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Original: **English**

No.: **ICC-01/05-01/13**
Date: **31 May 2017**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public
With Public Annexes A, B and Public Corrected Annex C

Public Redacted Version of "Corrected Version of 'Narcisse Arido's Document in Support of Appeal Pursuant to Article 81', (ICC-01/05-01/13-2145-Conf), filed 24 April 2017" (ICC-01/05-01/13-2145-Conf-Corr), filed 8 May 2017

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[1] Notice of Appeal is abbreviated as "N/A"; all references are to Updated Notice of Appeal, filed 22 February 2017. The list of authorities contained in Annex C includes abbreviations and shortened names for selected transcripts and legal documents referred to in the present document. Where a transcript from case ICC-01/05-01/13 is referred to the prefix 'ICC-01/05-01/13-' has been removed to enhance readability.

I. INTRODUCTION[2]

1. On 19 October 2016, Trial Chamber VII ('Chamber' or 'TC') rendered its Judgment under Article 74 of the Statute ("Judgment"), convicting Appellant of the offence of corrupting witnesses, in conjunction with Article 25(3)(a), in respect to P-260 (D-2), P-245 (D-3), D-4 and D-6. Appellant was acquitted of Article 70(1)(a) and (b) in respect to the same witnesses.[3]

2. Article 81, which covers errors in both the proceedings and decision, implicitly recognises that there is no definitive "red-line" between the process and its result. The relationship is dialectical, and porous: errors of unfair and unreliable processes can impact on, and produce a verdict which does not satisfy the legal standard of proof beyond a reasonable doubt.

3. This is what happened here: Appellant was convicted of one offence of corrupting four witnesses, based solely on the testimony of two of them – P-260 (D-2) and P-245 (D-3). There was no testimony from D-4 and D-6, and Appellant was denied his right to confront their evidence. The reliability of P-260 (D-2) and P-245 (D-3) was inherently compromised by their status as accomplice/perpetrators, whose criminal conduct was protected by Article 74 assurances.

4. In addition, the investigative processes, both by the Prosecution's office and entities under its aegis – through requests to national jurisdictions – violated the fair trial rights of Appellant and his civil, political and human rights as well as those of his family and others. These violations result in continuing harm to Appellant, who is erroneously and indelibly marked as a 'genocidaire' and to the 67 other persons whose transactions were investigated in relation to the Prosecution's case.

5. This appeal also addresses Appellant's legal arguments and remedies requested about which the Trial Judgment is silent. These "non-decisions" affect the fairness of the process and the fairness of the Judgment.

6. Lastly, there is a section in respect to requests for leaves to appeal which were rejected by the TC. These requests concern legal issues which affect the verdict, and also "raise an issue of

[2] Pursuant to Regulation 23*bis* of the RoC and Regulation 24 of the Regulations of the Registry ('RoR'), this request is submitted confidential as it refers to the names of protected witnesses and confidential materials.
[3] Trial Judgment, para. 871.

general importance for the case-law or functioning of the Tribunal."[4]

II. FAIR TRIAL ERRORS IN THE TRIAL PROCESS AND JUDGMENT (N/A, PARAS A12-15, B, C, D16-20, E, F21, G) AND ERRORS UNDER ARTICLE 81(1)(B)(IV) (N/A, PARAS 43-46)

A. Notice Errors

1. Introduction

7. It is a fundamental, common principle within the international courts and tribunals that an Accused has the "right to be informed promptly and in detail of the nature, cause and content of the charge […]".

8. This provision, in the Statutes for the ICC, ICTY, ICTR, and other judicial entities, mirrors the language of the ICCPR, and other international instruments.

9. Jurisprudence from the *ad hoc* tribunals has developed and affirmed the basic principle of notice for international criminal pleadings: the charging instrument should include factual allegations to support the elements of the crime and mode of liability charged.[5]

10. Appellate jurisprudence holds that the indictment suffers from a material defect if it does not plead the Prosecution's case with sufficient detail.[6] The legal standard is whether an Accused is informed clearly of the charges, so that s/he can prepare her/his defence.[7] An indictment is defective if it fails to plead required material facts.[8]

11. At the ICC, there is no indictment, but the principle of notice applies to the charging instrument, the Pre-Trial Chamber's ('PTC') Confirmation of Charges ('CoC') Decision, which uses the Prosecution's Document Containing the Charges ('DCC') as its reference point.

12. Here, the basic error is that the DCC and CoC failed to identify specific conduct which supported the specific mode of participation finally confirmed – direct perpetration, and the Prosecution Pre-Trial Brief ('PPTB') only identified this late – two months prior to trial. As a result, the Appellant was not provided adequate notice of the specifics regarding the mode of

[4] *Ndindabahizi* Appeal Judgment, para. 13.
[5] *See*, *Ntagerura* Separate Opinion of Judge Dolenc, para. 21.
[6] ICTY: *Kupreškić* Appeal Judgment, paras 114, 124, 246; *see* also Rule 47 (c), ICTR RPE and ICTY Statute, Article 18(4).
[7] *See*, *Kupreškić* Appeal Judgment, para. 88.
[8] ICTY: *Kvočka* Appeal Judgment, para. 28; *Kupreškić* Appeal Judgment, paras 88, 114; ICTR: *Ntagerura* Separate Opinion of Judge Dolenc, para. 21.

liability for which he was on trial and convicted.

13. Both the PTC and TC acted *ultra vires*: the PTC confirmed a mode of liability not identified in the DCC, and the TC convicted Appellant, as a direct perpetrator, for a mode of liability for which he was not given proper notice. Both Chambers failed to order an Updated DCC ('UDCC'), although this was a viable legal option, which resulted in the violation of Appellant's fair trial rights.

2. The Trial Judgment holdings on notice

14. The TC held that notice of the mode of liability of direct perpetration, the mode for which Appellant was convicted under Article 70(1)(c), his sole offence, was provided by factual allegations in the CoC Decision, the DCC and the PPTB.[9]

15. The TC also concluded that the Arido Defence a) had not raised any objections on notice regarding modes of liability confirmed since the Confirmation Hearing, and asserted that b) the Arido Defence had conducted its defence during the trial phase with the knowledge that direct perpetration had been confirmed.[10]

16. The TC made no finding on the Defence objection to the PTC holding that "perpetration is subsumed under the mode of liability of co-perpetration" which, the Defence asserted, in the context of no amended or UDCC – "simply muddied the waters of notice."[11] In fact, the TC dismissed this argument and adopted this formulation, and referred to its use by PTC in the CoC, which is not footnoted.[12]

3. The Trial Chamber erred by finding that Appellant was provided with adequate notice of the mode of liability for which he was convicted, violating Article 67(1)(a) (Judgment, paras 59-60)

a. Introduction

17. The Defence submits that the failure to order the Prosecution to produce an UDCC, based on the CoC, violated Appellant's right to notice of the offences and modes of liability charged, pursuant to the minimum guarantees under Article 67(1)(a).[13]

[9] Trial Judgment, para. 60.
[10] *Ibid.*
[11] Arido Closing Submission, para. 59.
[12] Trial Judgment, paras 59-60; CoC, para. 33.
[13] *See* Arido Defence Submissions cited in fn. 6 in ICC-01/05-01/13-992.

18. There are no references in the CoC, or the Prosecution's DCC to the mode of liability of direct perpetration for which Appellant was convicted. In the DCC, which is based on the theory of co-perpetration, there are no factual allegations in support of direct perpetration. In the DCC, the mode of liability of Article 25(3)(a) is listed as "direct and/or indirect co-perpetrator."[14] The first appearance of "direct perpetrator" in the Prosecution's pleadings is approximately two months prior to trial in the PPTB.[15]

19. In this circumstance, where the mode of liability was not requested by the Prosecution, which is the charging authority, the Chambers had the option of requesting the Prosecution to amend the DCC and provide an UDCC. Neither Chamber chose this option. Instead, both acted *ultra vires*, resulting in a failure to provide notice to the Appellant.

b. The Prosecution Pre-Trial Brief failed to provide notice

20. Appellate jurisprudence at the *ad hoc* tribunals has held that defects in an indictment may be cured if the Prosecution provides the Accused with timely, clear and consistent information detailing the basis underpinning the charge.[16]

21. However, the principle that a defect in an indictment may be cured is not without limits. The *Muvunyi* Appeals Chamber previously emphasized the "Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused."[17]

22. As a threshold issue, the PPTB in Appellant's case was untimely and deficient in respect to notice. It was filed on 31 July 2015, a short two months before the start of trial. Moreover, the PPTB failed to elaborate the specific *mens rea* required for the mode of liability of direct perpetration. Each mode of liability has its own specific *mens rea.* In short, the PPTB's lateness and lack of factual allegations in support of a material element of the charged mode of liability rendered it defective as to providing notice. Thus, it did not permit the Defence to investigate the allegations in regard to mode of liability confirmed.

[14] Arido Closing Submissions, para. 63; ICC-01/05-01/13-526-CONF-AnxB, pp. 74-79.
[15] PPTB, paras 255-256.
[16] *Muvunyi* Appeal Judgment, para. 20 (Appeals Chamber held that notice was defective and was not cured by the PPTB and witness summaries; this was one of the grounds for reversing convictions, quashing 25 year sentence and ordering re-trial on one count).
[17] *Muvunyi* Appeal Judgment, para. 20.

23. Since the Prosecution never charged this mode of liability, based in Article 25(3)(a),[18] none of its submissions prior to the CoC had provided notice of direct perpetration. As a result, there are no factual allegations for direct perpetration in the CoC.

4. The failure of both the Pre-Trial Chamber and/or the Trial Chamber to order an updated Document Containing the Charges (UDCC) violated Appellant's fair trial right to notice because the mode of liability for which he was convicted was not identified in the DCC, the charging document and hence, could not be properly confirmed in the CoC.

a. Both the Pre-Trial Chamber and Trial Chamber had the authority to order an UDCC, but both erred by not doing so in this case.

i. The Pre-Trial Chamber

24. Article 61(9) confers on the PTC the power to grant the Prosecution permission to amend the charges in the pre-trial stage. But, rather than ordering an amendment of the DCC to reflect the CoC's conclusions, the PTC substituted its own characterization of the mode of liability, based on the evidence. The PTC effectively re-characterized the legal framework of the mode of liability charged, *sua sponte*, in the CoC. The PTC took unilateral action, without affording the Parties the opportunity to be heard on the re-characterization.[19]

25. The PTC's failure to order an UDCC compounded the already existing lack of notice in both the DCC and CoC. For example, there are no specific factual allegations in respect to *mens rea* for the form of liability – direct perpetration – which was confirmed by the PTC.[20] There are also no specific factual allegations of *actus reus.* Even where the conduct is the same for multiple forms of liability, proper notice requires that the specific allegations in support of the charged mode of liability be identified.[21]

ii. The Trial Chamber

26. Under Article 61(11), the TC has the option to assume the functions of the PTC, or under Article 64(4), to refer a matter back to the PTC. The TC could have ordered an UDCC, based on the specifics of this case. But, here, the TC did not exercise these powers and instead, proceeded to hear the case against Appellant based on a defective CoC, which violated his

[18] *See* DCC, ICC-01/05-01/13-526-CONF-AnxB, pp. 76-81.
[19] *See* Regulation 55 of the RoC which applies to the TC for its underlying principle providing an opportunity to be heard by all parties regarding changing the legal characterisation of facts.
[20] *See* Arido Closing Submissions, paras 70-73.
[21] In the PPTB, for example, Appellant is charged with same factual allegations for two forms of liability: direct co-perpetrator and aiding and abetting. The *mens rea* required for each is different, and the requirements of each are different. Yet, the PPTB does not differentiate.

right to notice.

27. The Prosecution "is the charging authority and remains so for all purposes,"[22] and the exercise of a Chamber's discretion to order an UDCC is both consistent with the provisions of the Rome Statute and the fair trial right to notice to the Accused.

28. The *Ntaganda* Trial Chamber, in an identical factual situation, chose to order an UDCC. There, the PTC declined to confirm direct perpetration as a mode of liability in respect to counts 4 to 9[23] because it was not charged by the Prosecution in the DCC.[24] Ntaganda, like Appellant, was charged in the DCC as a direct or indirect co-perpetrator under Article 25(3)(a).

29. In *Ntaganda*, both the Prosecution and Defence agreed that an UDCC was necessary to provide the Accused with clear notice of the Prosecution's charges as confirmed in the CoC, the "operative document" for the purposes of trial.[25] In our case, the Prosecution did not object to the Defence request for an UDCC.

30. But, the Trial Chamber in *Ntaganda*, unlike in our case, ordered an UDCC to address many issues including clarity on the mode of liability. The Chamber, moreover, ordered that the paragraphs in question be amended, or deleted to avoid "giving the impression that the allegations constitute acts for which the accused is charged."[26]

b. The Pre-Trial Chamber and Trial Chamber erred by not exercising their discretion to order an UDCC in this case

i. An updated DCC is necessitated by fact that the CoC superimposed a form of liability for which notice was not provided

The CoC failed to provide notice[27]

31. First, an UDCC was necessary because it would have provided notice – where the DCC was

[22] Partly Dissenting Opinion of Judge Eboe-Osuji, para. 69.
[23] *Ntaganda* DCC, pp. 57-58.
[24] *Ntaganda* Confirmation Decision, para. 144 ("Finally, the Chamber finds that there are no substantial grounds to believe that Mr. Ntaganda can be held responsible as a direct perpetrator for any of the remaining crimes that he is charged with. The Prosecutor has not charged Mr. Ntaganda as a direct perpetrator of any of the crimes set forth in counts 4 to 9.")
[25] *Ntaganda* Decision on the updated DCC, para. 18.
[26] *Ibid.*, para. 45.
[27] *See* ICC-01/05-01/13-772: The Arido Defence requested Leave to Appeal the Article 61(a) and (b) Decision (ICC-01/05-01/13-749) on a number of grounds regarding the standard of proof under Articles 61 (7) and 25(3) – legal issues fundamental to the interpretation of the Rome Statute. The TC denied its Request (ICC-01/05-01/13-801).

based on a different theory than that which was confirmed. The DCC was based on a theory of modes of liability – co-perpetration and common purpose – which were unequivocally rejected by the PTC in respect to Appellant.[28]

32. The CoC decision, confirming perpetration in respect to Article 70(1)(c), the charge for which the Appellant is convicted, provided no factual allegations in support of this mode of liability.[29]

33. For Article 70(1)(c), the CoC referenced the DCC in counts 12, 15, 18 and 42 in support of Article 70(1)(c) and Article 25(3)(a).[30] In the DCC, in these counts, the reference is to "Article 25(3)(a) as a direct and/or indirect co-perpetrator, 25(3)(c) and 25(3)(d)." (underlining added) There is no reference in the DCC to direct perpetrator.

34. Even if the Appeals Chamber concludes that direct perpetration is implicit in Article 25, the failure of the Pre-Trial Chamber or TC to order an UDCC means that there was no timely notice of the elements of direct perpetration. Each mode of liability has its own legal requirements for the *actus reus* and *mens rea*. There is no "one size fits all" for factual allegations to support legal elements.[31]

35. This means that the failure to provide any factual allegations by the Prosecution, in combination with the TC's rejection of the Defence request for an UDCC, violated Appellant's right to notice of the modes of liability against which he had to defend.

36. The TC's failure to order an UDCC, especially in this situation where the CoC confirmed a mode of liability (perpetration) that appeared neither in the Rome Statute, nor in the Prosecution's DCC, violated Appellant's fair trial right to notice under Article 67(1).

37. Second, an UDCC would also have clarified and simplified the proceedings: the Prosecution presented a total of 43 charges, including 4 modes of liability for confirmation to the PTC. The PTC not only rejected some of the Prosecution's charges and charging theories, "*but also*

[28] CoC, p. 54, Section (b)(iii). The mode of liability based on common purpose was the subject of the Prosecution's Regulation 55(2) application, which was twice rejected by the TC (ICC-01/05-01/13-1250 and ICC-01/05-01/13-1553).
[29] DCC, p. 53, Section (v). The CoC, for Article 70(1)(c), confirms only generalized conduct, with no specifics: "[…] by way of instructing them to either provide false information or withhold true information during their testimony in the Court and encouraging their testimony with money transfers and the possibility of relocation in Europe (as included in counts 12, 15, 18 and 42 of the DCC)."
[30] DCC, p. 53, Section (v).
[31] Arido Closing Submissions, paras 45-73.

interposed charging theories that the Prosecution had not sought[...]")[32] *(italics added)* Specifically, it declined to confirm co-perpetration for Article 70(1)(c) under 25(3)(a), and limited Appellant's charges to four witnesses.

38. Third, "[t]he PTC superimposed onto the charges theories of criminal responsibility that the Prosecutor did not seek."[33] The PTC changed the mode of liability to direct perpetration for Appellant, although it was not a mode of liability which had been requested by the Prosecution.

39. Thus, at the end of the day, the notice of the mode of liability for which Appellant was convicted was defective, and it was not cured in a timely manner by any other auxiliary document.[34]

5. The Trial Chamber erred by not granting Appellant's leave to appeal its refusal to order an UDCC

40. Neither the Pre-Trial nor TC ordered an UDCC from the Prosecution, although the Prosecution had no objection to providing one.[35]

41. The Arido Defence requested an UDCC in its Defence Submissions, 13 April 2015.[36] Appellant also specifically requested that the TC provide guidance as to the constitutive elements of the charges, including modes of liability of 25(3)(a) direct perpetration and 25(3)(c), based on its powers and functions pursuant to Article 64(6)(f).[37]

42. In its Decision denying the Defence request for an UDCC, the Majority held that an UDCC was unnecessary because the CoC satisfied the minimum requirements of Article 67(1)(a),[38] and the Confirmation of Charges decision binds the TC, which has no authority for PTC matters, but must refer to them, pursuant to Article 64(4).[39]

43. In its Leave for Appeal, the Arido Defence argued, *inter alia*, that whether the TC has power

[32] Partly Dissenting Opinion of J. Eboe-Osuji, paras 109 -135, 113.
[33] *Ibid.*, para. 133.
[34] *See* arguments *supra*. lack of notice provided by PPTB and DCC.
[35] ICC-01/05-01/13-831, para. 1; Arido Closing Submissions, para. 43.
[36] ICC-01/05-01/13-901, para. 53; s*ee also*, Arido Submissions on the Elements of Article 70 and the Modes of Liability, para. 43.
[37] Arido Closing Submissions, paras 60-62.
[38] Decision on the Submission of Auxiliary Documents, para. 19.
[39] *Ibid.*, para. 14.

to order an UDCC is an appealable issue.[40] The TC denied leave to appeal.[41]

44. The authority and ambit of organs of the Court remain unsettled issues, with multiple legal layers, especially within the context of notice. For example, the Appeals Chamber has distinguished between the controlling authority of the confirmation decision in "defining parameters" of the charges for the purposes of trial, and auxiliary documents, including an UDCC, which provide notice to the Accused.[42]

45. For this reason, Appellant requests that the Appeals Chamber make a ruling on the issues in its leave to appeal.

6. The Trial Chamber's error of notice was prejudicial and harmful to Appellant

46. Appellant was convicted as a direct perpetrator for one offence under Article 70(1)(c).

47. The failure to provide notice was prejudicial because it impacted on both his investigations and presentations at trial.

48. Without clarity as to the charged mode of liability, the Appellant could not fully investigate the alleged conduct in support and fully defend against the *mens rea* required for this mode of liability.

49. The TC failed to exercise its function under Article 64(2) by not ordering an UDCC, or taking any other steps to remedy the lack of notice in regard to the mode of liability for which it convicted Appellant. The providing of the UDCC is a relevant option for the lack of notice, and was permissible under the Statute.

50. This error rendered the proceedings unfair, affecting the reliability of the decision because notice is fundamental to the fair trial rights of the Accused.[43]

7. The Trial Chamber erred by disregarding and factually misrepresenting the Defence objections to modes of liability

[40] *See* ICC-01/05-01/13-1026, paras 16-21; *see also* ICC-01/05-01/13-997-Conf (The TC granted the Arido Defence request for suspension of the time limit.).
[41] ICC-01/05-01/13-1089.
[42] *Lubanga* Appeal Judgment, para. 124; *see also* Partly Dissenting Opinion of Judge Eboe-Osuji, para. 22 ("[…] the pronouncements of the Appeals Chamber make all too clear, the fact that the Appeals Chamber has correctly found that the Pre-Trial Chamber has authority to define the parameters of the charges, in light of the evidence at the confirmation hearing, does not necessarily yield a legal norm that displaces the need or value for an updated DCC […]") (underlining added).
[43] ICC Statute: Article 83(2) and Article 67(1)(a).

51. The TC affirmatively dismissed the Arido Defence arguments and held that it was not necessary to address the point whether direct perpetration is subsumed under co-perpetration.[44]

52. The TC asserted, *inter alia*, that the Arido Defence had conducted its defence during the trial phase with the knowledge that direct perpetration had been confirmed.[45]

53. This formulation by the TC impermissibly shifts the burden to the Defence: notice of charges, including modes of liability, is given by the Prosecution, which has to adhere to certain rules of notice. The mere fact that the Defence refers to the mode of liability charged,[46] does not relieve the Prosecution of its legal obligation to provide notice of the factual allegations underlying the mode of liability, under Article 67(1). The Prosecution must supply the factual support, as a matter of law.

54. Thus, whether and how the Arido Defence conducted its defence is irrelevant to the obligations of the TC to conduct its trial functions with "full respect for the rights of the accused"[47] and of the Prosecution to discharge its obligations as the charging authority.

* * *

55. At **para. 60**, the TC noted, "[...] when this Chamber called for any objections as to the conduct of the proceedings since the confirmation hearing, the Arido Defence raised no notice objections as to the modes of liability confirmed."

56. The impression given by this conclusion is that there were no objections by the Arido Defence as to modes of liability, including direct perpetration.

57. This is factually incorrect: since the Confirmation Hearings, the Defence raised objections to modes of liability confirmed.[48]

- On 13 April 2015, the Arido Defence requested guidance regarding the constitutive

[44] Trial Judgment, para. 60.
[45] *Ibid.*
[46] ICC-01/05-01/13-951, para. 38
[47] Article 64(2), ICC Statute.
[48] The Defence generally raised the issue of modes of liability in its Opening Statement (T-39-CONF-ENG, 1 March 2016), where it highlighted that the Prosecution still continued to insist on its theory of common purpose liability, despite the fact that the PTC rejected both co-perpetrator and common purpose liability. T-39-CONF-ENG, p. 7, referencing T-10-CONF-ENG, p. 49, l.7 (the Prosecution states: "[…] The evidence will show that Arido's participation in the criminal plan […]").

elements of Article 70 and modes of liability confirmed by the Pre-Trial Chamber under Article 25(3)(a), Direct Perpetration and Article 25(3)(c) in order to exercise its right adequately prepare for trial and effectively challenge the Prosecution's evidence, under its right to notice.[49]

- On 1 June 2015, the Defence objected that the Pre-Trial Chamber did not provide a definition of the constitutive elements of direct perpetration in the Confirmation of Charges. [50]

58. Thus, Appellant made repeated objections to the lack of notice for direct perpetration and requests for judicial guidance for its constitutive elements, contrary to the representations of the Trial Judgment in **para.60**.

59. The factual allegations in the DCC and CoC were presented in the context of Appellant as a co-perpetrator to a Common Plan.[51] The CoC rejected co-perpetration as a mode of liability,[52] and substituted perpetration.[53] The same factual allegations cannot simply be "cut and pasted" for direct perpetration, because it has its own, specific legal elements. Neither the DCC nor the CoC identified the legal elements of direct perpetration, and this is the reason that – at the end of day – Appellant was not provided adequate notice of the specifics regarding the mode of liability for which he was on trial,[54] in violation of his right to fair trial.[55]

B. *Ultra-Vires* Conduct

1. The Pre-Trial Chamber and Trial Chamber acted ultra vires in respect to the mode of liability

60. The concept of *ultra vires* has been applied when a Chamber acts outside its "routine functioning" and in a manner which is inconsistent with the Rome Statute.

61. In *Stakić*, the Appeals Chamber held that the TC acted *ultra vires*, committing discernible error, in imposing a review obligation on the Host State where this obligation was inconsistent

[49] ICC-01/05-01/13-901, paras 60-62.
[50] Arido Submissions on the Elements of Article 70 and the Modes of Liability, para. 43.
[51] DCC, paras 117 and 130.
[52] CoC, p. 54.
[53] *Ibid.*, para. 96, p. 42.
[54] *See Kupreškić* Appeal Judgment, para. 88 ("[…] the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail in inform a defendant clearly of the charges against hm so that he may prepare his defence").
[55] This violation was magnified by the confusion in the Prosecution's case as to Appellant's specific role in the charged conduct. He is charged, for example, as both an agent of Mr. Kokaté and Me. Kilolo. *See* Arido Closing Submissions, paras 79-81.

with the regime in the ICTY Statute and its RPE.[56]

62. Here, both the PTC and TC acted *ultra vires* in respect to the mode of liability for which Appellant was convicted.

2. The Pre-Trial Chamber, acting ultra vires, superimposed a mode of liability which was not requested by the Prosecution

63. The Prosecution is the charging authority, and the PTC has the power to confirm or reject that charges and modes of liability presented by the Prosecution. This is based on Regulation 53 RoC, and Articles 61(9) and 61(4) which articulate the responsibility of the Prosecution to formulate charges, and, with permission of the PTC or TC, to amend or withdraw charges.[57]

64. Regulation 52 of the RoC sets out the requirements for the DCC. This includes the "[…] precise form of participation under articles 25 and 28."

65. The Prosecution, in the DCC, based on its theory of co-perpetration, articulated factual allegations it believed supported co-perpetration. The mode of liability of Article 25(3)(a) is listed as "direct and or indirect co-perpetrator" in the chart of the counts at the end of the DCC in respect to Appellant and the four potential witnesses. But, nowhere in the document are any factual allegations in support of direct perpetration discussed.

66. The PTC rejected direct and indirect co-perpetrator modes of liability, in addition to contribution in any other way and soliciting, and replaced these with direct perpetration as a charged mode of liability.[58]

67. Given that direct perpetration was not included in the DCC, the PTC had a number of procedural options, based on the premise that the Prosecution is the charging authority. The PTC, for example, could have ordered the Prosecution to amend the charge.[59]

68. But, rather than order an amended or UDCC, the PTC simply imposed its own characterization, acting *ultra vires*. The PTC held that that "perpetration is subsumed under the mode of liability of co-perpetration." The Pre-Trial Chamber confirmed perpetration as one of the modes of liability charged for the Article 70(1)(c) offense, although it was not

[56] *Stakić* Appeal Judgment, paras 392-393.
[57] Partly Dissenting Opinion of Judge Eboe-Osuji, paras 54-74.
[58] CoC, pp. 54-55.
[59] *See, Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges Pursuant to Article 67(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, para. 42.

included in the DCC.[60]

69. Appellant was subsequently convicted of the offence of Article 70(1)(c) based on this mode of liability for which he was not given notice.

3. The Trial Chamber's conviction of Appellant as a direct perpetrator was ultra vires

70. Here, the TC acted *ultra vires* because it convicted Appellant for a mode of liability which was not requested by the Prosecution, as the charging authority.

71. In the Judgment, the TC, endorsing the finding of the PTC in the CoC, holds that perpetration is subsumed under the mode of liability of co-perpetrator.[61]

72. Neither the PTC nor the TC cite any jurisprudence or other authority in support of this assertion of "subsuming." The TC provides no reasons, as required by Article 74(5) for its conclusion.

73. While a TC may not be required to give reasons for every conclusion, the "ordinary meaning" of this section suggests that the TC provide a "full and reasoned statement" for matters of law and fact resulting in a finding of acquittal or conviction of an Accused. Here, the mode of liability is a key legal finding in Appellant's conviction for Article 70(1)(c), yet the TC is silent on the legal issues underlying its conclusions.

