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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 redacted version of “Further Corrected version of ‘Prosecution’s
Consolidated Response to the Appellants’ Documents in Support of Appeal’”, 13
October 2017**

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INTRODUCTION

1. This was the first trial involving offences against the administration of justice before the International Criminal Court. It was an unprecedented case concerning a sophisticated and concerted plan to frustrate the Court's mandate to fairly adjudicate the most serious crimes of international concern. Jean-Pierre Bemba Gombo (the accused in the Bemba Main Case), Aimé Kilolo Musamba (his counsel), Jean-Jacques Mangenda Kabongo (his case manager) and at least two other individuals (Fidèle Babala Wandu and Narcisse Arido) were involved. At least fourteen—out of 34—Defence witnesses in the Bemba Main Case were interfered with. The offences, carried out over a prolonged period of time, were both discrete and compounded. The evidence of the Accused's acts, captured in *inter alia* intercepts, communications and bank transfers was irrefutable. And their lawful acquisition by the Prosecution, unassailable. Following a fair and properly administered process before the Chambers of this Court, on 19 October 2016 Trial Chamber VII ("the Chamber") convicted Bemba, Kilolo and Mangenda of offences under articles 70(1)(a), (b) and (c) of the Statute involving 14 witnesses, and Babala and Arido of offences under article 70(1)(c) involving two and four witnesses respectively. In doing so, the Chamber correctly defined the elements of the charged offences, properly assessed the evidence and reached reasonable conclusions regarding the guilt of the five Accused. The Appellants have not shown otherwise. Their five appeals should therefore be dismissed.

2. On 14 June 2012, two months before the Bemba Defence began calling witnesses in the Main Case, the Prosecution received a tip from an anonymous source that four Defence witnesses would provide false testimony in exchange for money in the Bemba Main Case. The Prosecution's investigation revealed that, over an extended period of time, Bemba, Kilolo and Mangenda designed and implemented a sophisticated criminal scheme to recruit potential Defence witnesses, pay them, give them non-monetary promises and benefits, and illicitly coach them by instructing them on the content of their testimony and on how to give evidence. They extensively scripted, rehearsed and harmonised the evidence of the witnesses, and presented *at least* 14 of them before this Court who, having been bribed and coached to provide false evidence to secure Bemba's acquittal, testified falsely about their contacts with the Defence, payments received from and benefits promised by the Defence, and their acquaintances with certain persons.

3. Throughout, Bemba, Kilolo and Mangenda sought to conceal their criminal conduct: they abused the Registry's privileged line, effected money transfers through third persons, distributed cell phones to the witnesses after the Victims and Witness Unit ("VWU") 'cut-off' date and used coded language. Once they became aware that they were the subject of an investigation, they conspired to pay off the witnesses with incentives and money to frustrate their potential cooperation with the Prosecution.

4. Babala and Arido assisted the three co-perpetrators. While Babala effected the transfer of money to two witnesses, Arido personally recruited, briefed and instructed four witnesses on the contents of their upcoming testimony, promising payments and other non-monetary benefits.

5. On 23 November 2013, Bemba was served with an arrest warrant. On that date, Kilolo, Mangenda and Arido were arrested in Belgium, The Netherlands and France respectively. The next day, Babala was arrested in the DRC. The Presidency found that Kilolo and Mangenda did not have immunity for their criminal conduct; and even if they did, it was waived. At trial, the Prosecution presented a wealth of reliable and consistent direct and circumstantial evidence. This evidence principally comprised oral testimony (including from witnesses who had falsely testified in the Main Case), witness statements, Western Union records of money transfers, call logs and recordings of Bemba's non-privileged conversations from the ICC Detention Centre, and emails, call data records and intercepts of telephones used by some of the Accused.

6. The financial records and the logs and recordings were obtained pursuant to judicial authorisations by domestic authorities and/or Pre-Trial Chamber II. Further, a Court-appointed Independent Counsel reviewed the material and intercepted conversations involving Bemba and Kilolo to determine which were relevant to the case and non-privileged because they were conducted in furtherance of a crime. Pre-Trial Chamber II or the Trial Chamber, depending on the stage of the proceedings, reviewed the Independent Counsel's assessments and only then provided the Prosecution with relevant material. Thus, the lawfulness of the interception was subject to multiple layers of judicial scrutiny and confirmed.

7. The Chamber's approach to the evidence throughout the proceedings was cautious and reasonable:

- At the start of trial, the Chamber notified the Parties that it would not determine the truth or falsity of the witnesses' testimony with respect to the merits of the Main Case because that would require access to the record of the Main Case. Rather, the Chamber would only determine whether the witnesses gave false evidence about their contacts with the Defence, payments received from and benefits promised by the Defence, and acquaintances with certain persons. Testimonial evidence concerning the merits of the Main Case would nevertheless be considered to show that pre-testimony witness coaching was repeated in court.¹
- Under article 69(4), the Chamber, as a general rule, deferred its assessments of the relevance and probative value of evidence to its deliberations on the guilt or innocence of the accused. At trial, with few exceptions, tendered evidence was recognised as formally submitted.
- As an exception to its general approach, the Chamber considered and decided on the Defence's challenges to the Western Union materials, Detention Centre logs and recordings and intercepts pursuant to article 69(7) prior to deliberations. The Chamber's decisions issued before the Judgment were careful and reasonable.

8. The Trial Judgment is no different. In almost 500 pages, the Chamber correctly defined the elements of the offences, thoroughly and reasonably assessed the credibility and reliability of witnesses and evidence, and provided a full and reasoned statement of its findings.

9. The five convicted persons have appealed the Judgment. None identify an error materially affecting the Judgment. Instead, they largely repeat their unsuccessful trial arguments—at times simply referring to their previous filings—and selectively (and unreasonably) interpret a specific piece of evidence and ignore the larger evidentiary record. The former submissions should be summarily dismissed.² The latter submissions should also

¹ [T-10-RED](#), 4:6-6:6.

² The Appeals Chamber has discretion to dismiss summarily—without providing detailed reasoning in writing—arguments such as those which are evidently unfounded, obscure or which suffer from other obvious

be dismissed since they fall short of the standard of appellate review which, for findings of guilt based on circumstantial evidence, requires an appellant to advance a reasonable alternative inference favourable to the accused with respect to the guilt of the accused or material or indispensable facts, and to demonstrate that no reasonable trial chamber could have excluded such an inference.³ The Appellants do not meet this standard. And understandably so, since the Trial Chamber's findings as to the Appellants' guilt are unassailable. Bemba, Kilolo, Mangenda, Babala and Arido's appeals should therefore be dismissed.

10. Finally, due to the overlapping arguments raised by the five Appellants, the Prosecution will first respond to their common arguments (*see* section one on the legality of the investigation; section two on the application of the submission of evidence regime and section three on the definitions of the elements of the offences), and will then address the remaining arguments of the five Appellants (*see* sections four to eight on Kilolo, Mangenda, Bemba, Babala and Arido).

Level of Confidentiality

11. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis* of the Regulations of the Court, since it refers to confidential information. The Prosecution will file a public redacted version in due course.

deficiencies. This is particularly when the appellant fails to set out an appealable error including its impact on the findings (*see* [Mbarushimana Application Release AD](#), para. 18); when arguments misrepresent the evidence or the Chamber's findings (*see* [Mbarushimana Reconsideration AD](#), para. 10); when arguments merely assert that the Chamber should (or should not) have considered certain evidence or failed to interpret the evidence in a particular manner; when arguments are irrelevant, obscure or contrary to common sense; when arguments are based on material not on the record and when arguments merely repeat unsuccessful trial submissions. *See* [Krajišnik AJ](#), paras. 16-27 and authorities cited therein.

³ [Stakić AJ](#), para. 219.

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I. THE INVESTIGATION WAS LAWFUL AND PROPER

12. The record of this case speaks for itself: the Prosecution conducted itself with the utmost integrity. It investigated and prosecuted diligently and according to its mandate. And, as a result, the Chamber found the five Appellants guilty and convicted them. Yet, an adverse litigation result is by itself no reason to claim foul. The Appellants, however, do just that. They seek to criticise the Prosecution's investigation through unfounded, disjointed, repetitive and incorrect claims. They even overlook and misunderstand the record. The Prosecution's investigation was proper, and its good faith beyond dispute.

13. The Chamber correctly decided not to exclude any evidence under article 69(7). Despite their repeated attempts at trial, the Defence failed to impugn the procedural propriety of the case. On appeal, they fail to show any germane error. Their claims are unsupported in law and in fact.

14. The Appellants fail to show that the Chamber erred in its legal analysis of article 69(7). The Chamber correctly and carefully considered the Statute's plain text and negotiating history. The Appellants, on the contrary, disregard it.

15. The Appellants fail to show that the Trial Chamber, the Single Judge of Pre-Trial Chamber II,⁴ the Presidency and the Appeals Chamber erred in fact or in procedure. The Judges not only developed and endorsed proper procedure, but followed it scrupulously at every stage. Thus, the collection and admission of financial records from Western Union, call logs and recordings of calls from the Detention Centre, and intercepted material from the Dutch authorities was reasonable and proper. These processes were judicially authorised by the Court and the relevant national authorities. Moreover, effective systems were in place to protect legitimate privileged material. The Appellants attempt to supplant the proper procedural narrative with conjecture. Conjecture, however, shows no error. Nor do the Appellants' piecemeal and partisan views. Their appeals should be dismissed.

I.A. THE CHAMBER CORRECTLY INTERPRETED THE LAW ON ARTICLE 69(7)

16. The Chamber correctly interpreted the Statute's legal framework governing the exclusion of evidence—contained in article 69(7)—according to its stated objective. Although Kilolo, Mangenda, Arido and Babala challenge the Chamber's interpretation of

⁴ Referred to as the "Single Judge".

article 69(7)—and how, if at all, this exclusionary rule of evidence relates to other parts of the Statute (including articles 69(8), 99(1) and 99(4))—none shows error.⁵ Rather, their arguments disregard the plain text and negotiated purpose of these provisions. Their submissions reflect a partial and partisan view of the drafting history and of academic treatises on the subject. Their reliance on select law from national and international jurisdictions is either inapposite or supports the Chamber’s reasoning. Put simply, the Appellants present an un-nuanced and inaccurate view of the law on exclusion of evidence at this Court.

17. In contrast, the Chamber properly nuanced its view while setting out the correct legal standard for excluding evidence at the Court. It showed not only a cogent understanding of the concerns evinced by various delegations when article 69(7) was being drafted, but also a cohesive view of how article 69(7) relates to other statutory provisions.⁶ The Chamber’s analysis was legally sound, consistent with the criteria of treaty interpretation under the Vienna Convention on the Law of Treaties (“VCLT”)⁷ and fully accorded with the drafters’ intentions.

I.A.1. The Chamber correctly interpreted the article 69(7) standard and decided not to exclude the evidence

I.A.1.a. Evidence is excluded only if it meets the high threshold of article 69(7)

18. Article 69(7) prescribes a two-step test governing the exclusion of evidence in proceedings at the Court. It states:

⁵ [Kilolo Brief](#), paras. 20-28, 37-47, 95-100; [Mangenda Brief](#), paras. 44-69, 95-102, 119-122; [Arido Brief](#), paras. 131-148; [Babala Brief](#), paras. 21-33.

⁶ See [First Western Union Decision](#), paras. 29-40 (setting out the legal standard); paras. 42-71 (rejecting the Defence requests to exclude the Western Union materials); paras. 72-74 (rejecting Kilolo’s and Mangenda’s requests to exclude the Intercepted Communications since they were derived from the Western Union materials); [Dutch Intercepts and CDR Decision](#), paras. 9-20 (setting out the law); paras. 21-38 (rejecting Kilolo’s, Mangenda’s and Bemba’s requests to exclude the Dutch intercepts and CDRs); [Second Western Union Decision](#), paras. 20-41 (finding that, in light of the two decisions issued on 22 April and 24 May 2016 issued by the *Oberlandesgericht Wien* (Higher Regional Court of Vienna)—also known as the Austrian Decisions—annulling two earlier rulings and denying previous authorisation regarding the collection of the Western Union Materials, there had been a violation of the right to privacy, but that the admission of the Western Union materials would not be antithetical to and would not seriously damage the integrity of the proceedings). Also [First Western Union ALA Decision](#), paras. 7-17 (rejecting Babala’s, Arido’s and Mangenda’s requests for leave to appeal the [First Western Union Decision](#)); [Second Western Union ALA Decision](#), paras. 16-26 (rejecting Arido’s and Bemba’s requests for leave to appeal the [Second Western Union Decision](#)).

⁷ Article 31(1), VCLT.

Evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if:

- a) The violation casts *substantial doubt* on the reliability of the evidence; or
- b) The admission of the evidence *would be antithetical to and would seriously damage the integrity of the proceedings*.⁸

Thus, for evidence to be excluded under the Statute, the facts must demonstrate both a violation and its detrimental effect. Moreover, the Chamber has discretion in determining whether these requirements are met on the particular facts of the case.⁹

19. Not every violation of the Statute or internationally recognised human rights leads to evidence being excluded.¹⁰ The judges have the discretion “to seek an appropriate balance

⁸ Article 69(7), [Statute](#) (emphasis added). See Piragoff and Clarke (2016), pp. 1747-1748, mns. 68-69: (“**The violation casts substantial doubt on the reliability of the evidence, or**”: This basis of exclusion reflects the concern that the manner by which the evidence is obtained, in violation of the Statute or internationally recognised human rights, can adversely affect the reliability of the evidence. Some forms of illegality or violations of human rights create the danger that the evidence, such as a confession obtained from a person during interrogation, may not be truthful or reliable as it may have been proffered as a result of the duress arising from the circumstances of the violation.[...] **‘The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’**: This basis of exclusion includes, but is broader than, issues related to the reliability of the evidence. [...] The rationale [...] is that it would be antithetical to the purposes and integrity of a Court, which was created to redress serious violations of international humanitarian law, to admit and use evidence that was obtained by means of a violation of its own Statute or internationally recognised human rights. Essentially, the admission and use of such evidence by the Court would damage the purpose and integrity of its own proceedings, which are to uphold the rule of law and human rights in the world [...].”); also [Lubanga Article 69\(7\) Decision](#), para. 37 (“[...] The Statute establishes the benchmark that evidence obtained otherwise than in compliance with internationally recognised human rights standards (or in breach of the Statute) shall be excluded, if it is potentially unreliable or would undermine the proceedings.”).

⁹ Piragoff and Clarke (2016), p. 1748, mn. 71 (also noting that “[article 69(7)] is the product of obtaining consensus and compromise. It is a balance of competing conceptions as to the basis for a rule of exclusion, as well as a mechanism to resolve the application of competing core values of the Statute within the concrete context of determining the admissibility of evidence in a particular case which, while probative, has been collected in a manner that offends other values.”).

¹⁰ [Lubanga Article 69\(7\) Decision](#), paras. 39-41 (rejecting the view that a violation of the right to privacy alone could render evidence inadmissible; stating “[t]his violation of the right to privacy may have rendered the evidence inadmissible had the drafting history of the Statute concluded in 1994” (based on a rule in the 1994 International Law Commission Draft Statute), but noting that after extensive negotiations at the March and April 1998 sessions of the Preparatory Committee, the Rome Conference adopted “a different formulation of this rule”.); Behrens (1999), p. 246 (noting that “[t]here was a substantial amount of debate about the scope of such a rule. Some delegations wanted to exclude evidence obtained by means of a violation of human rights, but this formulation was regarded as too broad.”); Alamuddin (2010), p. 239 (“Violation of [article 69(7)] does not lead automatically to exclusion.”); [Brđanin Intercept Decision](#), para. 54 (“[the] drafters of the [ICTY] Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained and opted instead to leave the matter of admissibility of evidence irrespective of its provenance to be dealt with under and in accordance with [rules] 89 and 95.”); para. 55 (“[...] It is clear from the review of national laws and international law, and the [rules] and practice of this International Tribunal, that before this Tribunal evidence obtained illegally is not, *a priori*, inadmissible, but rather that the manner and surrounding

between the Statute's fundamental values in each concrete case.”¹¹ When making article 69(7) determinations, the Chamber must distinguish between minor infringements of procedural safeguards and more serious violations.¹² Only the latter—those meeting the high threshold of article 69(7)(a) or (b)—may lead to exclusion of evidence.¹³

20. Moreover, article 69(8) bears a close link to article 69(7).¹⁴ Article 69(8) states:

When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.¹⁵

This provision precludes a Chamber “from adjudicating and making a decision about the applicability of a State's national law to a particular factual situation related to the relevance or admissibility of evidence.”¹⁶ Thus, in deciding whether to exclude evidence under article

circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility. *Illegally obtained evidence may, therefore, be admitted [...] since the jurisprudence [...] has never endorsed the exclusionary rule as a matter of principle.*”); also [Schenk v. Switzerland](#), para. 46 (noting the applicant's submission that the unauthorised recording of a private telephone conversation and its subsequent use in evidence violated his right to a fair trial, but stating that “[w]hile [article 6 of the ECHR] guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. *The court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible [...]*”) (emphases added).

¹¹ [Lubanga Confirmation Decision](#), para. 84 (“[article 69(7)] rejects the notion that evidence procured in violation of internationally recognised human rights should be automatically excluded. Consequently, the judges have the discretion to seek an appropriate balance between the Statute's fundamental values in each concrete case.”); [Mbarushimana Confirmation Decision](#), para. 61 (“Even if it were to be accepted that there were procedural shortcomings in the investigative procedures complained of, article 69(7) [...] does not mandate automatic exclusion of evidence obtained. In each case, the striking of an appropriate balance between the Statute's fundamental values is at the discretion of the Chamber [...]”); [Katanga and Ngudjolo Confirmation Decision](#), para. 93 (endorsing “[the] human rights and ICTY jurisprudence which focuses on the balance to be achieved between the seriousness of violation and fairness of the trial as a whole.”).

¹² [Lubanga Article 69\(7\) Decision](#), para. 35 (“Notably, the Statute does not ‘quantify’ the violation of the Statute, or the internationally recognised human right, by reference to the degree of ‘seriousness’. [...] even a non-serious violation may lead to evidence being deemed inadmissible, provided that one of the two limbs of the test in [article 69(7)] is satisfied [...]. *It is only in the second limb of the test that a requirement of a degree of “seriousness” is introduced, although this is unconnected with the seriousness of the violation.*”) (emphasis added).

¹³ *E.g.*, Piragoff and Clarke (2016), p. 1748, mn. 68 (“[article 69(7)(a)] requires that the effect of the violation of a procedural or substantive right of the Statute, or of internationally recognised human rights, must be of such a degree that it ‘casts substantial doubt’ on the reliability of the evidence.”); also [Lubanga Article 69\(7\) Decision](#), para. 41 (rejecting the view that *any* violation of internationally recognised human rights will necessarily damage the integrity of proceedings before the ICC.).

¹⁴ Behrens (1999), p. 246 (recognising the close link between articles 69(7) and (8)).

¹⁵ Article 69(8), [Statute](#). Also rule 63(5): The Chambers shall not apply national laws governing evidence, other than in accordance with article 21.

¹⁶ Piragoff and Clarke (2016), p. 1749, mn. 75; also [First Western Union Decision](#), fn. 55 (noting that the April 1998 Draft Statute had bracketed language in what became article 69(8) which would have given the Chambers more flexibility in examining national law, but that this language was ultimately removed. (“When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on [, but may have regard to,] the application of the State's national law.”)).

69(7), a Chamber cannot rule on the validity of a decision of a national court. Nor can it make a decision as to whether or how a national law might apply.¹⁷ Rather, these are matters of domestic jurisdiction within the sovereignty of the particular State.¹⁸ Likewise, neither national law nor domestic court rulings applying that law determine a Chamber's article 69(7) analysis, which should rather focus on whether there was a violation of the Statute or internationally recognised human rights.¹⁹

I.A.1.b. The Chamber correctly applied the law

21. In deciding not to exclude the evidence in this case, the Chamber correctly applied the principles underlying articles 69(7) and 69(8).

22. In the First Western Union Decision, the Chamber correctly found, based on the information then before it, that the Western Union materials were not obtained by means of a violation of the Statute or internationally recognised human rights. Moreover, the Chamber found that even assuming such a violation *arguendo*, the article 69(7)(a) and (b) criteria were not fulfilled.²⁰ In the Second Western Union Decision, the Chamber found—after considering the two Austrian Decisions that became available only after the First Western Union Decision had been issued—that “the internationally recognised right to privacy [had] been violated.”²¹ It found, however, that while there had been a violation—caused by an

¹⁷ Piragoff and Clarke (2016), p. 1749, mn. 75.

¹⁸ *Ibid.*, p. 1750, mn. 75 (“The Court is to be guided by its own applicable law, as set out in article 21, and the provisions of article 69. It is to apply its law, and not the domestic law, in deciding on the relevance and admissibility of evidence.”); also [Lubanga Article 69\(7\) Decision](#), para. 36 (“[The] Court is not bound by the decisions of national courts on the admissibility of evidence. Instead, the Court shall apply the sources of law set out in [article 21]. [...] evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of [article 69(7)].”).

¹⁹ Alamuddin (2010), pp. 239-240 (“Nor is National law determinative: a violation of national law on evidence does not compel exclusion, nor does compliance with it guarantee admissibility.”); also Behrens (1999), p. 246 (“Whereas a violation of internationally recognised human rights in principle qualifies as a ground for exclusion of evidence, a violation of national laws on evidence does not. The reason for this is that the Court should not be burdened with decisions on matters of purely national law. [...] Therefore, violations of specific national rules on the conduct of an interrogation or the like were not matters upon which the Court should base a decision on exclusion. The formula, as it was included in the ILC Draft Statute, was accepted in Rome.”).

²⁰ [First Western Union Decision](#), para. 70.

²¹ [Second Western Union Decision](#), para. 28 (“In view of the Austrian Rulings, the Chamber considers that any further assessment whether there was manifestly unlawful conduct is not necessary and concludes that the internationally recognised right to privacy has been violated.”).

error of legal reasoning by a national court—admitting the Western Union materials would not be antithetical to and would not seriously damage the integrity of the proceedings.²²

23. In the First Western Union Decision, the Chamber correctly set out its approach towards and the legal standard for assessing the article 69(7) applications.²³

- The Chamber first considered whether the evidence was collected in violation of the Court’s statutory scheme or internationally recognised human rights. If such a violation were found, it would then consider whether this violation “casts substantial doubt on the reliability of the evidence” or whether the admission of the evidence “would be antithetical to and would seriously damage the integrity of the proceedings.”²⁴
- The Chamber noted that the right to privacy was the internationally recognised human right at issue, and that it may not be interfered with except “in accordance with the law”.²⁵
- The Chamber then stated that, in light of article 69(8) and rule 63(5), it could not analyse whether the Austrian authorities correctly applied domestic laws as such.²⁶
- The Chamber, however, acknowledged that an article 69(7) inquiry may engage “with a discussion of the application of the national law”, which “creates tension with [article 69(8)].”²⁷ “This tension” required it “to balance its obligations under [articles 69(7) and (8)].”²⁸

²² [Second Western Union Decision](#), paras. 39-41 (rejecting the Defence’s request for reconsideration, based on the two Austrian decisions).

²³ [First Western Union Decision](#), para. 29. Also [Dutch Intercepts and CDR Decision](#), para. 10.

²⁴ [First Western Union Decision](#), para. 29; [Dutch Intercepts and CDR Decision](#), para. 10.

²⁵ [First Western Union Decision](#), para. 29 (noting that the “in accordance with the law” standard requires *inter alia* (i) the measure or measures in question should have some basis in law; (ii) the law in question should be accessible to the person concerned and foreseeable as to its effects; and (iii) as regards foreseeability, the law must be set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned—if need be, with appropriate advice—to regulate their conduct.); [Dutch Intercepts and CDR Decision](#), para. 10.

²⁶ [First Western Union Decision](#), para. 32; [Dutch Intercepts and CDR Decision](#), para. 13 (regarding the Dutch authorities).

²⁷ [First Western Union Decision](#), para. 33 (noting, for instance, that some specific provisions of the Statute (articles 55(2) and 59) apply directly to national authorities acting on the request of the Court, and that a Chamber’s analysis of the interference of the right to privacy “in accordance with the law” may also have some

- The Chamber then found that it would review the application of national law *only to the extent necessary* to determine whether a violation occurred under article 69(7). It would engage with national law “*solely to determine if something so manifestly unlawful occurred* that it amounts to a violation of the Statute or internationally recognised human rights.”²⁹ If it could not conclude that such manifestly unlawful conduct occurred at the national level, the Chamber considered that it could not “further examine whether a mere infringement of domestic rules of procedure transpired.”³⁰
- The Chamber then concluded that “[...] to preserve the meaning of [article 69(8)] and to maintain the limits on the kinds of violations specified in [article 69(7)]”, infringements of domestic procedure do not *per se* constitute violations of the Statute under article 69(7), even if such infringements did not accord with the laws of the requested State for purposes of Part IX of the Statute.³¹

24. In the Second Western Union Decision, the Chamber recalled its earlier approach.³² It then noted that the Austrian Decisions had “repealed the initial rulings due to a lack of basic reasoning” and had denied the requests for authorisation of the two underlying judicial orders concerning the collection of the Western Union materials.³³ In the particular circumstances of the case, the Chamber found that it did not need to further assess whether there had been “manifestly unlawful conduct”.³⁴ The two Austrian Decisions clearly expressed the intention of the national authorities to annul the earlier rulings and revoked, without ambiguity, the earlier judicial authorisations. The Chamber thus concluded on these facts that the internationally recognised right to privacy had been violated.³⁵

element of reviewing national law when national authorities act pursuant to Court cooperation requests); [Dutch Intercepts and CDR Decision](#), para. 14.

²⁸ [First Western Union Decision](#), para. 34; [Dutch Intercepts and CDR Decision](#), para. 15.

²⁹ *Ibid* (emphasis added).

³⁰ *Ibid*.

³¹ [First Western Union Decision](#), para. 40; [Dutch Intercepts and CDR Decision](#), para. 20.

³² [Second Western Union Decision](#), para. 26.

³³ *Ibid.*, para. 27.

³⁴ *Ibid.*, para. 28.

³⁵ *Ibid.*, para. 28; Piragoff and Clarke (2016), p. 1722, mn. 21 (noting that the Chamber could consider the application of national law in making its decision on relevance and admissibility, *as a factual matter*, without any express reference to the Chamber being able to have regard to national law.); p. 1750, mn. 76 (“[given] the negotiation history, there is some support that, while the Court may not rule on the application of a State’s national law as one of its legal functions, *compliance or non-compliance with such law may be treated as a*

25. In its article 69(7) analysis, the Chamber correctly balanced the different requirements of articles 69(7) and 69(8) in line with the Statute and the drafters' intentions.

I.A.1.c. The Appellants fail to show error in the legal standard applied.

26. In claiming error, the Appellants oversimplify article 69(7) and its interplay with article 69(8),³⁶ and incorrectly read the law governing State co-operation in articles 99(1) and 99(4).³⁷ Their interpretations run contrary to the established statutory intention.³⁸

27. The Appellants advance divergent and inaccurate appeals against the Chamber's article 69(7) legal analysis.

- Mangenda focuses his appeal on the interplay between article 69(7) and 69(8),³⁹ arguing a purported error that has no impact on this appeal. The relationship between articles 69(7) and 69(8) was relevant only to the Chamber's assessment of whether a right had been violated, and the extent to which it could consider national law under the "manifestly unlawful" standard—the first part of the article 69(7) inquiry. However, in light of the Chamber's findings in the Second Western Union Decision that the right to privacy had been violated,⁴⁰ and since the issue was resolved in the Appellants' favour and the Prosecution has not challenged this specific finding on appeal, questions regarding the "manifestly unlawful" standard are no longer relevant on appeal.⁴¹
- Kilolo claims that the Statute, and in particular articles 99(1) and (4), had been violated, but disregards key drafting history and judicial findings.⁴² The remainder of his appeal recites various case law without showing error.⁴³

factual matter if relevant to the admissibility or weight of the evidence. Compliance or non-compliance with national law gives some additional factual context. [...]") (emphasis added).

³⁶ E.g., [Mangenda Brief](#), paras. 44-64.

³⁷ E.g., [Kilolo Brief](#), paras. 20-28. But see [Mangenda Brief](#), fn. 20 (stating that "Mangenda does not contend on appeal that the ICC Statute was violated").

³⁸ Above paras. 18-25.

³⁹ [Mangenda Brief](#), paras. 44-64.

⁴⁰ [Second Western Union Decision](#), para. 28.

⁴¹ Notwithstanding, should the Appeals Chamber examine the issue, the Prosecution addresses Mangenda's challenge to the manifestly unlawful standard. *Below* paras. 33-36.

⁴² [Kilolo Brief](#), paras. 20-28.

⁴³ [Kilolo Brief](#), paras. 37-47.

- Arido claims error, but states in general terms that he “does not have enough space to properly brief the issue”.⁴⁴ Arido’s Brief was his one avenue to show error on appeal. Since he fails to advance arguments, let alone show error in his Brief, his unsubstantiated submissions should be dismissed summarily.⁴⁵ His offer to provide arguments at a later, unspecified, stage would constitute an unfair advantage having first had the opportunity to review all the other briefs on appeal. Doing so would also circumvent the existing briefing schedule and page limits, and would prejudice the finality of this appeal.
- Babala merely refers to his position at trial but shows no error.⁴⁶

I.A.1.c.i. Mangenda and Arido misinterpret article 69(8)

28. In claiming that the Chamber erred “in applying [article 69(8)] to limit its inquiry into the Prosecution’s violation of international human rights”,⁴⁷ Mangenda makes a series of legal and factual errors.

29. First, in repeating his trial arguments that article 69(8) did not apply because the Western Union materials were not “collected by a State” but “obtained directly by the Prosecution, or at [its] direct behest”,⁴⁸ Mangenda misreads the plain text and purpose of article 69(8). As the drafting history reveals, the phrase “evidence collected by a State” in article 69(8) refers not only to evidence collected by a State on its own initiative, but also to evidence collected by a State *at the request of the Prosecutor* under Part IX of the Statute.⁴⁹ Article 69(8) thus equally applies to this case.

30. Mangenda’s submissions are unfounded. He first alleges, without substantiation, that the Western Union materials were collected “by ICC investigators who were not even acting under the colour of authority of an Austrian court order”, but then, a few paragraphs later, argues, again without substantiation, that “[Austria] was acting as nothing more than the ICC

⁴⁴ [Arido Brief](#), paras. 131-148, in particular para. 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.”).

⁴⁵ *Ntaganda* Restrictions AD, para. 21; [Krajišnik AJ](#), para. 26.

⁴⁶ *E.g.*, [Babala Brief](#), para. 25; [Krajišnik AJ](#), para. 24.

⁴⁷ [Mangenda Brief](#), para. 44.

⁴⁸ [Mangenda Brief](#), paras. 45, 49. Also Mangenda Article 69(7) Motion, para. 37.

⁴⁹ Piragoff and Clarke (2016), p. 1749, mn. 74 (“Given the historical background to [article 69(8)], it is likely that no distinction exists dependant on whether the evidence was collected by a State on its own initiative or at the request of the Prosecutor under Part 9 of the Statute.”). Also [First Western Union Decision](#), paras. 36-38.

Prosecutor's agent".⁵⁰ Mangenda's submissions are also wrong. He seeks to supplant the Chamber's clear findings showing that the Prosecution followed the proper process with mere speculation.⁵¹ Nor does his reference to an excerpt of the testimony of P-267 (Western Union focal point) properly convey the import of his entire testimony.⁵²

31. Mangenda's reliance on two domestic cases from the United States (*Nesbitt* and *Burrows*) to purportedly illustrate "the necessity of looking at substance over form" is unrelated to the Court's legal framework.⁵³ Nor does he show how the two cases support his alleged error. In any event, both cases—*Nesbitt* and *Burrows*—are inapposite on the facts.⁵⁴

32. Second, Mangenda and Arido incorrectly advance the existence of international human rights violations as the *only* relevant factor in an article 69(7) analysis, contradicting the Statute's plain reading and the drafters' intentions.⁵⁵ Their interpretation renders article 69(7)'s plain text redundant. Although establishing a violation of an internationally recognised human right is one of two necessary conditions for an article 69(7) analysis, it is

⁵⁰ [Mangenda Brief](#), paras. 45, 47.

⁵¹ [First Western Union Decision](#), para. 56 (noting that the screening of Western Union material was allowed without court order); para. 68 ("[the] Austrian authorities themselves gave the impression that a previous screening of financial information [accorded] with the Austrian law."); [Second Western Union Decision](#), para. 36 ("[...] In fact, the Prosecution had complied with all the formal requirements by engaging with the national authorities in order to legally obtain the requested material."); *contra* [Mangenda Brief](#), para. 45 ("The fact that the same information was provided a second time after an Austrian court order is nothing more than window dressing [...]").

⁵² *E.g.*, [T-35-RED](#), 71:20-22 ("Of course we tried to find the right legal way how we can manage this."); [T-34-RED](#), 46:15-47:25 (noting *inter alia* that the Austrian Prosecutor allowed Western Union to release data from international transactions to the ICC). *Contra* [Mangenda Brief](#), para. 48, fn. 76 (citing only P-267's testimony stating "I...was aware of African war crimes [...]").

⁵³ [Mangenda Brief](#), para. 46.

⁵⁴ *Nesbitt*, pp. 3, 9, 11 (noting that the issue in the case was whether law enforcement may circumvent the need to obtain a subpoena or search warrant for an employee's bank records by merely requesting them directly from the employer financial institution that holds them. Also noting that *the State had not presented evidence regarding whether information was furnished because of a belief that the Bank was the victim of a crime.*); *Burrows*, pp. 1-2 (noting that the bank provided statements to the police in response to an *informal oral request* for information about all of the petitioner's accounts, and that the police obtained copies, *without a warrant or any court process*) (emphases added).

⁵⁵ [Mangenda Brief](#), para. 48 ("Applying [a]rticle 69(8) to any situation where there is any element of State involvement would inappropriately exempt the Prosecution from well-accepted international human rights norms."); [Arido Brief](#), paras. 141-142 (suggesting that the Chamber's interpretation "distorts the significance of international human rights"). See [Lubanga Article 69\(7\) Decision](#), para. 41 (rejecting the view that *any* violation of internationally recognised human rights will necessarily damage the integrity of proceedings before the ICC); *contra* Zappalà (2003), p. 152 ("[...] it seems correct to argue that any violation of internationally recognised human rights *ipso facto* meets the requirement that the integrity of proceedings shall not be impaired."); *but see* Guariglia (2005), pp. 245-246 (noting Zappalà, but stating a more nuanced view).

not a sufficient condition. Rather, any such analysis must further meet one or both of the conditions in articles 69(7)(a) or (b).⁵⁶ The Appellants disregard this critical requirement.

33. Third, Mangenda’s challenge to the “manifestly unlawful” standard misinterprets the commentaries, ICC case law and the ECtHR case law that he relies on.⁵⁷ In stating that the “manifestly unlawful” rule was “heretofore unknown in international criminal jurisprudence”,⁵⁸ Mangenda ignores the drafting history of article 69(8), and its plain text.⁵⁹ Whether a Chamber can make determinations of national law when determining the legality of the evidence was raised and debated during the Preparatory Committee’s negotiations.⁶⁰ The negotiating history supports the conclusion that while a Chamber may not rule on the application of a State’s national law, it could consider compliance or non-compliance with national law as a factual matter relevant to the admissibility of evidence.⁶¹ Mangenda reads the commentary selectively.⁶²

34. Mangenda’s interpretations of the *Lubanga* pre-trial and trial decisions are incorrect.⁶³ His argument that the findings in the *Lubanga* Confirmation Decision “contrast[] with” Trial Chamber VII’s findings on the “manifestly unlawful” standard is obscure. The *Lubanga* Confirmation Decision did not address this legal question.⁶⁴ It did not need to, since—as Mangenda acknowledges—the Pre-Trial Chamber considered the “limited scope of [the confirmation hearing]” and admitted the items seized by the Congolese authorities into evidence, but deferred any “final determination” to the trial.⁶⁵ Moreover, nothing in the

⁵⁶ Above para. 19. Also [Lubanga Article 69\(7\) Decision](#), paras. 35, 39.

⁵⁷ [Mangenda Brief](#), paras. 50-63.

⁵⁸ *Ibid.*, para. 51.

⁵⁹ Above para. 20.

⁶⁰ Piragoff and Clarke (2016), pp. 1721-1722, mns. 19-21.

⁶¹ Piragoff and Clarke (2016), p. 1750, mn. 76.

⁶² [Mangenda Brief](#), para. 60 (noting that “[a]ccording to another view which was widely supported, [the Court] should apply international law and should exclude evidence on the basis of a violation of international standards, regardless of what the national standards might be concerning the manner of its collection. [...]”, but omitting to mention the language of the proposed article 69(8) that followed this discussion, and the understanding that a Chamber could consider national law as a *factual matter*.). See Piragoff and Clarke (2016), p. 1722, mns. 20-21 and Behrens (1999), p. 246.

⁶³ [Mangenda Brief](#), paras. 56-59.

⁶⁴ *Contra* [Mangenda Brief](#), para. 56.

⁶⁵ [Lubanga Confirmation Decision](#), para. 90; [Mangenda Brief](#), para. 56.

Lubanga Confirmation Decision contradicts Trial Chamber VII’s findings: rather, the ruling supports the “manifestly unlawful” standard under article 69(8).⁶⁶

35. Likewise, Mangenda’s reading of the *Lubanga* Article 69(7) Decision is inaccurate.⁶⁷ Contrary to Mangenda’s claim, although the text of article 69(7) is not limited to “serious violations” of the Statute or internationally recognised human rights, the drafters effectively introduced a “seriousness threshold” by establishing the conditions in articles 69(7)(a) and (b).⁶⁸ The *Lubanga* Article 69(7) Decision makes that clear.⁶⁹ In claiming that “[the] ‘manifestly unlawful’ standard imposes the very ‘seriousness’ requirement removed from the Statute”, Mangenda conflates two different concepts: the “seriousness” that may attach to an article 69(7) violation, and the preliminary issue of the “manifestly unlawful” standard which operates only to determine the level of scrutiny a Chamber should afford national law under article 69(8).⁷⁰

36. Mangenda’s reliance on select ECtHR case law is inapposite.⁷¹ Despite claiming that the “manifestly unlawful” standard is “inherently inconsistent”, none of the cases that he advances—*Prezhdarovi* or *Robathin*—stands for that proposition. Neither case relates to the level of scrutiny that a Chamber must afford to national law while assessing a potential article 69(7) violation under the Statute.⁷² Rather, both cases limit their findings to discussing the internationally recognised right to privacy under article 8 of the ECHR.⁷³

37. Fourth, Mangenda incorrectly claims that “the Prosecution’s [mere] involvement in the violation” should have been determinative in the Chamber’s analysis.⁷⁴ Yet again, Mangenda fails to acknowledge the Chamber’s findings that the Prosecution conducted itself in good faith and “believed itself to act in accordance with the existing law during the prior

⁶⁶ [Lubanga Confirmation Decision](#), para. 69 (“[...] Therefore, the mere fact that a Congolese court has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court. This is clear from article 69(8) [...]”).

⁶⁷ [Mangenda Brief](#), paras. 57-59.

⁶⁸ Above para. 19.

⁶⁹ [Lubanga Article 69\(7\) Decision](#), para. 35.

⁷⁰ [Mangenda Brief](#), paras. 58-59.

⁷¹ [Mangenda Brief](#), paras. 54-55.

⁷² *Prezhdarovi*, paras. 49-52 (concluding, on the facts, that article 8 ECHR had been violated); *Robathin*, paras. 39-52 (finding, on the facts, that article 8 ECHR had been violated).

⁷³ *Ibid.*

⁷⁴ [Mangenda Brief](#), paras. 66-69.

contacts.”⁷⁵ Moreover, Mangenda’s reliance on one academic treatise is selective. That same treatise clarifies that “[...] evidence should be rarely excluded unless wilful prosecutorial conduct can be shown.”⁷⁶ And none had been shown here.

I.A.1.c.ii. Kilolo’s reliance on case law does not assist him

38. To challenge the Chamber’s legal analysis of article 69(7), Kilolo incorrectly claims that it “failed to look beyond the limited jurisprudence of the ICC in determining the relevant criteria under [article 69(7)(b)].”⁷⁷ Yet, Kilolo’s argument fails to acknowledge that the Chamber’s analysis was rightly grounded in the Statute’s plain text, its negotiating history and ICC case law.⁷⁸ Article 21 mandates that the Court apply “in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.”⁷⁹ As the Appeals Chamber has found, although *ad hoc* tribunal case law is instructive, the Court’s statutory text takes precedence.⁸⁰ Likewise, “general principles of law derived by the Court from national laws of legal systems of the world [...]” apply only when the statutory texts and rules of international law do not.⁸¹

39. In any event, Kilolo’s recitation of *ad hoc* tribunal and national case law largely supports the Chamber’s reasoning.⁸² His claim that neither the ICC nor the *ad hoc* tribunals

⁷⁵ [First Western Union Decision](#), paras. 54-58, 68-70; [Second Western Union Decision](#), paras. 36-40 (para. 39: “Accordingly, it is clear to the Chamber that the Prosecution did not act with the intention to circumvent national procedures, undertook the necessary steps to obtain the materials and had to—especially because Austrian courts repeatedly issued respective orders—assume that it had obtained the Western Union documents lawfully.”).

⁷⁶ Alamuddin (2010), pp. 304-305 (“[...] Honest mistakes that are made by investigators should not necessarily meet with the same penalty as a deliberate and flagrant disregard for the rules, at least when it comes to the ‘integrity’ prong of the dual test.”). *Contra* [Mangenda Brief](#), para. 68.

⁷⁷ [Kilolo Brief](#), para. 47.

⁷⁸ *E.g.*, [First Western Union Decision](#), paras. 32-40, 63-71.

⁷⁹ Article 21(1)(a), [Statute](#).

⁸⁰ [Lubanga AJ](#), para. 53 (“In the view of the Appeals Chamber, while [the jurisprudence of other international criminal tribunals] may be of assistance, the Court’s legal texts provide for the criteria that are applicable with regard to the admissibility of evidence on appeal.”); [Bemba TJ](#), para. 72 (citing with approval Trial Chamber I’s finding that “whilst relevant jurisprudence from the *ad hoc* tribunals may assist the Chamber in its interpretation of the Statute, the Chamber is bound, in the first place, to apply the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence, pursuant to Article 21(1)(a)”; *also* para. 69 (“Articles 21(1)(b) and 21(1)(c) provide for ‘subsidiary sources of law’, which may be resorted to when there is a *lacuna* in the written law contained in the sources included in Article 21(1)(a).”).

⁸¹ Article 21(1)(c), [Statute](#). *See* [Bemba TJ](#), para. 69 (“Articles 21(1)(b) and 21(1)(c) provide for ‘subsidiary sources of law’, which may be resorted to when there is a *lacuna* in the written law contained in the sources included in Article 21(1)(a).”).

⁸² [Kilolo Brief](#), paras. 39-46.

have expressly defined article 69(7)(b) criteria, in light of the plain text of the decisions he relies on, is incorrect.⁸³ His portrayal of several of these cases is inaccurate.

40. For instance, although Kilolo correctly refers to the *Lubanga* Confirmation Decision to state that judges have the discretion “to seek an appropriate balance between the Statute’s fundamental values in each concrete case” under article 69(7),⁸⁴ he disregards that same Decision’s analysis under article 69(7)(b) which—contrary to his suggestion—provided criteria to assess article 69(7) violations.⁸⁵

41. Likewise, it is unclear why Kilolo assumes that the cited cases from the ICTY and ICTR do not provide the necessary criteria for the Chamber to exercise its discretion under article 69(7)(b).⁸⁶ The Chambers in all those cases conducted a thorough review of the specific facts to reach conclusions. Obviously, a Chamber’s proper exercise of discretion can only be determined on the facts of a particular case. Contrary to Kilolo’s apparent suggestion, abstract legal criteria governing the exclusion of evidence, divorced from the specific circumstances of the case, should be avoided.

42. Although Kilolo prefers select case law from Canada, South Africa, the United Kingdom and France, he fails to show how the holdings in these cases are different from the

⁸³ *Ibid.*, para. 38.

⁸⁴ *Kilolo Brief*, para. 39 (citing *Lubanga Confirmation Decision*, para. 84).

⁸⁵ *Lubanga Confirmation Decision*, paras. 86-90. *Contra* *Kilolo Brief*, para. 39. *Also above* para. 34.

⁸⁶ *Contra* *Kilolo Brief*, paras. 40-41. See *Delalić et al. Exclusion Decision*, para. 55 (“The allegation of the Defence of inducement to confess did not go beyond reading the rules of the Austrian Police procedure to the suspect. This being the only offensive conduct, the Trial Chamber is not satisfied that this by itself was sufficient. [They] do not fall below fundamental fairness and such as to render admission antithetical to or to seriously damage the integrity of the proceedings.”); *Kordić Exclusion Decision*, 13684:9–13685:5 (“The concept of serious damage to the integrity of the proceedings is one that connotes, in my view, shades of conduct, shades of illegality. It is not illegality which will seriously damage the integrity of the proceedings.”; *also* “[each] case has to be judged on its own merits.”); *Brđanin Intercept Decision*, paras. 61, 63 (citing the holding of the *Nikolić* Appeals Chamber: “Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. [...] Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber’s view, usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community [...]” The *Brđanin* Trial Chamber also outlined certain factual circumstances which militated towards the admission of the intercept evidence.); *Karemera Exclusion Decision*, paras. 23-32 (with the Chamber’s detailed analysis on why Joseph Nzirorera’s interview was not admissible); paras. 44-47 (with the Chamber’s analysis on why Mathieu Ndirumutse’s interview relating to his co-accused was not admissible); *Kajelijeli Exclusion Decision*, paras. 8-15 (finding that the facts of the case did not show *contempt*, but that notwithstanding violations of the Chamber’s procedures would not be tolerated.”).

Chamber's own analysis.⁸⁷ Likewise, although Mangenda advances case law from Australia and Canada, he fails to show error.⁸⁸ Nor do the Appellants acknowledge the limited role that domestic law can play in view of the clear wording of article 21.

I.A.1.c.iii. Kilolo misreads articles 99(1) and (4)

43. Kilolo incorrectly claims that the Chamber erred by not applying articles 99(1) and 99(4) in its article 69(7) analysis.⁸⁹ In doing so, Kilolo disregards not only the plain text of these provisions, but also the Chamber's findings and its reasoning rejecting the same Defence arguments at trial.⁹⁰ As Kilolo fails to discharge his burden as appellant, his arguments should be dismissed summarily.⁹¹

44. First, Kilolo disregards the Chamber's findings on the interrelationship between article 69(7) and Part IX of the Statute and, in particular, on whether alleged article 99(1) violations are relevant to article 69(7) determinations.⁹² Article 99(1) states that "[r]equests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State [...]."⁹³ Although Kilolo interprets the Statute—and the phrase "a violation of this Statute" in article 69(7)'s *chapeau*—broadly to include all purported article 99(1) violations,⁹⁴ he fails to engage with the Chamber's comprehensive reasoning.

45. A failure to comply with national procedures in executing a request under Part IX does not necessarily mean that the Statute has been violated in accordance with article 69(7).⁹⁵ In setting out the law on article 69(7), the Chamber found several reasons militating against interpreting Part IX in a sweeping manner for article 69(7) purposes,⁹⁶ including:

⁸⁷ [Kilolo Brief](#), paras. 42-46 (citing case law of the Canadian Supreme Court, the UK House of Lords, the French *Cour de Cassation* and the South African Supreme Court of Appeal).

⁸⁸ [Mangenda Brief](#), paras. 119-121.

⁸⁹ [Kilolo Brief](#), paras. 20-28. *But see* [Mangenda Brief](#), fns. 20, 22 (advancing neither that the Statute was violated, nor that the evidence was unreliable).

⁹⁰ [First Western Union Decision](#), paras. 35-40, 44-45. *Also* [Dutch Intercepts and CDR Decision](#), paras. 16-20.

⁹¹ [Krajišnik AJ](#), para. 18.

⁹² [Kilolo Brief](#), paras. 20-24.

⁹³ Article 99(1), [Statute](#).

⁹⁴ [Kilolo Brief](#), paras. 22-24 (para. 23: "[the] Trial Chamber rendered the *chapeau* element of [article 69(7)] superfluous.").

⁹⁵ [First Western Union Decision](#), para. 36. *Also* para. 40 ("[the] reference to national law in [article 99(1)] describes obligations between the Court and its member states—it indicates how States execute requests for cooperation, and [does] not establish independent rights for the accused [...]").

⁹⁶ [First Western Union Decision](#), paras. 35-40.

- Conflating Part IX considerations with those under article 69(7) would render article 69(8) superfluous.⁹⁷ Doing so would qualify mere infringements of domestic procedure as “violations of the Statute” under article 69(7), and would require a Chamber to “get involved in intricate inquiries about domestic laws and procedures” to ascertain if the Statute had been breached. A Chamber is prohibited from doing so under article 69(8).⁹⁸
- Overly broad interpretations of Part IX provisions would contradict the plain language of article 69(7)’s *chapeau*, which is limited to violations of the Statute or internationally recognised human rights. It excludes domestic procedural violations.⁹⁹

46. The Chamber correctly concluded that “infringements of domestic procedure do not *per se* constitute violations of the Statute under [article 69(7)], even if such infringements are not in accordance with the laws of the requested State referenced in Part IX of the Statute.”¹⁰⁰ In so finding, the Chamber paid attention to principles of treaty interpretation, which require that “every provision in the Statute must be interpreted in a manner which gives every provision meaning and independent content.”¹⁰¹ In contrast, Kilolo fails to consider any of the reasons put forward by the Chamber.¹⁰² Rather, he advances an untenable and unforeseen interpretation of the Statute, and fails to show error.

