor's Second Request for Judicial Order to Obtain Evidence, para. 7.

that *bona fide* privileged communications relating to defence witnesses would not always be readily distinguishable from those of a criminal nature,

467. Despite this short-coming, the question to determine is how the Independent Counsel complied with this mandate in practice, and whether privileged or confidential information was in fact erroneously disclosed to the Prosecutor in the present case and to what extent. We stress that a party asserting privilege must, where possible, identify the documents over which privilege is asserted. Therefore, we shall now examine the issue of whether privileged communications were disclosed to the Prosecutor in practice, in light of Mr Bemba's concrete arguments.

468. We note that Mr Bemba has identified one intercepted communication as privileged and submits that this communication and four other intercepted communications concerning defence strategies were wrongly disclosed to the Prosecutor.[1030] He also claims that three confidential communications were transmitted to the Prosecutor and that one intercepted communication was transmitted to the Prosecutor in its entirety, although the Independent Counsel considered only part of it to be relevant.[1031] These intercepted communications are considered in detail below.

(i) 14 September 2013 Conversation

469. Mr Bemba submits that the Independent Counsel disclosed a privileged telephone conversation between two members of Mr Bemba's defence team to the Prosecutor ("14 September 2013 Conversation").[1032] He submits that the Pre-Trial Chamber ultimately "found that this conversation contained no evidence of crime or fraud, and 'declined to confirm the charges brought by the Prosecutor in connection with [14 allegedly false or forged documents tendered by the Defence for Mr Bemba in the Main Case]'".[1033] He also argues that this conversation and an earlier conversation ([redacted]) "included

[1030] Appeal Brief, paras 94, 108. Mr Bemba identified CAR-OTP-0080-1402 as containing defence strategies and privileged. The following documents were submitted as examples of communications concerning defence strategies: Annex to the Second Report of the Independent Counsel, pp. 6-10, 29, 36; CAR-OTP-0079-0114; and CAR-OTP-0080-0228.
[1031] Appeal Brief, para. 99. Mr Bemba identified CAR-OTP-0077-1407; CAR-OTP-0077-1414; CAR-OTP-0082-0663; CAR-OTP-0080-1369; CAR-OTP-0080-1370 as confidential. The final two items of evidence are audio files of the transcript CAR-OTP-0082-0663 and will not be considered separately below. Mr Bemba complains that CAR-OTP-0074-0986 was erroneously transmitted in its entirety.
[1032] Appeal Brief, paras 94-95.
[1033] Appeal Brief, para. 95, quoting Article 70 Confirmation Decision, paras 47-48, 50.

discussions of perceived weaknesses and gaps in the Defence evidence".[1034] The Prosecutor responds that the Pre-Trial Chamber "did not find that the 'Independent Counsel erred in the scope of the crime-fraud exception' to privilege".[1035]

470. We consider that the question of whether an intercepted communication is privileged or confidential cannot be determined solely on the basis of whether it is subsequently tendered, admitted or relied upon as evidence of the criminal scheme, although such factors may be of relevance to the assessment. Regarding the 14 September 2013 Conversation, we note that the Pre-Trial Chamber's finding that it tended to exonerate the interlocutors was limited to one aspect of the charges – the alleged forgery of documents – and did not relate to its character as privileged or otherwise.[1036]

471. In such circumstances, we consider that the question of whether the communication involved the furtherance of a criminal scheme must be determined in light of the available information about the scope and extent of the criminal activity in question. As the Appeals Chamber has previously held, "while an individual communication, viewed in isolation, may appear to be unrelated to the suspected criminal activity, it may, in fact, be a relevant element of a broader criminal scheme when evaluated in light of other conversations and all available information on the suspected criminal scheme".[1037]

472. We note that the 14 September 2013 Conversation was primarily related to the possibility of obtaining documentary evidence from a witness whom the suspects in the article 70 investigation were [redacted]. It was identified in the Second Report of the Independent Counsel as relevant to the article 70 investigation on the basis that it concerned [redacted].[1038] The conversation in question between Mr Kilolo and Mr Mangenda focused on a prospective defence witness [redacted]

[1034] Appeal Brief, para. 108.
[1035] Response to the Appeal Brief, para. 64, referring to Article 70 Confirmation Decision, paras 47-50.
[1036] Article 70 Confirmation Decision, paras 47-48.
[1037] *Bemba et al.* Appeal Judgment, para. 439.
[1038] Annex to Second Report of the Independent Counsel, p. 29.

[redacted].[1039] The Annex to the Second Report of the Independent Counsel contained information showing that [redacted] was potentially being assessed by the suspects in the article 70 investigation [redacted]. Indeed, the Independent Counsel linked the 14 September 2013 Conversation to the [redacted] between Mr Kilolo and Mr Mangenda,[1040] in which they discussed the [redacted].[1041]

473. In view of the context of the 14 September 2013 Conversation and the [redacted], and the available information regarding the alleged criminal activity, we would have found that these intercepted communications are not protected from disclosure by legal professional privilege under rule 73 of the Rules.

(ii) Intercepted communications containing defence strategies

474. Mr Bemba submits that the Prosecutor had possession of "conversations between Mr. Bemba and his Defence team, and amongst members of the Defence team, that the Pre-Trial Chamber characterised as concerning 'defence strategies'".[1042] He contends that "[t]hese conversations included discussions of […] potential Defence witnesses whose identity had not yet been revealed to the Prosecution, and internal Defence assessments as to how certain Defence witnesses had performed".[1043] He refers to five specific intercepted communications in support of his argument, including the 14 September 2013 Conversation and the [redacted], which have been addressed above.[1044]

475. We note that the Pre-Trial Chamber, in the relevant section of the Article 70 Confirmation Decision, refers only to the 14 September 2013 Conversation.[1045] It makes no reference to the intercepted communications that Mr Bemba argues it characterised as

[1039] Annex to Second Report of the Independent Counsel, pp. 29-30; original audio recording available at ICC-01/05-01/13-6-Conf-AnxB019.
[1040] Annex to Second Report of the Independent Counsel, p. 29.
[1041] Annex to Second Report of the Independent Counsel, pp. 6-10.
[1042] Appeal Brief, para. 108.
[1043] Appeal Brief, para. 108 (footnotes omitted).
[1044] Appeal Brief, para. 108, referring to Annex to the Second Report of the Independent Counsel, pp. 6-10, 29, 36; CAR-OTP-0079-0114; and CAR-OTP-0080-0228.
[1045] Article 70 Confirmation Decision, paras 47-48.

concerning 'defence strategies'.[1046] Accordingly, we would have dismissed Mr Bemba's arguments in this regard.

476. The conversations alleged by Mr Bemba to have included discussions of potential defence witnesses whose identity had not yet been revealed to the Prosecution were the 14 September 2013 Conversation and a further conversation on [redacted] regarding [redacted], the witness who was the subject of the 14 September 2013 Conversation.[1047] Although Mr Bemba refers to the description of the latter conversation in the Annex to the Second Report of the Independent Counsel, he has not included the relevant transcript or audio-file as part of his additional evidence request. We consider that, to the extent that conversations related to [redacted], whom the suspects in the article 70 investigation were apparently considering [redacted], those conversations, or the relevant parts thereof, are not protected from disclosure by legal professional privilege. Therefore, we would have dismissed Mr Bemba's argument that the identity of a prospective defence witness was improperly disclosed to the Prosecutor.

477. In support of his argument that the Prosecutor had possession of "internal Defence assessments as to how certain Defence witnesses had performed", Mr Bemba references two intercepted communications.[1048] These intercepted telephone calls took place between Mr Kilolo and Mr Mangenda on [redacted] and contained a discussion of how [redacted].[1049] In view of the contents of these conversations, we would have found that they are not protected from disclosure by privilege or confidentiality.

(iii) Allegedly confidential intercepted communications

478. Mr Bemba further submits that the Independent Counsel disclosed confidential information, "such as conversations between Counsel and actual or prospective witnesses",

[1046] Appeal Brief, para. 108, referring to Article 70 Confirmation Decision, paras 47-48.
[1047] Annex to the Second Report of the Independent Counsel, pp. 29, 36.
[1048] Appeal Brief, para. 108, referring to CAR-OTP-0079-0114; and CAR-OTP-0080-0228.
[1049] CAR-OTP-0079-0114; CAR-OTP-0080-0228; Annex to the First Report of the Independent Counsel, p. 17-19.

referring to three intercepted communications.[1050] We have assessed the intercepts referred to with a view to determining whether Mr Bemba's assertions are well founded.

479. The first two intercepted communications were telephone calls between Mr Kilolo and [redacted].[1051] The [redacted] took place [redacted].[1052] As noted in the Annex to the Second Report of the Independent Counsel, during this conversation, Mr Kilolo informed [redacted].[1053] In the [redacted], Mr Kilolo discussed with [redacted].[1054] [redacted] indicated that he would contact [redacted] to explain the process to him.[1055] In the Annex to the Second Report of the Independent Counsel, this conversation was [redacted].[1056]

480. In view of the information indicating that Mr Kilolo had been in contact with [redacted] and had given instructions [redacted], and that [redacted] would be prepared by the Defence [redacted], we would have found that the [redacted] are not protected from disclosure by legal professional privilege under rule 73 of the Rules.

[1050] Appeal Brief, para. 99, referring to CAR-OTP-0077-1407; CAR-OTP-0077-1414; CAR-OTP-0082-0663; CAR-OTP-0080-1369; and CAR-OTP-0080-1370. The final two items of evidence are audio files of the transcript CAR-OTP-0082-0663.
[1051] Appeal Brief, para. 99; CAR-OTP-0077-1407; CAR-OTP-0077-1414; Annex to Second Report of the Independent Counsel, pp. 25-27.
[1052] "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", 8 December 2010, ICC-01/05-01/08-1081-Anx, paras 27-31.
[1053] Annex to Second Report of the Independent Counsel, p. 25; CAR-OTP-0077-1407.
[1054] CAR-OTP-0077-1414 at 1415-1422; Annex to Second Report of the Independent Counsel, pp. 26-27.
[1055] CAR-OTP-0077-1414 at 1422.
[1056] Annex to the Second Report of the Independent Counsel, pp. 15, 27.

481. The third intercept was a [redacted] between Mr Kilolo and [redacted].[1057] The Annex to the Third Report of the Independent Counsel linked this conversation to a previous conversation between the same interlocutors.[1058] According to the Independent Counsel, [redacted].[1059] He further noted that, in the conversations of the [redacted], the interlocutors discussed [redacted].[1060] In the [redacted], Mr Kilolo provided [redacted].[1061]

482. As Mr Kilolo had been in contact with [redacted], we would have found that the [redacted] is not protected from disclosure by confidentiality.

(iv) Intercepted communications allegedly wrongly disclosed in their entirety

483. Mr Bemba further submits that the Independent Counsel almost always disclosed conversations in their entirety, contrary to the Single Judge's initial instruction that "exceptions to privilege be 'determined in light of, and limited by, the specific exceptions warranting such exception'".[1062] He highlights one example of such a conversation, which, he submits does not provide evidence of the commission of any offence.[1063] He argues that, even

[1057] CAR-OTP-0082-0663; Annex to the Third Report of the Independent Counsel, pp. 101-102.
[1058] Annex to the Third Report of the Independent Counsel, p. 101.
[1059] Annex to the Third Report of the Independent Counsel, pp. 87-97.
[1060] Annex to the Third Report of the Independent Counsel, pp. 98-100.
[1061] Annex to the Third Report of the Independent Counsel, p. 101; CAR-OTP-0082-0663.
[1062] Appeal Brief, para. 99.
[1063] Appeal Brief, para. 99, [redacted].

if the contrary were true, the disclosure to the Prosecutor "of the remainder of a case-related conversation between Mr. Bemba and his Lead Counsel" was not justified.[1064]

484. We note that Mr Bemba does not further specify the content of the allegedly privileged or confidential intercepted communication, and has not included the relevant transcript or audio-file as part of his additional evidence request. We are unable to reach a determination on this issue in the absence of further details and supporting documentation. Therefore, we would have dismissed the argument.

(v) Conclusion

485. Based on the foregoing, we would have rejected Mr Bemba's argument that privileged or confidential information was erroneously disclosed to the Prosecutor in the present case.

(c) Whether the failure to segregate the members of the Prosecution in the present case from the team conducting the investigation under Article 70 of the Statute affected the fairness of proceedings

486. Mr Bemba submits that the same prosecution team was responsible for Mr Bemba's prosecution and the article 70 investigation up until the issuance of the article 70 arrest warrants in the latter case, referring to a decision of the Single Judge and a filing of the Prosecutor in the *Bemba et al*. case in support of this contention.[1065] The Prosecutor does not address the veracity of this submission, but contends that Mr Bemba fails to show unfairness.[1066]

487. Mr Bemba's arguments in this regard appear to be contingent on his submission that privileged and confidential information between Mr Bemba and members of the Defence were wrongly disclosed to the Prosecutor.[1067] As we would have rejected this argument and Mr Bemba does not provide any further details as to the scope, quantity or content of the information transmitted to the Prosecutor, or the consequences of its disclosure, we would have been unable to determine whether the fairness of the trial was affected thereby. Therefore, we would have dismissed the argument.

[1064] Appeal Brief, para. 99.
[1065] Appeal Brief, paras 42-45.
[1066] Response to the Appeal Brief, para. 68.
[1067] Appeal Brief, paras 102, 104.

(d) Conclusion

488. In view of the foregoing considerations, we would have rejected this ground of appeal.

VI. FOURTH GROUND OF APPEAL: "THE CONTEXTUAL ELEMENTS WERE NOT ESTABLISHED"

A. Whether the Trial Chamber erred in relation to the *mens rea* requirement for crimes against humanity

1. Submissions of the parties

489. Mr Bemba argues that the Trial Chamber erred by limiting its enquiry to whether the alleged crimes against humanity were committed and failing to make the requisite finding that he knew that his conduct was part of a widespread attack on a civilian population.[1068] The Prosecutor responds that Mr Bemba's arguments are "based on the wrong premise that for a superior to be responsible under article 28 for crimes against humanity, *his own conduct* (i.e. his failure to prevent, punish or report) must be part of the attack against the civilian population" (emphasis in original).[1069] The Prosecutor contends that knowledge of the attack does not entail knowledge of the details of the attack.[1070]

2. Analysis

490. We note that importance of knowledge of the attack against the civilian population is highlighted in article 7 (1) of the Statute, which specifies that certain acts amount to crimes against humanity when committed as part of an attack, *with knowledge of the attack*. The Elements of Crimes assist the Court in interpreting and applying article 7 of the Statute by setting out the material elements of crimes against humanity. Regarding the requisite mental elements, article 30 of the Statute stipulates that persons shall be criminally responsible "only if the material elements are committed with intent and knowledge". An additional *mens rea* requirement is set out in the Elements of Crimes relating to the crimes against humanity of murder and rape – that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

[1068] Appeal Brief, paras 414-415.
[1069] Response to the Appeal Brief, para. 285.
[1070] Appeals Hearing Transcript 11 January 2018, p. 21, lines 4-5.

491. The question is whether this latter *mens rea* must be fulfilled by the direct perpetrator who physically carried out the criminal act in question, or by the accused, who may not have physically carried out the act but may bear criminal responsibility under a form of responsibility set out in articles 25 or 28 of the Statute, or by both the direct perpetrator and the accused. In support of his argument that this *mens rea* must be established in relation to the accused,[1071] Mr Bemba refers to paragraph 8 of the Introduction to the Elements of Crimes, which provides:

> As used in the Elements of Crimes, the term "perpetrator" is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply, *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.

492. This introductory text clarifies that, to the extent that they are capable of application in the particular context, all elements must be satisfied by the direct perpetrators, as well as by those accused under more remote forms of responsibility pursuant to articles 25 and 28 of the Statute.

493. We note that, in the case of those who are alleged to be criminally responsible as superiors, military commanders or persons so acting, article 28 of the Statute contains specific *mens rea* requirements that are tailored to reflect the distinct nature of the responsibility of such persons for having failed to exercise control properly over their subordinates. In such cases, it is required that the commanders or other superiors *knew, should have known or consciously disregarded information* that their subordinates were committing crimes within the jurisdiction of the Court. We consider that such knowledge must encompass not only the crimes committed but also the facts relevant to the context of those crimes that would bring them within the jurisdiction of the Court.

494. On the other hand, we are of the view that it would be inconsistent with the form of responsibility alleged under article 28 of the Statute to require that the accused fulfil the remaining *mens rea* requirements in relation to the material elements of the crimes against humanity of murder and rape under article 7 (1) of the Statute. In particular, we consider that, in cases where it is alleged that the accused should have known of or consciously disregarded

[1071] Appeal Brief, para. 416; Appeals Hearing Transcript 11 January 2018, p. 3, lines 16-20.

information about the commission of crimes, it would be incongruous with the form of responsibility alleged to require an examination of whether the accused actually knew that the conduct was part of an attack against the civilian population.

495. Based on the foregoing, we would have found that Mr Bemba has failed to show that the Trial Chamber committed a legal error by failing to make the requisite finding that he knew that the conduct was part of a widespread attack on a civilian population.

B. Whether the Trial Chamber erred in finding that there was an organisational policy

496. Mr Bemba takes issue with the cumulative factors used by the Trial Chamber to establish an organisational policy to commit an attack against a civilian population, alleging that "[i]n doing so, the Chamber made a series of legal and factual errors".[1072]

1. Link between any policy and the MLC

(a) Reliance on findings of knowledge and measures of other senior MLC commanders

497. Mr Bemba asserts that the Trial Chamber failed to establish a link between a policy to attack civilians and the MLC,[1073] as the Trial Chamber's findings concern the knowledge of and measures taken by Mr Bemba, rather than other senior MLC commanders.[1074] The Prosecutor observes that the Trial Chamber had made findings in relation to other MLC senior commanders' knowledge and/or failure to take measures.[1075]

498. We note that, in its determination of whether the relevant acts were committed "pursuant to or in furtherance of a State or organizational policy to commit such attack", the Trial Chamber relied on, *inter alia*, "its finding that senior MLC commanders, including Mr Bemba, were aware of the crimes being committed by the MLC troops".[1076] However, no cross-reference is provided to any such finding of the Trial Chamber. There is only reference to the section where Mr Bemba's failure to take all necessary and reasonable measures to

[1072] Appeal Brief, para. 422, referring to Conviction Decision, paras 675-687.
[1073] Appeal Brief, para. 425.
[1074] Appeal Brief, paras 423-424, referring to Conviction Decision, paras 684-687, 717, 734.
[1075] Response to the Appeal Brief, para. 301, referring to Conviction Decision, paras 582, 586-588, 595, 602, 604, 614, 620, 722.
[1076] Conviction Decision, para. 684.

prevent and repress the commission of crimes is discussed. That section contains no specific finding on senior MLC commanders' awareness of the commission of crimes.

499. However, we note that, as indicated by the Prosecutor, findings relevant to MLC commanders' awareness of the commission of the relevant crimes by the MLC troops are made elsewhere in the Conviction Decision. For instance, the Trial Chamber made findings:

- that "Mr Bemba and senior MLC officials [members of the General Staff[1077]] discussed media allegations of MLC crimes in the CAR";[1078]
- that Colonel Mondonga, listed among the MLC's "[s]enior military and political persons",[1079] transmitted to the MLC Chief of General Staff a file containing information on alleged crimes committed by MLC soldiers;[1080]
- that "Lieutenant Bomengo explained that Colonel Moustapha instructed him to collect all the items […] looted by the 28th Battalion";[1081]
- that before Mr Bemba's speech to, among others, civilians at PK12,[1082] Colonel Moustapha "calmed the civilians with promises that their grievances would be reported to Mr Bemba";[1083]
- that a commission of MLC officials, including a colonel and a G2 of the ALC,[1084] was sent to Zongo to collect information related to pillaged goods;[1085]
- that Mr Bemba discussed with senior MLC officials his decision to send a letter to the UN representative in the CAR regarding allegations of crimes by MLC soldiers;[1086]

[1077] Conviction Decision, para. 582, fn. 1795, referring to, *inter alia*, D49, Transcript of 20 November 2012, ICC-01/05-01/08-T-271-Red-Eng, p. 19, lines 4-23.
[1078] Conviction Decision, para. 582.
[1079] Conviction Decision, para. 396, fn. 1036.
[1080] Conviction Decision, para. 586.
[1081] Conviction Decision, para. 587, fn. 1817, referring to EVD-T-OTP-00393/CAR-DEF-0002-0001 at 0026.
[1082] Conviction Decision, para. 594.
[1083] Conviction Decision, para. 595.
[1084] Conviction Decision, para. 602, fn. 1879, referring to EVD-T-OTP-00392/CAR-DEF-0001-0155 at 0156.
[1085] Conviction Decision, paras 601-602.
[1086] Conviction Decision, paras 604-605.

- that in response to media reports on large-scale abuse in Sibut and Bozoum, Mr Bemba dispatched a delegation of MLC soldiers and officials, including Thomas Luhaka, the Secretary General of the MLC at the time, and Valentin Senga, a minister within the MLC.[1087]

500. We are satisfied that the findings listed above sufficiently support the conclusion that "senior MLC commanders […] were aware of the crimes being committed by the MLC troops",[1088] although they were not explicitly referenced by the Trial Chamber. It follows that Mr Bemba has not demonstrated that there is no basis in the evidence and in the Trial Chamber's findings for the statement that MLC commanders were aware of the crimes. We would have rejected this argument.

501. Regarding the Trial Chamber's finding of "the failure on the part of […] other senior MLC commanders to take action",[1089] we note that the Trial Chamber acknowledged that some measures were taken[1090] by MLC commanders including Colonel Mondonga[1091] and Colonel Moustapha.[1092] However, the Trial Chamber found that those measures "patently fell short of 'all necessary and reasonable measures' to prevent and repress the commission of crimes within [Mr Bemba's] material ability".[1093] Furthermore, we note the finding of the Trial Chamber that "there is no evidence that any action, including by Mr Bemba, was taken to pursue leads uncovered during the Zongo Commission's investigations".[1094] As indicated above, that commission was composed of MLC officials and is thus relevant to the issue of whether senior MLC commanders failed to take action. In view of the foregoing, we would have found that, contrary to Mr Bemba's submission, the statement regarding the MLC commanders' failure to take action does have a basis in evidence and in the Trial Chamber's findings. In addition, Mr Bemba does not point to any evidence undermining these findings or otherwise rendering them unreasonable.

[1087] Conviction Decision, paras 612, 614, fn. 1930.
[1088] Conviction Decision, para. 684.
[1089] Conviction Decision, para. 685.
[1090] Conviction Decision, para. 684 ("[T]here is no evidence that any other MLC leader took measures – *other than those addressed in Sections V(D) and VI(F)(4)* – to prevent or repress the crimes"; emphasis added).
[1091] Conviction Decision, para. 582.
[1092] Conviction Decision, paras 583, 595.
[1093] Conviction Decision, para. 731.
[1094] Conviction Decision, para. 722.