74. Assuming, *arguendo*, that the TC's conclusion about "subsuming" falls within the ambit of judicial interpretation, a fundamental legal issue is presented here: Article 25(3)(a) includes the language "commits […] individually" which is basically synonymous with perpetration. It is unclear why the PTC and TC did not adopt the language already in the Statute, especially since there is judicial support for the premise that strict construction of the provisions of the Rome Statute should be applied to modes of liability, pursuant to the parameters of Article 22(2).[62]

75. A failure to adhere to a strict construction analysis affects the notice requirement. Unless there is a clear legal standard, including consistent legal characterization of modes of liability,

[60] ICC-01/05-01/13-749, p. 53; ICC-01/05-01/13-1989, fn. 101: referencing CoC, para. 33.
[61] Trial Judgment, para. 59.
[62] *Ngudjolo* Judgment – Concurring Opinion of Judge Christine Van den Wyngaert, para. 18 (Article 22(2) "obliges the Court to interpret the definition of crimes strictly and prohibits any extension by analogy. There can be little doubt that this fundamental principle applies with equal force in relation to the definition of criminal responsibility […] ").

notice cannot be given. The errors and confusions emanating from the lack of notice in Appellant's case would have been less likely to occur if the Chambers were stricter in making their findings.

76. Based on the *ultra vires* conduct of the PTC and TC discussed *supra.,* the conviction against Appellant for direct perpetration should be reversed.

C. Other Fair Trial Violations

1. The Trial Chamber erred by not ruling in the Judgment on the Defence objections to the Prosecution's errors and conduct in investigations and disclosure.

77. The Prosecution has the duty of objective truth-seeking and effective investigation and prosecution. This includes the duty to investigate incriminating and exonerating circumstances equally.[63]

78. But, unfortunately, the Prosecution's investigative methods in this case rise to the level of prosecutorial misconduct. These issues are discussed in detail in Appellant's Closing Submissions, where the Defence concluded that the Prosecution abused its power, for failing to conduct investigations in an appropriate manner.[64] These errors and misconduct are identified in Notice of Appeal, paras 16 – 20,[65] and discussed *infra*.

79. On appeal, the Defence emphasizes that the error is that the TC, in its Judgment, simply ignores these objections and makes no ruling on them. Clearly, the conduct of investigations affects the fairness and reliability of the proceedings (Article 81[1][b][iv]). Therefore, the TC erred by not making a decision on these objections.

80. The gravamen of the error is the accountability of the Prosecution. The Defence position is that the Prosecution, under its mandate, is responsible for investigations undertaken by its office or at its request, whether by its own investigators or by national authorities, based on an RFA. As an example, the Prosecution is accountable for the errors resulting from the Western Union investigations,[66] including [REDACTED], which occurred because of the conduct of

[63] Article 54(1), ICC Statute; OTP Code of Conduct, sections 1 and 2, p. 14.
[64] Arido Closing Submissions, paras 95-108.
[65] Please note this correction to N/A, para. 20. The corrected ground of appeal should read: The TC erred by not ruling on the Defence objections to the Prosecution's implementation of investigations regarding CDRs and e-mail correspondence in reference to Appellant and others, resulting in violation of their civil, political and human rights.
[66] *See* Chart A and discussed *infra*. at p. 101.

national authorities who provide requested assistance to the Prosecution.

81. As the Defence has pointed out, the harm and prejudice to Appellant and third parties (including his family) was that the investigations, including those which were carried out both with and without judicial authorization, were overly broad in their reach, and violated the civil, political and human rights of Appellant and others investigated.[67]

2. The Trial Chamber erred by not ruling on the Defence objections that the Prosecution pursued two different theories in the case; and that the Prosecution failed to investigate exculpatory evidence, as per its duties under Article 54(1), particularly in relation to the role of Mr. Kokaté.(N/A, paras 15, 16)

82. The importance of a clear theory for notice to an Accused is a fundamental premise in criminal cases. In the "Military II" Appeal Judgment,[68] the Appeals Chamber reversed the TC's convictions of Major Nzuwonemeye for murder as a crime against humanity and violation of common Article 3 for aiding and abetting the Prime Minister's killing because he lacked notice of the Prosecution's theory of the mode of liability.

83. Here, two competing theories run through the Prosecution's case, and in the Trial Judgment: a) that Appellant was acting as the agent of Mr. Kokaté;[69] and b) that Appellant was acting as the agent of Me. Kilolo.[70] Both result in confusion as to the alleged specific role of Appellant, i.e. his mode of liability in the culpable conduct.

84. This confusion of theories is perpetuated, and reflected in inconsistent findings in the Judgment.[71] In its summary **para. 125** in the beginning of the Judgment, its states that "upon Mr. Kilolo's request, Mr. Kokaté requested Mr. Arido to identify soldiers […]" Then, in **para. 420**, the Chamber finds that both Appellant and Mr. Kokaté acted "upon Mr. Kilolo's request." But, in its summary **para. 872,** the Judgment finds that Appellant "assisted Mr. Kilolo in recruiting D-2, D-3, D-4 and D-6 for the Main Case Defence"[72] and Mr. Kokaté's role has evaporated.

85. The errors in respect to notice and the Prosecution's failure to investigate are closely linked:

[67] Notice of Appeal, para. 20.
[68] *Ndindiliyimana et al.* Appeal Judgment.
[69] *See* Arido Closing Submissions, paras 95-108, and 292-299. *See also* TC's references to Kokaté and Appellant: Trial Judgment, paras 125, 131, 320, 323, 326-327, 331, 334, 339, 341-342, 344, 430, and 716.
[70] Arido Closing Submissions, paras 78-81.
[71] *See* discussion of errors in 'Inconsistent Legal Findings', and *see* para. 230, *infra*.
[72] Trial Judgment, para. 872.

Mr. Kokaté remains the "elephant in the room" as an unindicted perpetrator in this case. In fact, the Judgment's findings reflect his ubiquitous presence at each stage of this case. Mr. Kokaté plays a leading role at all of the events for which Appellant is convicted:[73] recruiting witnesses and making promises to them.[74] Hence, the Defence submits that Mr. Kokaté's role exculpated Appellant, but the Prosecution failed to properly investigate and present it.[75] At the very least, the evidence presented reasonable doubt as to the Judgment's conclusions that Appellant recruited and made promises to D-2, D-3, D-4 and D-6.

86. Lastly, based on the inconsistent notice and findings, no reasonable trier of fact could conclude that Mr. Kokaté was blameless, or played a secondary role in the events for which Appellant was convicted. The TC mis-assessed and mis-appreciated the evidence about Mr. Kokaté because it disregarded the evidence that Mr. Kokaté was the decision maker, the initiator and source of the promises and its finding was inconsistent with its own analysis that Appellant was the "go-between."[76] Thus, the only reasonable conclusion, based on the evidence, is that Mr. Kokaté was responsible for recruiting and making promises to the witnesses, and, in the words of D-2, "hatched the deal."[77]

87. These confusions and contradictions make no "legal sense." But, they illustrate that the notice as to Appellant's role was inconsistent and unclear. Thus, Appellant's fair trial right to notice was violated.

3. The decision of the Single Judge permitting the Prosecution to interview defence witnesses as suspects, pursuant to Article 55(2), violated Appellant's rights under Article 67(1)(e). (N/A, G.)

88. The Witness Protocol was adopted in a Decision, 20 July 2015.[78] **Para. 34** requires that a party can only interview the witness of another party if the witness consents. **Para. 35** sets out procedures which "allow the calling party to ask the witness whether he/she agrees to be contacted or interviewed." A procedure to involve VWU as a neutral party was suggested, to avert the potential problem that free and voluntary consent may not be possible because if a

[73] *See* Arido Closing Submissions, paras 95-108, and 292-299. *See also* TC's references to Kokaté and Appellant: Trial Judgment, paras 125, 131, 320, 323, 326-327, 331, 334, 339, 341-342, 344, 430, and 716.
[74] *See* Arido Closing Submissions, paras 292-299.
[75] Notice of Appeal, para. 16.
[76] *See also* analysis for para. 230, *infra*.
[77] T-19-CONF-ENG, p. 64, l. 4; T-22-CONF-ENG, p. 39 ("[REDACTED] asked us to write down what we wanted and where we planning to go […][REDACTED] threatened to drop us and […] recruit some other people from[REDACTED]").
[78] ICC-01/05-01/13-1093.

Defence witness agrees to be questioned by the Prosecution, there might be an adverse reaction.[79]

89. In his Decision on 19 February 2016, the Single Judge found that the Protocol does apply to the Prosecution Request to Obtain Contact Information of Defence Witnesses.[80] It also held that the Prosecution should disclose the suspect status (Article 55(2)) to the witness, since it "might influence that person's decision as to whether he or she wishes to be contacted by the Prosecution or not."[81] Two witnesses on the Defence list, D-4 [REDACTED] and [REDACTED] (D24-0003), consented to be interviewed by the Prosecution.[82]

90. In its Response to the Prosecution's Request, the Defence rejected the Prosecution's efforts to have the Arido Defence convey the Article 55(2) status to these individuals, as an action which would be unethical and a conflict of interest.[83] Further, Lead Counsel Chief Taku made these same objections orally in Court on several occasions, at trial and at the Sentencing Hearing.[84]

91. On 4 March 2016, shortly before the Arido Defence case was to commence, the Prosecution finally disclosed the transcripts of the interview with D-4.[85]

92. The Prosecution's questioning of D-4 as a suspect created an untenable situation for the Defence because it meant that if D-4 were to be called as a Defence witness, he could incriminate himself, would need counsel, etc. As a result, on 7 March 2016, the Arido Defence was forced to drop D-4 as a witness, since he was a suspect pursuant to Article 55(2). This presented a conflict of interest for the Defence because it could no longer approach him without the permission of the Prosecution or risking an Article 70 investigation.[86]

93. This resulted in a violation of Appellant's right to present witnesses on his behalf, in his Defence case. Once the Prosecution attached "suspect status" to D-4, his fate had been sealed: there was a conflict of interest. This scenario occurred only because of the Single Judge's

[79] ICC-01/05-01/13-898, para. 55.
[80] ICC-01/05-01/13-1638, para. 10.
[81] *Ibid.*, para. 10.
[82] ICC-01/05-01/13-1705.
[83] *See* Arido response ICC-01/05-01/13-1630-Conf, and exchanges in confidential *Ex Parte* Annexes A and B.
[84] T-39-CONF-ENG, pp. 38-40; T-41-CONF-ENG, pp. 4-5; Arido Oral Sentencing Submissions, p. 19, l. 8 to, p. 20 l. 4.
[85] ICC-01/05-01/13-1700.
[86] *Ibid.*

Decision which granted its approval of "suspect status."

94. In sum, the Protocol and Single Judge's Decision resulted in a violation of Appellant's fair trial rights, under Article 67(1)(e).

4. The Trial Chamber's errors regarding Appellant's [REDACTED](N/A, para. 19)

95. In the Judgment, the TC fails to rule on Defence objections to Appellant's characterisation [REDACTED], at the behest of the Prosecution.[87]

96. As a threshold matter, the failure to address this in the Judgment removes the error, and insulates it, from appellate review. The erroneous [REDACTED] is a serious human rights violation with on-going adverse consequences: it is the kind of error that cannot be easily rectified, if at all, especially [REDACTED].

97. In its Decision, the TC, rejects Appellant's arguments that this erroneous label violated his human rights, on two grounds: the [REDACTED] document in which it appears is confidential; and the error of [REDACTED] cannot be imputed to the Prosecution.[88] While it acknowledges that there was a misrepresentation, the TC does not find that there was any harm, essentially because [REDACTED] by the Prosecution.

98. The emphasis which the TC gives to the "confidentiality" status of the document and its public inaccessibility is misplaced. Despite good intentions, "confidentiality" must reasonably be viewed as a limited protection in the current electronic age, where there appears to be unrestrained and growing access to information and documents.

99. But, more troubling is that the TC absolves the Prosecution of any responsibility, while implicitly placing complete blame on the national authorities. At the time of its Decision, the TC was aware of the content of the Austrian decisions.[89] Yet, in a later decision,[90] it held that although the Prosecution "was involved in the process that led to illegally obtained material, inasmuch as it triggered, via requests for assistance to the Austrian authorities, the process of requesting the judicial orders,"[91] the Prosecution was in no position to know that the information it had provided was insufficient.

[87] Arido Closing Submissions, paras 140-141.
[88] ICC-01/05-01/13-1943-Conf, para. 20.
[89] ICC-01/05-01/13-1928-Corr.
[90] ICC-01/05-01/13-1948.
[91] ICC-01/05-01/13-1948, para. 36.

100. This explanation of the Prosecution as an "unknowing initiator" is unconvincing: there was obviously correspondence between the Prosecution and the Austrian authorities on multiple occasions.[92] In addition, it is likely that some "follow-up" or internal "monitoring" system exists within the Prosecution. The error will never be rectified if the organ responsible for securing Austria's assistance in investigations in the first place – the Prosecution – is never held accountable.

101. But even if this position can be justified on technical or legal grounds, it eviscerates the ICC's moral position as an international judicial trailblazer whose practices are consistent with international laws, including the rights of persons not to be subject to unlawful attacks on their honour and reputation.[93]

102. Lastly, the TC's refers to the two Austrian decisions in **para. 212**, in the context of its denial of the Defence teams' requests. The Judgment refers to the 14 July 2016 Decision, where the TC concludes, based on the Austrian rulings, that Appellants' internationally recognized right to privacy was violated in the collection of Western Union material.[94] Thus, although it supports the legal reasoning of the Decisions, it takes the position that they have no impact on the evidentiary issues in the Article 70 case. The TC applies a double standard: the decisions are valid in terms of international human rights law, but are invalid and inapplicable to the very same evidence accepted in the Article 70 case.

5. Judgment errors with respect to Call Data Records ('CDRs')

a. The Trial Chamber erred by failing to apply *in dubio pro reo* to its conclusions about Appellant regarding CDRs, by factually misrepresenting the Defence position, by not providing a reasoned opinion and by denying Appellant's remedies for violations resulting from the CDRs. (Judgment, paras 325-326, N/A, paras 20, 25)

103. This principle of *in dubio pro reo* provides that any doubt should be resolved in favour of the Accused. The Appeals Chamber recalls that, as a corollary to the presumption of innocence and the burden of proof beyond reasonable doubt, the principle of *in dubio pro reo* applies to findings required for conviction, such as those which make up the elements of the crime

[92] *See* Chart A at p. 101 *infra*.
[93] ICCPR, Article 17; UDHR, Article 12.
[94] ICC-01/05-01/13-1948, para. 28.

charged.[95] (footnotes omitted)

104. Here, the TC erred by not applying the principle *in dubio pro reo* to the absence of CDRs in relation to the phone call which D-2 alleged occurred between Appellant and Me. Kilolo.[96]

105. As the Arido Defence argued in its Closing Submissions,[97] there was no information in P-433's report about the CDRs for Appellant during the month of February 2012, the key period in the Pre-Trial Chamber II's Decision on the Confirmation of Charges.[98] The CDRs produced for Appellant only cover the period from 1 May 2012 to 24 April 2013. Notably, there were no CDRs from the Cameroonian company during the critical January-February 2012 period, a factor which the TC fails to mention.[99]

106. The Defence, contrary to the representation in the Trial Judgment,[100] took the position that there was no proof beyond a reasonable doubt that any calls took place involving Appellant, including D-2's allegation of a phone call between Appellant and Me. Kilolo.[101] Hence, D-2's evidence about the alleged phone call demonstrates his unreliability.

107. Nevertheless, the TC concluded that the absence of CDRs – for period of its findings of culpable conduct – did not warrant a finding of unreliability or further corroboration.[102] This reasoning of the TC is legally erroneous, because the TC failed to apply the legal principle of *in dubio pro reo* to its finding on the evidence of P-433.

108. P-433 testified that the CDRs did not necessarily comprise all the numbers used, or all the calls made.[103] Based on this, the TC concluded that there could have been phone calls made, including between D-2 and Me. Kilolo and Appellant. This conclusion is purely speculative, and violates the principle of *in dubio pro reo.* If the TC had applied this legal principle, it would have concluded that P-433's did not support proof beyond a reasonable doubt that D-

[95] *Renzaho* Appeal Judgment, para. 474; *see also Akayesu* Trial Judgment, para. 501. *See further* Article 22(2) of the Statute; *Bemba* Trial Judgment: ICC-01/05-01/08-3343, para. 218.
[95] Trial Judgment, paras 325-326.
[96] *Ibid.*
[97] Arido Closing Submissions, paras 133-134.
[98] ICC-01/05-01/13-749, paras 88-93.
[99] Mr Arido's CDRs cover the period from 1 May 2012 to 24 April 2013: CAR-OTP-0073-0190, CAR-OTP-0073-0239, CAR-OTP-0073-0266, and CAR-OTP-0073-0269.
[100] Trial Judgment, para. 325.
[101] *See* T-20-CONF-ENG, pp. 59-61.
[102] Trial Judgment, paras 324-326.
[103] T-11-CONF-ENG, pp. 72-73.

2's evidence of the alleged phone call was reliable.[104] However, given the "plausible difference or application" of P-433's evidence, the TC chose to (wrongly) adopt a position to support its finding of Appellant's criminal conduct.[105]

109. Thus, the TC committed an error of law by failing to evaluate the absence of CDRs in favour of Appellant. Instead, this evidence was used by the TC to support its finding that Appellant had recruited witnesses, which was a fundamental element of the offence for which Appellant was convicted.

110. The TC's analysis erroneously presumes that the impugned call occurred, and was made for the purpose of Appellant's recruiting activities. This violates the presumption of innocence, which – in the view of the Defence – was not refuted by proof beyond a reasonable doubt. The impugned call was "missing evidence" which was important and relevant to the offence charged, as well as the credibility of D-2.[106]

111. Had the TC applied the principle of *in dubio pro reo*, the credibility of D-2 – one of the two witnesses against the Appellant – would have been undermined, resulting in a different verdict.

112. The TC, moreover, on this key point, failed to provide a full and reasoned opinion as to how it reached its conclusions. The TC corroborated the testimony of D-2 on the phone call with testimony of D-3 about a "similar pattern." [107] The evidence of D-2 and D-3 is the only evidence relied upon to convict Appellant.[108] Hence, the absence of a full and reasoned opinion provides no way for the Appeals Chamber to assess whether, in fact, the corroborative evidence of D-3 was similar. This is akin to the situation in *Muvunyi*, where the Appeals Chamber found it "impossible to assess the finding of the Trial Chamber that testimonies of Witnesses YAI and CCP were 'strikingly similar' or consistent with respect to the material facts relating to this charge" in the absence of a reasoned opinion.[109]

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[104] Trial Judgment, paras 324-326.
[105] *Krstić* Trial Judgment, para. 502 ("in accordance with the principle that where there is a plausible difference of interpretation or application, the position which most favours the accused should be adopted").
[106] *See* Minority Dissenting Opinion of Judge Christine Van den Wyngaert: ICC-01/04-01/07-3436-Anx I, para. 149 (conclusions reached on missing and important evidence are "inherently fragile and uncertain and cannot suffice for the standard of proof beyond reasonable doubt'').
[107] Trial Judgment, para. 325.
[108] ECtHR: *Georgiadis Judgment*, para. 23.
[109] *Muvunyi* Appeal Judgment, para. 144 (reversing convictions, quashing 25 year sentence and ordering re-trial on one count)

b. The Trial Chamber erred by not ruling on the Defence objections to the Prosecution's implementation of investigations regarding CDRs and e-mail correspondence in reference to Appellant and others, resulting in violation of their civil, political and human rights. (N/A, para. 20)

113. The Prosecution, from the inception of investigations related to this case, sought evidence without judicial authorization, and, where judicial orders were obtained, used the investigations as a "fishing expedition."[110]

114. This resulted in the violation of Appellant's civil, political and human rights, and the rights of his family and others.

115. The issue on appeal is whether the Prosecution is legally accountable, both for its conduct and for the conduct of others, such as national authorities, which result from the Prosecution's requests for assistance and information for its cases.[111]

6. Late Disclosures (N/A, para. 17)

116. The Defence objections to selective, delayed and late disclosures were not addressed in the Trial Judgment. These objections are found in extensive pleadings, detailed in the Closing Submissions.[112]

117. For example, despite repeated Defence requests[113] for the RFAs and responses concerning the Cameroon evidence, seven crucial RFAs to Cameroonian authorities were disclosed[114] to the Defence only at the end of the first day of P-433's testimony.[115] Thus, the Prosecution's selective and delayed disclosure of Rule 77 materials precluded the Defence from making any assessment of the legality of evidence which the Prosecution relied upon at trial, during P-433's testimony.[116]

118. P-433's was called by the Prosecution to present his report on, *inter alia*, CDRs from Cameroon. [117] There was no information in P-433's report about CDRs for Appellant during the month of February 2012, the key period in the CoC. Appellant's CDR's covered the

[110] *See* Chart A at p. 101 *infra*, and Arido Closing Submissions, paras 103-108, 382-383, 404-406.
[111] This is discussed in more detail in the section on Western Union documents, *supra* at p. 32.
[112] Arido Closing Submissions, paras 109-147, including Table 1 at p. 37.
[113] *See* for example the Arido Defence Letters of May 2015 (ICC-01/05-01/13-1141-Conf-AnxA) and 20 July 2015 (ICC-01/05-01/13-1141-Conf-AnxC), and ICC-01/05-01/13-1156-Conf and ICC-01/05-01/13-1637-Conf.
[114] *See* Prosecution's Disclosure of 30 September 2015 (Rule 77 - Package 30); ICC-01/05-01/13-1323.
[115] T-11-Conf-ENG: P-433 started his testimony on 30 September 2015.
[116] *See* Defence objections during the first day of trial at T-10-CONF-ENG, p. 12-13.
[117] Prosecution's Disclosure of 30 September 2015 (Rule 77 - Package 30), ICC-01/05-01/13-1323.

period from 1 May 2012 to 24 April 2013. [118] Thus, the P-433's report did not support D-2's and D-3's allegations[119] that Me. Kilolo contacted them via his mobile phone during the cut off period of their testimony.[120] Thus, the Prosecution's own expert witness provided reasonable doubt as to the credibility of D-2's and D-3's accounts.

119. In addition, the Prosecution sent the above-mentioned seven RFAs to Cameroon, starting 8 May 2013 through 18 June 2015.[121] All seven RFAs were disclosed only on 30 September 2015, although some had been in the Prosecution's possessions for over two years.[122]

120. The Prosecution, moreover, disclosed additional relevant materials (responses from Cameroonian authorities and official agreements between Prosecution and Cameroonian Government) related to the Cameroonian CDRS after it had finished its case. In late February 2016, the Prosecution disclosed these Rule 77 materials.[123]

121. These materials included (in addition to the seven RFAs to Cameroonian authorities disclosed late, discussed *supra*.) four undisclosed official responses from Cameroonian authorities,[124] two undisclosed official agreements with Cameroon, allowing the ICC Prosecution to investigate at its territory,[125] and three undisclosed e-mails between the ICC Prosecution investigators and the Cameroonian authorities.[126]

122. The failure of the Prosecution to fulfil its disclosure obligations in a non-selective and timely manner renders the proceedings unfair and adversely affected the Defence. Without full disclosure, it made it impossible for the Defence to confront all of the evidence against Appellant which accurately reflected the "whole picture" of the investigations. Thus, the Defence was placed in a position where it could not fully challenge the legality of the evidence against Appellant.

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[118] CAR-OTP-0073-0190, CAR-OTP-0073-0239, CAR-OTP-0073-0266, and CAR-OTP-0073-0269.
[119] T-19, pages 25-26; ICC-011/05-01/13-T-23, pages 28-29.
[120] *See* T-11-CONF-ENG, p.74, lines 19-24.
[121] *See* CAR-OTP-0091-0317 (RFA No. 1), CAR-OTP-0091-0333 (RFA No.2), CAR-OTP-0091-0320 (RFA No.3), CAR-OTP-0091-0326 (RFA No.4), CAR-OTP-0091-0331 (RFA No.5), CAR-OTP-0091-0307 (RFA no. 6), CAR-OTP-0091-0312 (RFA No. 7).
[122] *See* Prosecution's Disclosure of 30 September 2015 (Rule 77 - Package 30); ICC-01/05-01/13-1323.
[123] Prosecution's Disclosure of 23 February 2016 (Rule 77 - Package 41), ICC-01/05-01/13-1652; Prosecution's Courtesy Disclosure of 24 February 2016; and Prosecution's Disclosure of 26 February 2016 (Rule 77 - Package 42), ICC-01/05-01/13-1670.
[124] CAR-OTP-0073-0007, CAR-OTP-0073-0008, CAR-OTP-0073-0009, and CAR-OTP-0073-0010.
[125] CAR-OTP-0092-5497 (5 Feb 2013) and CAR-OTP-0092-5498 (27 Nov 2012).
[126] CAR-OTP-0093-0004, CAR-OTP-0093-0011, and CAR-OTP-0093-0053.

7. Errors in respect to Western Union Documents (Judgment, paras 211-212; N/A, paras 18 and 23)

a. Preliminary Errors

i. The Trial Chamber erred by factually misrepresenting the Defence position regarding the Western Union Documents

123. The TC's conclusion that the Defence never challenged the reliability and accuracy of the information in the Western Union records[127] is factually incorrect.

124. The Arido Defence challenged the reliability and accuracy of the records, both in its cross-examination of the Prosecution witness P-0267, who admitted that there "might be human mistakes […]"[128] and in its Motion on Inadmissibility and Exclusion of Evidence.[129]

ii. The Trial Chamber erred by not addressing Defence issues raised at trial below

125. Throughout the proceedings, the Arido Defence has consistently litigated against the legality of the Western Union evidence and its admissibility.[130]

126. The Defence challenged the legality of the Western Union RFAs producing the records,[131] which were obtained without reasonable suspicion and without specific and individualized grounds;[132] the overly broad nature of the request[133] (resulting in the production of records of Appellant and family members for almost seven years, far beyond the time period of the allegations[134]); and the violation of the internationally accepted right to privacy.[135] It requested exclusion of the Western Union records (and other material), and argued that

[127] Trial Judgment, para. 211.
[128] T-34-CONF-ENG, p. 21, line 1.
[129] ICC-01/05-01/13-1795, para. 46.
[130] *See* Arido Closing Submissions, para. 135-147 and Chart A at p. 101 *infra*.
[131] ICC-01/05-01/13-1795, paras 43, 44, and 48; *see also* Chart A at p. 101 *infra*.
[132] This point was later affirmed by two decisions of the *Oberlandesgericht Wien* - Higher Regional Court in Vienna: (*see* CAR-D24-0005-0001 and its corresponding official French Translation CAR-D24-0005-0045, and CAR-D24-0005-0013 and its corresponding official French Translation CAR-D24-0005-0034). Ultimately, the TC denied the Defence Request for an Effective Remedy in Light of Two Austrian Decisions, asking for ordering the destruction of all material obtained on the basis of the decisions that have been invalidated (*see* ICC-01/05-01/13-1928-Conf-Corr), and rejected the Defence request for leave to appeal (*see* ICC-01/05-01/13-1950).
[133] ICC-01/05-01/13-1795, para. 45; see also CAR-OTP-0091-0351, CAR-OTP-0091-0360.
[134] CAR-OTP-0092-0024, Tab 'Narcisse Arido', Entry 1, 'Send Date' - 27 December 2005; *see also* Chart A at p. 101 *infra*.
[135] ICC-01/05-01/13-1795, paras 45, 49.

admission into the record was in violation of Article 69(7) of the Statute.[136]

127. These Western Union records were found to be unlawfully collected, violating the right to privacy, by two *Oberlandesgericht Wien's* (Higher Regional Court of Vienna) rulings[137] and ultimately the TC.[138]

128. At **para. 211**, the TC identifies the Defence arguments,[139] which are also included in its Closing Submissions.[140] But none of these arguments have been addressed in the Judgment.