47. Second, in claiming that the Chamber erred in finding that article 99(4) did not apply, Kilolo misreads article 99(4)’s statutory purpose, and the import of the Chamber’s findings.¹⁰³ The Chamber correctly found that the Western Union materials were not obtained according to the procedure set out in article 99(4), but were provided by the

⁹⁷ [First Western Union Decision](#), para. 37.

⁹⁸ *Ibid.*, para. 37. Also [Third Article 69\(7\) Decision](#), para. 24 (finding with respect to an article 99(1) request for taking Arido’s statements on French territory in compliance with French law that the Chamber was precluded from ruling on whether French law was correctly applied in this context.). *Above* para. 20.

⁹⁹ [First Western Union Decision](#), para. 39.

¹⁰⁰ [First Western Union Decision](#), para. 40.

¹⁰¹ *Ibid.*, para. 40 (“In order to preserve the meaning of [article 69(8)] and to maintain the limits on the kinds of violations specified in [article 69(7)]”). On the principle of effective interpretation, see [Bemba TJ](#), para. 77.

¹⁰² [Kilolo Brief](#), para. 23.

¹⁰³ [Kilolo Brief](#), paras. 25-27.

Austrian authorities in response to the Prosecution’s RFAs.¹⁰⁴ Article 99(4) therefore did not apply.¹⁰⁵

48. As the plain text and commentary make clear, article 99(4) relates to “the ability of the Prosecutor to conduct on-site investigations, and in some instances, to do so outside the presence of national authorities.”¹⁰⁶ As such, it provides the possibility for the Prosecutor to conduct on-site investigations directly on the territory of the requested State. Moreover, for article 99(4) to apply, it must be clear that the Prosecutor’s direct execution of the request is necessary for its successful execution.¹⁰⁷ The text of article 99(4)—the subject of significant debate in Rome—reflects a delicate compromise on the following aspects:

- Article 99(4) relates to two different scenarios: uncooperative territorial States and States concerned with the principle of sovereignty;
- To allay the concerns of some States, the Prosecutor’s capacity to carry out on-site investigations is limited to measures that do not require compulsion and cases where it is necessary for the Prosecutor to do so for the successful execution of a request; and
- The Prosecutor’s ability to carry out an investigative measure, outside the presence of national authorities, includes measures such as taking a statement or evidence from a witness.¹⁰⁸

None of these conditions were present in the Prosecution’s cooperation request to the Austrian authorities and its liaising with the Western Union officials to obtain the Western Union materials. Significantly, contrary to Kilolo’s submission, the Prosecution’s emails to P-267 did not constitute “a direct request on the territory of a State Party pursuant to [article

¹⁰⁴ [First Western Union Decision](#), paras. 42, 45.

¹⁰⁵ *Ibid.*, para. 45.

¹⁰⁶ Kreß and Prost (2016), p. 2148, mn. 2. Also Mochochoko (1999), pp. 314-317 (on the drafting history). Guariglia (1999), p. 233 (“[article 99(4)] provides that the Prosecutor may, subject to specific restrictions, directly execute a request on the territory of the State [...]”); Alamuddin (2010), p. 247; also [Banda Cooperation Decision](#), para. 23 (“[the] general regime applicable for the execution of requests for assistance under [P]art 9 normally presupposes execution by States in accordance with national procedures pursuant to [articles] 93(1) and 99(1) of the Statute and that the direct execution of measures is *lex specialis* to be applied within the terms and conditions of [article 99(4)]”).

¹⁰⁷ Kreß and Prost (2016), p. 2151, mn. 18.

¹⁰⁸ Kreß and Prost (2016), pp. 2148-2149, mn. 5.

99(4)]”.¹⁰⁹ Kilolo adopts a strained interpretation of article 99(4), and ignores its true purpose.¹¹⁰ Since article 99(4) is inapplicable to the case, the Chamber did not need to conduct an “analysis of the interplay between Part IX of the Statute and [a]rticle 69(7) for [a]rticle 99(4) purposes.”¹¹¹

49. Kilolo fails to show that the Chamber erred in its analysis of articles 99(1) and 99(4).

I.A.2. The Chamber correctly interpreted the standard to exclude “derivative evidence”

50. None of the Appellants show that the Chamber erred in the standard it applied to the “derivative evidence”. Kilolo and Mangenda incorrectly argue that the Chamber should have assessed the “derivative evidence” under a different legal standard.¹¹² Arido merely claims that since the Western Union material “served as a trigger” for the proceedings against him, the Chamber should have taken a “different position”,¹¹³ but does not concretely address the issue. Babala merely makes a passing reference to the issue.¹¹⁴

51. Article 69(7), read with article 69(8), is the unique standard at this Court governing the exclusion of unlawfully obtained evidence. The Statute does not prescribe any other legal threshold to determine the exclusion of evidence—whether direct or derivative. Contrary to Kilolo’s and Mangenda’s claims, the Chamber did not err by not considering “whether the fruit of the poisonous tree doctrine applies at the ICC”.¹¹⁵ Given article 69(7), it was not required to consider the doctrine—there is no *lacuna* in the statutory framework. As the Chamber demonstrated in its article 69(7) analysis of the Dutch intercepts and the CDRs, it applied exactly the same article 69(7) standard to the “derivative evidence” as it did to other evidence.¹¹⁶

¹⁰⁹ [Kilolo Brief](#), para. 59.

¹¹⁰ [Kilolo Brief](#), para. 27.

¹¹¹ *Contra* [Kilolo Brief](#), para. 27.

¹¹² [Kilolo Brief](#), paras. 96-100; [Mangenda Brief](#), paras. 119-121.

¹¹³ [Arido Brief](#), paras. 144-148. Also [Arido Brief](#), para. 115 (relying on arguments advanced for the Western Union documents, for arguments on CDRs as well).

¹¹⁴ [Babala Brief](#), para. 26.

¹¹⁵ [Kilolo Brief](#), paras. 96-100; also [Mangenda Brief](#), paras. 119-121 (relying on two domestic cases to support his claim that derivative evidence should be excluded).

¹¹⁶ [First Western Union Decision](#), paras. 72-74; [Dutch Intercepts and CDR Decision](#), paras. 9-20. Also [Second Western Union Decision](#), para. 42.

52. Kilolo concedes that “[the article 69(7)(b) criterion] appears to be consistent with the doctrine of the fruit of the poisonous tree [...]”.¹¹⁷ His claim of error is thus nullified. Moreover, in view of the clear statutory text, his criticism of the *Lubanga* Article 69(7) Decision for declining “to apply the doctrine of the fruit of the poisonous tree” is irrelevant.¹¹⁸

53. Notwithstanding, as Kilolo further acknowledges, the fruit of the poisonous tree doctrine is “not universally employed.”¹¹⁹ As authors have noted, this doctrine is “extremely controversial”.¹²⁰ Although certain domestic jurisdictions (United States, Scotland) have upheld a form of this doctrine, others (for instance, England, Switzerland and Germany) have declined to endorse it.¹²¹ The ECtHR has similarly recognised: “there is no clear consensus” on the existence of an exclusionary rule for derivative evidence¹²² and has rejected its use as an absolute bar on its admission.¹²³ Rather, the ECtHR’s analysis pivots on the nature of the right in question, and whether that right is absolute or not.¹²⁴ As the Chamber correctly

¹¹⁷ [Kilolo Brief](#), para. 100.

¹¹⁸ [Kilolo Brief](#), paras. 97-98.

¹¹⁹ [Kilolo Brief](#), para. 100.

¹²⁰ Jackson and Summers (2012), p. 191.

¹²¹ Jackson and Summers (2012), p. 191 (“[the] German courts have refused to introduce the doctrine, referring instead to the importance of prosecuting crime and to the fact that ‘procedural technicalities’ should not be allowed to derail the criminal proceedings.”); *also* Guariglia (2005), p. 159; *also* Tapper, pp. 504-515 (noting the more nuanced approach in English law towards the exclusion of evidence, and noting the difference between “[the] English rule that evidence is in principle admissible however it has been obtained, subject only to an exclusionary discretion, and the old American rule that illegally obtained evidence should, in principle, be excluded”).

¹²² [Gäfgen v. Germany](#), para. 174 (“The Court notes that there is no clear consensus among the Contracting States to the Convention, the courts of other States and other human rights monitoring institutions about the exact scope of application of the exclusionary rule [referring to paras. 69-74, on the doctrine of the fruit of the poisonous tree]. In particular, factors such as whether the impugned evidence would, in any event, have been found at a later stage, independently of the prohibited method of investigation, may have an influence on the admissibility of such evidence.”); paras. 186-187 (The Court found that articles 3 and 6 had not been violated. It concluded “[that] in the particular circumstances of the applicant’s case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant’s conviction and sentence. *As the applicant’s defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair.*”); para. 163 (“[...] the question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found.”). *Also* [Khan v. United Kingdom](#), paras. 34, 37 (“[the] contested material in the present case was in effect the only evidence against the applicant and that the applicant’s pleas of guilty was tendered only on the basis of the judge’s ruling that the evidence should be admitted. *However, the relevance of the existence of evidence other than the contested matter depends on the circumstances of the case.* In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker.”) (emphases added).

¹²³ [Gäfgen v. Germany](#), paras. 169-188.

¹²⁴ [Gäfgen v. Germany](#), para. 176 (“[the] Court cannot but take note of the fact that Article 3 of the Convention [prohibiting torture and inhuman degrading treatment or punishment] enshrines an absolute right. Being absolute, there can be no weighing of other interests against it, such as the seriousness of the offence under

recognised, the right to privacy is not absolute.¹²⁵ The consequences of its violation must be assessed on the circumstances of each case. No automatic exclusionary rule can apply. The Appellants overlook this reasoning.¹²⁶

54. For the above reasons, the Appellants fail to show that the Chamber erred in assessing the “derivative evidence”. The Appellants’ alleged legal errors should be dismissed.

I.B. THE CHAMBER CORRECTLY DISMISSED THE ARTICLE 69(7) CHALLENGES TO THE WESTERN UNION DOCUMENTS

55. Kilolo, Mangenda, Babala and Arido selectively and inaccurately present the Chamber’s decisions not to exclude the Western Union material under article 69(7).¹²⁷ Their arguments reveal a misunderstanding of the process involved in collecting the Western Union material—despite the clarity provided by the Prosecution, the Austrian authorities, and the Chamber. They also incorrectly presuppose the Prosecution’s bad faith in collecting the materials—despite facts and findings to the contrary. The Appellants’ mere conjecture and speculation cannot supplant the facts and evidence before the Chamber.

56. The Chamber correctly concluded that the admission of the Western Union documents would not be antithetical to and would not seriously damage the integrity of the

investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature [...].”); para. 178 (“However, contrary to Article 3, Article 6 [right to a fair trial] does not enshrine an absolute right. The Court must therefore determine what measures are to be considered both necessary and sufficient in criminal proceedings concerning evidence secured as the result of a breach of Article 3 in order to secure effective protection of the rights guaranteed by Article 6”); see Jackson and Summers (2012), p. 194 (“The ECtHR’s case law clearly demonstrates, however, that it does not endorse [an approach that the use of evidence obtained in violation of a Convention right automatically violates the right to a fair trial]. The fact that evidence has been obtained in violation of one of the substantive rights protected by the Convention, such as privacy or even the right not to be subjected to inhuman treatment, will not necessarily result in a finding of a violation of Article 6 of the ECHR. [...]”); also Ormerod, pp. 9-16 (arguing against automatic exclusion of evidence for article 8 ECHR violations).

¹²⁵ [First Western Union Decision](#), para. 29 (“In the present case, the internationally recognised human right at issue is the right to privacy, which may not be interfered with except ‘in accordance with the law’.”). Also *Ntaganda* Restrictions AD, paras. 101-102 (implicitly recognising that the right to privacy is not an absolute right).

¹²⁶ [Kilolo Brief](#), paras. 95-100; [Mangenda Brief](#), paras. 95-102, 119-121; [Arido Brief](#), paras. 144-148; [Babala Brief](#), para. 26.

¹²⁷ [First Western Union Decision](#), paras. 63-71; [Second Western Union Decision](#), paras. 29-41; see [Mangenda Brief](#), paras. 21-29, 70-94; [Kilolo Brief](#), paras. 48-93; [Arido Brief](#), paras. 123-153; [Babala Brief](#), paras. 21-33.

proceedings.¹²⁸ The Chamber based this conclusion on a comprehensive and accurate understanding of all the circumstances,¹²⁹ including that:

- the Prosecution followed the Austrian authorities’ advice in screening the materials and when triggering the Austrian domestic process for acquiring the Western Union documents *via* its RFAs;
- the Prosecution genuinely believed, at all times, that it had complied with all substantive requirements of Austrian law and “did not act with the deliberate intention to circumvent national procedures”;
- the Austrian authorities consistently approved of the Prosecution’s conduct;
- the general terms and conditions for money transfer services by Western Union “show that the users of Western Union had to be aware that the personal information they provided might be communicated [...] to third parties for a number of reasons and was not subject to absolute privacy”;
- the collection of such records was not *per se* forbidden and Austrian law provided a procedure for obtaining them;
- the Prosecution’s RFAs were approved by the Austrian criminal courts (*Landesgerichts für Strafsachen Wien*) on three separate occasions on 15 November 2012, 5 November 2013 and 15 October 2014. The two former decisions were later annulled by the Higher Regional Court of Vienna (*Oberlandesgericht Wien*)—four years after the initial authorisation on 22 April 2016 and 24 May 2016 respectively. The timing of the *Oberlandesgericht Wien*’s decisions prevented the Prosecution from potentially providing further information to substantiate the RFAs that triggered the Austrian process and thereby remedying any perceived deficiencies in the RFAs;
- the perceived deficiencies in the RFAs did not affect the content of the Western Union material—and ultimately its reliability; and

¹²⁸ See [First Western Union Decision](#), paras. 63-71; [Second Western Union Decision](#), paras. 29-41.

¹²⁹ See [First Western Union Decision](#), paras. 54-61, 63-71; [Second Western Union Decision](#), paras. 29-41.

- the “way these records were obtained did not affect the Defence’s ability to challenge them in any meaningful way”.¹³⁰

57. In establishing the Prosecution’s good faith, the Chamber also considered the Prosecution’s belated disclosure of an investigator’s report documenting some of its interactions with the Austrian authorities.¹³¹ None of the Appellants’ arguments, which principally focus on *only one aspect* of the Chamber’s comprehensive analysis—the Prosecution’s good faith conduct in securing the Western Union materials—undermine the Chamber’s conclusion.

I.B.1. The Chamber correctly found that the Prosecution acted in good faith

58. The Chamber correctly found that the Prosecution acted in good faith when screening and collecting the Western Union records.¹³² The circumstances surrounding the Prosecution’s collection of the Western Union records are uncontroversial and correctly outlined in the Chamber’s First and Second Western Union Decisions.¹³³

- On 16 March 2011, Prosecution investigators met with [REDACTED] the Austrian Ministry of Justice, [REDACTED], to discuss, *inter alia*, “the procedure for ICC RFAs generally”.¹³⁴ During this meeting, [REDACTED] advised that the Prosecution was allowed to screen Western Union material, but that a court order would be required for further use.¹³⁵
- Consistent with this advice, on 28 September and 4 October 2012, Prosecution investigators contacted P-267, their focal point at Western Union, asking if he had information pertaining to certain individuals for whom the Prosecution had information that “they have been involved in suspect transactions via WU [...] over the past 12 months.”¹³⁶ On 11 October 2012, P-267 responded to the second of these

¹³⁰ See [First Western Union Decision](#), paras. 63-71; [Second Western Union Decision](#), paras. 29-41.

¹³¹ See [First Western Union Decision](#), para. 68 (“[t]he belated disclosure of the information is not, in and of itself, indicative that the Prosecution acted in bad faith.”).

¹³² [Second Western Union Decision](#), paras. 36, 39. Also [First Western Union Decision](#), para. 69.

¹³³ [First Western Union Decision](#), paras. 42, 68-69; [Second Western Union Decision](#), paras. 36-37.

¹³⁴ CAR-OTP-0092-0018, at 0018. Also [First Western Union Decision](#), para. 68; [Second Western Union Decision](#), para. 36.

¹³⁵ CAR-OTP-0092-0018, at 0018. Also [First Western Union Decision](#), paras. 56, 68; [Second Western Union Decision](#), para. 36.

¹³⁶ CAR-OTP-0092-0021-R01, at 0021; CAR-OTP-0092-0022-R01, at 0022. Also CAR-OTP-0092-0018, at 0018; [First Western Union Decision](#), para. 42.

emails attaching an excel sheet containing Western Union records pertaining to those individuals.¹³⁷

- On 19 and 20 October 2012, a Prosecution investigator visited the offices of Western Union in Vienna to screen further records.¹³⁸ During that visit, records pertaining to 32 of the 67 names of interest were screened.¹³⁹
- On 2 November 2012, the Prosecution submitted an RFA to the Austrian authorities requesting the transmission of records held by Western Union.¹⁴⁰ The RFA stated that the Prosecution had information that money transfers had taken place and that “[i]t appears that these money transfers could be linked to the commission of crimes under the jurisdiction of the Court such as offences against the administration of justice.”¹⁴¹ The RFA also notified the Austrian authorities that on 19 October 2012 the Prosecution had met with Western Union in Vienna to conduct “a subsequent screening of documents” during which the Prosecution had “identified a number of transactions and movements of large sums of money” that “appear to be of relevance to the ongoing investigation.”¹⁴²
- On 4 and 5 November 2012, a Prosecution investigator conducted a second visit to Western Union, during which he screened the remaining 35 of the 67 names of interest.¹⁴³
- On 7 November 2012, a Prosecution investigator inquired as to whether Western Union had information concerning payments sent or received by Mangenda, using his full name.¹⁴⁴ In response, P-267 claimed he got “300 hits”, attaching a spreadsheet containing that information.¹⁴⁵

¹³⁷ See CAR-OTP-0092-0022-R01, at 0023. Also CAR-OTP-0092-0018, at 0018; [First Western Union Decision](#), para. 42.

¹³⁸ See CAR-OTP-0092-0018, at 0018. Also [First Western Union Decision](#), para. 42.

¹³⁹ See CAR-OTP-0092-0018, at 0018. Also [First Western Union Decision](#), para. 42.

¹⁴⁰ See CAR-OTP-0091-0351 (“Prosecution’s First Austrian RFA”). Also [First Western Union Decision](#), para. 42.

¹⁴¹ CAR-OTP-0091-0351, at 0354, para. 5.

¹⁴² CAR-OTP-0091-0351, at 0354, para. 6.

¹⁴³ CAR-OTP-0092-0018, at 0018. Also [First Western Union Decision](#), para. 42.

¹⁴⁴ CAR-OTP-0092-0033-R02, at 0033.

¹⁴⁵ CAR-OTP-0092-0033-R02; CAR-OTP-0092-0034. Also [First Western Union Decision](#), para. 42.

- On 15 November 2012, a single judge of an Austrian criminal court (*Landesgerichts für Strafsachen Wien*) granted a request by the Austrian Public Prosecutor's office to fulfil the Prosecution's First Austrian RFA.¹⁴⁶ The order attached the Prosecution's RFA which, as noted above, stated that the investigation concerned offences against the administration of justice and noted the Prosecution's prior screening of Western Union records in Vienna.¹⁴⁷
- On 18 October 2013 and 10 October 2014, the Prosecution submitted its second and third RFAs to the Austrian authorities requesting the transmission of Western Union records.¹⁴⁸ The second RFA also referred to the Prosecution's prior conduct *vis-à-vis* Western Union, in particular the screening of Western Union documents prior to the Prosecution's issuance of the first RFA.¹⁴⁹ The third RFA similarly reminded the Austrian authorities of the Prosecution's prior two RFAs.¹⁵⁰ Requests by the Austrian Public Prosecutor's office executing those RFAs were granted by the *Landesgerichts für Strafsachen Wien* on 5 November 2013 and 15 October 2014, respectively.¹⁵¹
- On 16 June 2015, the Prosecution formally submitted to the Chamber the Western Union documents obtained from the Austrian authorities in response to its three RFAs.¹⁵²
- On 22 April and 24 May 2016, the *Oberlandesgericht Wien* rendered two rulings, annulling the two lower-court rulings from 15 November 2012 and 5 November 2013 concerning the first and second RFAs, respectively, but not the third.¹⁵³ Those decisions, obtained without opinions from the Prosecution or the Austrian Prosecutor's office,¹⁵⁴ annulled the lower-court rulings on the basis that the

¹⁴⁶ See CAR-OTP-0092-0834; also [First Western Union Decision](#), paras. 42, 68.

¹⁴⁷ See CAR-OTP-0092-0834, at 0844, paras. 5-6.

¹⁴⁸ See CAR-OTP-0091-0360 ("Prosecution's Second Austrian RFA"); CAR-OTP-0091-0371 ("Prosecution's Third Austrian RFA").

¹⁴⁹ See CAR-OTP-0091-0360, at 0362, paras. 6-7. Also [First Western Union Decision](#), para. 58.

¹⁵⁰ See CAR-OTP-0091-0371, at 0373-0374, para. 11.

¹⁵¹ See CAR-OTP-0074-0829; CAR-OTP-0085-0845; also [First Western Union Decision](#), para. 42.

¹⁵² See [Prosecution's First Bar Table Motion](#), para. 47 and fn. 128; also [First Western Union Decision](#), para. 42.

¹⁵³ See CAR-D24-0005-0001 and CAR-D23-0011-0006 (English translation); CAR-D24-0005-0013 and CAR-D23-0011-0016 (English translation) (Collectively, "the Austrian Decisions"). Also [Second Western Union Decision](#), para. 4.

¹⁵⁴ See CAR-D24-0005-0001, at 0004 ("Damit war – im Zweifel (die Staatsanwaltschaft Wien) ausserte sich zur Beschwerde ebensowenig wie die Oberstaatsanwaltschaft Wien (vgl AS 5 in ON)– von der Rechtzeitigkeit der Beschwerde auszugehen.") and CAR-D23-0011-0006, at 0009 ("neither the Vienna prosecutor nor the Vienna

Prosecution's first and second RFAs, the related order by the Austrian Prosecutor's office and the judicial orders by the *Landesgerichts für Strafsachen Wien* validating the requests had failed to mention the specific offences against the administration of justice to which the Western Union records related.¹⁵⁵ However, and notably, the *Oberlandesgericht Wien* did not rule that the Prosecution's prior screening of Western Union documents was unlawful under Austrian law. Further, the *Oberlandesgericht Wien* explicitly permitted the Austrian Public Prosecutor's office to seek new requests justifying the collection of the Western Union records so long as the requisite level of specificity was provided. It also found that there was no "further need" to examine the Applicants' "other arguments".¹⁵⁶

I.B.1.a. The Chamber correctly found, based on the totality of the circumstances, that the Prosecution acted on the Austrian authorities' advice

59. The Prosecution's conduct in obtaining the Western Union materials was at all times governed and guided by the advice of those best versed in Austrian law and procedure—the Austrian authorities themselves. The Chamber underscored this fact, along with the Prosecution's good faith displayed throughout the investigation.¹⁵⁷

60. Kilolo and Mangenda incorrectly claim that the Chamber failed to consider the totality of the circumstances when assessing the Prosecution's conduct.¹⁵⁸ Contrary to Kilolo's

Public Prosecutor expressed an opinion on the appeal lodged by the people concerned") (English translation); CAR-D24-0005-0013, at 0016 and CAR-D23-0011-0016, at 0019 (English translation).

¹⁵⁵ See CAR-D24-0005-0001, at 0010 and CAR-D23-0011-0006, at 0014 (English translation); CAR-D24-0005-0013, at 0025 and CAR-D23-0011-0016, at 0025 (English translation); also [Second Western Union Decision](#), para. 34.

¹⁵⁶ See CAR-D24-0005-0001, at 0011 and CAR-D23-0011-0006, at 0015 (English translation); CAR-D24-0005-0013, at 0025-0026 and CAR-D23-0011-0016, at 0026 (English translation).

¹⁵⁷ [First Western Union Decision](#), para. 57 ("the Prosecution at no point in time tried to conceal the fact that it had prior contacts with Western Union and access to financial information."); para. 58 ("the Austrian public prosecutor was aware of the prior contacts between the Prosecutor and Western Union and that the Prosecution had access to financial data beforehand when requesting that the orders be approved by an Austrian judge."); para. 68 ("[it] appears that the Austrian authorities themselves gave the impression that a previous screening of financial information was in accordance with the Austrian law" and "the Austrian authorities granted the RFAs in knowledge of the prior contacts of the Prosecution with Western Union and the exchange of information."); [Second Western Union Decision](#), para. 36 ("even though the *Oberlandesgericht* deemed that the information provided by the Prosecution was insufficient, the Prosecution was in no position to know this. In fact, the Prosecution had complied with all the formal requirements by engaging with the national authorities in order to legally obtain the requested material. [...] the Prosecution tried at all times to apprise the Austrian authorities of its actions in respecting of obtaining the Western Union documents [...] the Austrian public prosecutor's office did not request further information and proceeded to request authorisation [to collect the Western Union material] via judicial order."); para. 37 ("more importantly, the first-instance Austrian court provided the judicial orders as requested, so that the Prosecution had to assume that it had fulfilled all necessary requirements to legally obtain the material.").

¹⁵⁸ [Kilolo Brief](#), paras. 37, 48; [Mangenda Brief](#), paras. 72-73.

arguments,¹⁵⁹ the Chamber’s finding that the Prosecution “did not act with the deliberate intention to circumvent” Austrian law or the right to privacy was not based on the Chamber’s “mere[] consider[ation] [of] the OTP’s belated disclosure of its contacts with P-0267 in isolation”.¹⁶⁰ Mangenda also fails to substantiate his argument that the Chamber “blam[ed] the Austrian authorities” or treated the State’s conduct as a “rubber stamp”.¹⁶¹ To the contrary, the Chamber’s detailed analysis fully accounted for all facts and considerations.¹⁶²

61. The Chamber noted that throughout the Prosecution’s efforts to screen and later request the Western Union records, the relevant Austrian authorities had consistently impressed upon the Prosecution that its conduct complied with Austrian law.¹⁶³ As the Chamber correctly noted, that impression came from the Austrian Public Prosecutor’s office, who had earlier informed the Prosecution that the screening of financial information was valid under Austrian law and did not require a court order¹⁶⁴ and who subsequently executed the Prosecution’s RFAs knowing of the Prosecution’s prior screenings.¹⁶⁵ In addition, as the Chamber correctly found, “[t]he Prosecution had also reason to believe that it had complied with all the substantive requirements, since the Austrian [P]ublic [P]rosecutor’s office did not request further information and proceeded to request authorisation of the collection of the Western Union Documents via judicial order.”¹⁶⁶

62. Further endorsement of the Prosecution’s conduct also came from the *Landesgerichts für Strafsachen Wien* which executed the Prosecution’s RFAs in three separate decisions and ordered that the Western Union records be transmitted to the Prosecution.¹⁶⁷ As correctly observed by the Chamber:

Even though the *Oberlandesgericht* deemed that the information provided by the Prosecution was insufficient, the Prosecution was in no position to know this. In fact,

¹⁵⁹ See [Kilolo Brief](#), paras. 48-55, 68-69.

¹⁶⁰ [Kilolo Brief](#), para. 48. Also paras. 56, 90-93.

¹⁶¹ [Mangenda Brief](#) para. 89.

¹⁶² Above paras. 56-58.

¹⁶³ See [First Western Union Decision](#), paras. 68-69; [Second Western Union Decision](#), paras. 36-37.

¹⁶⁴ [First Western Union Decision](#), para. 56.

¹⁶⁵ [First Western Union Decision](#), para. 68; [Second Western Union Decision](#), paras. 36-37.

¹⁶⁶ [Second Western Union Decision](#), para. 36.

¹⁶⁷ [First Western Union Decision](#), para. 68; [Second Western Union Decision](#), paras. 36-37.

the Prosecution *had complied with all the formal requirements* by engaging with the national authorities in order to legally obtain the requested material.¹⁶⁸

63. The Chamber’s understanding that the *Oberlandesgericht Wien* would have allowed the lower court orders to be re-issued based on further substantiating information¹⁶⁹ comes from a plain reading of those decisions. Mangenda fails to undermine the accuracy of that understanding—rather, he confirms that further substantiating information was available at the time, and could have served that purpose.¹⁷⁰ Further, contrary to Babala’s submissions, the Chamber clearly did not “*fait fi des décisions autrichiennes*”,¹⁷¹ as is evident by the Chamber’s specific consideration of the *Oberlandesgericht Wien* decisions in the Second Western Union Decision.¹⁷²

64. Kilolo, Mangenda and Babala fail to acknowledge these findings, let alone show error.

I.B.1.b. The Chamber properly relied on the investigator’s report

65. In concluding that the Prosecution acted in good faith, the Chamber properly considered the investigator’s report summarising the Prosecution’s meeting with the Austrian Public Prosecutor’s office on 16 March 2011 and its subsequent screening of Western Union documents.¹⁷³ Moreover, other facts on the record corroborate the contents of the investigator’s report—including the Austrian authorities’ repeated endorsement of the Prosecution’s conduct. For instance, the Austrian Public Prosecutor’s office’s comment that the Prosecution was permitted to screen Western Union records under Austrian law without requiring a court order¹⁷⁴ is corroborated by the Austrian Public Prosecutor’s office’s and *Landesgerichts für Strafsachen Wien*’s subsequent execution of the Prosecution’s RFAs when they were fully aware of those screenings, and the *Oberlandesgericht Wien*’s lack of any criticism of such conduct. Other independent information corroborates the details in the investigator’s report. For instance, details concerning the Prosecution’s meetings and contacts with P-267 (its Western Union focal point) and screening of Western Union

¹⁶⁸ [Second Western Union Decision](#), para. 36 (emphasis added).

¹⁶⁹ [Second Western Union Decision](#), para. 37.

¹⁷⁰ [Mangenda Brief](#), para. 90.

¹⁷¹ [Babala Brief](#), para. 31.

¹⁷² [Second Western Union Decision](#), paras. 36-37.

¹⁷³ [First Western Union Decision](#), para. 56. [Second Western Union Decision](#), para. 36. *Contra* [Mangenda Brief](#), paras. 74-78; [Kilolo Brief](#), paras. 60-61.

¹⁷⁴ CAR-OTP-0092-0018, at 0018.

records¹⁷⁵ are corroborated by the evidence in the record, including copies of those communications,¹⁷⁶ mission notification reports to the Austrian authorities concerning those meetings,¹⁷⁷ RFAs to the Austrian authorities where those meetings are summarised,¹⁷⁸ and P-267's own testimony documenting the 16 March 2011 meeting.¹⁷⁹

66. These facts, all of which the Chamber accounted for,¹⁸⁰ also undermine Kilolo's contention that "the investigative report is unverifiable hearsay without any independent indicia of corroboration"¹⁸¹ and Kilolo's and Mangenda's arguments that the "report itself is valueless" and that the Chamber "erred in giving any evidential weight whatsoever" to the report.¹⁸² Even if the report were considered "hearsay", as Kilolo concedes, hearsay evidence is in principle admissible,¹⁸³ and in assessing the investigator's report's probative value the Chamber properly considered the report's surrounding circumstances, such as its production, disclosure and information corroborating the document's contents.¹⁸⁴

67. To the extent that the Appellants genuinely sought to challenge the veracity of the investigator's report, they had the opportunity to call witnesses in support of any of their allegations. The Chamber was not obliged to compensate for the Defence's failure to fulfil its burden of persuasion¹⁸⁵ by presenting information or evidence supporting its article 69(7) application.¹⁸⁶ Several cases at this Court recognise that burden. For instance, in *Mbarushimana*, Pre-Trial Chamber I confirmed that:

¹⁷⁵ CAR-OTP-0092-0018, at 0018.

¹⁷⁶ See CAR-OTP-0092-0021-R01; CAR-OTP-0092-0022-R01, at 0022-0023; CAR-OTP-0092-0033-R02.

¹⁷⁷ See CAR-OTP-0092-0892 (notification of October 2012 meeting with Western Union); CAR-OTP-0092-0890-R01 (notification of November 2012 meeting with Western Union).

¹⁷⁸ See CAR-OTP-0091-0351, at 0354, para. 6; CAR-OTP-0091-0360, at 0362, para. 6.

¹⁷⁹ [T-35-RED](#), 70:1-3 ("[we] usually disclose information when, as I said, when it's on urgent cases only for informative and investigative purpose, which should not be used at all for any other things."); 74:16-21 (confirming that "[there] is a difference between evidentiary purposes on the one hand and lead purposes [...] and that what was discussed with the Austrian prosecutor was "how we proceed in the future with certain requests from the international court.").

¹⁸⁰ E.g. [First Western Union Decision](#), paras. 56-59, 68; [Second Western Union Decision](#), paras. 36-37.

¹⁸¹ [Kilolo Brief](#), para. 60.

¹⁸² [Kilolo Brief](#), paras. 60, 66; [Mangenda Brief](#), paras. 74-78.

¹⁸³ See [Kilolo Brief](#), fn. 100, misstating the jurisprudence on hearsay evidence by relying upon the rules required for the admission of prior recorded statements; [Ngudjolo AJ](#), para. 226 ("[that] evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, 'although even this will depend upon the infinitely variable circumstances which surround hearsay evidence'"); [Bemba TJ](#), para. 238. Also [Tolimir AJ](#), para. 126; [Lukić AJ](#), para. 303; [Popović AJ](#), paras. 1276, 1307. Below paras. 185 and 465.

¹⁸⁴ See [First Western Union Decision](#), paras. 56-59, 66, 68-69. *Contra* [Kilolo Brief](#), para. 66.

¹⁸⁵ See [Mbarushimana Confirmation Decision](#), para. 58.

¹⁸⁶ *Contra* [Kilolo Brief](#), paras. 61, 64, 75-82.

[I]t may be presumed that the investigative activities carried out by national judicial and executive authorities in pursuance of domestic investigations or further to a request for co-operation by the Court have been carried out in accordance with the legal provisions applicable in that State.¹⁸⁷

Accordingly, Pre-Trial Chamber I concluded that “there is no burden on the Prosecution to prove that the impugned procedures were legal and that the evidence in question was not obtained in violation of the Statute or internationally recognised human rights.”¹⁸⁸ The Defence not only failed to make such a showing at trial; they now fail to show error on appeal.

68. At trial, the Appellants had sufficient time and opportunity to advance evidence in support of their burden by calling as witnesses or submitting statements from the individuals mentioned in documents they sought to contest. This includes the relevant Austrian authorities or even Prosecution investigators. The Appellants chose not to.¹⁸⁹ That was their decision. Contrary to Kilolo’s submission,¹⁹⁰ articles 64(6)(d) and 69(3) and rule 140(2) give the Chamber the discretion to call or present evidence if it so wishes, but not to compensate or substitute for the Parties’ own responsibility to present evidence. The Appeals Chamber has underscored that “the right to lead evidence pertaining to [...] the right to challenge the admissibility or relevance of evidence in trial proceedings *lies primarily with the parties*, namely, the Prosecutor and Defence.”¹⁹¹ The Appellants’ failure to lead such evidence does not lie at the Chamber’s door. The same is true with the Defence’s failure to concretely object to the introduction of the investigator’s report.¹⁹² The Chamber was not obliged to “inquire into the provenance of [the investigator’s report]” before it was shown to P-267.¹⁹³ To the extent the Appellants had any objections or questions relating to the report’s presentation to P-267, it was for them to do so in a timely manner.

¹⁸⁷ [Mbarushimana Confirmation Decision](#), para. 58.

¹⁸⁸ [Mbarushimana Confirmation Decision](#), para. 60.

¹⁸⁹ As conceded by Kilolo, the Defence did, however, attempt to test the veracity of the investigator’s report by using it during P-267’s cross-examination. [Kilolo Brief](#), para. 79 (citing [T-35-RED](#), 52:17-54:7).

¹⁹⁰ *Contra* [Kilolo Brief](#), paras. 75-78, 81-82.

¹⁹¹ [Lubanga Victim Participation AD](#), para. 93 (emphasis added).

¹⁹² [Kilolo Brief](#), paras. 79-80.

¹⁹³ [Kilolo Brief](#), paras. 80, 82.

I.B.1.c. The Prosecution's screening of Western Union documents was lawful

69. Kilolo, Mangenda and Arido incorrectly presuppose the illegality of the Prosecution's prior screening of Western Union documents¹⁹⁴ when neither the Austrian authorities nor the Chamber ruled as such. None of the Austrian authorities—the Austrian Public Prosecutor's office, the *Landesgerichts für Strafsachen Wien*, and even the *Oberlandesgericht Wien*—found that the Prosecution's prior screening of Western Union records violated Austrian law, despite having information about those screenings and the opportunity to make such ruling.¹⁹⁵ To the contrary, the Austrian Public Prosecutor's office had earlier verified the legality of such screenings in their 2011 meeting with Prosecution investigators, as the Chamber repeatedly observed.¹⁹⁶

70. During trial, the only evidence presented by the Defence to substantiate their allegation that the Prosecution's prior screening of Western Union records was unlawful, came from Mangenda Witness D23-1—a professor of Austrian criminal and comparative criminal law at the University of Salzburg.¹⁹⁷ Mangenda now appears to have abandoned any reliance upon D23-1's evidence¹⁹⁸—and rightfully so. Although D23-1 asserted during trial that the Austrian Banking Act applied to Western Union transactions, he conceded that “the Austrian Banking Act is administrative law [which] is not my speciality, not at all.”¹⁹⁹ When D23-1 was shown language from the terms of service from Western Union forms requiring the express consent of Western Union senders and receivers that their information could be disclosed to third parties for investigative purposes, D23-1 again conceded that he was “not an expert” on the matter and had not “consulted any legal book [or] any court decisions” on the issue.²⁰⁰ He also admitted that the Mangenda Defence had failed to provide him access to material from Western Union, the Austrian Prosecutor's office or “any documents related to this particular case”.²⁰¹

¹⁹⁴ [Kilolo Brief](#), para. 65; [Mangenda Brief](#), paras. 22-25, 70, 92-93; [Arido Brief](#), para. 143.

¹⁹⁵ *E.g.* [First Western Union Decision](#), paras. 58, 68; [Second Western Union Decision](#), paras. 36-37.

¹⁹⁶ *E.g.* [First Western Union Decision](#), paras. 56, 68; [Second Western Union Decision](#), paras. 36-37.

¹⁹⁷ *See generally* [T-44](#).

¹⁹⁸ Mangenda's Brief does not refer to D23-1's testimony.

¹⁹⁹ [T-44](#), 42:1-3. *Also* 42:9 (“I’m not a specialist for administrative, international administrative law”) 44:16 (“without being an expert to international administrative law”), 47:7-8 (“But to be honest, I’m not here for administrative law.”).

²⁰⁰ [T-44](#), 46:17-20.

²⁰¹ [T-44](#), 19:14-20:11. *Also* 30:20-22.

71. The relevance of these concessions is self-evident: D23-1's failure to review Western Union forms or speak with Western Union representatives meant that he had not considered the express consent provisions set out in Western Union forms. As confirmed by Western Union's Associate General Counsel, "[b]oth senders and receivers [of Western Union] are required to waive certain aspects of data privacy to avail themselves of the service" and this waiver "allows Western Union to share data collected about the individuals with [...] third parties, including where there is a reasonable need to help prevent and detect crime".²⁰² The terms and conditions of Western Union forms concerning in-person money transfers (of the type at issue here) include that express consent, and encompass the disclosure of "personally identifiable information, contact details and information relating to the money transfer, transaction history, and any other information supplied" by the Western Union sender or recipient.²⁰³ To the extent that the Austrian Banking Act (*Bankwesengesetz*) applies, article 38(2)(5) permits the release of customer information to third parties without requiring a judicial order where the "customer grants his/her express written consent to the disclosure of secrets".²⁰⁴

72. Kilolo refers to D23-1's evidence without acknowledging or addressing any of the above issues.²⁰⁵ None of the Appellants provide any evidence to support their contention that the screening of Western Union records violated Austrian law, rendering their arguments to that effect deficient.

73. The Appellants' remaining arguments about the Prosecution's screenings equally fail to show that the Chamber erred. First, the Prosecution's conduct did not constitute "more than a mere screening".²⁰⁶ Nothing in the Prosecution's communications with P-267 shows this and Kilolo fails to substantiate this point. Similarly, Mangenda's argument that the Prosecution took "possession" of Western Union documents during its October and November 2012 on-site screenings at Western Union is unfounded.²⁰⁷ The mission notification expressly stated

²⁰² CAR-OTP-0093-0217, at 0218.

²⁰³ *E.g.* CAR-OTP-0093-0219; CAR-OTP-0093-0220; CAR-OTP-0093-0221; CAR-OTP-0093-0222; CAR-OTP-0093-0223; CAR-OTP-0093-0224; CAR-OTP-0093-0225; CAR-OTP-0093-0226; CAR-OTP-0093-0227; CAR-OTP-0093-0229; CAR-OTP-0093-0232; CAR-OTP-0093-0234; CAR-OTP-0093-0237; CAR-OTP-0093-0240; CAR-OTP-0093-0243; CAR-OTP-0093-0246; CAR-OTP-0093-0250; CAR-OTP-0093-0253.

²⁰⁴ CAR-D23-0006-0001, at 0018. Also [T-44](#), 43:2-10; [First Western Union Decision](#), paras. 48-49 (noting the "series of exceptions" as to when the obligation to maintain banking secrecy does not apply under article 38 of the Austrian Banking Act).

²⁰⁵ [Kilolo Brief](#), paras. 21, 59.

²⁰⁶ [Kilolo Brief](#), para. 62.

²⁰⁷ [Mangenda Brief](#), paras. 24, 83-85, 88.

that the Prosecution would not take documents or copies thereof “during this mission”.²⁰⁸ The Prosecution squarely complied with those terms. No documents were collected while Prosecution investigators were in Austria during that mission. The four spreadsheets referred to by Mangenda²⁰⁹ were not, as he suggests,²¹⁰ collected during the Prosecution’s visit but were emailed by P-267 to a Prosecution investigator.²¹¹ Those documents were sent by Western Union following a request by Prosecution investigators that the company simply run “checks” and to inform the Prosecution as to whether Western Union had information concerning transfers between certain individuals.²¹² Likewise, Mangenda’s claim that the financial records sent were “disproportionate” to the time period under investigation must fail.²¹³ Importantly, none of the Austrian courts, including the *Oberlandesgericht Wien*, ever determined that the Prosecution’s conduct in screening the documents violated Austrian law despite being fully apprised of the matter.²¹⁴

74. Second, the Prosecution’s characterisation of its screening request as “urgent” to Western Union was not “misleading” or “misrepresentative”.²¹⁵ That four months elapsed between when the Prosecution received the anonymous tip and when it contacted Western Union, and then a mere six days passed between its first and follow-up email, does not show that the Prosecution’s representations to Western Union were misleading or intended to “coax[] [them] into divulging confidential banking records”.²¹⁶ The Appellants’ submissions misunderstand the nature of investigations, and their usual course and trajectory—determined, often, by their complexity. Kilolo and Mangenda overlook that during this time, the *Bemba* Main Case was in progress, witnesses for whom there were reasons to believe that they were being corruptly influenced were testifying, and time was of the essence. During that period, the Prosecution was also undertaking other investigative steps to evaluate the veracity of the initial information provided to further investigate the allegedly unlawful conduct.²¹⁷ Likewise, contrary to Kilolo’s claim, the Prosecution need not have immediately

²⁰⁸ *E.g.* CAR-OTP-0092-0892-R01, at 0892.

²⁰⁹ [Mangenda Brief](#), para. 24, fn. 33.

²¹⁰ [Mangenda Brief](#), para. 24.

²¹¹ The metadata for these documents (CAR-OTP-0092-0029; CAR-OTP-0092-0030; CAR-OTP-0092-0031; CAR-OTP-0092-0032) makes clear that they were attached to a 7 November 2012 email by Prosecution investigator [REDACTED] to P-267; and *not* as Mangenda suggests, in the footnote, “given to the Prosecution on 4 November 2014”).

²¹² CAR-OTP-0092-0021-R01; CAR-OTP-0092-0033-R02.

²¹³ *Contra* [Mangenda Brief](#), para. 26.

²¹⁴ *Above* para. 69.

²¹⁵ *Contra* [Kilolo Brief](#), para. 58; [Mangenda Brief](#), para. 86.

²¹⁶ [Kilolo Brief](#), para. 58.

²¹⁷ [First DU Records Access Request](#), para. 3; [Article 70 Investigation Notice](#), paras. 7-12.

sought a search warrant from the Austrian authorities following its initial screening.²¹⁸ Moreover, Kilolo disregards that an RFA was issued to the Austrian authorities less than two weeks after that initial screening.

75. Third, contrary to Mangenda's speculation, the Austrian authorities were neither misled nor did they fail to understand the nature and scope of the Prosecution's past screenings as detailed in its RFAs.²¹⁹ Rather, as further confirmation that the Prosecution's conduct was appropriate, the screenings were not found to be unlawful,²²⁰ the Austrian Prosecutor's office never asked for clarification concerning the later screenings²²¹ and the *Oberlandesgericht Wien* decisions were strictly based on the lack of substantiation of the initial RFAs, but did not comment on the screenings.²²²

76. Fourth, Kilolo fails to substantiate why the Prosecution would need to notify the Austrian Ministry of Justice that it had obtained information from Western Union through P-267.²²³ He fails to identify why such action would be required under Austrian law or the Statute, or how it could have affected the Chamber's article 69(7) assessment. He omits mentioning that the Austrian Public Prosecutor's office had previously approved the Prosecution's screenings of Western Union records.²²⁴ Kilolo also fails to demonstrate why the Prosecution's failure to notify the Austrian Ministry of Justice of that conduct undermines the Chamber's assessment that the Prosecution acted in good faith.

77. Fifth, Kilolo and Mangenda fail to explain how the October 2012 mission notification's reference to the Côte d'Ivoire (CIV) situation would have had any bearing on the legality of the Prosecution's subsequent acquisition of Western Union documents.²²⁵ Nor do they acknowledge that the Prosecution informed the Austrian authorities of the October 2012 mission and its connection with the article 70 allegations in its RFA, and that the RFA was nonetheless executed by the Austrian authorities.²²⁶

²¹⁸ [Kilolo Brief](#), paras. 57, 64.

²¹⁹ *Contra* [Mangenda Brief](#), para. 82.

²²⁰ *Above* paras. 69-72.

²²¹ *E.g.* [Second Western Union Decision](#), para. 36; [First Western Union Decision](#), paras. 57-58.

²²² *E.g.* [Second Western Union Decision](#), para. 34.

²²³ [Kilolo Brief](#), para. 63.

²²⁴ *Above* paras. 58, 61, 65.

²²⁵ [Kilolo Brief](#), para. 63; [Mangenda Brief](#), para. 24.

²²⁶ *Above* paras. 58, 61-62, 65.

78. Finally, the Chamber did not “ignore[] its own finding” that the Prosecution reviewed Western Union documents prior to issuing its first RFA to the Austrian authorities.²²⁷ The Chamber noted this fact in its First Western Union Decision and referred back to that consideration in its Second Western Union Decision.²²⁸

I.B.2. The Chamber correctly assessed the remaining factors in its analysis

79. Notwithstanding their unsubstantiated allegations regarding the Prosecution’s conduct, the Appellants fail to demonstrate any error in the Chamber’s comprehensive assessment and consideration of other factors in its analysis, detailed above²²⁹ and below.²³⁰

80. First, in claiming that the Chamber legally erred in failing to consider “all the evidence taken together” and thus comply with article 74(2),²³¹ Kilolo misapprehends the purpose of this provision. Article 74(2) relates to the scope of an article 74 decision, and not to a Chamber’s duty to assess the evidence in its totality. Notwithstanding, Kilolo and Mangenda fail to show that the Chamber erred in assessing the totality of the evidence before it. There is no indication that the Chamber undervalued the violation of the right to privacy by conducting a “fragmented and compartmentalised” assessment or failed to conduct “a holistic view of the trial record”.²³² To the contrary, the Chamber’s detailed analysis was based on a full consideration of the facts and relevant factors.²³³

81. Second, the Chamber did not err in concluding that the Defence had a full opportunity to challenge the authenticity and use of the Western Union records at trial.²³⁴ The Chamber was reasonable to consider potential prejudice to the Accused’s rights when ascertaining the impact that admission of the Western Union documents would have on the proceedings, and concluding that there was no such prejudice. In suggesting otherwise, Mangenda effectively seeks to establish a *per se* exclusion rule by comparing a breach of privacy to torture.²³⁵ His comparison is unpersuasive. Unlike the prohibition against torture which has *jus cogens*

²²⁷ *Contra* [Kilolo Brief](#), para. 57.

²²⁸ See [First Western Union Decision](#), paras. 54-59, 69; [Second Western Union Decision](#), para. 36.

²²⁹ *Above* para. 56.