502. Regarding the argument that none of the MLC commanders who gave evidence "were asked whether the MLC had an organisational policy to attack the civilian population in the CAR",[1095] Mr Bemba does not explain why a purported failure to ask questions regarding measures taken or the organisational policy amounts to an error and how it affects the Trial Chamber's finding that there is no evidence of measures taken by MLC leaders. In view of the foregoing, we would have found that Mr Bemba has not demonstrated that the Trial Chamber erred in finding that there was a "failure on the part of […] other senior MLC commanders to take action"[1096] to prevent or repress the commission of crimes. We would have rejected these arguments of Mr Bemba.

503. As regards Mr Bemba's argument that the errors in the Trial Chamber's findings on his knowledge of crimes and measures taken to prevent their commission "also invalidate the Trial Chamber's attempt to build a bridge between the policy and the MLC",[1097] we would have rejected this argument, in light of our findings regarding his knowledge and measures.[1098]

(b) Failure to (i) substantiate findings on deliberate failure to prevent and (ii) properly address contradictory evidence

504. Mr Bemba argues that the Trial Chamber did not substantiate its statement that the failure to act by Mr Bemba and other senior MLC commanders was "'deliberate' and 'consciously aimed at encouraging' an attack".[1099]

505. We note that in support of its finding that "the failure on the part of […] other senior MLC commanders to take action was deliberately aimed at encouraging the attack",[1100] the Trial Chamber detailed a number of factors. They are listed in the paragraphs directly preceding this conclusion.[1101] Mr Bemba's argument thus misrepresents the Conviction Decision. Contrary to Mr Bemba's assertion, the Trial Chamber did make an attempt to substantiate its finding. We would have dismissed this argument of Mr Bemba for his failure to identify an error.

[1095] Appeal Brief, para. 424.
[1096] Appeal Brief, para. 423.
[1097] Appeal Brief, para. 426.
[1098] *See supra* IV.A-IV.D.
[1099] Appeal Brief, para. 427, referring to Conviction Decision, paras 159, 685.
[1100] Conviction Decision, para. 685.
[1101] Conviction Decision, paras 676-684.

506. Mr Bemba further argues that the Trial Chamber dismissed without reasoning evidence of Mr Bemba's and the MLC hierarchy's efforts "to instill [*sic*] discipline and knowledge of IHL in the MLC troops".[1102] In this regard, Mr Bemba refers to his arguments regarding the Trial Chamber's finding that the crimes were a result of Mr Bemba's failure to exercise control properly.[1103] However, as discussed earlier, we would have rejected those arguments.[1104]

507. Mr Bemba also refers to his personal instruction to the MLC troops, which, he submits, the Trial Chamber did not properly address.[1105] He makes reference to the Trial Chamber's finding that "Mr Bemba, on occasion, warned the MLC troops against […] 'misconduct'".[1106] This finding of the Trial Chamber is primarily based[1107] on the finding, made elsewhere in the Conviction Decision, that

> [s]ometime in November 2002, Mr Bemba addressed MLC troops and civilians at PK12, referring to, *inter alia*, allegations of crimes by MLC soldiers against the civilian population in the CAR. He specifically mentioned the MLC troops' "misbehaviour", "stealing", and "brutalis[ing]" of the civilian population, and warned his troops against further misconduct.[1108] [Footnotes omitted.]

508. The Trial Chamber held that "in such circumstances", this warning to the MLC troops "does not undermine [the] finding [that "any suggestion that the crimes were the result of an uncoordinated and spontaneous decision of the perpetrators, acting in isolation, is not a reasonable conclusion to be drawn from the evidence"]".[1109] "[S]uch circumstances"[1110] are the factors analysed by the Trial Chamber in relation to its finding that there was an organisational policy. Among these factors, the Trial Chamber considered Mr Bemba's failure to take all necessary and reasonable measures to prevent or repress the crimes,[1111] which it discussed elsewhere in the Conviction Decision. In reaching the conclusion that Mr Bemba failed to take all such measures, the Trial Chamber did consider contradictory

---

[1102] Appeal Brief, para. 427.
[1103] Appeal Brief, paras 394-413.
[1104] *See supra* paras 361-370.
[1105] Appeal Brief, para. 427, referring to Conviction Decision, para. 685.
[1106] Conviction Decision, para. 685.
[1107] *See* Conviction Decision, fn. 2117, referring to Sections V (D) (1), V (D) (4) of the Conviction Decision.
[1108] Conviction Decision, para. 594.
[1109] Conviction Decision, para. 685.
[1110] Conviction Decision, para. 685.
[1111] Conviction Decision, para. 684.

evidence, and in particular the evidence concerning the warning given by Mr Bemba in PK12.[1112] It also explained why these measures "patently fell short of 'all necessary and reasonable measures' to prevent and repress the commission of crimes".[1113] Mr Bemba has therefore not demonstrated that the Trial Chamber failed to properly substantiate its findings on the organisational policy and to properly address contrary evidence. We would have rejected his arguments.

(c) Conclusion

509. For the foregoing reasons, we would have found that Mr Bemba has not demonstrated an error in the Trial Chamber's findings regarding the link between the organisational policy and senior MLC commanders.

2. Modus operandi

510. Mr Bemba contends that there is no evidential basis for the Trial Chamber's finding on the MLC troops' *modus operandi* because the hearsay evidence of witnesses P6 and P9 is unreliable.[1114] He asserts that none of the relevant criminal acts referred to in the factual findings conform to the stated *modus operandi*.[1115] The Prosecutor argues that the MLC troops' *modus operandi* was not limited to house-to-house searches or "mop up" operations.[1116] She submits that the Trial Chamber did not rely solely on P6 and P9's evidence to find that MLC troops followed a *modus operandi*, but also considered the testimony of P63, V2, P178, P119, P87, P47 and other evidence.[1117]

511. We note that in the Trial Chamber's analysis of the MLC's *modus operandi*, one of the factors the Trial Chamber considered relevant to its determination that a policy to attack the civilian population existed,[1118] consists of two findings. The first one, based on the testimony of P6 and a statement of P9, is that "the MLC troops had a consistent '*modus operandi*'".[1119] The second finding details actions of the MLC troops:

[1112] Conviction Decision, para. 719.
[1113] Conviction Decision, paras 720-731.
[1114] Appeal Brief, paras 428-431, referring to Conviction Decision, paras 564, 676.
[1115] Appeal Brief, para. 432; Appeals Hearing Transcript 11 January 2018, p. 8, lines 20-24.
[1116] Response to the Appeal Brief, para. 305. *See also* para. 309.
[1117] Response to the Appeal Brief, para. 307; Prosecutor's Submissions further to the Hearing, para. 17.
[1118] Conviction Decision, para. 676.
[1119] Conviction Decision, para. 564.

> In this respect, other witnesses testified that the troops first confirmed, by the absence of retaliatory fire and by using scouts, that General Bozizé's rebels had already departed an area. The MLC soldiers then "mop[ped] it up", searching "house-to-house" for remaining rebels, pillaging goods, raping civilians, and intimidating and killing civilians who resisted.[1120] [Footnotes omitted.]

512. The Trial Chamber refers to the testimony of P6, P9, P47, P63, P87, P119 and P178 in support of the second finding.

513. Mr Bemba argues that neither P6 nor P9 provides evidence that the *modus operandi* including searching for rebels was consistently employed and that P6's evidence does not cover murder.[1121] However, we note that the evidence of P6 does include murder.[1122] The Trial Chamber cites this evidence in support of its finding that the MLC soldiers were "killing civilians who resisted".[1123] The evidence of P9 cited by the Trial Chamber in support of its finding regarding the MLC's consistent *modus operandi* also includes statements that the MLC killed those who refused to comply with their orders.[1124]

514. As regards "searching […] for remaining rebels", the Trial Chamber also referred to the evidence of P6 in that context, although the portions of the testimony which it cited contain no express mention of the purpose of the searching.[1125] However, elsewhere in his testimony, the witness explained that the MLC troops "went into the homes of private individuals, theoretically, in order to seek out the rebels of General Bozizé".[1126] Mr Bemba's assertion that no such evidence was elicited[1127] is therefore incorrect.

515. Mr Bemba also submits that P6 stated that the rapes and pillage did not appear to correspond to a fixed plan.[1128] However, the Trial Chamber did not find that the MLC troops acted pursuant to a fixed plan. The Trial Chamber's finding, based on P6's evidence, is that

---

[1120] Conviction Decision, para. 564.
[1121] Appeal Brief, paras 428-429.
[1122] Conviction Decision, para. 564, fn. 1746, referring to, among other sources, Transcript of 5 April 2011, ICC-01/05-01/08-T-95-Red-Eng, p. 15, lines 3-5 ("There were many cases of murder. There were many murders. Why? Because if there was any form of resistance, they would kill the person.").
[1123] Conviction Decision, para. 564.
[1124] Conviction Decision, para. 564, referring to EVD-T-OTP-00046/CAR-OTP-0010-0120 at 0156.
[1125] Conviction Decision, para. 564, fn. 1745, referring to among other sources, Transcript of 5 April 2011, ICC-01/05-01/08-T-95-Red-Eng, p. 12, lines 18-22; Transcript of 6 April 2011, ICC-01/05-01/08-T-96-Red2-Eng, p. 3, lines 5-17.
[1126] Transcript of 6 April 2011, ICC-01/05-01/08-T-96-Red2-Eng, p. 7, lines 12-13.
[1127] Appeal Brief, para. 429.
[1128] Appeal Brief, para. 429, quoting EVD-T-OTP-00044/CAR-OTP-0005-0099.

"the MLC troops had a consistent '*modus operandi*'".[1129] The significance of the evidence which Mr Bemba quotes in support of his present argument is therefore unclear. Furthermore, the witness also stated that the acts of pillaging resulted from Mr Bemba's failure to pay his troops and that neither Mr Bemba nor President Patassé prevented the commission of rapes.[1130] This evidence supports the Trial Chamber's overall finding.

516. With regard to the evidence of witness P9, we note that the portions of his statement quoted by the Trial Chamber do not readily support the finding that "the MLC troops had a consistent '*modus operandi*'".[1131] In these portions the witness did not speak of a *modus operandi*. Rather, he described the types of criminal acts committed by the troops.[1132] When asked how the rapes were committed, the witness stated that there were several methods.[1133] We note, however, that the said finding of the Trial Chamber is also based on the evidence of the above-mentioned witness P6. Mr Bemba has therefore not demonstrated that the finding has no evidential basis. Elsewhere in its discussion of the *modus operandi*, the Trial Chamber also quotes a portion of the transcript of witness P9's testimony, where he describes the manner in which the MLC troops pillaged in Bangui.[1134] This evidence does support the Trial Chamber's findings.

517. Insofar as Mr Bemba argues that witness P9 indicated that he had not witnessed the relevant events,[1135] we note that the Trial Chamber was aware of the witness's role as the Investigating Judge who investigated crimes committed during the 2002-2003 CAR Operation.[1136] In addition, the Trial Chamber's finding of a *modus operandi* was not exclusively based on P9's evidence but was also supported by reference to the testimony of several other witnesses, including those who personally saw the commission of crimes.[1137] We would therefore have found that Mr Bemba has failed to identify an error.

[1129] Conviction Decision, para. 564.
[1130] EVD-T-OTP-00044/CAR-OTP-0005-0099 at 0109.
[1131] Conviction Decision, para. 564.
[1132] EVD-T-OTP-00046/CAR-OTP-0010-0120 at 0156-0157, 0161.
[1133] EVD-T-OTP-00046/CAR-OTP-0010-0120 at 0161.
[1134] Transcript of 4 May 2011, ICC-01/05-01/08-T-104-Red3-Eng, p. 28, line 17 to p. 29, line 3.
[1135] Appeal Brief, para. 431.
[1136] Conviction Decision, para. 564.
[1137] Conviction Decision, fns 1742-1746.

518. Mr Bemba further argues that the Trial Chamber relied on the presence of multiple perpetrators involved in the crimes, but provided no reasoning as to how this demonstrates a distinctive *modus operandi*.[1138] We find that it was not unreasonable for the Trial Chamber to have considered this factor. In particular, the involvement of multiple perpetrators in crimes distinguishes them from crimes committed by perpetrators acting alone. In this sense, the consistent involvement of multiple perpetrators in different criminal acts may be relevant to the assessment of whether the perpetrators acted according to a *modus operandi*. We would therefore have found that Mr Bemba has not demonstrated that the Trial Chamber's failure to explain how this factor demonstrates a *modus operandi* amounts to an error.

519. Regarding Mr Bemba's argument that the individual criminal acts described in the Conviction Decision do not conform to the stated *modus operandi*,[1139] we note that the acts to which he refers – the rape of two unidentified girls in Bangui in a canal near P119's compound,[1140] the rape of eight women on a ferry docked at the Port Beach naval base in Bangui[1141] and the rape of a woman in the bush outside PK22[1142] – were committed away from civilian houses. Mr Bemba argues on this basis that these acts do not conform to the *modus operandi* established by the Trial Chamber, whereby the MLC troops searched "house-to-house" for remaining rebels.[1143]

520. We note that the findings of the Trial Chamber on the *modus operandi* of the MLC troops do not indicate that all acts forming part of that *modus operandi* were committed inside civilian houses. It is also not suggested that the rapes were committed in the course of the "house-to-house" searches for the remaining rebels. Paragraph 676 of the Conviction Decision,[1144] read together with the original finding in paragraph 564, refers to the "house-to-house" searches and rapes as separate acts.[1145] Furthermore, even if it were accepted that the acts listed by Mr Bemba did not conform in some aspects to the *modus operandi* established

[1138] Appeal Brief, para. 432.
[1139] Appeal Brief, para. 432.
[1140] Conviction Decision, para. 469.
[1141] Conviction Decision, para. 483.
[1142] Conviction Decision, para. 523.
[1143] Appeal Brief, para. 432.
[1144] "MLC solders searched 'house-to-house' for remaining rebels, *raping* civilians" (Conviction Decision, para. 676, emphasis added).
[1145] "searching 'house-to-house' for remaining rebels, […] raping civilians" (Conviction Decision, para. 564).

by the Trial Chamber, this inconsistency only concerns a limited number of acts and as such does not undermine the overall finding.

521. Mr Bemba further argues that the Trial Chamber found that the attack on Mongoumba was punitive and thus not undertaken to "mop up" rebels.[1146] However, he does not explain, nor is it apparent, how the finding that the attack on Mongoumba was punitive contradicts the finding of the *modus operandi*, which, apart from mopping up, included "intimidating and killing civilians who resisted".[1147]

522. Mr Bemba also argues that the acts committed in houses were "in the context of a break-in, which is no evidence of a 'house-to-house' search for rebels".[1148] We would have found that Mr Bemba fails to demonstrate inconsistency. In particular, he does not point to findings of the Trial Chamber that acts were committed "in the context of a break-in". Mr Bemba does not explain why such a context should be inconsistent with a "house-to-house" search for remaining rebels.

523. In view of the foregoing, we would have found that Mr Bemba has failed to demonstrate that no reasonable Trial Chamber could have been satisfied beyond reasonable doubt that "the acts of rape and murder were committed consistent with evidence of a *modus operandi*".[1149]

3. Reliance on general motives

524. Mr Bemba avers that the Trial Chamber erred by relying on the perpetrators' general motives as a factor proving the existence of a policy.[1150] With regard to "[t]he finding that the MLC condoned self-compensation because it was not paying the troops adequately", Mr Bemba claims that "[a]ny failure to pay cannot be construed by a reasonable finder of fact as indicative of a policy attributable to the MLC but, rather, as indicative of the failure of the system" under which "the CAR authorities 'provided…support to the MLC over the course of the 2002-2003 CAR Operation'".[1151] The Prosecutor responds that "the Chamber did not

[1146] Appeal Brief, para. 432.
[1147] Conviction Decision, para. 564.
[1148] Appeal Brief, para. 432.
[1149] Conviction Decision, para. 676.
[1150] Appeal Brief, para. 433.
[1151] Appeal Brief, para. 434, quoting Conviction Decision, para. 412.

consider '[a]ny failure to pay' to be *per se* indicative of a policy. Rather, the Chamber found that the MLC hierarchy's tacit approval of the MLC troops' self-compensation through crimes indicated, together with other factors, the existence of such a policy".[1152] The Prosecutor states that "[t]hese findings do not contradict the Chamber's conclusion that CAR authorities provided logistical support to the MLC" as it "did not find that CAR authorities otherwise gave financial compensation to MLC troops".[1153]

525. We note that the Trial Chamber based its finding that there was an organisational policy, among other factors, on the perpetrators' general motives. However, the Trial Chamber does not appear to have directly relied on the motives of the perpetrators of the crimes. Rather, the Trial Chamber found these motives to be "indicative of the attack being, at least, condoned by the MLC hierarchy".[1154] Regarding the perpetrators, the Trial Chamber referred to its finding that "[t]he MLC troops in the CAR did not receive adequate financial compensation and, in turn, self-compensated through acts of pillaging and rape".[1155] Elsewhere in the Conviction Decision, the Trial Chamber found that the CAR authorities provided forms of support to the MLC over the course of the 2002-2003 CAR Operation, including food and money (primarily for the purpose of buying food).[1156]

526. We are not persuaded by Mr Bemba's contention that the finding that the CAR authorities provided the MLC troops with food and money undermines the conclusion that the MLC hierarchy at least condoned the attack on the civilian population. We note that the Conviction Decision does not explicitly address the issue of whether the CAR authorities or the MLC were responsible for supplying provisions to the MLC troops operating in the CAR. Rather, the Trial Chamber found that the MLC soldiers were not adequately compensated, were motivated by the need to self-compensate and punish civilians, and that the MLC hierarchy tacitly approved such conduct.

[1152] Response to the Appeal Brief, para. 311 (footnotes omitted).
[1153] Response to the Appeal Brief, para. 312.
[1154] Conviction Decision, para. 678.
[1155] Conviction Decision, para. 678, referring to paras 565-567.
[1156] Conviction Decision, para. 412.

527. In view of the foregoing, we would have found that it was not unreasonable for the Trial Chamber to rely on the general motives of the troops as well as the tacit approval of the MLC hierarchy as indicative of a policy to attack the civilian population.

528. Mr Bemba further argues that the finding that the MLC hierarchy tacitly approved pillaging to make ends meet is erroneous, as a policy cannot be inferred solely from the absence of action.[1157] We note, however, that the Trial Chamber did not infer the existence of an organisational policy "*solely* from the absence of governmental or organizational action".[1158] The Trial Chamber relied on a number of other factors, including the repetition of such acts over four and a half months and a wide geographic area, the consistent *modus operandi* and evidence of the soldiers' motives, the scale and degree of organisation of the pillaging, inconsistency in the training of the troops and the knowledge of Mr Bemba and senior commanders of the crimes, together with their failure to take action.[1159] Mr Bemba's argument is therefore incorrect.

529. For the foregoing reasons, we would have found that Mr Bemba failed to demonstrate that the Trial Chamber erred in relying on the MLC's general motives to conclude that there was an organisational policy.

4. Reliance on pillaging

530. Mr Bemba submits that "the Trial Chamber erred in finding that scale and organisation of pillage, a war crime, can be used to prove a policy to commit an attack which must involve, [*sic*] the multiple commission of acts referred to in Article 7(1), in this case, rape and murder".[1160] He adds that the finding regarding the presence of MLC "commanders generally at a location without an evidential link to presence at the scene of the crime or knowledge about the crime is not sufficient to attribute any policy to the MLC as an organisation".[1161] The Prosecutor submits that "[t]he Chamber properly considered the scale and degree of organisation of […] acts of pillage as well as the level of knowledge and involvement of the MLC hierarchy as indicating the existence of an MLC policy to attack the civilian

[1157] Appeal Brief, para. 435, referring to Elements of Crimes, fn. 6.
[1158] Elements of Crimes, fn. 6 (emphasis added).
[1159] Conviction Decision, paras 676-685.
[1160] Appeal Brief, para. 437.
[1161] Appeal Brief, para. 438, referring to Conviction Decision, para. 680.

population".[1162] In this regard, she argues that to establish a policy a trial chamber may rely on any fact, irrespective of whether it is legally characterised as pillaging.[1163]

531. Regarding Mr Bemba's argument that the Trial Chamber erred in law in relying on pillage, a war crime, to prove a policy to commit an attack, we note that article 7 (2) (a) of the Statute reads as follows:

> "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

532. Pursuant to this definition, an attack must involve the commission of "acts referred to in paragraph 1" of article 7 of the Statute, and thus acts constituting crimes against humanity. However, this requirement with respect to the kind of acts that may constitute an attack directed against any civilian population does not extend to proving that the attack was committed "pursuant to or in furtherance of a State or organizational policy". Indeed, we note that the policy may be established not only by reference to the criminal acts that make up the attack. Regard may also be had to broader considerations, including factors that are not criminal acts at all, for example, the organisational context in which the crimes occurred.[1164] We therefore consider that it is not inconsistent with article 7 (2) (a) of the Statute to rely on the evidence of commission of war crimes to prove an "organizational policy" to commit an attack involving acts constituting crimes against humanity.

533. In the present case, the Trial Chamber considered the following, among the factors of which "a cumulative consideration" led it to conclude that a policy to attack the civilian population existed:

> the scale on which, and degree of organization with which, the acts of pillaging – during the course of which many of the acts of rapes and murder were committed – were carried out, as well as the level of knowledge and involvement of the MLC hierarchy. In PK12, for example, where the MLC maintained a presence for most of the

[1162] Response to the Appeal Brief, para. 314.
[1163] Appeals Hearing Transcript 11 January 2018, p. 24, lines 13-18; Response to the Appeal Brief, paras 315-316, referring to Conviction Decision, para. 160 and *Kenya* Authorisation of Investigation Decision, paras 87-88.
[1164] The Introduction to the Crimes Against Humanity section of the Elements of Crimes offers guidance in indicating that "[i]t is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population".

> 2002-2003 CAR Operation, pillaged goods were stored at MLC bases. Further, pillaged goods were regularly transported back to the DRC, in particular, through Zongo, for distribution or sale. Moreover, there is consistent evidence that senior MLC commanders in the CAR benefited from and condoned acts of pillaging. [1165] [Footnotes omitted.]

534. It was not suggested that pillaging was part of that policy, nor that pillaging was part of the attack directed against the civilian population.[1166] Rather, pillaging was considered as an indicator of the existence of that policy. We would therefore have found that Mr Bemba failed to demonstrate that the Trial Chamber erred in law.