129. For example, the TC erred by not ruling on the Defence objections to the Prosecution's failure to disclose the basis of the request for Western Union pre-screening, which was not subject to judicial scrutiny/authorisation.[141]

130. This silence in the Trial Judgment makes the TC's legal holdings unreviewable, in violation of Appellant's right to a fair trial.

b. The Trial Chamber's decision to admit the Western Union Documents[142] is an error: it is legally inconsistent with Article 69(7)(b) and Article 21(3) and violates Appellant's right to a fair trial (N/A, para. 23)

i. Violations of internationally recognised Human Rights ('IRHR') render a trial unfair

131. The inextricable link between IRHR and fair trial rights has been upheld in the jurisprudence of the European Court of Human Rights ('ECtHR'), and particularly in respect to illegally obtained evidence. The principle is that where a violation of an international human right is

[136] *See* ICC-01/05-01/13-1795, paras 38-49; ICC-01/05-01/13-1869, paras 13, 14 and 31; ICC-01/05-01/13-1928-Conf-Corr, paras 3, 20; ICC-01/05-01/13-1950, para. 23.
[137] CAR-D24-0005-0001 (First Higher Regional Court of Vienna Decision), CAR-D24-0005-0045 (official French translation); CAR-D24-0005-0013 (Second Higher Regional Court of Vienna Decision), CAR-D24-0005-0034 (official French translation). The Defence has requested that the Appeals Chamber admit these Decisions into evidence in ICC-01/05-01/13-2140-Conf.
[138] ICC-01/05-01/13-1948, para. 28.
[139] The TC rejected both the Appellant's Request for Leave to Appeal the TC's VII 'Decision On Request to Exclude Western Union Documents and Other Evidence Pursuant to Article 69(7)' (*see* ICC-01/05-01/13-1869), and the Appellant's Request for Leave to Appeal 'Decision on Request in Response to Two Austrian Decisions' (*see* ICC-01/05-01/13-1950).
[140] Arido Closing Submissions, paras 383, 404-406 and remedies in para. 409.
[141] Arido Closing Submissions, paras 142-145.
[142] Trial Judgment, paras 211-212.

found in the Convention, there is also a violation of the right to a fair trial.[143]

132. The ICC Appeals Chamber has defined the term 'fair' as being associated with the norms of a fair trial and corresponding human rights, as per Article 64(2) and Article 67(1) of the Statute.[144]

133. A fundamental and explicit principle of the Rome Statute's provisions[145] and interpretation[146] is consistency with internationally recognized human rights.

134. Under Article 67, when evidence is obtained by means of a violation of an IRHR, it must overcome one of two criteria to be admitted.

135. Here, the Trial Chamber recognised the Western Union documents were obtained in violation of the right to privacy.[147] Yet, it still admitted the documents, holding that "the infringements to the right to privacy are not so severe as to taint the fairness of proceedings"[148] and concluded that "the admission would not be antithetical to and would [not] seriously damage the integrity of the proceedings."[149]

136. The TC denied the Defence request for leave to appeal.[150]

ii. The Trial Chamber's error dilutes and distorts the place of IRHR, which are enshrined in the ICC's core values

[143] ECtHR, *Jalloh* Judgment, page 1: (Evidence obtained in violation of Article 3 is a violation of fair trial rights under Article 6 where emetic was administered to applicant to induce regurgitation of a bag of cocaine); *Khan* Judgment - Partly Concurring, Partly Dissenting Opinion of J. Loucaides, p. 15: ('I cannot accept that a trial can be 'fair', as requested by Article 6, of a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention'); *Schenk* Judgment – Joint Dissenting Opinion: (Violation of right to fair trial under Article 6 where unlawfully obtained recording was admitted and part of basis of conviction'); *P.G and J.H. v UK* – Partly Dissenting Opinion of Judge Tulkens, p. 28, para. 1: ('I do not think that a trial can be described as "fair" where evidence obtained in breach of a fundamental rights guaranteed by the Convention has been admitted during the trial').
[144] ICC-01/04-168, para. 11.
[145] *See* ICC Statute, Articles 21, 36 and 69.
[146] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Observers' Notes, Article by Article, Second Edition, at pp. 1334-1335 ("Essentially the admission and use of such evidence [evidence obtained in violation of an international human right] by the Court would damage the purpose and integrity of its own proceedings which are to uphold the rule of law and human rights […]"), *see* Annex A.
[147] ICC-01/05-01/13-1948, para. 28: This represented a change in the TC's view, since prior to the Higher Regional Court of Vienna Decisions, it did not recognise that there had been a violation of the right to privacy. In its 'Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)', on 29 April 2016 (*see* ICC-01/05-01/13-1854, para. 60), the TC found that "manner in which the Western Union Documents were provided is not so manifestly unlawful that it fails to be 'in accordance with the law' for the purposes of the right to privacy as reviewed under Article 69(7) of the Statute".
[148] ICC-01/05-01/13-1948, para. 39.
[149] *Ibid.*, para. 40.
[150] ICC-01/05-01/13-1950; ICC-01/05-01/13-1963; *see also* ICC-01/05-01/13-1989, para. 211.

137. The Defence position is that the evidence obtained in violation of an internationally recognised human right can only damage the proceedings because it renders the trial unfair.[151]

138. The TC holds otherwise: it found that a violation of an IRHR (right to privacy) in respect to obtaining evidence was simply insufficient to result in a decision of inadmissibility.

139. The Defence does not have enough space to properly brief the issue, but would submit additional argument at a later date, if the Appeals Chamber requests it.

140. But, there is one salient erroneous contention in the TC's analysis which supports the inconsistency in its conclusions.

141. The error is that the TC sets up a "severity scale" for human rights violations. This implies that some internationally recognised human rights are more serious (and, hence, deserving) of legal remedies, such as the exclusion of illegally obtained evidence.[152]

142. The Defence rejects this interpretation, which distorts the significance of international human rights. It creates a "slippery slope" which can result in tolerating "less serious human rights infringements" in a case. This justification does not present an image consistent with the ICC as a guardian and champion of the rule of law and international human rights.

143. But, even accepting, *arguendo*, the TC's "severity scale," the Defence submits that the facts in this case meet its "severity" standard:

- Appellant was charged for a time period of only a month or so in February 2012, yet the evidence collected as a result of the Western Union RFAs go back as far as 2005 – for seven years;[153]

- Appellant is named with 67 others who are not named in this case, and whose privacy was violated in the Western Union investigation of financial records;[154]

- At the time when the investigation/collection of Western Union documents started in

[151] Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article, Second Edition, at pp. 1334-1335, *see* Annex A.
[152] ICC-01/05-01/13-1948, para. 39.
[153] CAR-OTP-0092-0024, Tab 'Narcisse Arido', Entry 1, 'Send Date' - 27 December 2005, *see also* Chart A at p. 101 *infra*.
[154] *See* CAR-OTP-0092-0018.

September 2012, Appellant was not even a suspect in this case;[155] and

- Appellant was erroneously [REDACTED]in the Austrian paperwork,[156] [REDACTED].[157]

iii. Appellant was harmed and prejudiced by the Trial Chamber's admission of the Western Union evidence

144. The Judgment makes no direct evidentiary link between the evidence and Appellant's guilt,[158] but the harm and prejudice to Appellant is found in how the Western Union investigations were used in this case.

145. The Western Union investigations served as a trigger for the proceedings against Appellant (and the other Co-Accused).[159] Appellant (as well as 67 other people) were identified without reasonable suspicion and specific, individualized legal grounds both in the pre-screening e-mails[160] and the Western Union RFAs sent to the Austrian authorities by the Prosecution.[161]

146. Had the TC taken a different position and found that the Western Union documents were illegally obtained and excluded them, this would have raised serious questions as to the whole basis for this judicial proceeding.

147. In addition, through this process, as noted in the Closing Submissions,[162] Appellant was wrongly identified in the Austrian request for information as [REDACTED]. The TC agreed that the Prosecution was "involved in the process that lead to the illegally obtained material"[163] but attributes no responsibility or accountability to it.[164]

148. Even though no Western Union payments regarding Appellant were identified in the Judgment, the Western Union issue continues to prejudice and harm Appellant and his family.

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[155] *See* CAR-OTP-0092-0021-R01.
[156] *See* CAR-D24-0002-1349.
[157] Arido Closing Submissions, paras 140-141; *see also* CAR-OTP-0092-0892-R01.
[158] The TC made no finding that any payments through Western Union, or its Cameroonian branch, inculpated Appellant.
[159] It also triggered follow-up collection of Call Data Records and E-mail Communication related to the Appellant, *see for example* CAR-OTP-0091-0317, ICC-01/05-01/13-427-Conf-Anx; ICC-01/05-01/13-140, para. 11; ICC-01/05-01/13-324, para. 9; see also Arido Closing Submissions, para. 144.
[160] *See* CAR-OTP-0092-0021-R01 (First pre-screening e-mail); CAR-OTP-0092-0022 (Second pre-screening e-mail); CAR-OTP-0092-0022-R01, at 0023 (Mr. Smetana's response).
[161] *See* CAR-OTP-0091-0351 (First OTP RFA); CAR-OTP-0091-0360 (Second OTP RFA).
[162] Arido Closing Submissions, paras 140-141, and remedies in para. 410.
[163] ICC-01/05-01/13-1948, para. 36.
[164] *Ibid.*, para. 39.

Throughout this proceeding, and continuing through the present, Appellant suffers from the violations emanating from the Western Union requests [REDACTED].

c. Conclusion

149. In sum, the Defence submits that the TC not only erred in finding that the Western Union documents were admissible, pursuant to Article 69(7)(b), but in so doing, violated Appellant's right to a fair trial under Articles 64(2) and 67(1), which ultimately resulted in a guilty verdict against Appellant.

d. Remedy requested

150. For reasons stated above, pursuant to Article 81(1)(b)(iv), Appellant is requesting that the Appeals Chamber review the TC's decisions, and rule on the issues in Appellant's two requests for leaves to appeal related to the Western Union evidence. [165]

151. The fundamental issue is whether the admission of illegally obtained evidence was inconsistent with the objectives of the Rome Statute, as per Articles 21(3) and 69(7) and should have been excluded.

152. This issue is important to Appellant because the Western Union investigation triggered the proceedings against Appellant and others which resulted in this case,[166] as well as other investigations involving CDR's and e-mail.[167] Absent the evidence produced from the Western Union investigation, it is likely that the Article 70 case could not have been prosecuted.

153. The impact of violations of international human rights on the investigative process and trial proceedings has general importance.[168] To our knowledge, this issue has not been ruled on by the Appeals Chamber. While there is substantial jurisprudence on the relationship between evidence obtained in violation of a human right and the right of fair trial in other courts, the issue of what this means – in practice – in respect to the provisions of the Rome Statute still needs to be decided.

8. Article 81(1)(b)(iv) – Leaves to Appeal (N/A, para. 46)

[165] ICC-01/05-01/13-1869 and ICC-01/05-01/13-1950.
[166] *See* CAR-OTP-0092-0018; *see also* CAR-D20-0003-0009.
[167] *See* Chart A at p. 101 *infra*.
[168] *Ndindabahizi* Appeal Judgment, para. 13.

154. The Appeals Chamber is the "final arbiter of the law," and may hear arguments which are significant to the Court's jurisprudence and has *proprio motu* powers to rule on legal issues.[169]

155. The Defence filed eleven leaves of appeal for PTC and TC decisions.[170] All were denied.[171] Some are directly discussed within this appeal and are mentioned in the Judgment, and others are highlighted in footnotes. Generally, the issues denied in the requests for leave to appeal are fair trial issues which impact on the investigations and proceedings for this case. These include notice issues;[172] right to examine evidence and present a defence (Article 67(1)(e)),[173] entitlement of each Accused in a joint trial to the same rights as if tried separately (Rule 136[2]),[174] evidentiary issues related to Western Union investigations and Austrian Court Decisions,[175] D-4's military background,[176] procedures regarding obtaining evidence from D-2 and D-3, the two witnesses on whose direct testimony Appellant was convicted;[177] right to translation under Article 67;[178] fairness regarding Single Judge process;[179] standard of review for disclosure violations;[180] and the issue of remedies.[181]

156. The Defence requests that the Appeals Chamber review the denials of appeal discussed, and deliberate and rule on the legal issues presented. The issues raised impact directly on Appellant, but are also of significance to the interpretation of the Rome Statute, particularly Article 70 and Article 25, and the processes and functioning of the Court's Prosecutorial and Judicial organs.

9. The Trial Chamber's failure to respond in the Judgment to Appellant's remedies, and its subsequent denial of Appellant's request for leave to appeal affected the fairness of the decision. (N/A, paras 43, 44, 45)

[169] *See* Nahimana Appeal Judgment, para. 12; *Ndindabahizi* Appeal Judgment, para. 13; *Kajelijeli* Appeal Judgment, para. 297.
[170] The Appellant filed the following requests for leaves for appeal PTC and TC decisions: ICC-01/05-01/13-2004, ICC-01/05-01/13-1950, ICC-01/05-01/13-1944-Conf, ICC-01/05-01/13-1871, ICC-01/05-01/13-1869, ICC-01/05-01/13-1311-Conf**,** ICC-01/05-01/13-1207, ICC-01/05-01/13-1026, ICC-01/05-01/13-772, ICC-01/05-01/08-3142-Conf, ICC-01/05-01/13-619.
[171] The TC granted the Arido Defence Request for suspension of time limit for leave to appeal in Email Decision, 12 June 2015, subject line "Arido's Request for a Suspension of the Time Limit, filing ICC-01/05-01/13-997-Conf." but did not grant subsequent Request for Leave, ICC-01/05-01/13-1026.
[172] ICC-01/05-01/13-772.
[173] ICC-01/05-01/13-3142-Conf.
[174] *Ibid.* (Appellant's access to unredacted documents to which co-Accused have access).
[175] ICC-01/05-01/13-1869 and ICC-01/05-01/13-1950.
[176] ICC-01/05-01/13-1871
[177] ICC-01/05-01/13-1311-Conf.
[178] ICC-01/05-01/13-2004.
[179] ICC-01/05-01/13-619, ICC-01/05-01/13-1207.
[180] ICC-01/05-01/13-1207.
[181] ICC-01/05-01/13-1944-Conf.

157. The Arido Defence submitted multiple remedies, based on its arguments and previous litigation, in its Closing Submissions.[182] In its Judgment, the TC is silent in respect to all of the remedies, but for the remedy of acquittal in **para. 407**.

158. Approximately a little less than four months prior to the Judgment, the TC issued a separate Decision,[183] rejecting Appellant's requests, and also rejecting Appellant's leave to appeal the Decision.[184]

159. The legal issues (*inter alia* Article 69(7) and the Prosecution's overly broad investigations, resulting in violations of UDHR and ICCPR rights, and right to compensation for human rights violations) developed in the course of the investigations and trial. Hence, the issues were significant to the fairness and reliability of the proceedings. The TC mentioned its denials of Defence objections in the Judgment,[185] but did not even address Appellant's remedies request and explain how it was dealing with, or had dealt with, the remedies requested.

160. By excluding the legal content of its decision on remedies from the Judgment, the TC violated Appellant's fair trial right to a full and reasoned opinion,[186] which would be subject to appellate review. Here, the TC denied Appellant's leave for request to appeal the Decision on Requests by the Arido Defence provided in its Final Submissions.[187]

III. LEGAL ERRORS

161. The Judgment's errors discussed *infra*. concern a) statutory interpretation of Article 70(1)(c); b) type of offense (conduct or result); c) modes of liability; and d) inconsistent findings and verdict. Although characterized as legal errors, these errors also result in violations of Appellant's right to a fair trial.

A. The Trial Chamber erred by interpreting two different definitions for the term of "witness" in Article 70 in the Statute, resulting in an inconsistent and illegal verdict.[188]

[182] Closing Submissions, paras 407-411.
[183] Document 1943, 29 June 2016.
[184] ICC-01/05-01/13-1944-Conf (Defence Request for Leave to Appeal), 4 July 2016; ICC-01/05-01/13-1951 (Decision), 19 July 2016.
[185] For example, para. 211 regarding Western Union documents.
[186] ICTY: *Furundzija* Appeal Judgment, para. 69. *See also* ECtHR: *Helle Judgment*, para. 55; *Jokela* Judgment, paras 72-73; *Torija* Judgment, para. 29.
[187] Impugned decision is ICC-01/05-01/13-1943-Conf. Arido Defence Request for Leave to Appeal is ICC-01/05-01/13-1944-Conf.
[188] *Also see* argument for inconsistent verdict on other grounds, *infra.* at p. 50.

(Judgment, paras 20, 44; N/A para. 21)

1. Introduction

162. The CoC confirmed charges for the offence of Article 70(1)(a), (b) and (c) against Appellant. The TC acquitted Appellant of Article 70(1)(a) and (b) and convicted him of 70(1)(c).

163. But the TC adopts two different definitions of "witness" within the same offence. For Article 70(1)(a), the TC defined a "witness" as "[...] a person appearing before the Court [...] who attests to factual allegations according to his or her personal knowledge."[189] For Article 70(1)(c), the TC held that the term "witness" "must encompass 'potential witnesses,' namely persons who have been interviewed by either party but have not yet been called to testify before the Court."[190]

164. There is no legal justification for two different definitions, and the term "potential witness" does not appear in the Rome Statute, nor is its inclusion supported by any legal authority which directly addresses Article 70.

165. The TC simply inserted "potential witnesses" into the Article, which clearly is conduct which can be characterized as *ultra vires*. It points to no relevant legal authority, nor commentary on the construction of the Statute to justify this radical action which violates the principle of strict construction under Article 22(2).

166. For this reason, the TC's *sua sponte* interpretation which enlarges the meaning of a term in the Statute was *ultra vires* conduct, and Appellant's conviction for Article 70(1)(c) should be reversed.

2. The Trial Chamber's legal references[191] do not support its insertion of "potential" into Article 70(1)(c)

167. The Trial Judgment cites the Appeals Chamber decision in *Katanga* and ICTY's *Beqaj* Trial Judgment to support its conclusion that "witness" must "also encompass 'potential witnesses.'"[192] The TC's reliance on these cases is misplaced because neither provides legal authority for the TC's conclusion.

[189] Trial Judgment, para. 20.
[190] *Ibid.*, para. 44.
[191] *Ibid.*, para. 44 at fn. 80.
[192] *Ibid.*, fn. 80.

168. In *Katanga,* the Appeals Chamber does use the term "potential Prosecution witnesses," but this reference is not relevant to our case. The term is defined in the context of the disclosure obligations regarding potential Prosecution witnesses, pursuant to Rule 81(2).[193] In *Katanga*, The issue was whether persons named in the statements of witnesses upon which the Prosecution relied should be viewed as "Prosecution sources" or "potential Prosecution witnesses," and thus protected from disclosure of identifying information.

169. The legal issue in our case is different: can the TC, *sua sponte*, insert "potential" into Article, 70(1)(c) when the term "potential witnesses" does not appear in the Rome Statute, which clearly uses the term "witness" without a modifier or adjective in Article 70.[194]

170. The Trial Judgment's reference to the *Beqaj* case is also inapplicable to our case. *Beqaj*, an ICTY TC judgment on contempt allegations in Rule 77, is clearly distinguishable: Rule 77 explicitly refers to "witness or potential witness."[195] **Para. 21** of the *Beqaj* Judgment,[196] cited in footnote 80, provides a list of possible *actus reus* of contempt of court which include "[...] otherwise interfering with a witness or a potential witness." (underlining added)

171. In the Rome Statute, Article 70(1)(c) makes no reference to "potential witness."

172. In addition, *Beqaj* is legally different than our case. The charging instrument, the indictment, included both witnesses and potential witnesses as categories,[197] since Rule 77, ICTY RPE under which Beqaj was charged specifically included "potential witnesses."

173. We note that the while there is no charging instrument such as an indictment, or even an UDCC, the CoC makes no reference to "potential witnesses."[198] The TC is bound by terms of

[193] The *Katanga* Appeals Chamber defined this term as "individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or how the Prosecutor intends to interview in in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses." *Katanga* Witness Redaction Appeals Judgment, ICC-01/04-01/07-476 (OA2), 13 May 2008, para. 2.
[194] Article 70(1)(c) states: "Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness […]"
[195] Rule 77(A)(iv) reads: "(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness." (Amended 4 Dec 1998, amended 13 Dec 2001)
[196] *Cited* in Trial Judgment, fn. 80.
[197] *Beqaj* Trial Judgment, paras 1, 15.
[198] The Trial Judgment consistently refers to D-2, D-3, D-4 and D-6 as witnesses, not as "potential witnesses." The PPTB also refers to "witness," stating "The person must know that the individual whom they seek to influence is a witness and intentionally seek to corruptly to influence that witness", para. 226 under *Mens Rea* for Article 70(1)(c).

the Confirmation Decision.[199] Thus, there is no "potential witness" term found in the CoC or in Article 70.

174. Therefore, the *Beqaj* case provides no legal authority.

3. The Trial Chamber erred by interpreting Article 70(1)(c) to encompass "potential witnesses," in violation of Article 22(2)

175. When interpreting the Rome Statute, the "ordinary meaning" of its terms shall apply.[200] Article 70(1)(a), (b) and (c) clearly refer to witnesses – giving false testimony, presenting evidence, corruptly influencing a witness, retaliating against a witness for giving testimony.

176. Moreover, a close reading of Article 70(1)(c) would suggest that corrupting a witness refers to a witness who has been identified as <u>one who is testifying</u>, especially since the obstruction and interference is in conjunction with attending the proceeding or giving testimony and retaliation is for giving testimony. To enlarge this category – to include potential witnesses – goes beyond the plain meaning of the Statute.

177. The addition of the term "potential witness" into Article 70(1)(c) also violates the fundamental tenet of strict interpretation. Article 22(2) states that "The definition of a crime shall be strictly construed [...]" While Article 70 enumerates offences, not crimes, the Rome Statute provisions regarding interpretation apply to offences.[201]

178. The Appeals Chamber, in *Katanga, supra.*, has emphasized the necessity to interpret the Rome Statute strictly. In *Katanga*, it re-framed the Pre-Trial Chamber's formulation of the issue,[202] which had included the term "prosecution sources," by deleting the term because "the term 'Prosecution sources' is not one that is used in Rule 81(2) or indeed elsewhere in the Statute or the Rules."[203] The Appeals Chamber did not consider "whether people who have been or are about to be interviewed by the Prosecutor can be classified as 'Prosecution sources" as such."[204]

[199] Trial Judgment, para. 101.
[200] VCLT, Article 31.
[201] Rule 163 RPE. In addition, *see Ngudjolo* Judgment – Concurring Opinion of Judge Christine Van den Wyngaert, para. 18 (Article 22(2) "obliges the Court to interpret the definition of crimes strictly" and applies this principle "with equal force in relation to the definition of criminal responsibility").
[202] *Katanga* Witness Redaction Appeals Judgment, para. 7.
[203] *Ibid.*, para. 46.
[204] *Katanga* Witness Redaction Appeals Judgment, para. 46.

179. In sum, the Trial Judgment's interpretation to include "potential witnesses" exceeded the boundaries of strict interpretation and was an error in law.

4. The Trial Chamber acted ultra vires: it had no authority to add any words to the Statute.

a. The Trial Chamber's interpretation by adding words to the Statute violates the intent and processes of the Rome Statute.

180. If it had been intended that Article 70(1)(c) should apply to both witnesses and potential witnesses, this would have been reflected in the Treaty's wording. But it is not.

181. The provisions of the Rome Statute – almost each word – were painstakingly negotiated and decided in years of discussions and negotiations in committees, working groups and Preparatory Committees ('PrepComs') to establish the ICC. Since the entry into force of the Rome Statute, the Assembly of States Parties has continued to discuss, negotiate and decide everything concerning the implementation of the Statute – including its provisions, rules and regulations.

182. There is no argument, or justification for the addition of the term "potential witness" based on intent of the makers, to be found in the historical documents and commentaries available for this section of the Statute. Nor does a discussion or proposals concerning "potential witnesses" appear anywhere, based on a review of various commentaries about this section.[205]

183. Thus, it would seem fair to conclude that the term "witness" was intended to mean "witness" – not "potential witness."

b. The Trial Chamber has no inherent power to add to the Rome Statute

184. The legal functions and powers of the Court are articulated in the Rome Statute, Articles 4 and 64, and in the corresponding RPE.

185. However, the inherent powers of the TC are limited and defined: the Regulations of the Court recognize that the TC has inherent powers in Regulation 28(3) and Regulation 29 (2), but these "inherent powers" are undefined.

[205] *See*, for example, Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Observers' Notes, Article by Article, Second Edition, at pp. 1334-133, in Annex A and Schabas, The International Criminal Court: A Commentary, pp. 854-855, in Annex B.

186. Generally, these powers are derived from judicial function.[206] At the ICC, these powers have been relied upon in the function of making necessary alterations to documents issued by the TC,[207] to stay proceedings,[208] and for reconsideration of decisions. In invoking this power to stay a proceeding, it must be done in a restrictive manner.[209]

187. But the TC has no "inherent power" or "inherent jurisdiction" to alter the wording of the Rome Statute, or to interpret its provisions through enlarging or expanding their meaning. As Schabas explains in his Commentary on Article 70, the reason is that, unlike the *ad hocs*, the ICC Statute explicitly provides jurisdiction to adjudicate these offenses.[210]

188. Thus, it is *ultra vires* for the TC to, *sua sponte*, define the term "witness" as encompassing "potential witness" for the purposes of Article 70(1)(c), corrupting witnesses.

5. The Trial Chamber's interpretation of Article 70(1)(c) was inconsistent within the Statute and its own prior holdings.

189. In its Protocol on witnesses, the TC defined a witness as someone who has been identified as giving evidence.[211] This definition is in conformity with Article 70(1)(c) and does not "encompass" the notion of "potential witness."

190. Yet, without providing any reason, as per Article 74(5), the TC decided and applied a legal definition in its Trial Judgment which is different than the one it used during trial.

191. Without a reasoned opinion, the Defence is left to guess or speculate on what a conclusion or

[206] Shelton, Dinah (2009) "Form, Function and the Powers of International Courts," *Chicago Journal of international Law*: Vol. 9: No. 2, Article 8, pp. 545-546 at http://chicagounbound.uchicago.edu/cjil/vol9/iss2/8.
[207] *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, 'Decision on the Prosecutor's Urgent Application Dated 26 September 2005', ICC-02/04-01/05, 27 September 2005.
[208] *Prosecutor v. Lubanga*, Appeals Chamber, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"', ICC-01/04-01/06-1486, 21 October 2008, para. 76, and *Prosecutor v. Kenyatta*, Trial Chamber V, 'Decision on defence application pursuant to Article 64(4) and related requests', ICC-01/09-02/11-728, 26 April 2013, para. 74.
[209] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, 'Decision on the defence request for a temporary stay of proceedings', ICC-02/05-03/09, 26 October 2012, para. 78 (exercise of inherent power to stay proceedings can be perceived as frustrating the administration of justice).
[210] Schabas, The International Criminal Court: A Commentary, pp. 854-855, *see* Annex B.
[211] Protocol on the Handling of formation During Investigations and Contact Between a Party and Witnesses of the Other Parties, ICC-01/05-01/13-1093-Anx. The TC defines "witness" as person whom a party intends to call to testify or on whose statement the party intends to rely upon, provided that such intention has been conveyed to the non-calling party, by means that establish a clear intention on behalf of the calling party to rely upon the individual as a witness. In addition, there is no evidence on record that D-2, D-3, D-4 and D-6 had been selected as witnesses by the *Bemba* Defence at the time of the Douala meeting.

a finding is based. The purpose of a reasoned opinion is to permit appellate review of the TC's findings on evidence and conclusions, and to potentially provide grounds for either Party to challenge these findings and conclusions.