²³⁰ *Below* paras. 80-84.

²³¹ [Kilolo Brief](#), paras. 49, 68. See article 74(2): The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings.

²³² [Mangenda Brief](#), paras. 70-73 (claiming that the Chamber undervalued the right to privacy).

²³³ [First Western Union Decision](#), paras. 42-71; [Second Western Union Decision](#), paras. 21-40.

²³⁴ [Second Western Union Decision](#), para. 38. *Contra* [Mangenda Brief](#), para. 91.

²³⁵ [Mangenda Brief](#), para. 91.

status and is non-derogable,²³⁶ the right to privacy is not absolute.²³⁷ The Chamber, unlike Mangenda, was mindful of this distinction, noting that “the transmission of the Western Union Documents was not per se forbidden and that the Austrian law provides for a procedure to legally obtain them.”²³⁸

82. Third, Kilolo’s argument that the Chamber failed to consider the “chilling effect” of the Prosecution’s collection of Western Union material on Defence Counsel is unwarranted.²³⁹ As a preliminary matter, Kilolo did not make this argument during the article 69(7) litigation at trial,²⁴⁰ which explains why the Chamber did not consider it.²⁴¹ Kilolo cannot now fault the Chamber for his own error, as no court can be expected to guess all potential arguments which the Defence may assert but did not actually present. For this reason alone, Kilolo’s challenge should be dismissed.

83. In any event, Kilolo’s argument is unpersuasive. Nothing in the Prosecution’s conduct or the Chamber’s article 69(7) decisions suggests that the Prosecution “can effectively go rogue and investigate Defence Counsel based on insufficient information”.²⁴² As illustrated above, the Prosecution’s investigative activities are governed by domestic and international law, which the Chamber found the Prosecution consistently sought to comply with.²⁴³ The Chamber’s decisions reinforce these principles: they underscore that both the Prosecution and the Austrian authorities consistently sought to operate within the parameters of the law and took measures to ensure that compliance.

84. Kilolo also fails to show *how* the Prosecution’s conduct would have led to a “chilling effect [...] on Defence Counsel in this and in all future cases before the ICC”.²⁴⁴ Kilolo’s argument that “all Defence Counsel” are now presented with “two untenable choices: either

²³⁶ *E.g.*, [Ntaganda Second Jurisdiction Decision](#), para. 51.

²³⁷ [Lubanga Article 69\(7\) Decision](#), para. 21.

²³⁸ [Second Western Union Decision](#), para. 37.

²³⁹ [Kilolo Brief](#), paras. 83-89.

²⁴⁰ See [First Western Union Decision](#), paras. 11-14; [Second Western Decision](#), paras. 9-16. Also generally [Bemba: Bemba Article 69\(7\) Motion](#); [Bemba Response to Second Western Union Motion](#); [Kilolo: Kilolo Article 69\(7\) Motion](#), paras. 21-54; [Kilolo Response to other Article 69\(7\) Motions](#); [Kilolo Response to Second Western Union Motion](#); [Mangenda: Mangenda Article 69\(7\) Motion](#), paras. 18-48; [Mangenda Response to other Article 69\(7\) Motions](#); [Mangenda Response to Second Western Union Motion](#); [Babala: Babala Article 69\(7\) Motion](#); [Babala Response to Second Western Union Motion](#); [Arido: Arido Inadmissibility Motion](#), paras. 38-49; [Arido Second Western Union Motion](#).

²⁴¹ [Krajišnik AJ](#), para. 22.

²⁴² [Kilolo Brief](#), para. 87.

²⁴³ *Above* paras. 57-68.

²⁴⁴ [Kilolo Brief](#), para. 47.

zealously represent the accused and risk coming under investigation by the OTP, or take cover and provide a less-than zealous representation [...]” does not distinguish between proper Defence representation and the commission of a crime.²⁴⁵ As the Prosecution and Chamber repeatedly emphasised at trial, the Prosecution’s investigation and this case “was evidently not about judging the Defence before the Court in general” and “not about criminalising legitimate Defence strategies”, or even about “a grey area in law pertaining to Defence behaviour.” Rather it was strictly “about [the] clear and downright criminal behaviour of the five accused”.²⁴⁶ “Zealous representation” is never, and should never, be an excuse to engage in unlawful practices. That Kilolo’s argument implicitly advances a contrary premise is an unfortunate reminder of his failure to appreciate the gravity of his crimes, and why a clear message that such conduct should not be tolerated is needed from the Court.

85. Finally, all of Arido’s arguments on this issue should be dismissed summarily.²⁴⁷ The Chamber did not “factually misrepresent[]” Arido’s position as to the reliability of the Western Union documents.²⁴⁸ The Chamber noted Arido’s argument in its First Western Union Decision, considered it, and concluded that “[t]he Arido Defence does not provide any further explanation for its assertion and the Chamber fails to see how the content of the material—and ultimately its reliability—is affected by the fact that it was unlawfully produced”.²⁴⁹ Arido fails to mention this.

86. Similarly, Arido’s argument that “[the] silence in the Trial Judgment makes the [Chamber’s] legal holdings unreviewable” disregards that all of his challenges were addressed in interlocutory procedural decisions relating specifically to those challenges.²⁵⁰ The Chamber was not required to recapitulate those holdings again in its Judgment.

²⁴⁵ [Kilolo Brief](#), para. 89.

²⁴⁶ [T-50](#), 13:7-20. Also [T-10-RED](#), 27:8-10 (Prosecution opening noting that the case “[was] not an attack against the Defence bar, much less against [the] lawyer-client privilege”).

²⁴⁷ [Krajišnik AJ](#), para. 24 (noting that the mere repetition of unsuccessful arguments from trial without demonstrating that the Chamber’s rejection constituted an error should be summarily dismissed).

²⁴⁸ [Arido Brief](#), paras. 123-124.

²⁴⁹ [First Western Union Decision](#), paras. 14, 62.

²⁵⁰ [Arido Brief](#), paras. 125-130. See generally [First Western Union Decision](#); [Second Western Union Decision](#); [Arido Additional Requests Decision](#).

I.B.3. Counsel immunity could not and did not bar the introduction of the Western Union documents

87. Kilolo's and Babala's argument that the Chamber failed to consider if Kilolo's article 48(4) immunity, as counsel, had been violated should be dismissed.²⁵¹ Kilolo had no immunity for his illegitimate and criminal activities. As the Presidency noted, counsel and persons assisting them do not enjoy immunity for alleged article 70 offences.²⁵² And even if such immunity may exist, it was effectively waived in this case.²⁵³ Kilolo and Babala fail to show error.

88. First, Kilolo never raised consideration of Defence Counsel immunity in the context of the article 69(7) litigation.²⁵⁴ Second, although Kilolo claims that the Chamber erred "by failing to consider the scope, purpose and waiver of Defence Counsel immunity", he fails to acknowledge the import of the most significant judicial pronouncement on the scope of such immunity in this case—the Presidency Immunities Decision rendered on 20 November 2013.²⁵⁵ Kilolo and Mangenda never enjoyed immunity in the course of the investigation, neither before nor after the arrest warrant against them was issued.²⁵⁶ By extension, no waiver would be needed for investigative steps preceding Kilolo's and Mangenda's arrest and detention for those offences.²⁵⁷

89. The Presidency—following a request by the Single Judge²⁵⁸—expressly concluded that the immunities enjoyed under the Headquarters Agreement and the Immunities Agreement "are granted to counsel and persons assisting counsel only to the extent necessary for the performance of their functions".²⁵⁹ It also underscored that counsel's legitimate functions "*do*

²⁵¹ [Kilolo Brief](#), paras. 29-36, 70-74; [Babala Brief](#), paras. 19-20. Also article 48(4): ("Counsel [...] required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court."); rule 22(3): ("In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel [...] and any other document adopted by the Court that may be relevant to the performance of their duties.").

²⁵² [Presidency Immunities Decision](#), para. 10.

²⁵³ *Ibid.*, para. 11.

²⁵⁴ [Kilolo Brief](#), paras. 70-74; [Krajišnik AJ](#), para. 25.

²⁵⁵ [Kilolo Brief](#), paras. 29-30, particularly para. 33 ("The Trial Chamber failed to consider that *waiver* of Defence Counsel's immunity belongs exclusively to the Presidency.").

²⁵⁶ *Contra* [Kilolo Brief](#), paras. 36, 71-72.

²⁵⁷ *Contra* [Babala Brief](#), para. 19; [Kilolo Brief](#), paras. 35, 72 (f).

²⁵⁸ [SJ Immunities Request](#), p. 1 (also noting the Prosecution's request "[s]uch privileges and immunities, and their waiver, apply only with respect to the exercise of jurisdiction by national courts with respect to their official capacity before the ICC, and do not serve as a limitation to their prosecution under Article 70 of the Statute before this Court.").

²⁵⁹ [Presidency Immunities Decision](#), para. 10 (emphasis added). Also article 25, [Headquarters Agreement](#) regulating the immunities of counsel in the territory of the host State (article 25(1): "Counsel shall enjoy the

not extend to the types of conduct depicted in articles 70(l)(b) and article 70(l)(c) of the Rome Statute, which [Kilolo and Mangenda] are alleged to have undertaken.”²⁶⁰ As a result, the Presidency determined that no waiver was needed for the arrest and potential detention of Kilolo and Mangenda for the article 70 offences.²⁶¹ In doing so, the Presidency primarily followed the approach the Prosecution had proposed: that immunity could only extend to acts of counsel in their official capacity, but could not be a bar to prosecution for their commission of a crime.²⁶² Thus, the Presidency permitted Kilolo and Mangenda to be arrested and detained after being well-apprised that the Prosecution’s arrest warrant application was based, in part, on intercepted telephone conversations between them in the months leading up to the arrest warrants.²⁶³

90. Because the Immunities Agreement and Headquarters Agreement are limited to the protection of legitimate acts “necessary for the independent performance [of counsel’s] functions”,²⁶⁴ they do not prevent or preclude counsel from being the subject of an investigation concerning the commission of criminal acts. Thus, they cannot bar genuine investigative measures in respect of acts which might constitute a crime, such as immunising counsel from judicially authorised wiretaps in the course of an investigation into suspected criminal conduct, as in the circumstances of this case. As reasoned by the Presidency’s Decision, the “relevant purposes of such immunities are the good administration of justice, the proper functioning of the Court and the independent performance of counsel’s functions.”²⁶⁵ Clearly these purposes “do not include the commission of offences against the

following privileges, immunities and facilities to the extent necessary for the independent performance of their functions [...]”; article 25(1)(c): “immunity from legal process of every kind in respect of words spoken or written and all acts performed by them in their official capacity [...]”; article 18, [Immunities Agreement](#), regulating the immunities of counsel on the territory of signatory States other than the host State (article 18(1): “Counsel shall enjoy the following privileges, immunities and facilities to the extent necessary for the independent performance of his or her functions [...] (a) Immunity from personal arrest or detention and from seizure of his or her personal baggage; (b) Immunity from legal process of every kind in respect of words spoken or written and all acts performed by him or her in official capacity [...]”). Also Karagiannakis (2016), p. 1316, mn. 12 (noting that defence counsel and persons assisting them have immunity “[...] sufficient to assure the proper administration of justice and to allow counsel to conduct investigations in other States, including interviewing of witnesses and collecting documents.”).

²⁶⁰ [Presidency Immunities Decision](#), para. 10 (emphasis added). Also [Arrest Warrant](#), para. 28.

²⁶¹ [Presidency Immunities Decision](#), para. 10.

²⁶² See [SJ Immunities Request](#), p. 2 (where the Single Judge noted the “delicate issue” and requested the Presidency to waive the privileges and immunities of Kilolo and Mangenda, or to follow the interpretation given by the Prosecution).

²⁶³ See generally [Arrest Warrant](#).

²⁶⁴ Art. 18(1), [Immunities Agreement](#); Art. 25(1), [Headquarters Agreement](#).

²⁶⁵ [Presidency Immunities Decision](#), para. 13.

administration of justice”, nor their attempt, planning, assisting, aiding, covering up or any other form of participation in the crime.²⁶⁶

91. The Presidency also decided, in any event, to “waive[] to the extent necessary” those immunities, including for Kilolo’s and Mangenda’s “potential detention on remand pending investigation or prosecution” of the article 70 offences.²⁶⁷ The Presidency reasoned that, first, in the circumstances of this case, immunities from arrest and detention would “impede the course of justice” if Kilolo and Mangenda were to flee and evade investigation and prosecution for article 70 offences and, second, immunities “can be waived without prejudice to the purposes for which they are accorded”,²⁶⁸ which did not include the commission of article 70 offences.²⁶⁹ Thus, even if it were to be argued that Kilolo had immunity (which he did not), it was waived to the extent that his conduct was being investigated for article 70 offences.

92. Third, contrary to Kilolo’s argument, the Presidency’s determination obviated the Chamber’s need to consider the matter as an interlocutory one as it had already been adjudicated.²⁷⁰ That decision was also definitive given that: (1) the Chamber was not the proper forum to consider whether Counsel immunity should be waived in the first place as the Immunities Agreement and Headquarters Agreement vest the Presidency with authority over whether to waive such immunity;²⁷¹ (2) absent express powers to review the Presidency’s decision, the Chamber could not review or alter the Presidency’s decision; and (3) since the scope of appeals delineated in the Statute generally excludes the review of Presidency decisions, the Appeals Chamber cannot do so either.²⁷² Moreover, Babala’s argument that he was unable to challenge the Presidency Immunities Decision before the

²⁶⁶ [Presidency Immunities Decision](#), para. 13. *Contra* [Kilolo Brief](#), para. 32.

²⁶⁷ [Presidency Immunities Decision](#), para. 13.

²⁶⁸ [Presidency Immunities Decision](#), para. 11.

²⁶⁹ [Presidency Immunities Decision](#), paras. 12-13.

²⁷⁰ [Kilolo Brief](#), para. 30.

²⁷¹ *E.g.*, article 26 (2)(f) [Immunities Agreement](#): (The privileges and immunities may be waived: in the case if counsel and persons assisting defence counsel, *by the Presidency*). Also article 30(2)(b)(ii), [Headquarters Agreement](#).

²⁷² [Katanga Article 108 Decision](#), paras. 15-17 (noting the limited scope of appellate review under the Statute, that, for this reason, an appeal against a Presidency decision under article 108 is inadmissible, but suggesting that the ASP consider whether the Statute should be amended to allow appeals against certain decisions of the Presidency.); also [Confirmation Decision](#), para. 10 (where the Pre-Trial Chamber declined to revisit the Presidency Immunities Decision); para. 10 (noting that some of the issues raised by the Defence had been “decided upon by [...] the Presidency [and] [the Chamber] cannot review previous decisions issued by [...] other organs of the Court.”).

Chamber²⁷³ is unfounded since he made no attempt to challenge that decision before either the Chamber or the Presidency. To the extent Babala challenges the Pre-Trial Chamber's determination not to review the Presidency Immunities Decision, he fails to show any error in the Pre-Trial Chamber's determination that it "cannot review previous decisions issued by the Single Judge or by other organs of the Court", including the Presidency.²⁷⁴ Indeed, that decision was sound for the reasons already articulated.

93. Fourth, Kilolo's argument erroneously conflates two distinct principles: legal professional privilege under rule 73(1) and the immunities afforded to Counsel under article 48(4).²⁷⁵ The two are independent of one another and protect different interests. Legal professional privilege protects communications made in the context of the counsel and client relationship.²⁷⁶ The privilege does not attach where communications are made in the context of a crime.²⁷⁷

94. Counsel immunities, on the other hand, are intended to protect the Court's interests *vis-à-vis* a State's domestic interests due to the unique nature of practicing before an international court.²⁷⁸ As noted by the ICTY Appeals Chamber, "members of the defence working in an international criminal court [, however,] operate in a different legal environment than those working in domestic criminal courts."²⁷⁹ As a result, basic investigative steps such as interviewing witnesses and gathering evidence "in a State's territorial jurisdiction may be more difficult without the grant of functional immunity, as there is always a risk that a State could interfere by exercising its jurisdiction in such a way as to impede or hinder the activities of the defence."²⁸⁰ Notwithstanding, immunities provided to Defence counsel are obviously not intended to protect and immunise them from being investigated for the commission of crimes. Indeed, it would be manifestly absurd and render the crime-fraud exception to privilege obsolete if counsel continued to enjoy immunities provided under article 48(4) even when they were being investigated for committing an article 70 offence.

²⁷³ [Babala Brief](#), para. 20.

²⁷⁴ [Confirmation Decision](#), para. 10.

²⁷⁵ *E.g.* [Kilolo Brief](#), paras. 33, 72(f).

²⁷⁶ Rule 73(1) of the Rules.

²⁷⁷ [Intercept Authorisation Decision](#), para. 4.

²⁷⁸ [Gotovina Restraining Order AD](#), para. 30.

²⁷⁹ [Gotovina Restraining Order AD](#), para. 31.

²⁸⁰ *Ibid.*

95. Kilolo's reliance on the ICTY *Gotovina* decision is inapposite.²⁸¹ In *Gotovina*, the ICTY Appeals Chamber, similar to the Presidency Decision, accepted that functional immunity is limited "to the actions in fulfilment of their official functions before the Tribunal and in the interests of the United Nations" and "does not allow them to violate domestic criminal laws with impunity."²⁸² While that decision was limited to precluding the exercise of functional immunity when committing domestic crimes, the *ad hoc* tribunal practice confirms the limited scope of functional immunity by allowing the prosecution of Defence counsel for contempt of court at international criminal tribunals. In *Rašić*, decided after *Gotovina*, a Defence case manager was investigated for (and pleaded guilty to) five counts of contempt, and no question of immunity was addressed.²⁸³ Similarly, in *Vujin*, former Defence counsel was convicted of contempt without discussion of the need for any waiver.²⁸⁴ Likewise, the ICTR Appeals Chamber has confirmed that although Defence counsel, in principle, have functional immunity, "the nature of their mission" determines whether they have such immunities.²⁸⁵ Such mission is limited "to engage in preparation for proceedings before the Tribunal."²⁸⁶

96. Finally, Kilolo's claim that "[the] Austrian decision did not merely recapitulate Defence arguments" and that the Chamber erred in so finding is obscure.²⁸⁷ A plain reading of the first Austrian Decision shows otherwise.²⁸⁸ Moreover, the Austrian courts could make no finding on Defence counsel immunity, when the issue is solely within the Presidency's remit. Nor is the Austrian Decision's reference to article 18 of the Rome Statute—a provision governing preliminary rulings on admissibility of a case—apposite on the issue of immunities or on the facts of this case.²⁸⁹

97. For these reasons, Kilolo's and Babala's submissions should be dismissed.

²⁸¹ [Kilolo Brief](#), para. 32.

²⁸² [Gotovina Restraining Order AD](#), para. 34.

²⁸³ See [Rašić AJ](#), paras. 58, 65-71 (noting that Rašić was "Milan Lukić's Case Manager when she committed the crimes"). Also [Rašić SJ](#), para. 18.

²⁸⁴ See generally [Tadić Contempt TJ](#), [Vujin 2001 AJ](#).

²⁸⁵ [Bagosora Immunities AD](#), para. 23.

²⁸⁶ *Ibid.*

²⁸⁷ [Kilolo Brief](#), para. 70. See [Second Western Union Decision](#), para. 30.

²⁸⁸ See CAR-D24-0005-0001, at 0011 and CAR-D23-0011-0006, at 0015 (English translation) (noting that "[m]oreover, it remains to be determined whether there are any obstacles to prosecution, within the meaning of article 18 of the Statute; the Applicants argue that the privileges and immunities enjoyed under this article [...]", but making no finding).

²⁸⁹ See [Second Western Union Decision](#), para. 30, fn. 47 (noting "[t]he ruling" states "Article 18 of the Statute" "but the Chamber assumes that the arguments of the appellants were geared towards Article 48 of the Statute.").

**I.C. THE CHAMBER CORRECTLY DISMISSED THE APPELLANTS' CHALLENGES TO THE
COLLECTION AND RELIANCE ON THE DETENTION CENTRE LOGS AND RECORDINGS**

I.C.1. The collection of the Detention Centre logs and recordings was lawful

98. The Prosecution's collection of the Detention Centre logs and recordings of non-privileged calls was lawful and reasonable. The Detention Centre calls and recordings were transmitted to the Prosecution following authorisation by the Single Judge on 8 May 2013 based on evidence showing Bemba's and Babala's use of the Detention Centre telephone system to commit article 70 offences.²⁹⁰ On 30 October 2015, the Trial Chamber subsequently reviewed that decision.²⁹¹ The Chamber correctly concluded that the Single Judge had acted according to the Statute and that access to the Detention Centre materials was necessary and proportionate to its objective.²⁹² The Chamber further found that the admission of the Detention Centre materials into evidence did not violate article 69(7).²⁹³ Bemba now repeats many of his trial challenges, but without showing that the Single Judge or the Chamber erred. Bemba also misreads the Chambers' respective decisions.²⁹⁴

99. First, Bemba misreads the Single Judge's 8 May 2013 decision. Bemba's suggestion that the Single Judge "jettisoned the specific regime for detention monitoring"²⁹⁵ as set out in the Regulations of the Court and the Regulations of the Registry is unsupported. Bemba cites the Single Judge's summary of the Prosecution's request for "[the] Chamber to exercise its powers under article 57(3)(a) of the Statute".²⁹⁶ Merely because the Single Judge did not follow Bemba's preferred language did not mean that he was not clearly mindful of the relevant provisions in the Regulations of the Court and Registry, as suggested by the Single Judge's reference to both sets of Regulations in his decision²⁹⁷ and the Prosecution's reference to both Regulations, including the specific provisions that Bemba refers to, in its application.²⁹⁸

100. But even if the Single Judge had operated solely based on article 57(3)(a) to authorise the collection of the Detention Centre materials, he would have been correct. Article 57 is the

²⁹⁰ See generally [First DU Records Access Decision](#).

²⁹¹ See generally [Third Article 69\(7\) Decision](#).

²⁹² See [Third Article 69\(7\) Decision](#), paras. 11-19.

²⁹³ *Ibid.*

²⁹⁴ [Bemba Brief](#), paras. 141-154. Also [Krajišnik AJ](#), paras. 18, 24.

²⁹⁵ [Bemba Brief](#), para. 142.

²⁹⁶ [First DU Records Access Decision](#), p. 3.

²⁹⁷ *E.g.* [First DU Records Access Decision](#), paras. 7-9.

²⁹⁸ See [First DU Records Access Request](#), paras. 27, 32-33, 36-37, 41.

overarching provision regulating the functions of the Pre-Trial Chamber, including during investigations. None of the specific Regulation provisions cited, contrary to Bemba's assertion, impose duties or restrictions on judges with respect to *the collection of evidence*. Regulation 100 of the Regulations of the Court concerns visits to the Detention Centre and regulations 174 and 175 of the Regulations of the Registry relate to the duties and powers of Detention Centre officials. Neither Regulation governs the Chamber's power to order the production of evidence they deem necessary. Bemba shows no error.

101. Second, the Chamber correctly understood that the Single Judge applied a "reasonable suspicion" standard when granting the request regarding the Detention Centre material.²⁹⁹ The Single Judge's 8 May 2013 decision stated that "[w]henver a *suspicion* as to the behaviour of an accused arises, recordings of telephone conversations can be of the essence in allowing the relevant authorities to properly investigate and determine the matter."³⁰⁰ The Single Judge "reiterated" this standard in his 27 May 2013 decision, noting that "the main purpose for recording telephone conversations from and to the detention centre is to allow the relevant authorities to access them at a later stage when the *reasonable suspicion* as to the commission of a crime arises".³⁰¹ In finding that the Single Judge "apparently appli[ed] a standard of 'reasonable suspicion'", the Chamber cited both of the above passages.³⁰² Bemba neither acknowledges this, nor shows error.

102. Third, Bemba incorrectly suggests that the Chamber "put the cart before the horse" by citing his failure to identify alternative measures.³⁰³ The Chamber correctly concluded that Bemba had failed to identify "that any other reasonable measure was available in order to obtain such information" for purposes of the Prosecution's investigation.³⁰⁴ Bemba's submission that this finding is "factually incorrect" is itself factually incorrect.³⁰⁵ While Bemba had cited other precedents in his motion to the Chamber, they were never advanced to argue for access to the Detention Centre records through less intrusive means.³⁰⁶ Those references were instead part of Bemba's attempts to increase the evidential threshold he

²⁹⁹ *Contra* [Bemba Brief](#), paras. 144-146.

³⁰⁰ [First DU Records Access Decision](#), para. 9 (emphasis added).

³⁰¹ [Second DU Records Access Decision](#), para. 10 (emphasis added).

³⁰² [Third Article 69\(7\) Decision](#), para. 16.

³⁰³ [Bemba Brief](#), paras. 148-149.

³⁰⁴ [Third Article 69\(7\) Decision](#), para. 16.

³⁰⁵ [Bemba Brief](#), para. 148.

³⁰⁶ *Contra* [Bemba Brief](#), para. 149.

thought should have been required, as part of his efforts to exclude the admission of those records.³⁰⁷

103. Fourth, Bemba fails to show why the Chamber erred when determining that the “Prosecution’s access to the Detention Centre Materials was necessary”. Nor does he demonstrate that the Single Judge failed to balance Bemba’s rights.³⁰⁸ Bemba cites no evidence supporting these allegations. To the contrary, the Single Judge’s decision, as noted by the Chamber, expressly recalled that the Detention Centre calls and logs “may be of essence for the Prosecutor to be able to shed further light on the relevant facts [...] for purposes of her investigation.”³⁰⁹ Further, as noted by the Chamber, the Single Judge ensured that “access to the Detention Centre Materials was proportionate to its objective.”³¹⁰ As summarised by the Chamber:

Before the relevant Detention Centre Materials were reviewed, the Single Judge found that (i) the ‘nature and legal status’ of communications between Mr Bemba and Mr Mangenda on a non-privileged line did not preclude direct access, and (ii) the different composition of Prosecution teams in the [Main Case] and the *Bemba et al.* case adequately addressed concerns regarding defence rights and the integrity of the proceedings. Trial Chamber III also has confirmed that the Prosecution’s access to, *inter alia*, the Detention Centre Materials resulted in no violation of Mr Bemba’s rights in respect of the Main Case. Finally, the Registry and Prosecution indicated that, as noted with approval by the Single Judge, the Prosecution would only receive recordings identified as relevant to its investigations.³¹¹

Bemba’s challenge entirely omits the Chamber’s careful and considered analysis.

104. Fifth, in granting the Prosecution’s request to access the Detention Centre records, the Single Judge’s decision was not based on “vague, unsubstantiated allegations”.³¹² Rather, it was a reasoned judicial determination based on evidence implicating Bemba and others in allegedly corrupting witnesses in the Main Case. The Prosecution meticulously detailed the

³⁰⁷ See generally [Bemba Response to Prosecution Second Bar Table Motion](#).

³⁰⁸ [Bemba Brief](#), paras. 143, 148-150.

³⁰⁹ [First DU Records Access Decision](#), para. 4. Also [Third Article 69\(7\) Decision](#), para. 16; [Second DU Records Access Decision](#), para. 10.

³¹⁰ [Third Article 69\(7\) Decision](#), para. 17.

³¹¹ [Third Article 69\(7\) Decision](#), para. 17 (citations omitted).

³¹² [Bemba Brief](#), para. 146.

factual basis supporting its request, referring to its analysis and the underlying support for its conclusions.³¹³ The Prosecution's request was based on numerous and varied sources, including the Prosecution's interviews with resource persons and witnesses, Western Union transfers between the Appellants and Defence witnesses in the Main Case, payments by the VWU to witnesses, information on Defence witnesses in the Main Case already known to the Prosecution, and information known about the telephone numbers used to communicate with Bemba in the Detention Centre.³¹⁴ Bemba disregards the totality of the Prosecution's analysis on the basis of which the Single Judge issued his decision³¹⁵ and upon which that decision was confirmed by the Chamber.³¹⁶

105. Finally, Bemba fails to show why the Detention Centre materials should be excluded as "derivative evidence".³¹⁷ Apart from relying on the inapplicable "fruit of the poisonous tree" doctrine,³¹⁸ Bemba relies on the unfounded and unsupported premise that Caroline Bemba's "diplomatic immunity" was found to be violated when, as the Chamber correctly observed, the *Oberlandesgericht* decisions never ruled on that issue.³¹⁹ Bemba also fails to substantiate at all, why the Chamber had any obligation to redact Detention Centre calls that were not privileged and relevant to the Prosecution's investigations.

106. Bemba's remaining challenges should be summarily dismissed:

- Bemba fails to cite any legal basis requiring the Prosecution to call witnesses or tender evidence to attest to the selection process or procedures adopted to collect the Detention Centre materials.³²⁰ The evidence was *prima facie* reliable and relevant and tendered through a Bar Table motion.³²¹ To the extent Bemba genuinely sought to challenge such matters, he had the right to present such evidence himself, which he did through D20-1's evidence.

³¹³ See [First DU Records Access Request](#), paras. 9-28.

³¹⁴ See [First DU Records Access Request](#), paras. 9-28.

³¹⁵ See [First DU Records Access Decision](#), paras. 1-2.

³¹⁶ See [Third Article 69\(7\) Decision](#), para. 16.

³¹⁷ [Bemba Brief](#), paras. 180-185.

³¹⁸ See paras. 50-54.

³¹⁹ [Second Western Union Decision](#), para. 30. *Above* para. 96.

³²⁰ [Bemba Brief](#), paras. 151, 184.

³²¹ *E.g.* [Prosecution Second Bar Table Motion](#), paras. 10-16; [Prosecution Fifth Bar Table Motion](#), paras. 15-16.

- Bemba fails to cite any authority requiring the Chamber to obtain “sworn assurances” from the Prosecution that it had not accessed detention recordings from Mangenda.³²² Such assurances were also redundant. The Prosecution is obliged “not [to] deceive or knowingly mislead the Court [or] judge”.³²³ The Appeals Chamber itself previously relied on the Prosecutor’s assurance that “neither she nor any member of her office working on the *Bemba* case had access to the conversations of Mr Kabongo” without requiring anything more.³²⁴ In accusing the Prosecution of wrongdoing and breaching this obligation, Bemba provides nothing more than an Annex showing that members of the Prosecution in the Main Case received Registry notification of court filings in the article 70 case.³²⁵ Those notifications fail to support Bemba’s allegation that the Main Case members accessed detention recordings from Mangenda. Nor, in any event, does such notification have any impact on this case. If at all, any such allegation could only be relevant to the Main Case.
- Bemba’s suggestion that he was denied the right to challenge the Detention Centre material,³²⁶ discounts the Chamber’s full consideration of this issue.³²⁷ As the Chamber reasoned, “there is no requirement that a detained person have an opportunity to be heard where an application is made under Article 57(3)(a) of the Statute.”³²⁸ Indeed, “[t]his is all the more true in the particular circumstances of this case, where prior consultations with Mr Bemba would have defeated the purpose for which the Article 57(3)(a) request was made.”³²⁹

I.C.2. The Chamber’s approach towards the Detention Centre logs and recordings was correct

107. The Chamber’s methodology for analysing the Detention Centre logs and recordings was reasonable and consistent with D20-1’s evidence.³³⁰ The Chamber’s approach was fully detailed and its methodology sufficiently specific. The Chamber did not need to further

³²² [Bemba Brief](#), para. 152.

³²³ [Code of Conduct for the Office of the Prosecutor](#), para. 71(g).

³²⁴ [Disqualification AD](#), para. 59.

³²⁵ [Bemba Brief](#), para. 152, fn. 262.

³²⁶ [Bemba Brief](#), para. 153.

³²⁷ [Third Article 69\(7\) Decision](#), para. 12.

³²⁸ [Third Article 69\(7\) Decision](#), para. 12.

³²⁹ [Third Article 69\(7\) Decision](#), para. 12.

³³⁰ [Judgment](#), paras. 226-227. Also [Prosecution Closing Brief](#), paras. 45-49. *Contra* [Bemba Brief](#), paras. 312-315.

elaborate on its methodology, including on what purportedly constitutes a “plausible discrepancy”.³³¹

108. As the Chamber correctly determined, and as D20-1 confirmed, due to technical irregularities in the Detention Centre’s recording device, “the sequence of utterance by two interlocutors” was an identified “problem”.³³² This meant that the sequence of utterances between two individuals in the recordings may not be aligned in the same manner as they occurred in fact.³³³ However, contrary to Bemba’s and Babala’s assertions, the Detention Centre recordings were not “fundamentally unreliable”.³³⁴ Standalone utterances remained reliable. D20-1 repeatedly confirmed that only the *sequence* of utterances was affected and that the *content* and *order* of utterances for each individual speaker was entirely unaffected and appeared to be accurate.³³⁵ Significantly, he confirmed that “[t]here was no evidence that [content was] missing”³³⁶ and that “the issue of reliability of these recordings is relative to the questions that one asks about them.”³³⁷ Consequently, the Chamber determined that it would not rely “on the audio recordings or their transcripts/translations in isolation” and that “the reliability of the recording depends on the type of information on which the Chamber seeks to rely.”³³⁸ The Chamber cautiously decided that “where discrepancies appear plausible, the Chamber refrained from relying on the recordings.”³³⁹ In such circumstances, the Chamber “relied on [the recordings and transcription/translations] only if corroborated by other evidence.”³⁴⁰ Bemba and Babala identify no error in this approach.

I.D. THE CHAMBER CORRECTLY UNDERSTOOD AND APPLIED THE LAW ON THE LEGAL PROFESSIONAL PRIVILEGE

I.D.1. The Chamber applied the correct evidentiary threshold for communications falling within the crime-fraud exception

109. The Prosecution’s collection of communications intercepted by the Dutch authorities and screened by the Independent Counsel was lawful. On 29 July 2013, following an evaluation of the information presented by the Prosecution, the Single Judge properly noted

³³¹ *Contra* [Bemba Brief](#), paras. 314-315.

³³² [Judgment](#), para. 227.

³³³ [Judgment](#), para. 227.

³³⁴ [Bemba Brief](#), para. 312. Also [Babala Brief](#), para. 36.

³³⁵ [Judgment](#), para. 227. Also *e.g.* [T-43-RED](#), 67:3-70:3.

³³⁶ [T-43-RED](#), 67:3-25.

³³⁷ [T-43-RED](#), 68:1-5.

³³⁸ [Judgment](#), para. 227.

³³⁹ [Judgment](#), para. 227.

³⁴⁰ [Judgment](#), para. 227.

that he was “satisfied that there are sufficient elements warranting access by the Prosecutor to those recordings which might have been instrumental to the furthering of the scheme under investigation”.³⁴¹ The Single Judge correctly recognised that “communications effected in furtherance of crime or fraud provide an exception to the principle of professional privilege” and authorised the Prosecutor to seize the Belgian and Dutch national authorities to collect Kilolo’s and Mangenda’s telephone calls “which might be of relevance for the purposes of the investigation”.³⁴² Upon challenge by the Defence, the Trial Chamber, on 15 May 2015 and repeatedly thereafter,³⁴³ approved the Single Judge’s order, noting that “communications effected [to further] crime or fraud are exempted from the principle of professional privilege” and thereby subject to disclosure.³⁴⁴

110. Kilolo’s contention that the Court should adopt a “clear and compelling evidence” standard to invoke the crime-fraud exception—a test he imports from domestic common law systems—overlooks the clear language and intent of the Single Judge’s Decision, and the overwhelming facts of the case that compelled the crime-fraud exception to be triggered.³⁴⁵ His mere preference for a different standard for triggering the crime-fraud exception shows no error. Nor does Bemba’s comment that privilege can only be lifted in “very exceptional circumstances” show error on the facts of this case.³⁴⁶

111. In claiming that the Chamber “applied an erroneous definition of privilege”,³⁴⁷ Bemba conflates two distinct concepts: (i) the legal exception to the privileges generally enjoyed by a person and his or her legal counsel, including privileged communications (“the crime-fraud exception”); and (ii) the determination of the scope of materials covered by the crime-fraud exception (“relevance” to the assessment of criminal responsibility).³⁴⁸ None of the

³⁴¹ [Intercept Authorisation Decision](#), para. 5. *Contra* [Kilolo Brief](#), paras. 111-115.

³⁴² [Intercept Authorisation Decision](#), pp. 5-7 (authorising the Prosecutor to seize the relevant authorities of Belgium and of The Netherlands, to collect logs and recordings of telephone calls placed or received by Kilolo and Mangenda).

³⁴³ *E.g.* [First Article 69\(7\) Decision](#), paras. 13, 20; [Second Article 69\(7\) Decision](#), paras. 19-32; [Dutch Intercepts and CDR Decision](#), para. 35; [Seized Material Review Decision](#), para. 14; Bemba Items Decision, p. 5.

³⁴⁴ [IC Reports Decision](#), para. 14.

³⁴⁵ [Kilolo Brief](#), paras. 115, 117. *See* [Intercept Authorisation Decision](#), para. 3 (“The statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(l)(b) of the Statute, is *obviously forfeit* whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when - as in the present case - the counsel seems to be an accomplice in the scheme.”) (emphasis added).

³⁴⁶ *E.g.* [Bemba Brief](#), paras. 160-162.

³⁴⁷ [Bemba Brief](#), paras. 155-163.

³⁴⁸ *E.g.* [Intercept Authorisation Decision](#), para. 4 (noting the crime-fraud exception: “that communications effected [to further] crime or fraud provide an exception to the principle of professional privilege is broadly

Appellants, including Bemba, actually challenge the first concept—the finding by the Single Judge and the Chamber that communications effected to further a crime or fraud provide an exception to the professional privilege owed to a person and his or her counsel.³⁴⁹ Bemba concedes, in fact, that “other international courts and domestic jurisdictions do not consider privilege absolute”, noting a decision by the SCSL that “privilege can be lifted in connection with communications that were in furtherance of a crime, or if there was *prima facie* evidence that the communications were intended to promote fraudulent activity.”³⁵⁰

112. Instead, Bemba appears to argue that evidence of such conduct—communications which fall within that exception—should be subject to some higher threshold than “relevance” prior to their production.³⁵¹ Not only does Bemba fail to identify what that threshold is; he also fails to acknowledge that the Statute and Rules prescribe a “relevance” threshold for both the collection and introduction of evidence.³⁵² Article 54(1)(a) permits the Prosecution to extend its investigation to all “facts and evidence *relevant* to an assessment of whether there is criminal responsibility”.³⁵³ “Relevance” and probative value (as balanced against prejudicial effect) is also the standard governing the introduction of evidence under articles 69(3) and (4) and rules 63(2) and 64. The Chamber’s and Single Judge’s use of a relevance test was thus entirely consistent with the Statute and Rules as a whole.

113. Bemba’s argument that “[i]t is [...] impossible to read a test of relevance into the text of Rule 73(1)” is unsupported, and wrong.³⁵⁴ Rule 73 simply establishes the existence of

accepted both at the national and the international level”); para. 6 (“since such communications are ordinarily privileged unless an abuse is suspected or shown, the need for safeguards aimed at duly circumscribing the exception now arises”, “[the] scope of such exception must be determined in light of, and limited by, the specific reasons warranting such exception.”); para. 7 (noting the relevance standard: “[t]he appointed counsel would have to review and screen all recordings, [to identify] those providing elements which might be relevant for the limited purposes of the Prosecution’s investigation [...]. Accordingly, privilege would be strictly maintained on all such recordings which would not offer elements of interest or relevance for the purposes of the Prosecutor’s investigation. [...]”); [Seized Material Review Decision](#), paras. 22-23 (noting that the Independent Counsel report should detail the “material he considers to be relevant and not privileged”); [IC Reports Decision](#), para. 15 (noting the need to decide the scope of materials falling within the crime-fraud exception); para. 16 (“the Chamber has conducted its own independent analysis of the relevance and potentially privileged character of the documents in question”); para. 17 (“[when] assessing the selected materials ‘relevance’, the Chamber has only considered relevance to the case generally”); para. 19 (setting out the parameters of the case which “are of particular importance when deciding which materials are relevant”).

³⁴⁹ [Intercept Authorisation Decision](#), paras. 3-4; Bemba Items Decision, p. 5; [IC Reports Decision](#), para. 14. See [Bemba Brief](#), paras. 155-163; [Kilolo Brief](#), paras. 111-117; [Mangenda Brief](#), paras. 95-115; [Babala Brief](#), paras. 13-20.

³⁵⁰ [Bemba Brief](#), para. 160 (emphases and citations omitted). Also [Bangura Subpoena Decision](#), para. 12.

³⁵¹ [Bemba Brief](#), paras. 155-162.

³⁵² *Contra* [Bemba Brief](#), para. 156.

³⁵³ The article is applicable *mutatis mutandis* to article 70 proceedings pursuant to rule 163(1).

³⁵⁴ [Bemba Brief](#), para. 159.

privileges for certain communications and information; it does not relate to the scope of the Prosecution's investigative powers if such privileges are abused to commit article 70 offences.

114. Article 54 is *lex specialis* to that effect and prescribes the applicable threshold for all investigative activities, including article 70 offences. Contrary to Kilolo's argument,³⁵⁵ article 54 is a sufficient basis to authorise the collection of the intercepts. By its clear terms, article 54(1) authorises the Prosecution to "collect and examine evidence relevant to an assessment of whether there is criminal responsibility under this Statute". The article applies *mutatis mutandis* to article 70 offences as per rule 163(1) and is supplemented by rule 165(1), which similarly states that "[t]he Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative". As noted by the Chamber, "[t]hese provisions give the Prosecution a wide mandate to collect evidence relevant to its investigations."³⁵⁶ Bemba and Kilolo challenge the plain text of article 54 without foundation and without refuting the Statute's plain terms. Moreover, Bemba's reliance on the case law of other courts "on the circumstances in which privilege can be lifted, and the extent to which it can be lifted" is unconvincing: (1) the Statute is the governing law on investigative activities at the Court, and its terms in this respect are clear; (2) the SCSL test of "*prima facie*" evidence is effectively akin to the one applied to trigger the crime-fraud exception in this case; not higher; and (3) references to the STL, ECtHR and Dutch law concern the exceptional nature of the crime-fraud exception; not the legal threshold related to the production of communications relating to that exception.³⁵⁷

115. Bemba's concern that the relevance test is too broad is also misguided.³⁵⁸ Obviously, communications in which a client confides in his or her lawyer to obtain legitimate legal advice do not fall within the crime-fraud exception, even if those communications concern the client's commission of a past crime. What it does capture, however, are conversations that are relevant to the lawyer's or his or her client's *abuse* of that relationship to perpetrate a crime, as occurred here. As the Chamber correctly observed, "[n]o legal system in the world

³⁵⁵ *Contra* [Kilolo Brief](#), paras. 118-124.

³⁵⁶ [First Article 69\(7\) Decision](#), para. 18.

³⁵⁷ [Bemba Brief](#), paras. 160-162.

³⁵⁸ [Bemba Brief](#), para. 159.

can accept the bribing of witnesses, the inducement of witnesses to lie or the illicit coaching of witnesses. Nor can the International Criminal Court.”³⁵⁹

116. The Chamber also applied a clear standard to identify the information covered by the crime-fraud exception and which is thus not privileged—a standard of “relevance” as consistent with the Statute and Rules.³⁶⁰ The Chamber detailed how it assessed relevance:³⁶¹ “when assessing the selected materials’ ‘relevance’, [it] only considered relevance to the case generally.”³⁶² The Chamber also noted that “whether a given communication satisfies the crime/fraud privilege exception must be evaluated in the context of the charges as a whole”, and then gave examples of its analysis.³⁶³ It cautioned against a piecemeal approach, and underscored that “[whether] such communication falls—either as privileged or as crime/fraud excepted—will depend on a proper appreciation of the broader context of the given communication.”³⁶⁴ The Chamber then identified the temporal parameters of what was relevant (end of 2011 to 14 November 2013), and outlined its overall assessment approach.³⁶⁵

117. The Single Judge and the Chamber correctly found that there was sufficient evidence justifying the interception of Kilolo’s and Mangenda’s telephone communications. As detailed below,³⁶⁶ the Prosecution relied on numerous and varied sources, including direct evidence of the Appellants’ telephone logs and conversations and their payments to Defence witnesses. That evidence showed that the Appellants were using telephone communications to facilitate the commission of crimes against the administration of justice—the veracity of which is demonstrated by the communications referred to throughout the Judgment. In arguing that the Chamber should have conducted its own “independent analysis” of the evidence that the Single Judge initially relied upon to authorise the intercepts,³⁶⁷ Kilolo fails to explain why the Chamber had to do so when it was in the Single Judge’s province to do so as the Pre-Trial Chamber was the proper Chamber then seised of the matter.

³⁵⁹ [T-50](#), p. 15, lns. 19-21.

³⁶⁰ *Contra* [Kilolo Brief](#), paras. 111-115.

³⁶¹ [IC Reports Decision](#), para. 17.

³⁶² [IC Reports Decision](#), para. 17.

³⁶³ [IC Reports Decision](#), para. 18.

³⁶⁴ [IC Reports Decision](#), para. 18.

³⁶⁵ [IC Reports Decision](#), paras. 19-20.

³⁶⁶ *Below* para. 142.

³⁶⁷ [Kilolo Brief](#), para. 116.

118. In any event, in determining whether those communications should be disclosed to the Prosecution, the Chamber “conducted its own independent analysis of the relevance and potentially privileged character of the documents in question.”³⁶⁸ Kilolo disregards this decision entirely. Kilolo also overlooks that the Chamber re-iterated this in its 16 September 2015 decision, in which it not only agreed with the Single Judge’s interpretation of the law, but conducted its own determination that there was a crime-fraud exception, and itself applied safeguards to ensure that no privileged communications were provided to the Prosecution.³⁶⁹ Finally, Kilolo merely speculates that the Chamber would have reached a different conclusion from the Single Judge if it had itself evaluated the evidence that led to his approval to intercept the communications.³⁷⁰ To the contrary, the Chamber’s consistent endorsement of the intercept process’s legality and the Single Judge’s authorisation, despite multiple challenges by the Defence,³⁷¹ all demonstrate that the Chamber endorsed the Single Judge’s decisions.

119. In addition to articulating and applying a clear and concise standard for identifying the information covered by the exception, the Chamber and the Single Judge were careful to identify those communications which they deemed to be “relevant” to the crime-fraud exception. The communications challenged by the Defence clearly fall within that exception.³⁷² Bemba’s contrary argument does not assist: that these conversations are relied upon in the Judgment demonstrates that the Independent Counsel’s and the Chamber’s assessments that they were relevant and fell within the crime-fraud exception were correct. For instance, Mangenda’s conversation with Bemba concerning the *Barasa* case (CAR-OTP-0079-0191) was clearly relevant as it concerned Bemba’s and Mangenda’s efforts to cover-up their crimes following a leak to the Main Case Defence of the Prosecution’s article 70 investigation.³⁷³ The conversations captured in CAR-OTP-0079-0102 (relevant to the use of codes), CAR-OTP-0079-1732 (relevant to the payment of potentially illegitimate money to D-25), CAR-OTP-0079-1744 and CAR-OTP-0082-0618 (relevant to the illicit coaching of D-15), CAR-OTP-0079-0191 and CAR-OTP-0082-1309 (relevant to Bemba’s and Kilolo’s attempts to cover-up their crimes and hinder the article 70 investigation), were all discernibly

³⁶⁸ [IC Reports Decision](#), para. 16.

³⁶⁹ [First Article 69\(7\) Decision](#), para. 13.

³⁷⁰ [Kilolo Brief](#), para. 117.

³⁷¹ *E.g.* [First Article 69\(7\) Decision](#), paras. 17-21; [Second Article 69\(7\) Decision](#), paras. 25-32; [IC Reports Decision](#), para. 14; [Dutch Intercepts and CDR Decision](#), paras. 21-34; [Seized Material Review Decision](#), paras. 12-16.

³⁷² *Contra* [Bemba Brief](#), para. 163.

³⁷³ [Judgment](#), para. 820. *Contra* [Bemba Brief](#), para. 163.

relevant to the convictions entered,³⁷⁴ and were not, as Bemba argues, simply involving legitimate Defence activities.

120. Bemba's challenge that the Dutch authorities collected communications that were "irrelevant" and thus the Chamber erred in relying on them³⁷⁵ is counterintuitive. The Chamber, the Single Judge, the Independent Counsel and the Dutch authorities did not have the power of precognition, so as to be able to "weed" out irrelevant communications as they occurred and before they are reviewed. Without that supernatural ability, it is inevitable that the Dutch authorities would intercept communications that could, in fact, be privileged and/or irrelevant to the commission of crimes. For that reason, the Single Judge and the Chamber rightfully endorsed a process whereby an Independent Counsel, and subsequently the Chamber, would review those communications to ensure that only those falling within the crime-fraud exception are disclosed to the Prosecution. Following confirmation of the charges, the Chamber also gave "the owner of and potential privilege-holders" the right to make objections before any such disclosures.³⁷⁶ That process ensured that the rights of "the owner and potential privilege-holders" were properly protected while permitting the disclosure of evidence relevant to the commission of crimes. Bemba fails to demonstrate any error in that process.