535. Mr Bemba further argues that the Trial Chamber's reliance on pillaging is invalidated by errors of law in its findings on pillaging.[1167] These errors are discussed elsewhere in the present opinion.[1168] In view of our conclusions regarding the law on pillaging, we would have found that the present argument of Mr Bemba fails.

536. Turning to errors of fact alleged by Mr Bemba, we note that the Trial Chamber's finding that there was an organisational policy is based on, *inter alia*, "the scale on which, and degree of organization with which, the acts of pillaging – during the course of which many of the acts of rapes and murder were committed – were carried out".[1169] The Trial Chamber also referred to "consistent evidence that senior MLC commanders in the CAR benefited from and condoned acts of pillaging".[1170] The Trial Chamber also noted "similar indications relating to acts of murder and rape".[1171]

537. Mr Bemba submits that "there is no evidential basis, nor is one identified, to support the conclusion that the 'MLC hierarchy' knew that rape and murder were being committed *in the context of pillaging*" (emphasis added).[1172] However, we note that the Trial Chamber made no such conclusion. Although, as discussed previously, the Trial Chamber made findings enabling the conclusion that MLC commanders knew that crimes, and thus rape and murder,

---

[1165] Conviction Decision, paras 676, 679.
[1166] The Trial Chamber found that the attack involved the multiple commission of rape and murder – acts listed in paragraph 1 of article 7 of the Statute (Conviction Decision, paras 671-672).
[1167] Appeal Brief, para. 436.
[1168] *See infra* VI.C.
[1169] Conviction Decision, para. 679.
[1170] Conviction Decision, para. 679.
[1171] Conviction Decision, para. 680.
[1172] Appeal Brief, para. 437.

were committed, it did not find that they knew that rape and murder were committed in the context of pillaging. Furthermore, the Trial Chamber did not rely on evidence of benefiting from pillage to prove, as Mr Bemba contends, that "acts of rape and murder were condoned by the MLC as an organisation".[1173] Mr Bemba has failed to explain why or how the Trial Chamber erred in failing to make such a specific finding regarding the MLC commanders' knowledge.

538. Mr Bemba further argues that the Trial Chamber erred by failing to make a link between the presence of MLC commanders at a location and the existence of a policy.[1174] However, the finding of the Trial Chamber that there was an organisational policy is not directly based on the presence of MLC commanders in areas where criminal acts were committed. The Trial Chamber referred to the MLC commanders' presence in certain areas in connection with "indications relating to acts of murder and rape", which were "similar" to those with respect to pillaging, discussed in the preceding paragraph of the Conviction Decision.[1175] It is not entirely clear which indications the Trial Chamber found to be similar. The preceding paragraph makes reference to the scale of pillaging and the degree of organisation, as well as to "the level of knowledge and involvement of the MLC hierarchy".[1176] It is also not clear whether the Trial Chamber considered these indications to be similar to the extent that the MLC hierarchy's "knowledge and involvement", found to be relevant in relation to pillaging, was equally relevant in relation to murder and rape. At any rate, the finding of the Trial Chamber does not go as far as to directly link the presence of the commanders with the existence of an organisational policy, as Mr Bemba suggests. Mr Bemba does not further argue or explain how the absence of such a finding impacts the overall conclusion of the Trial Chamber regarding the existence of a policy. We would therefore have found that Mr Bemba failed to identify an error.

539. In view of the foregoing, we would have found that Mr Bemba failed to demonstrate that the Trial Chamber erred in relying on pillaging to conclude that there was an organisational policy.

[1173] Appeal Brief, para. 437.
[1174] Appeal Brief, para. 438.
[1175] Conviction Decision, para. 680.
[1176] Conviction Decision, para. 679.

5. Significance of orders to exercise vigilance and use force against civilians

540. Mr Bemba takes issue with the inferences drawn by the Trial Chamber from its "finding that 'MLC troops in the CAR received orders to exercise vigilance against civilians in the CAR, including the use of force towards them' to prove the existence of the policy element".[1177] He claims that the evidence shows that the order to exercise vigilance towards the civilian population "makes no reference to any use of force" and "[o]n its face […] is a reasonable order to issue in a combat situation [which] does not require, either expressly or impliedly, MLC troops to commit crimes against civilians".[1178] The Prosecutor contends that the Trial Chamber's finding was not based solely on the order cited by Bemba.[1179] She observes that "[t]here is no suggestion in the Chamber's reasoning that this specific order *expressly* referred to the 'use of force'".[1180]

541. Among the factors relevant to its determination that a policy to attack the civilian population existed, the Trial Chamber recalled "its finding that MLC troops in the CAR received orders to exercise vigilance against civilians in the CAR, including the use of force towards them", which the Trial Chamber found "to be indicative that, at least, the commanders on the ground were aware of and authorised such treatment".[1181]

542. Mr Bemba argues that no reasonable finder of fact could conclude that this "ordinary military order", which, he submits, made no reference to any use of force, is indicative of the existence of a policy to attack the civilian population.[1182] We note that Mr Bemba's argument refers to only one of the orders reflected in the Trial Chamber's discussion.[1183] However, the Trial Chamber's finding was based on evidence of various orders received by the troops, including orders to kill or shoot at civilians, to treat everyone they encountered in the CAR as the enemy, and to shoot anything that moved.[1184] We would have found that Mr Bemba's argument is based on a misrepresentation of the Trial Chamber's finding and that it therefore fails.

[1177] Appeal Brief, para. 439, quoting Conviction Decision, para. 682.
[1178] Appeal Brief, para. 440, referring to Conviction Decision, para. 568, fn. 1765.
[1179] Response to the Appeal Brief, para. 319, referring to Conviction Decision, paras 568, 573.
[1180] Response to the Appeal Brief, para. 320, referring to Conviction Decision, para. 568 (footnotes omitted).
[1181] Conviction Decision, para. 682.
[1182] Appeal Brief, para. 440.
[1183] Conviction Decision, para. 568, quoting EVD-T-OTP-00703/CAR-D04-0002-1641.
[1184] Conviction Decision, paras 568-570, 573.

543. Mr Bemba further contends that the evidence regarding "a small number of lower level commanders", who "authorised such treatment", is insufficient to prove a policy attributable to the MLC.[1185] Mr Bemba does not explain the basis for his argument that the orders were issued by a "small number of lower level commanders"[1186]. The Trial Chamber noted that the witnesses "identified different sources of the orders to use force against civilians, including Mr Bemba, unidentified MLC officers, Colonel Moustapha, and President Patassé".[1187] In these circumstances, the Trial Chamber did not reach any conclusion as to the exact sources of the orders.[1188] It is not apparent from the Trial Chamber's finding how many commanders issued the orders in question and what their ranks were, although the Trial Chamber does refer to orders issued by Colonel Moustapha,[1189] who does not appear to have been a lower level commander. Finally, even if Mr Bemba's assertion were accepted, he does not explain why it would be erroneous for the Trial Chamber to rely on orders issued by a small number of lower level commanders in its determination of whether there was an organisational policy.

544. We would have found that Mr Bemba has not demonstrated that the Trial Chamber erred in relying on orders to exercise vigilance when determining that there was an organisational policy to attack the civilian population.

6. Reliance on factors not available on the evidence

545. Mr Bemba submits that the Trial Chamber "relies on factors which have no basis in the record, or are the product of the Trial Chamber's misappreciation or misstatement of the evidence".[1190] He argues that the Mongoumba attack does not assist in establishing an organisational policy.[1191] The Prosecutor contends that Mr Bemba's "undeveloped submission does not show any error in the Chamber's reasoning".[1192] She submits that Mr

[1185] Appeal Brief, para. 441.
[1186] Appeal Brief, para. 441.
[1187] Conviction Decision, para. 569.
[1188] Conviction Decision, para. 569.
[1189] Conviction Decision, paras 568 (it is noted, however, that the Trial Chamber was "unable to reach any conclusion as to the exact sources" of the order in issue), 571.
[1190] Appeal Brief, para. 442.
[1191] Appeal Brief, para. 444, referring to Conviction Decision, para. 681.
[1192] Response to the Appeal Brief, para. 324 (footnote omitted).

Bemba merely disagrees with the Trial Chamber's reasoning and findings without showing an error.[1193]

546. Mr Bemba argues that the Trial Chamber's finding that the inconsistent training of the MLC was indicative of a policy "was not a finding open to a reasonable Trial Chamber" and that the Trial Chamber provided no reasoning as to how the MLC Code of Conduct, which prohibited theft,[1194] was consistent with the policy to attack civilians.[1195]

547. We note that the Trial Chamber relied, for the purpose of determining whether there was an organisational policy, on its findings regarding "apparent inadequacies in the Code of Conduct" and the inconsistent training of the MLC troops.[1196] In its discussion of the MLC Code of Conduct the Trial Chamber noted that, while the MLC Code of Conduct included, as "*infractions*", murder of a civilian or "of some other person" and rape, it did not provide the meaning of the phrase "some other person" and details of the distinction between civilians and combatants.[1197] The Trial Chamber also found that the MLC Code of Conduct contained no provision prohibiting the crime of pillaging and, rather, referred to the offence of "Failure to verify and safeguard the spoils of war in the camp", without defining "spoils of war".[1198] The Trial Chamber noted that the MLC Code of Conduct was written in French only and that the commanders were responsible for translating it into Lingala for dissemination usually orally to lower ranked soldiers.[1199] As discussed earlier in this opinion, we would have found, in the context of causation, that the Trial Chamber did not err in drawing negative inferences from the MLC Code of Conduct's failure to specify that pillaging was prohibited.[1200] Regarding the training of the troops, the Trial Chamber noted that it was rapid, not universally applied and inconsistent in content.[1201] Having regard to these "apparent inadequacies" of the MLC Code of Conduct, including its approval of the taking of spoils of war, and the failure to ensure that the troops were adequately and consistently trained in their obligations towards the civilian population, we would have found that the relevance of these

[1193] Response to the Appeal Brief, para. 327 (footnotes omitted).
[1194] Appeals Hearing Transcript 11 January 2018, p. 9, line 16.
[1195] Appeal Brief, para. 442.
[1196] Conviction Decision, para. 683, referring to paras 391-393.
[1197] Conviction Decision, para. 392.
[1198] Conviction Decision, para. 392.
[1199] Conviction Decision, para. 393.
[1200] *See supra* IV.E.4(c).
[1201] Conviction Decision, para. 391.

factors to the existence of an organisational policy to attack the civilian population is apparent in the context. Therefore, we would have concluded that the Trial Chamber did not err in failing to provide reasoning with respect to its reliance on the "inadequacies" of the MLC Code of Conduct and inconsistent training, nor was it unreasonable for the Trial Chamber to include these factors among those it considered in its determination of whether an organisational policy existed.

548. Mr Bemba further challenges the Trial Chamber's reliance on the commission of individual criminal acts over a broad geographical area and temporal period, arguing that "[t]his finding is contingent on the MLC operating independently of other forces in the field, and not being 're-subordinated' to the CAR military hierarchy" (footnote omitted), which, he submits, are erroneous findings.[1202] We note that this argument of Mr Bemba is premised on his challenge to the Trial Chamber's findings that the MLC operated independently of other forces in the field and was not resubordinated to the CAR military hierarchy. As we would have rejected Mr Bemba's challenge to these findings,[1203] we would have necessarily rejected the present argument.

549. Among the factors relevant to its determination that a policy to attack the civilian population existed, the Trial Chamber recalled its finding that "MLC soldiers waged a punitive attack on Mongoumba, where only civilians were present at the relevant time".[1204] Mr Bemba argues that there is no evidentiary basis for the finding that Mr Bemba knew that only civilians were present in Mongoumba at the time of the attack by the MLC soldiers.[1205]

550. We note our conclusion that the Trial Chamber did not err in finding that Mr Bemba "knew of the punitive attack on Mongoumba, where only civilians were present".[1206] We would therefore have rejected Mr Bemba's present argument.

551. Finally, Mr Bemba contends that the reliance on the attack on Mongoumba contradicts the Trial Chamber's finding on the MLC troops' *modus operandi* in that the attack on

[1202] Appeal Brief, para. 443.
[1203] *See supra* IV.B.3.
[1204] Conviction Decision, para. 681.
[1205] Appeal Brief, para. 444.
[1206] *See supra* paras 300-306.

Mongoumba "did not employ such a mode of operation".[1207] In view of our conclusion on Mr Bemba's challenge to the finding on the MLC troops' *modus operandi*,[1208] we would have rejected the present argument as it fails to demonstrate an error.

7. Conclusion

552. In view of the foregoing, we would have rejected this sub-ground of Mr Bemba's appeal.

C. Whether the Trial Chamber erred in its consideration of pillage

553. Mr Bemba argues that the Trial Chamber's findings in relation to the war crime of pillaging were affected by a number of legal and factual errors. These arguments will be examined below.

1. Whether the Trial Chamber erred in its legal interpretation of the war crime of pillaging

554. Mr Bemba argues that the Trial Chamber erred in law in failing to find that the appropriation of property must be proven to be unlawful.[1209] He submits that the Trial Chamber's failure to recognise the qualifier that the appropriation be unlawful "places the law at odds with its previous practical ability to balance humanitarian and military considerations in this area".[1210] In response, the Prosecutor submits that the "elements of pillage adequately ensure that the limited class of lawful military appropriations are not penalised".[1211] She submits that "the elements of pillage adequately ensure that the limited class of lawful military appropriations are not penalised", highlighting in this regard that none of the lawful kinds of appropriations may be conducted for private gain.[1212]

555. Articles 8 (2) (b) (xvi) and 8 (2) (e) (v) of the Statute provide that pillaging a town or place constitutes a war crime in international and non-international armed conflicts respectively. The *chapeaus* to the relevant sub-paragraphs refer to the war crime of pillaging as a serious violation of the laws and customs applicable in armed conflicts, "within the established framework of international law".

[1207] Appeal Brief, para. 444.
[1208] *See supra* VI.B.2.
[1209] Appeal Brief, paras 445, 447-450.
[1210] Appeal Brief, para. 450.
[1211] Response to the Appeal Brief, para. 329.
[1212] Response to the Appeal Brief, paras 329, 334.

556. The *Introduction to War Crimes* in the Elements of Crimes indicates that the elements shall be interpreted within the established framework of the international law of armed conflict. The *General Introduction* to the Elements of Crimes explains that the "requirement of 'unlawfulness' found in the Statute or in other parts of international law, in particular, international humanitarian law, is generally not specified in the elements of crimes". According to the Elements of Crimes relevant to the war crime of pillaging, the perpetrator must have appropriated certain property, without the consent of the owner.[1213] The perpetrator must also have intended to deprive the owner of the property and to appropriate it for private or personal use. The footnote to this element provides that "[a]s indicated by the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging" ("Footnote 62").

557. Based on the Elements of Crimes, the Trial Chamber found that, for the appropriation of property to amount to the war crime of pillaging, it must be established that the perpetrator intended to appropriate the property for private or personal use.[1214] It considered that this "'special intent' requirement" distinguishes pillage from other types "of appropriation of property which may in certain circumstances be carried out lawfully" such as seizure or booty.[1215] The Trial Chamber found that the reference to military necessity in Footnote 62 clarified that "the concept of military necessity is incompatible with a requirement that the perpetrator intended the appropriation for private or personal use", but did not establish an exception to the absolute prohibition on pillaging.[1216]

558. Mr Bemba argues that these findings were in error and disputes the Trial Chamber's interpretation of the definition of pillaging. Mr Bemba contends that the Elements of Crimes, in particular Footnote 62, shows that the Prosecutor must prove that the appropriation was

[1213] According to its general introduction, the Elements of Crimes is to "assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute". The additional contextual elements are that the conduct of pillaging must have taken place in the context of and have been associated with an international armed conflict, and the perpetrator must have been aware of the factual circumstances that established the existence of an armed conflict.
[1214] Conviction Decision, para. 120.
[1215] Conviction Decision, para. 120.
[1216] Conviction Decision, para. 124.

unlawful and not justified by military necessity and/or that the property appropriated "had no ostensible military purpose".[1217]

559. We note that an absolute prohibition on pillaging is a part of customary[1218] and conventional[1219] international law, applicable to both international and non-international armed conflicts.

560. Nevertheless, the Hague Regulations, and the Geneva Conventions and Additional Protocols do not provide absolute protection for public or private property in armed conflicts. Indeed, in certain circumstances, the Hague Regulations and Geneva Conventions specifically allow for the appropriation of property without the consent of the owners.[1220] The prohibition on pillaging, which is absolute in terms and admits of no exceptions or justifications, is therefore not a prohibition on the appropriation of property without the consent of the owners *per se*, but rather targets a particular type of wartime looting by soldiers. The ICRC commentary on article 33 of the Fourth Geneva Convention explains the purpose of the prohibition on pillaging in the following terms:

> The purpose of this Convention is to protect human beings, but it also contains certain provisions concerning property, designed to spare people the suffering resulting from the destruction of their real and personal property (houses, deeds, bonds, etc., furniture, clothing, provisions, tools, etc.).
>
> This prohibition is an old principle of international law, already stated in the Hague Regulations in two provisions: Article 28, which says: "The pillage of a town or place, even when taken by assault, is prohibited", and Article 47, which reads: "Pillage is formally forbidden". The Geneva Convention of 1949 omitted the Word "formally" in order not to risk reducing, through a comparison of the texts, the scope of other provisions which embody prohibitions, and which, while they contain no adverb, are nevertheless just as absolute in character.
>
> This prohibition is general in scope. It concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay. […] It guarantees all types of property,

---

[1217] Appeal Brief, paras 451, 454.
[1218] *See* ICRC Database on Customary International Humanitarian Law, "Rule 52. Pillage", accessed at: https://ihl-databases.icrc.org/customary-ihl/eng/print/v1_rul_rule52.
[1219] *See e.g.* Articles 28, 47 of The Hague Convention II; articles 28, 47 of The Hague Convention IV, article 7 of The Hague Convention IX; article 33 of Geneva Convention IV; article 4 (2) (g) of Additional Protocol II.
[1220] *See* The Hague Convention II Articles 49, 51, 52. *See also* The Hague Convention IV, Articles 48, 49, 51, 52, 53. *See also* articles 55, 57 of Geneva Convention IV.

whether they belong to private persons or to communities or the State. [1221] [Footnotes omitted.]

561. We note that the Elements of Crimes specify *inter alia* that, in order to qualify as an act of pillaging, the appropriation must be intended for private or personal use. This is the defining element that conceptually distinguishes the war crime of pillaging from lawful appropriations of property without the consent of the owner. It also serves to denote one of the core differences between pillaging and other crimes concerning the expropriation of property (such as the extensive appropriation of property criminalised under article 8 (2) (a) (iv) of the Statute and seizure of enemy property criminalised under articles 8 (2) (b) (xiii) and 8 (2) (e) (xii) of the Statute). In relation to the extensive appropriation of property and the seizure of enemy property, the Elements of Crimes explicitly specify that the appropriation must not be justified or required by military necessity. In this context, seizures and appropriations for military purposes or use are unlawful unless they are required by military necessity. However, no such justification or requirement is set out for the war crime of pillaging. Indeed, it is unnecessary to consider any potential justification of military necessity in the context of pillaging because the requirement that the appropriation be intended for private or personal use precludes any military motivation.[1222]

562. We consider that this interpretation of the law on pillaging is supported when regard is had to the drafting history of the Elements of Crimes. It has been reported that discussions on pillaging centred on the difficulty of properly defining the concept, which international law had not previously described in adequate detail, and the need to exclude lawful justification from this definition. Commentators agree that the outcome of this discussion was the inclusion of the requirement that the appropriation be intended for private or personal use, which was considered to suitably capture the parameters of the crime of pillaging.[1223]

563. Based on the foregoing, we would have found that Mr Bemba has failed to show that the Trial Chamber committed a legal error when it found that "if the Prosecution proves that

---

[1221] Geneva Convention IV.
[1222] Cryer *et al.*, *An Introduction to International Criminal Law and Procedures*, 2nd ed, Cambridge University Press, 2010, p. 303.
[1223] Hosang H., writing in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers Inc. 2001, pp. 176-177. *See also* Dörmann K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, pp. 464-465.

property was appropriated for private or personal use, it is not obliged to 'disprove military necessity for the purpose of a charge under Article 8(2)(e)(v) of the Statute'". Accordingly, we would have dismissed Mr Bemba's arguments that the Prosecutor must prove that the appropriation was unlawful and not justified by military necessity and/or that the property appropriated "had no ostensible military purpose". In view of this conclusion, we would not have addressed Mr Bemba's arguments that these alleged errors materially affected the findings on pillage.

2. Whether the Trial Chamber misapplied the concept of "private or personal use"

564. Mr Bemba argues that "the Trial Chamber erred by employing an overly narrow definition of personal or private use" in failing "to recognise the military context in which the items were appropriated".[1224] In response, the Prosecutor contends that the circumstances of the appropriations in the present case "cannot remotely be considered to fall within the limited class of appropriations permitted by international law".[1225]

565. The Trial Chamber found "beyond reasonable doubt that the perpetrators of the acts identified above intended to appropriate the property for private or personal use".[1226] It based this conclusion on the following considerations:

> 643. […] MLC soldiers personally used pillaged goods, in particular, food, beverages, and livestock, as well as furniture, and other wooden items, that could be burned as firewood. The Chamber has further found that MLC troops traded certain pillaged goods for other items, such as alcohol, or forced civilians to buy back goods taken from them or their neighbours. Pillaged goods were also sent to the DRC where they were, *inter alia*, kept by the soldiers who had pillaged them, distributed to other soldiers or commanders, placed at the "disposal of the party", or sold. The items were appropriated from civilians after the departure of General Bozizé's rebels from the relevant area, and were clearly not appropriated out of military necessity. The uses noted above, when considered in conjunction with the nature of the items appropriated – namely, personal effects, household items (including appliances and furniture), business supplies, tools, money, vehicles, and/or livestock – indicate that the perpetrators intended to deprive civilians of their property for their own personal use and that of other MLC soldiers and commanders, or the private use of the MLC entity.

[1224] Appeal Brief, paras 459-460.
[1225] Response to the Appeal Brief, para. 336.
[1226] Conviction Decision, para. 645.

> 644. The above is also consistent with the Chamber's findings regarding the motives of the perpetrators, in particular, self-compensation in the absence of adequate payment and rations. In this regard, the Chamber notes that there is insufficient evidence to support a finding that the so-called Article 15, although applied by the MLC soldiers, was a formalised system of compensation adopted by the MLC. At most, the Chamber considers that the MLC hierarchy, which created the relevant circumstances, tacitly approved the measures that MLC soldiers took, including pillaging, to "make ends meet".[1227] [Footnotes omitted.]