192. This violates Appellant's fair trial right, because he is deprived of the possibility to exercise his right to seek recourse from the Appeals Chamber. [212]

193. This is the situation here: there is no decision, or, put more affirmatively, there is a "non-decision" on the legal issue. The Defence has to assume that the TC simply disregarded the legal point on the definition of witness.

194. The TC's failure to make a decision materially affects the Judgment: a wrong interpretation of the law does not provide a fair or reliable basis for a sound conviction. Hence, Appellants conviction for the offence of Article 70(1)(c) should be reversed.

6. Remedy

195. The Defence asks the Appeals Chamber to find that the TC erred, as a matter of law, by its addition of "potential witnesses" to Article 70(1)(c) and to reverse Appellant's conviction.

B. The Trial Chamber erred by not ruling on Appellant's argument, in his Closing Brief, that D-2, D-3, D-4, D-6 did not meet the definition of "witness," as contained in the Witness Protocol adopted for this case.[213] (N/A, para. F)

196. The TC was silent in its Judgment as to the Defence point that – as a matter of law – D-2, D-3, D-4 and D-6 – did not meet the definition of witness, based on the Protocol and that the Prosecution failed to prove this element of the offence charged beyond a reasonable doubt. [214]

197. The definition of "witness" in the Protocol conforms with the reasoning under Trial Judgment, **para. 20** – a person who a Party intends to call at trial, who will appear before the Court.

198. The Defence emphasizes that for the proceedings, the Protocol was the controlling definition of witnesses. Based on that definition, the impugned conduct found by the TC for which

[212] *Katanga* Trial Judgment, Minority Opinion of J. Van den Wyngaert, ICC-01/04-01/07-3436-AnxI 07-03-2014, paras 111-112 ("non-decision" of TC particularly problematic because it deprived Germain Katanga of the possibility of seeking recourse before the Appeals Chamber in order to protect his rights); Dissenting Opinion of J. Van den Wyngaert, ICC-01/04-01/07-3419-Anx, 19 November 2013, paras 1-2.
[213] ICC-01/05-01/13-1093.
[214] *See* Arido Closing Submissions, paras 156-161 and Arido Defence Closing Oral Arguments, p.104.

Appellant was convicted (recruiting and instructing) took place prior to any meetings or contact between the persons and Me. Kilolo. Thus, there was no evidence on record – at the time of conduct – that any of the four persons were to be relied upon by the *Bemba* Defence to give evidence. The decision as to their status as witnesses had not yet been made. Therefore, it was a legal, and factual impossibility for Appellant to corrupt witnesses by recruiting and instructing them, when – at the time of the conduct, the persons were not witnesses.

199. As a matter of law, Appellant's conviction for the offence of Article 70(1)(c) should be reversed, based on the ground that the element of the offense – the requirement that the persons be witnesses – had not been met.

C. The Trial Chamber erred regarding its statutory interpretation of Article 70(1)(c) as a conduct based offence (Judgment, paras 43-50, 953; N/A , para. F)

200. In the Judgment,[215] the TC concludes that corruptly influencing a witness under Article 70(1)(c) is a "conduct" offence, and does not require a result. This analysis echoes the Pre-Trial Chamber's position in the Confirmation of Charges.[216] Thus, whether or not there is false testimony is irrelevant to "corruptly influencing."

201. The Defence is aware that jurisprudence on offences against the administration of justice generally holds that the impugned conduct is sufficient, with no need to be linked to a result.

202. But these decisions are from the pre-trial or trial level[217] and cannot be relied upon as legal precedent.

203. In **para. 43**, the TC cites the Pre-Trial Chamber's finding in the *Bemba* Confirmation Decision for support, but no citations are provided in the Judgment or Confirmation Decision.[218] Nor was this decision subject to appellate review, since the TC rejected the requests for leave to appeal from all five Defence teams.[219] Thus, the legal issues remain un-

[215] *See*, generally, Trial Judgment, paras 43-50, and 953. The TC cites the approach of a few national jurisdictions at para. 48, as well as case law from the *ad hocs* and other international courts and tribunals.
[216] CoC, para. 30.
[217] This holding is supported in ICTY cases such as *Maglov* (2004), *Beqaj* Trial Judgment (2005), *Margetić* (2007), *Haraqija & Morina* (2008), *Šešelj* (2009), at SCSL in *Taylor* (2011) and at ICC, in *Barasa* (2013), and *Bemba et al* CoC (2014).
[218] CoC, para. 30.
[219] Joint decision on the applications for leave to appeal the "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute," 23 January 2015. *See also* Arido Request for Leave to Appeal Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 1 December 2014, paras 39-49 (issue related to the interpretation of Article 70 offences).

reviewed by the Appeals Chamber and unsettled.

204. The Defence submits that the definition of "corrupting witnesses" as an "independent" or "stand alone" offence is legally incorrect, because it encourages a "strict liability" analysis which does not require a finding of intent. In contrast, Article 70 is unequivocal that a legal requirement of the offence is intentional conduct.

205. But if you apply the strict liability analysis to this case, according to the TC, the acts of promising money and relocation are sufficient, regardless of the outcome, or intent of these acts. Thus, the TC treated its findings regarding Appellant's promises of money and re-location,[220] standing alone, as criminal acts.

206. What's wrong with this? The legal requirement of "when committed intentionally" still needs to be satisfied, based on the Statute.

207. Article 70 in the Statute does not "take for granted" that the conduct is intentional, nor does it presume the acts cited in the Article are intentional. The first sentence of Article 70(1) reads: "The Court shall have jurisdiction over the following offences against the administration of justice *when* committed intentionally:" (italics added). This language and syntax leave open the possibility that when acts enumerated in the Article are not committed intentionally, they do not constitute offenses.

208. Assuming, *arguendo*, that Appellant made the financial promises (as found by the TC), he could have done so to help fellow country persons out of a difficult economic situation, for example.[221] Here, the intent is not to act against the administration of justice or corrupt a witness.

209. But, even accepting, *arguendo* the Chamber's position that conduct alone is sufficient, there still needs to be a conclusion that the conduct is criminal or prohibited. It is only logical that intent – by definition – has to have an object: an intent to do something, result in something, etc. Intent cannot exist on its own. For this reason, the TC's bifurcation of conduct and result

[220] The Defence position is that this conduct was not proved beyond a reasonable doubt, but this is a separate argument (discussed in the Evidentiary Errors section *infra*).
[221] This was supported by evidence of D-2 and D-3, who viewed the promises as economic opportunities. *See*, Arido Closing Submissions, paras 223-234: D-2 testified that he "had signed up for" a "topo" to make money (T-18-CONF-ENG, p. 67, ll 10-13) and D-3 testified that Mr. Arido had presented him an opportunity, a deal to make money and perhaps, even get to the West, and "if possible, stay there" (T-22-CONF-ENG, p. 37, lines 12-14 and p. 27 l. 24 to p. 38, l. 1).

makes no sense.

210. The TC's *mens rea* conclusions about Appellant lead to the slippery slope of inferences. An inference of an Accused's intent must be the only reasonable one which is available on the evidence. [222] Based on the evidence at trial, the only intent would have been an intent to help or assist someone. Thus, an inference that a "criminal intent" is present is not the only available reasonable inference based on the evidence.

211. The bottom line remains the same: the intent to commit an offence against the administration of justice is still missing.

212. In sum, the analysis of Article 70(1)(c) as a conduct crime, which does not require a criminal result as an element is legally inconsistent with the statutory requirement of intent.

D. Errors regarding Modes of Liability

1. The Trial Chamber erred in finding that Appellant had a connection to the common plan, when common purpose mode of liability had been rejected by the CoC and in fact, by findings in the Judgment. (Judgment, paras 103, 112, 682, 803, 878; N/A, paras 41, 42)

213. In its Judgment, the TC finds that Appellant was not part of the common plan involving the three co-perpetrators – Bemba, Kilolo and Mangenda.[223] However, the TC also made findings which connected Appellant to the common plan.[224] These findings and conclusions connecting Appellant to the common plan are wrong as a matter of law.

214. First, the CoC rejected common purpose liability and co-perpetration in respect to Appellant.[225] In rejecting co-perpetration and common purpose liability, the notions of "acting in concert" or "acting jointly" were implicitly rejected. Considering that the TC held that it is legally bound by the terms of the Confirmation Decision,[226] its multiple connections of Appellant to the common plan and its goals contradict the boundaries established by the CoC.

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[222] *Vasiljevic* Appeal Judgment, paras 120, 128.
[223] Trial Judgment, paras 103, 112, 682, 803, and 878.
[224] Trial Judgment, paras 103 ("[…] agreement manifests itself in concerted actions….with others, including […] Mr. Arido"); para. 112 (Mr. Arido "made efforts to further this goal [of the common plan]"); para. 682 (Mr. Arido not a co-perpetrator but his actions allow TC to assess actions of the three co-perpetrators); para. 803 ("The Chamber infers the common plan from the concerted actions of the three co-perpetrators, in connection with that of other co-accused […]"); para. 878 ("[…] for the purpose of establishing the common plan between the co-perpetrators, its relied on their concerted actions, involving also the actions of non-members of the common plan, such as the two other co-accused, Mr. Babala and Mr. Arido and other third persons").
[225] CoC, para. 52.
[226] Trial Judgment, para. 100.

215. Second, these findings and conclusions are inconsistent with a) the Trial Judgment's explicit and repeated holdings that Appellant was not a member of the common plan[227] and b) the TC's rejection twice of the Prosecution's attempt to re-characterize (for Appellant) the charged mode of liability, under Regulation 55, to common purpose liability and co-perpetration.[228] Therefore, there is no legal basis to conclude that Appellant had any connection to a common plan, or that he exhibited any conduct which furthered its goals.

216. The harm and prejudice to Appellant is that, although he was not convicted as a co-perpetrator in the common plan, he was found guilty as a direct perpetrator for conduct which furthered the common plan (recruitment of witnesses, promises of money and re-location, etc.). Thus, the TC viewed the Prosecution's evidence against Appellant through the lens of the common plan, which prejudiced its assessment of the evidence.

217. Had the TC not viewed Appellant's conduct within the Prosecution's common plan theory, then it would have reached the only reasonable conclusion based on the evidence: that Appellant's connection to the Main Case was – as the Defence evidence demonstrated – simply as an expert who was recruited to prepare a report, and who intended to give testimony (until the security situation forced his withdrawal from the case).

2. The Trial Chamber erred by finding that Appellant acted in concert with Mr. Kokaté[229] (Judgment, para. 327; N/A, para. 42)

218. The PTC, in the CoC,[230] did not confirm any form of liability such as acting in concert, or common purpose liability.[231]

219. Since "acting in concert" was not charged, and the TC twice rejected the Prosecution's request for co-perpetration,[232] the TC's finding that Appellant acted in concert with others is beyond the terms of CoC, and is a finding based on a mode of liability for which he was not given notice in the CoC.

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[227] *See*, for example, Trial Judgment, paras 112, 682, and 878.
[228] Prosecution's Application under Regulation 55(2), 23 April 2015, ICC-01/05-01/13-922 and Decision: ICC-01/05-01/13-1250, 15 September 2015; Prosecution's Re-Application under Rule 55(2), ICC-01/05-01/13-1538 , 8 January 2015 and Decision, ICC-01/05-01/13-1553, 15 January 2016.
[229] Trial Judgment, para. 327 ("upon Mr. Kilolo's instruction, Mr. Kokaté and Mr Arido acted in concert to identify potential witnesses for the Main Case Defence").
[230] *Ibid.*, para. 100 (TC is bound by the terms of the Confirmation Decision).
[231] The PTC confirmed two forms of liability for Appellant for Article 70(1)(c): Article 25(3)(a) (perpetration), or, in the alternative, Article 25(3)(c) as an accessory, for aiding abetting or otherwise assisting in the commission of the offence. CoC, para. 96.
[232] *See* para. 215 *supra*.

220. Therefore, the TC's finding at **para. 327** is an error, as a matter of law.

E. Inconsistent Legal Findings

1. The Trial Chamber erred in making inconsistent legal findings in respect to its verdict. (Judgment, paras 943-949, N/A, para. 26)

221. The TC holds that, with respect to Article 70(1)(c), since it entered a finding of guilt for Appellant as a principal perpetrator, it is not necessary to enter a finding on the alternative modes of criminal responsibility charged.[233]

222. With respect to Article 70(1)(a), the TC is not convinced that Appellant aided or abetted in the introduction of false testimony, "by way of instructing [witnesses] on the false information to provide in Court and introducing them to Mr. Kilolo."[234]

223. With respect to Article 70(1)(b), the TC is not convinced that Appellant aided or abetted for the offence of giving false testimony "[...] by way of recruiting witnesses D-2, D-3, D-4, and D-6, instructing, persuading or otherwise influencing them, including by way of transfers of money and the possibility of a relocation in Europe […]"[235]

224. For all of the offences, the TC relied on the same evidence of conduct, in the testimonies of D-2 and D-3.

225. But there is a legal inconsistency here: for Article 70(1)(c), the findings of recruiting, instructing and promises of money and re-location are used to convict Appellant as a principal perpetrator. But, in respect to the offences under Articles 70(1)(a) and (b), this conduct is found not to be proved beyond a reasonable doubt.

226. This is illustrated by the example of the act of "instructing" the witnesses to give false testimony. The Trial Judgment finds that Appellant recruited and instructed the witnesses,[236] and this conduct is found to support corrupting witnesses, an element of the offence. Yet, the TC is also holding that there was no proof beyond a reasonable doubt of instructing for aiding,

[233] Trial Judgment, para. 945.
[234] *Ibid.*, para. 947.
[235] *Ibid.*, para. 948.
[236] *See*, for example, in Trial Judgment: inference of "scripted testimonies" (para. 351), "purported military background" (para. 420), "intended to manipulate the testimonial evidence" (para. 944).

abetting or otherwise assisting.[237]

227. If there is no proof beyond a reasonable doubt of aiding, abetting or otherwise assisting of conduct of instruction, then how can this proof exist for liability as a principal perpetrator?

228. The result is inconsistent verdicts.[238] No reasonable trier of fact could have convicted Appellant on the basis of such inconsistent findings.

229. Since there was no proof beyond a reasonable doubt, based on the same acts, to support Article 70(1)(a) and (b), the Appeals Chamber should reverse Appellant's conviction for the offence of Article70(1)(c).

230. In addition, there are other inconsistencies:

- The TC concluded that Appellant conduct had "contaminated" the evidence which was presented in the *Bemba* Main Case,[239] but made no such finding in respect to the same evidence in **para. 947**.

- The factual findings in the Judgment of Appellant as a "go-between" are inconsistent with his conviction as a direct perpetrator under Article 25(3)(a). By definition, "a go-between" plays an ancillary role in an event or transaction, acting as the "person in the middle." Factual findings of acting as a "go-between" support the legal characterisation of aid, abet or otherwise assist – a form of liability confirmed in the alternative for the offense of Article 70(1)(c), and rejected by the TC.[240]

- The Judgment is also inconsistent as to Appellant's role: he is referred to both as a "go-between" and also as a "leader or go-between," based on the evidence of D-2 and D-3.[241]

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[237] *Ibid.*, para. 947: The evidence did not show that Mr. Arido instructed the four witnesses on any of these points; para. 948: "For the same reasons developed in the context of Article 70(1)(b) […] the Chamber is not convinced beyond reasonable doubt that Mr. Arido 'aided, abetted […] by way of recruiting […] instructing […]" *See also* paras 872.

[238] This inconsistency is characterized in common-law jurisdictions as a repugnant verdict. A verdict must be set aside where it is "inherently inconsistent" with another verdict in the same case. *People v. Goodfriend* (1984); *People v. Tucker* (1981).

[239] Trial Judgment, para. 944.

[240] *Ibid.*, paras 131, 341, 344, 349, 399, 420, and 672.

[241] The Judgment is also inconsistent as Appellant's specific role: he is both referred to as a "go-between" and also as a "leader or go-between," based on the evidence of D-2 and D-3The Judgment concludes that Appellant acted as a "go-between" (paras 131, 341, 344, and 420) and as "go-between or leader" (paras 349, 399, and 672).

F. Conclusion

231. For the reasons stated above, the Defence requests that, as a matter of law, the Appeals Chamber reverse Appellant's conviction for the offence of Article 70(1)(c).

IV. EVIDENTIARY ERRORS

A. Introduction

232. In the Judgment, the evidentiary errors intersect with fair trial errors. Some have an inherent fair trial component; others result in fair trial violations. The inclusion of these errors in the evidentiary section does not negate or mitigate their fair trial aspect.

233. There were four general errors in respect to the assessment of evidence:

- the TC "took over" or assumed the Prosecution's burden to prove each and every element of the crime and mode of liability charged beyond a reasonable doubt;
- the TC's approach to the "missing witnesses" D-4 and D-6 violated Appellant's right to confrontation of evidence;[242]
- the TC's approach to bar table motions violated fair trial rights;[243] and
- the TC's formulation of the relation between Article 70 and Main Case evidence contradicted its own findings.[244]

234. The Defence submits that these evidentiary assessment errors, both individually and in the aggregate, violate Appellant's fair trial rights and rendered the proceedings and verdict unfair. For these reasons, Appellant's conviction should be reversed.

B. The Trial Chamber's approach violates Appellant's rights under Article 66.[245]

235. Article 66 places the onus on the Prosecution to prove the guilt of the Accused, beyond a reasonable doubt. The burden is not shared with the Chamber.

236. Nevertheless, the Judgment presents principles for the assessment of evidence which create the conditions for the Chamber to "fill in" the gaps in the Prosecution evidence, in order to

[242] Discussed *infra*.
[243] Trial Judgment, paras 190 and 192.
[244] *Ibid.*, para. 194. *See also infra*. Section on judicial notice errors.
[245] *Ibid.*, paras 198-200.

satisfy the Prosecution's burden of proof beyond a reasonable doubt.

237. For example, the TC holds that it can rely on any evidence in the record,[246] and broadly interprets the clause "discussed before it at trial."[247] The implementation of this approach to the TC's conclusions in respect to *mens rea*[248] illustrates the shifting of the burden of proof from the Prosecution to the Chamber. In **paras 673-677,** the TC rejects a number of the Prosecution's arguments, but still concludes Appellant possessed the required *mens rea* in **paras 671-672**.

238. Of course, the TC has the right to "pick and choose" evidence. But that is not issue. Based on a totality of the evidence, the Chamber has to decide if the Prosecution has met its burden of proof beyond a reasonable doubt. But the Chamber, rather than finding that the Prosecution had not met its burden, concluded that the Article 55(2) statement (which it factually misrepresented) and the testimonies of D-2 and D-3 (which were unreliable based on accomplice/perpetrator status) met the high standard required for a finding of guilt.

239. This was similar to the choice before Trial Chamber V(A) in its decision in the *Ruto/Sang* case.[249] The Trial Chamber could have entered a verdict of acquittal,[250] but did not: it vacated the charges and discharged the Accused without prejudice to future prosecutions.

240. But, here, in contrast to J. Fremr's explanations in the *Ruto/Sang* case, the TC offers no reasoned opinion as to why it chose essentially to assist the Prosecution in satisfying its burden, and why it simply did not find there was no proof beyond a reasonable doubt for *mens rea*.

C. The Trial Chamber erred in its approach to evidence, particularly in respect to the Bar Table Motions, which violated Appellant's right to a fair trial (Judgment, paras 190-191; N/A, para. 24)

241. The Arido Defence has previously argued that the Bar Table Motion vehicle violates the principle of orality and the right to cross-examination.[251] The Judgment, however, does not

[246] Trial Judgment, para. 199.
[247] *Ibid.*, para. 198.
[248] This is discussed more fully *infra*. at p. 79.
[249] ICC-01/09-01/11-2027-Red-Corr, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016.
[250] *See* J. Fremr's Reasons, paras 147-148 explaining his preference for acquittal but why he agreed to the discharge outcome.
[251] Arido Closing Submissions, paras 74-77.

address these arguments. Instead, the TC explains a process which clearly defers any assessment of standard evidentiary criteria until the deliberations phase. [252] The only exception is objections to procedural bars, such as Article 69(7).[253]

242. This evidentiary regime poses fundamental fair trial violations for the Appellant: the Defence has no way to know during the course of the trial while defending Appellant what evidence, presented by the Defence or the Prosecution, will be admitted and on what evidentiary criteria. This means that the Appellant is deprived of his right to confront all the evidence against him, and to litigate relevance or admissibility, based on the criteria of reliability, authenticity or probative vs. prejudicial value.

243. An evidentiary "free for all" is created: everything is submitted, and no assessment of the evidence or decision is made by the Chamber until the deliberations phase – which does not involve either party. If reasons appear later in the Judgment, then Appellant can argue a few evidentiary issues on appeal. The fact that brief arguments are made on paper in the Bar Table Motion charts is not a substitute for fair and effective litigation of evidentiary issues upon which a verdict may rest, because there is no indication as to what the Chamber will decide.

244. Given the plethora of documentary evidence in this case, where the Prosecution submitted a total of 1218 items through its Bar Table Motions, and the Chamber accepted 1205 items as formally submitted, the potential violations of fair trial are infinite.

245. Appellant is deprived of his right to argue any violations based on the 1205 items, because the Defence has no idea on what documentary evidence the conviction is based, but for the few references mentioned in the Judgment. The Defence cannot identify the harm and prejudice of an admitted document, without knowing that it has been admitted. The hidden danger is: what about the evidence which is not mentioned in the Judgment, but relied upon, nevertheless, by the TC?

246. The "safeguard" is supposed to be the full and reasoned statement on findings on evidence and conclusions, as per Article 74(5). But, this, clearly does not work, given the Judgment's multiple failures to provide a full and reasoned statement as to its evidentiary findings and

[252] Trial Judgment, para. 190 ("[…] Significantly, and with only rare exceptions, no *prima facie* assessment of the standard evidentiary criteria [relevance, probative vlue, potential prejudice) was made at the point of submission).
[253] *Ibid.*, para. 191.

conclusions.[254]

D. The Trial Chamber erred in its approach to, and handling of Trial Chamber III testimony, and superimposed its own analysis on the actual testimony before Trial Chamber VII and reached conclusions which were not supported by proof beyond a reasonable doubt. (Judgment, paras 388-389, 391, 399, 401; N/A, para. 38)

1. Introduction

247. The TC erred in handling the Trial Chamber III evidence of D-2, D-3, D-4 and D-6. First, the TC took judicial notice of the Trial Chamber III testimony, over Defence objection,[255] and admitted it through judicial notice.[256]

248. In its Decision, the TC held that it would take judicial notice of the dates and contents of the materials,"[257] but would not take judicial notice of "the truth or falsity of the testimony itself."[258]

249. But in the Judgment, however, the TC violated its own guide-lines and used the Main Case testimony to support its adverse conclusions in respect to Appellant on issues which were clearly put into dispute in the Article 70 case by his Defence – especially D-2's and D-3's claim that they (and others) were civilians, and had no military status.[259]

250. Article 69(6) permits the Court to take judicial notice of facts of common knowledge. Facts of common knowledge or notorious facts are facts which are not reasonably subject to dispute.[260] *Ad hoc* jurisprudence is unequivocal that the general principles of fair trial, including the presumption of innocence, govern the prohibitions for judicial notice: "judicial notice should not be taken of adjudicated facts related to the acts, conduct, or mental state of the accused."[261] If a fact can be "reasonably disputed," it falls under this "fair trial umbrella" which protects the procedural rights of the Accused.[262]

251. But here, although acts, conduct, or mental state of the accused are legally "off limits" on fair

[254] *See* "no reasoned opinion" errors at paras 278, 294-304, 301-302, 356, 442-443, and 454-460.
[255] ICC-01/05-01/13-1393.
[256] ICC-01/05-01/13-1473.
[257] *Ibid.*, p. 6.
[258] *Ibid.*, para. 3 (Referring to its prior 15 September 2015 Decision).
[259] *See* Arido Closing Submissions, paras 242-256 for arguments and citations to trial record.
[260] *Bikindi* Appeal Judgment, para. 99. Note: Given the limited ICC case law on judicial notice, the Defence suggests that jurisprudence from the *ad hocs* can provide guidance.
[261] *See Karemara* Decision on Interlocutory Appeal, para. 50.
[262] At the ICTR, for example, Rule 94(B) provided a mechanism for a hearing of the Parties on "reasonably disputed" facts.

trial grounds, the TC erred in its use of the testimonies of D-2, D-3, D-4, and D-6 in the Main Case to convict Appellant. And the TC, before admitting the Trial Chamber III testimony, did not implement a hearing procedure to adjudicate the harm and prejudice to Appellant.

2. Argument

252. The issue of whether the evidence of D-2, D-3, D-4 and D-6 in respect to their military status was false is a disputed fact in Appellant's case, and a central issue of Appellant's defence.[263] The Defence challenged the military status of D-2 and D-3 who testified, and argued that their non-military status was not proved beyond a reasonable doubt. In fact, the Defence demonstrated that the evidence proved the contrary: both had been soldiers. Hence, any conclusions that Appellant had "instructed" them to lie about this status were not supported by the Prosecution's evidence.

253. Eliciting D-2's and D-3's military status at trial was an unsuccessful endeavour: both agreed at first [REDACTED] to verify their military status or not, but withdrew permission.[264] As a result, at trial, no information was provided to the Court to corroborate their testimony. After the close of trial, D-6 [REDACTED], discussed *infra*. at paras 326 to 332 , revealed that he was, in fact, in the military.

254. The TC uses the Trial Chamber III testimony for its truth: to conclude that Appellant instructed the witnesses to give false testimony that they were in the military. The Trial Chamber III testimony was a base-line, to which the TC compared the content of the evidence in the Article 70 case. But the TC also grafted its own interpretation onto the testimony, resulting in factually misrepresenting it.

255. At **para. 388**, the Judgment states: "D2 testified before Trial Chamber III that he was a FACA soldier, as instructed by Mr. Arido." (underlining added). D-2's testimony before Trial Chamber III does not say that Appellant instructed him.[265] This "instructing" conclusion was

[263] Arido Closing Submissions, para 97; D-2: paras 242-256; D-3: para. 274.
[264] Both D-2 and D-3 were evasive on this issue, and withdrew permission for the Defence [REDACTED] military status. *See* Arido Closing Submissions, paras 278-280.
[265] Trial Judgment, paras 388. A close examination of fn. 723, in para. 388, does not suggest that Appellant "instructed" D-2. In fact, in P-260's Testimony (3), p. 33, lines 23-25, no one is named by D-2. The earlier reference to a "briefing" with Arido and discussion about dipping paper in tea (p. 33, ll. 1-5), even if believed, is at best "circumstantial evidence" from which "instruction" is not the only available inference: D-2 says the briefing is *with* Appellant, and he does not testify that the briefing is *by* Arido, leaving open the reasonable inference that someone else (Kokaté?) gave the instructions. In P-260's Testimony (2), p. 4, lines 18-24 , there is no testimony about who provided the information at the briefing.

from Trial Chamber VII. At **para. 389**, it concludes, based on comparing the content of the Trial Chamber VII and Trial Chamber III testimony, that "[...] Mr. Arido and Mr. Kilolo 'briefed' him [...]" [underlining added].

256. Both "instructing witnesses" and "briefing witnesses" were acts for which Appellant was found to be culpable by the TC, holding that they constitute the offence of corrupting witnesses. Hence, the testimony from Trial Chamber III contains clearly "disputed facts," was factually misrepresented and was erroneously admitted and given weight in Appellant's conviction.

257. At **para. 391**, the same pattern repeats itself for D-3. The TC concludes that "Consistent with Mr. Arido's instruction, D-3 testified before Trial Chamber III that he was a member of the FACA during the period relevant to the charges in the Main Case" (underlining added) and references the Main Case testimony before Trial Chamber III, in support.[266] It also concludes that D-3 testified before Trial Chamber III that he had not received any military training and had never been a soldier.