121. Kilolo's remaining challenges are subject to summary dismissal as he advances no argument:

- The Chamber was keenly aware that the "purpose of the legal professional privilege" is to facilitate free communication between counsel and the accused.³⁷⁷ The Chamber noted that "Mr Kilolo, as counsel for Mr Bemba, enjoyed the privilege of communicating freely and in confidence with his client, as provided by Rule 73 of the Rules, including by telephone at the ICC Detention Centre."³⁷⁸ Indeed, the Chamber so appreciated the importance and value of this privilege that later when, sentencing Kilolo, it found that its abuse constituted an aggravating circumstance enhancing

³⁷⁴ *E.g.*, [Judgment](#), paras. 480, 567-568, 615-616, 752-753, 782-784, 792, 809-810, 820, 836.

³⁷⁵ [Bemba Brief](#), paras. 155, 163; [Krajišnik AJ](#), para. 22.

³⁷⁶ [Intercept Authorisation Decision](#), paras. 7-8; [Seized Material Review Decision](#), paras. 16-23; [IC Reports Decision](#), para. 2. *Also* paras. 132-140.

³⁷⁷ *Contra* [Kilolo Brief](#), paras. 108-110.

³⁷⁸ [Sentencing Decision](#), para. 179.

Kilolo's culpable conduct.³⁷⁹ Kilolo points to no finding or reasoning by the Chamber suggesting that it had failed to appreciate the importance of a lawyer's right to communicate freely with counsel.

- Kilolo incorrectly assumes the "lack of any pre-existing framework" to determine the use of potentially privileged communications at this Court.³⁸⁰ In doing so, he disregards the clear statutory language and instead focuses on the fact that the right to privacy requires a legal regime for it to be protected. Rather, the legal regime protecting attorney-client communications is set forth in rule 73 which protects privileged communications between counsel and those they represent. Further, article 69(7) enables the Court to exclude evidence which violates the right to privacy. Kilolo also overlooks that the Prosecution, as noted by the Chamber, "did not exercise this mandate in the absence of judicial authority, but duly applied to the Single Judge for authorisation to obtain the Challenged Materials under Article 57(3)(a) of the Statute."³⁸¹ As the Chamber concluded, "[j]udicial authorisation of this kind is a main safeguard when considering infringement of the rights of the accused."³⁸²

I.D.2. The collection and transmission of the intercepted materials was lawful

122. Bemba's challenges to the Prosecution's collection and admission of the intercepted communications distort the process by which those records were authorised, reviewed, transmitted, and subsequently submitted to the Chamber.³⁸³

I.D.2.a. The collection of intercepted materials by the national authorities was lawful

123. Throughout the collection process, the Prosecution, the Single Judge, the Chamber and the Dutch authorities diligently ensured that the interception process was conducted according to Dutch law and the Statute. The record, which is extensive, shows that from the very beginning, on 19 July 2013, the Prosecution engaged the Court by requesting judicial authorisation from Pre-Trial Chamber II to seize the Dutch and Belgian authorities to collect logs and records of telephone calls placed or received by Kilolo and Mangenda.³⁸⁴ That

³⁷⁹ [Sentencing Decision](#), para. 179.

³⁸⁰ [Kilolo Brief](#), para. 121.

³⁸¹ [First Article 69\(7\) Decision](#), para. 18.

³⁸² [First Article 69\(7\) Decision](#), para. 18.

³⁸³ [Bemba Brief](#), paras. 164-185.

³⁸⁴ See generally [Intercept Authorisation Request](#).

request was granted on 29 July 2013, when the Single Judge also authorised the appointment, through the Registrar, of an Independent Counsel to screen the logs and recordings and only transmit those portions that “might be of relevance for the purposes of the investigation”.³⁸⁵

124. After receiving the Court’s authorisation, the Prosecution seized the Dutch Prosecutor’s office *via* an initial RFA dated 6 August 2013, and supplementary RFAs in August,³⁸⁶ September³⁸⁷ October,³⁸⁸ and November 2013.³⁸⁹ In turn, the Dutch Public Prosecutor reviewed the Prosecution’s RFAs and subsequently seized the Dutch Investigating Judge, who authorised the collection of the intercepted communications.³⁹⁰ In each of these decisions, the Dutch Investigating Judge assessed and determined whether the request was in accordance with the requirements of Dutch law. For instance, on 14 August 2013, the Dutch Investigating Judge authorised the wiretaps, noting that “the allegations are based on concrete facts and circumstances”, that the offences are also criminal under Dutch law, and that the request satisfied the legal requirements of the Dutch Code of Criminal Procedure.³⁹¹ The Dutch Investigating Judge also set forth conditions for executing the recording of the communications, considering their potentially privileged nature.³⁹²

125. To the extent there were any legal challenges, those challenges were adjudicated by a Dutch District Court, a three-judge division for criminal cases, which in turn affirmed the legality of the intercepts under Dutch law.³⁹³ For instance, on 28 April 2014, the Dutch District Court ruled on the legality of the last batch of intercepts obtained until and including 23 November 2013, and authorised their transmission to the Court. The District Court explicitly reasoned that the protections afforded to privileged communications under Dutch law had been preserved and that “[t]he examining magistrate sought the advice of the Dean, consulted an independent expert on confidentiality to listen to and select—incriminating and

³⁸⁵ [Intercept Authorisation Decision](#), pp. 7-8.

³⁸⁶ *E.g.* CAR-OTP-0090-1928 (OTP/CAR/NLD-9b-JCCD-af).

³⁸⁷ *E.g.* CAR-OTP-0090-1930 (OTP/CAR/NLD-9c/TL/JCCD-pt); CAR-OTP-0090-1935 (OTP/CAR/NLD-9d/JCCD-to); CAR-OTP-0090-1937 (OTP/CAR/NLD-9e/ID-to).

³⁸⁸ *E.g.* CAR-OTP-0090-1941 (OTP/CAR/NLD-9f/TL/JCCD-pt); CAR-OTP-0093-0041 (OTP/CAR/NLD-9g/ID-ptlh); CAR-OTP-0093-0046 (OTP/CAR/NLD-9h/TL/JCCD-pt).

³⁸⁹ *E.g.* CAR-OTP-0091-0615 (OTP/CAR/NLD-10/TL/JCCD-ptlh); CAR-OTP-0091-0620 (OTP/CAR/NLD-11/TL/JCCD-ptlh).

³⁹⁰ *E.g.* CAR-D20-0006-3562, at 3584-3588; CAR-D23-0011-0001 (English translation); CAR-D20-0006-3538; Dutch 15 October 2013 Decision; Dutch 18 November 2013 Decision; [Dutch District Court Decision](#).

³⁹¹ CAR-D20-0006-3562, at 3584-3588. *Also* CAR-D23-0011-0001 (English translation); [Dutch Intercepts and CDR Decision](#), para. 29.

³⁹² CAR-D20-0006-3562, at 3584-3588. *Also* CAR-D23-0011-0001 (English translation); [Dutch Intercepts and CDR Decision](#), para. 29.

³⁹³ *E.g.* [Dutch District Court Decision](#).

exculpatory—tapped calls and even allowed the complainants to comment on the documents that were seized.”³⁹⁴ Overall, as a result, the lawfulness of the interception was subject to multiple layers of judicial scrutiny, and confirmed.

126. Bemba’s portrayal of the process of collecting the intercepted communications is inaccurate. He alleges, without foundation, that the Prosecution was “disingenuous”.³⁹⁵ None of his arguments show error.

127. First, Bemba’s principal challenge, concerning the Prosecution’s role in the intercept process,³⁹⁶ effectively amounts to a request to disqualify the Prosecution from its evidence-gathering function, a matter which was extensively litigated before the Appeals Chamber. The Prosecution is vested with authority to investigate article 70 offences. Rule 165(1) explicitly states that “[t]he Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative”. As the Appeals Chamber found, the participation of the Bemba Main Case Prosecution staff in the article 70 investigation did not create a conflict that would divest the Prosecution of that authority. “[T]hat staff members of the OTP who were already familiar with the *Bemba* case also carried out the initial phases of article 70 proceedings arising from that case does not, on its own, give rise to reasonable doubts as to the Prosecutor’s impartiality.”³⁹⁷ Bemba fails to show error.

128. Second, as the authority responsible for investigating and prosecuting article 70 offences, the Prosecution correctly framed its RFAs to the Dutch authorities.³⁹⁸ In any event, as detailed above,³⁹⁹ measures were put in place to ensure that the wiretaps were done according to Dutch law. The Single Judge was clearly satisfied that there was sufficient evidence supporting the Prosecution’s request for authorisation to seize the national authorities to collect the intercepts. That opinion was also held by the Dutch Prosecution office, which facilitated the Prosecution’s RFAs, the Dutch Investigating Judge, who evaluated the evidentiary support provided by the Prosecution, and the Dutch District Court, which upheld the lawfulness of the intercept process.

³⁹⁴ [Dutch District Court Decision](#), p. 9.

³⁹⁵ [Bemba Brief](#), paras. 170-173.

³⁹⁶ [Bemba Brief](#), paras. 166-167.

³⁹⁷ [Disqualification AD](#), para. 40. *Contra* [Bemba Brief](#), para. 167.

³⁹⁸ *Contra* [Bemba Brief](#), paras. 168-169.

³⁹⁹ *Above* para. 124.

129. Third, there is no evidence supporting Bemba’s contention that domestic protections under Dutch law were “dilute[d]”.⁴⁰⁰ As the Chamber itself noted, the Dutch Investigative Judge “personally consulted with the Dean, but appointed the same Independent Counsel appointed by the [Single Judge] for purposes of reviewing the potentially privileged character of the intercepts in question.”⁴⁰¹ The decision to appoint the Independent Counsel and not the Dean made sense since the Independent Counsel, unlike the Dean, was fluent in Lingala—a language spoken in the intercepted conversations.⁴⁰² The Investigative Judge also ensured that the Independent Counsel understood the “internal procedures that they have in Holland” and evaluated the Independent Counsel’s background and experience “to designate [him] as a legal expert in domestic Dutch law for the needs of the case”.⁴⁰³ That the Investigative Judge proceeded with using the Independent Counsel instead of the Dean does not negate the lawfulness of the collection, review and transmission of the intercepted materials.⁴⁰⁴ The [REDACTED] gave a statement saying that the Investigating Judge is not mandated but rather has the discretion whether to give lawyers or the Dean of The Hague Bar an opportunity to review intercepts, and moreover, that his advice was not legally binding on the Judge.⁴⁰⁵ As the Chamber correctly observed, on the basis of the [REDACTED] evidence, “[e]ven if the Dean had conducted the review himself, his advice would not have been binding on the Investigative Judge under Dutch law.”⁴⁰⁶

130. Fourth, the Prosecution and members of this Court are not precluded from corresponding with national counterparts when undertaking investigative steps.⁴⁰⁷ To the contrary, it is normal for the Prosecution and the Court to engage with their national counterparts to ensure that investigative steps comply with national laws and with the Court’s statutory framework. Bemba fails to show that such contact is unlawful or that those discussions affected the original legal justifications given for the intercepts.⁴⁰⁸ To the extent that Bemba implies that the Dutch authorities may have circumvented Dutch legal safeguards based on communications with the Prosecution or the Court, his argument is simply

⁴⁰⁰ [Bemba Brief](#), para. 171.

⁴⁰¹ [Dutch Intercepts and CDR Decision](#), para. 29.

⁴⁰² See T-2-CONF, 11-12:11-9; T-4-CONF, 4:2-8.

⁴⁰³ T-4-CONF, 4:2-8.

⁴⁰⁴ *Contra* [Bemba Brief](#), para. 171.

⁴⁰⁵ CAR-OTP-0094-0359, at 0364-0366, lns. 189-194, 220-232 (relating to CAR-D20-0006-1316, at 1318-1319).

⁴⁰⁶ [Dutch Intercepts and CDR Decision](#), para. 30 (citing CAR-OTP-0094-0359, at 0364-0366).

⁴⁰⁷ *Contra* [Bemba Brief](#), paras. 170, 177.

⁴⁰⁸ See e.g. [Dutch Intercepts and CDR Decision](#), para. 25.

unfounded. Bemba's witness, [REDACTED], confirmed that the seizure of materials from Kilolo and Mangenda complied with Dutch law.⁴⁰⁹

131. Finally, Bemba's remaining arguments misread or distort the facts and should be dismissed summarily:⁴¹⁰

- Bemba's allegation that the Prosecution asked the Dutch Investigative Judge to rely exclusively on the Independent Counsel instead of the Dean is speculative, incorrect and unsupported.⁴¹¹ Nothing in the status conference cited by Bemba justifies that allegation.
- Bemba's argument that the "Prosecution implied at a Status Conference that some taps had been put in place prior to [the] 29 July decision" is unsupported,⁴¹² not least by the cited transcript of the 30 August 2013 status conference, which simply notes that "the Dutch authorities *have begun* the wiretaps. They *have begun* intercepting, or listening in to the conversations."⁴¹³
- That the Dutch authorities updated the Prosecution *on their progress* in executing the RFAs is distinct from Bemba's speculation that the Prosecution was actually sent intercepts prior to their vetting or received "substantive information".⁴¹⁴ In fact, the very status conference transcript referred to by Bemba includes the Prosecution's clear statement that "we've never had [the recordings] in our possession."⁴¹⁵ Bemba overlooks this fact.
- That the Dutch authorities directly transmitted the CDRs to the Prosecution did not violate either the lawyer-client communication privilege or the Single Judge's prior orders.⁴¹⁶ The Single Judge himself confirmed that "[t]he logs no problem [...] I think it's not privileged, so you just get them from the Dutch authorities as soon as they are

⁴⁰⁹ CAR-OTP-0094-0359, at 0364, Ins. 161-172 (relating to CAR-D20-0006-1316, at 1320-1321).

⁴¹⁰ [Krajišnik AJ](#), para. 18.

⁴¹¹ [Bemba Brief](#), para. 171.

⁴¹² *Contra* [Bemba Brief](#), para. 169.

⁴¹³ T-2-CONF, 10:5-6 (emphasis added).

⁴¹⁴ *Contra* [Bemba Brief](#), para. 172.

⁴¹⁵ T-2-CONF, 12:18-19.

⁴¹⁶ *Contra* [Bemba Brief](#), paras. 173-174.

ready.”⁴¹⁷ The Prosecution was also transparent about the fact that it had received the CDRs directly from the Dutch authorities in its third request for judicial authorisation.⁴¹⁸ The Single Judge granted the Prosecution’s motion, referring to the fact that the Prosecution was in possession of those CDRs.⁴¹⁹ At no point did the Single Judge decide that the Prosecution’s receipt of CDRs directly from the Dutch authorities violated any of his prior decisions.

- Bemba’s unsupported claim regarding a CDR (CAR-OTP-0072-0079) that “[the] Prosecution went so far as to insert the later [creation] date into the CDRs’ metadata on ringtail” is misleading, incorrect and demonstrates unfamiliarity with how the Ringtail system operates.⁴²⁰ The Prosecution has no control over the “creation date” field on the Defence’s Ringtail system, so as to be able to manipulate it in the manner suggested by Bemba.⁴²¹ The “creation date” on Ringtail is automatically generated when a document is imported onto a party’s ringtail database. It is not a metadata field that is exported by the Prosecution when a document is disclosed. The “creation date” is a field that the Prosecution cannot even technically export from its own Ringtail account. Rather, it is a field that is different depending on when a document is imported onto the specific user’s Ringtail account—for instance the “creation date” of this document is different on the Prosecution’s Ringtail account (10 October 2013) than on Bemba’s Ringtail account (21 July 2014) because of the different date when the document was imported by each user. In any event, there were no grounds for confusion since the CDR’s metadata accurately depicted that it was received by a Prosecution’s investigator from the Dutch authorities on 10 October 2013.⁴²²
- If Bemba wishes to argue that the Prosecution “[obtained] a litigation advantage” in the Main Case proceedings due to its article 70 investigation,⁴²³ he can, as he has, litigate it in the Main Case, not in this one. This matter was already raised before Trial Chamber III, which found that Bemba had provided “no substantiation or explanation as to how the Prosecution allegedly gaining access to this information did

⁴¹⁷ T-4-CONF, 29:3-5.

⁴¹⁸ [Third Judicial Order Request](#), paras. 2, 10-12.

⁴¹⁹ [Third Judicial Order Decision](#), pp. 3-5.

⁴²⁰ [Bemba Brief](#), para. 173.

⁴²¹ [Bemba Brief](#), para. 173.

⁴²² Bemba Annex K.

⁴²³ [Bemba Brief](#), para. 174. Also paras. 167, 170.

or could have impacted on the fairness of the *Bemba* case”, including “by illustrating any resulting actual or potential impediment to the Defence’s presentation of its evidence, advantage gained by the Prosecution, or impact upon the Chamber’s ability to fairly assess the evidence presented to it at trial.”⁴²⁴ The same deficiencies underline Bemba’s arguments in this case.

I.D.2.b. The screenings of the intercepted materials for privileged material were done correctly

132. Bemba and Babala fail to demonstrate any error in the process of screening the intercepted material established by the Single Judge and later endorsed by the Chamber.⁴²⁵ Once the national authorities had collected the intercepted communications, they were filtered through a series of safeguards put in place by the Single Judge, and subsequently the Chamber, to ensure that privileged material was isolated and withheld from the Prosecution.

133. This process was instituted at the outset of the Prosecution’s investigation. On 29 July 2013, the Single Judge authorised the Prosecutor to seize the relevant authorities in Belgium and The Netherlands to collect logs and recordings placed or received by Kilolo and Mangenda.⁴²⁶ In light of the potentially privileged nature of the calls, the Single Judge ordered the Registrar to appoint an Independent Counsel tasked to review any telephone calls made available by the relevant Belgian and Dutch authorities “with a view to identifying any calls received from or placed to parties connected with the investigation” and “transmitting to the Prosecutor the relevant portions of any and all such calls which might be of relevance for the purposes of the investigation”.⁴²⁷ The Single Judge also permitted the Independent Counsel to seize the Single Judge with “[a]ny question or issue which may arise in connection with the aforementioned review”.⁴²⁸

134. The very purpose of the Independent Counsel’s appointment was to protect the Appellants’ rights and interests. In ordering the appointment of an Independent Counsel, the Single Judge noted that communications between an accused and his or her counsel “are ordinarily privileged unless an abuse is suspected or shown” and that there are “need[s] for

⁴²⁴ [Bemba Abuse of Process Decision](#), para. 56.

⁴²⁵ [Bemba Brief](#), paras. 164-179; [Babala Brief](#), para. 13-18.

⁴²⁶ See generally [Intercept Authorisation Decision](#).

⁴²⁷ [Intercept Authorisation Decision](#), pp. 7-8.

⁴²⁸ [Intercept Authorisation Decision](#), para. 7.

safeguards aimed at duly circumscribing the exception to the privilege”.⁴²⁹ The Single Judge also noted that “the scope of such exception must be determined in light of, and limited by, the specific reasons warranting such exception.”⁴³⁰ The Single Judge also ensured that the Independent Counsel would “be a really independent one, as opposed to one to be appointed by or acting in cooperation with the Prosecutor” and that “privilege would be strictly maintained on all [...] recordings which would not offer elements of interest or relevance for the purposes of the Prosecutor’s investigation.”⁴³¹

135. The Independent Counsel undertook precisely this role. Upon being obtained by the national authorities, the materials were first transferred to the Independent Counsel, who reviewed the material to identify those which were privileged.⁴³² As the Chamber repeatedly emphasised, the Independent Counsel was “neutral and independent”.⁴³³ As further noted by Pre-Trial Chamber II, “all of these activities were carried out by [the] Independent Counsel under the supervision of the Dutch judicial authorities and of the *Bâtonnier* of The Hague.”⁴³⁴

136. On 9 April 2015, the Chamber maintained the review procedure established by the Single Judge,⁴³⁵ with slight modifications that further safeguarded the Appellants’ rights. In particular, following the Appellants’ arrest, the Chamber ensured that the Independent Counsel also submitted a confidential *ex parte* report to the Chamber of additionally seized material, notifying Bemba, Mangenda, and Kilolo (as the owners of and potential privilege-holders), detailing the results of his review and conclusions.⁴³⁶ At that point, Bemba, Kilolo and Mangenda could make observations on the report.⁴³⁷ Only then would the Chamber decide what, if any, of those materials could be transmitted to the Prosecution.

137. As a result of the process employed, the Chamber itself observed, “[t]here is no indication [...] that the specific safeguards adopted by the Chamber have been inadequate in

⁴²⁹ [Intercept Authorisation Decision](#), para. 6.

⁴³⁰ [Intercept Authorisation Decision](#), para. 6.

⁴³¹ [Intercept Authorisation Decision](#), para. 7.

⁴³² [Intercept Authorisation Decision](#), para. 7.

⁴³³ [Seized Material Review Decision](#), para. 21. Also [Intercept Authorisation Decision](#), paras. 7-8; [IC Appointment Decision](#), pp. 4-6; [IC Disqualification Decision](#), pp. 4-7; [IC Referral Decision](#), p. 8; [Seized Material Review Decision](#), paras. 13-15.

⁴³⁴ [Confirmation Decision](#), para. 2. The *Bâtonnier* of The Hague is the Dean of the Hague Bar.

⁴³⁵ [Seized Material Review Decision](#), para. 16.

⁴³⁶ [Seized Material Review Decision](#), paras. 22-23.

⁴³⁷ [Seized Material Review Decision](#), paras. 22-23.

isolating privileged material which are not affected by the crime/fraud exception.”⁴³⁸ Indeed, the Appellants fail to identify a single disclosed document vetted by the Independent Counsel and the Chamber/Single Judge that contained potentially privileged information.

138. None of Bemba’s or Babala’s challenges undermine the legality and appropriateness of the vetting system employed. The Independent Counsel was not “[*une création prétorienne extra legem qui va à contre-courant du principe de la légalité pénale*”,⁴³⁹ but permitted within the scope of articles 57(3)(a) and (c), a provision which empowers the Pre-Trial Chamber to issue “such orders and warrants as may be required for the purposes of an investigation” and “[w]here necessary, provide for [...] the preservation of evidence”. Babala ignores the text of the statutory provision.

139. Nor did the Chamber deny the Appellants’ right to challenge the propriety of the Court’s procedure for appointing and using the Independent Counsel.⁴⁴⁰ The Appellants had several opportunities to challenge the propriety of the Independent Counsel and did so. For instance, on 3 April 2014, the Bemba Defence challenged the propriety of the review procedure by requesting that it, not the Independent Counsel, vet privileged information.⁴⁴¹ On 19 February 2015, it repeated that same challenge and proposal.⁴⁴² Both objections were rejected by the Single Judge and the Chamber in reasoned decisions.⁴⁴³ When Bemba repeated his challenge, yet again, the Chamber noted the issue had already been litigated and referred to its past decisions reaffirming the Independent Counsel’s mandate.⁴⁴⁴ There was no error in doing so.

140. Bemba’s and Babala’s remaining arguments are subject to summary dismissal.⁴⁴⁵ Babala’s argument that “[*l]e conseil indépendant n’a pas mené son mandat de manière neutre*”⁴⁴⁶ is barely argued. The import of his apparent concession that “[*l]e Conseil indépendant n’a pas eu accès aux informations confidentielles de l’affaire principale, et n’a*

⁴³⁸ [First Article 69\(7\) Decision](#), para. 14 (emphasis added).

⁴³⁹ [Babala Brief](#), paras. 14, 16, 18.

⁴⁴⁰ [Bemba Brief](#), para. 164; [Babala Brief](#), para. 15.

⁴⁴¹ [Bemba IC Referral Response](#), para. 5.

⁴⁴² [Bemba Seized Material Request](#), paras. 1-2, 46.

⁴⁴³ [IC Referral Decision](#), p. 8; [Seized Material Review Decision](#), paras. 14-18.

⁴⁴⁴ [Dutch Intercepts and CDR Decision](#), para. 31 (citing [Seized Material Review Decision](#); [IC Reports Decision](#); [First Article 69\(7\) Decision](#)).

⁴⁴⁵ [Krajišnik AJ](#), para. 24.

⁴⁴⁶ [Babala Brief](#), para. 16.

pas vécu les faits” is unclear.⁴⁴⁷ Bemba’s arguments in paragraphs 177 to 179 of his Brief are similarly unsupported and repeat old arguments from his article 69(7) application. The Chamber addressed and dismissed these arguments,⁴⁴⁸ which Bemba fails to acknowledge. On this basis alone, Bemba’s arguments should be dismissed.⁴⁴⁹ In any event:

- Whether or not Bemba could have obtained a remedy before a Dutch court was not a matter the Chamber could pronounce upon, as it was purely a matter of domestic law.⁴⁵⁰ Bemba’s dissatisfaction with his alleged lack of standing before Dutch courts did not make the process illegal.⁴⁵¹
- Regarding Bemba’s access to the Pre-Trial Chamber and Chamber,⁴⁵² the Chamber noted that Bemba had access to both Chambers and that both “made multiple rulings on defence challenges to the legality and propriety of using the Dutch Materials” and as a result “it cannot be said they did not have any opportunity to obtain a remedy for alleged violations.”⁴⁵³
- That the Chamber employed additional processes to vet the privileged communications following the Confirmation Decision did not make the Pre-Trial Chamber’s vetting process pre-confirmation unlawful.⁴⁵⁴ The circumstances before and after the Confirmation Decision were different, justifying two different procedures. Authorising Bemba to review the seized material for privilege when he was under investigation (pre-confirmation) would have made no sense as it would have defeated the purpose of monitoring him. Such action would also have effectively ceded Bemba, an interested party, the power to stop relevant evidence from being available for trial.

⁴⁴⁷ [Babala Brief](#), para. 16.

⁴⁴⁸ [Dutch Intercepts and CDR Decision](#), para. 32.

⁴⁴⁹ [Krajišnik AJ](#), para. 24.

⁴⁵⁰ [Dutch Intercepts and CDR Decision](#), para. 32. *Contra* [Bemba Brief](#), para. 177.

⁴⁵¹ *Contra* [Bemba Brief](#), para. 177.

⁴⁵² [Bemba Brief](#), para. 178.

⁴⁵³ [Dutch Intercepts and CDR Decision](#), para. 32.

⁴⁵⁴ *Contra* [Bemba Brief](#), para. 179.

- The Chamber properly articulated the extent to which it relied upon the intercepted communications and Detention Centre calls.⁴⁵⁵ It relied on those sources to substantiate its findings, as reflected throughout the Judgment.

I.D.3. The Chamber correctly rejected the Appellants’ challenges to “derivative evidence”

141. Kilolo’s and Mangenda’s challenges to the intercepted communications as “derivative” of the Western Union records should be denied.⁴⁵⁶ First, contrary to Kilolo’s assertions, the Chamber did not err in law or fact by not excluding the intercepted communications, despite the technical procedural violation of Austrian law.⁴⁵⁷ Even if the Appeals Chamber were to accept the “fruit of the poisonous tree” doctrine—a controversial rule that Kilolo and Mangenda seek to import by citing select common law jurisdictions—it would only operate if the primary evidence is actually excluded.⁴⁵⁸ As the so-called “tree” (the Western Union documents) was not poisoned but was properly admitted,⁴⁵⁹ so too were its “fruits”.

142. Second, Kilolo’s and Mangenda’s arguments that the Western Union records were “the basis” and “[t]he only evidence” of the suspected article 70 offences referred to in the RFA to the Dutch authorities⁴⁶⁰—a repeat of Mangenda’s trial submissions⁴⁶¹—is factually incorrect, as Mangenda effectively concedes in a footnote acknowledging that other evidence existed.⁴⁶² The request to intercept their calls was made after analysing several evidentiary sources, including the logs and partial records of Bemba’s conversations from the Detention Centre,⁴⁶³ Babala’s mobile phone records,⁴⁶⁴ and information received from the anonymous informant, as submitted in two of the Prosecution’s requests for judicial authorisation.⁴⁶⁵ The analysis of all this information, in addition to the Western Union records, also provided the basis for the Single Judge authorising the Prosecution to seize the Dutch and Belgian authorities to collect the intercepts.⁴⁶⁶

⁴⁵⁵ *Contra* [Bemba Brief](#), paras. 186-187.

⁴⁵⁶ [Mangenda Brief](#), paras. 95-102; [Kilolo Brief](#), paras. 94-106.

⁴⁵⁷ [Kilolo Brief](#), paras. 95-100.

⁴⁵⁸ *Above* paras. 50-54.

⁴⁵⁹ *Above* paras. 55-97.

⁴⁶⁰ [Kilolo Brief](#), para. 95; [Mangenda Brief](#), paras. 96, 101.

⁴⁶¹ Mangenda Article 69(7) Motion, para. 49.

⁴⁶² [Mangenda Brief](#), fn. 148.

⁴⁶³ [Intercept Authorisation Request](#), para. 14.

⁴⁶⁴ [Intercept Authorisation Request](#), para. 15.

⁴⁶⁵ [Intercept Authorisation Request](#), para. 15; [First DU Records Access Request](#), para. 3.

⁴⁶⁶ See [Intercept Authorisation Decision](#), paras. 3, 5.

143. Third, Mangenda’s suggestion that the Prosecution failed to provide sufficient information to the Dutch authorities for them to execute a wiretap is unfounded.⁴⁶⁷ Mangenda’s contention is belied by the fact that the Prosecution’s request was judicially authorised by this Court⁴⁶⁸ and on the national level.⁴⁶⁹ Mangenda misreads a decision by the Dutch Investigating Judge of the Hague District Court authorising the wiretap, arguing that the Dutch authorities “merely” did what the Prosecution told them.⁴⁷⁰ Mangenda omits to mention that the Dutch Investigating Judge analysed the propriety of the intercepts “[u]nder Dutch law” by setting out the relevant domestic legal standard for “recording telephone conversations and data exchanges between a suspect and his or her lawyer”. It relied on relevant decisions from the Supreme Court of The Netherlands and provisions of the Code of Criminal Procedure. It then applied that law to the facts and circumstances supporting the request.⁴⁷¹ There is no indication that the Hague District Court abrogated its duty to ensure compliance with Dutch law when it evaluated the Prosecution’s request.

144. Mangenda also discounts a 28 April 2014 decision by the Dutch District Court⁴⁷² that, as the Chamber observed, “specifically verified if the compliance with the Request for Assistance was done in conformity with Dutch law.”⁴⁷³ As the Chamber correctly concluded, “[c]orrespondingly, the Dutch Authorities responded in a manner consistent with the assumption that the [RFA] was a request for judicial authorisation.”⁴⁷⁴ This decision and the Chamber’s corresponding finding, both of which Mangenda omits, undermine his argument.

145. Fourth, the Chamber correctly found that the Prosecution did not “misrepresent” matters either to Pre-Trial Chamber II or the Dutch authorities.⁴⁷⁵ Mangenda repeats his rejected trial arguments,⁴⁷⁶ without showing that the Chamber erred by doing so.⁴⁷⁷ Instead, he misreads the Prosecution’s 19 July 2013 request for a judicial order and relies upon a narrow reading of the Prosecution’s filing—one part of one sentence of a 15 page filing.⁴⁷⁸

⁴⁶⁷ [Mangenda Brief](#), paras. 103-106.

⁴⁶⁸ See [Intercept Authorisation Decision](#), pp. 7-8.

⁴⁶⁹ See Dutch 15 October 2013 Decision; Dutch 18 November 2013 Decision; [Dutch District Court Decision](#).

⁴⁷⁰ [Mangenda Brief](#), paras. 105-106 (citing CAR-D20-0006-3562).

⁴⁷¹ CAR-D23-0011-0001, at 0003-0005.

⁴⁷² See [Dutch District Court Decision](#).

⁴⁷³ [Second Article 69\(7\) Decision](#), para. 25.

⁴⁷⁴ [Second Article 69\(7\) Decision](#), para. 25.

⁴⁷⁵ See [Second Article 69\(7\) Decision](#), paras. 19-31. *Contra* [Mangenda Brief](#), paras. 107-111.

⁴⁷⁶ See generally [Mangenda Intercepts Motion](#).

⁴⁷⁷ [Mangenda Brief](#), paras. 31-35, 107-111; [Krajišnik AJ](#), para. 24.

⁴⁷⁸ [Mangenda Brief](#), para. 108. In fn. 155, Mangenda cites the [First DU Records Access Request](#) when in fact the language he claims are “misrepresentations” come from the [Intercept Authorisation Request](#). In light of this,

As correctly noted by the Chamber when “considering the Request to Obtain Evidence as a whole, it becomes apparent that the Prosecution did not present the situation as an established fact but as an intermediate result of an on-going investigation.”⁴⁷⁹

146. As detailed in the Prosecution’s request, the evidence collected by that time suggested that Kilolo and others were paying Defence witnesses without legitimate explanation.⁴⁸⁰ The same individuals who were paying Defence witnesses were also paying Mangenda.⁴⁸¹ This led to a reasonable suspicion that Mangenda *may* also be paying witnesses. This suspicion was also supported by the pattern of large Western Union payments received by Mangenda on dates coinciding with the testimony of several witnesses in the Main Case.⁴⁸²

147. For these reasons, the Prosecution’s request was carefully worded to ensure that the Single Judge understood that the Prosecution’s conclusions were based on information it had reviewed *to date* and that its conclusions were not definitive.⁴⁸³ For instance, as recited by the Chamber, the Prosecution’s request was circumspect, stating that “[t]he times and dates of the transfers of exact sums of money suggest that [...] MANGENDA may be paying witnesses.”⁴⁸⁴ Other parts of the request were equally carefully crafted, noting that the “evidence *strongly indicates*”⁴⁸⁵ or “*significantly strengthens* the Prosecution’s initial suspicion.”⁴⁸⁶ As noted by the Chamber, when summarising the results of the investigation, the Prosecution “admit[ted] that ‘the evidence is largely circumstantial and the Prosecution has a fair but incomplete understanding of the scheme.’”⁴⁸⁷ As the Chamber concluded, “[i]n fact, the need to fully understand the alleged bribery scheme was advanced by the Prosecution as a reason why the interception of telephone calls should be granted and ultimately taken up by the Single Judge in his Decision on the Request to Obtain Evidence.”⁴⁸⁸

the Prosecution assumes that Mangenda is challenging the legality of the [Intercept Authorisation Request](#) and *not* the [First DU Records Access Request](#).

⁴⁷⁹ [Second Article 69\(7\) Decision](#), para. 22.

⁴⁸⁰ [Intercept Authorisation Request](#), paras. 3, 15, 16.

⁴⁸¹ [Intercept Authorisation Request](#), para. 21.

⁴⁸² [Intercept Authorisation Request](#), para. 21.

⁴⁸³ [Second Article 69\(7\) Decision](#), para. 22.

⁴⁸⁴ [Intercept Authorisation Request](#), para. 21 (emphasis added). Also [Second Article 69\(7\) Decision](#), para. 22.

⁴⁸⁵ [Intercept Authorisation Request](#), para. 22 (emphasis added). Also [Second Article 69\(7\) Decision](#), para. 22.

⁴⁸⁶ [Intercept Authorisation Request](#), para. 14 (emphasis added).

⁴⁸⁷ [Second Article 69\(7\) Decision](#), para. 22 (quoting [First DU Records Access Request](#), para. 22).

⁴⁸⁸ [Second Article 69\(7\) Decision](#), para. 22 (citing [First DU Records Access Request](#), para. 20; [Intercept Authorisation Decision](#), para. 1).

148. Contrary to Mangenda's contention,⁴⁸⁹ the Chamber also correctly decided that the Prosecution did not withhold information from the Single Judge that payments by Mangenda did not coincide with the appearance of Defence witnesses in the Main Case.⁴⁹⁰ The Chamber correctly confirmed that "on the information available to the Prosecution when requesting to intercept Mr Mangenda's telephone contacts before the Pre-Trial Chamber, the Prosecution could have reasonably brought this hypothesis forward."⁴⁹¹ Further, the Single Judge clearly knew that payments received by Mangenda did not coincide with the appearance of Main Case Defence witnesses when granting the Prosecution's 19 July 2013 request. In its request, the Prosecution expressly stated that Mangenda received a much larger amount of money (21,595.77 USD) than the payments alleged to coincide with the testimony of witnesses (8,119 USD).⁴⁹² The Prosecution's request also provided the Single Judge with the relevant underlying information. The request incorporated the evidence from its prior 3 May 2013 request for judicial assistance,⁴⁹³ which in turn annexed a list of 18 payments to Mangenda through Western Union.⁴⁹⁴

149. Further, Mangenda's argument that the Prosecution failed to exercise sufficient diligence or that the Prosecution lacked probable cause to intercept Mangenda's calls⁴⁹⁵ are unfounded. The Chamber correctly concluded that "the disposition of the Prosecution at that moment in time was supported by sufficient circumstantial evidence to have been reasonably brought forward."⁴⁹⁶ Mangenda fails to show error.

150. Finally, Mangenda's "other misconduct" arguments⁴⁹⁷ should be summarily dismissed. An appellant cannot incorporate by reference arguments from another brief, much less from another case. An appellant is obliged to substantiate his or her position in writing.⁴⁹⁸ Such an approach would also circumvent the page limits imposed for appeal briefs.⁴⁹⁹ However, if the Appeals Chamber were minded to consider Bemba's Main Case appellate arguments referred

⁴⁸⁹ [Mangenda Brief](#), para. 109.

⁴⁹⁰ [Second Article 69\(7\) ALA Decision](#), paras. 7-9.

⁴⁹¹ [Second Article 69\(7\) ALA Decision](#), para. 8 (citing [Second Article 69\(7\) Decision](#), paras. 21-24).

⁴⁹² [Intercept Authorisation Request](#), para. 21.

⁴⁹³ See [Intercept Authorisation Request](#), paras. 1, 21.

⁴⁹⁴ [First DU Records Access Request, Annex A](#), pp. 5-6.

⁴⁹⁵ [Mangenda Brief](#), paras. 109, 112-115.

⁴⁹⁶ [Second Article 69\(7\) Decision](#), para. 23.

⁴⁹⁷ [Mangenda Brief](#), para. 116.

⁴⁹⁸ See [Hadžihasanović AJ](#), para. 46; [Galić AJ](#), para. 250.

⁴⁹⁹ Regulation 57, RoC.

to by Mangenda, then the Prosecution equally incorporates by reference its response to those arguments as set out in its response brief in the Main Case.⁵⁰⁰

151. For all the above reasons, the Appellants' challenges should be dismissed.

⁵⁰⁰ [Bemba Prosecution Response Brief](#), pp. 7-36.

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II. THE CHAMBER PROPERLY APPLIED THE SUBMISSION OF EVIDENCE REGIME

152. Babala’s, Arido’s and Bemba’s challenges to the regime governing the submission of evidence in the case misunderstand the fundamental tenets of that regime. Their challenge also misinterprets the statutory provisions governing the submission of evidence and the Appeals Chamber’s decision authorising that regime. Likewise, their challenge misreads the Chamber’s decision implementing that regime in this case. None of them shows error.⁵⁰¹

153. Generic challenges to the principles governing the evidence submission regime and its suitability⁵⁰² must fail. Babala, Arido and Bemba cannot rewrite the Statute or supplant the drafters’ intention merely because they prefer a different system for the admission of evidence. Moreover, their objections to how the Chamber applied the system merely disagree with the Chamber’s decision rejecting their arguments. Likewise, submitting documentary evidence through bar table motions is an accepted practice at this Court. The Appellants were not prejudiced.

II.A. THE APPELLANTS MISUNDERSTAND THE SUBMISSION REGIME AND ITS GOVERNING LAW

154. The Statute permits two systems for taking evidence in a trial—admitting evidence (with a Chamber making *prima facie* admissibility determinations at the time the evidence is presented)⁵⁰³ or submitting evidence (with a Chamber recognising the evidence as “formally submitted” when it is presented, but deferring further assessments until the end of the trial). The Chamber adopted the latter system. It could do so.

155. Article 69(4) of the Statute provides that “[t]he Court may rule on the relevance or admissibility of any evidence [...]”.⁵⁰⁴ As commentators state, this provision—a compromise between civil law and common law⁵⁰⁵—allows a Chamber to:

⁵⁰¹ [Babala Brief](#), paras. 49-72; [Bemba Brief](#), paras. 188-202; [Arido Brief](#), paras. 241-246.

⁵⁰² *E.g.* [Babala Brief](#), paras. 49-72; [Arido Brief](#), paras. 241-246.

⁵⁰³ With the exception of instances in the admission regime, for instance, where documents are marked for identification and assessments on their admissibility are deferred to a later point.

⁵⁰⁴ Article 69(4): The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence. *Also* rule 63(2): A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69; article 69(3): The parties may submit evidence relevant to the case, in accordance

[E]ither

- (1) rule first [on] whether evidence possesses sufficient relevance to justify its admissibility, taking into account a number of factors mentioned in [article 69(4)], and evaluate subsequently the weight of any admitted evidence as part of the evaluation process; or *instead*
- (2) *[submit] evidence and consider relevance, admissibility and weight together as part of the evaluation of the admitted evidence, taking into account the same factors.*⁵⁰⁶

The Chamber has the discretion to choose either “analytical method” based on several other factors including the rights of the accused, fair trial, fair evaluation of witness testimony and the victims’ rights.⁵⁰⁷ The drafters deferred further details of the evidentiary regime to the rules and case law.⁵⁰⁸

156. The Appeals Chamber has provided further clarity. In *Bemba*, the Appeals Chamber expressly endorsed the submission of evidence regime as one of two evidentiary avenues available to admit evidence in a case (“*Bemba* Admissibility AD”).⁵⁰⁹ It held that:

As borne out by the use of the word “may” in article 69(4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or

with article 64; article 64(8)(b): Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute; article 64(9)(a): The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to rule on the admissibility or relevance of evidence; rule 140: If no agreement can be reached [on the order and manner in which the evidence shall be submitted to the Trial Chamber], the Presiding Judge shall issue directions.

⁵⁰⁵ Piragoff and Clarke (2016), p. 1735, mn. 37 (noting that article 69(4) is an amalgam of common law and civil law concepts and does not strictly follow the procedures of either. “While the article adopted presumptively the civil law procedure of general admissibility and free evaluation of evidence, some common law concepts are incorporated, which results in a hybrid system.”). Also Piragoff (2001), pp. 351-354 (“The compromise in the Rome Statute was to eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system, provided that the Court has a discretion to ‘rule on the relevance or admissibility of any evidence.’”); Cryer *et al.* (2007), pp. 382-383 (“[t]he approach to evidence at the Tribunals has been described as flexible, liberal and unhindered by technical rules found in national and particularly common law systems. Professional judges try both fact and law and there is no need to protect jurors from lay prejudice. The same is true for the ICC.”).

⁵⁰⁶ Piragoff and Clarke (2016), p. 1735, mn. 37 (emphasis added).

⁵⁰⁷ *Ibid.* Also Schabas (2016), pp. 1087-1088.

⁵⁰⁸ La Rosa (2012), pp. 1587-1588 (“*Les détails de cette évaluation sont toutefois laissés au Règlement de procédure et de preuve ou encore à la jurisprudence de la Cour.*”).

⁵⁰⁹ [Bemba Admissibility AD](#), paras. 36-37. Also Bitti (2016), p. 1619, mn. 50.

admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. [...] *Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person.*⁵¹⁰

157. This Chamber followed the Appeals Chamber’s guidance in deciding to use the submission of evidence regime. It carefully outlined its approach, both at the start of trial and in the Judgment.⁵¹¹ As a general rule, it said it would “defer its assessment of the admissibility of evidence until deliberating its judgment pursuant to [a]rticle 74(2) of the Statute.”⁵¹² It would “consider the relevance, probative value and potential prejudice of each item of evidence submitted at that time, though it may not necessarily discuss these aspects for every item submitted in the final judgment.”⁵¹³ When evidence was submitted, the Chamber’s ‘formal action’ was to ‘recognise’ such submission.⁵¹⁴ Notwithstanding the Chamber’s general approach, it reiterated that it was not estopped from “giving earlier consideration to admissibility objections” related to article 69(7) challenges or regarding the statutory pre-requisites for admitting prior recorded testimony under rule 68.⁵¹⁵ The Chamber’s approach was consistent and clear. The submission of evidence regime is accepted practice at this Court. The Appellants have not shown otherwise.

158. Nor can they show that the Chamber erred in adopting this particular regime of evidence submission *per se*. Not only has the Appeals Chamber endorsed its legality, but other Chambers at this Court have adopted similar regimes.⁵¹⁶

⁵¹⁰ *Ibid* (emphasis added).

⁵¹¹ [Evidence Submission Decision](#), paras. 5-15 (para. 8, noting [Bemba Admissibility AD](#), para. 37); [Judgment](#), paras. 189-194 (fn. 196, noting [Bemba Admissibility AD](#), para. 36).

⁵¹² [Evidence Submission Decision](#), para. 9.

⁵¹³ [Evidence Submission Decision](#), para. 9; [Judgment](#), para. 190 (“Significantly, and with only rare exceptions, no *prima facie* assessment of the standard evidentiary criteria (relevance, probative value, potential prejudice) was made at the point of submission. These considerations were instead deferred to when the Chamber deliberated its judgment.”); [Babala Brief](#), paras. 50-52 (noting the Chamber’s approach).

⁵¹⁴ [Judgment](#), paras. 191-192.

⁵¹⁵ [Evidence Submission Decision](#), para. 13. Also rule 63(3): A Chamber shall rule on an application of a party or on its own motion, made under article 64, subparagraph 9(a), concerning admissibility when it is based on the grounds set out in article 69, paragraph 7; [Judgment](#), para. 191 (“However, when objections were raised relating to procedural bars which could foreclose the Chamber’s consideration of the standard evidentiary criteria, these were ruled upon at the point of submission. Such objections primarily concerned challenges under Article 69(7) of the Statute or to the procedural pre-requisites of Rule 68 of the Rules.”).

⁵¹⁶ See *Ongwen* and *Gbagbo* trial practices: [Ongwen Conduct Directions](#), paras. 24-26 (para. 24: “When the participants formally submit evidence during trial, all the Chamber will generally do is to recognise their formal

159. Several national systems, based on the continental legal system, also follow similar procedures. For instance,

- In France, under the principle of freedom of evidence (*le principe de la liberté de la preuve*), the general rule is that all evidence is admissible in criminal proceedings.⁵¹⁷ All evidence contained in the dossier is considered submitted to the trial judge; the judge does not rule on whether the evidence is admissible. There are very few rules to exclude evidence.⁵¹⁸ Moreover, although the judges must reason their decisions, it suffices that a superior judge may verify its correctness.⁵¹⁹ Judges need not list every

submission”); para. 26: (“The Chamber always retains the discretion to rule on admissibility related issues upfront when appropriate, particularly when procedural bars are raised which may foreclose consideration of the standard admissibility criteria”); [Ongwen Article 56 Decision](#), para. 7 (“In line with its general rule, the Chamber addresses below the Defence objections relevant to [article 69(7)] and otherwise defers its assessment of the relevance and probative value of the [a]rticle 56 Evidence until deliberating its judgment [...]”); [Ongwen Rule 68\(2\) Decision](#), pp. 107-112 (deciding on the admissibility of rule 68(2) requests); [Ongwen Second Rule 68\(2\) Decision](#), pp. 14-16 (allowing prior recorded testimony and associated documents to be introduced into evidence under rule 68(2)); [Ongwen Intercepts Decision](#), paras. 4-13 (para. 7: “The Chamber emphasises that its general approach does not involve making any relevance, probative value or potential prejudice assessments at the point of submission—not even on a *prima facie* basis.”); [Ongwen Bar Table Decision](#), para. 46. Also [Gbagbo Evidence Submission Decision](#), paras. 3-18; [Gbagbo Documentary Evidence Decision](#), para. 33 (“Unless a preliminary evaluation of the evidence is required (such as under [article 69(7)] and rule 68], the Chamber will not as a general rule decide on its relevance or admissibility before having heard the entirety of the case.”). Also [ECCC Internal Rules](#), rule 87 (1): Unless provided otherwise in these IRs, all evidence is admissible; rule 87(3): The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. *But see* *Lubanga, Katanga and Bemba* trial practices adopting the admission regime: [Lubanga Admission Decision](#), paras. 23-32 (“[the] Chamber must ensure that the evidence is *prima facie* relevant to the trial [...]”; “[the] Chamber must assess whether the evidence has on a *prima facie* basis, **probative value**.”); [Katanga Admission Decision](#), para. 13 (“[each] item of evidence must be individually assessed for its relevance and probative value at the time it is tendered and before being admitted into evidence.”); *see generally* [Bemba 6 November 2013 Admission Decision](#). *See also* ICTR, ICTY, STL and SCSL practices, using the admission regime, and where the Statute and/or Rules are more explicitly geared towards using this regime: rule 89(C) of the [ICTR RPE](#) and [ICTY RPE](#) states that the Chambers “may admit any relevant evidence which it deems to have probative value”; rule 89(C), [SCSL RPE](#) states that a Chamber “may admit any relevant evidence”; article 21(2), [STL Statute](#) allows a Chamber “[to] admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial”; *also* [Rutaganda AJ](#), paras. 33, 266: (“[p]rovisional proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.”); [Prlić et al. Admission AD](#), para. 15: (“[while rule 89] grants Trial Chambers a broad discretion in assessing admissibility of evidence they deem relevant, this discretion is not unlimited, considering that the test to be met before ruling evidence inadmissible is rigorous. [...] This principle should not be interpreted to mean that definite proof of reliability must necessarily be shown for evidence to be admissible. *Prima facie* proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.”); [Fofana et al. Bail AD](#), para. 24: (“[If] relevant, then under [r]ule 89(C), they may [...] be admitted, with their weight to be determined thereafter. [...] Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for admission.”). *Also* Sluiter et al. (2012), pp. 1022-1024.