566. Mr Bemba does not appear to take issue with the facts and circumstances outlined above. Rather, he argues that the Trial Chamber's analysis failed to take into account the military context of the appropriations and their potential for military use. His arguments appear to be closely related to his legal arguments that appropriations that have a military purpose are lawful and that "when a warring party takes food away from civilians to feed its troops, it is by definition not pillage".[1228]

567. The assessment of whether an appropriation is for personal or private use when the items appropriated are "ostensibly capable of military use", as Mr Bemba argues in the context of this case, necessarily requires a consideration of all the circumstances surrounding the appropriation. Mr Bemba has not demonstrated that the military context of the appropriations, to which he refers, and the fact that the pillaged items may have been used by third parties rather than the individual soldiers render the Trial Chamber's finding of private or personal use unreasonable. In our view, given the nature of the property taken and the circumstances detailed in the Conviction Decision regarding the way in which the property was subsequently dealt with, it was not unreasonable for the Trial Chamber to consider the appropriations to be intended for private or personal use and to amount to pillaging.

568. Mr Bemba has failed to demonstrate that no reasonable Trial Chamber could have been satisfied beyond reasonable doubt that the perpetrators of pillaging intended to appropriate the property for private or personal use. Accordingly, we would have rejected his arguments.

[1227] Conviction Decision, paras 643-644.
[1228] Appeal Brief, paras 453-454.

VII. FIFTH GROUND OF APPEAL: "THE TRIAL CHAMBER ERRED IN ITS APPROACH TO IDENTIFICATION EVIDENCE"

569. Under the fifth ground of appeal, Mr Bemba argues that despite "significant obstacles to identification", the Trial Chamber found that the perpetrators of the crimes of which he was convicted were MLC soldiers.[1229] Mr Bemba submits that the Trial Chamber failed to deliver a reasoned judgment as to the identities of the perpetrators[1230] and, with respect to some of the findings, altered dates to fit the movements of the MLC.[1231]

A. Whether the Trial Chamber failed to deliver a reasoned judgment as to the identities of the perpetrators of rape and pillage

1. Cumulative assessment of identification criteria

570. Mr Bemba challenges the Trial Chamber's finding that he is "liable for each of the underlying acts of rape and pillage based on a cumulative assessment of identification criteria".[1232] The Prosecutor contends that the Trial Chamber "sufficiently reasoned the identification of Bemba's subordinates as perpetrators of the crimes of rape and pillaging".[1233] The Victims' Representative argues that, contrary to Mr Bemba's submission, the Trial Chamber "did perform a case-by-case analysis of the relevant evidence identifying the perpetrators".[1234]

571. We note at the outset that Mr Bemba's argument concerning the requirement of "a reasoned opinion" for identification is based on jurisprudence relating to the individual and specific identification of an accused person, rather than to the identification of the military affiliation of soldiers.[1235] The latter requires the ability to identify a particular feature of the perpetrator, *in lieu* of pinpointing their exact identity. Indeed, there may be circumstances in which it is impossible for a witness to determine the identity of an individual perpetrator, yet it is relatively easy to identify their military affiliation. Given the differences between these

[1229] Appeal Brief, para. 462. *See also* para. 463.
[1230] Appeal Brief, paras 465-479.
[1231] Appeal Brief, paras 480-493.
[1232] Appeal Brief, para. 466.
[1233] Response to the Appeal Brief, para. 343, referring to, for instance, Conviction Decision, paras 462, 467, 471-472, 480-481, 487-488, 496-497, 502, 504, 508, 510, 514-515, 522, 531-532, 545-546.
[1234] Victims' Observations, para. 83.
[1235] Appeal Brief, para. 465, quoting *Kupreškić et al.* Appeal Judgment, para. 39 ("[A] reasoned opinion must carefully articulate the factors relied upon in support of the *identification of the accused* and adequately address any significant factors impacting negatively on the reliability of the identification evidence" (emphasis added)).

two types of identification, the principles enunciated in the jurisprudence quoted by Mr Bemba are of little, if any, relevance to the present appeal.

572. Mr Bemba appears to distinguish "a cumulative assessment of identification criteria"[1236] from an "individual[…] assessment" made with respect to each criminal act.[1237] As an example of a cumulative assessment, Mr Bemba quotes a passage of the Conviction Decision, where, he submits, the identification of the perpetrators is addressed "[f]or each of the 28 instances of rape".[1238] We note that, contrary to his averment, the cumulative assessment quoted is not the only assessment made of the identities of the perpetrators of rape. The cumulative assessment in question only summarises the various "identifying characteristics" which the Trial Chamber found to be present in one or more of the instances of rape established in the preceding section of the Conviction Decision.[1239] The analysis of evidence supporting these "identifying characteristics" is made in that section with respect to each instance of rape.[1240] Therefore, to the extent that Mr Bemba contends that the Trial Chamber did not perform "a case-by-case assessment"[1241] and that "[t]he only individualised assessment was in relation to P29",[1242] his arguments misrepresent the Conviction Decision, as it does include such an assessment for each act of rape. Similarly, we dismiss Mr Bemba's argument that the Trial Chamber's reasoning in relation to the perpetrators of pillaging was also cumulative,[1243] as the Trial Chamber did perform an individual assessment of the identifying characteristics with respect to each instance of pillaging.[1244]

573. To the extent that Mr Bemba argues that the factors enabling the Trial Chamber to identify the perpetrators of the rape of P29 were not identified,[1245] we note that it is clear

[1236] Appeal Brief, para. 466.
[1237] Appeal Brief, para. 467.
[1238] Appeal Brief, para. 466, quoting Conviction Decision, para. 634.
[1239] Conviction Decision, para. 634.
[1240] Conviction Decision, paras 462, 467, 472, 481, 487-488, 496-498, 508, 510, 515-516, 522, 545, 546-548.
[1241] Appeal Brief, para. 464.
[1242] Appeal Brief, para. 467.
[1243] Appeal Brief, para. 470.
[1244] Conviction Decision, paras 462-463, 467, 470-471, 474, 487, 495-496, 502, 504, 507-509, 510-511, 514, 522, 533, 546-547.
[1245] Appeal Brief, para. 467, referring to Conviction Decision, para. 635.

from the Conviction Decision that "the other factors set out above"[1246] are those listed in the preceding paragraph of that decision.[1247] His averment is therefore incorrect.

2. Rape of P22 and uniforms of attackers

574. Mr Bemba refers to the example of P22, who testified that the perpetrators wore uniforms of the "*Garde présidentielle*" ("GP"), which "should have been sufficient to rule out" that they were MLC soldiers, or "at least warrant a reasoned opinion as to why the Trial Chamber was still satisfied" that they were.[1248] The Prosecutor argues that the fact that the perpetrators wore uniforms with GP insignia is, *inter alia*, "consistent with the Chamber's finding that MLC soldiers were given new CAR military uniforms".[1249]

575. We note the evidence of witness P22, who testified that the soldiers who broke into P22's uncle's house "wore the same uniforms as those worn by the GP",[1250] which, P22 explained, stood for the *Garde présidentielle* – the Presidential Guard.[1251] Mr Bemba argues that this evidence contradicts the Trial Chamber's finding that the perpetrators of the rape of P22 were MLC soldiers, as there is no evidence that MLC soldiers wore Presidential Guard uniforms or that he had effective control over members of the Presidential Guard.[1252]

576. We note that Mr Bemba raised this issue before the Trial Chamber. In his closing brief, Mr Bemba argued that, "where the witnesses noticed the initials GP on the uniforms of their assailants, the Chamber can actually rule out MLC soldiers as potential perpetrators".[1253] The Trial Chamber did not specifically address P22's statement regarding the initials on the perpetrators' uniforms. However, it cited to this particular portion of the witness's evidence and summarised it as follows: "[t]he soldiers had new CAR military uniforms".[1254] Elsewhere in the Conviction Decision, the Trial Chamber relied on, among other evidence, this portion of P22's evidence to find that the CAR authorities provided MLC troops with "new uniforms

[1246] Conviction Decision, para. 635.
[1247] Conviction Decision, para. 634.
[1248] Appeal Brief, para. 468.
[1249] Response to the Appeal Brief, para. 349, referring to Conviction Decision, para. 508.
[1250] Transcript of 1 December 2010, ICC-01/05-01/08-T-41-Red2-Eng, p. 16, line 3.
[1251] Transcript of 1 December 2010, ICC-01/05-01/08-T-41-Red2-Eng, p. 16, lines 6-8.
[1252] Appeal Brief, para. 468.
[1253] Mr Bemba's Closing Brief, para. 567.
[1254] Conviction Decision, para. 508.

similar to those worn by the CAR military".[1255] The Trial Chamber referred to this finding in its discussion of the identity of the perpetrators.[1256]

577. Mr Bemba does not argue that uniforms with the initials GP were not CAR military uniforms. He does not explain why uniforms with the initials GP should have led the Trial Chamber to make a finding different from the one it made with respect to soldiers wearing CAR military uniforms. In view of the foregoing, we find that Mr Bemba neither explained why this evidence should have led to a different finding, nor demonstrated why the Trial Chamber should have given reasons for its conclusion that the perpetrators were MLC soldiers despite wearing uniforms with the initials GP. We would therefore have rejected this argument of Mr Bemba.

3. Treatment of evidence of the attackers' language

578. Mr Bemba also argues that the Trial Chamber did not adequately address the evidence of some attackers speaking Sango,[1257] which the Trial Chamber found is "the language commonly spoken in the CAR".[1258] The Prosecutor contends that the Chamber did consider Mr Bemba's submissions that some attackers spoke Sango.[1259] The Victims' Representative submits that the excerpts cited by Mr Bemba in support of his arguments regarding the use of Sango are "truncated" and that the "witnesses addressed the matters of the attackers speaking Sango in greater depth at other points in their testimony".[1260]

579. We note that Mr Bemba's argument is that the Trial Chamber failed "to give a reasoned opinion".[1261] However, we recall that, although the Trial Chamber has an obligation to provide a reasoned opinion,[1262] it is not required to individually set out each and every factor that was before it, provided that it indicates with sufficient clarity the basis

[1255] Conviction Decision, para. 412, fn. 1119.
[1256] Conviction Decision, para. 626. The Trial Chamber referred to this finding in its discussion of the identity of the perpetrators of murder. However, it incorporated the findings regarding the identity of those perpetrators into the discussion of the identity of the perpetrators of rape ("the same identifying characteristics were also present in respect of the perpetrators of the […] acts identified above"; Conviction Decision, para. 634).
[1257] Appeal Brief, para. 469.
[1258] Appeal Brief, para. 469, quoting Conviction Decision, para. 627.
[1259] Response to the Appeal Brief, para. 350, referring to Conviction Decision, paras 240, 695.
[1260] Victims' Observations, para. 87.
[1261] Appeal Brief, para. 469.
[1262] *Lubanga* Appeal Judgment, para. 24, quoting *Kupreškić et al.* Appeal Judgment, para. 32.

of the decision.[1263] We also find that it is to be presumed that the Trial Chamber evaluated all the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence. In setting out this general principle, we are guided by the jurisprudence of other international courts, whose appellate procedures are similar to those of the Court.[1264]

580. Mr Bemba argues that the Trial Chamber "brushed aside […] evidence that, in many cases, the attackers spoke Sango, which the Trial Chamber found was 'the language commonly spoken in the CAR'".[1265] In support of his argument, Mr Bemba refers, *inter alia*, to the evidence of P23 that one of the "Banyamulengués" spoke to him in Sango.[1266] This evidence was given in cross-examination, when counsel for the Defence inquired about the witness's prior statement. However, the witness also testified that the "Banyamulengués" did not speak Sango, but Lingala,[1267] and the Trial Chamber found so based on, *inter alia*, P23's evidence.[1268] When questioned about it by counsel for the Defence, P23 explained that some of the Zaireans[1269] who were already in the CAR "doing odd jobs", could communicate in Sango and that they may have been incorporated into the "Banyamulengués".[1270]

581. The Trial Chamber did not refer to the evidence of P23 that one of the "Banyamulengués" spoke in Sango, although it did note Mr Bemba's challenge to reliance on the language of the perpetrators, including on this particular part of P23's evidence.[1271] In view of P23's statement that (i) the perpetrators spoke Lingala and (ii) the individual who spoke Sango may have been present in the CAR before the relevant time and incorporated to the MLC, we consider that there was no need for the Trial Chamber to explicitly address in its reasoning the evidence that one person spoke Sango. We therefore find that Mr Bemba has

[1263] Majority Judgment, paras 51-52.
[1264] *Delalić et al.* Appeal Judgment, para. 498; *Kvočka et al.* Appeal Judgment, para. 23; *Kalimanzira* Appeal Judgment, para. 195; *Simba* Appeal Judgment, para. 152; *Halilović* Appeal Judgment, para. 121; *Nuon Chea and Khieu Samphân* Appeal Judgment, para. 304.
[1265] Appeal Brief, para. 469, referring to Conviction Decision, para. 627.
[1266] Appeal Brief, para. 469, referring to Transcript of 25 January 2011, ICC-01/05-01/08-T-53-Red2-Eng, p. 38, line 14 to p. 39, line 5.
[1267] Transcript of 25 January 2011, ICC-01/05-01/08-T-53-Red2-Eng, p. 37, lines 9-14; p. 38, line 25 to p. 39, line 1.
[1268] Conviction Decision, para. 487.
[1269] Transcript of 24 January 2011, ICC-01/05-01/08-T-52-Red2-Eng, p. 42, lines 2-6.
[1270] Transcript of 25 January 2011, ICC-01/05-01/08-T-53-Red2-Eng, p. 39, lines 1-5, 10-12.
[1271] Conviction Decision, para. 240, referring to, *inter alia*, Mr Bemba's Closing Brief, para. 589.

not demonstrated that the Trial Chamber failed "to give a reasoned opinion" with respect to the finding that the perpetrators of the rape of P23 were MLC soldiers.

582. Mr Bemba further refers to the evidence of P110 that some of the soldiers she saw spoke in Sango and some in French.[1272] We note that the Trial Chamber did address this witness's evidence that the soldiers spoke Sango. It specifically referred to the evidence of P110 that the soldiers "called out to a woman, telling her in Sango to come to them".[1273] The Trial Chamber did not address the potential inconsistency of this evidence with the evidence that the perpetrators spoke Lingala, although it did note Mr Bemba's challenge to the identification based on the language of the perpetrators, including on this particular evidence of P110.[1274]

583. We note that, when examined by counsel for the Defence, P110 stated that among the "Banyamulengués" whom P110 saw in front of her neighbour's gate, there was a "shoe-shiner",[1275] one of those who had come to the area to do petty jobs and who could speak Sango.[1276] In view of P110's statement that (i) the perpetrators spoke Lingala and (ii) the one who spoke Sango may have been a "shoe-shiner", we consider that there was no need for the Trial Chamber to explicitly address the evidence that one of the perpetrators spoke Sango. We therefore find that Mr Bemba has not demonstrated that the Trial Chamber failed "to give a reasoned opinion" with respect to the finding that the perpetrators of the pillaging of P110's property were MLC soldiers.

584. Mr Bemba refers to the evidence of P112 that one of the perpetrators of pillaging spoke both Lingala and Sango.[1277] However, it is clear from the evidence cited by Mr Bemba that the soldier speaking Sango to the witness only translated something that had been said in Lingala.[1278] There is no suggestion that other soldiers spoke Sango. On the contrary, P112 testified that the soldiers spoke Lingala among themselves[1279] and that they were

[1272] Appeal Brief, para. 469.
[1273] Conviction Decision, para. 505.
[1274] Conviction Decision, para. 240, referring to, *inter alia*, Mr Bemba's Closing Brief, para. 589.
[1275] Transcript of 10 June 2011, ICC-01/05-01/08-T-126-Red2-Eng, p. 49, lines 2-3.
[1276] Transcript of 10 June 2011, ICC-01/05-01/08-T-126-Red2-Eng, p. 44, line 9 to p. 45, line 3.
[1277] Appeal Brief, para. 469.
[1278] Transcript of 15 June 2011, ICC-01/05-01/08-T-129-Red3-Eng, p. 8, lines 6-13.
[1279] Transcript of 15 June 2011, ICC-01/05-01/08-T-129-Red3-Eng, p. 33, lines 12-14.

"Banyamulengués".[1280] In addition, we note that the Trial Chamber made no finding on the language spoken by that particular group of soldiers, based on the testimony of P112. We, therefore, find that Mr Bemba has failed to demonstrate how the evidence cited by him contradicts the Trial Chamber's finding that the perpetrators were MLC soldiers such that not referring to this evidence amounts to "a failure to give a reasoned opinion".

585. Mr Bemba refers to the evidence of D30 and D36, who, he alleges, were victims of crimes committed by persons speaking Sango, among other languages.[1281] We note that the criminal acts which D30 and D36 apparently describe in their evidence are not among the criminal acts on the basis of which the Trial Chamber convicted Mr Bemba. Furthermore, Mr Bemba has not specified where and when these acts were committed. The relevance of the evidence to which Mr Bemba cites is therefore unclear. We would have dismissed Mr Bemba's argument for failure to explain why the Trial Chamber should have addressed the evidence of D30 and D36.

586. Mr Bemba also refers to the evidence of P63 that some "women carrying looted goods" spoke Sango.[1282] However, he does not explain the relevance of this evidence. In particular, this evidence does not appear to relate to any of the criminal acts on the basis of which Mr Bemba was convicted. Furthermore, the persons who apparently spoke Sango, were "women carrying looted goods", rather than soldiers pillaging property. Finally, the evidence cited by Mr Bemba is that the women carrying goods were from Zaire.[1283] We would therefore have dismissed Mr Bemba's argument for failure to explain why the Trial Chamber should have addressed the evidence of P63 that the women carrying looted goods spoke Sango.

[1280] Transcript of 15 June 2011, ICC-01/05-01/08-T-129-Red3-Eng, p. 52, lines 7-17. *See further* Conviction Decision, para. 504, fn. 1485.
[1281] Appeal Brief, para. 469.
[1282] Appeal Brief, para. 469.
[1283] Transcript of 17 May 2011, ICC-01/05-01/08-T-110-Red3-Eng, p. 12, lines 5-8.

4. Reliability of other identification criteria

587. Mr Bemba raises a number of arguments regarding other identification criteria.[1284] The Prosecutor contends that Mr Bemba's argument "is based on a piecemeal approach to the evidence", as the specific strands of evidence are challenged "in isolation".[1285]

588. With respect to Mr Bemba's argument regarding the reliability of uniforms as an indicator of affiliation,[1286] we note that the Trial Chamber did acknowledge that "a number of the forces operating in the CAR during the period of the charges wore [CAR military] uniforms" and that, therefore, "this factor alone […] is not a sufficient basis for concluding that MLC troops were responsible for the acts [of murder]".[1287] Mr Bemba's argument that the Trial Chamber "ignored precedent"[1288] concerning the reliability of uniforms in identification misrepresents the Conviction Decision and we would therefore dismiss it for failure to identify an error.

589. Regarding Mr Bemba's argument that the Trial Chamber erred in basing its "cumulative reasoning" on the "exclusive presence" of the MLC troops in a given area and that the MLC's exclusive presence is not borne out by the evidence,[1289] we note that, as indicated earlier, the Trial Chamber did not make a finding of exclusive presence with respect to all instances of the crimes for which Mr Bemba was convicted. The paragraphs to which Mr Bemba refers only summarise the various "identifying characteristics" which the Trial Chamber relied upon in one or more of the instances of the crimes established in the preceding sections of the Conviction Decision.[1290] Mr Bemba does not identify the specific findings made in relation to the individual instances of crimes with which he takes issue. We would therefore have dismissed Mr Bemba's argument for his failure to identify an error.

590. As regards the argument that the witnesses' identification of perpetrators as "Banyamulengués" or MLC soldiers was insufficient, we note that Mr Bemba does not

---

[1284] Appeal Brief, paras 472-477.
[1285] Response to the Appeal Brief, para. 352, referring to Appeal Brief, paras 475-477.
[1286] Appeal Brief, para. 474, referring to *Boškoski and Tarčulovski* Trial Judgement, paras 58, 61.
[1287] Conviction Decision, para. 626. The Trial Chamber referred to this reasoning also in its analysis of acts other than murder: the acts of rape (Conviction Decision, para. 634) and pillaging (Conviction Decision, para. 642).
[1288] Appeal Brief, para. 474.
[1289] Appeal Brief, para. 472, quoting Conviction Decision, paras 634, 642.
[1290] Conviction Decision, paras 634, 642.

explain why in cases of such identification "the Trial Chamber was required to […] perform a judicial evaluation of whether this identification was reliable beyond a reasonable doubt".[1291] The Trial Chamber did, in some cases, rely on the witnesses' identification of the perpetrators as "Banyamulengués" or MLC soldiers. However, this indicator was not the sole basis for the identification in those cases. The Trial Chamber relied also on other factors and concluded, on the basis of all of them, that it was established beyond reasonable doubt that the perpetrators were MLC soldiers.[1292] Mr Bemba fails to identify an error in the Trial Chamber's findings and we would therefore have dismissed his argument.

591. Mr Bemba argues that in some cases the Trial Chamber relied solely upon the *modus operandi* and general motive of MLC soldiers.[1293] In support of this contention, he refers to six paragraphs of the Conviction Decision.[1294] We note, however, that none of these references identifies a specific instance of one of the crimes where the *modus operandi* or general motive of MLC soldiers was the sole factor upon which the Trial Chamber relied. The references provided by Mr Bemba are in fact irrelevant to the point he makes, as they contain an introduction to the section discussing the "CAR Operation",[1295] conclusions for *all* instances of murder and pillaging[1296] and contextual elements of crimes against humanity.[1297] We would therefore have dismissed this argument of Mr Bemba, as he has failed to identify an error.

592. Insofar as Mr Bemba argues that the stated *modus operandi* does not fit the allegations of rape in the bush, in a ditch, on the road or on a boat,[1298] we refer to our conclusion that Mr Bemba did not demonstrate an error in the Trial Chamber's finding regarding the MLC troops' *modus operandi*.[1299] We would have dismissed his present argument.

[1291] Appeal Brief, para. 473.
[1292] *See e.g.* Conviction Decision, paras 472, 496, 505, 506, 522.
[1293] Appeal Brief, para. 475.
[1294] Appeal Brief, para. 475, fn. 927.
[1295] Conviction Decision, para. 452.
[1296] Conviction Decision, paras 627, 642.
[1297] Conviction Decision, paras 671, 676, 680.
[1298] Appeal Brief, para. 477.
[1299] ,*See supra* VI.B.2.