258. The TC's conclusion, "consistent with Mr. Arido's instructions," is misleading. In the Main Case transcript, D-3 does not testify that he was instructed or coached or briefed by Appellant. In fact, the only mention of Mr. Arido throughout the Trial Chamber III transcript is in response to a specific question about whether he knows him.[267]

259. For D-3, as for D-2, the TC a) makes a comparison of the witness testimony on his status as a soldier before Trial Chamber III and Trial Chamber VII; b) notes the contradiction in the testimony; c) finds that the Main Case testimony is false, and the Article 70 testimony is true, and then c) makes an inference that the difference in the testimony was because of Appellant's instructions to say that he was a soldier in the Main Case.

260. In this process, the TC makes a finding as to the truth or falseness of the Main Case

[266] Trial Judgment, footnote 733 (referencing Trial Chamber III, ICC-01/05-01/08-T-325-Red, p. 10, line 21 to p. 11, line 5.).
[267] *See* Trial Judgment, para. 391, fn. 738.

testimony, contrary to its own holdings not to re-litigate the Main Case.[268] While the Chamber may have tried to "wall off" the Article 70 case from Main Case testimony, **para.391** (as an example) indicates that it did not succeed: the boundaries between the cases were, in fact, quite porous.

261. The reason is that the subject matter of the testimony – whether D-2 or D-3 was a soldier or not – was central to the finding against Appellant that he instructed the witness. The conduct of instructing is a factual element which goes directly to the acts and conduct of the Accused, and cannot be subject to judicial notice. It is a material element of the offense charged and for which Appellant was convicted.

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262. The Trial Chamber III testimonies from D-4[269] and D-6[270] mostly concern Me. Kilolo, but include a few references which are adverse to Appellant, and should be highlighted here.

263. At **para. 399**, the Judgment states: "[...] The Chamber is convinced that the above-mentioned parts of D-6's testimony were untruthful, considering that he belonged to the group of witnesses in Douala gathered for a 'briefing' by the their 'leader' and 'go-between' Mr. Arido." (underlining added)

264. The TC makes a finding on truthfulness in the Main Case testimony. The TC is explicitly saying that in the Main Case, the witness lied, based on representations from others (D-2 and D-3) that D-6 was part of the group gathered in Douala.

265. In **para. 401**, there is yet another finding on truthfulness: the TC finds that "D-6 testified incorrectly in the Main Case when testifying that he had not talked to any person he knew to be a Main Case witness." It continues: "[...] Considering that D-6 joined D-2, D-3 and D-4 in Douala where they were briefed by Mr. Arido […] the Trial Chamber concludes that D-6's statement before Trial Chamber III was evidently false […]"

[268] T-10-CONF-ENG, p. 4, l. 6 to p. 6, l. 6 (*see* p. 4 lines 9-12: "The Chamber emphasises again that the purpose of these proceedings is not to relitigate the main case, namely, the case of The Prosecutor versus Jean-Pierre Bemba Gombo. Submissions which attempt to do so or evidence presented solely for these purposes will not be entertained."). How the TC deals with the issue of false testimony alleged before Trial Chamber III case is a conundrum for it. *See*, Closing Submissions, paras 194-201. The way the TC tries to circumvent this problem is by limiting the matters at issue for Article 70(1)(a) and (b). It states that "it will not consider the falsity of matters relating to the merits of the Main Case" in **para. 872**.
[269] Trial Judgment, paras 393-394.
[270] *Ibid.*, paras 395-404.

266. As with D-2 and D-3, the TC explicitly makes a finding on the truthfulness of the Trial Chamber III testimony, contrary to its own decision not to re-litigate the Main Case.[271]

267. As to D-4, the conclusions at **para. 394** are focused on the conduct of Me. Kilolo, but, using Trial Chamber III testimony, the TC also concludes that D-4 "untruthfully testified before Trial Chamber III that he did not know Arido" since "D-4 participated in the same meetings in the same context as D-2 and D-3."

268. Here, again, the Trial Chamber III testimony is being used – for its content – to support the TC's inference and conclusion that D-4 participated in the Douala meeting, based on the testimony solely of D-2 and D-3.

269. The prejudice and harm to Appellant are that the TC's use of Trial Chamber III testimony, for its content, in respect to especially D-2 and D-3, but also D-4 and D-6, provided support for the TC's conviction of Appellant.

E. Evidentiary Errors in Assessment of D-2, D-3, D-4 and D-6[272] (N/A, paras 27-34)

1. Introduction

270. D-2 and D-3 were the sole witnesses who provided the evidence upon which the TC convicted Appellant for the offence of Article 70(1)(c) in respect to D-2, D-3, D-4 and D-6. The Prosecution did not call D-4 and D-6 to testify in the present case,[273] although the TC convicted Appellant of the offence in respect to D-4 and D-6. D-4 and D-6 were "missing witnesses."

271. The TC convicted Appellant in respect to all four persons – although it heard direct testimony from only two of these persons. It relied on the live testimony of 50% of the persons named, and hearsay for its conviction. The TC "bootstrapped" the allegations regarding D-4 and D-6 through the testimony of D-2 and D-3, and denied Appellant his fair trial right to confront witnesses, pursuant to Article 67(1)(e). The evidence of D-2 and D-3, moreover, was compromised and unreliable because they were accomplice/perpetrators who had to protect their own legal interests and testified under Article 74 assurances.

272. Thus, as a matter of law, Appellant's conviction was not based on credible and complete

[271] T-10-CONF-ENG, p. 4, l. 6 to p. 6, l. 6; Trial Judgment, para. 872.
[272] *See also* errors regarding judicial notice, *supra*.
[273] Trial Judgment, para. 306.

evidence, and did not support proof beyond a reasonable doubt. Therefore, Appellant's conviction should be reversed.

2. The Trial Chamber erred by finding the testimony of D-2 and D-3 reliable, and failing to give proper weight to their legal status as accomplice/perpetrators, which rendered their evidence incredible and unreliable (Judgment, paras 202, 319, 323, 325; N/A, para. 28)

273. In its Judgment, the TC repeatedly gives credibility and reliability to the testimonies of D-2 and D-3.[274] But the evidence of both D-2 and D-3 was legally impaired. Both D-2 and D-3, the only two live witnesses, were not credible or reliable based on the fact that each had entered into an immunity agreement with the Prosecution, each was considered a suspect pursuant to Article 55(2) and each was potentially culpable for Article 70(1) (a) and (b).[275]

274. The TC did not respond to these arguments in the Judgment, although the legal status of D-2 and D-3 as accomplice/perpetrators is fundamental to assessing credibility and reliability of the only two witnesses against Appellant in this case. Especially because the TC relied on the evidence of D-2 and D-3 to convict Appellant, it should have explained the effect of their accomplice status on their motivations and incentive to testify.[276]

275. Nevertheless, the TC pays "lip service" to this notion: the TC included "provisions of assurances against self-incrimination" as one of the factors it used to evaluate the testimony of a witness,[277] and it recognized the witness's accomplice/perpetrator status in granting the Prosecution's application for Article 74 assurances.[278]

276. Yet, in the same breath, it also holds that a witness who has previously given false testimony should not be viewed as inherently unreliable. In its Assessment of Oral Testimony, the TC rejects the notion of *per se* unreliability of a witness, including a witness who has previously given false testimony before a court.[279] In fact, the TC essentially holds that there is a

[274] *See*, for example, paras 319, 323, 325.
[275] Arido Closing Submissions, paras 238-241, and 266-275.
[276] *See Krajisnik* Trial Judgment, para. 149 (Amicus Curiae for Defence must demonstrate that the Trial Chamber erroneously relied on evidence of accomplice witnesses for "findings essential to the determination of Krasjisnik's guilt").
[277] Trial Judgment, para. 202.
[278] D-2: P-260's Testimony (1), pp. 28-30 (private session); D-3: P-245's Testimony (1), pp. 22-24 (private session)
[279] Trial Judgment, para. 202.

presumption of reliability[280]

277. This point – on its face – defies common sense: if a witness lies in one case, a presumption of reliability – with no caution or hesitation – hardly seems legally sound. This implies that giving false testimony in another case is a "neutral" factor which should be overlooked and runs counter to any notion that a TC should be guided by credible and reliable evidence. This is a legal distortion of the TC's power to "pick and choose" what evidence to believe from a witness.

278. The Judgment gives no evidence that the TC simply ignored the accomplice/perpetrator argument, but the Chamber erred by giving complete weight to evidence of D-2 and D-3:

- it did not limit or caution its view of D-2's and D-3's evidence or require additional corroboration;
- it applied a presumption of reliability to D-2 and D-3, and made no specific finding as to the effect of the accomplice/perpetrator status of D-2 and D-3 on their testimony; and
- it gave no reasoned opinion on this point.

279. These errors prejudiced Appellant, and materially affected the outcome of the Judgment. Had the TC found that the evidence of D-2 and D-3 was unreliable, the deliberations would have resulted in an acquittal for Appellant. However, based on its findings of credibility and reliability, Appellant was convicted in respect to D-2 and D-3, as well as D-4 and D-6.

3. The Trial Chamber erred by not applying caution to D-2's and D-3's testimonies

280. Immunity agreements are common in national and international jurisdictions. By definition, an immunity agreement is intended to provide an incentive to a witness, in exchange for providing assistance to the Prosecution. In exchange for information or testimony, especially on matters where the witness could otherwise be found culpable, the Prosecution promises to protect the witness from prosecution based on providing evidence.

281. Courts, including international courts and tribunals, do not look "askance" at these

[280] Trial Judgment, para. 204 ("it is possible for a witness to be accurate and truthful on some aspects of her or her testimony (and therefore reliable in this regard) but inaccurate, contradictory and untruthful on other aspects […]") .

agreements, usually based on an argument of a "greater good" or a "greater truth." The prosecution of one crime for which the witness may be/is culpable is "sacrificed" for the prosecution of another crime.

282. But there is an inherent danger in any immunity agreement: that the witness may have a self-interest in telling the Prosecution what s/he wants to hear – whether or not it is the truth. But measures are taken to minimize this danger. For example, in some common-law jurisdictions, a cautionary warning is given to the jury[281] and accomplice testimony must be corroborated.[282]

283. International courts and tribunals weigh the testimony of a person in this position with caution,[283] or even great caution[284] and may require corroboration. Although "accomplice witness evidence" is not *per se* unreliable, where accomplice witnesses have motives to implicate an Accused, the TC is bound to consider these motivations.[285]

284. For example, in the "Military II" case,[286] the ICTR TC cautioned about the dangers of accomplice testimony. In its Judgment, it stated, at para. 1000:

> The Chamber recalls that accomplice testimony is admissible, but must be considered carefully because accomplice witnesses may have motives or incentives to implicate the accused.[287] The Chamber also recalls that corroboration is important when assessing a witness's credibility.[288]

285. In applying these principles, the "Military II" TC held that it would weigh witness AOG's

[281] *See* U.S. Ninth Circuit Jury Instructions Committee, *Ninth Circuit Manual of Model Criminal Jury Instructions*§ 4.9 (2017) (instructions to consider the extent to which or whether witness's testimony may have been influenced by immunity or other benefits, and that witness's testimony should be examined with greater caution than testimony of other witnesses), p. 66.
[282] *See* NY Crim Pro L § 60.22 (2012).
[283] *Ntagerura et al.* Appeal Judgment, paras 203 – 206 (in assessing the reliability of accomplice evidence the Trial Chamber must consider whether the particular witness has a specific motive to testify as s/he did and to lie)
[284] *Popovic* Trial Judgment, para. 26 (evidence of witnesses categorized as "accomplice witnesses" in so far as they were involved in the criminal events examined with great caution); *also see Kordic and Cerkez* Trial Judgment, para. 628.
[285] *Krajišnik* Appeal Judgment, para. 146 (Trial Chamber must "carefully consider the totality of the circumstances" in which evidence of accomplice witnesses is tendered, and should cautiously assess this evidence by explaining why it accepted evidence of witnesses who may have had motives or incentives to implicate the accused).
[286] *Ndindiliyimana et al.*Trial Judgment.
[287] *Niyitegeka* Appeal Judgment, para. 98; *Nchamihigo* Appeal Judgment, para. 305.
[288] *Nchamihigo* Appeal Judgment, para. 47.

evidence regarding Ndindiliyimana with caution, and applied the need for corroboration.[289]

286. But here, in the Trial Judgment, there is no word of caution from the TC and the TC ignored evidence of accomplice witness motivation.[290]

287. Even the Prosecution was cognizant of the potential dangers with its witnesses and urged caution. In its Opening Statement, the Prosecution indicated that the Court would "hear from and consider the statements of witnesses involved in the charged crimes" and cautioned that "when these witnesses are testifying in this case, they may try to minimise their own responsibility, their own conduct or have done so in providing statements to avoiding incriminating themselves or others."[291] It repeated a similar warning at the Sentencing Hearing.[292]

288. The Chamber did apply a "test" of corroboration to D-2 and D-3, but its "test" is flawed. The TC used D-2 and D-3 to corroborate each other and found that each corroborated the other's evidence.[293] But the criterion of corroboration is compromised since both D-2 and D-3 are in the same position – as a suspect, and as an accomplice/perpetrator in the Article 70 offenses. Both of them are legally vulnerable, and, in the interests of self-preservation and self-protection, have every reason to tell the Prosecution what they think it wants to hear.

289. Lastly, the failure of the TC to properly assess the legal status of D-2 and D-3 is illustrated by its finding in **para. 348:** "[...] The witnesses consistently maintained their statements and did not endeavour to detract from their own wrongdoing."

290. First, the witnesses testified under the protection of an immunity agreement, and did not need to "explain" or "defend" their wrongdoing. Their participation and the content of their evidence, as discussed above, was conditioned by this agreement.

291. Second, the witnesses, in fact, did not consistently maintain their statements. D-3, for

[289] *Ndindiliyimana et al.* Trial Judgment, paras 435-436 ("Even if the Chamber were to cast aside its reservations regarding the impartiality of Witness AOG's evidence, the Chamber is not satisfied that the uncorroborated evidence of Witness AOG is sufficient to prove that Ndindiliyimana sought to undermine the UNAMIR-led efforts to ensure compliance with the KWSA […]")
[290] *See* paras 274, and 296-300.
[291] Prosecution Opening Statement, pp. 34-35.
[292] Sentencing Hearing, p. 67, l. 21 to p. 68, l. 4.
[293] Trial Judgment, para. 334; para. 310 (D-3 corroborated many aspects of D-2's evidence regarding the meetings in Douala and Yaoundé, such as arrival times, accommodation and attendance); para. 314 (D-3 and D-2 essentially described the same scenario regarding arrival times, accommodation and attendance).

example, changed his story about who made promises, from Mr. Kokaté to Appellant.[294]

292. Even assuming that the TC, composed of professional judges, reflexively applies an "internal" caution, the failure to articulate this caution in the Judgment makes it impossible for the Appeals Chamber to review the findings on the fundamental issue of the credibility of the two witnesses on whom Appellant's conviction is based.[295]

293. This leaves both the Defence and the Appeals Chamber to "guess" about the TC's reasons, and the impact of factors of accomplice/perpetrator status and other motivational factors on its conclusions. The Appeals Chamber must be able to conclude whether a reasonable trier of fact could have relied on the testimony of D-2 and D-3 to convict Appellant.[296] Absent a full and reasoned opinion on the critical issue of the witnesses' legal status, this is impossible.

F. The Trial Chamber erred by not providing a full and reasoned statement, as per Article 74(5) in respect to D-2's and D-3's credibility and reliability and disregarding relevant evidence. (N/A, paras E and 39)

294. The provision of a full and reasoned opinion is a matter of fundamental fairness.[297] In *Kupreskic*, the Appeals Chamber held that TC erred by failing to consider several matters going directly to the credibility of Witness H, and emphasized that this is "not a case where the Trial Chamber addressed all the relevant issues and the Appeals Chamber simply disagrees with the Trial Chamber's conclusion."[298]

295. Similarly, here, the TC failed to consider evidence which was directly relevant to the credibility of D-2.

296. The evidence of Defence witness D-24-001,[299] the only witness presented by the Arido Defence, contested the credibility of D-2's evidence and provided unchallenged evidence about D-2's motivation to lie in his testimony against Appellant. The testimony, corroborated

[294] Arido Closing Submissions, paras 342, and 269-272 (includes footnoted transcripts). In addition, D-3 took no responsibility for his wrongdoing: he acknowledged that he was aware he gave false testimony, and placed the blame on Appellant. T-23-CONF, pp. 38 – 39.
[295] *See*, *Kunarac* Appeal Judgment, para. 41 ("only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence").
[296] *Muvunyi* Appeal Judgment, para. 144.
[297] *Kupreskic* Appeal Judgment, para. 224: "The Appeals Chamber accepts that a Trial Chamber must be accorded a degree of flexibility in setting out its reasoning in its judgment. This flexibility is always circumscribed, however, by the obligation to provide a reasoned explanation of its decision in any case. This is a matter of fundamental fairness for the parties concerned."
[298] *Kupreskic* Appeal Judgment, para. 224.
[299] *See* testimony of witness D24-001: T-46-Conf-ENG; T-47-Conf-ENG.

by D-2's e-mails, showed that D-2 had a deep-seated animosity toward Appellant.[300] D-2, for example, claimed in the e-mail that Appellant did not want him to testify in the *Bemba* Main Case: "[REDACTED]."[301] This contradicts D-2's previous evidence that Appellant "briefed" him, and undermines the Judgment's conclusion that he "instructed" D-2. In addition, D-2 was personally jealous of Appellant: [REDACTED].[302] It was inevitable that this animosity would affect D-2's version of the events.

297. D24-001's evidence was clearly relevant to D-2's motivation, and key in assessing his evidence. Yet, there is no discussion in the Trial Judgment of this evidence, which means that the TC did not provide a full and reasoned opinion.[303]

298. Thus, the TC erred by disregarding the evidence provided by the Arido Defence, D24-001[304] and D-2's emails,[305] which together articulated a strong motive for D-2 to testify unreliably and incredibly about Appellant and the alleged Douala "briefing."

299. This evidence was clearly relevant to the TC's findings regarding D-2, and its omission indicates that the evidence was disregarded.[306] This affected the Judgment.[307] When evidence which is clearly relevant to the findings is not addressed by the TC's reasoning, the presumption that it evaluated all the evidence presented to it may be rebutted.[308]

300. The TC's lack of discussion of "motivational" factors, especially in respect to D-24-001's testimony and D-2's evidence, rendered the assessment of D-2's reliability erroneous, not simply incomplete. If the TC had considered the evidence about D-2's motivation, it would have materially affected the Judgment because it undermined the TC's finding that D-2 was,

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[300] T-46-Conf-ENG, pp. 22 - 25; Arido Closing Submissions, para. 184; *see also* Email from D-2 to Me. Kilolo, 21 June 2013 (CAR-OTP-0088-0504, at 0509).
[301] S*ee* e-mail from D-2 to Me. Kilolo, 21 June 2013 (CAR-OTP-0088-0504, at 0509).
[302] Arido Closing Submissions, para. 184; T-46-Conf-ENG, pages 22-25; *see also* Email from D-2 to Me. Kilolo, 21 June 2013 (CAR-OTP-0088-0504, at 0509) ("[…] [REDACTED] […]").
[303] *See* Trial Judgment.
[304] T-46-Conf-ENG; T-47-Conf-ENG.
[305] Email from D-2 to Me. Kilolo, 21 June 2013 (CAR-OTP-0088-0504, at 0509).
[306] Although the TC does not refer to evidence in the Trial Judgment, there is a presumption that the TC "evaluated all the evidence presented to it as long as there is no indication that the TC completely disregarded any particular piece of evidence. The Appeals Chamber also recalls that there may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed in the TC's reasoning." [footnotes omitted] *Popovic* Appeal Judgment, para. 1136; *Dordevic* Appeal Judgment, para. 864 (Trial Chamber failure to take relevant evidence into account constitutes error law).
[307] *Kamuhanda* Appeal Judgment, para. 105 (Appellant who alleges that the TC failed to provide a reasoned opinion in writing has to also demonstrate that the evidence allegedly disregarded by the TC would have affected the Trial Judgment)
[308] *See*, *Kvočka* Appeal Judgment, para. 23.

in fact, credible and reliable. D-2's evidence was 50% of the Prosecution's witness testimony against Appellant, and the TC clearly relied on it for its findings and conclusions. A finding of incredibility for D-2 would not have supported Appellant's conviction. Thus, the failure to take this evidence into account constitutes an error of law.

301. Even, *arguendo*, accepting the Trial Judgment's assessment of D-2 and D-3, the TC had an obligation, under Article 74(5) to provide "a full and reasoned statement for its findings on the evidence and conclusions." But, its analysis of its reasons is erroneous because it does not address the relevant and key issue (articulated by both the Defence and the Prosecution) of D-2's and D-3's accomplice status, motivation and incentive to testify.

302. This is similar to the reasoning of the Appeals Chamber in *Muvunyi* where the Appeals Chamber concluded that absent a reasoned opinion of the TC's findings regarding Prosecution witnesses YAI and CCP, it was impossible to assess whether their testimony was "strikingly similar," and why the TC deemed the two Prosecution witnesses to be reliable and the Defence witness M078 to be unreliable. The *Muvunyi* Appeals Chamber found that the TC failed to provide a reasoned opinion on this point, which was one of the grounds for reversing the TC's decision.[309]

303. In addition, the Court's judgments are written both for the legal community and a broader non-legal community.[310] Hence, the Judges' reasoning is essential to understand their conclusions.

304. In sum, the TC did not provide a full and reasoned statement on the evidence and its conclusions. This violated the fair trial right of the Appellant, who, under Article 67(1)(e), has the right to conduct a defence, which includes the right to appeal the TC's conclusion of guilt.[311]

G. The Trial Chamber erred by disregarding exculpatory evidence from D-2 and D-3 (N/A, paras 39 and 40)

305. The TC failed to give credit to the evidence on record that undermined the credibility and

[309] *Muvunyi* Appeal Judgment, paras 144 and 147.
[310] *See generally* Wilson, Richard Ashby, *Writing History in International Criminal Trials* (Cambridge University Press: 2011).
[311] See, Dissenting opinion of J. Van den Wyngaert, *Katanga v Prosecutor*, ICC-01/04-01/07-3419-Anx, 19 November 2013, paras 8-11 (criticizing the Majority's "non-decision" regarding necessity and possibility for Defence investigations and concluding that by refusing to rule in the Trial Judgment on the issues "the Majority is effectively shielding itself from appellate review").

reliability of the testimonies of D-2 and D-3 relating to Appellant's alleged promise of relocation to Europe in exchange for false testimony about their military status in favour of Mr. Bemba.[312]

306. The TC also failed to assess the potentially exculpatory evidence which was not produced by D-2 and D-3 in relation to their military status. Both gave permission to the Arido Defence to review [REDACTED], and to present any findings to the TC. However, both witnesses subsequently withdrew authorization to review [REDACTED], resulting in the Court being unable to verify their military status.[313] This is an indication that D-2 and D-3 were unwilling to provide information which would corroborate or contradict what they told the Court about their military status, which is a ground for a finding of reasonable doubt.

1. Conclusion regarding evidence of D-2 and D-3

307. The TC's errors discussed *supra.* in assessing the evidence of D-2 and D-3 prejudiced the fair trial rights of Appellant, and rendered its conviction of Appellant unfair. D-2's and D-3's testimony was the sole evidence on which Appellant was convicted, and was central to the reliability of the Judgment.

308. Moreover, if the TC had applied the appropriate caution to accomplice/perpetrator evidence, it could not have reached the conclusion that the Prosecution had proved Appellant's guilt beyond a reasonable doubt.

309. Combined with this error, the TC failed to provide reasoning from which the Appeals Chamber "could discern how the Chamber's conclusions could have reasonably been reached from the evidence before it."[314]

310. For this reason, the conviction of Appellant in respect to D-2 and D-3 should be reversed.

H. The Trial Chamber erroneously convicted Appellant in respect to D-4 and D-6, violating Appellant's fair trial rights under Articles 66(3) and 67(1)(e)

[312] Arido Closing Submissions, paras 276-277.
[313] Consent granted for D-2: P-260's Testimony (3), p. 50, l. 16; and D-3: P-245's Testimony (3), p. 60, ll. 17-20. For withdrawal of consent for D-3: *see* CAR-D240004-0101, CAR-D240004-0314, CAR-D240004-0317, and an overview of these documents in ICC-01/05-01/13-1789-Conf-AnxA, p. 2; for D-2: P-260's Testimony (4) p. 34, ll. 4-12.
[314] ICC-01/04-01/10-283, 'Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'"', 14 July 2011, para. 17.

1. Introduction

311. The TC's errors in respect to the "missing witnesses"[315] D-4 and D-6 render Appellant's conviction unfair and unreliable, as per Article 81(1)(b)(iv).

312. Although the CoC confirmed allegations against D-4 and D-6, the Prosecution did not submit any direct evidence from D-4 and D-6.[316] D-4 and D-6 were "missing witnesses." In *lieu* of direct and available evidence from D-4 and D-6, the Prosecution and TC relied solely on the testimony of D-2 and D-3. The TC accepted representations about D-4 and D-6 from D-2 and D-3, who had been given immunity from Prosecution for any offences under Article 70(1) (a) and (b) in the Main Case.

313. Appellant was denied his fair trial right to cross-examine D-4 and D-6, and to confront their evidence against him. This violated the principle of orality, which this TC upheld,[317] and is the clear preference of the ICC and other international courts and tribunals.[318]

314. Nevertheless, the TC convicted Appellant in respect to D-4 and D-6 based solely on the unreliable evidence from accomplice/perpetrator witnesses D-2 and D-3 who had immunity,[319] in violation of Article 66(3) and in violation of his right of confrontation.

315. This resulted in an illegitimate and unfair conviction, because it was based on unreliable evidence, which was obtained in violation of Appellant's fair trial rights.

2. D-4 and D-6 are missing witnesses

[315] The "missing witness" concept is based on the "missing-witness" rule: If one party has a witness within its control and the witness has material evidence, failure to produce the witness and provide the evidence 'creates the presumption that the testimony, if produced, would be unfavorable.' *Graves*, 150 U.S. at 121. *See* "Avoiding Application of the Missing-Witness Rule," Michelle M. Rutherford, September 16, 2013, American Bar Association.
[316] The fact that the Prosecution produced D-4 as a witness for the Sentencing Hearing, after the Judgment, does not legally impact on its burden of proof during the trial. The revelation that the Prosecution had contact with D-4 throughout the trial, including a few weeks before the Defence case opened, clearly supports that the Prosecution could have called D-4 as a witness at trial, but chose not to do so. Thus D-4 was available, and within the Prosecution's control and bottom line – had information which was material and relevant to the elements of the offence charged.
[317] ICC Statute, Article 69(2); Prosecution Opening Statement, 29 September 2015, p. 7, ll.21-22. The TC, however, asserted this position in respect to D-4 at the Sentencing Hearing: it rejected admission of the transcripts of the interview in favour of the testimony of D-4 so that he could be cross-examined by the Defence: ICC-01/05-01/13-2025, paras 16, 18.
[318] *See* ICTR RPE, Rule 90(A): Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.
[319] *See supra*.

316. The Defence argued that D-4 and D-6 were "missing witnesses"[320] and that the charges in reference to them should be dismissed as a matter of law.[321]

317. Both had information which was material to the charges and both were known to and available to the Prosecution.

- D-4 had been interviewed as a suspect by the Prosecution just days before the start of the Defence presentations in February 2016[322]

- As to D-6, the Prosecution disclosed on 25 July 2016 "potentially exculpatory material"[323] which included [REDACTED].[324] Based on this, it can be concluded that the Prosecution knew how to contact D-6 as late as August 2014, a year prior to the start of its case.