⁵¹⁷ Pradel (2015), pp. 364-366. *Also* [Article 427](#) of the *Code de procédure pénale* (CPP): *Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son intime conviction. Le juge ne peut fonder sa décision que sur des preuves qui lui sont apportées au cours des débats et contradictoirement discutées devant lui.*

⁵¹⁸ Pradel (2015), pp. 364-368. *E.g.*, [Article 432 CPP](#): “La preuve par écrit ne peut résulter de la correspondance échangée entre le prévenu et son avocat.”

⁵¹⁹ Pradel (2015), pp. 820-821.

piece of evidence in their final judgments. For example, a *Cour d'assises*, a court composed of both professional judges and lay jurors to hear cases concerning grave crimes (e.g. murder or rape), produces a *feuille de motivation*; a document which summarises the main “*éléments à charge qui...ont convaincu la cour [et] qui ont été exposés au cours des délibérations menées par la cour et le jury*”.⁵²⁰

- Likewise in Germany, the court conducts a free evaluation of the evidence.⁵²¹ The parties may make motions to tender evidence at any point in the trial.⁵²² All such motions will be accepted (as they assist in the court’s duty to establish the material truth), unless, for instance, the evidence is *inter alia* “superfluous” or “irrelevant”, or “wholly inappropriate or unobtainable”.⁵²³ Throughout the proceedings, a court is required to make evidentiary rulings only when it is going to reject an item of evidence.⁵²⁴ The court, in its final judgment, may only rely on the evidence orally presented and discussed in the hearing before it. This ensures that the parties know which pieces of evidence the decision will be based on.⁵²⁵
- The system in Belgium is similar to those in France and Germany. In Belgium, any evidence is introduced in so far as it can assist the judge in his/her decision.⁵²⁶ Generally, a judge assesses the probative value of evidence based on what was

⁵²⁰ [Article 365-1](#) (added to the CPP in August 2011), which reads in full:

Le président ou l'un des magistrats assesseurs par lui désigné rédige la motivation de l'arrêt. En cas de condamnation, la motivation consiste dans l'énoncé des principaux éléments à charge qui, pour chacun des faits reprochés à l'accusé, ont convaincu la cour d'assises. Ces éléments sont ceux qui ont été exposés au cours des délibérations menées par la cour et le jury en application de l'article 356, préalablement aux votes sur les questions.

La motivation figure sur un document annexé à la feuille des questions appelé feuille de motivation, qui est signée conformément à l'article 364.

Lorsqu'en raison de la particulière complexité de l'affaire, liée au nombre des accusés ou des crimes qui leur sont reprochés, il n'est pas possible de rédiger immédiatement la feuille de motivation, celle-ci doit alors être rédigée, versée au dossier et déposée au greffe de la cour d'assises au plus tard dans un délai de trois jours à compter du prononcé de la décision.

⁵²¹ Section 261, Code of Criminal Procedure (*Strafprozessordnung*) ([StPO](#)): The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.

⁵²² Section 246(1), [StPO](#).

⁵²³ Sections 244, 245, [StPO](#). Also Bohlander (2012), pp. 167-169 (e.g., evidence is “inadmissible” when “the means of evidence is inadmissible”; evidence is “irrelevant” when “it can have no discernible influence on either conviction or sentence”; a means of evidence is “entirely inadequate” if the alleged fact cannot be proved, on either abstract or concrete grounds based on the individual scenario, by using this particular piece of evidence.)

⁵²⁴ Section 244(6), [StPO](#).

⁵²⁵ Bohlander (2012), pp. 28-29. Also Sections 260, 271, [StPO](#).

⁵²⁶ Vandermeersch (2012), p. 716.

submitted to him or her, and on which the parties have made submissions.⁵²⁷ Illegally obtained evidence is excluded; there are however certain exceptions to this rule on exclusion.⁵²⁸ Since the law does not require “*un mode spécial de preuve*”, the judge can freely assess the evidence.⁵²⁹

- In Finland, there are no special rules on the way in which evidence must be collected, nor on items that may qualify as admissible in criminal proceedings. Rather, the court is simply required to weigh the evidence to “decide what is to be deemed the truth in the matter” beyond reasonable doubt.⁵³⁰ Evidence obtained in violation of fair trial rights is not allowed.⁵³¹ The court is not bound by rules on how it must assess the evidence.⁵³² In giving reasons for its verdict, the court must indicate what evidence the judgment is based on.⁵³³
- The Portuguese legal system also follows the principle of the free assessment of evidence.⁵³⁴ There are no specific requirements to submit evidence.⁵³⁵ The court receives evidence as long as it is relevant to the discovery of the truth.⁵³⁶

Therefore, the Statute, the Appeals Chamber, other Trial Chambers of this Court, and several national legal systems have all endorsed the submission of evidence regime.⁵³⁷ The Defence’s sweeping challenge to established rules and practices is unpersuasive.

⁵²⁷ *Ibid.*, p. 717. Also Kennes (2009), p. 3 (“*En matière répressive, lorsque la loi n’établit pas un mode spécial de preuve, le juge du fond apprécie en fait la valeur probante des éléments sur lesquels il fonde sa conviction, qui lui sont régulièrement soumis et que les parties ont pu librement contredire.*”).

⁵²⁸ Franchimont *et al.* (2009), pp. 1035-1045, 1050-1051.

⁵²⁹ *Ibid.*, pp. 1047-1049.

⁵³⁰ Nuutila (2012), para. 4.3.1.

⁵³¹ *Ibid.*, para. 4.3.1.

⁵³² *Ibid.*, para. 4.3.2.

⁵³³ *Ibid.*, para. 4.3.2.

⁵³⁴ Article 127 of the Criminal Procedure Code (*Codigo de processo Penal*).

⁵³⁵ Article 164(2) of the Criminal Procedure Code (*Codigo de processo Penal*).

⁵³⁶ Articles 355 and 374 of the Criminal Procedure Code (*Codigo de processo Penal*).

⁵³⁷ See para. 158, fn. 516. *But see* various common law jurisdictions adopting the admission regime: Keane, p. 21 (“The admissibility of evidence is a matter of law for the judge. The most important feature of the English law of evidence is that all evidence which is sufficiently relevant to prove or disprove a fact in issue and which is not excluded by the judge, either by reason of an exclusionary rule of evidence or in the exercise of his discretion, is admissible.”); Tapper, p. 176 (“There are always some conditions precedent to the admissibility of evidence. [...] The judge alone has to decide whether the condition has been fulfilled. [...] he has no right to ask the opinion of the jury on the fact of a condition precedent.”); Section 136, Indian Evidence Act 1872 (“[...], the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not

II.A.1. The Chamber properly deferred its assessment of the relevance and probative value of the evidence

160. Although Babala advances a wholesale challenge to the Chamber's decision to defer its admissibility assessments, he shows no error. Rather, his appeal misunderstands the Chamber's decisions and the regime itself. In claiming that “[c]ontrairement à l’attente” the Chamber failed to render decisions on admissibility,⁵³⁸ Babala fails to acknowledge that although the Chamber did not render any such decisions, it was not required to do so.⁵³⁹ The Chamber was only expected to “consider the relevance, probative value and prejudice of each item submitted [...]” in its deliberations.⁵⁴⁰ This it did. But, contrary to Babala's claim, it did not need to expressly set out each “decision” in the Judgment.⁵⁴¹

161. Babala also misinterprets the *Bemba* Admissibility AD. That decision expressly allows a Chamber to defer admissibility assessments until the end of trial.⁵⁴² The Appeals Chamber found that Bemba's arguments that the wholesale admission into evidence of all items on the List of Evidence could violate his right to prepare his defence were speculative.⁵⁴³ The Appeals Chamber underscored that “irrespective of the approach the Trial Chamber takes to the admission of evidence”, an accused must expect “that all evidence listed [...] might be used against him and prepare his defence accordingly.”⁵⁴⁴ Babala cursorily alleges a violation of his right to prepare his defence,⁵⁴⁵ but he is equally bound by the Appeals Chamber's strictures. Indeed, all of the Accused in this case were expected to prepare their cases based on *all* the evidence formally submitted in the case. And they did, as demonstrated by their vigorous challenges to every aspect of the Prosecution's case. Moreover, contrary to Babala's

otherwise.”); Section 56, [Australian] Evidence Act 1995 (“Evidence that is not relevant in the proceeding is not admissible”). Also Brady (1999), pp. 289-290 (explaining the differences between various national systems).

⁵³⁸ [Babala Brief](#), para. 52 (“*Contrairement à l’attente, aucune décision sur l’admissibilité des éléments de preuves n’a été rendue, à aucun moment de la procédure. Aucune trace n’est visible dans le Jugement en soi.*”).

⁵³⁹ [Evidence Submission Decision](#), para. 9; [Judgment](#), para. 193 (“However, the Chamber's admissibility approach does not mean that all such items have been discussed in the present judgment. [...] Regardless of a Chamber's admissibility approach, as long as the judgment remained ‘full and reasoned’ it need not discuss therein every item of evidence submitted during trial.”).

⁵⁴⁰ [Evidence Submission Decision](#), para. 9 (emphasis added).

⁵⁴¹ *Ibid.*

⁵⁴² [Bemba Admissibility AD](#), para. 37.

⁵⁴³ *Ibid.*, paras. 66-68. (para. 67: “[Bemba] does not argue here that his right under article 67(1)(b) has been violated [...], but that it *could* be violated. The Appeals Chamber finds this argument speculative as it is not possible, at this stage, to determine the impact [...] on this right.”).

⁵⁴⁴ [Bemba Admissibility AD](#), para. 67. (“Moreover, it is not unusual that prior to the beginning of the trial, the defence does not know on which evidence the Court will eventually rely and which evidence will be ruled inadmissible.”).

⁵⁴⁵ [Babala Brief](#), para. 53 (“*L’approche de la Chambre de première instance a consacré l’impossibilité pour les parties de savoir quelles éléments avaient été admis au dossier et quelles autres ne l’avaient pas été.*”).

suggestion,⁵⁴⁶ a Chamber's decision to defer admissibility assessments cannot, on its own, violate his rights. Such a deferral has been endorsed both by the Statute and the Appeals Chamber.

162. In any event, Babala's claims of prejudice show no specific error. Rather, he alleges a particular state of affairs for "*la Défense*", but does not demonstrate any impact on his convictions.⁵⁴⁷ Even if Babala alleges a procedural error, he must at least show that the decision was materially affected by the procedural error or that, absent the procedural error, the decision "would have substantially differed from the one rendered."⁵⁴⁸ Babala fails to do so.

163. Babala speculates on the impact of this regime on the Prosecution.⁵⁴⁹ However, his concerns for the Prosecution's function do not show error either. Notwithstanding the evidence regime employed, the Prosecution discharged its burden of proof in this case and, on the basis of the evidence presented and discussed at trial, it proved beyond reasonable doubt that the five accused were guilty of the crimes charged. Moreover, Babala's reliance on the Prosecution's submissions when it closed its case does not assist him.⁵⁵⁰ In those submissions, the Prosecution did not challenge the evidence submission regime *per se*, as Babala does. Rather, it acknowledged the Chamber's decision to defer admissibility assessments to the end of trial, and asked the Chamber to assess the admissibility of its evidence at the latest before the closing submissions in the case.⁵⁵¹ The Prosecution's submissions did not revisit the basics of the evidence submission regime, as Babala's arguments now do. Rather, they suggested a different timing for the Chamber's admissibility assessments so that the Prosecution could determine if its evidence was sufficient to prove the charges.

⁵⁴⁶ [Babala Brief](#), para. 53.

⁵⁴⁷ [Babala Brief](#), para. 53.

⁵⁴⁸ [Ngudjolo AJ](#), para. 21.

⁵⁴⁹ [Babala Brief](#), para. 53.

⁵⁵⁰ [Babala Brief](#), para. 53.

⁵⁵¹ [T-37-RED](#), 55:17-25: "I would also, I would also add this caveat, that to the extent the documents have been deemed formally submitted, *and we do recognise the Chamber's position with respect to making a determination of the admissibility of documents*, we would prefer and it is our position that we should have at least prior to resting on the direct case, the Prosecution's direct case, a decision on the admissibility of these documents to determine whether in fact we have sufficient evidence to have proven our case on the record and admitted in the case. *At the very latest, however, we would submit that that decision should be forthcoming in advance of the closing submissions that may follow in this case.*" (emphasis added).

164. Further, Babala’s generalised comments on the scope and size of this case portray its nature but do not reveal error.⁵⁵² The mere fact that a case is large in scope does not make the use of the submission regime erroneous. The Statute and the Appeals Chamber’s case law apply to all types of cases. More so, the Chamber’s methodical use of the regime, as reflected in the Judgment, belies Babala’s claim. In particular,

- The Parties were allowed to submit evidence (i) in writing through a bar table application; (ii) by email or (iii) orally during the hearing;
- The Parties, according to rule 64(1), could object to the relevance or admissibility of evidence upon its submission;
- When the Parties raised procedural bars (article 69(7) challenges or rule 68 procedural requisites), the Chamber ruled on these objections at the time of submission;
- Unless procedural bars were raised or found, the Chamber generally recognised the “formal submission of the evidence”. The Registry reflected these items in the accompanying eCourt metadata;
- In its deliberations, the Chamber considered all ‘recognised’ submitted evidence and all corresponding objections.⁵⁵³

165. Moreover, Babala’s reliance on Judge Ozaki’s and Judge Henderson’s Dissents does not assist him.⁵⁵⁴ These dissents were written in the particular circumstances of the respective *Bemba* and *Gbagbo & Blé Goudé* cases. Babala disregards the specific contexts, which are distinguishable from this case. Judge Ozaki’s Dissent was a response to the *Bemba* Majority’s decision “to admit into evidence all of the materials included by the [P]rosecution on its List of Evidence.”⁵⁵⁵ In “admitting” this evidence, the *Bemba* Majority made a “*prima*

⁵⁵² [Babala Brief](#), para. 58. See [Gbagbo Evidence Submission Decision](#), para. 16 (“[n]umbers (of items, of witnesses or of hours required for the presentation of the evidence) are just numbers, as such neutral in respect of the procedure to be followed for the admission of evidence.”).

⁵⁵³ [Judgment](#), paras. 190-193.

⁵⁵⁴ [Babala Brief](#), paras. 54-56, 59-60.

⁵⁵⁵ [Judge Ozaki’s Dissent](#), paras. 1-2; [Bemba Admission Decision](#), paras. 8-10.

facie finding of the admissibility of this evidence.”⁵⁵⁶ Judge Ozaki disagreed with this conclusion, and the indiscriminate manner of admitting evidence. In her view, the Statute did not sanction the concept of “*prima facie* admissibility”.⁵⁵⁷ In contrast, Trial Chamber VII generally did not “admit” any evidence when it was presented, nor did it make a “*prima facie* finding of admissibility.” Rather, it chose to apply the evidence submission regime, one of the two statutory options available to it. Moreover, as the Appeals Chamber found, the *Bemba* Majority had “admitted” all items on the Revised List of Evidence into evidence, notwithstanding that they had not been “submitted”, thus contravening the requirements of article 74(2)⁵⁵⁸ and without affording the parties an opportunity to raise issues as to their relevance and admissibility pursuant to rule 64(1).⁵⁵⁹ To the contrary, Trial Chamber VII properly limited its consideration to the evidence properly “submitted” according to article 74(2), the Parties were permitted to challenge the submitted evidence, and the Defence did so extensively.

166. Likewise, although in the *Gbagbo & Blé Goudé* case, Judge Henderson preferred to render admissibility rulings at the time the evidence was submitted, he did not question the legality of the submission regime *per se*. Rather, he noted that “there is little dispute that a trial chamber may defer its consideration on the relevance and admissibility of evidence submitted by a party until the deliberations stage of proceedings”.⁵⁶⁰ Judge Henderson’s Dissent was also made in the context of the *Gbagbo & Blé Goudé* case. In Judge Henderson’s view, the *Gbagbo* Majority had issued its decision which changed the evidence admission regime in the case “on the eve [of] trial”.⁵⁶¹ The *Gbagbo* Majority rejected the earlier Directions of Conduct and adopted the evidence submission regime instead.⁵⁶² Judge Henderson thus made his remarks when, in his words, there had been a “significant departure

⁵⁵⁶ [Bemba Admission Decision](#), para. 9 (“[The decision] is based on making a *prima facie* finding of the admissibility of this evidence. It is important to distinguish this from the Chamber’s future determination of the probative value to be given to the evidence since the Chamber will evaluate [...] the probative value and appropriate weight to be given to the evidence as a whole, at the end of the case when making its final judgement.”).

⁵⁵⁷ [Judge Ozaki’s Dissent](#), para. 4 (“In my opinion, the concept of *prima facie* admissibility simply does not exist in [the Statute or the Rules].”); para. 5 (“The Statute does not, contrary to the Majority’s assertion, foresee an ‘intermediate stage’ in the ruling on admissibility. In my view, materials presented to the Court must either be admissible, or not admissible, without the possibility of an interim status such as ‘*prima facie* admissible’.”).

⁵⁵⁸ [Bemba Admissibility AD](#), paras. 45-46.

⁵⁵⁹ [Bemba Admissibility AD](#), paras. 47-50.

⁵⁶⁰ [Judge Henderson’s Dissent](#), para. 6; [Judge Henderson’s Second Dissent](#), para. 2.

⁵⁶¹ [Judge Henderson’s Dissent](#), para. 20.

⁵⁶² [Gbagbo Evidence Submission Decision](#), paras. 3-18; also [Gbagbo Directions of Conduct](#), para. 51 (providing that evidence would be admitted only with a *prima facie* determination of relevance and probative value).

from these directions” too close to the start of trial.⁵⁶³ He also noted that the parties had prepared on the basis of the earlier Directions of Conduct.⁵⁶⁴ Babala fails to place the two Dissents in context.

167. Babala’s reliance, in a footnote, on various ICTY and ECCC decisions alleging a “lack of certainty for the accused” is also not persuasive.⁵⁶⁵ He fails to elaborate. Comparisons between those decisions and the Court’s own are distinguishable. Although the respective ICTY and ECCC Chambers granted the Defence additional time to prepare based on admissibility decisions rendered at trial, none of the decisions in themselves prove the contrary, *i.e.*, that an accused would have been prejudiced if such admissibility decisions had been deferred.⁵⁶⁶

168. For the reasons above, Babala fails to show that the Chamber erred, as a general rule, in deferring its admissibility assessments.

II.A.2 The Chamber properly assessed each item of evidence and reasoned the Judgment

169. Both Babala and Arido misread and conflate the requirement for a Chamber to make item-by-item assessments and its obligation to provide a reasoned opinion more generally.⁵⁶⁷ Contrary to their interpretations, neither requirement would have obliged the Chamber to list every piece of evidence, and its related decision, in the Judgment. As the Chamber correctly

⁵⁶³ [Judge Henderson’s Dissent](#), paras. 19-20.

⁵⁶⁴ *Ibid.* Also [Judge Henderson’s Second Dissent](#), paras. 5-7 (noting the failure to comply with the Directions of Conduct in that case).

⁵⁶⁵ [Babala Brief](#), fn. 87 (referring to [Judge Henderson’s Dissent](#), para. 9).

⁵⁶⁶ [Tolimir Bar Table Decision](#), paras. 45-48 (granting the accused additional time to file his Final Trial Brief, since he had spent time responding to the Prosecution’s bar table motion, and preparing for the contingency that proposed exhibits might be admitted.); [Popović Bar Table Motion](#), pp. 1-4 (granting the Defence additional time to file closing briefs and preparing closing arguments because new exhibits had been admitted); [Prlić Schedule Decision](#), pp. 5-6 (granting the Defence additional time to present its case because of “[a] very large number of motions presented by the Prosecution and subsequent decisions rendered by the Chamber [...]”); [Hadžihasanović Scheduling Order](#), pp. 2-4 (granting the Defence additional time to file its closing brief “conscious of the additional workload generated by the filing of the entire War Diaries”); [Case 002 Adjusted Schedule Decision](#), pp. 1-3 (granting the parties additional time to prepare closing briefs because of decisions admitting evidence).

⁵⁶⁷ [Babala Brief](#), paras. 62-68 (para. 63: “[n]ombre des éléments de preuves soumis ne sont même pas mentionnés. On ne pourra donc penser que la Chambre s’est déchargée de ses obligations de rendre une décision motivée sur les éléments de preuves, comme exigé par l’art 74(5) du Statut, via ces affirmations générales”); [Arido Brief](#), para. 246 (“[t]he ‘safeguard’ is supposed to be the full and reasoned statement on findings on evidence and conclusions, as per [a]rticle 74(5). But, this, clearly does not work [...]”).

held, “[r]egardless of a Chamber’s admissibility approach, as long as the judgment remains ‘full and reasoned’ it need not discuss therein every item of evidence submitted at trial.”⁵⁶⁸

170. The Chamber was correct. First, the standard for a reasoned opinion under article 74(5) is undisputed. Although a Chamber must indicate the basis for its decisions with sufficient clarity, the extent of its reasoning will depend on the circumstances of each case. Such reasoning will not necessarily require reciting each and every factor; rather a Chamber must identify the facts relevant to its conclusion.⁵⁶⁹

171. Second, as the Appeals Chamber has stated in the *Bemba* Admissibility AD, “it must be clear from the reasons of the decision that the Chamber carried out the required item-by-item analysis, and how it was carried out”, but a Chamber can “rule on the relevance or admissibility of several items of evidence in one decision.”⁵⁷⁰

172. What happened in the *Bemba* trial is in sharp contrast to this case. In *Bemba*, the Trial Chamber failed to give “any item-specific reasons for its ‘*prima facie* finding of admissibility’ of the [Prosecution’s list of] evidence [...]”.⁵⁷¹ Apart from “general statements [on] the legal basis and the potential value of admitting the evidence”, the *Bemba* Chamber failed to “explain why the material was found *prima facie* admissible.”⁵⁷² In contrast, this Chamber discussed witnesses’ testimonies and the submitted items of evidence in its Judgment “to an extent which provides a full and reasoned statement of its findings on the evidence and conclusions [...]”.⁵⁷³ In so doing, the Chamber assessed and relied on

- relevant evidence, *i.e.*, the specific piece of evidence pertained to the matters properly to be considered by the Chamber in its investigation of the charges against the accused; and

⁵⁶⁸ [Judgment](#), para. 193.

⁵⁶⁹ [Lubanga Redactions AD](#), para. 20; [Lubanga Second Redactions AD](#), para. 30.

⁵⁷⁰ [Bemba Admissibility AD](#), para. 59.

⁵⁷¹ [Bemba Admissibility AD](#), para. 60; [Bemba Admission Decision](#), paras. 8-9.

⁵⁷² [Bemba Admissibility AD](#), para. 60.

⁵⁷³ [Judgment](#), para. 195.

- the probative value of evidence, including indicia of reliability and, where applicable, potential prejudice of the evidence upon which it relies.⁵⁷⁴

In its Judgment, the Chamber discussed those evidentiary items upon which it relied to convict.⁵⁷⁵ The Chamber did not discuss “every incriminatory piece of evidence submitted by the Prosecution [...]”.⁵⁷⁶ Nor did it refer to specific evidence “when there [was] significant contrary evidence on the record.”⁵⁷⁷ The Chamber was not obliged to do so. Rather, it should be presumed that the Chamber “assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.”⁵⁷⁸ Following deliberations, items not discussed in the Judgment could also have included those assessed as “going solely to points ultimately having no impact on the Chamber’s essential findings” or “needlessly cumulative [to] other evidence supporting [the findings].”⁵⁷⁹ The Chamber also considered the Parties’ submissions.⁵⁸⁰ Moreover, the Chamber thoroughly assessed the evidence and several procedural issues in the Judgment, and entered reasoned factual and legal findings.⁵⁸¹ Babala, Bemba and Arido disregard these essential findings.⁵⁸²

173. Moreover, the Appellants misquote the *Bemba* Admissibility AD and misunderstand the “item-by-item assessment” requirement. By claiming that the Decision requires that “*une Chambre doit se prononcer sur la pertinence, la valeur probante et l’effet préjudiciable de chaque élément de preuve qui lui a été soumis*”,⁵⁸³ Babala’s argument blurs a critical distinction. A Chamber need only *consider* the relevance, probative value and potential prejudice of each item of evidence, but it need not reflect every one of those items in the Judgment.⁵⁸⁴ Accordingly, Annex E submitted by Babala—alleging that only 354 submitted

⁵⁷⁴ [Judgment](#), para. 195.

⁵⁷⁵ [Judgment](#), para. 196. *Contra* [Arido Brief](#), para. 245.

⁵⁷⁶ [Judgment](#), para. 196.

⁵⁷⁷ *Ibid.* Also [Bemba TJ](#), para. 227 (“[in] performing its ‘holistic evaluation and weighing of *all the evidence*’, [the Chamber] is under no obligation ‘to refer to the testimony of every witness or every piece of evidence on the trial record’.”).

⁵⁷⁸ [Bemba TJ](#), para. 227.

⁵⁷⁹ [Ongwen Intercepts Decision](#), para. 13 (emphasis added).

⁵⁸⁰ [Judgment](#), para. 199.

⁵⁸¹ [Judgment](#), paras. 185-893.

⁵⁸² [Arido Brief](#), para. 245 (“[the Defence has no idea on what documentary evidence the conviction is based[...]]”); [Babala Brief](#), para. 66 (“[il] est impossible de savoir quels éléments ont été admis au dossier et lesquels n’ont pas été.”); [Bemba Brief](#), para. 193 (“But, having deferred its admissibility decision to the Judgment, the Chamber was then required to issue item-by-item admissibility determinations [...]”).

⁵⁸³ [Babala Brief](#), para. 62 (emphasis added), para. 67.

⁵⁸⁴ [Bemba Admissibility AD](#), para. 37.

items, and only two items from his List of Evidence were mentioned in the Judgment—is fundamentally misconceived.⁵⁸⁵ Bemba’s submission reveals the same misunderstanding.⁵⁸⁶

174. Babala also misinterprets the Chamber’s assessment of the ICC Detention Centre logs and recordings.⁵⁸⁷ First, he fails to acknowledge that the Chamber assessed the content, provenance, source or authorship (including the author’s role in events) and any other relevant material for all non-oral evidence (documents and audio recordings). The Chamber assessed the indicia of reliability broadly, and underscored that a document, even if with sufficient indicia of authenticity, may still be unreliable.⁵⁸⁸ Second, the Chamber correctly did category-by-category assessments of evidence;⁵⁸⁹ it did not need to discuss individual DU recordings in its Judgment.⁵⁹⁰ Third, the Chamber properly discussed the authenticity, chain of custody and accuracy of the Detention Centre logs and recordings in the Judgment.⁵⁹¹

175. The Chamber found that an “array of mutually reinforcing information confirm[ed] the accuracy of the intercepted communications and their corresponding logs”. It also conducted an in-depth analysis of the authenticity of the Detention Centre communications, providing no less than five separate reasons.⁵⁹² Some of these include:

- Some communications and logs had inherent indicia of authenticity (for instance, corporate watermarks of the telecommunications provider). Some of the communications began with persons identifying themselves as “the ICC” when connecting Bemba’s calls in the Detention Centre;
- The content of every communication in evidence matched the corresponding logs and attributed numbers;
- The case record “was replete” with further information confirming the authenticity and chain of custody of these communications and logs. The Pre-Trial Chamber Judge, in his orders, stated “exactly where the materials came from.” The Registry

⁵⁸⁵ Babala Annex E, pp. 1-8; [Babala Brief](#), para. 68, fn. 107.

⁵⁸⁶ [Bemba Brief](#), paras. 189,193.

⁵⁸⁷ [Babala Brief](#), paras. 63-64.

⁵⁸⁸ [Judgment](#), para. 208.

⁵⁸⁹ [Judgment](#), paras. 209-227 (outlining the Chamber’s approach to the Western Union Records, Telephone Communications, and the recording of the Detention Centre communications).

⁵⁹⁰ [Bemba Admissibility AD](#), para. 59.

⁵⁹¹ [Judgment](#), paras. 217-227.

⁵⁹² [Judgment](#), paras. 219-223.

“exhaustively chronicled all seized materials received” and “kept formal chain of custody logs”. Materials were unsealed by the Registry in the presence of Defence counsel;

- The Registry—the Court’s neutral organ tasked with non-judicial aspects of its administration—itself generated many of the materials, including the Detention Centre logs.⁵⁹³

176. Babala fails to properly consider this analysis. Rather, he selectively reads a minor part of the analysis. Babala wrongly claims that the Chamber erred by using the phrase “for example” to extend its findings on *some* communications to justify its findings of authenticity for *all* communications.⁵⁹⁴ In doing so, Babala ignores all additional indicia that the Chamber relied on to establish authenticity of all communications.⁵⁹⁵ Babala’s submission is also illogical: for instance, he offers no good reason for why, when certain Detention Centre logs among those collected were found to be authentic based on the ICC identity of persons at the time of connecting, such authenticity cannot also be extended to all the other Detention Centre logs and recordings. Likewise, Bemba also wrongly suggests—contrary to the *Bemba* Admissibility AD⁵⁹⁶—that the Chamber could not consider whether categories of evidence could be admitted.⁵⁹⁷ Neither Appellant shows error.

177. For these reasons, the Appellants fail to show that the Chamber erred in its reasoning.

II.A.3 The Appellants were not prejudiced

178. The Appellants claim they suffered prejudice, but fail to show prejudice and crystallise error. Often they do not even substantiate their argument.⁵⁹⁸ Such unsupported arguments should be dismissed *in limine*.⁵⁹⁹

179. Arido’s reference to “potential fair trial violations” is vague and speculative.⁶⁰⁰ Further, his claim that the regime was a “free for all” with no role for the Parties ignores that the

⁵⁹³ *Ibid.*

⁵⁹⁴ [Babala Brief](#), paras. 63-64. *E.g.*, [Judgment](#), para. 219: (“For example, some call logs bear the corporate watermarks of the telecommunications provider. As another example, some of the Detention Centre communications begin with persons identifying themselves as the ICC when connecting [Bemba’s calls].”).

⁵⁹⁵ *E.g.* [Judgment](#), paras. 219-227.

⁵⁹⁶ [Bemba Admissibility AD](#), para. 59.

⁵⁹⁷ [Bemba Brief](#), para. 196.

⁵⁹⁸ [Babala Brief](#), paras. 69-72; [Arido Brief](#), paras. 241-246; [Bemba Brief](#), paras. 188-202.

⁵⁹⁹ [Lubanga AJ](#), paras. 29-34.

Parties were expected to, and did, present timely objections on the items when they were submitted.⁶⁰¹ Likewise, although Babala and Arido claim that “they cannot identify the harm or prejudice of the admitted document, without knowing that it has been admitted”,⁶⁰² this argument underscores their misconception of the regime. The Chamber clarified at the outset that it would not rule on admissibility, but that it would assess the totality of the evidence at the end of trial. Further, all the evidence “formally submitted” was part of the case record, and the Defence was expected to, and did, mount their cases on that basis—indeed, most vigorously.

180. Moreover, on appeal, the Appellants must show error. Yet they fail to show that any specific piece of evidence was unreasonably disregarded and thereby caused prejudice. Further, Babala’s claim that “*la Chambre d’appel [elle-même] est mise en difficulté*” disregards that the Appeals Chamber has full access to the e-Court record with all the evidence as formally submitted.⁶⁰³ Moreover, the Appeals Chamber, absent showing of error on appeal, will not conduct a review of the evidence itself. Nor, contrary to Babala’s suggestion, will the Appeals Chamber assume an advisory role to address alleged difficulties in the *Gbagbo and Blé Goudé* and *Ongwen* cases—none of which Babala elaborates upon.⁶⁰⁴

181. Although Arido alludes to “evidence not mentioned in the Judgment but relied upon”, he offers no example.⁶⁰⁵ Equally, Babala scantily refers to evidentiary items to show error. In an unrelated part of his Brief, he mentions 10 individual Detention Centre recordings which he appears to challenge in the context of the evidence submission regime.⁶⁰⁶ All 10 Detention Centre recordings mentioned are discussed in the Judgment.⁶⁰⁷ Yet, Babala wrongly argues that the Chamber did not give reasons for their admissibility.⁶⁰⁸ His unsupported submission fails to acknowledge the Chamber’s thorough analysis of the authenticity of the Detention

⁶⁰⁰ [Arido Brief](#), para. 244.

⁶⁰¹ [Arido Brief](#), para. 243.

⁶⁰² [Arido Brief](#), para. 245; [Babala Brief](#), para. 69.

⁶⁰³ [Babala Brief](#), para. 69.

⁶⁰⁴ [Babala Brief](#), para. 70.

⁶⁰⁵ [Arido Brief](#), para. 245.

⁶⁰⁶ [Babala Brief](#), para. 35 (fn. 53 refers to Brief, para. 76, in turn referring to the *sui generis* system relating to Bemba’s legal aid).

⁶⁰⁷ CAR-OTP-0087-2093 ([Judgment](#), fn. 1573); CAR-OTP-0074-0610 ([Judgment](#), fns. 349, 353, 361, 362); CAR-OTP-0074-0478 ([Judgment](#), fns. 1573, 1590); CAR-OTP-0074-0697 ([Judgment](#), fns. 1573, 1595); CAR-OTP-0074-0590 ([Judgment](#), fns. 1573, 1591); CAR-OTP-0074-636 ([Judgment](#), fns. 1573, 1597); CAR-OTP-0074-0624 ([Judgment](#), fns. 1573, 1598); CAR-OTP-0074-0628 ([Judgment](#), fns. 1573, 1592); CAR-OTP-0074-0490 ([Judgment](#), fns. 1573, 1593); CAR-OTP-0074-0514 ([Judgment](#), fns. 1573, 1596).

⁶⁰⁸ [Babala Brief](#), para. 35.

Centre logs and recordings, among other telephone communications.⁶⁰⁹ The Chamber authenticated the Detention Centre logs and recordings, as part of its analysis of their relevance and probative value. The Chamber also found that notwithstanding the “technical irregularities in recording conversations”, their exclusion was not warranted. The Chamber followed a case-by-case approach when it relied on the recordings and only did so when they were corroborated.⁶¹⁰ Babala raises no germane error. Moreover, the Prosecution provided extensive submissions on the relevance, reliability and authenticity of the Detention Centre logs and recordings in its bar table motion.⁶¹¹ Annex A of that submission addressed individual call logs and recordings in detail.⁶¹² In relying on certain call logs and recordings in the Judgment, the Chamber implicitly agreed with the Prosecution’s submissions. The relevance and reliability of the Detention Centre logs and recordings were thus already established.

182. Bemba alleges prejudice and claims that the Chamber should not have deferred its admissibility decisions.⁶¹³ Bemba likewise misreads the *Bemba* Admissibility AD. Merely because a party raises questions on the relevance or admissibility of the evidence does not automatically oblige the Chamber to rule on these questions immediately.⁶¹⁴ The Chamber is only required to “balance its discretion” *to consider whether to defer its ruling* in light of the parties’ arguments at that stage, but it is not required to rule then.⁶¹⁵ Indeed, it is only for article 69(7) and rule 71 challenges that a Chamber is obliged to rule immediately.⁶¹⁶ And based on Bemba’s arguments, the Chamber’s decision to defer its assessment was understandable: Bemba’s submissions were and are inaccurate, and show no prejudice.

183. First, contrary to the Appellants’ claims,⁶¹⁷ submitting evidence through bar table motions is not prejudicial *per se*. Rather, it is part of this Court’s standard practice⁶¹⁸

⁶⁰⁹ Above paras. 174-177.

⁶¹⁰ [Judgment](#), paras. 226-227.

⁶¹¹ [Prosecution Second Bar Table Motion](#), paras. 8-29; [Fourth Bar Table Motion Decision](#), para. 1; [Prosecution Final Brief](#), para. 50 (relying on its submissions on the *prima facie* reliability and relevance to admit the documentary evidence contained in its six bar table motions, to demonstrate their weight.”).

⁶¹² [Prosecution Second Bar Table Motion](#), Annex A; [Evidence Submission Decision](#), para. 6, p. 11 (recognising as ‘submitted’).

⁶¹³ [Bemba Brief](#), paras. 189-191.

⁶¹⁴ *Contra* [Bemba Brief](#), para. 190.

⁶¹⁵ [Bemba Admissibility AD](#), para. 37 (emphasis added).

⁶¹⁶ See rules 63(3) and (4).

⁶¹⁷ [Bemba Brief](#), para. 190; [Arido Brief](#), paras. 241, 244; [Babala Brief](#), para. 71.

⁶¹⁸ Piragoff and Clarke (2016), p. 1728, mn. 29 (“Explicit authority in the Statute to permit the introduction of documents and written transcripts is in accord with the general philosophy of article 69 to avoid overly technical rules of evidence [...]. There is no general rule prescribing how documents or physical evidence are to be placed

permitted under article 69(2).⁶¹⁹ As the Chamber correctly held, the Statute does not establish an absolute requirement that evidence be introduced only through a witness—whether in article 5 or article 70 cases.⁶²⁰ Article 69(2) establishes the primacy of orality with respect to witness testimony, but not with respect to other evidence.⁶²¹ Importantly, Chambers have a significant degree of discretion in considering all types of evidence—given the nature of the cases that come before the ICC.⁶²² The Prosecution’s use of bar table motions in this case cannot be said to be prejudicial, particularly when the Defence has robustly challenged the evidence in each of them.⁶²³ Thus, contrary to the Appellants’ claim, notwithstanding the evidentiary system, the Defence confronted all evidence brought against them.⁶²⁴ Nor is the use of bar table motions extraordinary or exceptional merely because the Prosecution did so, especially when the Defence equally made full use of bar table motions to submit evidence.⁶²⁵

184. Apart from fleetingly alleging that the Judgment did not address his arguments on “the principle of orality” and “the right to cross-examination”,⁶²⁶ Arido fails to elaborate. Not only does Arido disregard the Chamber’s pertinent findings,⁶²⁷ he discounts the Statute and the Court’s case law allowing the use of bar table motions.⁶²⁸

in evidence. The Court is thus left to apply its discretion under article 69 para. 4, as to the relevance or admissibility of such evidence.”).

⁶¹⁹ Article 69(2): “[...] The Court may also permit [...] the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused”.

⁶²⁰ [Judgment](#), paras. 206-208.

⁶²¹ Article 69(2): “The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules. [...]”; [Bemba Admissibility AD](#), paras. 76-78.

⁶²² [Judgment](#), para. 206 (citing [Lubanga Admission Decision](#), para. 24 (“[t]he drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited—at the outset—the ability of the Chamber to assess evidence ‘freely’.”); also [Katanga Admission Decision](#), para. 12 (“[it] is permissible to tender documentary evidence directly without producing it by or through a witness under the Statute and the Rules, this does not entail a lower standard of relevance or admissibility.”); [Ongwen Bar Table Decision](#), para. 49 (“[t]here is nothing prejudicial about submitting [evidence on critical elements of the charges] through this procedure, [...] [t]he method of submission of documentary evidence has no bearing on how the Chamber will eventually evaluate the evidence.”).

⁶²³ *E.g.* [Evidence Submission Decision](#), para. 2 (documenting Defence responses); [Fourth Bar Table Motion Decision](#), para. 2; [Fifth Bar Table Motion Decision](#), para. 2; Outstanding Evidentiary Applications Decision, para. 34.

⁶²⁴ *E.g.* [Arido Brief](#), para. 242.

⁶²⁵ *E.g.* Outstanding Evidentiary Applications Decision, para. 8 (Bemba submitted 292 items from the bar table); para. 14 (Kilolo submitted 177 items from the bar table); para. 19 (Babala submitted three items from the bar table); para. 25 (Arido submitted 67 items from the bar table).

⁶²⁶ [Arido Brief](#), para. 241.

⁶²⁷ [Judgment](#), paras. 206-208.

⁶²⁸ *E.g.* [Ongwen Intercepts Decision](#), para. 10 (“[it] must be emphasised that the statutory scheme does not require that evidence be submitted only through a witness [...] the ultimate prejudice which the Defence may

185. Second, reliance on hearsay evidence—whether adduced through a bar table motion or not—is not prejudicial *per se*.⁶²⁹ As the Appeals Chamber has held, “[t]hat evidence is hearsay does not necessarily deprive it of probative value [...]”.⁶³⁰ Crucially, Bemba fails to specify what particular hearsay he takes issue with.⁶³¹ The Detention Centre logs and many of the intercepted communications are not “remote hearsay”;⁶³² rather, they relay Bemba’s actual words. Moreover, with all the telephone communications, the Chamber conducted “its own independent assessment of the evidence” including to ascertain the relevant details including the speakers, relevant numbers and the date of the call.⁶³³ Bemba fails to acknowledge that the Chamber did so. In these circumstances, his unspecified claims of prejudice are unconvincing.

186. Third, Bemba’s submission alleging “the Prosecution’s failure to include sufficient information concerning admissibility criteria”⁶³⁴ overlooks the Prosecution’s substantive motion to submit the Detention Centre logs and recordings, and the accompanying 128 page Annex A addressing the admissibility criteria in detail *vis-à-vis* individual logs and recordings. Likewise, the Prosecution’s motion to submit the intercepts also explained the threshold criteria of admissibility.⁶³⁵ Moreover, the *prima facie* relevance of these intercepts from the Dutch authorities was established. Not only was the material examined by the Independent Counsel (mandated to identify material which might be relevant for the proceedings, excluding potentially privileged information), the Single Judge independently determined its relevance.⁶³⁶ Further, as the Chamber stated, in deciding whether the Accuseds’ private intercepted communications selected by the Independent Counsel should be provided to the other Parties, it assessed the material for general relevance, as an additional safeguard.⁶³⁷

suffer depends on the nature of the material, how the material is discussed during trial, whether the Chamber relies on it in its judgment and—if so—how it relies on it.”).

⁶²⁹ [Bemba Brief](#), para. 190. *Above* para. 66 and *below* para. 465.

⁶³⁰ [Ngudjolo AJ](#), para. 226 (citing [Aleksovski Admissibility AD](#), para. 15); [Ngudjolo AJ, Dissenting Opinion of Judges Trendafilova and Tarfusser](#), para. 50 (“[hearsay] is not to be automatically excluded.”).

⁶³¹ [Bemba Brief](#), paras. 190, 290.

⁶³² *Ibid.*

⁶³³ [Judgment](#), para. 216.

⁶³⁴ [Bemba Brief](#), para. 190.

⁶³⁵ *E.g.* [Prosecution First Bar Table Motion](#), paras. 1-4, 10-52.

⁶³⁶ [IC Appointment Decision](#), p.4; [Article 70 Investigation Decision](#), pp.7-8; [IC Disqualification Decision](#), pp.4-5; [Seized Material Review Decision](#), paras. 19-23; [Seized Material Review ALA Decision](#), para. 15; [IC Reports Decision](#), paras. 16-20.

⁶³⁷ [Evidence Submission Decision](#), fn. 28 (“In this regard, the Chamber notes that broadly similar concerns arise in the present proceedings when the Chamber has to decide whether it is necessary to provide the accuseds’

187. Fourth, Bemba's vague arguments on "the benefit of an updated DCC, Pre-Trial Brief, or disclosure [...]"⁶³⁸ and "the relevance and precise meaning of the intercepts"⁶³⁹ are simply irrelevant to the submission regime and the grounds of appeal. Nor do Bemba's brief remarks show otherwise.

188. Fifth, Bemba's argument that "it was impossible to verify" the Chamber's assessment of D-20-1's (Dr. Harrison) testimony is contradictory.⁶⁴⁰ Four paragraphs later, Bemba concedes that the Judgment cited D-20-1's report and testimony.⁶⁴¹ This claim is also erroneous. Bemba omits critical parts of the Judgment, assessing D-20-1's testimony and his expert report.⁶⁴² Bemba's argument thus expresses no more than mere dissatisfaction with the outcome of the Chamber's assessment.

189. Sixth, Bemba's argument that "testimonial evidence was necessary" to authenticate the materials misreads the Chamber's findings.⁶⁴³ The Chamber did not limit its analysis on whether testimonial evidence was required to the question of "provenance" alone. Rather, it considered that the Single Judge had noted "exactly where the materials came from."⁶⁴⁴ Moreover, the Registry kept an exhaustive record of the chain of custody,⁶⁴⁵ which would have included "gathering, retrieval and storage".⁶⁴⁶ And Bemba fails to mention that the materials, on multiple occasions, were unsealed only in the presence of Defence counsel.⁶⁴⁷ Bemba also fails to mention that P-361 gave expert testimony on the origins of the CDRs.⁶⁴⁸ In these circumstances, Bemba fails to impugn the Chamber's finding that it was "entirely unreasonable" to hear from the Single Judge and the Registry on events the Defence counsel had themselves witnessed.⁶⁴⁹

private intercepted communications, which are selected by the Independent Counsel, to the other parties. The Chamber has had to assess the communications' general relevance to the case as a safeguard, though these decisions are explicitly made without prejudice to 'the admission of any items into evidence or [the Chamber's] ultimate decision on the merits'."); [IC Reports Decision](#), para. 17.).

⁶³⁸ [Bemba Brief](#), para. 190. *Below* para. 310-312.

⁶³⁹ [Bemba Brief](#), para. 191. *Below* para. 550.

⁶⁴⁰ [Bemba Brief](#), para. 194.

⁶⁴¹ [Bemba Brief](#), para. 199.

⁶⁴² [Judgment](#), paras. 226-227 (fns. 241-247, referring to Defence expert testimony and report).

⁶⁴³ [Bemba Brief](#), paras 196-197.

⁶⁴⁴ [Judgment](#), para. 222.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Contra* [Bemba Brief](#), para. 197.

⁶⁴⁷ [Judgment](#), para. 222.

⁶⁴⁸ [Judgment](#), para. 221.

⁶⁴⁹ [Judgment](#), para. 222.

190. Finally, Bemba's vague claims that the Chamber overlooked specific items of evidence adopt a strained reading of the Judgment. Notably, these claims are unrelated to challenges to the evidence submission regime, but rather appear to merely express discontent with the Chamber's rejection of his argument.⁶⁵⁰ They should be dismissed summarily.⁶⁵¹ Notwithstanding, they do not show error. For instance:

- "The attribution and usage of the '11' number", "the opaque nature of the shared burden between the Defence and the Registry [...]", "the amounts reimbursed by the Registry", "the broad types of [witness payments at other tribunals]" and "Bemba's unawareness as to the purpose of certain payments [...]" are not "evidential items".⁶⁵² Rather, these are subjective arguments put forward by the Bemba Defence which were rejected.
- Bemba misreads the Judgment and the case record when he claims that the Chamber erred in stating that "[t]he Defence did not contest the reliability of the Western Union spreadsheets."⁶⁵³ In its Judgment at the end of the trial, the Chamber stated that "[t]he reliability and accuracy of the information contained in the [Western Union] records was actually never challenged by the Defence."⁶⁵⁴ To challenge this finding, Bemba relies on a single submission he made on 9 October 2015.⁶⁵⁵ But that submission does not categorically challenge the reliability of the Western Union records. Rather, it acknowledges that [REDACTED] (P-267) could verify the authenticity of the Western Union records, and had not yet testified.⁶⁵⁶ Indeed, contrary to Bemba's claims that P-267 acknowledged errors in the processing of the data, P-267 only stated that "[t]here might be human mistakes or something", and requested the opportunity to review the transactions."⁶⁵⁷ The Chamber's finding in the Judgment accepted and relied on P-267's testimony, during which he authenticated

⁶⁵⁰ [Bemba Brief](#), paras. 195, 199-200.

⁶⁵¹ [Krajisnik AJ](#), para. 26.

⁶⁵² *Contra* [Bemba Brief](#), paras. 200-201.

⁶⁵³ [Bemba Brief](#), para. 195.

⁶⁵⁴ [Judgment](#), para. 211.

⁶⁵⁵ [Bemba Brief](#), fn. 366 (referring to [Bemba 9 October 2015 Response](#), para. 80)

⁶⁵⁶ [Bemba 9 October 2015 Response](#), paras. 81-82.

⁶⁵⁷ [Bemba Brief](#), para. 195; [T-34-RED](#), 20:23–21:3; *also* [T-35-RED](#), 74:22-85:6.

the financial records. Bemba did not raise this reliability issue in his article 69(7) application, or in his closing brief.⁶⁵⁸

- Likewise, Bemba wrongly claims that the Chamber did not consider examples of “inaccurate digital evidence” that the Defence provided.⁶⁵⁹ To support this claim, Bemba refers, indirectly, to a single selective example in a footnote in its 9 October 2015 filing, and provided only by way of illustration.⁶⁶⁰ This cannot impugn the Chamber’s conclusion that “[t]he Defence has likewise been unable to present a single *substantiated* challenge to the authenticity of any of this information.”⁶⁶¹ Bemba’s cursory claim that P-433 acknowledged “human error” in preparing the CDRs does not detract from this finding.⁶⁶²
- And again, in claiming that the Chamber erred in stating that the “[D]efence submitted no evidence concerning the call patterns of the ‘11’ number”, Bemba misapprehends the import of the Judgment.⁶⁶³ Rather, the Chamber found Babala’s arguments unconvincing.⁶⁶⁴ The Chamber’s rejection of unpersuasive Defence arguments cannot be equated to an alleged failure to consider an evidential item. Bemba’s unsupported submission shows no error.

191. For the above reasons, the Appellants have not shown that the Chamber erred. Their arguments should be dismissed.

⁶⁵⁸ See generally [Bemba Article 69\(7\) Application](#) and [Bemba Closing Brief](#).