B. Whether the Trial Chamber failed to deliver a reasoned judgment as to the identities of the perpetrators of murder

1. Murder of P87's "brother"

593. Mr Bemba argues that the Trial Chamber applied a cumulative test regarding the affiliation of the soldiers found to have murdered P87's "brother".[1300] The Prosecutor responds that the Trial Chamber properly identified the perpetrators of the murder of P87's "brother".[1301]

594. We reiterate our finding above that the jurisprudence on which Mr Bemba relies to support the need for a cautious approach to identification evidence relates to the identification of the accused by a witness and that the same considerations are not directly relevant to the identification of the perpetrator's military affiliation.[1302]

595. In relation to the murder of P87's "brother", the Trial Chamber relied on P87's testimony that the "Banyamulengués" were the only soldiers she saw in the Fourth Arrondissement, where her "brother" was killed, on or around 30 October 2002.[1303] This finding is also supported by the Trial Chamber's conclusion in the introduction to its description of the events in Bangui that the MLC took control of the Fourth Arrondissement in the wake of the withdrawal of General Bozizé's rebels on 30 October 2002, based on, *inter alia*, the testimony of P29, P63, P87, P108 and P119, as well as video evidence.[1304] The Trial Chamber further noted that the attackers were "wearing new uniforms like those of the CAR military",[1305] and that P87 had interacted with at least three different groups of MLC soldiers earlier in the day when her "brother" was killed, whom she recognised as such on the basis of the language or the way they spoke.[1306] The Trial Chamber noted that on the occasion when

---

[1300] Appeal Brief, para. 479.
[1301] Response to the Appeal Brief, para. 365, referring to Conviction Decision, paras 471-472, 478, 626-627.
[1302] *See supra* para. 571.
[1303] Conviction Decision, para. 471, referring to Transcript of 12 January 2011, ICC-01/05-01/08-T-45-Red2-Eng, p. 4, lines 9-11.
[1304] Conviction Decision, para. 460, referring to Transcript of 14 March 2011, ICC-01/05-01/08-T-80-Red2-Eng, p. 10, lines 3-8; p. 13, lines 6-18; Transcript of 11 January 2011, ICC-01/05-01/08-T-44-Red3-Eng, p. 12, lines 16-19; p. 13, lines 5-10; p. 17, lines 11-13; p. 18, line 25 to p. 19, line 10; Transcript of 20 May 2011, ICC-01/05-01/08-T-113-Red2-Eng, p. 37, lines 11-14; Transcript of 24 May 2011, ICC-01/05-01/08-T-115-Red2-Eng, p. 5, lines 23-25; Transcript of 28 June 2011, ICC-01/05-01/08-T-133-Red2-Eng, p. 10, line 21 to p. 12, line 16; Transcript of 21 March 2011, ICC-01/05-01/08-T-83-Red2-Eng, p. 4, line 21 to p. 5, line 1; EVD-T-OTP-00682/CAR-OTP-0058-0167 at 0174-0175, 0179, 0185.
[1305] Conviction Decision, paras 472, 626.
[1306] Conviction Decision, paras 471-472.

her "brother" was shot, P87 could see two "Banyamulengués" in the sitting room of the house, could hear her "brother" talking to a "Banyamulengué" in another room and, after shots were fired, saw the third soldier entering the sitting room as she heard her "brother" moaning and muttering, and then silence.[1307] The Trial Chamber observed that a crime scene analysis corroborated P87's account of events.[1308] The Trial Chamber also noted that "the perpetrators' actions [we]re consistent with evidence of the MLC's *modus operandi* and the general motives of MLC soldiers during the 2002-2003 CAR Operation".[1309]

596. In light of the foregoing, we would have found that it was not unreasonable for the Trial Chamber to conclude that P87's "brother" was killed by the MLC soldiers on or around 30 October 2002.

2. Murder of P69's sister

597. Mr Bemba argues that the Trial Chamber failed to provide an individualised assessment of the affiliation of the soldiers who it found had murdered P69's sister.[1310] We note that Mr Bemba refers only to the "Legal Findings" section of the Conviction Decision and does not refer to the "Facts" section.[1311] The latter section sets out an individualised assessment of the murder of P69's sister taking into account, *inter alia*, that the MLC was the only armed group in and around PK12 at the time, and that the soldiers spoke Lingala and wore army uniforms.[1312] As Mr Bemba has failed to set out why the Trial Chamber's findings were unreasonable, we would have dismissed his argument.

C. Whether the Trial Chamber altered dates to fit the MLC's movements

1. Rape of P68 and P68's sister-in-law

598. Mr Bemba argues that P68 testified that she and her sister-in-law were raped on 27 October 2002.[1313] He submits that there was "no evidential basis for suggesting that the MLC

[1307] Conviction Decision, para. 475.
[1308] Conviction Decision, para. 478.
[1309] Conviction Decision, para. 627.
[1310] Appeal Brief, para. 479, referring to Conviction Decision, paras 626-627.
[1311] Appeal Brief, para. 479.
[1312] Conviction Decision, para. 496.
[1313] Appeal Brief, paras 483-484, referring to Conviction Decision, para. 633 (a); Transcript of 17 January 2011, ICC-01/05-01/08-T-48-Red2-Eng, p. 10, line 18 to p. 12, line 1; p. 14, line 18 to p. 15, line 2; p. 18, line 10 to

were in the Fouh area on 27 October, less still that they were in control of it".[1314] The Prosecutor argues that the Trial Chamber's finding was reasonable.[1315] She submits that Mr Bemba "does not show that the [Trial] Chamber, by referring to 'the end of October', meant a different date than 27 October 2002".[1316]

599. The Trial Chamber found that P68 and P68's sister-in-law were raped in the Bondoro area of Bangui at the end of October 2002.[1317] The Trial Chamber noted that the events took place after the MLC troops had arrived in Bangui, as P68 and P68's sister-in-law were fleeing their house to seek refuge in PK5.[1318] Excerpts of the transcripts of P68's testimony referred to by the Trial Chamber show that the witness consistently testified that P68 and P68's sister-in-law were attacked on 27 October 2002.[1319]

600. The Trial Chamber found that the MLC troops "arrived in the CAR on 26 October 2002 and commenced operations no later than 27 October 2002".[1320] It noted that they first arrived in Bangui at "a naval base next to the Oubangui River, and from there, they were transported to the Support Regiment, near Camp Béal and the Fourth Arrondissement" (footnote omitted).[1321] The Trial Chamber found that "[b]y 30 October 2002, MLC troops had advanced along the Avenue de l'Indépendence and to the neighbourhoods of 36 Villas, Fouh, and Bogombo" and took control over the Fourth Arrondissement in the wake of the withdrawal of General Bozizé's rebels.[1322] However, the Trial Chamber did not reach definitive findings on the precise movements and locations within Bangui of the loyalist and rebel forces during the days between the MLC's arrival on 27 October 2002 and their assumption of control over the Fourth Arrondissement from 30 October 2002.[1323] The

---

p. 19, line 1; Transcript of 18 January 2011, ICC-01/05-01/08-T-49-Red2-Eng, p. 10, lines 1-3; p. 13, line 23 to p. 14, line 1; p. 18, lines 12-16; p. 27, line 24 to p. 28, line 2; p. 28, lines 17-18.
[1314] Appeal Brief, para. 485.
[1315] Response to the Appeal Brief, para. 368, referring to Conviction Decision, paras 459-460, 462-466, 633, 640.
[1316] Response to the Appeal Brief, para. 369.
[1317] Conviction Decision, paras 464, 466.
[1318] Conviction Decision, para. 462.
[1319] *See* Conviction Decision, fn. 1305; Transcript of 17 January 2011, ICC-01/05-01/08-T-48-Red2-Eng, p. 10, line 25 to p. 11, line 8; p. 18, lines 17-23.
[1320] Conviction Decision, para. 458.
[1321] Conviction Decision, para. 459.
[1322] Conviction Decision, paras 459-460.
[1323] Conviction Decision, paras 459-460.

evidence referred to by the Trial Chamber is also inconclusive as to the exact movements of the MLC during this time.[1324]

601. It is also clear from the Trial Chamber's other findings that the MLC was not the only military group present in Bangui at the time that P68 and P68's sister-in-law were raped. The Trial Chamber noted:

> FACA units were based in the Camp Kassaï military base; some senior FACA officials and the Ministry of National Defence were based at Camp Béal; and the navy was located at Port Beach, along the Oubangui River. During the 2002-2003 CAR Operation, the FACA troops were stationed in the residential southern neighbourhoods and the administrative centre of Bangui, as well as various other locations throughout the CAR.[1325] [Footnotes omitted.]

602. The Trial Chamber also noted that the CAR President's personal guards, the USP, "held permanent positions in Bangui",[1326] "[s]everal militias also fought on behalf of President Patassé",[1327] "around 100 Libyan soldiers acting on President Patassé's behalf" were based in PK3,[1328] "[a] small *Communauté des Etats Sahélo-Sahariens* […] force was confined to its base near the Bangui airport" and "Central African Economic and Monetary Community […] troops were present to ensure President Patassé's security".[1329]

603. We note that, in determining the affiliation of the perpetrators of the rape of P68 and P68's sister-in-law, the Trial Chamber relied upon P68's statement that the perpetrators were "Banyamulengués", spoke Lingala, wore uniforms similar to those of CAR soldiers and were "the only armed group P68 saw in the area".[1330] The question is whether it was reasonable for the Trial Chamber to rely solely on the witness's identification of the soldiers as members of the MLC, based on the factors P68 outlined, in circumstances where the MLC's exclusive presence in a particular area of Bangui at the time was not conclusively established.

[1324] Conviction Decision, paras 459-460, fns 1298, 1300-1302.
[1325] Conviction Decision, para. 405.
[1326] Conviction Decision, para. 407.
[1327] Conviction Decision, para. 408.
[1328] Conviction Decision, para. 409.
[1329] Conviction Decision, para. 409.
[1330] Conviction Decision, para. 462, referring to Transcript of 17 January 2011, ICC-01/05-01/08-T-48-Red2-Eng, p. 11, lines 16-21; p. 19, line 23 to p. 20, line 11; p. 20, lines 16-18; p. 22, lines 7-14; Transcript of 18 January 2011, ICC-01/05-01/08-T-49-Red2-Eng, p. 11, lines 20-25; p. 13, lines 12-18; p. 21, lines 5-13, lines 20-22; p. 29, lines 13-20; p. 47, lines 18-19; Transcript of 20 January 2011, ICC-01/05-01/08-T-50-Red2-Eng, p. 4, line 12 to p. 5, line 17; p. 6, line 18 to p. 7, line 6; p. 7, line 21 to p. 8, line 4.

604. We note P68's consistent testimony that P68 and P68's sister-in-law were raped and their belongings pillaged on 27 October 2002. The findings of the Trial Chamber, which have not been challenged by Mr Bemba, indicate that the MLC troops were already present and had commenced operations in Bangui on that date.[1331] In addition, the Trial Chamber's conclusion that the perpetrators were members of the MLC was also based on factors other than their exclusive presence in the area: the witness's identification of the soldiers as "Banyamulengués", their use of Lingala and the uniforms they wore.[1332] We would therefore find that Mr Bemba has failed to show any error in the Trial Chamber's overall conclusion regarding the affiliation of the perpetrators of the rape of P68 and P68's sister-in-law and the pillaging of their belongings.

2. Two unidentified girls aged 12 or 13 in Bangui

605. Mr Bemba argues that witness "P119 testified that the rapes she witnessed took place on 28 October 2002, three days after the commencement of hostilities in the capital" and that no reasonable Trial Chamber could have found that the events occurred "on or around 30 October".[1333] The Prosecutor contends that it was reasonable and consistent with P119's testimony for the Trial Chamber to find that the rapes happened in Boy-Rabé in the Fourth Arrondissement on or around 30 October 2002.[1334]

606. The Trial Chamber found on the basis of P119's testimony that "on or around 30 October 2002, in a canal near P119's compound in the Boy-Rabé neighbourhood of Bangui", two MLC soldiers raped two unidentified girls.[1335] Having examined the excerpts of the transcripts of P119's testimony referred to by the Trial Chamber, we note that the witness consistently testified that the attack occurred on 28 October 2002.[1336] The Trial Chamber appears to have based its finding that the events took place "on or around 30 October 2002" on the witness's testimony that the incident followed the withdrawal of General Bozizé's

[1331] Conviction Decision, para. 456.
[1332] Conviction Decision, para. 462.
[1333] Appeal Brief, para. 489, referring to Transcript of 18 March 2011, ICC-01/05-01/08-T-82-Red2-Eng, p. 31, lines 2-4; p. 32, line 4 to p. 33, line 5; p. 39, line 3 to p. 40, line 4; Transcript of 21 March 2011, ICC-01/05-01/08-T-83-Red2-Eng, p. 4, line 21 to p. 5, line 1; Transcript of 23 March 2011, ICC-01/05-01/08-T-86-Red2-Eng, p. 10, lines 6-7.
[1334] Response to the Appeal Brief, para. 372, referring to Conviction Decision, paras 467-470, 633.
[1335] Conviction Decision, paras 469, 633-634, 636.
[1336] Conviction Decision, para. 467, referring to Transcript of 18 March 2011, ICC-01/05-01/08-T-82-Red2-Eng, p. 24, line 11; p. 25, lines 15-17; p. 27, lines 7-11; Transcript of 21 March 2011, ICC-01/05-01/08-T-83-Red2-Eng, p. 4, line 21 to p. 5, line 1.

rebels from the Fourth Arrondissement, which it found to have taken place between 29 and 30 October 2002.[1337]

607. In order to identify the soldiers as members of the MLC, the Trial Chamber emphasised the witness's testimony that the "soldiers arriving at her house in PK12 – in the immediate vicinity of which [the rapes] occurred – told her that they were sent by 'Papa Bemba'".[1338] The reference to PK12 in this context appears to be a mistake in light of the witness's testimony and the Trial Chamber's prior finding that these events took place in the Boy-Rabé neighbourhood of Bangui.[1339] The Trial Chamber also appears to have relied on the fact that the witness identified the soldiers as "Banyamulengués", "wearing new military uniforms like those worn by the CAR army with no insignia", that she had interacted with members of the group and that she heard the perpetrators cry out in Lingala when she threw a large stone on them, as well as on the witness's statement that they were the only armed group in the area.[1340] The question is whether it was reasonable for the Trial Chamber to rely solely on the witness's identification of the soldiers as members of the MLC, based on the factors she outlined in circumstances where the MLC's exclusive presence in a particular area of Bangui at the time was not conclusively established.

608. We note that P119 testified that the rapes P119 witnessed took place on 28 October 2002. The findings of the Trial Chamber, which have not been challenged by Mr Bemba, indicate that the MLC was already present in Bangui on that date and had commenced its operations.[1341] In addition, the Trial Chamber's conclusion that the perpetrators were members of the MLC is based on factors other than their exclusive presence in the area: the witness's identification of the soldiers as "Banyamulengués", the uniforms they wore, their use of Lingala and the fact that they told her that "Papa Bemba" had sent them.[1342] We would

[1337] Conviction Decision, paras 460, 467, fn. 1323.
[1338] Conviction Decision, para. 634.
[1339] Conviction Decision, para. 469.
[1340] Conviction Decision, para. 467, referring to Transcript of 18 March 2011, ICC-01/05-01/08-T-82-Red2-Eng, p. 8, lines 19-23; p. 17, lines 1-2; p. 18, line 20 to p. 19, line 3; p. 24, line 11; p. 25, lines 15-17; p. 26, line 15 to p. 27, line 11; p. 28, lines 14-23; p. 31, lines 2-3; p. 34, lines 1-2; p. 37, line 9; Transcript of 21 March 2011, ICC-01/05-01/08-T-83-Red2-Eng, p. 3, line 20 to p. 5, line 1; Transcript of 22 March 2011, ICC-01/05-01/08-T-84-Red2-Eng, p. 14, line 15 to p. 17, line 7; p. 19, lines 4-6; Transcript of 23 March 2011, ICC-01/05-01/08-T-85-Red2-Eng, p. 25, line 23 to p. 26, line 2; Transcript of 23 March 2011, ICC-01/05-01/08-T-86-Red2-Eng, p. 9, lines 21-23.
[1341] Conviction Decision, para. 456.
[1342] Conviction Decision, para. 467.

therefore have found that Mr Bemba has failed to show any error in the Trial Chamber's overall conclusion regarding the affiliation of the perpetrators of the rapes witnessed by P119.

3. The woman in the bush outside PK22

609. Mr Bemba argues that, contrary to the Trial Chamber's finding that the rape witnessed by P75 occurred in November 2002, the witness testified that it occurred two days after the arrival of Bozizé's troops in Bangui on 25 October 2002.[1343] The Prosecutor argues that the Trial Chamber's finding was reasonable given P75's clear and consistent testimony and ability to distinguish MLC soldiers from regular CAR soldiers.[1344]

610. The Trial Chamber found that the events witnessed by P75 outside PK22 occurred in November 2002.[1345] In arriving at this conclusion, the Trial Chamber appears to have relied on the witness's testimony that P75 fled Bangui after the "Banyamulengués" arrived at the end of October, but could not remember the exact date, and that the "Banyamulengués" arrived in Nguerengou, north of PK22, the day after the events.[1346]

611. Contrary to Mr Bemba's assertions, the Trial Chamber did not reach a definitive conclusion regarding the date on which the MLC arrived in PK22, finding only that a few days after arriving in PK12 (on 30 or 31 October 2002[1347]), "the MLC pursued and engaged in combat with General Bozizé's rebels on the road to PK22, arrived in the vicinity of PK22 before 15 November 2002, and captured the area soon after".[1348] From this finding, it may be

[1343] Appeal Brief, paras 486-487, referring to Conviction Decision, para. 522, fn. 1569; Transcript of 30 March 2011, ICC-01/05-01/08-T-92-Red2-Eng, p. 35, lines 10-20; ICC-01/05-01/08-T-92-Conf-Eng, p. 8, line, 10 to p. 11, line 3; Transcript of 31 March 2011, ICC-01/05-01/08-T-93-Red2-Eng, p. 3, line 3 to p. 4, line 16.
[1344] Response to the Appeal Brief, paras 376-377, referring to Transcript of 30 March 2011, ICC-01/05-01/08-T-92-Red2-Eng, p. 8, lines 9-19; p. 16, lines 14-20; p. 17, lines 1-11; p. 19, lines 15-20; p. 20, line 25 to p. 21, line 17; p. 22, lines 3-20.
[1345] Conviction Decision, paras 522-523, referring to Transcript of 30 March 2011, ICC-01/05-01/08-T-92-Red2-Eng, p. 6, line 19; p. 7, line 1; p. 8, line 9 to p. 10, line 13; p. 11, line 3; p. 12, lines 16-17; p. 19, lines 5-14; p. 19, line 19 to p. 20, line 4; p. 20, line 11; p. 21, line 2; p. 22, lines 9-11; p. 25, lines 5-13; p. 25, line 15 to p. 26, line 3; p. 26, line 13 to p. 28, line 5; p. 28, lines 20-21; p. 29, lines 6-10; p. 30, lines 2-15; p. 40, line 21 to p. 41, line 7; Transcript of 31 March 2011, ICC-01/05-01/08-T-93-Red2-Eng, p. 5, lines 3-20; p. 9, lines 5-8; p. 10, lines 22-25; p. 12, lines 5-25; p. 13, lines 7-9; p. 15, lines 20-21; p. 25, lines 17-19.
[1346] Conviction Decision, para. 522, fn. 1569, referring to Transcript of 30 March 2011, ICC-01/05-01/08-T-92-Red2-Eng, p. 6, line 19; p. 7, line 1; p. 8, line 9 to p. 10, line 13; p. 11, line 3; p. 19, line 19 to p. 20, line 4, p. 21, line 2; Transcript of 31 March 2011, ICC-01/05-01/08-T-93-Red2-Eng, p. 5, lines 3-20; p. 25, lines 17-19.
[1347] Conviction Decision, para. 485.
[1348] Conviction Decision, para. 520; fn. 1566, referring to Transcript of 23 November 2010, ICC-01/05-01/08-T-33-Red2-Eng, p. 23, lines 5-7; p. 24, line 7 to p. 25, line 6; Transcript of 11 February 2011, ICC-01/05-01/08-T-64-Red2-Eng, p. 10, lines 13-22; p. 13, lines 13-19; Transcript of 25 January 2011, ICC-01/05-01/08-T-53-Red2-Eng, p. 20, line 9, to p. 21, line 8; p. 26, lines 12-22; Transcript of 6 April 2011, ICC-01/05-01/08-T-96-

derived that the MLC troops arrived sometime between 1 and 14 November 2002, but the precise date of their arrival is unclear. Therefore, we find that the MLC may have been present in the area at the time of the events alleged by P75.

612. The Trial Chamber appears to have based its finding regarding the affiliation of the soldiers in question on the witness's testimony that the attack occurred "outside PK22, after the MLC arrived in the vicinity in November 2002" and that the attackers were shouting in Lingala, using the word "*Yaka*", which, according to the Trial Chamber "meant that they were asking for money".[1349] The Trial Chamber noted that, although the witness did not understand the language, P75 testified that it was the same as that "spoken by other 'Banyamulengués'".[1350] The Trial Chamber also relied on the testimony of P22 and P79 that "Yaka" was Lingala.[1351] The Trial Chamber noted that P75 indicated that the soldiers who raped the woman identified wore military t-shirts and trousers and were accompanied by a woman.[1352]

613. In view of P75's testimony as to the identifying features of the soldiers, and the witness's other interactions with the "Banyamulengués" during the 2002-2003 CAR Operation, we would have found that Mr Bemba has failed to show any error in the Trial Chamber's overall conclusion regarding the affiliation of the perpetrators of the rapes witnessed by the witness.

Red2-Eng, p. 19, lines 11-16; p. 21, lines 2-7; EVD-T-OTP-00399/CAR-OTP-0004-0343 at 0344. The Trial Chamber relied on testimonial evidence that the MLC troops went to PK22 one day or three days after they arrived in PK12 and that they engaged Bozizé's troops in PK 22 from 15 to 18 November 2002, as well as on an open letter published on 13 November 2002 from the populations of PK12, 13 and 22, requesting the initiation of an international investigation against the Central African Republic and Mr Bemba for crimes committed against the populations of these areas.

[1349] Conviction Decision, para. 522.

[1350] Conviction Decision, para. 522, fn. 1570.

[1351] Conviction Decision, para. 522, fn. 1570.

[1352] Conviction Decision, para. 522.

VIII. SIXTH GROUND OF APPEAL: "OTHER PROCEDURAL ERRORS INVALIDATE THE CONVICTION"

A. No reliance should have been placed on the evidence of P169, P178 and the 19 CAR Witnesses

614. Mr Bemba argues that the Trial Chamber erred by relying on the evidence proffered by witnesses P169, P178 and 19 other prosecution witnesses[1353] ("19 CAR Witnesses").[1354] In light of the nature of most of the challenges raised by Mr Bemba, which are intrinsically linked to previous decisions rendered by the Trial Chamber, we find it appropriate to set out the relevant procedural background first and set out and address his arguments thereafter.