318. Lastly, D-4 was ultimately called as a Prosecution witness in the Sentencing Hearing to support its claims of aggravating circumstances. The Prosecution wanted to submit a statement from D-4, rather than calling him as a witness. The Chamber, in its Decision,[325] rejected this proposal, holding that the Defence should be afforded the opportunity to challenge the serious allegations related to the charge for which Appellant was convicted, and which was raised by the anticipated summary of D-4's testimony.[326]

3. The missing witnesses rendered the conviction unfair

319. The occurrence of missing witnesses is ubiquitous in complex international cases. These cases are often investigated and prosecuted a long time after the events in question, and missing evidence (both testimonial and documentary) is not uncommon.

[320] Arido Closing Submissions, para. 169: If this had occurred in some common-law jurisdictions in a jury trial, the Defence would have requested a "missing witness" charge to the jury. In New York State, the moving party must make a *prima facie* showing that (1) uncalled witness was knowledgeable about a material issue pending in the case, (2) that the witness could be expected to provide testimony favourable to the party who has not called him, and (3) that the witness is available to that party (*see People v. Gonzalez* (1986) *People v. Lambert Kitching* (1991).
[321] Arido Closing Submissions, paras 162-170; *see also* Arido Defence Opening Statement, p. 7, lines 1-3; Arido Defence Closing Oral Arguments, p. 97, lines 5-9.
[322] *See* Arido Defence Opening Statement, pp. 38-40; D21-0003's Testimony, pp. 4-5; ICC-01/05-01/13-1700.
[323] Prosecution e-mail, dated 25 July 2016, which was included with the Rule 77 package including CAR-OTP-0094-1580.
[324] CAR-OTP-0094-1580-R01.
[325] Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, 11 November 2016.
[326] Decision, 11 November 2016, para. 16.

320. Although missing evidence renders a record incomplete,[327] not all missing evidence is equal. Where the missing evidence is central to the events, and "could have cast a significantly differently light" on those events, conclusions reach on the basis of the incomplete evidence cannot support the standard of proof beyond a reasonable doubt.[328]

321. This is the case here: both D-4's and D-6's evidence are central to the allegations in this case. According to the evidence of D-2 and D-3, D-4 and D-6 were at the centre of the events for which Appellant was convicted. But the trial record is missing the direct evidence of D-4 and D-6, although both were known and available to the Prosecution and had information material to the case. Had they testified, their evidence would have raised reasonable doubt as to the Prosecution's theory: D-6's [REDACTED] contained exculpatory information that he was in the military[329] which would have challenged the Prosecution's basic premise that D-6 was a civilian who had to be instructed by Appellant to testify that he was in the military in the Main Case. D-4's testimony, based on his evidence at the Sentencing Hearing, would have challenged the evidence of D-2 and D-3, adopted by the TC, that Appellant assigned ranks to the persons at the Douala "briefing."[330] Thus, this incomplete evidence calls into question the ultimate conclusion of Appellant's conviction of the offence in respect to D-4 and D-6.

322. The TC had options to address the "missing witness" problem: it could have ordered the Prosecution to produce D-4 and D-6, or called them as the Chamber's own witnesses. But instead, it chose to base its conclusions on direct evidence from 50% of the witnesses for which it convicted Appellant, and whose evidence was unreliable because of their legal

[327] J. Van den Wyngaert. *Katanga* Minority Opinion, para. 148 ("the complete absence of evidence from those who were really at the centre of things at the time inevitably created the impression that essential information is missing from the record").
[328] *Ibid.*, paras 148-149 ("it is odd […] to recognize that important evidence is missing from the case record, but to nevertheless proceed to making a string of findings beyond a reasonable doubt on precisely those points on which the missing evidence could have cast a significantly different light. This concern is aggravated by my impression that most of the witnesses who were called by the Prosecution […] were persons whose knowledge about matters was second-hand or incomplete at best […] failure to submit this evidence may, in certain circumstances, suffice to generate a reasonable doubt in the sense of article 66(3). Conclusions reached on the basis of such incomplete evidence are inherently fragile and uncertain and cannot suffice for the stand of proof beyond a reasonable doubt").
[329] CAR-D24-0005-0056 at 0077 ("[REDACTED]
[REDACTED]
[REDACTED]
Q: [REDACTED]?
A: [REDACTED]
Q: [REDACTED]?
A: [REDACTED] I was in the army. [REDACTED]. I was employed by the army [REDACTED]."). *See* argument *infra*.
[330] *See* argument para. 417 *infra*.

status.[331] For the other 50%, the only evidence on record is the hearsay evidence of D-2 and D-3 about them, and the judicially noticed transcripts imported from the *Bemba* Main Case.[332]

323. The confluence of these legal and evidentiary factors resulted in an unfair conviction.

324. But what is most significant and troubling is that the TC makes no acknowledgement that there is anything missing in the evidence in respect to D-4 and D-6 or that their testimony is "missing evidence."[333] Nor is there any discussion of D-4 and D-6 as "missing witnesses," which was raised by the Defence.[334] The TC simply proceeds as if it is "business as usual" – to make findings about Appellant's conduct and interactions with D-4 and D-6, based on the unreliable and untested hearsay evidence of D-2 and D-3.

325. The Defence submits that the TC's silence on the "missing witness" problem and the Defence objection is a violation of Article 74(5), for the reasons of their centrality to the allegations and conviction, as discussed *supra*.

I. The Trial Chamber erred in its decision not to admit exculpatory material of D-6.[335]

326. On 25 July 2016, well after the 8 April deadline set by the Presiding Judge for the close of all evidentiary submissions, the Prosecution disclosed D-6's [REDACTED].

327. D-6's [REDACTED] suggested that a) he had a military background; and b) that Appellant did not recruit him – two factors which go to fundamental issues in this case.[336]

328. The Defence did not adduce this material at trial, because it was a factual impossibility: Appellant was not in possession of this material until it was disclosed on 25 July 2016, almost two months after Closing Arguments on 31 May and 1 June 2016.

329. However, the TC rejected the Defence request for admission of [REDACTED][337] and did not find "exceptional circumstances" to warrant "a belated admission" of evidence. It rejected

[331] Discussed *supra*. at paras. 280-293.
[332] Discussed *supra*.at paras 247-269.
[333] *See*, in contrast, the *Katanga* Judgment (Majority Opinion), paras 62-63, where the Majority holds that missing evidence would have been "desirable" in the trial whereas the Minority points out numerous deficiencies in the Prosecution's investigations and the fact that "a number of potential witnesses were either not interviewed or not called to testify" (*Katanga* Judgment (Minority Opinion), para. 138).
[334] Arido Closing Submissions, paras 162-170.
[335] The Arido Defence is seeking to admit this evidence in its Application to Appeals Chamber, 14 March 2017, ICC-01/05-01/13-2116-Conf.
[336] *See*, Arido Request to Admit CAR-OTP-0094-1580-R01 into Evidence, 14 August 2016.
[337] ICC-01/05-01/13-1978.

Appellant's argument under Regulation 35(2) RoC, that the timing of the request was outside its control.[338] Since D-6 had been on the Defence witness list (but was withdrawn), the TC held that the Defence knew of the interview and its contents. The TC also concluded that the Defence should have requested the interview, based on its duty to prepare its defence.[339]

330. The TC's reasoning impermissibly shifted the burden in respect to exculpatory material to the Defence. The legal issue here is the Prosecution's obligation under Article 67(2) to disclose exculpatory material "as soon as practicable." It is consistent with the Prosecution's duties and powers under Article 54(1), and is independent of the conduct of the Defence. It is not apparent exactly when the material came into the possession of the Prosecution, but the TC should have re-focused its queries on the lateness of the disclosure, and whether the "as soon as practicable" requirement had been met.

331. In addition, in its holding regarding "exceptional circumstances" admission,[340] the TC permitted time limits to trump the Appellant's fair trial right to be informed about exculpatory disclosure.[341]

332. Appellant was prejudiced by the decision to not admit D-6's evidence. Its admission would have materially affected the Judgment since the interview directly raises reasonable doubt as to D-2's and D-3's claims that D-6 (like the others at the Douala "briefing") was recruited by Appellant, and was instructed by him to testify falsely in the *Bemba* Main Case on his military status. This point was fundamental to the TC's conviction of Appellant for Article 70(1)(c).

J. The Trial Chamber erred in basing its conviction of Appellant on the untested hearsay evidence of D-4 and D-6, which was an "unacceptable infringement" since Appellant was denied his right to confront them through cross-examination, as per Article 67(1)(e).

333. TCs have a wide discretion in admitting hearsay evidence although establishing the reliability of this type of evidence is of paramount importance when hearsay evidence is admitted as substantive evidence in order to prove the truth of its contents.[342] Evidence which is not tested by cross-examination must be balanced against the rights of the Defence. In assessing how to

[338] *Ibid.*, para. 4.
[339] *Ibid.*, para. 8.
[340] *Ibid.*, para. 10.
[341] *Katanga and Ngudjolo*, ICC-01/04-01/07-1336, 27 July 2009, para. 29 (TC allowed the Prosecution's request to admit belated disclosure of transcripts and translations of disclosed videos, because the initial disclosure of videos was incomplete since they did not include transcripts or translations so that they could be used by the Defence).
[342] *Prlic* Decision, para. 52

evaluate weight of evidence which is not subjected to the test of cross-examination, the ICTY Appeals Chamber has applied the jurisprudence of the European Court of the Human Rights.[343]

334. The evidence of D-4 and D-6 came into the record through the testimony of D-2 and D-3, although the "makers" of the evidence were known to the Prosecution and the TC and available to both. The failure to both call the missing witnesses to testify, and the subsequent acceptance of their hearsay evidence violated Appellant's fundamental guarantee to a fair trial, including the right to cross-examination.

335. The evidence about D-4 and D-6 was hearsay evidence: although D-2 and D-3 were testifying about each one's direct observations, the content and subject matter of the observations (what happened to D-4 and D-6, their presence in Douala, etc.) were accepted by the TC for its truth, although neither D-4 and D-6 were called to testify either in support of or to contradict the observations, nor were D-4 and D-6 subjected to cross-examination. For example:

- D-2 and D-3 both testified that D-4 and D-6 were part of the group which met with Appellant in Douala[344]
- D-3 testified that "D-4 and D-6 told the other witnesses in the group that they had no military background."[345] This testimony supported the TC's conclusion that Appellant "purposefully and deliberately" instructed the witnesses and is cited in the Judgment's footnote.[346]
- The TC concluded that both D-2 and D-3 "confirmed that the promise was addressed to all four witnesses present in Douala."[347]
- The TC concluded that Appellant, based on D-2's and D-3's evidence, distributed money for food to all four persons.[348]

336. The TC relied on the hearsay evidence to support its finding in respect to D-2, D-3 and D-4

[343] *Prlic* Decision, para. 53; ECtHR, *A.M. v Italy Judgment*, paras 25, 28 (fair trial rights under Article 6(1) and 6(3)(d) violated where defendant could not test witness statements through cross-examination which formed basis of his conviction).
[344] Trial Judgment, para. 334.
[345] *Ibid.*, para. 338.
[346] Trial Judgment, para. 671. See fn. 1533.
[347] *Ibid.*, para. 341.
[348] *Ibid.*, para. 347.

and D-6 – that Appellant "unduly influenced them […] in particular the instruction to present themselves as having a certain military background, regardless of the truth or falsity of the information."[349] It concluded that D-4 and D-6 were "recipients of those instructions." [350] It also concluded that Appellant met with the witnesses, including D-4 and D-6, prior to them meeting with Me. Kilolo, for the purpose of giving them "precise directions as to the accounts the witnesses should provide to Mr. Kilolo."[351]

337. The TC also made similar adverse conclusions on which it convicted Appellant, based on inferences in relation to D-4 and D-6, in the Judgment's sections on Me. Kilolo.[352]

338. The TC's ultimate conclusion – its conviction of Appellant – was based "in a decisive manner"[353] on its hearsay findings regarding D-4 and D-6. Whether or not they had a military background, and whether or not they were instructed are material to the elements of the offence for which Appellant was convicted. Thus, the TC's reliance on the untested evidence about D-4 and D-6 from D-2 and D-3 is an "unacceptable infringement"[354] on the fundamental fair trial right of Appellant to confront the evidence of D-4 and D-6. This hearsay evidence to which fair trial guarantees applies[355] was not subject to cross-examination, in violation of Appellant's right to confront the evidence against in him.[356]

K. Conclusion

339. The failure of the Prosecution to call D-4 and D-6 in its case at trial denied Appellant his right to confront the witnesses against him. The evidence of both D-4 and D-6 was central to the

[349] *Ibid.*, para. 340.
[350] *Ibid.*, para. 339.
[351] *Ibid.*, para. 129.
[352] *Ibid.*, para 399: "[…] The Chamber is convinced that the above-mentioned parts of D6's testimony were untruthful, considering that he belonged to the group of witnesses in Douala gathered for a '*briefing*' by their '*leader*' and '*go-between'* Mr Arido [...]"
[353] *See Prilic* Decision, para. 53 ("A different matter is, of course, what weight a trier of fact is allowed to give to evidence not subjected to the testing of cross-examination. It is in this matter that the jurisprudence of the ECtHR is valuable, as it has authoritatively sated that principle that 'all evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence.' Unacceptable infringements of the rights of the defence, in this sense, occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial […]" [footnotes omitted]).
[354] *Prlic* Decision, para. 53.
[355] *See*, *Prlic* Decision, para. 52, citing *Aleksovski* Decision on the Admissibility of Evidence at footnote 88.
[356] After the Judgment was rendered, at the Sentencing Hearing, Appellant questioned D-4 about his military background in the context of [REDACTED], starting at p. 44 of T-53-CONF-ENG, on 12 December 2016. D-4 also gave evidence that he was [REDACTED] (12 December, p. 51). *See also* CAR-D24-0006-0005 (Declaration of DEF-A3) in which D-4 describes his training and career in the military (12 December, p. 44, ll.9-18).

allegations of culpable conduct against Appellant.

340. The TC reinforced this fair trial error by convicting Appellant for the offence of Article 70(1)(c) in respect to D-4 and D-6 based on hearsay evidence about them from D-2 and D-3, and denying Appellant's request to admit D-6's exculpatory [REDACTED].

341. The TC's errors prejudiced and harmed Appellant. These errors materially affected both the fairness of the Judgment,[357] and rendered the trial fundamentally unfair, resulting in a miscarriage of justice. If D-4 and D-6 had been called to testify by the Prosecution, especially given D-4's evidence in the Sentencing Hearing, the TC could not have rendered a judgment of conviction.

342. The Defence, in its Closing Submissions, requested the TC to dismiss the charges in respect to D-4 and D-6,[358] because the Prosecution failed to meet its burden of proof, based on their status as "missing witnesses." The TC, however, failed to address this remedy in its Judgment.

343. Therefore, the Arido Defence is requesting that Appeals Chamber rule on this legal issue as the "final arbiter of the law," because of its importance not only to Appellant, but generally to the legal standards for evidence on which international convictions are based.[359]

344. The Appellant also is requesting that the Appeals Chamber reverse Appellant's conviction in respect to D-4 and D-6, as a matter of law.

V. OTHER EVIDENTIARY ERRORS

A. Introduction

345. The Judgment is replete with other evidentiary errors, including factual errors, where the TC failed to take into account relevant facts (as in its assessment of the accomplice status of D-2 and D-3, its disregard of D-24001's evidence and D-6's exculpatory evidence) or misappreciated facts by misrepresenting them or reaching a conclusion where its reasonableness cannot be discerned, based on the evidence.[360]

[357] See sections 'Evidentiary Errors in Assessment of D-2, D-3, D-4 and D-6' at p. 59; and 'The Trial Chamber erred in its decision not to admit exculpatory material of D-6', at p. 71.
[358] Arido Closing Submissions, paras 162-170.
[359] *Ndindabahizi* Appeal Judgment, 16 January 2007, para. 13.
[360] *Lubanga* Appeal Judgment, 1 December 2014, para. 22.

346. As a corollary, the Defence submits that the factual errors raised reasonable doubt on the key issues in the case, and the credibility of D-2 and D-3. The TC's factual errors resulted in convicting Appellant on a lesser standard of proof than beyond a reasonable doubt, in violation of Article 66(3).

B. The Trial Chamber erred in giving no weight to the Cameroonian police report (CAR-D24-0002-0001) and finding that it did not raise reasonable doubt in respect to credibility of D-2 and D-3 (Judgment, para. 333; N/A, para. 39)

347. The Arido Defence had introduced this report to challenge the veracity and credibility of D-2's and D-3's evidence in respect to the alleged Douala briefing. The report, produced and signed by the Director of Public Security in Cameroon, stated that there was no record that D-2 and Appellant stayed at the Hotel Grand Moulin in Douala in the month of February 2012.

348. This report contradicted the evidence of D-2 and D-3, who both averred that D-2 and Appellant stayed there,[361] and therefore presented reasonable doubt that the evidence given by D-2 and D-3, was, in fact, credible and reliable.

349. The TC found the document to be reliable, but it rejected the content of the document. The TC concluded that D-2, D-3, Appellant and others stayed in a specific hotel, identified by D-2 and D-3 in Douala in February 2012.[362]

350. The TC's reasons for rejecting the content of the report, and accepting the evidence of D-2 and D-3 as reliable, are erroneous:

- Reason #1: The report was produced more than two years after the relevant events.

  This reason is not linked to any point which indicates why this report would not be reliable or credible, whenever it was produced. Records of hotels and occupants are often maintained over a long period of time, and retrieved at later dates. Neither the TC nor the Prosecution raised an objection about the reliability or accuracy of the information, or of its author, the Cameroonian police.

- Reason #2: "[…] the Kilolo Defence relies on interviews recorded during the Doula

[361] T-21-CONF-ENG, 15 October 2015, p. 7 ll.24-25 & p. 8 l. 1; T-22-CONF-ENG, 19 October 2015, p. 9, ll. 5-8.
[362] Trial Judgment, para. 333: When Defence questioned D-2 about the document, the Prosecution did not raise any objection as to its authenticity or reliability; *see also* T-21-CONF-ENG, 15 October 2015, pp. 7–10.

meeting [...]"[363] and this supports the TC's view that the meeting took place with D-2.

This reason violated Rule 136(2) because evidence of a co-Accused cannot be used against another co-Accused.[364] These interviews were not presented as evidence in the Arido Defence.

- Reason #3: The third reason refers to the testimony of D-2 and D-3.

351. As discussed *supra*. the evidence of D-2 and D-3 was not credible or reliable, based on their legal status as accomplice/perpetrators.

352. In addition, the TC's conclusion in respect to "and others" stayed at the hotel is unsupported in the record. The only evidence to which the TC points concerns hotel accommodations for D-2, D-3, Appellant and [REDACTED]. There is no evidence cited about "and others." Therefore, this conclusion is unfounded.

353. In sum, the TC chose not to credit the evidence of an official government entity which was not a Party to the Article 70 proceeding, and – instead – base its erroneous conclusions on the evidence of D-2 and D-3, who were accomplice/perpetrators to the events.

354. As a result, the TC erred by wrongly assessing, and rejecting the Defence evidence of reasonable doubt.

C. The Trial Chamber's conclusion, attributing sole responsibility for culpable conduct to Appellant, ignored relevant evidence in the record of the leading role of Mr. Kokaté (Judgment, para. 344; N/A, para. 39)

355. At **para. 344,** the TC states that it is convinced that Appellant promised D-2, D-3, D-4 and D-6 money and relocation in exchange for testifying in the *Bemba* Main Case, based on the evidence of D-2 and D-3. The Trial Judgment rejects the Defence analysis that D-3's evidence "blurred" the roles of Appellant and Mr. Kokaté.[365]

356. The TC failed to consider relevant evidence that Mr. Kokaté, not Appellant, made the promises[366] and failed to provide a full and reasoned statement on the contradictory evidence

[363] Trial Judgment, para. 333.
[364] *See*, *Bagosora et al*., para. 13.
[365] Trial Judgment, para. 344, referencing Defence arguments in Arido Closing Submissions, paras 268-271.
[366] *See* Arido Closing Submissions, paras 348-356, but especially paras 348-349 (citing, at fn. 293, D-2's testimony that Kokaté made the offer of money and re-location).

about promises from D-2 and D-3.[367] In rendering a reasoned opinion, the TC is obliged to indicate all relevant factors which a reasonable TC would be expected to take into account before coming to a decision.[368]

357. This evidence is highly relevant as to whether D-2 and D-3 are reliable and credible, especially since the TC considers that promises of money and re-location, standing alone, constitute the element of conduct for corrupting witnesses.[369]

358. The Defence submits that the TC misappreciated and misunderstood the Defence argument.[370] The main point was – that once the Prosecution reminded D-3 of his suspect status, the identity of the "deal maker changed": from Mr. Kokaté to Appellant. The TC simply "overlooks" this shift in the role of Mr. Kokaté to Appellant, triggered by D-3's suspect status. This error is one example which demonstrates that the TC disregarded the ramifications of the accomplice/perpetrator status of both D-2 and D-3.

359. Lastly, the Defence reminds the Appeals Chamber that Mr. Kokaté's role as an unindicted perpetrator[371] remains untouched and objectively protected.[372] The TC's findings and conclusions in this Judgment include a plethora of criminal conduct on his part, in support of his leading role.[373] Perhaps the Prosecution is waiting for the proceedings in "CAR II" to resolve this.

360. In sum, based on the record, a reasonable trier of fact could not have concluded that Appellant made promises of money and re-location, if all the relevant evidence was considered in deliberations.

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[367] Arido Closing Submissions, para. 338 (D-2 refers to the 10 million FCFA, and there is no reference to this in D-3's testimony). *See also* Arido Closing Submissions, paras 344-347 (D-2 and D-3 inconsistencies about the "note-taking")
[368] *Šainović et al.* Decision on Provisional Release, para. 6; *Haradinaj et al.* Decision on Ramush Haradinaj's Modified Provisional Release, para. 23.
[369] Trial Judgment, para. 48.
[370] Arido Closing Submissions, paras 268-271, cited at Trial Judgment, fn. 577.
[371] *See* Arido Closing Submissions, "The Mystery of Captain Kokaté," paras 292-299.
[372] T-48-CONF-ENG, pp. 5-6: During Closing Arguments, J. de Brichambaut questioned the Prosecution about its views on the role of Mr. Kokaté in the recruitment of witnesses and his influence over them, noting that he is mentioned by both the Prosecution and Defence teams and that he has not been convicted and did not appear as a witness.
[373] Trial Judgment, paras 125, 131, 320, 323, 326-327, 331, 334, 339, 341-342, 344, 430, 716.

VI. ERRORS IN FACTUAL, EVIDENTIARY AND LEGAL FINDINGS AND CONCLUSIONS (N/A, PARA. 27)[374]

A. Introduction

361. Within the Judgment, the TC summarizes adverse findings and conclusions in respect to Appellant, for example at **paras 125-132** (which are un-footnoted) and at **paras 944-945**.[375] Within these paragraphs, the Defence has identified Judgment errors in the following categories: factual, evidentiary, procedural and legal. Findings and errors are repeated in different places, and may affect each other; a paragraph may contain more than one error and category. This section discusses errors emanating from (1) erroneous conclusions on the findings of *mens rea*; and (2) other adverse conclusions.

B. *Mens Rea* Section

1. The Trial Chamber erred in concluding that Appellant possessed the required mens rea for direct perpetration because this was based on procedural errors and factual misrepresentations (Judgment, paras 668-677)[376]

a. Introduction

362. The TC concluded that Appellant's "*mens rea* is demonstrated by his conduct and interaction with the witnesses" and relied on two factors: 1) Appellant's instruction to the witnesses about their professional background and 2) Appellant's promises of money and re-location.[377] The TC based its conclusion on a) the testimonies of D-2 and D-3[378] and b) Appellant's Article 55(2) statement in November 2013 to the French police.[379]

363. Both factors, as discussed *infra.*, were not based on the evidence. The TC "misappreciated the factual evidence" in the record because it misassessed the testimonies of D-2 and D-3, misrepresented the factual evidence, including the Article 55(2) statement and failed to take into account relevant facts.

364. Moreover, the testimony of D-4 at the Sentencing Hearing directly refutes the TC's conclusions in respect to *mens rea*.

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[374] *Ibid.*, paras 125-132, 141-143, 320-330, 331-334, 338-340, 341-344, 345-347, 348-349, 351-352, 378-380, 388-389, 391, 399, 401, 411, 420, 669-672, 674, 682, 803, 872, 944-946.
[375] *Ibid.*, paras 944-945 reference previous findings at paras 670-672, 125-138, 129-132, 321, 334-338-341-343, 345-346, 351 and 420.
[376] Errors regarding lack of notice of *mens rea* are addressed *supra.*, in the fair trial section.
[377] Trial Judgment, paras 670-672. The TC rejected a number of the Prosecution's arguments at paras 674-677.
[378] *Ibid.*, para. 671, fn. 1533. Unreliability of evidence of D-2 and D-3 is discussed *supra*.
[379] *Ibid.*, para. 671, fn. 1535.

365. The TC's procedural and factual errors are made in the context of a fundamental fair trial error: the lack of notice provided for the factual allegations in support of the elements for the *mens rea* for direct perpetration.[380] The TC does not address this objection in its Judgment,[381] thus failing to provide a full and reasoned opinion on an issue which is relevant and fundamental to its factual findings.

366. For these reasons, the conclusion of *mens rea* was unfounded, and Appellant's conviction for the offence should be reversed.

b. *Mens Rea* Factor One: The Trial Chamber's erroneous conclusions on Appellant's conduct of instructing witnesses

i. The Article 55(2) Statements (paras 670-672; N/A 35)

i) Introduction

367. In respect to the Article 55(2) Statement, the Defence position is that it is not an admission or statement, and the procedural and factual irregularities render it illegal. We use the term "statement" here because it is used in the Trial Judgment.

368. One of the key points in the TC's finding on *mens rea* is that Appellant had stated that he believed that D-2, D-3, D-4 and D-6 had not been military persons, based on his Article 55(2) Statement (23 November 2013).[382] The reliance on this statement is erroneous: (a) the TC's reliance on the Article 55(2) statement in the Judgment is legally inconsistent with the Chamber's conclusions in its Sentencing Judgment;[383] (b) the Article 55(2) statement does not meet the procedural requirements under Rule 111; and (c) the TC factually misrepresented the contents of the statement. Therefore, the TC's finding of *mens rea* for direct perpetration is unfounded in law and in fact, and Appellant's conviction should be reversed.

ii. The Trial Chamber erred in the Judgment, as a matter of law, by relying on the Article 55(2) statements, when its findings on them in its Sentencing Judgment are legally inconsistent with the Judgment

369. In the Judgment, the TC's finding of Appellant's *mens rea* is based on Appellant's stated belief, in the Article 55(2) statement, that D-2, D-3, D-4 and D-6 had not been military

[380] *See* Arido Closing Submissions, paras 70 -73.
[381] *See* Trial Judgment, paras 670-672 (findings on *mens rea*).
[382] Trial Judgment, para. 671, fn. 1535.
[383] ICC-01/05-01/13-2123-Corr, Sentencing Judgment, para. 85.

persons.[384] Based on this, the TC concluded that Appellant coached and instructed them to represent themselves as soldiers.[385]

370. The TC's reliance on the Article 55(2) statements is contradicted by its holdings in the Sentencing Judgment. The TC concludes that the Article 55(2) statements are not aggravating circumstances. The TC points to the "doubts as to the Prosecution's selective interpretation" of these statements, which included Prosecution claims which had been rejected by the TC.[386] It states:

> For example, contrary to the Prosecution's allegations, Mr. Arido actually confirmed that he knew some of the Main Case Defence witnesses. [fn. 138 – Article 55(2) Statements of Mr. Arido, CAR-OTP-0074-1065-R02 at 1068-R02, para. 4]. As to the payments received by Mr. Kilolo, the Chamber recalls that it did not accept the Prosecution's claim in the Judgment [fn. 139 - Trial Judgment, para 677.]"