⁶⁵⁹ [Bemba Brief](#), para. 195.

⁶⁶⁰ [Bemba Brief](#) (referring to [Bemba 9 October 2015 Response](#), para. 80). (Footnote 52 of that filing (confidential version) provides one example.).

⁶⁶¹ [Judgment](#), para. 224 (emphasis added).

⁶⁶² [T-12-RED](#), 35:6-11.

⁶⁶³ [Bemba Brief](#), para. 199; [Judgment](#), para. 739.

⁶⁶⁴ [Judgment](#), para. 739.

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III. THE CHAMBER CORRECTLY DEFINED THE OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

192. Bemba's,⁶⁶⁵ Mangenda's,⁶⁶⁶ Babala's⁶⁶⁷ and Arido's⁶⁶⁸ arguments concerning the Chamber's definition of the elements of the article 70 offences must be dismissed. They misread the Judgment, misunderstand the law and largely repeat arguments presented at trial dismissed by the Chamber.

193. First, the Chamber correctly found that the standard *mens rea* under article 30 applies to article 70 offences. The ICC legal texts do not require special intent. Second, the Chamber correctly found that article 70 offences contain different legal elements and that cumulative convictions may be entered as long as all the elements are met. Third, the Chamber correctly defined the offence of false testimony under article 70(1)(a) as encompassing the withholding of true information. Fourth, Bemba is a "party" entitled to present evidence for the purposes of article 70(1)(b). Fifth, the Chamber correctly defined the offence of "corruptly influencing a witness" under article 70(1)(c).

III.A. ARTICLE 70 OFFENCES DO NOT REQUIRE SPECIAL INTENT

194. The Appeals Chamber should dismiss Bemba's challenges to the Chamber's interpretation of the required *mens rea* for article 70 offences.⁶⁶⁹ Bemba's two-fold argument is misplaced: first, he wrongly construes the *chapeau* of article 70 as introducing a *specific intent* requirement to interfere with the administration of justice;⁶⁷⁰ and second, he misunderstands article 70 as excluding accessorial liability.⁶⁷¹

III.A.1. Article 30 applies to article 70 offences

195. First, the Chamber correctly found that the term "intentionally" in the *chapeau* of article 70(1) refers to the standard *mens rea* enshrined in article 30⁶⁷²—namely, "*dolus directus* in the first degree (direct intent) and second degree (oblique intent)"⁶⁷³—which applies "unless otherwise provided".⁶⁷⁴ Indeed, the relevant provisions do not include an

⁶⁶⁵ [Bemba Brief](#), paras. 8-56.

⁶⁶⁶ [Mangenda Brief](#), paras. 146-165.

⁶⁶⁷ [Babala Brief](#), paras. 143, 157, 252.

⁶⁶⁸ [Arido Brief](#), paras. 162-212.

⁶⁶⁹ [Bemba Brief](#), paras. 10-18.

⁶⁷⁰ [Bemba Brief](#), paras. 11-14.

⁶⁷¹ [Bemba Brief](#), paras. 10, 15-18.

⁶⁷² [Judgment](#), para. 26.

⁶⁷³ [Judgment](#), para. 29.

⁶⁷⁴ [Judgment](#), para. 31.

additional legal requirement that the administration of justice be “harmed” or that the offence be committed to interfere with the administration of justice.⁶⁷⁵ Rather, “the harm is captured in the illicit and deliberate conduct of the perpetrator to tamper with the reliability of the evidence”.⁶⁷⁶

196. This reasoning is consistent with the criteria of treaty interpretation.⁶⁷⁷ First, the plain terms of the *chapeau* of article 70 (“the Court shall have jurisdiction *over the following offences against the administration of justice when committed intentionally*”⁶⁷⁸) do not require proof that the crimes be committed with a special intent to harm the administration of justice. The first clause is a reference to the general classification into which all offences enumerated in article 70(1)(a) to (f) fall: they are all “offences against the administration of justice”. It is not meant as a constituent element (whether objective or subjective) of the offences in article 70, but merely explains their nature in general terms. The second clause identifies the mental element and refers to the standard mental element in article 30, which applies *mutatis mutandis* pursuant to rule 163(1).⁶⁷⁹ The objective elements of each of the offences are then elaborated in sub-paragraphs 1(a) to (f) of article 70.

197. Bemba’s interpretation of “intentionally”—as being equivalent to “specific intent”—disregards this plain reading and renders redundant other provisions that explicitly incorporate a specific intent requirement.⁶⁸⁰ For example, article 6 states a clear specific intent for genocide: “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. Article 7(1)(g) and (2)(f) also states a clear specific intent for

⁶⁷⁵ [Judgment](#), para. 31.

⁶⁷⁶ [Judgment](#), para. 31.

⁶⁷⁷ Article 31 VCLT.

⁶⁷⁸ Article 70, *chapeau*. Emphasis added.

⁶⁷⁹ The ICC relevant jurisprudence has adopted this position. See [Confirmation Decision](#), para. 32; [Gicheru and Kipkoech Article 58 Decision](#), para. 20. See also Piragoff (2016), pp. 1753-1754, mn. 5 (noting that “on strict interpretation article 30 does not apply to article 70, as the latter concerns ‘offences’ against the administration of justice. Nevertheless, there are two arguments indicating that the definition of ‘intentionally’ in article 30 should apply to article 70. First, rule, 163, sub-rule 1, provides explicitly that ‘the Statute and the Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in article 70’, and none of the exclusions that are set out in the rule are applicable. Second, under the Statute the Court may, pursuant to article 21 (applicable law) be guided by the definition of ‘intent’ in article 30 in developing its interpretation of ‘intentionally’ for the purposes of article 70.”)

⁶⁸⁰ [Akayesu TJ](#), paras. 498 and 517-518 (indicating that in the context of international criminal law, a ‘specific intent’ “[i]s the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged [...]” and is “characterised by a psychological relationship between the physical result and the mental state of the perpetrator”, which only applies to certain crimes).

forced pregnancy: “with the intent of affecting the ethnic composition”.⁶⁸¹ Bemba’s submissions would thus be incompatible with the principle of effective interpretation.⁶⁸²

198. Second, the Chamber’s correct interpretation of the plain terms of the *chapeau* of article 70 accords with the provision’s object and purpose.⁶⁸³ Bemba’s submission that the harm would only occur if article 70 requires specific intent to interfere with the administration of justice⁶⁸⁴ disregards that “the offences are of conduct and the harm is captured in the illicit and deliberate conduct of the perpetrator to tamper with the reliability of evidence.”⁶⁸⁵ Thus, as the Chamber found, “that the administration of justice is interfered with and thereby harmed [...] is an obvious consequence of the acts committed under Article 70(1)(a) to (c).”⁶⁸⁶ Nor do the authorities cited by Bemba, through his improper reference to his previous trial submission, assist him.⁶⁸⁷ Article 30(2) of the Rome Statute does not encompass negligence; instead, it requires intent to engage in the conduct and intent with respect to the consequence, or awareness that it will occur in the ordinary course of events, to establish criminal responsibility.

199. Moreover, Bemba’s argument would readily contradict the preventive role of article 70. Since article 70 offences “threaten or disrupt the overall fair and efficient functioning of justice in the specific case to which they refer,” and “ultimately undermine the public trust in the administration of justice and the judiciary”,⁶⁸⁸ the criminalisation of article 70 offences seeks to deter such conduct from occurring, given its serious consequences, no matter the subjective motivations of the perpetrator.

⁶⁸¹ Other examples include: *torture* – it must be shown that “the perpetrator inflicted the pain or suffering for such purposes as: obtaining information [...]” (article 8(2)(a)(ii), para. 2, Elements of Crimes); *using protected persons as shields* – it must be proven that “the perpetrator intended to shield a military objective from attack or shield, favour or impede military operations” (article 8(2)(b)(xxiii), para. 2, Elements of Crimes); *taking of hostages* – it must be shown that “the perpetrator intended to compel a State, an international organisation, a natural or legal person (...) to act or refrain from acting [...]” (article 8(2)(c)(iii), para. 3 Elements of Crimes); *pillage* – it is required that “the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use” (article 8(2)(e)(v), para. 2, Elements of Crimes). See also [Judgment](#), para. 31, fn. 53.

⁶⁸² [Bemba TJ](#), para. 77 (“on the basis of the principle of good faith provided for in this provision, the general rule also comprises the principle of effectiveness, requiring the Chamber to dismiss any interpretation of the applicable law that would result in disregarding or rendering any other of its provisions void.”).

⁶⁸³ E.g. [Lubanga AJ](#), para. 277; [DRC Extraordinary Review AD](#), para. 33. See also [Ruto Summonses AD](#), para. 105.

⁶⁸⁴ [Bemba Brief](#), para. 13.

⁶⁸⁵ [Judgment](#), para. 31.

⁶⁸⁶ [Judgment](#), para. 31.

⁶⁸⁷ [Bemba Brief](#), para. 14, fn. 13 referring to [Bemba Elements Submissions](#), para. 22 and arguing that “intent to commit the offence in question” is required to establish criminal responsibility for criminal contempt.

⁶⁸⁸ [Kilolo Release Decision](#), para. 23. On appeal against this decision, the Appeals Chamber did not disturb these findings: see [Kilolo Release AD](#), para. 65.

200. Further, and as Bemba concedes,⁶⁸⁹ recent jurisprudence from other international criminal tribunals has confirmed that their equivalent provisions⁶⁹⁰ do *not* contain a specific intent requirement.⁶⁹¹ This jurisprudence likewise underscores that the prosecution of conduct amounting to criminal contempt seeks to prevent the obstruction, frustration, prejudice or abuse of the Tribunals' ability to exercise their basic jurisdiction over genocide, crimes against humanity and war crimes.⁶⁹² As such, the purpose of punishing persons for contempt is to ensure that this jurisdiction and the integrity and dignity of the judicial process are safeguarded.

201. Finally, Bemba incorrectly claims that the Chamber disregarded the drafting history of article 70.⁶⁹³ Yet, the drafting history does not support Bemba's claims that the drafters intended to include a specific intent requirement in article 70. The proposal that Bemba refers to simply required that the offences be committed "intentionally",⁶⁹⁴ but the natural meaning of this term in context and consistent with the drafters' approach to articles 5 and 30 does not include specific intent. Previous⁶⁹⁵ and subsequent drafts⁶⁹⁶ did not introduce such requirement either.

202. Nor is Bemba assisted by referring to how some States have incorporated the Statute into their domestic law, or otherwise elected to punish similar offences.⁶⁹⁷ The understanding of a few individual States, in isolation, is not a reliable basis to interpret the intention of the drafters of the Statute as a whole. The Chamber's passing observation in a footnote that at least some "national laws do not require the existence of special intent", merely reflects the

⁶⁸⁹ [Bemba Brief](#), para. 16 (noting that "later ICTY case law has not applied the 'special intent' requirement").

⁶⁹⁰ The ICTY's, ICTR's and SCSL's rule 77(A) ("the Tribunal in the exercise of its inherent power *may hold in contempt those who knowingly and wilfully interfere with its administration of justice* [...]"); STL's rule 60 bis (A) ("the Tribunal (...) may hold in contempt those who knowingly and wilfully interfere with its administration of justice [...]).

⁶⁹¹ [Hartmann AJ](#), para. 128; [Hartmann TJ](#), para. 55; [Tupajic TJ](#), para. 16; [Pećanac TJ](#), para. 19; [Margetic TJ](#), para. 16. See also [Bangura TJ](#), pp. 182-183 (the Chamber did not require proof of specific intent even if the Prosecution's submissions (*id.*, para. 23) had specifically included this element). See also [Al Jadeed TJ](#), para. 48 (where the Trial Chamber held that "[t]he mens rea required for a violation of Rule 60 bis (A) is knowing and wilful interference with the Tribunal's administration of justice" and rejected that "[o]n a plain reading of the text and in line with relevant case-law 'knowing and wilful' is a mere stand-in for 'specific intent' [...]").

⁶⁹² [Tadić Contempt TJ](#), para. 16; [Simić Contempt TJ](#), para. 91; [Jokić Contempt TJ](#), para. 38; [Beqaj TJ](#), para. 13; [GAA TJ](#), para. 10; [Nshogoza TJ](#), para. 218; [Samura TJ](#), para. 15.

⁶⁹³ [Bemba Brief](#), para. 14, fns. 11 and 12 referring to [Bemba Elements Submissions](#).

⁶⁹⁴ [1996 Preparatory Committee, USA Proposal](#).

⁶⁹⁵ [1994 Report of the Working Group \(14 July 1994\)](#), p. 27; [1995 Siracusa Draft \(alternative to the ILC Draft\)](#), pp. 68-69.

⁶⁹⁶ [1998 Preparatory Committee \(25 March 1998\)](#), p. 1; [1998 Preparatory Committee \(1 April 1998\)](#), pp. 13-14; [1997 Decision of Preparatory Committee \(18 December 1997\)](#), pp. 31-32; [1997 Working Groups on Procedural Matters \(11 December 1997\)](#), p. 3.

⁶⁹⁷ *Contra* [Bemba Brief](#), paras. 16-17.

lack of a general consensus on the issue. Indeed, the Chamber expressly acknowledged that other States take “a different approach”.⁶⁹⁸ The lack of a general principle simply means that State practice in framing their own laws cannot guide interpretation of the drafters’ intentions when drafting article 70.

III.A.2. Accessories can be responsible for article 70 offences

203. Bemba wrongly asserts that the Chamber erred in expanding the application of accessorial liability to article 70 offences since, by requiring that article 70 crimes be committed *intentionally*, article 70’s *chapeau* excludes accessorial liability.⁶⁹⁹ Bemba’s arguments are not only legally inaccurate but disregard that the Chamber addressed and dismissed these arguments in the Judgment.⁷⁰⁰ Since he fails to show an error in the Chamber’s reasoning, Bemba’s submissions should be dismissed summarily.⁷⁰¹

204. In any event, the Chamber correctly found that article 25(3) of the Statute remains applicable to article 70 offences as per rule 163(1), which prescribes that the Statute shall be applied ‘*mutatis mutandis*’, namely with the necessary changes, to the article 70 offences.⁷⁰² Hence, principal perpetrators and accessories can be held criminally responsible for article 70 offences as long as they “fulfil the objective elements of the offences with the required ‘guilty mind’, commonly known as the *mens rea*”.⁷⁰³

205. Bemba thus conflates the subjective and objective requirements of article 70 offences with the forms of liability in article 25(3). While article 70 and article 30 prescribe the objective and mental elements of the offences, articles 25(3) and 28 set out the modes of liability. This same distinction exists between the article 5 crimes, whose objective and mental elements are contained in articles 6 to 8 and article 30 (unless otherwise provided), and whose modes of liability are set out in articles 25(3) and 28.⁷⁰⁴

⁶⁹⁸ [Judgment](#), para. 31, fn. 56.

⁶⁹⁹ [Bemba Brief](#), paras. 10 (fn. 6 referring to [Judgment](#), para. 26) and 15-18.

⁷⁰⁰ [Judgment](#), paras. 52-54. *See also* [Confirmation Decision](#), para. 28 (with respect to article 70(1)(a) offences, “any third person may be prosecuted as an accessory under article 25(3)(b)-(d) of the Statute, provided that the witness’s testimony was objectively false”).

⁷⁰¹ [Krajišnik AJ](#), para. 24.

⁷⁰² [Judgment](#), paras. 52-54.

⁷⁰³ [Judgment](#), para. 55. And aider and abetter, for example, has a two-fold intent: first, with respect to his/ her own facilitation (he/she assists with the aim of facilitating the offence) and, second, with respect to the principal’s offences (he/she must at least be aware of the essential elements of the offence). *See below* para. 476.

⁷⁰⁴ [Ntakirutimana AJ](#), para. 546 (individual responsibility for murder, which is an intentional crime, is not limited to personal commission).

206. Further, Bemba incorrectly claims that both national legislation implementing article 70 and the jurisprudence of other international criminal tribunals show that accessorial liability cannot apply to these offences.⁷⁰⁵ Bemba's examples—improperly added by reference to previous filings—do not support his proposition. The domestic legislation he cites only requires, like the *chapeau* of article 70, that the offences are committed 'intentionally'.⁷⁰⁶ This does not exclude accessorial liability.

207. Likewise, Bemba is incorrect to suggest that the jurisprudence of other international criminal tribunals excludes prosecution for contempt based on accessorial liability. Their provisions expressly regulate "incitement" to commit contempt.⁷⁰⁷ Milan Vujin, a defence lawyer in *Tadić*, was held in contempt of the ICTY for instructing witnesses to make false statements.⁷⁰⁸ And in the *Prince Taylor* case, the SCSL Trial Chamber convicted the accused of 'persuading' a witness to give false testimony.⁷⁰⁹ Similarly, in *Rašić*, the ICTY Trial Chamber accepted a guilty plea based not only on 'bribing' a witness but also for 'inciting' that witness "to offer bribes to other potential witnesses", and "procuring false statements" from two other persons.⁷¹⁰ In all three cases, the accused were convicted based on accessorial modes of liability similar to the Rome Statute's article 25(3)(b) (soliciting or inducing the offences).

208. Bemba's arguments should similarly be dismissed.

⁷⁰⁵ [Bemba Brief](#), para. 16, fns 14 and 15.

⁷⁰⁶ [Bemba Brief](#), fn. 14 referring to [Bemba Regulation 55 Response](#), paras. 14-18 and [Bemba Elements Submissions](#), fn. 19. The latter refers to: [South Africa, Implementation RS ICC Act 2002](#), section 37(1)(c); [Malta, ICC Act 2002](#), sections 7(1) and 8(2); [Spain, L.O.15/2003 Implementing RS ICC](#), art. 471bis; [Uganda, ICC Act 2010](#), arts. 14 and 16; [New Zealand, ICC Act 2000](#), sections 19 and 21; [Nigeria, Criminal Code Act; UK, ICC Act 2001](#), sections 54 and 61; [Canada, CAH and WC Act 2000](#), sections 16 – 21; [Ireland, ICC Act 2006](#), section 11.

⁷⁰⁷ See rule 77(B) of the [ICTY](#), [ICTR](#) and [SCSL](#) Rules and rule 60bis (B) of the [STL Rules](#).

⁷⁰⁸ [Tadić Contempt TJ](#), paras. 139-150, 160.

⁷⁰⁹ [Prince Taylor TJ](#), para. 195.

⁷¹⁰ [Rašić SJ](#), paras. 10-13. Other examples include *Kamuhanda*, where the ICTR Appeals Chamber ordered the Prosecutor to investigate not only false testimony based on the significant discrepancies in the testimony of witness GAA and GEX, but also the *solicitation* of false testimony by other persons since, according to the Appeals Chamber, "both forms of behaviour are specifically prohibited by the Rules of Procedure and Evidence": [Kamuhanda Appeals Hearing](#), 50:12–51:16. Following the investigation, Nshogoza, a former defence investigator, was charged with manipulating, inciting, inducing and persuading witness GAA and GEX to sign false statements prepared by Nshogoza, and to give false testimony: [Nshogoza TJ](#), para. 3.

III.B. THE CHAMBER CORRECTLY ENTERED CUMULATIVE CONVICTIONS

209. The Chamber correctly concluded that cumulative convictions are permissible if the offences contain “materially distinct elements not required by the others”.⁷¹¹ It also correctly found that the offences in article 70(1)(a)-(c) meet this criterion since they “criminalise entirely different forms of conduct”.⁷¹² Based on the evidence, the Chamber correctly entered cumulative convictions for Bemba, Kilolo and Mangenda since the distinct legal requirements of article 70(1)(a), (b) and (c) were fulfilled.⁷¹³

210. Bemba, once again, repeats his arguments at trial—which the Chamber duly noted and dismissed—without showing an error.⁷¹⁴ On this basis alone, Bemba’s arguments should be summarily dismissed.⁷¹⁵

211. In any event, Bemba’s arguments lack merit.⁷¹⁶ First, the *ne bis in idem* principle enshrined in article 20(1) does not apply to cumulative convictions, since it prohibits a second trial for *conduct* which formed the basis of the *crimes* for which the person has already been convicted or acquitted by the Court.⁷¹⁷ It does not prohibit the conviction of a person in the same trial for multiple crimes or offences based on the same underlying conduct as long as each of the crimes or offences possesses a materially different legal element from each other, and the underlying conduct satisfies each of these elements. Bemba’s arguments on article 17 and admissibility determinations are similarly irrelevant.⁷¹⁸ In admissibility proceedings, a Chamber seeks to determine whether domestic authorities are genuinely investigating or prosecuting substantially the same conduct and the same person as the Court, or have done so.⁷¹⁹ To the contrary, and as the Chamber rightly underscored in dismissing these same arguments at trial: “[a] determination [of cumulative convictions]

⁷¹¹ [Judgment](#), para. 951.

⁷¹² [Judgment](#), para. 952 (“In the view of the Chamber, Articles 70(1)(a) to (c) [...] clearly capture distinct forms of conduct by way of which the administration of justice is compromised.”); para. 953 (“Article 70(1)(a) [...] addresses the conduct of a witness giving false evidence and centres on the legal requirement of ‘false testimony’, while [a]rticle 70(1)(b) [...] requires the presentation of ‘false or forged evidence’ by a ‘party’. Both provisions criminalise entirely different forms of conduct and contain ‘materially distinct elements’ not required by either of them. These elements are also absent from [a]rticle 70(1)(c), [...] [which] does not require that the conduct of the perpetrator actually influence the witness in question”).

⁷¹³ [Judgment](#), paras. 952-955.

⁷¹⁴ [Judgment](#), paras. 950-955.

⁷¹⁵ [Krajišnik AJ](#), para. 24.

⁷¹⁶ [Bemba Brief](#), paras. 19-22.

⁷¹⁷ Schabas, pp. 502-507.

⁷¹⁸ *Contra* [Bemba Brief](#), para. 20.

⁷¹⁹ [Kenyatta Admissibility AD](#), paras 39-40; [Gaddafi Admissibility AD](#), paras. 70-73 (on the degree of sameness about the cases).

involves comparing legal elements of the relevant statutory provisions; the specific facts of the case play no role”.⁷²⁰

212. Further, Bemba disregards that the “materially different legal elements” test, consistently applied at this Court⁷²¹ and in other international criminal tribunals,⁷²² “fairly labels the criminal conduct to reflect its true scope”⁷²³ and ensures that an accused fully accounts for all the different crimes and offences arising from his criminal conduct.⁷²⁴

213. Second, the Chamber correctly found that article 70(1)(a), (b) and (c) “criminalise entirely different forms of conduct and contain ‘materially distinct elements’”⁷²⁵ and adequately defined the offences.⁷²⁶ In particular:

- Article 70(1)(a) addresses the giving of ‘false testimony’ by persons who are under an obligation, pursuant to article 69(1), to tell the truth and thus give, before commencing their testimony and pursuant to rule 66(1), an undertaking as to the truthfulness of the evidence to be given.⁷²⁷ Only *witnesses* (persons who attest to factual allegations according to their knowledge and, for the purposes of this provision, appearing before the Court either in person or by technological means) can be the physical perpetrators of the offence.⁷²⁸ The offence is committed when a witness intentionally affirms an *objectively* false fact or negates an *objectively* true fact when directly asked, or withholds information that is *objectively* true and that is inseparably linked to the issues explored during questioning.⁷²⁹ Only information that has an impact on the assessment of the facts relevant to the case or the assessment of

⁷²⁰ [Judgment](#), para. 951.

⁷²¹ [Katanga TJ](#), para. 1695; [Bemba TJ](#), paras. 747-748.

⁷²² [Delalić AJ](#), para. 412; [Ntabakuze AJ](#), para. 260; [Gatete AJ](#), para. 259.

⁷²³ [Judgment](#), para. 955.

⁷²⁴ If the test is met, a Chamber is bound to enter multiple convictions to ensure that the convicted person’s criminal responsibility is fully reflected: [Strugar AJ](#), para. 324; [Stakić AJ](#), para. 358; [Gatete AJ](#), para. 261.

⁷²⁵ [Judgment](#), para. 953.

⁷²⁶ [Contra Bemba Brief](#), para. 21 (noting that the Chamber “adopt[ed] broad definitions of such elements”).

⁷²⁷ [Judgment](#), para. 19.

⁷²⁸ [Judgment](#), paras. 19-20.

⁷²⁹ [Judgment](#), para. 21. *See also* para. 25 (and fn. 36) where the Chamber stated that it would take an objective approach when determining the falsity of the information, rather than a subjective approach.

the witnesses' credibility may trigger the applicability of article 70(1)(a).⁷³⁰ This assessment is, however, case-specific and cannot be determined in the abstract.⁷³¹

- Article 70(1)(b) addresses the presentation of false evidence by *parties* to the proceedings, namely participants entitled to introduce evidence in Court proceedings.⁷³² Parties are at least the Prosecution and the Defence. The Chamber rightly found that the actual role of the members of the Defence team (a person who is either formally authorised to present evidence or who, *de facto*, plays a significant role in the team's decisions on the strategy of the accused's representation), rather than the formal job title, determines who can be perpetrators.⁷³³ The Chamber correctly found that an *accused* can also be the perpetrator of this offence since he is entitled to present evidence according to the Rome Statute and that '*evidence*' embraces all types of evidence including witness testimony and documents which are 'false' or 'forged'.⁷³⁴ The offence is committed when the evidence is *introduced* in the proceedings; in the case of oral testimony this takes place at least when the witness appears before the Court and testifies.⁷³⁵
- Article 70(1)(c) (corruptly influencing a witness) as developed below,⁷³⁶ focuses on the conduct of the perpetrator, which can be *any person* who carries out *any conduct*—such as bribing, instructing, correcting or scripting the answers or pressuring, intimidating or threatening witnesses or potential witnesses—which may have an impact or influence on the evidence to be introduced in the proceedings. Notably, the offence is committed even if the witness is not actually influenced.⁷³⁷

214. Consequently, and based on the evidence before it, the Chamber correctly entered cumulative convictions for these article 70 offences with respect to Bemba, Kilolo and

⁷³⁰ [Judgment](#), para. 22.

⁷³¹ [Judgment](#), para. 24.

⁷³² [Judgment](#), paras. 32-33.

⁷³³ [Judgment](#), para. 34.

⁷³⁴ [Judgment](#), para. 35. *See also* para. 39 (noting that 'false' is defined in the same manner as in article 70(1)(a) and describes "something as being objectively incorrect and not according with truth or fact" and 'forged' "can only relate to tangible objects, such as documents, that are fraudulently imitated or manipulated to state something untruthful").

⁷³⁵ [Judgment](#), para. 40.

⁷³⁶ *See below* paras. 236 - 260.

⁷³⁷ [Judgment](#), paras. 43-50.

Mangenda.⁷³⁸ Bemba's arguments misunderstand the elements of the offences and the Judgment, and conflate these elements with the modes of liability under article 25(3).⁷³⁹ Bemba was convicted as a co-perpetrator of article 70(1)(b) offences under article 25(3)(a) because he, as an accused person, had the right to present evidence,⁷⁴⁰ and did present witnesses who provided false testimony on their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.⁷⁴¹ On the other hand, he was convicted for soliciting article 70(1)(a) offences under article 25(3)(b) because he asked, personally or through Kilolo, the 14 Main Case Defence witnesses to give false testimony on the above three issues.⁷⁴² Thus, the Chamber did not convict Bemba of the same offence under different modes of liability.⁷⁴³ Moreover, as in *Gatete*, the same evidence can be used to fulfil the requirements of the elements of the offences or crimes and the modes of liability.⁷⁴⁴ There is no error in the Chamber's approach; instead, Bemba's arguments are incorrect.⁷⁴⁵

215. Thus, Bemba's arguments on cumulative convictions should be dismissed.

III.C. THE CHAMBER CORRECTLY DEFINED FALSE TESTIMONY UNDER ARTICLE 70(1)(A)

216. The Chamber correctly held that:

The offence under Article 70(1)(a) of the Statute is committed when a witness intentionally affirms a false fact or negates a true fact when directly asked. The same

⁷³⁸ *Contra* [Bemba Brief](#), paras. 21-22. *In particular*, see para. 21, where Bemba misrepresents paragraph 35 of the Judgment. The Chamber found that Bemba, as an accused person, had the right to present evidence under the Rome Statute, and not that he was a party because, as a defendant, he "exerts a direct influence on strategic decisions concerning evidence".

⁷³⁹ [Bemba Brief](#), paras. 21-22.

⁷⁴⁰ [Judgment](#), para. 35.

⁷⁴¹ [Judgment](#), paras. 816-820. *See also* [Judgment](#), paras. 926-929.

⁷⁴² [Judgment](#), paras. 852-854. *See also* [Judgment](#), paras. 930-933.

⁷⁴³ *Contra* [Bemba Brief](#), para. 21. Bemba's reference to [Al-Mahdi TJ](#) is thus inapposite.

⁷⁴⁴ [Gatete AJ](#), para. 263 ("[...]the Trial Chamber inferred from the evidence establishing that Gatete participated in a joint criminal enterprise that he also entered into an agreement to commit genocide. On this basis, it found that entering a conviction for the crime of genocide would render a conviction for conspiracy redundant. The Appeals Chamber recalls that conspiracy to commit genocide is a crime under the Statute, while joint criminal enterprise is a form of criminal responsibility. The Appeals Chamber considers, Judge Agius dissenting, that a *comparison of the evidence underpinning these two elements is irrelevant when deciding whether convictions can be entered for both crimes of genocide and conspiracy to commit genocide, as the issue of cumulative convictions arises only between crimes.*") (emphasis added).

⁷⁴⁵ [Bemba Brief](#), paras. 21-22.

applies if *the witness is not directly asked but intentionally withholds information that is true, and that is inseparably linked to the issues explored during questioning*.⁷⁴⁶

217. Bemba's arguments—that the Chamber erroneously expanded the scope of false testimony to include the withholding of true information even if the witness is not asked—selectively quote from the Judgment.⁷⁴⁷ The Chamber reasonably found that to incur criminal liability for article 70(1)(a) offences a witness must withhold information which is “inseparably linked to the issues explored during questioning”.⁷⁴⁸ This common-sensical definition is plainly fair to laypersons since it would exclude situations where the questions posed are unrelated or ambiguous.⁷⁴⁹ As the Chamber noted, this definition is consistent with the plain wording and purpose of article 70(1)(a).⁷⁵⁰ First, this provision is drafted broadly and a witness's testimony included not only positive actions but also omissions that may be duly considered by the Chamber when it assesses the evidence as a whole. Second, witnesses under oath have the duty to speak the *whole* truth.⁷⁵¹ Third and relatedly, the provision captures those situations where a witness intentionally provides a partially truthful account in order to mislead the judges in their enquiry into the facts of the case and thus, he or she does not give the whole truth.⁷⁵²

218. Similarly, the provisions and authorities relied upon by the Chamber are correct and support the Chamber's definition of false testimony.⁷⁵³ Nor were those determinative of the Chamber's decision.⁷⁵⁴

219. Further, Bemba's arguments with respect to witness P-214 (D-55) are mistaken. Since D-55 was directly asked about all his contacts with the Defence,⁷⁵⁵ this plainly encompassed

⁷⁴⁶ [Judgment](#), para. 21. Emphasis added.

⁷⁴⁷ See [Bemba Brief](#), para. 23 (“The Chamber found that false testimony can encompass the withholding of truthful information, even if ‘not directly asked’”). Bemba omits to quote the full sentence of paragraph 21 of the Judgment.

⁷⁴⁸ [Judgment](#), para. 21.

⁷⁴⁹ *Contra* [Bemba Brief](#), paras. 24, 28.

⁷⁵⁰ [Judgment](#), para. 21.

⁷⁵¹ Rule 66(1). [Judgment](#), para. 21.

⁷⁵² [Judgment](#), para. 21.

⁷⁵³ [Judgment](#), fn. 30. *Contra* [Bemba Brief](#), paras. 25-26. As noted by the Chamber many domestic jurisdictions punish as false testimony or perjury the withholding or concealing of information, see article 372 of the [Italian Criminal Code](#); article 247bis of the [Mexican Federal Criminal Code](#); and section 346 of the [Slovak Criminal Code](#), all referred by the Chamber. See also article 275 of the [Argentinean Criminal Code](#) and article 233(1) of the [Polish Criminal Code](#) Act. The German case cited by the Chamber is similarly on point, since the Chamber's definition of false testimony requires an inseparable link to the questions posed.

⁷⁵⁴ [Judgment](#), para. 21.

⁷⁵⁵ *Contra* [Bemba Brief](#), paras. 29-30.

the witness's Amsterdam meeting and telephone contact with Bemba, about which he remained silent. D-55 understood the question. Indeed, during his testimony, after asking D-55 about two previous contacts he was known to have had with the Defence,⁷⁵⁶ the Prosecution directly asked him (twice) about any other contacts he might have had with the Defence:

Were there other contacts thereafter with other members of the Defence team?⁷⁵⁷

D-55 responded by rhetorically repeating the question, and acknowledged only one additional contact:

Other contacts with the Defence team? No. I know that other contacts with the Defence team was -- that was the last -- the last September, when I agreed with Mr Kilolo and he said to me, 'Henceforth, we will contact you -- correction, you will be contacted by a team that will organise your travel to The Hague.'⁷⁵⁸

220. The Prosecution then asked D-55 to confirm the total number of contacts he had had with the Defence:

So all in all, approximately speaking, we can say you had three contacts with the Defence team, is that correct?⁷⁵⁹

And D-55 responded:

Yes, more or less. Three contacts, unless I'm mistaken.⁷⁶⁰

221. These were direct and clear questions. Yet, D-55 untruthfully testified about only three contacts with the Defence, and concealed his meeting with Kilolo in Amsterdam in June 2012⁷⁶¹ and his telephone call with Bemba in October 2012.⁷⁶² In any event, any contact that D-55 may have had with Bemba was information inseparably related to the issues explored

⁷⁵⁶ [ICC-01/05-01/08-T-264-Red2](#), 62:22-66:14.

⁷⁵⁷ [ICC-01/05-01/08-T-264-Red2](#), 66:15-16.

⁷⁵⁸ [ICC-01/05-01/08-T-264-Red2](#), 66:17-20.

⁷⁵⁹ [ICC-01/05-01/08-T-264-Red2](#), 66:21-22.

⁷⁶⁰ [ICC-01/05-01/08-T-264-Red2](#), 66:23.

⁷⁶¹ [Judgment](#), para. 301. See paras. 120-121, 123, 288, 299.

⁷⁶² [Judgment](#), para. 301. See paras. 123, 293-299.

by the Prosecution.⁷⁶³ In fact, in his rule 68 statement, D-55 indicated that he [REDACTED].⁷⁶⁴

222. Thus, the Chamber reasonably found that D-55 untruthfully testified, among other topics, about his prior contacts with the Main Case Defence.⁷⁶⁵

223. Finally, Bemba's submissions about the relevance of the Chamber's findings on D-55 for Bemba's *mens rea* are inaccurate.⁷⁶⁶ The Chamber relied on an array of evidence—and not only D-55's testimony—to conclude that Bemba knew and intended the witnesses to give false testimony on the issues of their contacts with the Defence, payments and benefits, and acquaintances with other persons.⁷⁶⁷

224. Bemba's arguments should therefore be dismissed.

III.D. THE CHAMBER CORRECTLY FOUND THAT BEMBA IS A “PARTY” UNDER ARTICLE 70(1)(B)

225. Bemba repeats his trial arguments and challenges the Chamber's finding that he could be considered a “party” within the meaning of article 70(1)(b).⁷⁶⁸ Since the Chamber already addressed and dismissed those same arguments,⁷⁶⁹ and Bemba fails to point to an error in the Judgment, his submissions should be dismissed.⁷⁷⁰

226. The Chamber correctly found that Bemba, as the accused in the Main Case, is a “party” under article 70(1)(b), and thus can be held responsible for “presenting” false or forged evidence. Bemba's contrary arguments are erroneous. First, the Chamber correctly found that Bemba had the right, among others, to present evidence. Second, Bemba's legal representation did not absolve him from criminal responsibility for the offences under article 70(1)(b).

⁷⁶³ [Judgment](#), para. 21.

⁷⁶⁴ Transcribed Statement of D-55, CAR-OTP-0074-0872-R03, at 0880 [REDACTED].

⁷⁶⁵ [Judgment](#), para. 301.

⁷⁶⁶ [Bemba Brief](#), paras. 30-31.

⁷⁶⁷ [Judgment](#), paras. 817-820; 930-933.

⁷⁶⁸ [Bemba Brief](#), paras. 32-42 referring to [Judgment](#), paras. 32-37.

⁷⁶⁹ See [Judgment](#), paras. 35-36, fns. 64 and 66 referring to [Bemba Closing Submissions](#), see 66:14-67:23.

⁷⁷⁰ [Krajišnik AJ](#), para. 24.

III.D.1. Bemba was allowed to present evidence

227. The Chamber, in keeping with the VCLT, duly noted the differences between the authentic versions of the Statute and construed article 70(1)(b) in light of its context and its object and purpose.⁷⁷¹ It correctly found that “[article 70(1)(b)], in all authentic versions, must be understood as being addressed to those who have the right to present evidence to a chamber in the course of proceedings before the Court”.⁷⁷² It further found that an “accused is permitted under the Statute to present evidence him- or herself”.⁷⁷³ In particular, the Chamber noted that article 67(1)(e) specifically entitles the accused “to raise defences and to *present* other evidence admissible under this Statute.”⁷⁷⁴ During the hearing on the confirmation of charges, article 61(6)(c) entitles the ‘person’ to ‘*present* evidence’.⁷⁷⁵ This article applies *mutatis mutandis* to trial and appeal proceedings.⁷⁷⁶

228. Thus, the Chamber’s decision was correct and Bemba’s arguments should be dismissed.

III.D.2. Bemba remained a “party” even though he was represented by counsel

229. Bemba wrongly suggests that once counsel is appointed, the accused plays no role in his defence and counsel bears sole responsibility for his actions, including for presenting evidence on behalf of his or her client.⁷⁷⁷

230. Bemba’s submissions lack merit. First, even if accused persons are represented, they play an essential role in their own defence. The ICC Code of Conduct—selectively read by Bemba—confirms this. For instance, article 14(2)(a) of the Code requires counsel to “abide by the client’s decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel’s duties under the Statute, the Rules of Procedure and Evidence, and this Code.”⁷⁷⁸ Counsel is also required to “consult the client on the means by which the objectives of his or her representation are to be pursued.”⁷⁷⁹ Notably, pursuant to article 15(1) of the Code, “[c]ounsel shall provide the client with all explanations reasonably

⁷⁷¹ Article 33(4) VCLT referred to by the Chamber in [Judgment](#), para. 33, fn. 59.

⁷⁷² [Judgment](#), para. 33 (noting that the term ‘party’ appears in the English and Arabic versions, but not in the other four authentic versions of the Statute). *See also* para. 37 (“The clarification in the provisions of the English and Arabic versions of the Statute also makes clear that the offence can only be committed by the ‘presenting’ party”). *Contra* [Bemba Brief](#), paras. 34-35.

⁷⁷³ [Judgment](#), para. 35.

⁷⁷⁴ Emphasis added. *See* [Judgment](#), para. 35.

⁷⁷⁵ Emphasis added. *See* [Judgment](#), para. 35.

⁷⁷⁶ Rule 149. *See* [Judgment](#), para. 35.

⁷⁷⁷ [Bemba Brief](#), paras. 35-36.

⁷⁷⁸ [ICC Counsel Code of Conduct](#), article 14(2)(a).

⁷⁷⁹ [ICC Counsel Code of Conduct](#), article 14(2)(b).

needed to make informed decisions regarding his or her representation”. In this vein, the ICTY Appeals Chamber has held that: “counsel representing an accused acts on behalf of the accused. Unless it is shown that [...] counsel acted beyond their mandate or in contravention of [the accused’s] instructions, submissions made by his counsel are attributable to [the accused]”.⁷⁸⁰ This is also referred to as the unity of identity between counsel and client.⁷⁸¹

231. In fact, the Pre-Trial Chamber already rejected Bemba’s argument that “there is a separation between a defendant and his or her counsel”.⁷⁸² The Chamber noted that “[Bemba’s] assumption [on this was] inaccurate”.⁷⁸³ Since Bemba had access to all records from the Main Case, he could decide “whether, and to what extent, he shall or shall not share such access with his Counsel” in the article 70 case.⁷⁸⁴

232. Second, counsel’s personal responsibility pursuant to article 24(2) of the ICC Counsel Code of Conduct “for the conduct and presentation of the client’s case”⁷⁸⁵ does not exclude an accused’s criminal responsibility for his or her actions. An accused bears his or her own responsibility, independent of counsel, to act lawfully. Bemba thus confuses his actions and contributions to the Common Plan with those of Kilolo.⁷⁸⁶ Bemba *personally* played a key role and made an essential contribution to the Common Plan;⁷⁸⁷ indeed, without his actions the offences would not have been committed in the same manner.⁷⁸⁸ As a result, Bemba was held responsible as a co-perpetrator for the actions of Kilolo and Mangenda and Bemba’s actions were attributed to Kilolo and Mangenda.⁷⁸⁹

⁷⁸⁰ [Prlić Rule 92bis AD](#), para. 41.

⁷⁸¹ [Tadić Additional Evidence AD](#), para. 65 (“The unity of identity between client and counsel is indispensable to the workings of the International Tribunal. If counsel acted despite the wishes of the Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced, even if he did so reluctantly”).

⁷⁸² [Bemba Access Decision](#), p. 3.

⁷⁸³ [Bemba Access Decision](#), p. 3.

⁷⁸⁴ [Bemba Access Decision](#), p. 4.

⁷⁸⁵ *Contra* [Bemba Brief](#), para. 36.

⁷⁸⁶ *Contra* [Bemba Brief](#), para. 36.

⁷⁸⁷ [Judgment](#), paras. 106, 108, 688, 693-703, 924.

⁷⁸⁸ [Judgment](#), paras. 857 (“Mr Bemba’s conduct had an effect on the commission of the offence of false testimony by the 14 Main Case Defence witnesses”) and 932 (“Mr Bemba’s conduct had a direct effect on [the 14] witnesses” and “[w]ithout Mr Bemba’s directives, the witnesses would not have testified untruthfully before Trial Chamber III in that manner”). *See also* [Sentencing Decision](#), para. 222 (“Without Mr Bemba’s authoritative influence, personally or through Mr Kilolo and/or Mr Mangenda, the witnesses would not have testified untruthfully before Trial Chamber III”).

⁷⁸⁹ *See below* 478 and 480.

233. Third, Bemba unhelpfully relies on legislation and jurisprudence from domestic jurisdictions and other international criminal tribunals to claim that a represented defendant is immune from prosecution for presenting false evidence in the same case for which he or she was convicted.⁷⁹⁰ Domestic legislation from two countries and jurisprudence from another country which Bemba selectively cites—also by reference to his previous filings—are inapposite since the Rome Statute does not prevent prosecution of an accused—or convicted—person for article 70(1) offences based on different conduct from that of a main case.⁷⁹¹ Nor do the Codes of Conduct that Bemba cites requiring counsel to decline, in certain circumstances, instructions from the client, but not to report them, demonstrate that an accused is immune from prosecution.⁷⁹² This practice means no more than what it says—and does not rule out the client’s prosecution based on *other* evidence.

234. Moreover, it is irrelevant that the international criminal tribunals have never prosecuted an accused for presenting false evidence tendered through counsel.⁷⁹³ Of more relevance is whether such charges could legally have been prosecuted at those tribunals. The case law suggests it could have been. Simić, an accused person, was prosecuted together with his defence counsel at the ICTY for conducting a program of harassment and intimidation, supported by bribery, of a potential witness to persuade that person to testify falsely in favour of Simić.⁷⁹⁴ The prosecution failed due to insufficient evidence. But there was no legal bar to prosecuting both the accused and his counsel for the alleged crimes. Indeed, as the Chamber noted, “it was not argued, nor could it be, that the allegations made by Witness Agnes against the two Respondents, if established, would not constitute contempt of the Tribunal in the

⁷⁹⁰ [Bemba Brief](#), paras. 37-40.

⁷⁹¹ [Bemba Brief](#), para. 37, referring to [Bemba Elements Submissions](#), fn. 27; and [Bemba Sentencing Submissions](#), fn. 77. The four US cases cited by Bemba in fn 77 – *US v. Westbrooks* (2015), *In re Walters* (1989), *US v. Armstrong* (1986) and *NLRB v. Berkley Machine W. & F. Co* (1951) do not support his proposition that a represented accused is immune from prosecution for article 70(1) offences. All four cases concern persons held in contempt of court for failing to comply with court orders. The defendants each tried to refute their responsibility, arguing that they had disobeyed the court orders on the advice of counsel. While acknowledging that in US law, it is in principle possible to negate the element of wilfulness required for contempt by demonstrating good faith reliance on the advice of counsel (the so-called “advice of counsel defence”), the courts in each found that the defendants had failed to meet the elements of the defence (disclosure of all material information and good faith reliance on advice). Hence, at most these cases are authority for the existence of an “advice of counsel defence” in US law; they do not support the contention that accused persons are immune from criminal contempt charges and convictions simply because they are represented by a lawyer.

⁷⁹² *Contra* [Bemba Brief](#), para. 38. For instance, the [UK BSB Code of Conduct](#) relied on by Bemba mandates counsel to decline instructions and withdraw if there is a risk that the Court will be misled. Although the Code prohibits withdrawing counsel from revealing the information to the Court, the Code does not state that the client cannot be prosecuted on the basis of other evidence: *see e.g.*, C16, rC25, gC11.

⁷⁹³ [Bemba Brief](#), para. 39.

⁷⁹⁴ [Simić Contempt TJ](#).

sense of knowingly and wilfully interfering with its administration of justice [...].”⁷⁹⁵ By the same logic, no legal bar would have existed to prosecuting Simić, or any other accused, together with his counsel, for “presenting” the false testimony of the witness.

235. Finally, the Chamber did not impose a duty on Bemba “to correct the record”.⁷⁹⁶ Instead, the Chamber found that Bemba knew and intended that false testimony be presented based on an array of evidence, including that Bemba witnessed in Court the false testimony of the witnesses which was consistent with his instructions.⁷⁹⁷ Bemba’s arguments must thus be dismissed.

III.E. THE CHAMBER CORRECTLY DEFINED “CORRUPTLY INFLUENCING A WITNESS” IN ARTICLE 70(1)(C)

236. The Chamber correctly defined the offence of ‘corruptly influencing’ a witness under article 70(1)(c) of the Statute. The Chamber found that the offence contains a non-exhaustive list of conduct not encompassed in the other provisions which may influence a witness’ testimony.⁷⁹⁸ The Chamber identified some of the modes of commission, such as bribing witnesses, pressuring, intimidating or threatening witnesses or causing injuries aimed at a particular testimony and instructing, correcting or scripting the witnesses’ answers or providing instructions on how to behave in court.⁷⁹⁹ The Chamber aptly set a threshold to distinguish such criminal conduct from licit acts: the former seek to contaminate or unduly influence the witness’s testimony so that the judges will be unable to distinguish what the witnesses personally experienced from what they did not.⁸⁰⁰

237. Bemba,⁸⁰¹ Mangenda,⁸⁰² Babala⁸⁰³ and Arido⁸⁰⁴ fail to show any error in the Chamber’s definition and application of article 70(1)(c). First, the Chamber’s definition of the offence did not include licit conduct.⁸⁰⁵ Rather, it correctly distinguished conduct giving rise to the

⁷⁹⁵ [Simic Contempt TJ](#), para. 92.

⁷⁹⁶ *Contra* [Bemba Brief](#), para. 41.

⁷⁹⁷ [Judgment](#), para. 928.

⁷⁹⁸ [Judgment](#), para. 45.

⁷⁹⁹ [Judgment](#), paras. 45-46.

⁸⁰⁰ [Judgment](#), paras. 46-47.

⁸⁰¹ [Bemba Brief](#), paras. 43-55.

⁸⁰² [Mangenda Brief](#), paras. 146-165.

⁸⁰³ [Babala Brief](#), paras. 143, 155, 252.

⁸⁰⁴ [Arido Brief](#), paras. 162-212.

⁸⁰⁵ *Contra* [Bemba Brief](#), paras. 43, 45, 52, 53, 55. *Contra* [Mangenda Brief](#), paras. 156-162.

offence from legitimate conduct.⁸⁰⁶ Second, the Chamber also correctly considered the offence as a conduct offence, which does not require that the criminal conduct actually influenced the witness in question.⁸⁰⁷ Third, the Chamber reasonably concluded that article 70(1)(c) encompasses “potential witnesses”.⁸⁰⁸ Fourth, the Chamber reasonably found that the co-perpetrators illicitly gave or facilitated the giving of money to Defence witnesses thus incurring an article 70(1)(c) offence.

III.E.1. The Chamber correctly defined “corruptly influencing a witness” under article 70(1)(c) and distinguished licit from illicit conduct

238. Bemba and Mangenda wrongly claim that the Chamber’s definition of “corruptly influencing a witness” was amorphous and too broad and encompassed licit conduct protected by the Statute, such as “licit investigative interactions [and] interviews” and “robust, but permissible, witness preparation”.⁸⁰⁹ The Appellants’ arguments are legally and factually incorrect.