1. Issue on Appeal

615. We understand Mr Bemba to argue that the Trial Chamber erred in relying on the testimony of P169, P178 and the 19 CAR Witnesses, resulting in factual errors in the factual findings in respect of which these witnesses were relied upon by the Trial Chamebr.[1355] In support of his contention, Mr Bemba advances a number of arguments aimed at demonstrating that the credibility of these witnesses was affected by allegations of witness collusion and other issues.

616. We note that Mr Bemba's arguments essentially challenge the Trial Chamber's conclusion that, despite the issues that have arisen, the testimony of P169, P178 and the 19 CAR Witnesses need not be rejected outrightly, though particular caution was required in respect of, *inter alia*, P169's and P178's testimony.[1356] In this regard, we recall that, in reviewing the Trial Chamber's assessment of witness testimony, a margin of deference must be applied to the Trial Chamber's appreciation of the evidence.[1357] Thus, the Appeals Chamber may only interfere with the Trial Chamber's assessment if no reasonable trier of fact could have decided, in the circumstances at hand, that the evidence could be relied upon, albeit with caution.

[1353] The witnesses are P22, P23, P29, P38, P42, P47, P63, P68, P69, P73, P75, P79, P80, P82, P87, P110, P112, P119, P209 (ICC-01/05-01/08-3138-Conf-AnxA). We note that there is a discrepancy in the relevant part of the Conviction Decision regarding the 19 CAR Witnesses (Conviction Decision, fn. 726).
[1354] Appeal Brief, para. 495.
[1355] *See e.g.* Appeal Brief, paras 495, 506, 513, 515, 520.
[1356] *See* Conviction Decision, para. 329.
[1357] *See supra* II.

2. Reliance on testimony of P169 and P178

617. Mr Bemba challenges, first, the Trial Chamber's decision not to fully reject the testimony of P169 and P178.[1358] We shall address the four sets of arguments that he raises in support of this contention – namely that (i) the Trial Chamber did not have sufficient information regarding the manner of creation of a list containing the names and contact information of 22 individuals, including many Prosecution witnesses ("List"), the collusion of witnesses, and the identity and role of an individual named [redacted];[1359] (ii) the Trial Chamber's credibility analysis was superficial;[1360] (iii) the Trial Chamber did not address Mr Bemba's submissions regarding P169's 2014 Testimony;[1361] and (iv) for other reasons, the testimony of P169 and P178 were not of the quality that should be accepted by a court[1362] – in turn.

(a) Lack of sufficient information

618. As to the argument that the Trial Chamber decided based on insufficient information, we note Mr Bemba's submission that, after the receipt of witness's collusion allegations, "rather than order proper investigations", the Trial Chamber limited its actions to recalling P169.[1363] Mr Bemba's assertion in this respect is factually incorrect. Once apprised of the information concerning contact between witnesses and informed of the content of the letters sent by witness P169, the Trial Chamber adopted several measures. Notably, the Trial Chamber rendered eight decisions[1364] and reopened the presentation of evidence for the

---

[1358] Appeal Brief, paras 506-515.
[1359] Appeal Brief, paras 506-508.
[1360] Appeal Brief, para. 509.
[1361] Appeal Brief, para. 510.
[1362] Appeal Brief, paras 511-512.
[1363] Appeal Brief, para. 506; *see also* para. 520.
[1364] Decision on Information of Contacts of Prosecution Witnesses; Decision on Request Concerning Witness Contact; Decision on Admission of Evidence concerning P169 and P178; Decision on Mr Bemba's Request for Reclassification of Documents; Decision on Request for Investigative Assistance concerning P169 and P178; Decision on Request to Recall P169; Decision on Request to Recall P178; Decision on Reconsideration to Recall P178. In these decisions, the Trial Chamber ordered, *inter alia*, the submission by VWU of a report on the issues informed in the Prosecutor's First Report on Witness Contact, [redacted] (Decision on Information of Contacts of Prosecution Witnesses, para. 13 (i); Decision on Mr Bemba's Request for Reclassification of Documents, paras 17-19, 31 (ii)-(iii); and Decision on Request to Recall P169, para. 50 (iii)); the submission of a report by the Prosecutor on the measures she intended to take in relation to the conduct of witnesses P169 and P178 (Decision on Information of Contacts of Prosecution Witnesses, para. 13 (iii)); the Registry to contact witnesses P169 and P178 in order to emphasise the importance of and rationale behind protective measures, and seek to obtain information on the [redacted] (Decision on Request for Investigative Assistance concerning P169 and P178, para. 37 (ii)); the submission of a report by the Registry on its contacts with

limited purpose of hearing P169 in relation to issues arising out of his various allegations and issues of witness credibility.[1365] Furthermore, the parties and participants were given an opportunity to adduce evidence related to the allegations contained in the letters sent by witness P169 and to make additional submissions following P169's 2014 Testimony.[1366] The Trial Chamber admitted into evidence several documents related to these allegations.[1367]

619. We note that Mr Bemba requested the Trial Chamber to order the Prosecutor to initiate an investigation into the allegations of witness collusion.[1368] We do not find the Trial Chamber's determination that, pursuant to rule 165 (1) of the Rules, "the responsibility to initiate and conduct investigations in the context of article 70 of the Statute lies with the prosecution" unreasonable.[1369] In reaching this conclusion, the Trial Chamber noted the submissions made in this connection by the Prosecutor, namely that (i) she had briefed witnesses P169 and P178 about [redacted], their impact on [redacted] and offences under article 70 of the Statute; (ii) witness P178 refused to [redacted]; and (iii) absent reports of [redacted], she had no reason to undertake any measures pursuant to article 70 of the Statute.[1370] In light of the foregoing, we would have rejected Mr Bemba's argument.

620. In view of the above considerations, we would have rejected Mr Bemba's argument that the Trial Chamber "limited its actions to recalling P169" and failed to order "proper investigations".

621. We also note Mr Bemba's submission – made in respect of the Trial Chamber's reliance on the 19 CAR Witnesses – that, after receipt of the 5 August 2014 Letter, (i) the Prosecutor and the VWU failed to contact the 19 CAR Witnesses to check if they wished to

---

witnesses P169 and P178 (Decision on Request for Investigative Assistance concerning P169 and P178, para. 37 (iii)); the [redacted] VWU and the Prosecutor [redacted] and report on any further developments in a timely manner (Decision on Request for Investigative Assistance concerning P169 and P178, para. 37 (iv)).

[1365] Decision on Request to Recall P169, paras 50 (i)-(ii).

[1366] Decision on Modalities of Additional Evidence, para. 13 (i)-(iii); Decision on Request to Recall P169, para. 50 (xvi).

[1367] Decision on Admission of Evidence concerning P169 and P178, paras 24, 32-33 (a); Transcript of 24 October 2014, ICC-01/05-01/08-T-363-Red-Eng, p. 32, lines 4-13.

[1368] Mr Bemba's Request for Investigative Assistance, para. 39.

[1369] Decision on Request for Investigative Assistance concerning P169 and P178, paras 28, 36.

[1370] Decision on Request for Investigative Assistance concerning P169 and P178, para. 28.

recant their testimony; and (ii) no attempts were made to examine P169's and P178's telephone records to check whether they had been in contact with the numbers on the List.[1371] Mr Bemba sets out several measures that, in his view, the Trial Chamber should have adopted in light of the witness collusion allegations contained in the last letter sent by P169.[1372] However, we find that, by merely advancing alternative or additional measures to those put in place by the Trial Chamber, Mr Bemba fails to show unreasonableness on its part. In this regard, we consider that Mr Bemba merely disagrees with the approach taken by the Trial Chamber but fails to demonstrate that it erred. Accordingly, we would have rejected Mr Bemba's arguments.

622. With respect to P169's 2014 Testimony, we note that, as stated by Mr Bemba,[1373] P169 did not state in the part of his testimony referred to by the Trial Chamber that the claims of witness subornation were untrue.[1374] However, other parts of P169's 2014 Testimony clarify that what P169 referred to as "subornation of witnesses" and "evidence of witnesses having been corruptly influenced" was the purported "mistreatment […] that [the witnesses] were subjected to by the VWU",[1375] meaning the handling of the witnesses' financial claims, in particular in regard of lost income. It is of note in this respect that the Trial Chamber, when referring to P169's claims of witness "subornation", also recalled its findings regarding the Defence allegations of collusion among witnesses – which the Trial Chamber had dismissed.[1376] Thus, it appears that, when discussing the claims of witness "subornation", the Trial Chamber was not referring to the question of whether there had been witness collusion, but to the issue of "mistreatment" of witnesses by the VWU. In light of the foregoing considerations, we find that it was not unreasonable for the Trial Chamber to conclude that P169's "claims of subornation of witnesses were untrue and used for the sole purpose of

[1371] Appeal Brief, para. 517.
[1372] Appeal Brief, para. 520.
[1373] Appeal Brief, paras 518-519.
[1374] The Trial Chamber relied on the following excerpt of P169's testimony: "Q. Sir, you've looked at this document a number of times. I don't have many questions to ask you about it. This is the document - the letter - in which you again said that witnesses wanted to bring evidence of their subornation and this time you threatened to reconsider your testimony. I just want to clarify one thing. By 5 August of this year you and [redacted] had completely fallen out with one another, hadn't you? A. Yes. Q. So this letter we can take it is all your own work? It's all your idea? A. **So who wrote it? Myself. I added a few things to place more pressure on them. That is why I said that. I thought that by doing that I would get an answer to my claims, but it was me myself who wrote this letter** (emphasis added) (Conviction Decision, para. 322, referring to Transcript of 24 October 2014, ICC-01/05-01/08-T-363-Red-Eng, p. 22, lines 15-25).
[1375] Transcript of 22 October 2014, ICC-01/05-01/08-T-361-Red-Eng, p. 36, line 5 to p. 37, line 1.
[1376] *See* Conviction Decision, paras 319, 322.

putting pressure on the readers of his letters".[1377] Accordingly Mr Bemba's arguments in this regard warrant rejection.

623. We further note Mr Bemba's argument that, "[e]ven had P169 testified that his letter of 5 August was a lie", during his 2014 Testimony, the witness [redacted].[1378] In this regard, [redacted].[1379] We notice that in the 7 June 2013 Letter, P169 referred to [redacted].[1380] In June 2013, [redacted].[1381] In the Conviction Decision, the Trial Chamber noted that the testimony of P169 "lacked clarity in relation to […] the date, place, and number of meetings with P42 and/or P178".[1382] Given the Trial Chamber's explicit finding that P169's testimony lacked clarity in relation to, *inter alia*, the alleged meeting(s) held between Prosecution witnesses, we consider that Mr Bemba's argument shows no error in the Trial Chamber's assessment of the witness's testimony. Rather, the Trial Chamber specifically acknowledged the lack of clarity in this regard.

624. We observe Mr Bemba's contention that the Trial Chamber erred by not recalling P178.[1383] The Trial Chamber rejected Mr Bemba's request to recall P178 in three different decisions, one rendered before and two rendered after P169's 2014 Testimony.[1384] In setting out its approach to the possibility of recalling witnesses, the Trial Chamber considered that, in its determination, it would "consider whether the requesting party has demonstrated *good cause*" and that a "recall should be granted only in the most compelling circumstances where

---

[1377] Conviction Decision, para. 322.
[1378] Appeal Brief, para. 519.
[1379] Appeal Brief, para. 519.
[1380] EVD-T-D04-00057/CAR-OTP-0072-0504-R02.
[1381] EVD-T-D04-00105/CAR-OTP-0083-1489-R01 at 1491.
[1382] Conviction Decision, para. 320 referring to Transcript of 24 October 2014, ICC-01/05-01/08-T-363-Red-Eng, p. 8, lines 18-21: "Q. The meeting at which you received the list of [redacted], was that in March of 2013? A. I told you that I'd forgotten the date. I told you I could not remember any date. That's my answer. I told it to the Prosecutor, I told it to the Presiding Judge and I have given this answer to Maître Douzima as well."
[1383] Appeal Brief, paras 507-508, 520.
[1384] Decision on Request Concerning Witness Contact, para. 38 (vi); Decision on Request to Recall P178, paras 18-25; Decision on Reconsideration to Recall P178, para. 34.

the evidence is of significant probative value and not of a cumulative nature".[1385] Mr Bemba does not challenge the approach set out by the Trial Chamber. In deciding to reject Mr Bemba's requests to recall P178, the Trial Chamber stated that it was

> not convinced by the defence's assertion that the witnesses "acted as a collective bargaining unit" or that there was "collusion" between them. Indeed the attempted contact allegedly initiated by Witness 178 took place *after* the relevant witnesses testified and, as noted in the Prosecution Submissions, those witnesses who could be contacted by the prosecution to verify the information stated that they refused to attend such meeting. Accordingly, on the basis of the material before it, the Chamber finds that the defence's assertion regarding "collusion" of witnesses is unsubstantiated.[1386]

625. The Trial Chamber further made a distinction between its decision to recall P169 and Mr Bemba's request to recall P178.[1387] In deciding to recall P169, the Trial Chamber first noted its previous decision rejecting an identical request.[1388] In the Decision on Request to Recall P169, the Trial Chamber considered that "in light of the nature of the allegations made in the 5 August 2014 Letter – in particular the witness's purported claims that he has information on the 'subordination' and ill-treatment of the Relevant Witnesses and 'money transferred by the ICC prosecution'", there were exceptional circumstances warranting the recalling of P169.[1389]

626. The Trial Chamber distinguished Mr Bemba's request to recall P178 indicating that Mr Bemba had not demonstrated any "substantial change of circumstances warranting reconsideration of the [Decision on Request Concerning Witness Contact], or the existence of compelling and exceptional circumstances warranting an additional reopening of the presentation of evidence and the recall of Witness P-178".[1390] In support of this conclusion, the Trial Chamber noted that information "related to the alleged [redacted] of Witness P-178, the fact that the witness was [redacted], his relationship with an unidentified [redacted], and his allegations of threats" had been already considered in its Decision on

[1385] Decision on Request Concerning Witness Contact, para. 35; Decision on Request to Recall P178, para. 18.
[1386] Decision on Request to Recall P178, paras 19, 22, referring to Decision on Request Concerning Witness Contact, para. 34.
[1387] Decision on Request to Recall P178, para. 20; Decision on Reconsideration to Recall P178, paras 17-18.
[1388] Decision on Request to Recall P169, para. 29.
[1389] Decision on Request to Recall P169, para. 29.
[1390] Decision on Request to Recall P178, para. 20.

Request Concerning Witness Contact.[1391] The Trial Chamber considered that recalling P178 was not "justified in order to further check the general credibility" of witness P169.[1392] It further considered that P169's 2014 Testimony and the reports submitted by the Prosecutor and the VWU were "in line with the Chamber's assessment that the defence's allegations of collusion among witnesses called by the prosecution is unsubstantiated".[1393]

627. We recall that in the Conviction Decision, the Trial Chamber found that "the letters sent by P169 were motivated by a personal desire to receive benefits from the Court after having completed his testimony, but do not, in themselves, render his 2011 Testimony on issues related to the merits of the case unreliable".[1394] The Trial Chamber further found that there was "no reason to doubt the testimony of P173, P178, or the 19 Protected Witnesses on the basis of the letters P169 sent to the Court in light of [P169's] 2014 Testimony".[1395]

628. We note that the Trial Chamber's main consideration in rejecting Mr Bemba's request to recall P178 was that "it was not convinced that information on the creation of the List and post-testimony contact between witnesses bore relevance to 'collusion among witnesses'".[1396] For the reasons that follow, we find that the Trial Chamber did not err in making this finding.

629. We recall, firstly, that the reports submitted by the Prosecutor and the VWU are consistent [redacted].[1398] They are also consistent in that [redacted].[1399] Furthermore, we note that both P169 and P178 said that their actions had been motivated by

[1391] Decision on Request to Recall P178, para. 21, referring to Decision on Request Concerning Witness Contact, paras 1, 5, 23, 31.
[1392] Decision on Request to Recall P178, para. 21.
[1393] Decision on Request to Recall P178, para. 22.
[1394] Conviction Decision, para. 321.
[1395] Conviction Decision, para. 322.
[1396] Decision on Reconsideration to Recall P178, para. 25.
[1397] Conviction Decision, para. 320; Prosecutor's First Report on Witness Contact, para. 15; Annex to VWS Fourth Report on Witness Contact.
[1398] *See* Prosecutor's First Report on Witness Contact, paras 13-14; Annex to VWS Second Report on Witness Contact; Annex to VWS Fourth Report on Witness Contact; Annex to VWS Fifth Report on Witness Contact.
[1399] Annex to VWS Second Report on Witness Contact; Annex to VWS Fourth Report on Witness Contact; Annex to VWS Fifth Report on Witness Contact.

their discomfort with the Court's delay in paying their loss of income claims.[1400] This account of events was confirmed by P169 in his 2014 Testimony.[1401] Finally, we recall that the alleged contact between witnesses took place *after* completion of their respective testimony at the Court, which further supports the Trial Chamber's conclusion that allegations of witness collusion were unsubstantiated.[1402]

630. In light of the above considerations and in the absence of any indication that the witnesses may have colluded to testify falsely or to corruptly claim benefits from the Court, we find that the Trial Chamber did not err in rejecting challenges to the credibility of prosecution witnesses on the basis of it not having enough information to dismiss allegations of witness collusion. While it is correct that the Trial Chamber did not have certainty about certain aspects of the issues raised in the letters sent by P169, these had no significant bearing on the credibility of P169 or P178.

(b) Superficial credibility analysis

631. We note Mr Bemba's argument that the Trial Chamber's credibility assessment of P169 and P178 was superficial and its reasoning simplistic.[1403] Specifically in relation to P169, Mr Bemba contends that the Trial Chamber found him reliable solely on the basis of: "(i) his 'assertion that his 2011 Testimony was truthful'; (ii) his claims were made after his 2011 testimony; and (iii) his denial that the Prosecution exerted any influence on his testimony before or after his court appearance".[1404]

632. We recall that the Trial Chamber addressed Mr Bemba's challenges to the credibility of P169 and P178 in detail, providing sufficient reasoning to each of its conclusions.[1405] It is also important to recall that the Trial Chamber "has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence" and therefore "it is primarily for the Trial Chamber to determine

---

[1400] *See* Prosecutor's First Report on Witness Contact, para. 15; VWS Third Report on Witness Contact, para. 5; VWS Sixth Report on Witness Contact, para. 3.
[1401] Conviction Decision, paras 320-321, referring to Transcript of 22 October 2014, ICC-01/05-01/08-T-361-Red-Eng, p. 44, line 14 to p. 45, line 12; p. 53, lines 12-15; Transcript of 23 October 2014, ICC-01/05-01/08-T-362-Red-Eng, p. 35, line 22 to p. 36, line 2; p. 37, lines 10-15, 17-24; p. 42, lines 22-25.
[1402] Conviction Decision, para.321; Decision on Request Concerning Witness Contact, para. 34.
[1403] Appeal Brief, para. 509.
[1404] Appeal Brief, para. 509.
[1405] Conviction Decision, paras 318-328.

whether a witness is credible".[1406] We consider that, rather than demonstrating an error in the Trial Chamber's assessment of the credibility of P169 and P178, Mr Bemba disagrees therewith. In light of the foregoing considerations, Mr Bemba's argument is rejected.

(c) Failure to address Mr Bemba's supplemental submissions

633. We note Mr Bemba's argument that the Trial Chamber failed to address "in any meaningful way" his supplemental submissions on P169's 2014 Testimony.[1407] As an example, Mr Bemba refers to P169 lying about the number of times he met with [redacted],[1408] an issue about which he had made submissions in his supplemental submissions.[1409] In the Conviction Decision, the Trial Chamber referenced these submissions,[1410] but noted that the testimony of P169 "lacked clarity in relation to […] the date, place and number of meetings with P42 and/or P178".[1411] Given the Trial Chamber's determination that P169 lacked clarity on the specificities surrounding the number of meetings he had with other Prosecution witnesses [redacted], we consider that the Trial Chamber clearly acknowledged and addressed Mr Bemba's submissions. We therefore find no merit in Mr Bemba's contention that his submissions on this point were not addressed meaningfully.

634. We note that in his appeal brief, Mr Bemba does not refer to any other example of submissions not addressed by the Trial Chamber in the Conviction Decision. Although he makes a general reference to his submissions on P169's 2014 Testimony in a footnote in his appeal brief,[1412] he does not even refer to specific paragraphs of his submissions that were allegedly ignored. In our view, this falls short of the requirement of an appellant to set out the alleged error and to explain how it materially affected the decision.[1413] Furthermore, we recall that the Trial Chamber is not bound to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with

---

[1406] *Bemba et al.* Appeal Judgment, para. 93.
[1407] Appeal Brief, para. 510.
[1408] Appeal Brief, para. 510.
[1409] Mr Bemba's Submissions on P169 2014 Testimony, paras 50-57.
[1410] Conviction Decision, para. 320, fn. 772, referring to Mr Bemba's Submissions on P169 2014 Testimony, paras 46-64.
[1411] Conviction Decision, para. 320, referring to Transcript of 24 October 2014, ICC-01/05-01/08-T-363-Red-Eng, p. 8, lines 18-21: "Q. The meeting at which you received the list of [redacted], was that in March of 2013? A. I told you that I'd forgotten the date. I told you I could not remember any date. That's my answer. I told it to the Prosecutor, I told it to the Presiding Judge and I have given this answer to Maître Douzima as well."
[1412] Appeal Brief, fn. 1004.
[1413] *Lubanga* Appeal Judgment, para. 30 requires the appellant to set out the alleged error and explain how it materially affected the impugned decision.

sufficient clarity the basis for its decision.[1414] Accordingly, Mr Bemba's arguments in relation to submissions not addressed in the Conviction Decision warrant rejection.

(d) Other reasons to reject the testimony of P169 and P178

635. Mr Bemba argues that broader credibility issues affected the testimony of P169 and P178.[1415] In particular, he refers to the witnesses testifying to untrue events, to inconsistencies between their testimony and prior statements[1416] and to them receiving benefits going beyond the ordinary requirements of subsistence.[1417]

636. As to Mr Bemba's first argument, namely that the witnesses testified to untrue events, we note that he advances one example in relation to each witness.[1418] In relation to P169, Mr Bemba submits that he lied when testifying that an MLC soldier used to rape children to infect them with AIDS.[1419] To support his contention, Mr Bemba refers to the part of the transcript where the witness testified on this point and to a paragraph of his closing brief without explaining the basis for his allegation that the witness lied.[1420] Furthermore, neither the paragraph of Mr Bemba's Closing Brief nor the excerpt of P169's testimony referred to by Mr Bemba show or explain on what basis he considers that the witness lied. In these circumstances, his argument must be rejected.