371. The legal standard for aggravating circumstances is proof beyond a reasonable doubt – the same standard which is applied to a conviction of guilt. Yet, here, the same standard resulted in different legal conclusions: the TC finds "there are doubts as to the Prosecution's selective interpretation of Mr. Arido's statements,[387] and holds that the legal standard of aggravating circumstances is not met. But, based on the same evidence, in the Trial Judgment, it holds that conclusions, based on the Article 55(2) statement evidence, meet the standard of proof beyond a reasonable doubt.[388]

372. Thus, as a matter of law, Appellant's conviction should be reversed.

iii. The Trial Chamber's reliance on the Article 55(2) statements was illegal, based on the requirements of Rule 111.

373. Rule 111 of the RPE provides that the record of questioning shall be signed by the person who records and conducts the questioning, the suspect and his counsel. Moreover, the same rule provides that when someone has not signed, the reason shall be given in the said record. Thus, the rule requires that three signatures appear.

374. Both interviews with Appellant (23 November 2013 and 17 January 2014) have only two

[384] Trial Judgment, para. 671.
[385] *Ibid.*, paras 129-132.
[386] ICC-01/05-01/13-2123-Corr, *Sentencing Judgment*, para. 85.
[387] *Ibid.*
[388] Trial Judgment, para. 340: (The Judgment concludes that Appellant unduly influenced and instructed the four, to present a military background, "regardless of the truth or falsity of the information.").

signatures each. It appears that the interviews are signed by Appellant and the Police Officer, but they are not signed by counsel, nor is any reason provided.

375. The Arido Defence argued that both interviews should be excluded, as a matter of law, based on the violation of Rule 111.[389] It also asserted that their admission violated Article 69(7), based on the violation of Appellant's right to remain silent and right to adequate and effective counsel.[390]

376. However, in its 29 April 2016 Decision, the TC did not address the Rule 111 violation, and did not rule on this legal point.[391]

377. The Defence requested leave to appeal the Decision, and identified one of the appealable issues as whether the Chamber erred in failing to decide and provide reasons about the application of Rule 111 with respect to the French statements.[392]

378. The TC denied the request, and stated that it had already rejected the application for inadmissibility in its Decision, 30 October 2015.[393] But the Arido Defence submits that the TC did not, in fact, decide the Rule 111 violation in the Decision, 30 October 2015.

379. While the TC was aware that "Rules 111 and 112 impose requirements on the record of questioning in connection with an investigation,"[394] it only discussed Rule 112 requirements in an earlier decision rejecting inadmissibility of the Arido statements.[395]

380. Thus, the Rule 111 violation, which was an issue in the Leave to Appeal, was and still remains undecided, and the Arido Defence requests that the Appeals Chamber decide this issue of law.

381. In addition, the Defence notes that the TC's reliance on the Article 55(2) statements as evidence of *mens rea* implicitly means that the TC did not find any violation of Rule 111. If it had found a violation, then it could not have relied on the Article 55(2) statements.

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[389] ICC-01/05-01/13/1795-Conf, paras 18-20.
[390] *Ibid.*, paras 21-23; see also ICC-01/05-01/13-1241-Conf, paras 33-58.
[391] ICC-01/05-01/13-1854, paras 75-76 (TC rejected other Defence arguments regarding legality of the Statement, and referenced Arido Response to the Prosecution's Third Bar Table Motion of 21 August 2015, which highlighted the Rule 112 violations, but does not identify the Rule 111 violation.)
[392] ICC-01/05-01/13-1869, para. 12.
[393] ICC-01/05-01/13-1898, para. 13, footnote 20.
[394] ICC-01/05-01/13-1432, para. 23.
[395] *Ibid.*, para. 24.

382. Thus, the TC erred by its reliance on the Article 55(2) statements to support *mens rea*, based on the procedural violation of Rule 111.

iv. The Trial Chamber erred by factually misreading and misrepresenting Appellant's 55(2) Statements to support its finding on mens rea

383. Appellant's 55(2) statements on which the Trial Judgment relied are not admissions, and fail to support the findings in **paras 128**, **671** and **672**. We note that the conclusions in **para. 128** are un-footnoted, so that it is impossible to review whether and what evidence exists to support them.

384. The TC concluded that Appellant had "purposely and deliberately instructed witnesses" regarding their professional background, and "stated his belief that D-2, D-3, D-4 and D-6 had not been military persons."[396] This was based on his November statement to the French police.[397] It concluded: Mr. Arido stated his belief that D-2, D-3, D-4 and D-6 had not been military persons. The TC's conclusion is factually incorrect. Appellant never admitted that he believed that D-2, D-3 and D-6 were not soldiers of FACA.

385. The pertinent section referred to in fn.1535 is OTP-0074-1065-R02 at 1066-R02 and OTP-0074 at 1068-R02.

386. CAR-OTP-0074-1066 reads:

« … [REDACTED] .»[398] [Bold added]

387. It is clear from the original French document that there were no potential witnesses physically present; there were simply recordings which had previously been taken, and these were on a dictaphone machine.[399]

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[396] Trial Judgment, para. 671.
[397] *Ibid.*, para. 671, fn. 1535.
[398] *See* CAR-OTP-0074-1066.
[399] On this point, see Arido Closing Arguments, T-49-CONF-ENG, 1 June 2016, pp. 110, ll. 13-25 - p. 111, l.1:

> 13 Now, if you look at the language here, what it says in French, it's very clear,
> 14 there were no witnesses that Mr Arido met with Mr Kilolo. It is true if you
> 15 look at the interview that Mr Kilolo had a Dictaphone machine with some
> 16 témoinage, testimony on it. And that is what he asked Mr Arido to listen to
> 17 after Mr Arido and he talked about the expert report.
> 18 What it says in French is (Interpretation) "The testimonies were recorded on
> 19 a Dictaphone. I did not know many of the witnesses and so on and so forth.
> 20 They were introduced to me by Maître Kilolo." (Speaks English) The "ils",
> 21 i-l-s, the antecedent to "They were shown to me," doesn't mean the witnesses

388. Appellant indicates he knew there were six witnesses who were from [REDACTED], but there is no indication as to the identities of those six persons, or of any other person who was on the recording. Nor is there any indication that the recordings to which he was asked to listen and evaluate were identified by name. Hence, the TC's conclusion, that these recorded testimonies were from D-2, D-3, D-4 and D-6, is unfounded in fact, and is erroneous.

389. The TC adopted the view expressed by the Prosecution in its Closing Arguments that the "very witnesses" were introduced to Appellant by Me. Kilolo as CAR soldiers, and that Appellant, a former soldier, knew they were not soldiers. The Prosecution directly implied that "very witnesses" were in fact – D-2, D-3, D-4 and D-6 – although none are identified in the 23 November 2013 statement.[400]

390. The Arido Defence, in its Closing arguments, pointed out in the Appellant's answer, "ils" refers back to "les temoingages" (translated as "testimonies").[401]

> « [...] [REDACTED] [...] » [bold added]

391. The interviewer also asked Appellant, during the course of the interviews, in separate questions, about individuals connected to the *Bemba* Defence, but this does not support the

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> 22 were shown to him. That's what the Prosecution would like you to believe,
> 23 that these were the witnesses assembled.
> 24 The témoinages, the testimonials on the Dictaphone is the antecedent to "ils."
> 25 I invite the Chamber to take a look at this, it's on page 2 of the November

[400] Prosecution Closing Arguments, T-48-CONF-ENG, 31 May 2016, p. 33, ll. 12-20:

> 12 For example in his 23
> 13 November 2013 statement, he claims that Kilolo introduced him to the very
> 14 witnesses that the evidence clearly shows he assembled to meet Kilolo.
> 15 (Interpretation) "They were introduced to me by Maître Kilolo as being
> 16 Central African soldiers, but as myself, I was a former soldier. I knew that
> 17 none of these witnesses had been a soldier."
> 18 (Speaks English) And again where he claimed in his 17 January statement
> 19 that he knew D4 as a former military, but then claimed in the same statement
> 20 that he did not know him.

[401] Arido Defence Closing Oral Arguments, p.110, ll. 18-23.

conclusion that Appellant knew that D-2, D-3 and D-6 were not military.[402]

392. Similarly, the fact that the TC found that other prospective witnesses were present in Douala[403] also does not support the conclusion that Appellant knew that the four persons were civilians, and had to be instructed to present themselves as military.

v. The Trial Chamber erred by not considering Appellant's January 2014 interview in respect to the military status of D-4.

393. In respect to D-4's status, the TC's representation was incomplete, resulting in a factual misrepresentation. In the November interview, Appellant was not asked about the military background of D-2, D-3 or D-6, but was questioned about D-4 and D-7 (who did not testify).[404] The pertinent section at -1068 confirms that D-4 ([REDACTED]) was never part of the Central African army. D-7 could not be confirmed by Appellant.

394. But in his later interview, on 17 January 2014, Appellant says that that D-4 was known to him as a former military, but he did not know him personally.[405]

395. Appellant's answer changed. But the Judgment does not point to this contradictory answer – whose content goes to the heart of this case: the military status of D-4.

396. The January interview clearly confirmed that Appellant believed D-4 to be part of the military. If the TC had given weight to this, the allegations in respect to Appellant instructing D-4 would evaporate. But, the Judgment does not refer to this point in the 17 January 2014 interview.

397. The TC's incomplete analysis of Appellant's statements resulted in an erroneous finding, that

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[402] CAR-OTP-0074-1068, at 1069, CAR-OTP-0078-0121. Appellant said he knew a certain [REDACTED], and also [REDACTED] and [REDACTED], a person with the first name of [REDACTED], [REDACTED]. He knew [REDACTED] from [REDACTED] in Cameroon. He did not know [REDACTED] or [REDACTED] (only by name). He could not confirm if [REDACTED] was part of the military, and said that [REDACTED] was not (but changed his position in a 2nd interview). He was also asked about [REDACTED], who was a professional colleague.

[403] Trial Judgment, para. 331 ("[…] "other people, among them [redacted] and prospective witnesses (who did not eventually testify), were also present at the time of the meeting in Douala […]").

[404] *See* CAR-OTP-0074-1068:

> Q : [REDACTED]?
> Réponse : [REDACTED]
> Q : [REDACTED] ?
> Réponse : [REDACTED].

[405] CAR-OTP-0078-0121 (17 January 2014 Statement): ("[…][REDACTED], […].).

Appellant intentionally instructed D-4 (as well as the other three persons) to misrepresent themselves as military.

vi. Conclusion

398. If the TC had accurately represented the Article 55(2) statement, and the evidence in respect to Appellant's role, it could not have concluded, as it did in **paras 670-672**, that Appellant possessed the *mens rea* for the offence, and was culpable for the promises and their transmission.

2. Other adverse conclusions regarding "instructing" in the Judgment

a. The Trial Chamber erroneously concluded that D-2, D-3, D-4 and D-6 followed Appellant's instructions regarding testimony.[406]

399. Most of the conclusions in **para. 348** concern Me. Kilolo. However, within these conclusions, the TC has inserted adverse findings in respect to Appellant.

400. For example, in respect to D-2 and D-3, the TC notes that D-2 "candidly admitted that his statements, which had been 'arranged,'" were influenced by Appellant's instructions. As to D-3, he gave information to Me. Kilolo "as instructed by Mr. Arido."

401. The conduct of "instructing" is considered by the TC as conduct to support corrupting witnesses.

402. In addition, although the Trial Judgment only cites evidence from D-2 and D-3, as discussed *supra*., the TC again erred by accepting the hearsay evidence of D-2 and D-3 about D-4 and D-6, who were not called to testify and concluding that all four persons "followed Mr. Arido's instructions."

b. The Trial Chamber erred by concluding, based solely on D-2's testimony, that Appellant "readjusted the scripted testimonies of D-2, D-3, D-4 and D-6."[407]

403. The TC based its conclusion solely on D-2's testimony without corroboration.

404. The finding of "readjusted the scripted testimonies" is an element of the offense of corrupting witnesses, for which Appellant was convicted.

[406] Trial Judgment, para. 348; cited in support of para. 944.
[407] Trial Judgment, para. 351; cited in fn. 2089, in support of para. 944.

405. Given that D-2's testimony was unreliable and incredible as an accomplice/perpetrator, the TC should have corroborated it.

406. In addition, D-2's account is undercut by his evidence that he left Douala after meeting Me. Kilolo,[408] which undermines the credibility that there was a "de-briefing session" with Appellant and the witnesses after they had each met individually with Me. Kilolo.[409] Appellant was not present during the interviews with Me. Kilolo since the Chamber found that the witnesses were interviewed separately.[410]

407. Lastly, the TC erred by mischaracterizing the evidence about D-2's alleged briefing notes (Annex 2) in its finding. The witness testified that he inserted the notes into tea to convince Me. Kilolo that they were old notes he had kept about his participation in the armed conflict in Central African Republic in 2002-2003. Yet he did not present the notes to Me. Kilolo when he met him.[411] Although the TC found D-2's "old tea notes" account credible, D-2's evidence makes no sense: the veracity of D-2's testimony is undermined by the fact that he never showed the notes to Me. Kilolo, although D-2 claimed the purpose in "aging" the notes was to convince Me. Kilolo.

3. The Trial Chamber's mens rea conclusions based on D-2's and D-3's testimonies are refuted by D-4. (N/A, paras 36 and 37)

a. Introduction

408. The Defence submits that the Appeals Chamber can review the Judgment and the evidence from the Sentencing Hearing because both are part of the record of the same trial. The fact that in the ICC, the judgment and sentence are rendered separately, as opposed to the *ad hocs*, is a procedural matter and does not impact on the legal authority of the Appeals Chamber.

[408] T-19-CONF-ENG, p. 8, ll. 17-23.
[409] Trial Judgment, para. 331 ("[…] At the [Douala] meeting, Mr. Kilolo together with his legal assistant (the 'white lady') interviewed the witnesses individually").
[410] *Ibid.*, para. 332.
[411] *See* T-20-CONF-ENG, 14 October 2015, pp. 32-34, and T-21-CONF-ENG, 15 October 2015, pp. 67-69; *see also* D-2 interviews with the OTP where D-2 claimed to have already modified the briefing notes by dipping them in tea to make them look 'old' when meeting with Me. Kilolo (CAR-OTP-0080-0494, lines 419-434: 'Je l'ai trempé dans du thé.. pour rendre le papier vieux'), to give the impression that he had these notes for a long time (CAR-OTP-0080-0494, lines 430-431), in case Me. Kilolo asked him for it (CAR-OTP-0080-0494, lines 442-443); On 5 November 2014, the OTP asked D-2 when he dipped the pages in tea (CAR-OTP--0084-0412, line 205). D-2 first dipped them in tea and then dried them (CAR-OTP-0084-0412, lines 206-208). He said that he added the information after, when they all meet in the Douala hotel (CAR-OTP-0084-0412, lines 210-211).

409. D-4 was the Prosecution witness (P-256) at the Sentencing Hearing.[412]

410. As discussed *supra.*, D-4 was not called as witness in the Prosecution's case. No doubt, this could have been because he would have given testimony, on the material issue of instructing witnesses, which would have contradicted D-2 and D-3.[413]

411. This is what, in fact, happened, at the Sentencing Hearing.

412. D-4's evidence directly contradicted key evidence relied on by the TC for proof of *mens rea.*

b. D-4's testimony refuted evidence that Appellant coached or instructed witnesses, key conduct on which the conviction was entered

413. The TC's conclusion that Appellant instructed or coached D-2, D-3, D-4 and D-6 is a central element in its conviction of Appellant.[414] The TC relied solely on the evidence from D-2 and D-3 that Appellant was recruiting military persons to testify in the Main Case, and that, although neither D-2 nor D-3 were soldiers, they were instructed by Appellant.[415]

414. In support of this conclusion, the TC repeatedly emphasized that Appellant assigned ranks and gave insignias to each of them, [416] and instructed them to present themselves as military persons (sub-lieutenant or corporal).[417] In the Judgment, there is a section entitled "Preparatory Meeting: Assignment of Military Ranks by Mr. Arido" [418]

415. At trial, Appellant presented evidence contradicting the non-military status of D-2 and D-3,[419]

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[412] The Defence objected to calling of D-4 at the hearing (*see* ICC-01/05-01/13-2029-Conf and ICC-01/05-01/13-2059). The TC decided that either D-4 should appear for cross-examination or be withdrawn by the Prosecution. Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, 11 November 2016, para. 16 ("[…] procedural fairness demands that the Prosecution Witness also appear to be examined by the other parties. If the Prosecution does not wish to expose this witness to such an examination, then it must withdraw him. The anticipated testimony summary raises serious allegations, and the Arido Defence in particular should be afforded an opportunity to challenge them"). At the hearing, the Presiding Judge had to remind the Prosecution, which kept veering into Main Case issues, to return to the three points it identified in its witness summary. (T-53, p. 31, ll 2-7; 14-17). We also note that the Prosecution did not object on the issue of the scope of the Defence cross-examination.

[413] Under a missing witness/adverse inference analysis, this meets the criterion that what the missing witness would have testified about would have been adverse to the case of the calling party.

[414] Trial Judgment, para. 944 ("[…] intentionally instructed and briefed…even while believing that they did not have such a [military] background").

[415] *Ibid.*, para. 319 (the TC relies on evidence of D-2 and D-3 regarding the meetings with Mr. Arido and Me. Kilolo).

[416] *Ibid.*, paras 130, 338, 339, 420 and 669.

[417] *Ibid.*, paras 322, 323, 328, 338, and 327-328.

[418] *Ibid.*, section heading before para. 334.

[419] Arido Closing Submissions, paras 242-256; 273-274.

as well as significant inconsistencies in each's accounts of the Douala meeting.[420]

416. In its Judgment in October 2016, the TC, based solely on D-2 and D-3, rejected the Appellant's evidence and made no finding of reasonable doubt. To the contrary, it held that there was proof beyond a reasonable doubt that Appellant had recruited and instructed the witnesses to lie in the Main Case.

417. But, in December 2016, at the Sentencing Hearing, D-4 testified that it was he, not Appellant, who assigned ranks to D-2 and D-3.[421] He contradicted the Judgment's conclusions, and the evidence of D-2 and D-3. D-4 testified that he met D-2 and D-3 in February 2012, and that they had introduced themselves to him as soldiers.[422]

418. Based on D-4's evidence, in the interests of justice, the Appeals Chamber has to consider whether a reasonable trier of fact could have reached the same conclusion that the TC did in respect to Appellant's "instructing" of witnesses about their military background.

419. D-4's reliability must be addressed here. The TC found D-4 to be reliable, in particular, regarding the Forged Document and his interactions with Appellant and the Defence team, while also finding him vague in some responses.[423]

420. It is clear from the Sentencing Hearing that D-4 is far from a "model" witness. Even the Prosecution, the Party which presented him, realized his deficiencies. [424]

421. But the Defence emphasizes that D-4 had no reason to lie about his role in assigning ranks. He testified with counsel present and under Article 74 assurances. As the TC found,[425] he was forth-coming in his admissions of prior wrong-doing. For example, he explained in detail that

[420] *Ibid*., paras 334-347.
[421] T-53-CONF-ENG, 12 December 2016, p. 23 (ll. 20-21), p. 27 (ll. 1-12).
[422] *Ibid*., p. 23 (ll. 2-7), p. 26 (ll. 21-22).
[423] ICC-01/05-01/13-2123-Corr, *Sentencing Judgment*, para. 81.
[424] T-53-CONF-ENG, 12 December 2016, pp. 67-68: ("Now, having seen 256, I am sure the Chamber will no doubt recall the caution which we advised of at the beginning of this case concerning these types of witnesses. Be assured that we have not lost sight of the fact that 256 lied in the Main Case, that he lied during the course of this interviews with the Defence, the interview with Mr. Mabanga, the interview with Mr. Taku, that he lied even when he met with the Prosecution in February of this year. There are no illusions about that.").
[425] ICC-01/05-01/13-2123-Corr, *Sentencing Judgment*, para. 81.

he falsified [REDACTED][426] and falsified a document and forged a signature for [REDACTED].[427] He had nothing to gain by fabricating his role in assignment ranks and insignias.

c. Conclusion

422. In sum, the testimony of D-4/P-256 contradicted the TC's conclusions on key points, which were fundamental as underpinnings of Appellant's conviction. Yet, while D-4's credible evidence challenged the reliability and legitimacy of the Judgment's findings and conclusions, and presented reasonable doubt, the TC still convicted and sentenced Appellant for the offence of Article 70(1)(c).

423. To remedy this legal inconsistency, Appellant's conviction should be reversed.

4. Mens Rea Factor Two: Promises of Money and Re-location

a. The Trial Chamber erroneously concluded that Appellant made promises of money and re-location[428] by a) factually misrepresenting the transcript references; and b) misrepresenting the roles of Appellant and Mr. Kokaté and finding that Appellant made promises and relocation, which contradicted its own findings that Mr. Kokaté was the person who was responsible for "calling the shots"

i. Factual Misrepresentations

424. In **para. 672**, the Chamber "recalls that Mr. Arido promised the witnesses a significant financial reward and relocation to Europe as an encouragement to give certain evidence."[429] and concluded that "[...] Mr. Arido specifically instructed them to write their conditions (both payment of money and relocation destination) on a piece of paper which he would personally convey to Mr. Kilolo as their 'leader' or 'go-between.'"[430]

425. First, the Judgment cites D-2's and D-3's testimony in **para. 341** as support for its conclusions. But, this is a factual misrepresentation. Contrary to the conclusion that Appellant

[426] T-53-CONF-ENG, 12 December 2016, pp. 23-26, 44-50, 52-53; see also Trial Judgment, para. 322: (The TC gave no weight to this document, finding that it had no probative value); T-53-CONF-ENG, [DATE], p. 29, ll. 15-18: (D-4 testified that he had told the Arido Defence that [REDACTED]); The witness signed a statement on 24 August 2015 (CAR-D24-0006-0004 to -0009, referred to in Lead Counsel's summation (T-55-CONF-ENG, 12 December 2016, p. 14) where he disclosed the same information (CAR-D24-0006-0006) and stated that D-2 and D-3 presented themselves to him as CAR military, and that he had seen D-2 [REDACTED] (CAR-D24-0006-0008).
[427] T-53-CONF-ENG, 12 December 2016, pp. 27-28, 52-53.
[428] Trial Judgment, para. 672.
[429] *Ibid.*, para. 671, footnote 1536; *see also* Trial Judgment, paras 320, 328 and 342.
[430] *Ibid.*, para. 671, footnote 1537; *see also* Trial Judgment, para. 341.

made promises, it was Mr. Kokaté who made the promises. In fact, D-2 testified that Appellant had informed him that "[REDACTED] had a deal and he explained it to me."[431] D-2 also testified that [REDACTED] was the one who promised the 10 million FCFA and re-location in Europe[432] and [REDACTED] was the one who "hatched" the deal and set the terms and conditions of the deal.[433]

426. **Para. 341** cites **D-2's testimony** at fn. 562 to show that Appellant "asked each witness to note his conditions on a piece of paper, which he would transmit to Mr. Kilolo." Fn. 562 cites T-22, p. 39, ll. 14-15 to support this conclusion, but in fact – it does not.[434] The T-22 transcript supports the conclusion that it was Mr. Kokaté, not Mr. Arido, who asked the witnesses to write down how much money and where they were planning to go.[435] (underlining added) The antecedent in T-22, l. 14 is Kokaté, not Mr. Arido.[436]

427. **Para. 341** also summarises **D-3's testimony** as "Mr. Arido had asked each witness to note his conditions on a piece of paper, which he would transmit to Mr. Kilolo." But the testimony at fn. 562 in support is contradictory: D-3 testifies that "[...] each person had to submit his request to Kokaté [not Mr. Arido][...][437] and also that " [...] Arido said he was the one who was responsible for presenting all those requests to Mr. Kilolo."[438]

428. Second, there is no proof beyond a reasonable doubt about the promises based on the footnotes cited because D-3 failed to remember the amount of money or location he had written down[439] and could attest to what the others wrote down.[440] In D-3's testimony, there is

[431] T-20-CONF-ENG, 14 October 2016, p. 36, l. 18.
[432] T-18-CONF-ENG, 12 October 2015, pp 71-72: (D-2 testified that Mr. Kokaté talked about the money and the possibility to emigrate to Europe); *see also* T-19-CONF-ENG, 13 October 2015, pp. 5-6.
[433] *See* T-19-CONF-ENG, 13 October 2015, p. 64, ll. 1-7; *see also* T-22-CONF-ENG, 19 October 2015, p. 39: ("[REDACTED]").
[434] T-22-CONF-ENG, 19 October 2015, p.39, reads:

> 13 [REDACTED]
> 14 [REDACTED]
> 15 [REDACTED]
> 16 [REDACTED]
> 17 [REDACTED]. (bold added)

[435] Arido Closing Submissions, para. 269.
[436] T-26-CONF-ENG, 22 October 2015, p. 48, ll. 14-16 (also sited at fn. 562): (D-3 gave evidence that Mr. Arido had asked everyone to write done information on a piece of paper, and that he would transmit this to Me. Kilolo. D-3's testimony contradicted D-2,was contradictory, and certainly provided reasonable doubt Appellant made the promises and transmitted them to Me. Kilolo).
[437] *Ibid.*, p. 48, ll. 23-24.
[438] *Ibid.*, ll. 2-5.
[439] *Ibid.*, p. 49, ll. 1-5.

not even a whisper about the 10 million FCFA promised, whereas this figure is prominent throughout D-2's testimony.[441]

429. Thus the TC's conclusion in **para. 341** that both D-2 and D-3 "confirmed that the promise was addressed to all four witnesses present in Douala" is contradicted by D-3's testimony, the inconsistencies about the 10 million FCFA and is a factual misrepresentation of the evidence.

430. Lastly, the TC failed to provide a reasoned opinion on these inconsistencies, which related to a relevant and key element of the offence, i.e. the promises, on which Appellant was convicted. Together, these inconsistencies undermined the finding that Appellant made promises of payments and re-location.

b. The Trial Chamber's conclusion that Appellant conveyed the conditions for testifying of D-2, D-3, D-4 to Me. Kilolo is an erroneous reading and misrepresentation of the record, and is contradictory as to the findings on the roles of Appellant and Mr. Kokaté

431. The TC concludes in **paras 672** and **674**[442] that Appellant "conveyed" the conditions of D-2, D-3, D-4 and D-6 to Me. Kilolo. This factually misrepresents the evidence, and is not based on proof beyond a reasonable doubt.

432. **Para. 674** refers to **para. 341,** which states: "Similarly, P-260(D-2) testified that Mr. Arido acted as an intermediary who conveyed the witnesses' conditions to Mr. Kilolo.[fn. 564]"

433. But, there is no evidence in fn. 564 to support that Appellant conveyed anything to Mr. Kilolo. Fn. 564 cites T-18-Red2, p. 72, lines 15-17 which reads:

> Q: Who said that? […]
>
> A: Well, before we were able to go to Douala, those were the conditions that bound us to Mr. Arido because he was the go-between. He himself, he said so directly in his own words. And that was the commitment […]

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[440] *Ibid.*, p. 49, ll. 22-24 ("[…] On that day, Arido had told us that all requests had to be individual. And because of that there was no way for me to know what the others were requesting. I could not have any idea about what the others wrote down")
[441] Arido Closing Submissions, para. 338.
[442] Trial Judgment, para. 674: (The TC does not find any evidentiary support for the allegation that Appellant knew, at the time of the Douala meeting, that "Me. Kilolo would illicitly coach witnesses…..at the Yaoundé meeting," but it also finds that Appellant knew that Me. Kilolo would pay witnesses for their services as Main Case witnesses. While these findings do not directly support Appellant's culpable conduct, they are still harmful because they implicate Appellant generally in the conduct of corrupting witnesses).

434. The finding that Appellant "conveyed conditions" is a central underpinning in the TC's conclusion that Appellant made promises of money and re-location, and was responsible for "conveying" this information to Me. Kilolo.