239. First, and consistent with the VCLT, the Chamber correctly found that article 70(1)(c) “proscribes any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness.”⁸¹⁰ The offence “is to be construed broadly, allowing many different modes of commission [...] that are capable of influencing the nature of the witness’s evidence”.⁸¹¹ The Chamber defined the conduct prohibited by article 70(1)(c) as including, *inter alia*, “bribing witnesses” and “instructing, correcting or scripting the answers”,⁸¹² and distinguished article 70(1)(c) offences from permissible conduct.⁸¹³ It underscored that the offence proscribes conduct aimed at “contaminating the witness’s testimony” and “compromising the reliability of the evidence”.⁸¹⁴ The Chamber specifically excluded from the scope of the offence “recapitulating the information that the

⁸⁰⁶ [Judgment](#), paras. 43, 46-47.

⁸⁰⁷ [Judgment](#), para. 48. *Contra* [Arido Brief](#), paras. 200-212.

⁸⁰⁸ [Judgment](#) para. 44. *Contra* [Arido Brief](#), paras. 162-199.

⁸⁰⁹ [Bemba Brief](#), paras. 45, 52, 53; [Mangenda Brief](#), paras. 156-162.

⁸¹⁰ [Judgment](#), para. 43.

⁸¹¹ [Judgment](#), para. 45.

⁸¹² [Judgment](#), paras. 45-47.

⁸¹³ [Judgment](#), paras. 46-47.

⁸¹⁴ [Judgment](#), paras. 46, 47. *See also* [Confirmation Decision](#), para. 30.

witness already knows”⁸¹⁵ and “rehearsal of testimony” without contaminating the evidence.⁸¹⁶

240. Legitimate witness preparation does not extend to the conduct perpetrated by the Appellants in this case. Protocols regulating witness preparation expressly exclude conduct which “[s]eeks to influence the substance of the witness’ answers, either directly or indirectly (including, for instance, by informing the witness of the type of evidence that would assist the calling party’s case, by suggesting whether or not the witness’ answers are right, or leading the witness in an inappropriate way).”⁸¹⁷ Nor do they permit training the witnesses or practising the questions and answers expected during the witnesses’ in-court testimony, so that they memorise those questions and answers.⁸¹⁸ Undoubtedly, “[a]ny attempt to influence a witness to testify to factual events that the witness did not observe or perceive is prohibited. Coaching, training or practising are not allowed.”⁸¹⁹ The Appellants’ attempt to confuse their illicit conduct with legitimate and permissible witness preparation, which is appropriately used in domestic jurisdictions and international criminal courts like the ICC, is unsustainable.

241. Notably, the Chamber sensibly underscored the need “to pay heed to the legal framework which contextualises the conduct of the perpetrator”.⁸²⁰ In the Main Case, Trial Chamber III prohibited any contact between the entity calling the witness and the witnesses (with the exception of a courtesy meeting on the premises of the Court and attending the courtroom familiarisation) once the process of witness familiarisation by VWU had commenced.⁸²¹ The legal framework was clear to all Parties and participants from the outset.

242. Second, the Chamber reasonably found that the co-perpetrators’ illicit coaching activities encompassed “instructions to (i) testify according to a particular script concerning the merits of the Main Case, regardless of the truth or falsity of the information therein; (ii) testify *falsely* on the number of contacts with the Main Case Defence; (iii) testify *falsely* about payments, material and non-monetary benefits received from the Main Case Defence; and (iv) testify *falsely* about acquaintances with other persons.”⁸²² Thus, and contrary to

⁸¹⁵ [Judgment](#), para. 46.

⁸¹⁶ [Judgment](#), para. 46.

⁸¹⁷ [Kenya Witness Protocol](#), para. 27; [Ntaganda Witness Protocol](#), para. 28; [Ruto Witness Protocol](#), para. 27.

⁸¹⁸ [Kenya Witness Protocol](#), para. 28; [Ntaganda Witness Protocol](#), para. 29; [Ruto Witness Protocol](#), para. 28.

⁸¹⁹ [Kenya Witness Protocol](#), para. 3; [Ntaganda Witness Protocol](#), para. 3; [Ruto Witness Protocol](#), para. 3.

⁸²⁰ [Judgment](#), para. 47.

⁸²¹ [Bemba Witness Protocol](#), paras. 27-35.

⁸²² [Judgment](#), paras. 704, 733-734. Emphasis added.

Bemba's submissions, the illicit coaching related to both the merits of the Main Case and credibility issues⁸²³ which are equally 'material' to the case.⁸²⁴ Further and contrary to Mangenda's submissions, element (i) above (coaching on the merits) does not "contemplate recklessness as to the truth or falsity".⁸²⁵ As developed below, it simply means that the Chamber declined to rule on the objective falsity or veracity of the witnesses' testimony on issues related to the merits of the Main Case.⁸²⁶

243. Third, the Chamber did not "water[] down the requirement of 'corruption' by focusing on whether witnesses had been influenced to testify 'in favour of Bemba'".⁸²⁷ Bemba conflates the Appellants' criminal conduct with the ultimate goal of the Common Plan, in which the co-perpetrators agreed, through the illicit interference with Defence witnesses, to ensure that they would provide evidence in favour of Bemba.⁸²⁸ The element of corruption lay with the criminal means employed by the co-perpetrators. Other paragraphs of the Judgment cited by Bemba do not assist his arguments, since they plainly show that the Appellants instructed the witnesses to provide false testimony and bribed them.⁸²⁹

244. Further, Bemba's assertion that the Chamber wrongly criminalised "[t]hanking a witness for testifying" misstates the facts and misses the point.⁸³⁰ The evidence shows that Bemba, by thanking D-55 before his Court appearance, circumvented the Registry's monitoring regime and illicitly communicated with the witness through the privileged line⁸³¹ "with the intention of motivating D-55 to give specific testimony".⁸³² These considerations

⁸²³ *Contra* [Bemba Brief](#), para. 53. The jurisprudence cited in fn. 89 is inapposite, since the decisions do not preclude witness coaching on aspects related to the witnesses' credibility. In fact, the broad definition of witness coaching endorsed in *Kenyatta* ("manipulat[ing] the testimony of the Court's witnesses") supports the Chamber's position. See [Kenyatta Stay Decision](#), para. 35.

⁸²⁴ [Judgment](#), paras. 22-23. See also para. 789 ("the co-perpetrators were aware that credibility factors are 'material' to the case").

⁸²⁵ [Mangenda Brief](#), para. 150.

⁸²⁶ See below paras. 303 and 433.

⁸²⁷ [Bemba Brief](#), paras. 43 (fn. 67 referring to [Judgment](#), paras. 103, 115, 240, 541 and 702), 54 and 55. Bemba's references to *Karemera* and *Haradinaj* in fns. 93 and 94 are inapposite. In [Karemera Witness Proofing AD](#), paras. 12-13, the Appeals Chamber found that there are several ways for parties to identify if witness preparation has improperly influenced witnesses, *for example*, through careful cross-examination. If evidence of manipulation comes to light, a Chamber can take appropriate measures including initiating contempt proceedings. In [Haradinaj Rule 68 Decision](#), para. 63, the Trial Chamber did not find impropriety since there was no evidence showing that the Prosecution had reached an agreement with a witness so that the witness would testify in *exchange* for the Prosecution's help with an asylum application.

⁸²⁸ [Judgment](#), para. 103. See also paras. 681, 802. See also para. 702 (overall conclusions on payments and non-monetary promises).

⁸²⁹ See [Judgment](#), paras. 115, 240, 541.

⁸³⁰ [Bemba Brief](#), para. 55 (referring to [Judgment](#), paras. 123, 170 and 298).

⁸³¹ [Judgment](#), para. 814. See also paras. 293-298, 305, 740, 769.

⁸³² See below paras. 515-522. See [Judgment](#), paras. 298, 305.

form part of the Chamber's broader assessment of Bemba's contributions to the execution of the crimes within the framework of the Common Plan, and his intent and knowledge.⁸³³

245. Fourth, the Chamber's broad definition of "corruptly influencing" is also consistent with the purpose of the offence, which seeks to criminalise "*any conduct* that is intended to disturb the administration of justice by deterring the witness from testifying according to his or her recollection".⁸³⁴ Commentators⁸³⁵ and the jurisprudence from other international criminal tribunals⁸³⁶ further support this interpretation.

III.E.2.The Chamber correctly found that article 70(1)(c), first alternative, is a conduct offence and no special intent is required

246. The Trial Chamber correctly found that article 70(1)(c):

penalises the improper conduct of the perpetrator who intends to influence the evidence before the Court and does not require proof that the conduct had an actual effect on the witness. It is not required for this offence that the criminal conduct

⁸³³ See e.g. [Judgment](#), para. 732 (Bemba's satisfaction or dissatisfaction with "the testimony of the coached witnesses and Mr Kilolo's illicit coaching activities [...] *further underscores* that he was fully involved", emphasis added). See below paras. 439, 449, 453, 522.

⁸³⁴ [Judgment](#), para. 44. (Emphasis added). See also para. 14 ("Articles 70(1)(a) to (c) of the Statute aim at protecting the reliability of the evidence presented to the Court by criminalising conduct of undue interference with the production and presentation of evidence"). See also [Confirmation Decision](#), para. 30.

⁸³⁵ Piragoff, p. 1754, mn. 8 ("Subparagraph (c) makes punishable a number of different forms of conduct aimed at influencing witness testimony or otherwise thwarting the production of reliable evidence. [...] 'Corruptly influencing a witness' covers the direct or indirect offer of anything of value (e.g., a bribe) in order to influence the witness's testimony"); Schabas, p. 1105 ("The offence of 'corruptly influencing a witness' suggests bribery or some inducement in order that the witness changes his or her testimony. [...] The word 'corruptly' suggests that 'the relevant conduct is aimed at contaminating the witness's testimony'"); Dreysée, p. 1604 ("*En réalité, l'article 70-1-c n'incrimine pas un seul et unique comportement mais plusieurs qui empêchent la manifestation de la vérité [...]. Il s'agit encore une fois d'une atteinte particulièrement grave puisqu'elle peut influencer sur l'issue du procès pénal. De plus, de tels comportements compromettent aussi le système de protection des témoins et affectent la crédibilité et l'autorité de la Cour.*").

⁸³⁶ [Judgment](#), fn. 81. Those tribunals' interpretation of the offence "otherwise interfering with a witness or a potential witness" in ICTY, ICTR and SCSL rule 77(A)(iv) is of guidance. See [Beqaj TJ](#), para. 21 ("[t]he expression 'otherwise interfering with a witness or a potential witness' is an indication that Rule 77 gives a non-exhaustive list of modes of commission of contempt of the Tribunal" and "encompasses any conduct that is intended to disturb the administration of justice by deterring a witness or a potential witness from giving full and truthful evidence, or in any way to influence the nature of the witness' or potential witness' evidence"). See also [Maglov Rule 98bis Contempt Decision](#), para. 28 ("The *actus reus* for the offence of otherwise interfering with a witness may take one of a number of different forms. Such forms include, but are not limited to, keeping a witness out of the way, by bribery or otherwise". [...] 'otherwise interfering with a witness' refers to other acts or conduct of a similar gravity that equally seek to influence the outcome of a pending case by interfering with a witness or a potential witness. The acts or omissions of the accused, viewed in light of the circumstances of the case, have to be likely to deter a witness or a potential witness from giving evidence, or to influence the nature of the evidence. As in the case of intimidation of a witness as a form of contempt of court, it is not necessary for the Prosecution to prove that the witness was actually deterred or influenced."); [Margetić TJ](#), para. 64 ("The phrase 'otherwise interfering with a witness or potential witness' adds to these specifically provided acts any conduct that is likely to dissuade a witness or a potential witness from giving evidence, or to influence the nature of the witness' or potential witness' evidence").

actually influences the witness in question—the offence can be complete even if the witness refuses to be influenced by the conduct in question. [...] Whether the witness met the perpetrator’s intentions is irrelevant in this regard.⁸³⁷

247. None of the Appellants identify an error in the Judgment. Arido’s challenge to this finding fundamentally misunderstands it.⁸³⁸ The Chamber did not find that article 70(1)(c) “encourages a ‘strict liability’ analysis which does not require a finding of intent”; nor did it find that “the acts of promising money and relocation are sufficient, *regardless of the [...] intent of these acts*”.⁸³⁹ Rather, the Chamber correctly held that “[p]ursuant to Article 70(1)(c) [...], the physical perpetrator must have ‘intentionally’ corruptly influenced the witness”.⁸⁴⁰ Thus, and consistent with article 30(2), “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 offence”.⁸⁴¹

248. The Chamber’s findings on the subjective element of article 70(1)(c) accord with its interpretation of the *chapeau* of article 70(1) and its application of the standard *mens rea* under article 30 to offences against the administration of justice.⁸⁴² Thus, Mangenda’s arguments as to a separate special intent “to induce a falsehood”⁸⁴³ and Babala’s submission as to “*un dol special*” “*de determiner autrui soit à faire ou délivrer une deposition, une declaration ou une attestation mensongère, soit à s’abstenir de faire ou délivrer une deposition [...]*”⁸⁴⁴ in article 70(1)(c) are obscure and misunderstand the elements of the offence. Indeed, the perpetrator’s intent to influence the witness testimony is encompassed

⁸³⁷ [Judgment](#), para. 48. See also [Judgment](#), para. 31 (“The offences are of conduct and the harm is captured in the illicit and deliberate conduct of the perpetrator to tamper with the reliability of the evidence. It is an obvious consequence of the acts committed under Articles 70(1)(a) to (c) of the Statute that the administration of justice is interfered with and thereby harmed”). Other international criminal tribunals have adopted the same position. See [Margetić TJ](#), para. 64 (“Proof is not required that this conduct *actually* produced such a result”); [Beqaj TJ](#), para. 21 (“There is nothing to indicated that proof is required that the conduct intended to influence the nature of the witness’s evidence produced a result”); [Haraqija TJ](#), paras. 18, 20 (“for the purposes of establishing the responsibility of the accused, it is immaterial whether the witness actually felt threatened or intimidated, or was deterred or influenced”).

⁸³⁸ [Arido Brief](#), paras. 200-212.

⁸³⁹ *Contra* [Arido Brief](#), paras. 204-205. (emphasis added).

⁸⁴⁰ [Judgment](#), para. 50. See also paras. 26 (“The *chapeau* of Article 70(1)(c) of the Statute prescribes that all offences under its sub-paragraphs must be committed ‘intentionally’”) to 29.

⁸⁴¹ [Judgment](#), para. 50. *Contra* [Arido Brief](#), paras. 209 and 455.

⁸⁴² See above paras. 195-202. [Judgment](#), para. 31.

⁸⁴³ *Contra* [Mangenda Brief](#), paras. 146-155, 165.

⁸⁴⁴ [Babala Brief](#), paras. 157, 252.

within the general article 30 intent to bring about the material elements of the offence.⁸⁴⁵ Mangenda misreads the Confirmation Decision⁸⁴⁶ and the commentary cited by Babala does not support the existence of a special and distinctive intent.⁸⁴⁷ Further, the provisions and case law from a few selected domestic jurisdictions and one international instrument are unhelpful to interpret the distinct terms of the Rome Statute.⁸⁴⁸

249. Similarly, there is no such special intent “to induce a falsehood” for article 70(1)(b) offences (presenting false evidence). It suffices that the “perpetrator knows that his or her action will bring about the material elements of the offence, viz. presenting false evidence with the purposeful will (intent) or desire to bring about those material elements of the offence; or the perpetrator is aware that his or her actions will result, in the ordinary course of events, in the commission of the offence.”⁸⁴⁹

250. Nor did the Chamber conflate the *mens rea* and *actus reus* requirements of article 70(1)(c) offences.⁸⁵⁰ The Chamber’s emphasis on the *perpetrator’s conduct*⁸⁵¹ highlighted its unlawfulness, and that such conduct offends the administration of justice and the integrity of

⁸⁴⁵ See [Judgment](#), para. 50. The jurisprudence of other international criminal tribunals is at times unclear and inconsistent as to the existence of an additional *mens rea* requirement for rule 77(A)(iv) (“otherwise interferes with”). While most cases solely refer to the standard *mens rea* set out in the chapeau of rule 77(A), namely, “knowingly and wilfully”, ([Šešelj 2012 TJ](#), para. 40; [Beqaj TJ](#), para. 21; [Simić Contempt TJ](#), para. 91), other cases are unclear and seem to require an additional element, without qualifying it as special intent ([Margetić TJ](#), para. 66 (“As a general *mens rea* requirement for contempt, the Prosecution must prove that the Accused acted knowingly and wilfully. Rule 77(A)(iv) of the Rules also requires that the conduct was carried out with an intent to interfere with witnesses”. But the Trial Chamber also refers to [Beqaj TJ](#) and the standard *mens rea*. See para. 16); [Nshogoza TJ](#), para. 158 (“Besides the general *mens rea* requirement for contempt, for which the Prosecution must also prove that the Accused acted knowingly and wilfully, rule 77(A)(iv) also requires that the conduct was carried out with the intent to interfere with the witness or with the knowledge that the conduct was likely to deter or influence the witness”).

⁸⁴⁶ *Contra* [Mangenda Brief](#), para. 151 referring to [Confirmation Decision](#), para. 30. The sentence italicised by Mangenda refers to the possible consequence of the perpetrator’s conduct, which “*may have* (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness”. (Emphasis added).

⁸⁴⁷ [Babala Brief](#), para. 157, fn. 205.

⁸⁴⁸ *Contra* [Mangenda Brief](#), paras. 152-154. *Contra* [Babala Brief](#), para. 252 referring to a French case.

⁸⁴⁹ [Judgment](#), paras. 41. *Contra* [Mangenda Brief](#), paras. 146, 151.

⁸⁵⁰ *Contra* [Mangenda Brief](#), para. 149 referring to [Judgment](#), paras. 44 and 46.

⁸⁵¹ [Judgment](#), paras. 43 (“Article 70(1)(c), first alternative, of the Statute (‘corruptly influencing a witness’) proscribes *any conduct* that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness”), 44 (“This broad conception accords with the purpose of the provision, namely to criminalise *any conduct* that is intended to disturb the administration of justice by deterring the witness from testifying according to his or her recollection”) and 48 (“the provision penalises the *improper conduct* of the perpetrator who intends to influence the evidence before the Court and does not require proof that the conduct had an actual effect on the witness. [...] This is so because the provision penalises the conduct of the physical perpetrator who, from his or her vantage point, seeks to manipulate the evidence given by the witness”). See also para. 14 (“The different sub-paragraphs of Article 70(1) of the Statute address *various forms of conduct* that may encroach upon the integrity and efficacy of the proceedings before the Court”). Emphasis added.

the proceedings *regardless of any result*.⁸⁵² Moreover, the Chamber clearly distinguished between the *actus reus* and *mens rea* of the offence.⁸⁵³ Even if in this case the interfered witnesses provided false testimony on their contacts with the Defence, payments and benefits, and acquaintances with certain persons, limiting the offence to conduct “directed to the production of false evidence” would unduly narrow the scope of the provision and thus undermine its purpose. It would also make the offence one of “result” in most cases. Thus, Bemba’s⁸⁵⁴ and Babala’s⁸⁵⁵ related arguments should similarly be dismissed.

III.E.3. The Chamber reasonably interpreted article 70(1)(c) to include “potential witnesses”

251. Arido further challenges the Chamber’s definition of ‘witness’ within the terms of article 70(1)(c) which, according to the Chamber, “must also encompass ‘potential witnesses’, namely persons who have been interviewed by either party but have not yet been called to testify before the Court.”⁸⁵⁶ Instead, Arido prefers the definition of ‘witness’ adopted by the Chamber in the Confidential Information Protocol,⁸⁵⁷ namely, that ‘witness’ is a person “who has been identified as one who is testifying”.⁸⁵⁸

252. Arido’s proposed definition of ‘witness’ is not compatible with a reading of the provision in good faith in its context and in light of its object and purpose,⁸⁵⁹ and is unsupported by commentary,⁸⁶⁰ since it would dilute the purpose of the offence and unduly narrow the application of the provision. In particular, it would leave unpunished situations where a number of potential witnesses are bribed or coached but not selected to testify, for

⁸⁵² [Judgment](#), para. 48. *See also* para. 31 (“[t]he offences are of conduct and the harm is captured in the illicit and deliberate conduct of the perpetrators to tamper with the reliability of the evidence”). *See also* [Confirmation Decision](#), para. 30.

⁸⁵³ [Judgment](#), paras. 45-49 (*actus reus*) and 50 (*mens rea*).

⁸⁵⁴ [Bemba Brief](#), paras. 43, 52, 54.

⁸⁵⁵ [Babala Brief](#), para. 143.

⁸⁵⁶ [Judgment](#), para. 44. [Arido Brief](#), paras. 162-199.

⁸⁵⁷ [Confidential Information Protocol](#), para. 4(e) (“witness” is a 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.”). *Contra* [Arido Brief](#), paras. 197-198.

⁸⁵⁸ [Arido Brief](#), para. 176 (underlined in original).

⁸⁵⁹ Article 31(1) VCLT.

⁸⁶⁰ Piragoff (2016), p. 1753, mn. 5 and fn. 13 (“Although article 70 is contained in Part 6 of the Statute (pertaining to trial), there is no indication that the Conference intended to limit application of these crimes to actions taking place during the trial process alone. To interpret the scope of the article so narrowly would unduly limit the ability of the Court to protect the integrity of its processes. Accordingly, article 70 is most properly interpreted to apply to violations of paragraph 1 committed during other phases of the Court’s proceedings as well [such as] violations committed during the investigation [and] subsequent pre-trial proceedings [...]”).

example, because they do not accept the bribe or fail to learn the script to the perpetrator's satisfaction. It would also make the offence a "result offence" in most cases.

253. Instead, the Chamber's interpretation of the term 'witness' for the purposes of article 70(1)(c) as not being limited to "person[s] appearing before the Court" and also encompassing 'potential witnesses',⁸⁶¹ accords with the open and broad formulation of the offence,⁸⁶² its purpose⁸⁶³ and the emphasis on the perpetrator's conduct and intent.⁸⁶⁴ Moreover, it accords with the Court's jurisprudence on witness interference.⁸⁶⁵ Since the application of the provision will depend on the facts of each case,⁸⁶⁶ the Prosecution does not understand the Chamber's definition of 'potential witness' as being exhaustive.⁸⁶⁷ The Chamber's reference to *Katanga* Redactions AD was also apt since the Appeals Chamber, like this Trial Chamber, considered the purpose of the provision and the specific facts of the case to determine the application of rule 81(2).⁸⁶⁸

⁸⁶¹ See [Judgment](#), para. 20 (where the Chamber defined 'witness' as "a person appearing before the court, [...], who attests to factual allegations according to his or her personal knowledge") and para. 44 ("when discussing Article 70(1)(c) of the Statute, the term must also encompass 'potential witnesses', namely persons who have been interviewed by either party but have not yet been called to testify before the Court.") (Emphasis added).

⁸⁶² See above para. 239. The Chamber's reference to *Beqaj* TJ was thus apposite. *Contra* [Arido Brief](#), paras. 167, 170-172. See [Beqaj TJ](#), para. 21 ("The expression "otherwise interfering with a witness or a potential witness" is an indication that Rule 77 gives a *non-exhaustive list of modes of commission of contempt of the Tribunal* [and] encompasses *any conduct that is intended to disturb the administration of justice* by deterring a witness or a potential witness from giving full and truthful evidence, or in any way to influence the nature of the witness's or potential witness's evidence. There is nothing to indicate that proof is required that the conduct intended to influence the nature of the witness's evidence produced a result.") (emphasis added).

⁸⁶³ See above para. 245.

⁸⁶⁴ See above para. 250.

⁸⁶⁵ [Ongwen Meeting Decision](#), paras. 6 ("the meeting in question was not innocuous but was held with a view to exercising some form of influence on persons who possess information relevant to the case. [...] Simply gathering a number of *potential witnesses* in a single location with a view to discussing matters which are *sub judice* may lead to the pollution of those witnesses' accounts and thus interfere with the collection (and later presentation) of accurate evidence") and 7 ("[i]t is irrelevant for the present purposes that the attendees of the meeting were not witnesses of the Prosecutor, but, at this stage, only "*potential witnesses*"). Emphasis added.

⁸⁶⁶ [Ongwen Payments Decision](#), fn. 37 ("For this purpose, 'potential witnesses' are those who appear on a provisional or final witness list. At this time, the only witnesses the Defence has been required to identify before the commencement of trial are those relating to grounds for excluding criminal responsibility"). See also [Kostovski v. The Netherlands](#), para. 40 (noting "the autonomous interpretation to be given to [the] term ['witness']", the Court adopted a more flexible interpretation irrespective of whether the persons concerned were "witnesses" under Dutch law); [Recommendation Rec \(2005\)9, Council of Europe](#) ("witness' means any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law), who is not included in the definition of 'collaborator of justice'") and [Recommendation No. R \(97\)13, Council of Europe](#) ("witness' means any person, irrespective of his status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition includes experts as well as interpreters").

⁸⁶⁷ [Judgment](#), para. 44.

⁸⁶⁸ *Contra* [Arido Brief](#), paras. 167-168. See [Katanga Redactions AD](#), para. 2 ("In this appeal 'potential prosecution witnesses' are individuals to whom reference is made in the statements of actual witnesses upon

254. Notably, Arido's arguments are inaccurate and lack merit.

255. First, since the start of the trial, the Prosecution's position has been that article 70(1)(c) should be interpreted as including "potential witnesses".⁸⁶⁹ The Confirmation Decision set out a definition of article 70(1)(c) in line with that in the Judgment.⁸⁷⁰ Nor did the Chamber depart from the definition of 'witness' adopted at trial. The definition in the Confidential Information Protocol⁸⁷¹ was not the "controlling definition of witnesses" for the purposes of article 70 offences, nor did the Chamber seek to set out the elements of the article 70(1)(c) offence in the Protocol.⁸⁷² Rather, the Protocol regulated the handling of confidential information—such as disclosure of the identity of protected witnesses to the other party or contact with witnesses of the other party—during investigation, nearing or during trial.⁸⁷³ Notably, Arido had argued, before the start of the trial, that article 70(1)(c) applies to a "witness or potential witness".⁸⁷⁴

256. Second, the Chamber's definition of 'witness' under article 70(1)(c) is consistent with its definition in article 70(1)(a).⁸⁷⁵ For both, a 'witness' is a person who may possess information relevant to the factual allegations before the Court. However, due to the differing language and purpose of the provisions,⁸⁷⁶ article 70(1)(c) may cover conduct which precedes the witness' undertaking under article 69(1).

whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses.") (emphasis added) The Appeals Chamber found that non-disclosure pursuant to rule 81(2) could also cover identities and identifying information of potential witnesses even if they were not expressly mentioned in the provision.

⁸⁶⁹ [Prosecution Confirmation Submission](#), para. 274 ("The term 'witness' refers to any person possessing information relevant to proceedings before the Court with respect to which he or she has been called to testify, is testifying, has testified, or is able to testify (*i.e.*, potential witnesses))."

⁸⁷⁰ [Confirmation Decision](#), para. 30.

⁸⁷¹ [Confidential Information Protocol](#), para. 4(e) ("witness" is a 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.")

⁸⁷² *Contra* [Arido Brief](#), paras. 197-198.

⁸⁷³ [Confidential Information Protocol](#), para. 1.

⁸⁷⁴ [Arido Elements Submissions](#), paras. 33 and 40.

⁸⁷⁵ See [Judgment](#), paras. 20 where the Chamber defined 'witness' as "a person appearing before the court, [...], who attests to *factual allegations according to his or her personal knowledge*" and para. 44 ("when discussing Article 70(1)(c) of the Statute, *the term must also* encompass 'potential witnesses', namely persons who have been interviewed by either party but have not yet been called to testify before the Court".) (Emphasis added) *Contra* [Arido Brief](#), paras. 163-164.

⁸⁷⁶ Compare article 70(1)(a) ("Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth") with article 70(1)(c) ("Corruptly influencing a witness").

257. Third, article 22(2)—and the rule of strict construction—is inapposite, since it only applies if the text reveals an ambiguity that cannot be resolved after applying the ordinary rules of statutory interpretation.⁸⁷⁷ There is no ambiguity in article 70(1)(c) if the provision is interpreted in good faith and considering its object and purpose.⁸⁷⁸ Similarly, the doctrine of inherent powers is irrelevant since the Chamber did not resort to it.⁸⁷⁹ Indeed, it did not need to since there was no *lacuna* to fill.

258. Fourth, the Chamber was not obliged to address all of Arido’s arguments, much less when raised for the first time in his Closing Brief.⁸⁸⁰ In any event, and on the facts of this case, Arido’s conduct with respect to D-2, D-3, D-4 and D-6 falls squarely within the terms of article 70(1)(c). Indeed, Arido and Kokaté, upon Kilolo’s instructions, identified and recruited potential Defence witnesses for the Main Case Defence.⁸⁸¹ In particular, in January 2012, when Arido met—and already bribed and coached—D-2⁸⁸² and D-3,⁸⁸³ he put D-2 on the phone with Kilolo, and Kilolo confirmed that he was looking for witnesses “who were part of the experience of what happened, witnesses who can come to testify here or who can come to testify in The Hague”, and said that he would come to Douala and discuss the matter in detail with D-2.⁸⁸⁴ Similarly, Arido spoke with Kilolo on the phone in D-3’s presence and Arido informed Kilolo that he was “‘together with his elements’, a reference [D-3] understood to relate to prospective witnesses”.⁸⁸⁵

259. Shortly afterwards, in February 2012, Arido again met with the witnesses in Douala and repeated his promises of money and relocation, and further coached the four Cameroonian witnesses (D-7 and D-9 and other prospective witnesses who eventually did not testify were also present)⁸⁸⁶ before and after they met with Kilolo.⁸⁸⁷ D-2, D-3, D-4 and D-6 eventually testified in June 2013 and provided false testimony.⁸⁸⁸ Against this backdrop, the Chamber

⁸⁷⁷ Broomhall, p. 962, mn. 47. [Katanga TJ](#), para. 53; [Delalić TJ](#), para. 413.

⁸⁷⁸ *Contra* [Arido Brief](#), para. 177. Arido’s reliance on [Katanga Redactions AD](#), para. 46 is unhelpful, since the Appeals Chamber found that the identity and identifying information of ‘potential witnesses’ may be redacted pursuant to rule 81(2), even if ‘potential witnesses’ are not expressly referred to in that provision.

⁸⁷⁹ *Contra* [Arido Brief](#), paras. 184-188.

⁸⁸⁰ [Semanza AJ](#), para. 45 (“the Trial Chamber was under no obligation to address an argument that was raised for the first time in the Defence’s Closing Brief”). See [Arido Brief](#), paras. 196-199.

⁸⁸¹ [Judgment](#), para. 327.

⁸⁸² [Judgment](#), paras. 320-324.

⁸⁸³ [Judgment](#), paras. 327-328.

⁸⁸⁴ [Judgment](#), para. 324.

⁸⁸⁵ [Judgment](#), para. 329. See *below* para. 677.

⁸⁸⁶ [Judgment](#), para. 331.

⁸⁸⁷ [Judgment](#), paras. 331-352.

⁸⁸⁸ [Judgment](#), paras. 383-404.

reasonably concluded that Arido had corruptly influenced D-2, D-3, D-4 and D-6 within the meaning of article 70(1)(c).⁸⁸⁹

260. Arido's arguments should thus be dismissed.

III.E.4. The Chamber reasonably found that the co-perpetrators gave or facilitated the giving of money to Defence witnesses

261. Bemba argues that the Chamber erred in relying on the 'context' of payments, such as the timing of the payments, the amounts of the payments and Kilolo's remarks to determine whether the co-perpetrators' conduct was illicit.⁸⁹⁰ Bemba misunderstands the Judgment and does not accurately present the facts. The Chamber reasonably found that the similarity between the timing of the payments to Defence witnesses, the amounts of money, Kilolo's remarks "that the money be considered as a 'gift' or 'not an official thing'", and Kilolo's instructions to witnesses to name third persons to whom the money would be sent, evinced a *pattern* which permitted the Chamber to establish, together with the other evidence, that the co-perpetrators (Bemba, Kilolo and Mangenda) gave or facilitated the giving of money and other non-monetary benefits to Defence witnesses to influence their testimony in Bemba's favour.⁸⁹¹

262. This approach was reasonable and consistent with jurisprudence from other international criminal tribunals.⁸⁹² Moreover, although the conduct of the accused, the timing of payments and the amounts of payments to the witnesses demonstrated a pattern,⁸⁹³ this did not mean that each payment had to comply with every aspect of this pattern, as if it were a legal criterion. Indeed, corroboration does not mean that each item of evidence or each witness testimony attest to each factual allegation or describe them identically; rather, it suffices that the evidence—including witness testimony—is thematically consistent and

⁸⁸⁹ [Judgment](#), para. 945.

⁸⁹⁰ [Bemba Brief](#), paras. 44-47 (referring to [Judgment](#), para. 702).

⁸⁹¹ [Judgment](#), para. 702. See paras. 689-703.

⁸⁹² [Nshogoza TJ](#), para. 199 (where the Chamber considered the following factors, among others, in concluding that the Prosecution had not proved that Nshogoza had made payments or other promises to influence witnesses' evidence: (i) the accused did not give any money to the witnesses until after they informed him that they had provided false statements and, in one case, false testimony; (ii) the accused informed the witnesses that the money provided was for transport, or for their families, while they were away from home testifying in Arusha; and (iii) payments of similar amount were, at least on occasion, made to witnesses by representatives of the Prosecution and WVSS. By contrast, in this case, the entire body of evidence—ranging from the timing and amounts of the payments, statements of the accused accompanying the payments, and the evidence-contaminating activities perpetrated by the accused—showed that the accused intended to 'corruptly influence' the witnesses when they paid or promised money or other benefits.)

⁸⁹³ [Judgment](#), para. 702.

compatible.⁸⁹⁴ The Chamber reasonably assessed each payment in light of the totality of the relevant evidence and its particular context, and not in isolation.⁸⁹⁵

263. Bemba inaccurately claims that although different witnesses were paid the same amounts, the Chamber made different findings with respect to the purposes of the payments.⁸⁹⁶ To the contrary, the Chamber was consistent and did not consider as illicit some payments made in different contexts.⁸⁹⁷ Also consistent with the above principles, the Chamber reasonably considered as illicit some payments effected after the witnesses' testimony.⁸⁹⁸ For instance, the Chamber reasonably found that the *post-testimony* payment to D-6 was illicit.⁸⁹⁹ Bemba ignores that the evidence showed that Kilolo had promised to pay D-6 the money *before* he testified.⁹⁰⁰ Moreover, the evidence shows that Kilolo paid that witness after the witness called to remind Kilolo of his promise to pay.⁹⁰¹ Furthermore, Kilolo specifically related the payment to the witness's *performance during testimony*, when he told D-6 that Bemba was very pleased with the witness's evidence.⁹⁰² The Chamber thus reasonably rejected Kilolo's claim that the payment concerned hotel expenses.⁹⁰³

264. Equally, Bemba's submissions that the Chamber erred by not considering witnesses' expectations concerning benefits made by 'third parties' lack merit.⁹⁰⁴ He ignores that the 'third parties' (such as Arido) had acted upon Kilolo's instructions to identify persons to

⁸⁹⁴ [Gatete AJ](#), para. 125; [Nahimana AJ](#), para. 71; [Ntabakuze AJ](#), para. 150; [Rukundo AJ](#), paras. 81, 201.

⁸⁹⁵ [Nahimana AJ](#), paras. 701, 715, 739, 988 (the Appeals Chamber considered the broadcasts as a whole and in their context in order to determine whether the accused had publicly incited genocide).

⁸⁹⁶ [Bemba Brief](#), para. 46, fn. 74 referring to [Judgment](#), para. 150. Paragraph 150 does not support Bemba's proposition since it describes Kilolo's bribing of D-23.

⁸⁹⁷ *Contra* [Bemba Brief](#), para. 46. *See e.g.*, [Judgment](#), paras. 234-254 (the Chamber found Kilolo's payment of USD 106 to D-57 not to be illicit. It was paid long before the testimony, there was no evidence concerning Kilolo's discussion of the witness's evidence and its use as reimbursement for transport when he met Kilolo was reasonable. The Chamber found Kilolo's payment of the same witness USD 665 to be illicit – since it occurred in a different context: it was a bigger amount; it was paid on the eve of D-57's testimony on the VWU cut-off date; Kilolo's explanation that the money was for upkeep was unreasonable, since all such expenses were covered by the Court; Kilolo and D-57 had an extensive telephone discussion on the eve of the testimony; just as for other witnesses Kilolo had illicitly paid, the money was paid through a third party, and the witness denied receiving any money during his testimony). *See also* paras. 261-281 (the Chamber found payment of USD 106 to D-64 as travel expenses, and USD 700 paid to the same witness on the eve of the testimony, to be illicit. These payments were made in circumstances similar to payments made to D-57).

⁸⁹⁸ *Contra* [Bemba Brief](#), para. 47.

⁸⁹⁹ [Judgment](#), paras. 405-407, 410-411; *contra* [Bemba Brief](#), para. 47.

⁹⁰⁰ [Judgment](#), paras. 410-411.

⁹⁰¹ [Judgment](#), paras. 405-406, 410-411.

⁹⁰² [Judgment](#), para. 406.

⁹⁰³ [Bemba Brief](#), para. 47.

⁹⁰⁴ [Bemba Brief](#), para. 47.

testify for Bemba in exchange for money or other benefits⁹⁰⁵ and that, notably, Kilolo followed up on the promises and reiterated the promises and effected the payments.⁹⁰⁶

265. Nor did the Chamber err by disbelieving Kilolo's or some of the witnesses' explanations about the purposes of the payments.⁹⁰⁷ Bemba's arguments are unsubstantiated. In any event, when faced with competing versions of events, the Chamber—as a trier of fact—has the discretion to decide which is more credible.⁹⁰⁸ Here, the Chamber reasonably disbelieved Kilolo and D-23 and, based on the totality of the evidence, including D-23's testimony and the pattern of similar payments to numerous other witnesses shortly before their testimony, concluded that Kilolo's payment and gift to D-23 were not for legitimate reasons.⁹⁰⁹

266. Finally, Bemba's submissions that he did not know about the illicit nature of the payments are inaccurate.⁹¹⁰ Bemba improperly parcels out individual findings and offers an alternative interpretation without showing that the Chamber erred in its material findings based on the entirety of the evidence.⁹¹¹ As developed below,⁹¹² the Chamber reasonably found that, based on an overall assessment of all the evidence, Bemba—who was in control of the payment scheme—knew that some of the payments he discussed and authorised over the phone also served illegitimate purposes. This conclusion is further corroborated by the fact that Bemba and Babala discussed payments in coded language and, when Bemba became aware that their criminal actions had been discovered, he suggested to Kilolo to deny the allegations.⁹¹³ In any event, to be held responsible as a co-perpetrator for corruptly influencing the 14 witnesses, Bemba did not need to contribute to—and know about—each and every individual illicit payment. It sufficed that he shared the Common Plan and that his

⁹⁰⁵ [Judgment](#), paras. 125, 327.

⁹⁰⁶ See e.g. [Judgment](#), para. 419.

⁹⁰⁷ *Contra* [Bemba Brief](#), para. 46 referring to [Judgment](#), para. 150 (which relates to D-23). For the Chamber's more detailed assessment on Kilolo's payment to D-23, see [Judgment](#), paras. 438-445.

⁹⁰⁸ [Gacumbitsi AJ](#), para. 81.

⁹⁰⁹ [Judgment](#), paras. 438-445. *Contra* [Bemba Brief](#), para. 46, fn. 47. Bemba's reference to [Nobilo Contempt AJ](#), paras. 47-48, is inapposite since in that case the Chamber found beyond reasonable doubt that a fact denied by a witness was true, when "[t]here is no other evidence upon which the Trial Chamber could have made those findings". In this case, conversely, the evidence overwhelmingly indicates that Kilolo knew and intended to corruptly influence the witnesses including by payments and other benefits.

⁹¹⁰ [Bemba Brief](#), para. 48.

⁹¹¹ [Bemba Brief](#), paras. 49-51.

⁹¹² See *below* paras. 524-531.

⁹¹³ [Judgment](#), para. 700-701, 703.

overall role and contribution to the Common Plan was essential such that, without his intervention, the offences would not have occurred in the same manner.⁹¹⁴

⁹¹⁴ See below paras. 477-478 and 480.

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IV. KILOLO WAS PROPERLY CONVICTED

IV.A. INTRODUCTION

267. Kilolo played a central role in implementing the Common Plan. He arranged the payments and non-monetary benefits which Bemba authorised so Defence witnesses had an incentive to testify in Bemba's favour.⁹¹⁵ Kilolo facilitated Bemba's abuse of his privileged telephone line to advance the Common Plan.⁹¹⁶ Kilolo contacted witnesses before and during their testimony to ensure their evidence followed Bemba's preferred narrative. To facilitate his coaching efforts, Kilolo gave witnesses telephones—which they were not to reveal to the Victims and Witness Unit ("VWU")—so he could remain in contact with them in violation of Trial Chamber III's non-contact order.⁹¹⁷

268. When he contacted witnesses, Kilolo not only provided them with precise instructions about what they should say in court, he told them how they should act when answering questions so other participants in the proceedings would not suspect that any illicit coaching had taken place.⁹¹⁸ When witnesses deviated from the script they were supposed to follow, Kilolo made sure they corrected their account.⁹¹⁹ Kilolo's instructions to witnesses did not relate solely to the merits of the Main Case. To ensure Trial Chamber III believed what Defence witnesses were saying, Kilolo instructed them to falsely deny contacts with and knowledge of those associated with the Main Case Defence, as well as payments and material benefits the witnesses received from or were promised by the Main Case Defence.⁹²⁰ In carrying out the illicit coaching operation, Kilolo relied heavily on Mangenda to tell him how witnesses were performing, to relay Bemba's directions and to provide advice and logistical assistance to advance the illicit coaching operation.⁹²¹

269. After learning of the investigation into the article 70 violations, Kilolo played a central role in attempts to frustrate the investigation's progress. He and Mangenda spoke about potential sources who may have provided information to the Prosecution; Kilolo suggested to Bemba that witnesses be paid and asked to provide statements asserting that they had lied to

⁹¹⁵ [Judgment](#), paras. 689-691, 699, 703, 823.

⁹¹⁶ [Judgment](#), paras. 737-741, 831, 833.

⁹¹⁷ [Judgment](#), paras. 367-371, 445, 747, 824.

⁹¹⁸ [Judgment](#), paras. 825-826.

⁹¹⁹ [Judgment](#), paras. 468-471, 557, 562, 570-571, 590, 609, 643, 711, 824; fn. 1443.

⁹²⁰ [Judgment](#), para. 707.

⁹²¹ [Judgment](#), paras. 705, 708, 713, 717-726, 729, 731-732, 734, 824, 828.

the Prosecution; and on Bemba's instructions, Kilolo contacted witnesses and discouraged their cooperation with the investigation.⁹²²

270. Based on all these factors, the Chamber reasonably concluded that Kilolo was responsible for inducing witnesses to provide false testimony, and together with Bemba and Mangenda, for co-perpetrating the offences of corruptly influencing witnesses and presenting false evidence.

271. Kilolo's arguments in ground three of his appeal, challenging his criminal responsibility, fail to meet the appellate standard of review. His arguments neither engage with the totality of the evidence on which the Chamber relied, nor the detailed reasons offered by the Chamber in support of its conclusions. For instance, Kilolo fails to confront what the Chamber considered "[t]he most illustrative examples" of his illicit coaching activities: the evidence of his contacts with P-198 (D-15), P-201 (D-54) and D-26.⁹²³ Another key feature of the Chamber's analysis which Kilolo ignores is the Chamber's detailed assessment of his efforts to frustrate the article 70 investigation. Some of Kilolo's arguments are entirely undeveloped and should be summarily dismissed.⁹²⁴ Kilolo's failure to address the Chamber's analysis in a meaningful way is an implicit concession that its conclusions concerning his criminal responsibility are correct.

IV.B. KILOLO ILLICITLY COACHED D-26, D-15 AND D-54, INCLUDING BY INSTRUCTING THEM TO PROVIDE FALSE TESTIMONY

272. The Chamber reasonably concluded that Kilolo illicitly coached D-26, D-15 and D-54, including by dictating to them their testimony concerning the merits of the Main Case and instructing them to testify falsely regarding their contacts with the Main Case Defence.⁹²⁵ The Chamber's conclusions are supported by ample evidence, including Kilolo's own words as recorded in the frequent telephone conversations he had with each witness before and during their testimony. Kilolo addresses none of this evidence or the related findings which the Chamber made.

⁹²² [Judgment](#), paras. 774, 776-778, 787, 792-795, 801.

⁹²³ [Judgment](#), para. 825.

⁹²⁴ [Kilolo Brief](#), paras. 142 (claiming "there is no evidence" to support the Chamber's conclusions relating to D-4 and D-6), 169 (claiming that the Chamber erred in concluding that Kilolo's contribution to the common plan was essential). See [Galić AJ](#), para. 297; [Krajišnik AJ](#), para. 26.

⁹²⁵ [Judgment](#), paras. 475-476, 589-590, 651.

273. In his conversations with D-26, D-15 and D-54, Kilolo told the witnesses what questions he and other participants in the proceedings would ask, and how the witnesses needed to respond. His instructions were unambiguous and direct:

- “[A]nd then it’s also important to note that ... there were problems between ethnic groups in Central Africa: that was also a significant factor in the crimes”.⁹²⁶
- “And then I’m also going to ask you why there was pillaging. Now, you’ll be able to explain yourself: because there weren’t any supplies. Why were women raped? There was also some settling of scores [...]”.⁹²⁷
- “And then I’ll ask you, how many guards were there with him [Mobuto]? You give me the figure around three to four thousand.”⁹²⁸
- “To conclude, I’ll say to you (...) erm ... according (...) to one theory, Jean-Pierre Bemba (...) was the military leader in Central Africa, because he exercised command and control over the troops in Mustapha’s brigade in Bangui. What’s your reaction? So there, really, if you can string several military arguments together for me to explain that it was impossible”.⁹²⁹
- “I suggest you reduce [...] the time you spent in Pretoria. If you can reduce it to two ... two weeks or three weeks maximum.”⁹³⁰
- “Well, here’s what you’ll tell them regarding the deployment [...]”.⁹³¹
- “No, no, you’ll say that you did not find these crimes that the MLC people are being accused of, and you didn’t see them being committed either [...]”.⁹³²
- “Here, you’ll only repeat, and you’ll say: it is true that I went there, but I received no complaints, we saw no victims, whether of rape, murder or pillaging [...]”.⁹³³

⁹²⁶ [Judgment](#), fn. 944.

⁹²⁷ [Judgment](#), para. 463 (English translation in fn. 947).

⁹²⁸ [Judgment](#), fn. 1185.

⁹²⁹ [Judgment](#), fn. 1190.

⁹³⁰ [Judgment](#), para. 562 (English translation in fn. 1204).

⁹³¹ [Judgment](#), para. 631 (English translation in fn. 1438).

⁹³² [Judgment](#), para. 634 (English translation in fn. 1443).

- “[T]hey’ll ask you now, ‘Are you aware of the crimes committed by the ALC, in the various towns they captured?’ You will say, no, no crime was committed because we checked. There was no complaint either.”⁹³⁴
- “No, no, very bad, very bad, because it absolutely mustn’t sound as if that intelligence service was operating in Bangui, no, that’s not good.”⁹³⁵

274. Kilolo dominated his conversations with D-26, D-15 and D-54, while the witnesses largely remained silent or passively confirmed their agreement with a “oui” or similar utterance.⁹³⁶ Occasionally, the witnesses sought clarification from Kilolo.⁹³⁷ When there was any suggestion of deviating from Kilolo’s instructions, Kilolo made it clear he expected blind obedience.⁹³⁸

275. Kilolo also used his telephone contacts with the witnesses to address deficiencies in the evidence they had already given.⁹³⁹

- Prior to D-15’s third day of testimony on 13 September 2013, Kilolo told him that he “wanted to return to the RFI [Radio France Internationale] issue. Because you were asked, ‘had you heard about the crimes and all that?’ You reply, ‘Yes, on RFI.’ So (...) from a legal point of view, that could ... if we leave it like that, it could be awkward for us because it will create the element of knowledge. The only way of stifling that (...) is to show that what you heard were merely vague rumours: nothing specific.”⁹⁴⁰
- Prior to D-54’s third day of testimony on 1 November 2013, Kilolo told him: “about the pillaging ... you didn’t really explain that very well today. Now, as regards that you’ll take advantage of this opportunity to go back to it in depth, and you’ll say: If ... (...) there was pillaging, if there were murders, if there were rapes, what we heard

⁹³³ [Judgment](#), para. 635 (English translation in fn. 1445).

⁹³⁴ [Judgment](#), fn. 1445.

⁹³⁵ [Judgment](#), para. 642 (English translation in fn. 1464).

⁹³⁶ [Judgment](#), paras. 461, 465, 555-556, 564, 569, 578-579, 641, 645.

⁹³⁷ [Judgment](#), para. 461, 465, 556, 564 .

⁹³⁸ [Judgment](#), para. 564.

⁹³⁹ [Judgment](#), paras. 468-471, 557, 570-571, 643; fn. 1443.