637. With regard to P178, as rightly noted by the Prosecutor,[1421] Mr Bemba refers to a part of the transcript that is not related to his submissions on appeal, namely that P178 claimed that the MLC employed child soldiers on the basis of children seen playing with a baton behind a house.[1422] As in the case of P169, Mr Bemba fails to show or explain on what basis he submits that P178 lied on this point. The references provided in footnote 1009 of his appeal brief do not provide this information either. In these circumstances, Mr Bemba's argument must be rejected.

[1414] Majority Judgment, para. 53.
[1415] Appeal Brief, para. 511.
[1416] Appeal Brief, para. 511.
[1417] Appeal Brief, para. 496.
[1418] Appeal Brief, para. 511.
[1419] Appeal Brief, para. 511.
[1420] Appeal Brief, fn. 1008.
[1421] Response to the Appeal Brief, para. 411.
[1422] Appeal Brief, para. 511, fn. 1009.

638. With respect to Mr Bemba's contention that the Trial Chamber disregarded inconsistencies between the testimony of P169 and his statements, we notes that once again Mr Bemba attempts to import arguments made in his closing brief by way of referring to them in a footnote.[1423] He does not explain, however, why the Trial Chamber erred in this regard and how the purported error materially affected the Conviction Decision. We will not address these submissions as they have not been fully placed before the Appeals Chamber.[1424]

639. As regards inconsistencies between P178's testimony and his prior statement, we note that the parts of the witness's testimony to which Mr Bemba refers show inconsistencies in the account provided by the witness on the following two points: (i) who issued the order for the MLC forces to withdraw;[1425] and (ii) whether he heard Colonel Moustapha informing Mr Bemba of the commission of crimes by MLC troops over the phone.[1426] In this regard, we recall that it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimony. It is for the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence.[1427] In any event, we recall that the Trial Chamber considered that particular caution was required in analysing the testimony of P178.[1428] As such, even if we were to find an error in the Trial Chamber's consideration of inconsistencies in the evidence of P178, it has not been shown how this error would impact the credibility assessment of P178 given that the Trial Chamber had reservations in relation thereto and considered such reservations in the assessment of the witness evidence.[1429]

640. With respect to Mr Bemba's submissions that P169 and P178 received benefits going beyond the ordinary requirements of subsistence, we recall that the Trial Chamber found, on

[1423] Appeal Brief, para. 511, fn. 1010.
[1424] *See supra* para. 634.
[1425] Appeal Brief, para. 511, referring to Transcript of 6 September 2011, ICC-01/05-01/08-T-154-Red2-Eng, p. 22 line 19 to p. 24, line 16 where the witness explained that in his prior statement he had said that it was President Patassé who ordered the withdrawal because the investigators "perhaps […] hadn't expressed themselves properly".
[1426] Appeal Brief, para. 511, referring to Transcript of 6 September 2011, ICC-01/05-01/08-T-154-Red2-Eng, p. 45, line 16 to p. 52, line 6 where the witness explains that in his prior statement it appeared that he had answered "no" to the question of whether he heard Moustapha talking to Mr Bemba about the abuses because the investigators had made "a typing error" during the taking of the interview.
[1427] *Bemba et al*. Appeal Judgment, para. 93.
[1428] Conviction Decision, para. 329.
[1429] Conviction Decision, para. 329.

the basis of the reports submitted by the VWU that "the financial assistance provided to the two witnesses […] [redacted].[1430] By merely asserting on appeal that the financial assistance received by the witnesses amounted to benefits going beyond the ordinary requirements of subsistence without explaining why this is the case and why the Trial Chamber's assessment was incorrect, Mr Bemba fails to demonstrate an error in the Trial Chamber's determination. Accordingly, his argument must be rejected.

641. In light of the foregoing considerations, Mr Bemba's arguments under this heading warrant rejection.

(e) Conclusion in relation to Mr Bemba challenges to the Trial Chamber credibility assessment of P169 and P178

642. Having rejected the totality of Mr Bemba's arguments, we find that the Trial Chamber did not err in its credibility assessment of P169 and P178.

3. Reliance on testimony of 19 CAR Witnesses

643. In challenging the Trial Chamber's reliance on the evidence of the 19 CAR Witnesses, Mr Bemba submits that "[t]he potential collusion and corruption of the entire list of the Prosecution's CAR witnesses" should have warranted further investigative measures such as contacting the 19 CAR Witnesses in order to determine whether they wished to recant their testimony and examining the telephone records of P169 and P178.[1431] We have found that the Trial Chamber did not err in rejecting challenges to the credibility of prosecution witnesses on the basis of it not having enough information to dismiss allegations of witness collusion.[1432] Specifically in relation to Mr Bemba's argument concerning additional investigative measures that the Trial Chamber should have taken, we considered that Mr Bemba merely disagreed with the approach taken by the Trial Chamber but failed to demonstrate that the Trial Chamber erred – his argument was accordingly rejected.[1433]

644. We also note Mr Bemba's contention that, in rejecting his challenges to the credibility of the 19 CAR Witnesses, the Trial Chamber made a factual error insofar as it found P169

[1430] Decision on Request for Investigative Assistance concerning P169 and P178, para. 20.
[1431] Appeal Brief, para. 517.
[1432] *See supra* VIII.A.2(a).
[1433] *See supra* para. 621.

testified that his claims of subornation of witnesses were untrue and used for the sole purpose of putting pressure on the readers of his letters.[1434] We have found that on the basis of the information before it, it was not unreasonable for the Trial Chamber to make this finding.[1435]

645. Finally, we have also rejected Mr Bemba's argument that the Trial Chamber did not have enough information to reject challenges to the credibility of witnesses based on allegations of witness collusion.[1436]

646. In light of the foregoing, we find that the Trial Chamber did not err in its credibility assessment of the 19 CAR Witnesses.

B. Scope of the legal representative of victims' involvement led to an unbalanced and unfair trial

1. Procedural background and submissions

647. On 19 November 2010, the Trial Chamber issued a decision, in which it, *inter alia*, set out modalities of the participation of victims at trial.[1437] The Trial Chamber reiterated its earlier rulings that Victims' Representatives "wishing to participate during the trial proceedings should set out in a discrete application the nature and detail of their proposed questions to witnesses at least seven days before the witness is scheduled to testify".[1438] The Trial Chamber further held that

> [i]n addition to the application described above, the Chamber decides that victims may, at the end of the questioning by the prosecution, request leave to ask questions in addition to those questions filed in the application as set out in the paragraph above. Such request must explain both the nature and the details of the proposed questioning as well as specify in what way the personal interests of the victims are affected, in compliance with the conditions of Rule 91 of the Rules. The Trial Chamber will determine such applications on a case-by-case basis.[1439]

648. Regarding the scope of the questioning, the Trial Chamber held that

---

[1434] Appeal Brief, paras 518-519.
[1435] *See supra* VIII.A.2(a).
[1436] *See supra* para. 630.
[1437] Decision on the Conduct of the Proceedings.
[1438] Decision on the Conduct of the Proceedings, para. 18, referring to Decision on Victim Participation, para. 102(h); Decision on Common Legal Representation of Victims, para. 39.
[1439] Decision on the Conduct of the Proceedings, para. 19.

> the legal representatives are expected only to question a witness to the extent relevant to the victims' interests. The scope of questioning is therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts, notwithstanding their relevance to the guilt or innocence of the accused.[1440]

649. On 19 July 2013, Mr Bemba filed a motion concerning the allegedly unrestricted questioning of the defence witnesses by the Victims' Representatives.[1441]

650. On 21 August 2013, the Trial Chamber found that Mr Bemba's proposed additional restrictions on the Victims' Representatives' ability to question the remaining witnesses were unwarranted.[1442] The Trial Chamber recalled that it had "always been mindful of the need to restrict the legal representatives to only those questions which are relevant to the interests of the victims they represent".[1443] The Trial Chamber denied having allowed an unrestrained questioning, as alleged by Mr Bemba, and noted that it had "carefully considered the legal representatives' applications to question each defence witness, and ha[d] issued oral and written decisions authorising some questions and not others, on the basis of, *inter alia*, whether the questions were sufficiently linked to the personal interests of the victims".[1444] The Trial Chamber explained that "in order to expedite the proceedings", it had not directed the Victims' Representatives to make new applications for leave to ask follow-up questions, as it had "closely monitored the nature of the follow-up questions" and had sought "clarification when the relationship of the questions to the personal interests of victims was not clear".[1445]

651. On 11 September 2013, the Trial Chamber denied Mr Bemba's request for leave to appeal the Decision on Victims' Representatives Questioning.[1446]

652. Mr Bemba submits on appeal that the unrestricted involvement of the Victims' Representatives in the proceedings against him led to "an unbalanced and unfair trial".[1447] He argues that the "only meaningful remedy would be for the trial to be conducted again in the

---

[1440] Decision on the Conduct of the Proceedings, para. 20.
[1441] Motion on the Questioning of Defence Witnesses by the Victims' Representatives.
[1442] Decision on Victims' Representatives Questioning, para. 11.
[1443] Decision on Victims' Representatives Questioning, para. 10.
[1444] Decision on Victims' Representatives Questioning, para. 10.
[1445] Decision on Victims' Representatives Questioning, para. 10.
[1446] Decision on Leave to Appeal regarding Victims' Representatives Questioning, paras 15, 17.
[1447] Appeal Brief, paras 521-546.

manner envisaged by the drafters of the Statute".[1448] However, given the length of time he spent in detention, the only appropriate remedy in his view would be a permanent stay of proceedings.[1449]

653. The Prosecutor submits that the Trial Chamber properly monitored the Victims' Representatives' questioning of witnesses and ensured, on a case-by-case basis, that the Victims' Representatives' proposed questions were related to the victims' personal interests and did not prejudice Mr Bemba's rights.[1450] She contends that Mr Bemba has not demonstrated prejudice resulting from the Trial Chamber's reliance on the evidence led by the Victims' Representatives as "[the] [v]ictims may lead evidence and examine witnesses on any matter, including the accused's culpability".[1451]

654. In his reply, Mr Bemba submits that rule 91 (3) of the Rules does not give the Trial Chamber a discretion to allow questions "for which prior authorization has not been sought and no judicial authorization has been granted".[1452] The Victims' Representative avers that the Trial Chamber carefully examined the questions proposed by the Victims' Representatives and authorised those that were sufficiently linked to the demonstrated personal interests of the victims.[1453]

2. Analysis

655. Under this sub-ground of appeal, Mr Bemba argues that the scope of the involvement of the Victims' Representatives in the proceedings and in particular their questioning of witnesses led to "an unbalanced and unfair trial".[1454] He thus raises a "ground that affects the fairness or reliability of the proceedings or decision" within the meaning of article 81 (1) (b) (iv) of the Statute.

(a) Questioning by the Victims' Representatives was unconstrained

656. Before addressing the specific arguments raised by Mr Bemba, we recall that article 68 (3) of the Statute enables victims to participate in judicial proceedings by presenting their

[1448] Appeal Brief, para. 546.
[1449] Appeal Brief, para. 546.
[1450] Response to the Appeal Brief, paras 417-420, 428.
[1451] Response to the Appeal Brief, paras 417, 431.
[1452] Reply to the Response to the Appeal Brief, para. 69.
[1453] Victims' Observations, paras 92-93.
[1454] Appeal Brief, paras 521-546.

views and concerns where their personal interests are affected. The modalities of participation of the victims under that provision must be specified by the chamber in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[1455]

657. As regards the questioning of witnesses or the accused by legal representatives of victims, rule 91 (3) of the Rules provides:

> (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.
>
> (b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

658. We observe that, in setting out the modalities of the participation of victims in the questioning of witnesses, the Trial Chamber relied on article 68 (3) of the Statute and rule 91 of the Rules.[1456] The Trial Chamber ruled that the Victims' Representatives were "expected only to question a witness to the extent relevant to the victims' interests" and that the "scope of questioning [was] therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts, notwithstanding their relevance to the guilt or innocence of the accused".[1457] It recalled that victims "[should] not be considered as a support to the prosecution".[1458] The Trial Chamber instructed the Victims' Representatives, if they wished to question a witness, to "set out in a discrete written application the nature and the details of their proposed questions to witnesses 7 days before the witness [was] scheduled

[1455] *DRC* OA6 Judgment, para. 45.
[1456] Decision on the Conduct of the Proceedings, paras 4, 19.
[1457] Decision on the Conduct of the Proceedings, para. 20.
[1458] Decision on the Conduct of the Proceedings, para. 17.

to testify".[1459] The Victims' Representatives had to demonstrate that the proposed questions concerned issues that affected the victims' personal interests.[1460] On occasion, the Trial Chamber reminded the Victims' Representatives to comply with the requirement of demonstrating how the personal interests of victims were affected.[1461]

659. Mr Bemba argues that the Trial Chamber's interpretation of the victims' personal interests was unduly broad, as the Trial Chamber found in the Decision on Applications to Question Witnesses that "the victims have a general interest in the proceedings and in their outcome" and that "all pertinent questions are put to witnesses".[1462] Leaving aside the question of whether a general interest of victims in the proceedings and their outcome could qualify as "personal interests" in terms of article 68 (3) of the Statute, we note that, in the aforementioned decision, the Trial Chamber considered whether victims could have a personal interest in the testimony of so-called "insider witnesses". The Trial Chamber found that "the interests of victims are not limited to the physical commission of the alleged crimes under consideration. Rather, their interests extend to the question of the person or persons who should be held liable for those crimes, whether physical perpetrators or others".[1463] Thus, the Trial Chamber did not stipulate that victims have a general personal interest in the proceedings, but explained why the issue at hand – the testimony of an insider witness – could affect their personal interests. It is of note that the Trial Chamber, in the same decision, rejected two proposed questions by the victims on the basis that they were "not relevant to the personal interests of victims or speculative",[1464] indicating that the Trial Chamber did apply

[1459] Decision on Victim Participation, para. 102 (h).
[1460] *See e.g.* Transcript of 21 June 2013, ICC-01/05-01/08-T-328-Red2-Eng, p. 2, lines 7-18; Transcript of 19 June 2013, ICC-01/05-01/08-T-326-Red-Eng, p. 23, line 20 to p. 24, line 8; Transcript of 7 May 2013, ICC-01/05-01/08-T-313-Red2-Eng, p. 2, line 3; p. 4 line 1; Transcript of 22 April 2013, ICC-01/05-01/08-T-308-Red2-Eng, p. 2, lines 5-13; Transcript of 8 April 2013, ICC-01/05-01/08-T-301-Red2-Eng, p. 2, lines 1-14; Transcript of 13 March 2013, ICC-01/05-01/08-T-293-Conf-Eng, p. 28, line 25 to p. 29, line 15; Transcript of 30 November 2012, ICC-01/05-01/08-T-279-Red2-Eng, p. 1, line 24 to p. 2, line 9; Transcript of 27 November 2012, ICC-01/05-01/08-T-276-Red2-Eng, p. 1, line 22 to p. 2, line 9; Transcript of 19 November 2012, ICC-01/05-01/08-T-270-Red2-Eng, p. 1, line 24 to p. 2, line 11; Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 1, line 24 to p. 2, line 12; Transcript of 18 October 2012, ICC-01/05-01/08-T-257-Red2-Eng, p.1, line 22 to p. 2, line 13; Transcript of 19 September 2012, ICC-01/05-01/08-T-248-Red2-Eng, p. 56, line 16 to p. 57, line 8.
[1461] *See e.g.* Transcript of 31 March 2011, ICC-01/05-01/08-T-93-Red2-Eng, p. 29, line 14 to p. 30, line 7.
[1462] Reply to the Victims' Observations, para. 58, referring to Decision on Applications to Question Witnesses, para. 15.
[1463] Decision on Applications to Question Witnesses, para. 15.
[1464] Decision on Applications to Question Witnesses, para. 17 (i).

the "personal interests" criterion. We therefore do not consider that the Trial Chamber's approach was erroneous.

660. Regarding Mr Bemba's argument that the Victims' Representatives asked unauthorised follow-up questions that were unrelated to the personal interests of the victims,[1465] we note that, in the Decision on the Conduct of the Proceedings, the Trial Chamber stipulated a procedure for questions which the Victims' Representatives intended to ask in addition to questions listed in their original applications.[1466] According to this procedure, the Victims' Representatives were required to seek leave to ask such questions, specifying how the personal interests of the victims were affected by the issue.[1467] The scope of the questioning was to be "limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts, notwithstanding their relevance to the guilt or innocence of the accused".[1468]

661. We note that Mr Bemba raised with the Trial Chamber the issue of allegedly unauthorised follow-up questions and the Trial Chamber reiterated that when "exercising the discretion [to allow the Victims' Representatives to put additional questions], [it would] ensure that the legal representatives' questions [were] relevant, related to the personal interests of their clients and consistent with the fairness, impartiality and expeditiousness of the trial".[1469]

662. In the subsequent practice, however, the Trial Chamber did not always require an additional application for follow-up questions by the Victims' Representatives. Indeed, in another oral decision regarding follow-up questions, the Trial Chamber noted that the Victims' Representatives "ha[d] regularly asked the witnesses additional questions that would arise from witness's testimony and could not have been anticipated in their prior applications" and that the Chamber "ha[d] allowed this practice as long as it ha[d] not been

[1465] Appeal Brief, paras 521-528.
[1466] Decision on the Conduct of the Proceedings, para. 19.
[1467] Decision on the Conduct of the Proceedings, para. 19. *See also* Transcript of 17 September 2012, ICC-01/05-01/08-T-246-Red2-Eng, p. 29, line 1 to p. 31, line 4; Transcript of 12 September 2012, ICC-01/05-01/08-T-243-Red2-Eng, p. 1, line 22 to p. 3, line 18.
[1468] Decision on the Conduct of the Proceedings, para. 20.
[1469] Transcript on 28 November 2011, ICC-01/05-01/08-T-192-Red2-Eng, p. 59, lines 15-24.

prejudicial to the Defence".[1470] The Trial Chamber indicated that it intended to continue allowing that practice "as long as witnesses' summaries provided by the Defence lack[ed] the requisite detail".[1471]

663. We recall that in its decision of 21 August 2013 addressing another challenge made by Mr Bemba to the Victims' Representatives' questioning,[1472] the Trial Chamber reiterated that it "carefully considered the legal representatives' applications to question each defence witness, and ha[d] issued oral and written decisions authorising some questions and not others, on the basis of, *inter alia*, whether the questions were sufficiently linked to the personal interests of the victims".[1473] The Trial Chamber explained, however, that "in order to expedite the proceedings", the Victims' Representatives were not requested to present a new application each time they wanted to ask follow-up questions, as the Trial Chamber "closely monitored the nature of the follow-up questions" and sought "clarification when the relationship of the questions to the personal interests of victims was unclear".[1474]

664. We note that the approach of the Trial Chamber adopted in the course of the trial diverged from the procedure set out in the Decision on the Conduct of the Proceedings. However, the Trial Chamber appears to have adopted that approach in view of the lack of sufficient detail in summaries of evidence of defence witnesses.[1475] In any event, we consider that the Trial Chamber's approach complied with the Court's legal framework. As noted above, rule 91 (3) (a) of the Rules requires an application by the legal representatives of victims to the Trial Chamber if they wish to question a witness or the accused. The same provision stipulates that the Trial Chamber *may* require legal representatives to submit the intended questions in advance in writing. Thus, while rule 91 (3) (a) of the Rules provides that questioning of witnesses by legal representatives of victims is dependent on prior authorisation by the Chamber, it does not require that each question be authorised in advance. Importantly, in its Decision on Victims' Representatives Questioning, the Trial Chamber affirmed that it continued to monitor the compliance of that questioning with the principles it

[1470] Transcript of 7 May 2013, ICC-01/05-01/08-T-313-Red2-Eng, p. 3, lines 13-17.
[1471] Transcript of 7 May 2013, ICC-01/05-01/08-T-313-Red2-Eng, p. 3, lines 16-19.
[1472] Motion on the Questioning of Defence Witnesses by the Victims' Representatives.
[1473] Decision on Victims' Representatives Questioning, para. 10.
[1474] Decision on Victims' Representatives Questioning, para. 10.
[1475] Transcript of 7 May 2013, ICC-01/05-01/08-T-313-Red2-Eng, p. 3, lines 13-19.

had set out in the beginning of the trial. In our view, this approach complied with both rule 91 (3) (a) of the Rules and article 68 (3) of the Statute.

665. Regarding Mr Bemba's examples of allegedly inappropriate questioning by the Victims' Representatives, we observe that during the Victims' Representatives' questioning of witness D6,[1476] the Presiding Judge intervened, following an objection by Mr Bemba,[1477] and directed the Victims' Representative to show that the question posed to the witness related to his earlier testimony.[1478] Following the Victims' Representative's clarification, the Presiding Judge allowed the witness to answer the question.[1479] Mr Bemba did not raise any other objection during the Victims' Representative's questioning of the witness, nor during the questioning conducted by the other Victims' Representative.[1480] Regarding witness D4,[1481] Mr Bemba objected to a question posed by the Victims' Representative on the basis that the question had not been authorised and did not relate to the evidence given by the witness or to the interests of the victims represented by the Victims' Representative.[1482] Having received clarification from the Victims' Representative, the Presiding Judge authorised him to proceed with the question.[1483] Mr Bemba did not raise any other objection to the Victims' Representative's questions, nor to questions by the other Victims' Representative.[1484] Overall, the Trial Chamber's handling of the objections by Mr Bemba does not disclose any error on the part of the Chamber.

666. We note that, apart from arguing that the Victims' Representatives asked a series of allegedly unauthorised 'follow-up' questions, including to D4 and D6, Mr Bemba does not show that the Trial Chamber abused its discretion in allowing those questions, rendering the proceedings unfair. While Mr Bemba gives examples of objections that the Trial Chamber dismissed, he does not explain how these examples show an error in the Trial Chamber's

[1476] Transcript of 21 June 2013, ICC-01/05-01/08-T-328-Red2-Eng, p. 2, lines 7-18.
[1477] Transcript of 24 June 2013, ICC-01/05-01/08-T-329-Red-Eng, p. 34, lines 12-23.
[1478] Transcript of 24 June 2013, ICC-01/05-01/08-T-329-Red-Eng, p. 35, lines 3-8.
[1479] Transcript of 24 June 2013, ICC-01/05-01/08-T-329-Red-Eng, p. 35, line 21.
[1480] Transcript of 24 June 2013, ICC-01/05-01/08-T-329bis-Red-Eng, p. 1, line 25 to p. 16, line 22.
[1481] Transcript of 19 June 2013, ICC-01/05-01/08-T-326-Red-Eng, p. 23, line 23 to p. 24, line 8.
[1482] Transcript of 20 June 2013, ICC-01/05-01/08-T-327-Red-Eng, p. 52, lines 16-18.
[1483] Transcript of 20 June 2013, ICC-01/05-01/08-T-327-Red-Eng, p. 52, lines 19-25.
[1484] Transcript of 20 June 2013, ICC-01/05-01/08-T-327-Red-Eng, p. 56, line 4 to p. 61, line 8; Transcript of 20 June 2013, ICC-01/05-01/08-T-327bis-Red-Eng, p. 1, line 25 to p. 16, line 22.

approach to the follow-up questions.[1485] Moreover, we note that, during the course of the trial, the Trial Chamber intervened during the Victims' Representatives' questioning of witnesses, either on its own motion or in response to objections, by requesting clarification[1486] or restricting the scope of the Victims' Representatives' follow-up questions.[1487]

(b) Allegation that defence witnesses were cross-examined three times

667. Mr Bemba contends that, because of the way the Victims' Representatives questioned the witnesses presented by the Defence, those witnesses "were cross-examined three times".[1488] He raises several arguments in support of this allegation, which we shall address in turn.