435. If the TC had made a different finding, based on an accurate reading of the transcript, it would have undermined the conduct of making promises, which the TC viewed as culpable conduct for corruptly influencing witnesses.

436. The "conveying" theory fit neatly into the TC's characterization of Appellant as a "go-between," based on D-2's testimony. A "go-between" is someone who acts a liaison between others, but does not have authority in the situation, i.e., the person is not a "principal."

437. Here, the Judgment's "go-between" references[443] for Appellant contradict the TC's conclusions for example, in **para. 672 (**referencing **paras 320** and **328)** that Appellant made promises of money and re-location. Based on the evidence, it is unreasonable to conclude that Appellant played this principal role.[444] Moreover, **paras 320** and **328** cite evidence to support that the search for witnesses had been initiated by Mr. Kokaté, which would place him in the role of the principal, who made the promises.[445] This leading role of Mr. Kokaté is affirmed by the evidence cited in **para. 342**, where both D-2 and D-3 testified that problems in payments were not raised until Mr. Kokaté joined the meeting. When D-3 threatened to withdraw, Mr. Kokaté got angry and threatened to recruit others to do the job.[446]

438. Based on this evidence, it is reasonable to conclude that the persons raised the payment and relocation issues with Mr. Kokaté, not Appellant, because they knew and/or understood that Appellant did not have the power to make or execute any decisions in respect to these issues.

439. The TC's conclusions contradicted its own findings: the Chamber makes repeated references to findings that Appellant is a "go-between,"[447] yet, in concluding that Appellant made promises, places him also in the role as "deal-maker" or "king-pin."

440. This inconsistency in assessing Appellant's role presents reasonable doubt that he was, in fact, in charge of anything.

[443] *See,* for example, paras 341, 344, 349.
[444] *See* Arido Closing Submissions, para. 349 (D-2 explicitly testified that Arido did not make him the offer of money and re-location); *see also* T-21-CONF-ENG, 15 October 2015, p. 14, ll. 6-8.
[445] *Ibid*.
[446] Trial Judgment, para. 342. *See also* Arido Closing Submissions, paras 349-356.
[447] Trial Judgment references to "go-between" at paras 131, 341, 344, 349, 399, 420, 672.

441. If the TC had made no finding as to Appellant's role as a conveyer of conditions, it would have undermined the conduct of making promises, which the TC viewed as culpable conduct to support corruptly influence witnesses.

c. The Trial Chamber erred by making adverse findings in respect to Appellant's promises of money and re-location, and by providing no reasoned opinion on the inconsistencies in the principal (and only) evidence, from D-2 and D-3 (paras 372-380)

442. **Paras 372-380** are under the heading of "Mr. Kilolo's Payment [...]" but they include adverse findings in respect to Appellant and promises of money and re-location for testimony.

443. The TC's conclusions about these promises were key in its finding of *mens rea* at **para. 672.**

444. The TC refers to promises made by Appellant and Me. Kilolo in **para. 411**; it infers that at the time of the Yaoundé meeting, Me. Kilolo knew about Appellant's promise of payment to the witnesses in **para. 379,** and refers to the 10 million FCFA as the promised amount in **paras 372, 374, and 378**.

445. But, contrary to "Mr. Arido's promise of CFA 10 million" in **para. 378**, the evidence presented does not support that Appellant made the promise. At **para. 374,** D-2 states that the money was given by Me. Kilolo to "fulfill the promise of FCFA 10 million." D-2, however, does not describe the promise as having been made by Appellant. Similarly, D-3, at **para. 373**, gave evidence of a payment of 600,000, promised by Me. Kilolo. But D-3's evidence at trial is totally silent on a promise by Appellant of 10 million CFA at the Douala meeting.[448]

446. Thus, even if D-2 and D-3 were talking about different promised payments, neither linked the promised payments back to Appellant. The evidence, moreover, supported that promises and deal originated from Mr. Kokaté, not Appellant.[449]

447. The TC's conviction of Appellant for making promises as culpable conduct for Article 70(1)(c) was based solely on the evidence of D-2 and D-3.

448. The TC also held that the evidence of D-2 and D-3 is consistent and mutually corroborative in

[448] *See* Arido Closing Submissions, paras 338 -343L (On inconsistencies between D-2 and D-3 testimony on the 10 million CFA).
[449] *Ibid.*, paras 348-350.

this regard, confirming that these promises were indeed made."[450] This proposition of consistency and corroboration was refuted in the Defence Closing Submissions.[451]

449. Since both D-2 and D-3 provided the principal evidence to support the conviction, the TC had an obligation to provide a reasoned opinion which discussed inconsistencies both within and between their testimonies.[452] These inconsistencies are identified in the transcript references in Closing Submissions.[453]

450. The Judgment, however, fails to do this. Instead of addressing the inconsistencies, the TC simply includes a single footnote, **Fn. 667** which reads: "Contrary to Arido Closing brief, paras 281-291." This is to support the conclusion in **para. 372** that the promises were made.[454] There is no discussion of the Defence arguments cited which address reasonable doubt, and challenge the credibility of D-2's and D-3's motivations. There is no discussion of the significant divergence in the accounts of D-2 and D-3 about the money: D-2 talks about the 10 million FCFA, but in D-3's testimony, there is not even a whisper about the 10 million FCFA.

451. Nevertheless, at **para. 379** the TC refers twice to Appellant's "promise of payment to the witnesses," although this is unfounded in the record, based solely on the testimony of D-2.[455]

452. D-3, moreover, gave evidence from which it was reasonable to conclude that no promises were made by Appellant: he asserted that Appellant was simply an "intermediary" in this situation who collected little pieces of paper with witnesses' conditions for Me. Kilolo. Although D-3 claimed to be part of the group, he could not specify how much money he had requested or where he wanted to re-locate, nor did he know what others had written down.[456]

453. Even if, *arguendo*, there was some discussion about what the witnesses would receive in return for testifying, there is no evidence that Appellant was the person who made the promises, and, as discussed *supra*., there was evidence to the contrary – that it was Mr.

[450] Trial Judgment, para. 372.
[451] Arido Closing Submissions, paras 338-343.
[452] *Haradinaj* Appeal Judgment, para. 134: (finding that Trial Chamber failure to address inconsistencies in testimony of witness who provided the principal evidence upon which Trial Chamber relied to convict violated Appellant's right to a reasoned opinion, constituting an error law).
[453] Arido Closing Submissions, paras 338-350.
[454] Trial Judgment, para. 372.
[455] *See fn. 77 supra.*
[456] Arido Closing Submissions, para. 316.

Kokaté who made the promises. Thus, it cannot be discerned how the TC could reasonably reached its conclusion that Appellant made promises, based on the evidence before it.

5. The Trial Chamber erred by not giving a full and reasoned opinion as to the legal element of Appellant's knowledge, a requirement of Article 70(1)(c)

454. Article 30 delineates the mental element of criminal responsibility: the commission of material elements with intent and knowledge.[457]

455. In the Judgment, it is unclear whether Article 30 elements apply to Article 70(1)(c) offences, since Article 30 is discussed in reference to Article 70(1)(a) and (b), but **para. 50** applies to Direct Perpetration.[458]

456. **Para. 50** states the requirement is fulfilled "if the perpetrator knows that his or her action will bring about the material elements of the offence, viz., corruptly influencing the witness, with the purposeful will (intent) or desire to bring about those material elements of the offense."

457. The TC convicted Appellant of the offence of corruptly influencing a witness, yet it points to no evidence in the Judgment to support the element that Appellant knew that his actions would result in corruptly influencing a witness.

458. To the contrary, the TC rejects the Prosecution arguments that Appellant's appreciation of the Main Case testimonies demonstrated intent to corruptly influence the witnesses,[459] and that, at the time of Douala meeting, Appellant knew "that Mr. Kilolo would illicitly coach the witnesses on what to say in court at the May 2013 meeting in Yaoundé."[460]

459. Yet, the TC gives no explanation about this inconsistency, which directly involves an element of the offence for which Appellant was convicted.

460. Lastly, the TC's assertion that Appellant "instructed the witnesses [...] without concern for its truth, during their testimonies before Trial Chamber III" is not evidence that Appellant knew the testimonies were untrue. It is simply the TC's subjective assessment that Appellant was unconcerned, a conclusion which is purely subjective and not based on any evidence in the

[457] Whether Article 30, which specifies "crime," is also applicable to an offense under the Statute is, in the Defence view, an unsettled question. Article 70, for example, refers to "offences committed against its administration of justice when committed intentionally" and makes no reference to the knowledge element.
[458] Trial Judgment, para. 58: Referencing the applicable subjective elements for offences under Articles 70.
[459] Trial Judgment, para. 676.
[460] *Ibid.*, para. 674.

record.

C. Other adverse findings and conclusions

1. Introduction

461. References to Appellant's conduct are found throughout the judgment, in sections concerning him as well as other Co-Accused. The Judgment summarizes its adverse findings and conclusions at paras 943-944, which reference the following paragraphs in the footnotes: 670-672; 125-128; 328; 341-343 and 420; 129-132-321, 334-338, 345-346, 351 and 420. Below are the paragraphs which have not yet been discussed in Appellant's brief.

a. Paras 345-346.

462. The TC erred by relying on D-2 and D-3 for its finding that Appellant took away the telephones of D-2, D-3, D-4 and D-6 and then instructed them to lie to Me. Kilolo that they had no telephones and to request new ones.[461]

463. Appellant's position is that this evidence, from D-2 and D-3, was not credible and not based on proof beyond a reasonable doubt.[462]

464. The TC's conclusion that this applied to D-4 and D-6 is not supported by the transcripts cited for **para. 345**. D-3 testified that Appellant took his phone, and the phone of [REDACTED] and D-3; there is no mention of D-4 and D-6.[463] Similarly, the references to transcripts cited for D-2[464] do not identify the persons by name. This is another example of the TC erroneously assuming that D-4 and D-6 are involved, although, as illustrated here – there is no evidence about them (and they were not called to testify).

465. These adverse findings are harmful to Appellant because they support the TC's conclusion that Appellant engaged in criminal conduct, i.e., instructing these persons to lie about their backgrounds, and present themselves as military while believing they did not have such a background. These **paras 345-346** are cited in fn. 2089 for **para. 944**.

b. Paras 347 and 352

466. While there is no adverse finding in the Judgment in respect of payments from Appellant to

[461] Trial Judgment, para. 346.
[462] See Arido Closing Submissions, paras 237-291.
[463] Trial Judgment, footnote 578.
[464] *Ibid.*, footnote 582.

others, this conclusion is still harmful because it links Appellant to the "briefing," alleged to have occurred, supporting the Prosecution's narrative.

467. In **para. 347**, the TC, based on D-2 and D-3, the TC found that all four were given 10,000 FCFA at Me. Kilolo's request for food that evening, and that Appellant distributed the money to buy the food and not to influence the witnesses.[465]

468. In **para. 352**, the TC found that Appellant gave 10,000 FCFA to D-2 and D-3 to cover travel costs, and that it was not meant to influence their testimony.

c. Para. 420

469. Most of the conclusions in this section (Judgment, **paras 412-420**) concern Me. Kilolo, but the TC includes adverse conclusions in respect to Appellant.

470. At **para. 420**,[466] the TC finds that, "upon Mr. Kilolo's request, Mr. Arido, together with Mr. Kokaté, recruited D-2, D-3, D-4 and D-6 as witnesses for the Main Case Defence." The paragraph summarizes all the conduct considered to be corrupting witnesses: making promises, instructed them to present themselves as FACA and MLC soldiers, assigning their alleged military ranks, handing out insignia, briefing them about their purported military background, experience and training, de-briefing them after their meeting with Me. Kilolo, and then further guiding and instructing the witnesses. He also acted as a 'go-between' and relayed the witnesses' concerns to Me. Kilolo. **Para. 420** is cited in fn. 2089, in support of the summary adverse findings in the Judgment in **para. 944**.

471. While there are no footnotes for these overall conclusions, it is fair to presume that, consistent with the rest of the Judgment, that they are based solely on the testimony of D-2 and D-3.

472. What is especially important here, however, is that the TC has concluded that Mr. Kokaté is named in the important, initial role of recruitment but there is no other evidence summarized. This is because Mr. Kokaté was never produced as a witness, although he remained the unindicted perpetrator casting a shadow – from the beginning of investigations through the verdict – in this case.[467]

[465] *Ibid.*, para. 347.
[466] Trial Judgment, para. 420.
[467] Arido Closing Submissions, '*Section on the Mystery of Kokaté*' paras 292-299.

D. Conclusion (Sections IV, V and VI)

473. The Defence submits that the factual and evidentiary errors discussed *supra*. in Sections IV, V and VI, both individually and in the aggregate, result in conclusions unsupported by the record, and do not support the legal standard of proof beyond a reasonable doubt. For this reason, Appellant requests that the Appeals Chamber reverse his conviction.

VII. REMEDY REQUESTED

474. For the reasons stated in this brief, the Appellant requests that the Appeals Chamber set aside and reverse the TC's conviction for the offence of Article 70(1)(c) and enter a verdict of acquittal.

475. In respect to remedies requested in his Closing Submissions, the Appellant requests that the Appeals Chamber review and rule on the rejected remedies.

476. The Appellant requests that the Appeals Chamber grant any other remedies which it deems to be fair and equitable.

The Defence reserves the right to amend this brief.

Signed:

Chief Charles A. Taku, Lead Counsel

Beth S. Lyons, Co-Counsel

Dated this 31st Day of May 2017
The Hague, The Netherlands

The Defence acknowledges the invaluable contributions of team members Tibor Bajnovic, Tharcisse Gatarama and Michael Rowse to this appeal. The Defence is also grateful to Marie O'Leary and Alex Paredes-Penades of the OPCD for their assistance.

CHART A – CHRONOLOGY OF EVENTS RELATED TO THE UNLAWFUL COLLECTION OF WESTERN UNION DOCUMENTS

**[REDACTED] - Prosecution Investigator*
***[REDACTED] - Prosecution Investigator*
[REDACTED] - [REDACTED] - Prosecutor Witness P-0267

Date	Document	Issue	Error/Violation
28 Sept 2012	CAR-OTP-0092-0021-R01; *see also* CAR-OTP-0092-0018;	'*First Pre-Screening E-mail'*: Prosecution* requests urgent check by Mr [REDACTED], on three individuals, including Mr Arido, based on suspect transactions **since Sept 2011.**	No prior judicial order or authorization.
4 Oct 2012	CAR-OTP-0092-0022-R01; *see also* CAR-OTP-0092-0018;	*Second Pre-Screening E-mail*': Prosecution sends another e-mail to Mr [REDACTED] ('[REDACTED]'), and states that "we only have 3 priorities". One of the being Mr Arido.	No prior judicial order or authorization.
11 Oct 2012	CAR-OTP-0092-0022-R01, at 0023; *see also* CAR-OTP-0092-0024, Tab 'Narcisse Arido';	Mr [REDACTED] responds to Prosecution*'s two pre-screening emails and attaches an Excel Spreadsheet, named [REDACTED]. This Excel Spreadsheet corresponds with the document CAR-OTP-0092-0024, submitted as evidence by the Prosecution during the 'Article 70' case proceedings.	The collected information on WU payments covered records of Mr Arido and his family members, going back more than six years, to **29 Dec 2005**, far beyond the time period of the 2012 allegations against Appellant. Overly broad search in terms of time period, and persons in violation of right to privacy.

19-20 Oct 2012	CAR-OTP-0092-0892-R01; *see also* CAR-OTP-0092-0018;	Prosecution** met with Mr [REDACTED] at WU offices in Vienna to 'screen' first 32 individuals out of 67 individuals, which include Mr. Arido.	No prior judicial order or authorization
2 Nov 2012	CAR-OTP-0091-0351;	'*First Official Prosecution RFA*': The Prosecution sends its first RFA to the Austrian authorities. Attached to this RFA is the same list of 67 individuals that Prosecution** and Mr [REDACTED] scanned in Vienna on 19-20 Oct 2012. Mr Arido is among the 67 individuals. The RFA is too broad and refers to the Bemba 'Main case'.	
8 Nov 2012	CAR-OTP-0092-0834 (original language); CAR-D24-0002-1363 (English translation);	The Austrian Prosecution sends a request to Austrian Regional Court, seeking an 'Order for information regarding bank accounts and bank transactions' of 67 individuals.	Mr. Arido is named [REDACTED]. The first Austrian Prosecution request and the first Austrian Judicial Order are overly broad, and not based on any reasonable or specific grounds.
15 Nov 2012		The Austrian Regional Court issued 1st Order to 'Western Union Payment Services' and granted the Austrian Prosecution request.	

18 Oct 2013	CAR-OTP-009-0360;	*'Second Official Prosecution RFA'*: The Prosecution sends its second RFA to the Austrian authorities. Attached to this RFA is the Prosecution list of 68 individuals. It is the same list of 67 individuals with the addition of one name.	Mr. Arido is among the 68 individuals. The RFA is overly broad and refers to the Bemba 'Main case'.
29 Oct 2013 **5 Nov 2013**	CAR-D23-0002-0024;	The Austrian Prosecution sends a second request to Austrian Regional Court, seeking an 'Order for information regarding bank accounts and bank transactions' of 68 individuals. The Austrian Regional Court issued 2nd Order to 'Western Union Payments Services' and granted the Austrian Prosecution request.	The second Austrian Prosecution request and the second Austrian Judicial Order request is overly broad, and not based on any reasonable or specific grounds.
22 April 2016	CAR-D24-0005-0001 (Original version); CAR-D24-0005-0045 (French version);	The Bemba *et al.* Defence teams filed two complaints to the Austrian Regional Court in Vienna against the unlawful collection of the Western Union evidence that occurred through the two Austrian Judicial orders.	Both Higher Regional Court of Vienna decisions held that the two Austrian Judicial Orders issued by the Regional Court were unlawful, because there was no reasonable suspicion or specific

			individualized grounds[468] for the highly intrusive collection.
24 May 2016	CAR-D24-0005-0013 (Original version); CAR-D24-0005-0034 (French version);		
Based on the Western Union Information Collected There Were Follow-Up Investigations			
8 May 2013	CAR-OTP-0091-0317;	The Prosecution requests the Cameroonian authorities *via* RFA to monitor and provide CDRs of Mr Arido's number.	Illegal Western Union request triggered additional requests to Cameroonian authorities and French authorities.
9 Oct 2013	ICC-01/05-01/13-427-Conf-Anx; see also ICC-01/05-01/13-140, para. 11.	The Prosecution requests the French authorities *via* RFA to provide an information and data concerning the [REDACTED] e-mail accounts of Mr Arido.	Illegal Western Union request triggered additional requests to Cameroonian authorities and French authorities.

[468] These legal standards are based on an unofficial translation of the Decisions obtained by the Defence. The Defence reserves the right to amend the description of the standards, based on an official ICC translation of the Decisions, if they are admitted into evidence.

CHART B – TABLE OF GROUNDS OF APPEAL

Notice of Appeal Ground	*Judgment Reference*	*In Appeal Text*
A. Notice Violations - Article 67(1)(a)		
TC erred by finding that Appellant was provided with adequate notice of the mode of liability for which he was convicted, in violation of Article 67(1)(a) (para. 12)	paras 59-60	pp. 11-12
TC factually misrepresented the Defence objections to mode of liability (para. 13)	para. 60	p. 17
TC erred by not ordering the Prosecution to provide an UDCC (para. 14)	n/a	pp. 13-14
TC erred by not ruling on the Defence objections that the Prosecution pursued two different theories in the case: a) that Appellant was acting as the agent of Kokaté; and b) that Appellant was acting as the agent of Mr. Kilolo (para. 15)	n/a	p. 23-24
B. The TC's Conviction of Appellant as a Direct Perpetrator was Ultra Vires		
(p. 7, points a and b)	para. 59	p. 21
C. The Pre-Trial Chamber Acted Ultra Vires by Imposing a Mode of Liability Which Was Not Found in the DCC		
(p. 7)	n/a	pp. 19-20
D. Prosecution Errors/Misconduct in Investigations and Disclosure		
TC erred by not ruling on the Defence objection that the Prosecution failed to investigate, as per its duties under Article 54(1) exculpatory evidence, particularly in relation to role of Mr. Kokaté (para. 16)	paras 125, 131, 320, 323, 326-327, 331, 334, 339, 341-342, 344, 430, 716	pp. 23-24

Notice of Appeal Ground	*Judgment Reference*	*In Appeal Text*
TC erred by not ruling on the Defence objections to selective, delayed, and late disclosures of material relevant and necessary to the preparation and presentation of the Defence, including but not limited to the absence of Cameroonian call-data-records ('CDR') from the critical period of January to February 2012, in violation of Article 67(1)(e) (para. 17)	n/a	pp. 30-31
TC erred by not ruling on the Defence objections to the Prosecution's failure to disclose the basis of the request for Western Union pre-screening (para. 18)	n/a	pp. 32-37
TC erred by not ruling on the Defence objections to the Appellant's characterization [REDACTED], at the behest of the Prosecution (para. 19)	n/a	p. 26
TC erred by not ruling on the Defence objections to the Prosecution's implementation of investigations regarding CDRs and e-mail correspondence in reference to Appellant and others, resulting in violation of their civil, political and human rights. (para. 20)	n/a	p. 30
E. The TC Erred by Failing to Provide a Full and Reasoned Opinion on the Findings on Evidence and Conclusions, as per Article 74(5)		
p. 8	paras 319, 323, 325, and un-footnoted paras 125-132, 141-143	pp. 27, 64, 94, 96
F. The TC Erred Regarding Its Statutory Interpretation of Article 70(1)(c)		

Notice of Appeal Ground	*Judgment Reference*	*In Appeal Text*
TC erred by interpreting two different definitions of "witness" in the Statute, resulting in an illegal conviction and inconsistent verdicts (para. 21)	paras 20, 43-50, 953	p. 40
G. The Decision of the Single Judge Permitting the Prosecution to Interview Defence Witnesses as Suspects, Pursuant to Article 55(2), Violated the Appellant's Rights under Article 67(1)(e)		
p. 10	n/a	pp. 24-25
H. The TC's Evidentiary Errors are Legal, Factual and Procedural		
TC erred in its approach to, and assessment of evidence (para. 22)	paras 189-205	pp. 52-61
TC erred by factually misrepresenting the Defence position regarding the Western Union documents, and erred in its conclusions regarding admissibility under Article 69(7) (para. 23)	paras 211-212	pp. 32-37
TC erred in its approach to evidence, particularly in respect to the Bar Table Motions, which violated the right of fair trial and its formulation of the relation between Article 70 and Main Case evidence (para. 24)	paras 190, 192, 194	pp. 53-54
TC erred by factually misrepresenting the Defence position regarding CDRs and in its conclusions regarding CDRs and the Appellant, and by not providing a reasoned opinion (para. 25)	paras 324-325	p. 27
I. The TC Erred in its Legal, Factual, and Evidentiary Conclusions Regarding the Appellant		

Notice of Appeal Ground	*Judgment Reference*	*In Appeal Text*
TC erred by making legal and factual findings and conclusions which were adverse to the Appellant, and which were not based on proof beyond a reasonable doubt. These are found in sections which a) directly address the Appellant; b) address other co-defendants, where the Appellant is mentioned; and c) in paragraphs recounting witness testimony, in the Article 70 and in the Main Case (para. 26)	paras 125-132, 141-143, 320-330, 331-334, 338-340, 341-344, 345-347, 348-349, 351-352, 378-380, 388-389, 391, 399, 401, 411, 420, 669-672, 674, 682, 803, 872, 944-946.	pp. 79-99
TC erred in its assessment of, and weight given to, the evidence of P-260 (D-2) and P-245 (D-3), both of whom were accomplices/perpetrators. Nevertheless, the Chamber cloaked them in a presumption of reliability and found them to be credible (para. 27)	paras 202, 319, 323, 325	pp. 60-63
TC erred in basing the Appellant's conviction solely on the evidence P-260 (D-2) and P-245 (D-3), although the Prosecution did not call D-4 and D-6 (in relation to whom the Appellant was also convicted) (para. 28)	para. 306	pp. 86-90
TC erred in giving any weight to the hearsay evidence about D-4 and D-6, admitted through the testimony of P-260 (D-2) and P-245 (D-3), which violated Appellant's fair trial right to confront the witnesses and evidence against him. (para. 29)	paras 338, 341, 671	pp. 73-74
TC erred by not addressing Appellant's argument that, as a matter of law, the allegations regarding D-4 and D-6, who were missing witnesses, should be dismissed (para. 30)	n/a	pp. 68-70

Notice of Appeal Ground	*Judgment Reference*	*In Appeal Text*
TC erred in rejecting exculpatory evidence regarding the [REDACTED] D-6 which was [REDACTED] (para. 31)	n/a	pp. 70-75
TC erred by not providing a full and reasoned statement, as per Article 74(5) of the Statute in respect to its finding of P-260 (D-2)'s and P-245 (D-3)'s credibility and reliability (para. 32)	n/a	pp. 64-66
TC erred by using P-260 (D-2) and P-245 (D-3) to corroborate each other (para. 33)	para. 334	pp. 60-65, 87
TC erred in concluding that Appellant possessed the required *mens rea* for direct perpetration because it misinterpreted key evidence on which it relied: including the Appellant's 55(2) interview. The Chamber factually misread this evidence, and failed to rule on the Defence objection that the evidence was in procedural violation of Rule 111 of the RPE (para. 34)	paras 670-672	pp. 79-86
TC finding of *mens rea* based on P-260 (D-2) and P-245 (D-3)'s testimony, was refuted after the Judgment was rendered by D-4, a Prosecution witness at the Sentencing Hearing (para. 35)	paras 130, 322, 323, 327-328, 330, 338-339, 420, 669	pp. 68-70, 75
TC erred in making adverse conclusions on significant points which were refuted by D-4's evidence, and on which the conviction was entered (para. 36)	paras 130, 334-340	pp. 68-70, 75

Notice of Appeal Ground	*Judgment Reference*	*In Appeal Text*
TC erred in its approach to and handling of Trial Chamber III testimony, and superimposed its own analysis on the actual testimony before Trial Chamber III and reached conclusions which were not supported by proof beyond a reasonable doubt (para. 37)	paras 388-389, 391, 399, 401	pp. 55-56
TC erred by miss-assessing, or not assessing and giving no weight to the Defence evidence which presented a reasonable doubt (para. 38)	para. 333	pp. 76-78
TC erred by not finding that the failure of P-260 (D-2) and P-245 (D-3) to provide [REDACTED] was a basis for reasonable doubt, and rendered their evidence incredible and unreliable (para. 39)	n/a	pp. 55-58, 89
J. Other TC Errors Regarding the Mode of Liability		
TC erred by making findings which connected the Appellant to the "common plan," although the CoC had rejected any notion of co-perpetration or common purpose liability (para. 40)	para. 878	pp. 48-49
TC erred by making inferences and conclusions about "concerted action" which alleged involvement of the Appellant, although no "acting in concert" liability was confirmed by the CoC (para. 41)	paras 103, 112, 682, 803, 878	pp. 48-49
K. Other Grounds Which Affect the Fairness or Reliability of the Proceedings or Decision		

Notice of Appeal Ground	*Judgment Reference*	*In Appeal Text*
Article 81(b)(iv) allows the Appellant/Defendant to appeal any other ground that affects the fairness or reliability of the proceedings or decision (para. 42)	n/a	pp. 10, 22-23
TC erred by not deliberating on any of the remedies requested, but for the one in reference to the acquittal of all offences charged under Article 70 (para. 43)	n/a	pp. 27, 38-39, 100
These remedies stem from violations of Appellant's and his family's civil, political and human rights which occurred in connection with this trial process and some still remain unresolved. For example, the Appellant never received a response from the ICC regarding threats to his security situation in the Main Case (para. 44)	n/a	p. 30
The Appellant will appeal denials of leaves of appeal which are relevant to, and affect the fairness or reliability of the proceedings (para. 45)	n/a	pp. 38-39