(i) Leading questions

668. With respect to Mr Bemba's claim that the Trial Chamber "sat silently" while the Victims' Representatives asked leading and repetitive questions to defence witnesses,[1489] we are not convinced by Mr Bemba's argument regarding the Victims' Representatives' questioning of D49.[1490] The Victims' Representatives' questions to D49 concerned issues with respect to which the Trial Chamber had previously authorised questioning on the basis that the victims' personal interests were affected.[1491] The Victims' Representative's questions on military training and the popularisation of the MLC Code of Conduct were based on answers previously given by the witness during his testimony.[1492] We note that Mr Bemba did not oppose the authorisation of questions sought by the Victims' Representatives and did not raise any objection during the Victims' Representatives' questioning of the witness.[1493]

[1485] Reply to the Response to the Appeal Brief, para. 71, referring to, *inter alia*, Transcript of 8 November 2012, ICC-01/05-01/08-T-269-Red2-Eng, p. 20, line 16 to p. 21, line 4; Transcript of 22 August 2013, ICC-01/05-01/08-T-334-Red-Eng, p. 47, line 3 to p. 49, line 5; Transcript of 3 September 2013, ICC-01/05-01/08-T-342-Red-Eng, p. 18, line 14 to p. 19, line 7.
[1486] Transcript of 20 June 2013, ICC-01/05-01/08-T-327-Red-Eng, p. 52, lines 19-25.
[1487] Transcript of 18 September 2012, ICC-01/05-01/08-T-247-Red2-Eng, p. 35, line 15 to p. 36, line 3.
[1488] Appeal Brief, paras 529-540.
[1489] Appeal Brief, paras 529-537.
[1490] Appeal Brief, paras 528, 530, fns 1070-1071.
[1491] Transcript of 19 November 2012, ICC-01/05-01/08-T-270-Red2-Eng, p. 1, line 22 to p. 2, line 9. *See also* "*Requête de la Représentante légale de victimes relative à l'interrogatoire du témoin 49*", 9 November 2012, ICC-01/05-01/08-2407-Conf, p. 3; "*Requête du Représentant légal de victimes afin d'être autorisé à interroger le témoin 49*", 9 November 2012, ICC-01/05-01/08-2408-Conf, pp. 3-5.
[1492] Transcript of 23 November 2012, ICC-01/05-01/08-T-274-Red2-Eng, p. 37, lines 11-24; p. 38, lines 6-18.
[1493] Transcript of 23 November 2012, ICC-01/05-01/08-T-274-Red2-Eng, p. 36, line 19 to p. 60, line 3.

Furthermore, the Trial Chamber itself intervened by directing the Victims' Representative to avoid asking speculative questions.[1494]

669. Regarding D45,[1495] we note that both Victims' Representatives were authorised to put all their questions to the witness.[1496] We note that Mr Bemba neither objected to the proposed questions, when authorisation was sought,[1497] nor to any of the Victims' Representatives' questions,[1498] including the question which he argues on appeal was leading.[1499] Similarly, Mr Bemba's further examples of allegedly leading questions to other witnesses[1500] do not support his argument that the Trial Chamber failed to intervene, as he did not object to any of those questions.[1501] We further note in this respect that, if Mr Bemba had objected to questions at the time they were posed, he could have possibly prevented the witnesses from answering those questions. While it is the Trial Chamber's duty, under article 64 (2) of the Statute, to ensure that the trial is fair and expeditious, and that it is conducted with full respect for the rights of the accused, the Trial Chamber is not always in a position to detect, on its own motion, an irregularity in respect of the accused's rights. It is therefore crucial that the accused alerts the Trial Chamber to such irregularities. If the accused fails to do so, he or she may be regarded, in certain circumstances, as having acquiesced to the irregularity affecting his or her rights, which, in turn, leads to the conclusion that the fairness of the proceedings was not affected. In the circumstances of the present case and having regard to the nature of his present arguments, we would find his failure to make contemporaneous

[1494] Transcript of 23 November 2012, ICC-01/05-01/08-T-274-Red2-Eng, p. 58, line 23 to p. 59, line 2.
[1495] Appeal Brief, para. 530, fn. 1071, referring to, *inter alia*, Transcript of 21 March 2013, ICC-01/05-01/08-T-299-Red2-Eng, p. 41, lines 10-12.
[1496] Transcript of 13 March 2013, ICC-01/05-01/08-T-293-Conf-Eng, p. 28, line 25 to p. 29, line 15. *See also* "*Requête du Représentant légal de victimes afin d'être autorisé à interroger le témoin*", 4 March 2013, ICC-01/05-01/08-2521-Conf, pp. 3-5.
[1497] Transcript of 13 March 2013, ICC-01/05-01/08-T-293-Conf-Eng, p. 28, line 25 to p. 29, line 15.
[1498] Transcript of 21 March 2013, ICC-01/05-01/08-T-299-Red2-Eng, p. 32, line 25 to p. 50, line 6; Transcript of 22 March 2013, ICC-01/05-01/08-T-300-Red2-Eng, p. 2, line 11 to p. 6, line 12.
[1499] Appeal Brief, para. 530, fn. 1071, referring to Transcript of 21 March 2013, ICC-01/05-01/08-T-299-Red2-Eng, p. 41, lines 10-12.
[1500] Appeal Brief, para. 530, fn. 1071, referring to Transcript of 24 April 2013, ICC-01/05-01/08-T-310-Red2-Eng, p. 36, lines 5-8; Transcript of 12 April 2013, ICC-01/05-01/08-T-306-Red2-Eng, p. 70, lines 7-8, 23-24; p. 71, lines 1-2; Transcript of 12 March 2013, ICC-01/05-01/08-T-292-Red2-Eng, p. 17, lines 2-6; Transcript of 24 June 2013, ICC-01/05-01/08-T-329-Red-Eng, p. 42, lines 10-12.
[1501] Transcript of 24 April 2013, ICC-01/05-01/08-T-310-Red2-Eng, p. 36, lines 5-14; Transcript of 12 April 2013, ICC-01/05-01/08-T-306-Red2-Eng, p. 70, lines 7-10, 23-25; p. 71, lines 1-3; Transcript of 12 March 2013, ICC-01/05-01/08-T-292-Red2-Eng, p. 17, lines 1-10; Transcript of 24 June 2013, ICC-01/05-01/08-T-329-Red-Eng, p. 42, lines 10-20.

objections to be critical to the consideration of Mr Bemba's present arguments. For that reason, we would have rejected these arguments.

(ii) Lengthy extracts from testimony

670. We are also not convinced by Mr Bemba's submission that the Victims' Representatives "regularly" put lengthy extracts from testimony of other witnesses to defence witnesses with a view to contradict their evidence.[1502] A review of the examples cited by Mr Bemba[1503] shows that extracts put by the Victims' Representatives to some of the witnesses were prior statements made by the same witnesses.[1504] We observe that Mr Bemba neither objected to putting any of the extracts to the witnesses, nor to the questions that followed.[1505] Similarly, Mr Bemba did not object to a comment made by the Victims' Representative during the testimony of D53, which he also cites as an example.[1506] Regarding Mr Bemba's assertion that the Victims' Representative put 14 documents to one defence witness[1507], the passage of the transcript cited in support only indicates that the witness was questioned in relation to two documents; in any event, Mr Bemba did not object to the presentation of these documents to the witness.[1508]

671. We also note that the Trial Chamber did, on occasion, express its dissatisfaction with the number and length of extracts of statements put to witnesses by the Victims' Representatives.[1509] Thus, the Trial Chamber was aware of the issue and kept it under control.

[1502] Appeal Brief, para. 531.
[1503] Appeal Brief, para. 531, fn. 1072.
[1504] Transcript of 17 June 2013, ICC-01/05-01/08-T-324-Eng, p. 13, line 13 to p. 14, line 13; Transcript of 13 May 2013, ICC-01/05-01/08-T-316-Red-Eng, p. 25, line 25 to p. 26, line 6.
[1505] Transcript of 17 June 2013, ICC-01/05-01/08-T-324-Eng, p. 13, line 13 to p. 14, line 13; Transcript of 13 May 2013, ICC-01/05-01/08-T-316-Red-Eng, p. 25, line 25 to p. 28, line 4; Transcript of 12 April 2013, ICC-01/05-01/08-T-306-Red2-Eng, p. 59, line 8 to p. 61, line 5; Transcript of 23 November 2012, ICC-01/05-01/08-T-274-Red2-Eng, p. 52, line 4 to p. 53, line 14; Transcript of 26 October 2012, ICC-01/05-01/08-T-263-Red2-Eng, p. 29, line 12 to p. 30, line 13; p. 36, line 18 to p. 38, line 2; Transcript of 19 October 2012, ICC-01/05-01/08-T-258-Red2-Eng, p. 51, line 22 to p. 52, line 25; Transcript of 18 September 2012, ICC-01/05-01/08-T-247-Red2-Eng, p. 32, line 21 to p. 34, line 16.
[1506] Appeal Brief, para. 531, fn. 1072, referring to Transcript of 22 August 2012, ICC-01/05-01/08-T-234-Red2-Eng, p. 59, line 1 to p. 60, line 6.
[1507] Appeal Brief, para. 531, fn. 1073.
[1508] Transcript of 22 August 2012, ICC-01/05-01/08-T-234-Red2-Eng, p. 32, line 25 to p. 33, line 8; p. 38, line 16 to p. 39, line 9.
[1509] Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 4, lines 17-18; Transcript of 7 February 2012, ICC-01/05-01/08-T-207-Red2-Eng, p. 2, lines 11-15; Transcript of 30 January 2012, ICC-01/05-01/08-T-201-Red2-Eng, p. 4, lines 8-10.

672. In view of the foregoing, we would have rejected Mr Bemba's argument regarding extracts from testimony.

(iii) Repetitive questions

673. Turning to Mr Bemba's contention that the Victims' Representative's questioning of defence witnesses was "oppressively repetitive",[1510] we note that Mr Bemba does not explain, nor is it apparent, how the allegedly repetitive questions affected the fairness of the proceedings. He only avers that the Trial Chamber discounted the evidence of some witnesses on that basis, which we will discuss later.

674. Furthermore, regarding Mr Bemba's example of the questioning of D4,[1511] we observe that Mr Bemba objected to the relevant question on the ground that it had not been authorised or did not relate to the personal interests of the victims.[1512] However, he did not object on the basis that the question was repetitive. When the other Victims' Representative asked questions about the same issue, Mr Bemba did not object either.[1513]

675. Mr Bemba's further examples of "oppressively repetitive" questions to defence witnesses[1514] are equally unpersuasive. The Victims' Representatives questioned the witnesses on issues which the witnesses had previously mentioned in their testimony; Mr Bemba did not object to the questions on the basis of repetitiveness.[1515]

676. We note that, as indicated earlier, Mr Bemba raised the issue of the Victims' Representatives' unrestricted questioning in his motion of 19 July 2013[1516] and that the Trial Chamber ruled on, among other issues, the alleged repetitiveness of questions. The Trial Chamber reiterated that it "closely monitored the nature of the follow-up questions" and that

[1510] Appeal Brief, paras 532-537.
[1511] Appeal Brief, para. 532.
[1512] Transcript of 20 June 2013, ICC-01/05-01/08-T-327-Red-Eng, p. 52, lines 16-18.
[1513] Transcript of 20 June 2013, ICC-01/05-01/08-T-327-Red-Eng, p. 57, lines 19-20.
[1514] Appeal Brief, paras 533-535, fns 1077-1083.
[1515] Transcript of 26 October 2012, ICC-01/05-01/08-T-263-Red2-Eng, p. 26, lines 9-20; p. 50, lines 17-24; Transcript of 18 September 2012, ICC-01/05-01/08-T-247-Red2-Eng, p. 21, lines 16-19; Transcript of 22 August 2012, ICC-01/05-01/08-T-234-Red2-Eng, p. 51, lines 5-10; Transcript of 24 June 2013, ICC-01/05-01/08-T-329-Red-Eng, p. 37, lines 9-10; p. 52, lines 9-14; Transcript of 13 May 2013, ICC-01/05-01/08-T-316-Red-Eng, p. 8, line 25, to p. 9, lines 1-2; p. 36, line 11; p. 38, lines 4-6; Transcript of 10 May 2013, ICC-01/05-01/08-T-315-Red2-Eng, p. 57, lines 1-3; Transcript of 23 October 2012, ICC-01/05-01/08-T-260-Red3-Eng, p. 64, lines 12-18.
[1516] Motion on the Questioning of Defence Witnesses by the Victims' Representatives, paras 22-30.

it would "ensure that the questions [were] not repetitive".[1517] Having regard to the above-mentioned instances of the Trial Chamber's intervention with respect to the Victims' Representatives' questions, we would have found no error in this ruling of the Trial Chamber.

677. With respect to Mr Bemba's argument that the testimony of some defence witnesses was discounted on the basis of their "reluctance" to answer the Victims' Representatives' repetitive questions,[1518] we observe that Mr Bemba misrepresents the Trial Chamber's finding that he cites. The Trial Chamber did not "discount" the evidence of the witness to whose testimony Mr Bemba refers. It only considered that "particular caution" was required in analysing it.[1519] Furthermore, the Trial Chamber found that, "[t]hroughout his testimony, D2's demeanour was evasive".[1520] In support of this finding the Trial Chamber referred to the witness's answers not only to questions put by the Victims' Representatives,[1521] but also by the Prosecutor[1522] and the Presiding Judge.[1523] Mr Bemba also does not substantiate his claim that the witness's evasive demeanour resulted from the same question being asked "over and over".[1524] Therefore, we would have found that Mr Bemba has not shown that the Trial Chamber's finding as to the witness's evasive demeanour was based on the allegedly improper questioning of that witness by the Victims' Representatives.

(iv) Uneven approach of the Victims' Representatives

678. Regarding Mr Bemba's contention that the Victims' Representatives did not "cross-examine" Prosecution witnesses and put "[a]dversarial and repetitive questions" only to defence witnesses,[1525] we note that he fails to demonstrate how this allegedly different treatment of Prosecution and defence witnesses affected his right under article 67 (1) (e) of the Statute, to which he refers.

[1517] Decision on Victims' Representatives Questioning, paras 10-11.
[1518] Appeal Brief, para. 537.
[1519] Conviction Decision, para. 351.
[1520] Conviction Decision, para. 348 (footnotes omitted).
[1521] Transcript of 13 June 2013, ICC-01/05-01/08-T-322-Red2-Eng, p. 55, line 24 to p. 57, line 7; Transcript of 13 June 2013, ICC-01/05-01/08-T-322-Conf-Eng, p. 35, line 4 to p. 37, line 19; p. 59, line 5 to p. 60, line 14.
[1522] Transcript of 12 June 2013, ICC-01/05-01/08-T-321bis-Red-Eng, p. 4, line 24 to p. 10, line 21; Transcript of 13 June 2013, ICC-01/05-01/08-T-322-Red2-Eng, p. 21, line 5 to p. 22, line 2; Transcript of 13 June 2013, ICC-01/05-01/08-T-322-Conf-Eng, p. 23, line 5 to p. 24, line 2.
[1523] Transcript of 13 June 2013, ICC-01/05-01/08-T-322-Conf-Eng, p. 24, line 10 to p. 25, line 25.
[1524] Appeal Brief, para. 537.
[1525] Appeal Brief, para. 538.

679. Mr Bemba's claim that the Trial Chamber failed to intervene with respect to a comment made by one Victims' Representative to D50 is equally unfounded. We note that the Victims' Representative indicated that she "was there and […] heard about" different troops committing acts of violence and asked the witness whether he had heard complaints about these acts.[1526] This comment related to the Victims' Representative's question regarding "the reaction of the people, of the population, of the authorities, of the military authorities […] upon learning about [these acts of violence] over the radio".[1527] Mr Bemba has not explained how the comment made by the Victims' Representative affected the witness's answer to the question. Furthermore, Mr Bemba did not object when the Victims' Representative made this comment, nor did he object to the Victims' Representative's question that followed the comment.[1528] Mr Bemba has not demonstrated that the Trial Chamber erred by not intervening in that instance.

(v) Conclusion

680. In conclusion, we would have found that Mr Bemba has not demonstrated that the manner in which the Victims' Representatives questioned witnesses affected the fairness of the proceedings and his arguments are therefore rejected.

(c) Prejudice caused to Mr Bemba

681. Mr Bemba submits that the way in which the Victims' Representatives were allowed to question witnesses of the Defence caused him prejudice.[1529] While it is not clear whether Mr Bemba raises these arguments as separate errors or merely to substantiate the impact of the alleged errors of the Trial Chamber discussed above, we will address them below.

(i) Expeditiousness of the proceedings

682. Mr Bemba argues that his right to an expeditious trial was compromised by the Trial Chamber's purported failure to restrain the questioning of witnesses by the Victims' Representatives, leading to unnecessarily long questioning, and that, even once the Trial Chamber had imposed a two-hour limit for questions by the Victims' Representatives, the

[1526] Transcript of 16 October 2012, ICC-01/05-01/08-T-255-Red2-Eng, p. 45, line 25 to p. 46, line 3.
[1527] Transcript of 16 October 2012, ICC-01/05-01/08-T-255-Red2-Eng, p. 45, lines 10-24.
[1528] Transcript of 16 October 2012, ICC-01/05-01/08-T-255-Red2-Eng, p. 45, lines 10-24.
[1529] Appeal Brief, paras 541-545.

Victims' Representatives were authorised to use the full two hours for their questioning even when Mr Bemba's questioning of his witnesses was less than two hours.[1530]

683. We recall that, for the reasons set out in the preceding sections, we are not persuaded by Mr Bemba's arguments about the alleged lack of restrictions to the Victims' Representatives' questioning. Therefore, to the extent Mr Bemba argues that the lack of restrictions led to delays in the proceedings, his argument fails.

684. As far as Mr Bemba appears to argue that the overall length of the Victims' Representatives' questioning delayed the proceedings, we note that victims may participate in the proceedings and question witnesses, as is recognised by rule 93 (3) of the Rules. Therefore, unless such participation does not comply with the requirements of article 68 (3) of the Statute, delays occasioned by this form of participation cannot be regarded to amount to "undue delay" within the meaning of article 67 (1) (c) of the Statute. Furthermore, Mr Bemba does not indicate how long the questioning took in the present case and how many witnesses were subjected to an allegedly unduly lengthy questioning. It is therefore difficult to assess how this affected the overall length of his trial. We also take note of the Prosecutor's submission that, with one exception, the Victims' Representatives examined each defence witness for a shorter time than the Defence.[1531]

685. We also observe the Trial Chamber's oral decision of 15 October 2012, in which it ruled that the Victims' Representatives would have two hours for their questioning, with the possibility of extension.[1532] When Mr Bemba raised the issue of length of the Victims' Representatives' questioning, the Trial Chamber noted that Mr Bemba had not demonstrated "a link between any questions it consider[ed] 'repetitive' or 'non-neutral' and the expeditiousness of trial, particularly since in relation to the majority of witnesses, the legal representatives ha[d] not exceeded the two hours granted to them, and in fact ha[d] often completed their questioning in well under the time limit".[1533] The Trial Chamber rejected Mr

[1530] Appeal Brief, para. 542, fn. 1095, referring to article 64 (2) of the Statute and rule 101 of the Rules.
[1531] Response to the Appeal Brief, para. 430.
[1532] Transcript of 15 October 2012, ICC-01/05-01/08-T-254-Red2-Eng, p. 66, line 18 to p. 67, line 1.
[1533] Decision on Leave to Appeal regarding Victims' Representatives Questioning, para. 20.

Bemba's subsequent request for leave to appeal that decision.[1534] We would have found no error in this ruling.

686. For the foregoing reasons, we would have rejected Mr Bemba's argument concerning the expeditiousness of the proceedings.

(ii) Reliance on evidence led by the Victims' Representatives

687. Mr Bemba contends that he was prejudiced because some of the Trial Chamber's adverse findings were corroborated by testimony of witnesses in response to questions by the Victims' Representatives.[1535]

688. We recall that:

> [t]o give effect to the spirit and intention of article 68 (3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful. Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant. If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.[1536]

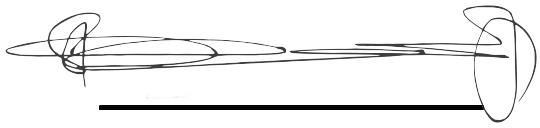
689. It follows from the above that the Trial Chamber may, in making findings on guilt or innocence, rely on testimony resulting from questioning by the Victims' Representative. Indeed, there is no basis in the Court's legal texts for the proposition that a trial chamber should exclude or attach a lower weight to the testimony of a witness merely because that testimony was given in response to questions posed by the legal representative of victims. Therefore, we are not persuaded by Mr Bemba's apparent proposition that the Trial Chamber should not have relied on evidence led by the Victims' Representatives when making findings adverse to him and that he was prejudiced in this regard.

[1534] Decision on Leave to Appeal regarding Victims' Representatives Questioning, paras 21, 24.
[1535] *See* Appeal Brief, para. 543, referring to Conviction Decision, para. 288, fns 679-680, para. 419, fn. 1147 (Transcript of 26 October 2012, ICC-01/05-01/08-T-263-Red2-Eng, p. 36, lines 16-17), para. 555, fn. 1702 (Transcript of 8 November 2012, ICC-01/05-01/08-T-269-Red2-Eng, p. 46, line 21 to p. 47, line 10), para. 602, fn. 1884.
[1536] *Lubanga* OA9/OA10 Judgment, para. 97.

(d) Conclusion

690. In sum, we would have found that Mr Bemba has not demonstrated that the Trial Chamber abused its discretion in the management and monitoring of the Victims' Representatives' questioning of witnesses and therefore affected the fairness of the proceedings. We would have thus rejected this sub-ground of appeal.

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



Judge Sanji Mmasenono Monageng

Judge Piotr Hofmański

Dated this 8th day of June 2018

At The Hague, The Netherlands