⁹⁴⁰ [Judgment](#), para. 570 (English translation in fn. 1231).

was what the people themselves were complaining about, they were saying that it was Bozizé's men who had committed them".⁹⁴¹

276. Kilolo ensured the witnesses' evidence was in harmony with the evidence of other Defence witnesses.⁹⁴² For instance, on 11 September 2013, after D-15 had completed his testimony for the day, Kilolo asked him to give evidence the following day that was consistent with the evidence given by D-45 and D-19:⁹⁴³

Kilolo: So don't forget, they'll ... they'll badger you about your visit to Bangui. So I'd prefer you to say that you went alone, so that you can't implicate other officers. D-15: Of course. Of course I went alone. Kilolo: Now, they'll also ask you if you met [D-19]. Well. Can we say that you didn't meet him? Why? Because [D-19] has already been asked. (...) D-15: [D-45]? [D-45] I met. Kilolo: Erm ... no because even [D-45], he was asked, he said there were never any ALC officers in Bangui.⁹⁴⁴

277. To ensure the illicit coaching went undetected, Kilolo provided instructions on how questions should be answered. For example, Kilolo told D-15 to:

[B]e careful: if they come back to that tomorrow, they'll ask you in which ... in which language Bemba spoke at PK12. In any case, say that you don't know about that. You don't have that exact information. Because since you weren't there, it's too precise a detail. If you give that, it's going to look suspicious. You don't know anything about that.⁹⁴⁵

Later, during the same exchange, Kilolo added:

You can say that you don't remember. Or reply, but with a great deal of hesitation, to show that it's a long time ago. [...] If you say you remember ... they're going to get the impression that someone's recently told you what to say. [...] you absolutely

⁹⁴¹ [Judgment](#), fn. 1443.

⁹⁴² [Judgment](#), paras. 466, 558, 642, 709.

⁹⁴³ [Judgment](#), para. 709.

⁹⁴⁴ [Judgment](#), para. 709 (English translation in fn. 1635).

⁹⁴⁵ [Judgment](#), para. 561 (English translation in fn. 1200).

mustn't mention it straight away. You can mention it only if they ask you the question, but after hesitation and reflection. Not spontaneously; not too quickly.⁹⁴⁶

278. Kilolo also told the witnesses to testify falsely regarding their contacts with him. For example:

- On 20 August 2013, before D-26 began testifying later that day, Kilolo told him: “the last time you spoke to me was ... when we met ...so that I could introduce you to those people. Since then, you haven't heard anything further from me obviously”.⁹⁴⁷
- On 10 September 2013, Kilolo told D-15—who was scheduled to begin his testimony the next day—“you and I, we don't know each other very well ... because we've seen each other (...) only once, and have spoken two or three times. [...] Also the last time you had me, you heard my voice, was in January this year. You haven't heard from me since then...”.⁹⁴⁸
- On 30 October 2013, after D-54 had completed his testimony for the day, and in anticipation of his testimony the following day, Kilolo told him “most importantly don't forget the question that they'll ask: you and I, if we've spoken and when, the last time. So, really as far as that's concerned, don't forget that ... erm ... the last time you and I spoke, in any case ... erm ... it was roughly a month ago at least.”⁹⁴⁹

D-26, D-15 and D-54 complied with Kilolo's instruction, and testified falsely regarding their contacts with the Main Case Defence.⁹⁵⁰

279. The evidence supporting the Chamber's conclusions concerning D-26, D-15 and D-54 is overwhelming.⁹⁵¹ Kilolo's perfunctory challenges are incapable of demonstrating an error. It makes no difference, for instance, that D-26 did not testify.⁹⁵² There is ample evidence supporting the Chamber's conclusion that Kilolo illicitly coached D-26, including by instructing him to provide false evidence. Furthermore, although both D-15 and D-54 denied

⁹⁴⁶ [Judgment](#), para. 561 (English translation in fn. 1200).

⁹⁴⁷ [Judgment](#), para. 464 (English translation in fn. 948).

⁹⁴⁸ [Judgment](#), para. 555 (English translation in fn. 1180).

⁹⁴⁹ [Judgment](#), para. 637 (English translation in fn. 1446).

⁹⁵⁰ [Judgment](#), paras. 473-474, 582-583, 640, 646-647.

⁹⁵¹ *Contra* [Kilolo Brief](#), para. 159.

⁹⁵² *Contra* [Kilolo Brief](#), paras. 167-168.

being coached by Kilolo,⁹⁵³ the Chamber carefully analysed their credibility, and reasonably favoured Kilolo's unambiguous words instructing D-15 and D-54 to lie.⁹⁵⁴

IV.C. KILOLO INSTRUCTED D-25 TO PROVIDE FALSE TESTIMONY

280. The Chamber reasonably concluded that Kilolo instructed D-25 to falsely deny being paid by the Main Case Defence.⁹⁵⁵ The Chamber did not need to hear from D-25 to draw this conclusion.⁹⁵⁶ It reasonably relied on remarks made by Kilolo and Mangenda in their telephone conversations during and immediately after D-25's testimony which demonstrate that Kilolo illicitly coached D-25, as well as the pattern which showed that when Kilolo illicitly coached other witnesses, he instructed them to lie about payments they received from the Main Case Defence.⁹⁵⁷

281. Kilolo's phone conversations with Mangenda are neither "ambiguous" nor do they constitute innocuous discussions concerning D-25's ongoing testimony.⁹⁵⁸ Given the surrounding context of illicit coaching, the Chamber reasonably found that during these conversations:

- Kilolo and Mangenda discussed the instructions Kilolo gave D-25 concerning the substance of his testimony;⁹⁵⁹
- Mangenda expressed concern that the judges in the Main Case suspected that D-25 had been illicitly coached;⁹⁶⁰ and
- after D-25 concluded his testimony, Mangenda referred in code to the illicit coaching which D-25 received by saying that Bemba "*a vu vraiment que (...) un véritable travail de couleurs a été effectivement fait*" / "really saw that (...) thorough colour work was effectively carried out".⁹⁶¹

⁹⁵³ [T-30-RED2](#), 74:21-25; [T-28-RED2](#), 32:21-33:11.

⁹⁵⁴ [Judgment](#), paras. 545-548, 553, 572, 577, 580, 582, 595-596, 633, 643, 645. *Contra* [Kilolo Brief](#), paras. 167-168.

⁹⁵⁵ [Judgment](#), paras. 499-504. *Contra* [Kilolo Brief](#), para. 148.

⁹⁵⁶ *Contra* [Kilolo Brief](#), para. 151.

⁹⁵⁷ [Judgment](#), paras. 496-502. *Contra* [Kilolo Brief](#), para. 150.

⁹⁵⁸ *Contra* [Kilolo Brief](#), para. 151.

⁹⁵⁹ [Judgment](#), paras. 488-489, 493-494.

⁹⁶⁰ [Judgment](#), para. 490.

⁹⁶¹ [Judgment](#), para. 495 (English translation in fn. 1018).

282. Kilolo also challenges the Chamber's conclusion that D-25 testified falsely about the payment he received.⁹⁶² Yet Kilolo contradicts himself by conceding a paragraph later that "D-25 falsely stated in the Main Case that he did not receive any payments from the Defence".⁹⁶³ Leaving aside this contradiction, the evidence shows that Kilolo transferred USD 132.61 to D-25 through Western Union,⁹⁶⁴ and D-25 denied receiving this payment when the Prosecution asked him whether he had "ever receive[d] any sum of money from the members of the Defence team, whether it be for reimbursement of expenses or as a form of support for your testimony".⁹⁶⁵ Given Kilolo's role in the money transfer, and the nature of the question posed, the Chamber reasonably concluded that D-25 testified falsely when he denied receiving any payment from the Main Case Defence.⁹⁶⁶

IV.D. KILOLO ARRANGED AN ILLICIT PAYMENT TO D21-3 (D-29) AND INSTRUCTED HIM TO PROVIDE FALSE TESTIMONY

283. The Chamber reasonably concluded that Kilolo instructed D-29 to lie about his contacts with, and deny he received money from, the Main Case Defence.⁹⁶⁷ In drawing these conclusions, the Chamber relied on a variety of factors, including the consistent pattern of instructions Kilolo gave other witnesses,⁹⁶⁸ as well as Kilolo's telephone conversations with Mangenda during D-29's second day of testimony on 29 August 2013.⁹⁶⁹

284. Kilolo misconstrues the Chamber's analysis when he argues that his conversations with Mangenda do not show he instructed D-29 to lie about payments or contacts.⁹⁷⁰ The Chamber relied on these conversations because they show that Kilolo illicitly coached D-29.⁹⁷¹ It was reasonable for the Chamber to rely upon such evidence to infer that Kilolo instructed D-29 to deny payments from and contacts with the Main Case because this was consistent with Kilolo's *modus operandi*. In other words, when Kilolo illicitly coached witnesses, he scripted

⁹⁶² [Kilolo Brief](#), para. 149.

⁹⁶³ [Kilolo Brief](#), para. 150.

⁹⁶⁴ [Judgment](#), para. 478. *Contra* [Kilolo Brief](#), para. 149.

⁹⁶⁵ [Judgment](#), fn. 1026.

⁹⁶⁶ [Judgment](#), para. 500. *Contra* [Kilolo Brief](#), para. 149.

⁹⁶⁷ [Judgment](#), paras. 527, 531, 540-541. *Contra* [Kilolo Brief](#), para. 154.

⁹⁶⁸ [Judgment](#), paras. 527, 531, 538.

⁹⁶⁹ [Judgment](#), para. 531.

⁹⁷⁰ [Kilolo Brief](#), para. 158.

⁹⁷¹ [Judgment](#), paras. 534-539.

the entirety of their testimony, including topics relating to their credibility, such as payments and contacts.⁹⁷²

285. Other challenges which Kilolo makes are equally unavailing. The Chamber clearly identified the physical, telephone, and SMS contacts which D-29 failed to disclose during his testimony in the Main Case.⁹⁷³ D-29's false evidence regarding his contacts followed a pattern of false evidence which Kilolo instructed other Defence witnesses to give.⁹⁷⁴ The Chamber reasonably relied on this pattern, as well as Kilolo's conversations with Mangenda to conclude that Kilolo instructed D-29 to testify falsely regarding his contacts with the Main Case Defence.⁹⁷⁵

286. Kilolo also argues he had no reason to instruct D-29 to deny being paid by the Main Case Defence,⁹⁷⁶ yet he ignores the Chamber's conclusion that he arranged for D-29 to be paid so that the witness would testify in Bemba's favour.⁹⁷⁷ It was in Kilolo's interest that this payment remain a secret.⁹⁷⁸ In drawing this conclusion, the Chamber considered the former head of VWU,⁹⁷⁹ D21-9's testimony that in principle, a calling party is not prohibited from funding witness requests.⁹⁸⁰ It also accepted that D-29 may not have realised the payment he received was in exchange for his testimony.⁹⁸¹ Nonetheless, the Chamber reasonably concluded the payment was illicit in light of other factors, such as the timing and size of the payment, which corresponded with illicit payments to other Defence witnesses.⁹⁸² Having established that the payment was illicit, the Chamber reasonably concluded that Kilolo instructed D-29 to deny receiving it, just as he did with other witnesses.⁹⁸³

IV.E. KILOLO INSTRUCTED D-13 TO PROVIDE FALSE TESTIMONY

287. The Chamber reasonably concluded that Kilolo instructed D-13 to testify falsely regarding his contacts with the Main Case Defence.⁹⁸⁴ It was unnecessary for the Chamber to

⁹⁷² [Judgment](#), para. 501.

⁹⁷³ [Judgment](#), paras. 514-517, 519, 528. *Contra* [Kilolo Brief](#), para. 157. *Below*, para. 334.

⁹⁷⁴ [Judgment](#), paras. 528, 531.

⁹⁷⁵ [Judgment](#), paras. 531, 540-541.

⁹⁷⁶ [Kilolo Brief](#), para. 156.

⁹⁷⁷ [Judgment](#), paras. 522-526.

⁹⁷⁸ [Judgment](#), para. 527.

⁹⁷⁹ [Judgment](#), para. 522.

⁹⁸⁰ [Judgment](#), para. 525. *Contra* [Kilolo Brief](#), para. 156.

⁹⁸¹ [Judgment](#), para. 530. *See* [Kilolo Brief](#), fn. 347 citing T-40-CONF, 33:12-34:1.

⁹⁸² [Judgment](#), paras. 522-526.

⁹⁸³ [Judgment](#), para. 527.

⁹⁸⁴ [Judgment](#), paras. 663-664, 666. *Contra* [Kilolo Brief](#), paras. 143, 147.

hear from D-13 to draw these conclusions.⁹⁸⁵ D-13 had four lengthy conversations with Kilolo on 8 November 2013—four days before D-13 began testifying in the Main Case.⁹⁸⁶ Yet, when examined about his contacts with the Main Case Defence, D-13 responded that his last contact with Kilolo had occurred several weeks before his testimony.⁹⁸⁷ D-13’s false evidence followed a pattern of similar false evidence which Kilolo instructed other Defence witnesses to give.⁹⁸⁸

288. In addition to relying on this pattern, the Chamber reasonably relied on Kilolo’s conversation with Mangenda on 10 November 2013 to infer that Kilolo had instructed D-13 to testify falsely regarding his contacts with the Main Case Defence.⁹⁸⁹ There is no ambiguity in the conversation.⁹⁹⁰ During their 10 November conversation, Kilolo referred in code to his illicit coaching of D-13 when he said that he was “*occupé avec LES COULEURS de cette personne parce que tu vois le type... [...] donc il avait... il n’avait plus ces choses-là dans sa tête [...] Donc j’ai dû tout recommencer à zéro [...]*”/“dealing with that person’s COLOURS because you see the chap [...] no longer had those things in mind [...] I had to start again from the beginning”.⁹⁹¹ Rather than engaging with the Chamber’s analysis, Kilolo provides an alternative inference which is insufficient to demonstrate an error.⁹⁹²

289. Nor did the Chamber err in concluding that D-13 was the subject of Kilolo’s 10 November conversation with Mangenda. It makes no difference that neither Kilolo nor Mangenda referred to D-13 by name.⁹⁹³ As the Chamber observed, three days before the 10 November conversation, the Trial Chamber in the Main Case had rescheduled the start of D-13’s testimony for 12 November.⁹⁹⁴ Furthermore, during their conversation, Kilolo referred to the earlier postponements in D-13’s testimony when he stated that due to the time lapse, “that person” would no longer remember “things”.⁹⁹⁵ Kilolo fails to confront this reasoning.

⁹⁸⁵ *Contra* [Kilolo Brief](#), para. 145.

⁹⁸⁶ [Judgment](#), paras. 656-657.

⁹⁸⁷ [Judgment](#), para. 662.

⁹⁸⁸ [Judgment](#), paras. 663-664.

⁹⁸⁹ [Judgment](#), paras. 659-661, 663-664.

⁹⁹⁰ *Contra* [Kilolo Brief](#), para. 146.

⁹⁹¹ [Judgment](#), paras. 659-660 (English translation in fn. 1526).

⁹⁹² [Kilolo Brief](#), paras. 145-146.

⁹⁹³ *Contra* [Kilolo Brief](#), para. 146.

⁹⁹⁴ [Judgment](#), para. 660.

⁹⁹⁵ [Judgment](#), para. 660. *Also* para. 655.

IV.F. KILOLO INSTRUCTED P-214 (D-55) TO PROVIDE FALSE TESTIMONY

290. The Chamber reasonably concluded that Kilolo instructed D-55 to deny receiving money and non-monetary promises from the Main Case Defence, to lie about his prior contacts with the Main Case Defence and to testify that a November 2009 letter D-55 co-authored had been prepared to bolster the [REDACTED] case of D-55's co-author.⁹⁹⁶ Kilolo's arguments, which misinterpret and ignore relevant evidence relied upon by the Chamber, fail to show an error:

- By telling D-55 that he should not refer to the Amsterdam meeting in public, Kilolo was instructing him not to reveal the meeting during his Main Case testimony.⁹⁹⁷ D-55's rule 68 statement confirms this. In it, D-55 indicated that he [REDACTED].⁹⁹⁸ Kilolo ignores this evidence when arguing that "D-55 did not deny the Amsterdam meeting."⁹⁹⁹
- Kilolo's instruction not to divulge the Amsterdam meeting would have been futile if D-55 had disclosed that Kilolo had paid his costs of attending the meeting. It was reasonable therefore for the Chamber to conclude that Kilolo instructed D-55 not to reveal this payment, particularly since D-55's failure to disclose this information followed a pattern of similar false evidence which Kilolo instructed other witnesses to give.¹⁰⁰⁰ D-55's rule 68 statement supports the Chamber's conclusion.¹⁰⁰¹
- Kilolo argues that D-55 did not give false testimony concerning his telephone contact with Bemba,¹⁰⁰² but he ignores evidence relied upon by the Chamber which shows the opposite. During his Main Case testimony, D-55 only referred to three contacts with the Main Case Defence.¹⁰⁰³ None of these contacts were with Bemba. Furthermore, in his rule 68 statement, D-55 confirmed [REDACTED].¹⁰⁰⁴

⁹⁹⁶ [Judgment](#), paras. 290, 299-302, 304. *Contra* [Kilolo Brief](#), paras. 159, 160, 167.

⁹⁹⁷ *Contra* [Kilolo Brief](#), para. 163.

⁹⁹⁸ Transcribed Statement of D-55, CAR-OTP-0074-0872-R03, at 0880 ([REDACTED]).

⁹⁹⁹ [Kilolo Brief](#), para. 163.

¹⁰⁰⁰ [Judgment](#), para. 302.

¹⁰⁰¹ Transcribed Statement of D-55, CAR-OTP-0074-0872-R03, at 0880 ([REDACTED]). *Contra* [Kilolo Brief](#), para. 162.

¹⁰⁰² [Kilolo Brief](#), para. 165.

¹⁰⁰³ [T-264-RED2](#), 62:22-66:23 *relied on at* [Judgment](#), para. 301.

¹⁰⁰⁴ Transcribed Statement of D-55, CAR-OTP-0074-0872-R03, at 0880 ([REDACTED]). *Contra* [Kilolo Brief](#), para. 165.

- The Chamber acknowledged that D-55 “never positively stated” that he spoke to Bemba and that “in an attempt at accuracy, he stated that he assumed that the person on the other end of the line was Mr Bemba.”¹⁰⁰⁵ The Chamber reasonably relied on D-55’s testimony, together with the evidence in his rule 68,¹⁰⁰⁶ as well as the relevant call data records, to establish that D-55 in fact spoke to Bemba.¹⁰⁰⁷
- D-55’s evidence was that Kilolo instructed him to testify that the letter he co-authored had been prepared to advance his co-author’s [REDACTED].¹⁰⁰⁸ He said this in his rule 68 statement.¹⁰⁰⁹ He also provided consistent testimony by confirming that [REDACTED].¹⁰¹⁰
- Kilolo’s argument¹⁰¹¹ that the Chamber erred in concluding¹⁰¹² that Bemba “thanked [D-55] for agreeing to testify in his favour” ignores D-55’s rule 68 statement which contains this very assertion.¹⁰¹³

Finally, nowhere in his Brief does Kilolo acknowledge D-55’s testimony in this case, that “instructions [were] given to me that I should not talk about certain things”,¹⁰¹⁴ and that “[t]here was coaching, yes.”¹⁰¹⁵

IV.G. P-260 (D-2), P-245 (D-3) AND P-261 (D-23) WERE “GENERALLY CREDIBLE”

WITNESSES

291. Having found that D-2, D-3 and D-23 were “generally credible” witnesses,¹⁰¹⁶ the Chamber reasonably relied on their evidence to conclude that Kilolo paid witnesses, illicitly coached them and instructed them to give false testimony.¹⁰¹⁷ Kilolo challenges these conclusions by arguing that the Chamber erred in assessing the credibility of D-2, D-3 and D-

¹⁰⁰⁵ [Judgment](#), para. 294. *Contra* [Kilolo Brief](#), para. 165.

¹⁰⁰⁶ Transcribed Statement of D-55, CAR-OTP-0074-0872-R03, at 0879 ([REDACTED]).

¹⁰⁰⁷ [Judgment](#), paras. 294, 296-297.

¹⁰⁰⁸ *Contra* [Kilolo Brief](#), para. 161.

¹⁰⁰⁹ [Judgment](#), para. 290 *relying on* Transcribed Statement of D-55, CAR-OTP-0074-0872-R03, at 0878 ([REDACTED]), 0879 ([REDACTED]), 0880 ([REDACTED]).

¹⁰¹⁰ T-36-CONF, 29:17.

¹⁰¹¹ [Kilolo Brief](#), para. 164.

¹⁰¹² [Judgment](#), para. 305.

¹⁰¹³ Transcribed Statement of D-55, CAR-OTP-0074-0872-R03, at 0879 ([REDACTED]).

¹⁰¹⁴ T-36-RED, 33-24 *relied on* at [Judgment](#), para. 300.

¹⁰¹⁵ T-36-RED, 34-2 *relied on* at [Judgment](#), para. 300.

¹⁰¹⁶ [Judgment](#), paras. 319, 427.

¹⁰¹⁷ [Judgment](#), paras. 365-366, 372-380, 384-389, 391-392, 394, 396-401, 407-419, 435-439, 444, 446, 448-450, 452-453. *Contra* [Kilolo Brief](#), paras. 133-135, 138, 140-141.

23 because they testified falsely in the Main Case.¹⁰¹⁸ However, this factor alone did not bar the Chamber from relying on the evidence given by these witnesses in this case. Their evidence in this case was no different than accomplice evidence.¹⁰¹⁹ The ICTR and the SCSL Appeals Chambers have affirmed that such evidence may be relied upon even in the absence of corroboration.¹⁰²⁰ While nothing prohibits a chamber from relying on such evidence, what is required is that a chamber approach such evidence with caution,¹⁰²¹ which the Chamber here did.¹⁰²²

292. The Chamber’s cautious approach is set out in detail in the Judgment. In conducting its credibility analysis, the Chamber observed that the witnesses did not distance themselves from their untruthful evidence in the Main Case which it reasonably found enhanced the reliability of their evidence in this case.¹⁰²³ The Chamber also considered a variety of other factors in assessing the witnesses’ credibility—factors Kilolo ignores entirely. For instance, the Chamber noted that:

- D-2’s account was “clearly structured, coherent and detailed, and followed a chronological pattern”;¹⁰²⁴
- D-2 was “articulate and precise in his descriptions”;¹⁰²⁵
- D-2 “differentiate[d] between the varying roles and conduct of the different accused” in such a way that demonstrated that he “recounted events as he personally experienced them”;¹⁰²⁶

¹⁰¹⁸ *Contra Kilolo Brief*, paras. 128-131, 134, 159, 167.

¹⁰¹⁹ *Brima AJ*, para. 127. Also *Niyitegeka AJ*, para. 98.

¹⁰²⁰ *Nchamihigo AJ*, paras. 42, 48; *Brima AJ*, paras. 127, 129. See also below paras. 554 and 706-714.

¹⁰²¹ *Nchamihigo AJ*, paras. 42, 47-48; *Niyitegeka AJ*, para. 98; *Brima AJ*, para. 129.

¹⁰²² *Contra Kilolo Brief*, para. 131.

¹⁰²³ See *Judgment*, paras. 308 (“The Chamber observes that P-260 (D-2) was forthcoming and replied candidly to questions put to him by the Prosecution and the Defence. [...] From the outset, P-260 (D-2) admitted that he had lied on specific points in the Main Case for his own benefit”), 313 (“P-245 (D-3) [...] remained frank and forthcoming throughout his testimony. [...] He provided explanations voluntarily and did not evade questions, even if they could potentially cast him in a disadvantageous light”), 424 (P-261(D-23)’s “answers were direct and forthcoming and did not change during the Defence examination”), 425 (P-261 (D-23) “unhesitatingly confirmed, on several occasions, that he had lied before Trial Chamber III”).

¹⁰²⁴ *Judgment*, para. 308.

¹⁰²⁵ *Judgment*, para. 309.

¹⁰²⁶ *Judgment*, para. 310.

- D-2 used “diversified vocabulary when describing events at different junctures of his testimony, while the substance of his account would remain essentially the same” which demonstrated his “sincerity and truthfulness”;¹⁰²⁷
- D-3 “demonstrated confidence in the course of his testimony”;¹⁰²⁸
- D-3’s “answers were chronologically structured, coherent and clear”;¹⁰²⁹
- D-3 provided a “level of detail” and “complicating elements” which were “consistent with the account of someone who personally experienced the events”;¹⁰³⁰
- D-3 “resisted Defence propositions and did not revise or retract his statements”;¹⁰³¹
- D-23 “appeared natural and coherent, and was quick to specify the extent of his knowledge in response to questions that concerned his meetings with Mr Kilolo and Mr Kokaté”;¹⁰³² and
- D-23 “was capable of clearly describing the chronology of meetings and the circumstances under which they took place”.¹⁰³³

293. Given the Chamber’s conclusion that D-2 and D-3 were generally credible witnesses,¹⁰³⁴ the Chamber did not abuse its discretion in relying on the mutually corroborative features of their evidence as a further factor demonstrating the reliability of their evidence.¹⁰³⁵ Kilolo also ignores that the evidence given by D-2, D-3 and D-23 followed a pattern demonstrating that Kilolo:

- paid witnesses to testify in Bemba’s favour;¹⁰³⁶

¹⁰²⁷ [Judgment](#), para. 310.

¹⁰²⁸ [Judgment](#), para. 313.

¹⁰²⁹ [Judgment](#), para. 313.

¹⁰³⁰ [Judgment](#), para. 314.

¹⁰³¹ [Judgment](#), para. 315.

¹⁰³² [Judgment](#), para. 424.

¹⁰³³ [Judgment](#), para. 424.

¹⁰³⁴ [Judgment](#), para. 319.

¹⁰³⁵ *Contra Kilolo Brief*, para. 132.

¹⁰³⁶ [Judgment](#), paras. 380, 436-437, 439, 690-691.

- instructed witnesses not to reveal they had received money or other benefits from the Main Case Defence;¹⁰³⁷
- distributed telephones to witnesses so Kilolo could remain in contact with them after the VWU cut-off date;¹⁰³⁸ and
- instructed witnesses to conceal the true number of their contacts with the Main Case Defence¹⁰³⁹ and to deny they knew individuals associated with the Main Case Defence.¹⁰⁴⁰

294. Furthermore, in challenging D-23's credibility, Kilolo downplays the significance of call data records which support D-23's testimony that he and Kilolo were in contact during the witness's testimony in the Main Case.¹⁰⁴¹ The Chamber reasonably relied on these call data records which confirmed the timing and frequency of their conversations, parts of D-23's evidence in which he admitted that he spoke to Kilolo about the substance of his testimony and the broader "recurring pattern of communication" that Kilolo had with other witnesses during their testimony to conclude that Kilolo instructed D-23 concerning specific topics that he was to testify about.¹⁰⁴²

IV.H. KILOLO ARRANGED ILLICIT PAYMENTS TO P-20 (D-57) AND P-243 (D-64) AND INSTRUCTED THEM TO PROVIDE FALSE TESTIMONY

295. The Chamber reasonably concluded that Kilolo transferred money to D-57 and D-64 through Babala so they would testify in Bemba's favour.¹⁰⁴³ It also reasonably concluded that Kilolo instructed these witnesses to lie about these payments and their contacts with the Main Case Defence.¹⁰⁴⁴

296. Kilolo's arguments ignore the Chamber's detailed reasons supporting its conclusions. He asserts, for instance, that payments were for expenses incurred by the witnesses,¹⁰⁴⁵ but ignores passages of the Judgment in which the Chamber considered and rejected this very

¹⁰³⁷ [Judgment](#), paras. 366, 436, 707.

¹⁰³⁸ [Judgment](#), para. 368-371, 445, 747.

¹⁰³⁹ [Judgment](#), paras. 366, 707.

¹⁰⁴⁰ [Judgment](#), paras. 366, 435, 707.

¹⁰⁴¹ [Kilolo Brief](#), para. 134.

¹⁰⁴² [Judgment](#), paras. 446- 450.

¹⁰⁴³ [Judgment](#), paras. 238-245, 253, 268-273, 280. *Contra* [Kilolo Brief](#), paras. 152, 162.

¹⁰⁴⁴ [Judgment](#), paras. 250-251, 253, 277-278, 280. *Contra* [Kilolo Brief](#), paras. 152, 162, 166.

¹⁰⁴⁵ [Kilolo Brief](#), para. 152.

argument.¹⁰⁴⁶ Kilolo also argues that the Chamber erred in failing to rely on the evidence given by D-57 and D-64 since neither of them testified that Kilolo instructed them to lie.¹⁰⁴⁷ However, the lies which D-57 and D-64 told during their Main Case testimony followed a pattern of similar lies that Kilolo instructed other witnesses to tell.¹⁰⁴⁸ The Chamber reasonably favoured this pattern over the witnesses' denials that they were illicitly coached.¹⁰⁴⁹ In arguing that this was an error,¹⁰⁵⁰ Kilolo ignores the Chamber's detailed credibility assessment, including that:

- D-57 “occasionally prevaricated with regard to his own conduct”;¹⁰⁵¹
- D-64 showed some “reluctance [...] to fully disclose information at the time of his January 2014 statement”;¹⁰⁵²
- D-64’s “account was, at times, evasive and contradictory”;¹⁰⁵³ and
- D-64 “would, at times, adapt his testimony following confrontation by the Prosecution”.¹⁰⁵⁴

297. In light of its concerns regarding their credibility, the Chamber only relied on the evidence that D-57 and D-64 gave about the Appellants' behaviour and conduct, if the evidence was sufficiently corroborated.¹⁰⁵⁵ D-57 and D-64's denials¹⁰⁵⁶ that they had been illicitly coached were not corroborated. In these circumstances, the Chamber reasonably relied on its assessment that the witnesses' lies during their Main Case testimony followed a pattern of similar lies which Kilolo instructed other witnesses to tell.

¹⁰⁴⁶ [Judgment](#), paras. 239-240, 271-273.

¹⁰⁴⁷ [Kilolo Brief](#), para. 166.

¹⁰⁴⁸ [Judgment](#), paras. 250-251, 277-278.

¹⁰⁴⁹ *Contra* [Kilolo Brief](#), paras. 152, 166-167.

¹⁰⁵⁰ [Kilolo Brief](#), paras. 166-167.

¹⁰⁵¹ [Judgment](#), para. 231.

¹⁰⁵² [Judgment](#), para. 257.

¹⁰⁵³ [Judgment](#), para. 257.

¹⁰⁵⁴ [Judgment](#), para. 257.

¹⁰⁵⁵ [Judgment](#), paras. 231, 257.

¹⁰⁵⁶ [T-31-RED2](#), 49:23-50:5; [T-32-RED2](#), 66:23-67:8.

IV.I. CONCLUSION

298. The Chamber properly concluded that Kilolo induced witnesses to give false evidence, and that he was responsible for corruptly influencing witnesses and presenting false evidence as a co-perpetrator. Ground three of Kilolo's appeal should be dismissed.

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V. MANGENDA WAS PROPERLY CONVICTED

V.A. GROUND 2: MANGENDA WAS PART OF THE COMMON PLAN AND MADE AN ESSENTIAL CONTRIBUTION TO IT

V.A.1. Introduction

299. Mangenda espoused the Common Plan¹⁰⁵⁷ and played a central role in implementing it.¹⁰⁵⁸ Mangenda's function in the Main Case Defence team was more than just as a case manager. He advised Kilolo and Bemba on legal and factual issues arising in the context of the Main Case, Defence staffing issues, evidentiary matters, and Defence strategies, including the calling and questioning of witnesses.¹⁰⁵⁹

300. As a result of this position within the Defence team, Mangenda participated in the planning and execution of Kilolo's illicit coaching activities and the presentation of false evidence. He acted as an equal in implementing the Common Plan. While Mangenda did not physically perform the illicit coaching, he nevertheless played a critical role in it. He kept Kilolo updated, whenever the latter was not in court, and advised him on points to be rehearsed with witnesses. Mangenda also conveyed Bemba's instructions on the content of the illicit coaching to Kilolo and provided essential logistical support to Kilolo, such as providing the questions that the Legal Representative of Victims ("LRV") proposed to ask the witnesses. Mangenda discussed with Kilolo, and updated him, on the witnesses' in-court testimonies, including their compliance with Kilolo's illicit instructions and took part in planning and implementing remedial measures intended to frustrate the article 70 investigations. In sum, without Mangenda's assistance, Kilolo would not have been able to perform the illicit coaching in the same manner as it was done.¹⁰⁶⁰

301. Based on all these factors, the Chamber reasonably concluded that Mangenda was responsible, together with Bemba and Kilolo, for co-perpetrating the offences of corruptly influencing witnesses and presenting false evidence, and for aiding and abetting the giving of false testimony.

302. Mangenda argues that the Chamber erred in finding that he was part of the Common Plan and provided an essential contribution to it based on the intercepted conversations of D-

¹⁰⁵⁷ [Judgment](#), paras. 103, 681, 802, 847.

¹⁰⁵⁸ [Judgment](#), paras. 837-850.

¹⁰⁵⁹ [Judgment](#), para. 846.

¹⁰⁶⁰ [Judgment](#), paras. 839-845, 847, 911.

25, D-29, P-198 (D-15), P-201 (D-54) and D-13.¹⁰⁶¹ He argues that the Chamber erred in fact and law by relying on such intercepted conversations to infer that he shared the Common Plan and provided an essential contribution to it.¹⁰⁶² Mangenda's arguments are not supported. Ground Two should be dismissed.

V.A.2. The Chamber did not err by relying on matters beyond the scope of the charges and the Common Plan was clearly defined

V.A.2.a. The Chamber did not err by relying on matters beyond the scope of the charges

303. The Chamber did not err by relying on evidence concerning the merits of the Main Case.¹⁰⁶³ Consistent with rule 63(2), the Chamber was free to rely on all evidence before it, including intercepts in which the co-accused discussed the merits of the Main Case,¹⁰⁶⁴ to establish that Mangenda and his co-perpetrators engaged in the practice of illicit coaching and that they acted with the requisite *mens rea*. This does not mean that the Chamber made findings on the merits of the Main Case. Consistent with its remarks at the start of the trial,¹⁰⁶⁵ the Chamber refrained from making any findings on whether the testimony of witnesses on the merits of the Main Case was true or false.

304. In particular, the Chamber did not infer Mangenda's *mens rea* by relying on his knowledge of the falsity of the witnesses' testimonies on the merits of the Main Case. It inferred that Mangenda knew about Kilolo's illicit coaching activities from Kilolo's instructions to witnesses to "testify according to a particular script concerning the merits of

¹⁰⁶¹ [Mangenda Brief](#), para. 127.

¹⁰⁶² *Contra* [Mangenda Brief](#), paras. 135-262.

¹⁰⁶³ *Contra* [Mangenda Brief](#), paras. 135-142.

¹⁰⁶⁴ [Mangenda Brief](#), para. 138.

¹⁰⁶⁵ [T-10-RED](#), 4:6-6:6, where the Presiding Judge stated that "Main case witnesses may have falsely testified on issues pertaining to the merits of the main case, including for example whether they were members of certain groups or entities, the structure of these groups or entities, their movements on the ground and the names of officials. However, this Chamber cannot assess the truth or falsity of these statements without command over the evidence in the main case, which would necessitate a partial rehearing of the evidence before this Chamber. The result of such a course would be to litigate an Article 70 case and relitigate part of an Article 5 case before another Chamber in the course of this hearing. [...] [T]he Chamber finds that it is not necessary to extend its inquiry as to whether or not the witnesses testified falsely to the merits of the main case. Rather, whether or not the witness falsely testified can be ascertained in relation to other information [...] in respect of issues like: [...] their previous contacts with the Defence; their meetings with other prospective witnesses; their acquaintance with some of the accused or other persons associated with them; the fact that promises had been made to them in exchange for their testimony; and the fact that they had received reimbursements or transferred by Mr Bemba on his behalf for the purpose of unduly influencing the witness". In the Judgment, the Chamber restated this position and noted that it did not assess the truth or falsity of the testimonies on the merits of the Main Case and that its findings on the falsity of the evidence for the purpose of the offences under article 70(1)(a) and (b) would relate only to the witnesses' prior contacts with the Defence, payments and other benefits, and their acquaintances with other persons. See [Judgment](#), para. 194. See also [Mangenda Brief](#), para. 135.

the Main Case, *regardless of the truth or falsity of the information therein*".¹⁰⁶⁶ The Chamber found that Mangenda knew that Kilolo was engaging in the *practice* of illicit coaching. The Chamber defined this practice as encompassing the rehearsing, instructing, correcting and scripting of expected answers on issues pertaining to the Main Case.¹⁰⁶⁷ Contrary to Mangenda's contention, knowledge of "scripting" of the witnesses' evidence does not necessarily imply or require knowledge of the falsity of such evidence.¹⁰⁶⁸ Rather, it suffices that he knew that the witnesses' testimonies could be influenced in a manner such that without such scripting, "they would not have testified on a number of issues in the same way".¹⁰⁶⁹

305. The Chamber also established Mangenda's *mens rea* by relying on his knowledge that Kilolo instructed witnesses to testify falsely on three matters not related to the merits of the Main Case—their contacts with the Main Case Defence, payments and benefits, and their acquaintances with certain persons.¹⁰⁷⁰ The Chamber also considered Mangenda's knowledge of Kilolo's illicit coaching activities to find that Mangenda espoused the Common Plan.¹⁰⁷¹

306. Thus, while correctly considering evidence regarding Mangenda's and Kilolo's discussions about D-13, D-54, D-29, D-25 and D-15's Main Case testimony both on the merits of the case and on the three other issues,¹⁰⁷² the Chamber did not infer Mangenda's *mens rea* by relying on his knowledge that the witnesses testified falsely on the merits of the Main Case, nor did the Chamber make findings on whether the evidence on the merits of the Main Case was ultimately true or false. In particular:

- The Chamber found that Kilolo illicitly coached D-13¹⁰⁷³ and discussed with Mangenda his "illicit coaching activities",¹⁰⁷⁴ using such terms as "*faire [...] la couleur*" or "*couleur*", but did not address the veracity of the content of the witness' testimony on the merits of the Main Case.¹⁰⁷⁵

¹⁰⁶⁶ [Judgment](#), para. 704 (emphasis added); *see also* paras. 712, 733, 808.

¹⁰⁶⁷ [Judgment](#), paras. 651, 825, 860, 862.

¹⁰⁶⁸ [Mangenda Brief](#), para. 140.

¹⁰⁶⁹ [Judgment](#), para. 825; *see also* para. 48.

¹⁰⁷⁰ [Judgment](#), paras. 704, 733, 914, 919; *see also* paras. 844, 849, 865, 870, 921.

¹⁰⁷¹ [Judgment](#), paras. 704, 717-726, 734.

¹⁰⁷² *Contra* [Mangenda Brief](#), paras. 138-139.

¹⁰⁷³ [Judgment](#), para. 666.

¹⁰⁷⁴ [Judgment](#), para. 667.

¹⁰⁷⁵ [Judgment](#), paras. 660-663.

- With respect to D-54, the Chamber found that “Kilolo extensively rehearsed, instructed, corrected and scripted the expected answers on a series of issues pertaining to the Main Case”¹⁰⁷⁶ and that “[he] also instructed D-54 to testify incorrectly about his prior contacts with the Main Case Defence, on how to conduct himself before the Court and to deny any payments from the Main Case Defence”.¹⁰⁷⁷ The Chamber concluded that Mangenda knew that Kilolo illicitly coached D-54,¹⁰⁷⁸ and that “together they discussed the best approach to ensure consistency with other evidence and avoid contradictions on D-54’s part”.¹⁰⁷⁹
- The Chamber found that Kilolo instructed D-29 to “falsely testify about his prior contacts with the Main Case Defence [and to] deny payments of money”.¹⁰⁸⁰ It made no finding as to whether Kilolo asked D-29 to testify falsely about the merits of the Main Case. Although Mangenda updated Kilolo on D-29’s evidence on the merits of the Main Case (using disparaging terms),¹⁰⁸¹ Kilolo had merely asked Mangenda to update him on the witness’ answers to questions on prior contacts with the Main Case Defence and payments, so that another witness (D-30) could be prepared accordingly.¹⁰⁸² On this basis, the Chamber held that “Mangenda approved of and partook in Mr Kilolo’s overall illicit coaching strategy”.¹⁰⁸³
- Similarly, the Chamber reached its findings on D-25 based on the fact that Kilolo illicitly coached the witness “in relation to payments of money from the Main Case Defence”,¹⁰⁸⁴ that he gave “instructions on the substance of the Main Case”,¹⁰⁸⁵ and that he had an illicit coaching meeting with D-25.¹⁰⁸⁶ The Chamber held that

¹⁰⁷⁶ [Judgment](#), para. 651.

¹⁰⁷⁷ [Judgment](#), para. 651.

¹⁰⁷⁸ [Judgment](#), para. 652.

¹⁰⁷⁹ [Judgment](#), para. 652.

¹⁰⁸⁰ [Judgment](#), paras. 538, 541.

¹⁰⁸¹ [Judgment](#), para. 534.

¹⁰⁸² [Judgment](#), para. 538.

¹⁰⁸³ [Judgment](#), para. 542.

¹⁰⁸⁴ [Judgment](#), para. 504.

¹⁰⁸⁵ [Judgment](#), paras. 488, 493-494. The Chamber did not make findings as to the veracity of the content of these instructions, but merely pointed out that “in no circumstances does permissible witness coaching encompass specific instructions on the substance of the testimony” ([Judgment](#), paras. 488-490).

¹⁰⁸⁶ [Judgment](#), para. 493.

Mangenda knew about, approved and took part in Kilolo's overall illicit coaching activities.¹⁰⁸⁷

- Finally, the Chamber found that for D-15, "Kilolo extensively rehearsed, instructed, corrected and scripted the expected answers on a series of issues pertaining to the Main Case that were followed by the witness scrupulously".¹⁰⁸⁸ And it found that Kilolo instructed D-15 to testify untruthfully in relation to his prior contacts with the Main Case Defence.¹⁰⁸⁹ The Chamber found that "Mangenda was firmly involved in and approved of Mr Kilolo's illicit coaching activities involving D-15".¹⁰⁹⁰

307. The above examples demonstrate that Kilolo and Mangenda discussed Kilolo's illicit coaching activities. Although in that context they also discussed the testimonies of the witnesses pertaining to the merits of the Main Case, the Chamber made no findings on whether their evidence on the merits of the Main Case was ultimately true or false. Nor did the Chamber infer Mangenda's *mens rea* by relying on his knowledge that the witnesses testified falsely on the merits of the Main Case. In any event, the Chamber would not have erred even if it had relied on evidence demonstrating Mangenda's *belief* that the witnesses' testimonies were false on the merits, to conclude that Mangenda knew that Kilolo was illicitly coaching witnesses, and knew and intended that the 14 Defence witnesses would provide false testimony about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons. Such an approach would have been within the Chamber's stated parameters and would not have required it to find that the testimonies of the 14 witnesses on the merits of the Main Case were objectively false.¹⁰⁹¹

308. Mangenda's arguments should be rejected.

¹⁰⁸⁷ [Judgment](#), para. 505. *See also* paras. 488, 493-495.

¹⁰⁸⁸ [Judgment](#), para. 590. *See also* paras. 555-564, 569-573, 578-580, 583, 587.

¹⁰⁸⁹ [Judgment](#), para. 589. *See also* paras. 554-555, 582.

¹⁰⁹⁰ [Judgment](#), para. 591. *See also* paras. 566, 575-576.

¹⁰⁹¹ *See e.g.* [Judgment](#), paras. 128, 670-671, where the Chamber made a subsidiary finding on Arido's belief as to the falsity of the evidence on the merits.

V.A.2.b. The Chamber did not rely on an undefined Common Plan

309. Mangenda’s argument that he was not informed promptly and in detail of the nature, cause and content of the charges, in violation of article 67(1)(a), because of the Prosecution’s alleged failure to adequately define the Common Plan in its closing statements¹⁰⁹² is unsupported and should be rejected.

310. As the Appeals Chamber held in the *Lubanga* case, “the decision on the confirmation of the charges defines the parameters of the charges at trial.”¹⁰⁹³ Auxiliary documents may, depending on the circumstances, provide further details about the charges,¹⁰⁹⁴ provided the information was made available “before the start of the trial hearings”.¹⁰⁹⁵

311. The Pre-Trial Chamber had found that the accused Bemba, Kilolo and Mangenda shared an Overall Strategy¹⁰⁹⁶ of “defending Mr Bemba against the charges in the Main Case by means which included the commission of offences against the administration of justice”.¹⁰⁹⁷ The Confirmation Decision further stated that Bemba was “the ultimate beneficiary” of this strategy,¹⁰⁹⁸ and that he, together with Kilolo and Mangenda, committed the offence of corruptly influencing witnesses by way of planning and coordinating with the other suspects the perpetration of this offence and the ensuing false testimonies.¹⁰⁹⁹ According to the Confirmation Decision, Kilolo instructed, persuaded or otherwise influenced Defence witnesses, including by way of transfers of money, to state false information or withhold true information, and presented false oral evidence in the knowledge that it was false.¹¹⁰⁰ The Pre-Trial Chamber further held that Mangenda corruptly influenced witnesses together with Kilolo and Bemba, by way of liaising between Bemba and Kilolo, by discussing, coordinating with and advising Kilolo both on money transfers to witnesses and on the content of their testimony, as well as through other activities, and together with Bemba and Kilolo, presented false oral evidence in the knowledge that it was false.¹¹⁰¹

¹⁰⁹² [Mangenda Brief](#), paras. 143-145, referring to [Judgment](#), para. 681.

¹⁰⁹³ [Lubanga AJ](#), para. 124.

¹⁰⁹⁴ [Lubanga AJ](#), paras. 124, 128, 132.

¹⁰⁹⁵ [Lubanga AJ](#), para. 129.

¹⁰⁹⁶ For the purposes of this case, the terms “Common Plan” and “Overall Strategy” were found to be synonymous: [Prosecution Pre-Trial Brief](#), paras. 237-238; [Judgment](#), para. 680.

¹⁰⁹⁷ [Confirmation Decision](#), para. 52.

¹⁰⁹⁸ [Confirmation Decision](#), paras. 52, 97.

¹⁰⁹⁹ [Confirmation Decision](#), pp. 47-48. See also paras. 97-106.

¹¹⁰⁰ [Confirmation Decision](#), pp. 48-49. See also paras. 53-72.

¹¹⁰¹ [Confirmation Decision](#), pp. 49-52. See also paras. 73-76.

312. In the Prosecution's Pre-Trial Brief,¹¹⁰² an auxiliary document providing additional information to the accused as to the nature, cause and content of the charges,¹¹⁰³ the Prosecution provided further detail on the scope of the Common Plan, the actors involved in it, their respective roles in its implementation, the means by which it was implemented (including through bribing witnesses, giving non-monetary promises, illicitly coaching witnesses and presenting their false evidence), as well as the crimes committed in pursuance of the Common Plan.¹¹⁰⁴

313. The Common Plan, as articulated by the Trial Chamber in the Judgment, clearly fell within the scope of the Confirmation Decision. The Trial Chamber defined the Common Plan as follows:

Mr Bemba, Mr Kilolo and Mr Mangenda, in the context of defending Mr Bemba from the charges in the Main Case, agreed to illicitly interfere with witnesses in order to ensure that those witnesses would provide evidence in Mr Bemba's favour. More precisely, Mr Bemba, Mr Kilolo and Mr Mangenda agreed to instruct or motivate defence witnesses to give a specific testimony, knowing the testimony to be false, at least in part, by giving monies, material benefits or promises, and subsequently to present these witnesses to the Court.¹¹⁰⁵

314. Although the Trial Chamber may have used slightly different words from those in the Confirmation Decision, the Common Plan for which Mangenda was convicted clearly fell within the scope of the charges notified to Mangenda. Accordingly, Mangenda's rights under article 67(1)(a) were fully respected. His arguments should be rejected.

V.A.3. The offence of 'corruptly influencing witnesses' does not require an intent to induce a falsehood

315. As discussed in paragraphs 238 to 250 above, Mangenda's arguments that the Chamber erred in defining the offence of "corruptly influencing" as not requiring an intent to induce a falsehood¹¹⁰⁶ are unsupported and should be rejected.

¹¹⁰² [Prosecution Pre-Trial Brief](#).

¹¹⁰³ [Lubanga AJ](#), paras. 128-129.

¹¹⁰⁴ [Prosecution Pre-Trial Brief](#), paras. 17-63, 237-238.

¹¹⁰⁵ [Judgment](#), paras. 103, 681, 802, 847.

¹¹⁰⁶ [Mangenda Brief](#), paras. 146-165. *See above* paras. 248, 250.

V.A.4. Mangenda knew that Kilolo illicitly coached witnesses and instructed them to lie

316. Although the title of Mangenda's sub-ground 2(C) focusses on his knowledge that Kilolo was inducing the five intercepted witnesses (D-25, D-29, D-15, D-54 and D-13) to lie, his arguments are broader.¹¹⁰⁷ In fact, Mangenda appears to challenge both the Chamber's findings that he knew that Kilolo illicitly coached witnesses in general¹¹⁰⁸ and that he knew that Kilolo induced witnesses to testify untruthfully on the three issues of their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.¹¹⁰⁹ In any event, Mangenda fails to show any error in these findings. His arguments are unsupported and should be rejected.

V.A.4.a. The Chamber reasonably concluded that Mangenda knew that Kilolo illicitly coached witnesses, including by instructing them to lie about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons

317. The Chamber reasonably concluded that Mangenda knew that Kilolo illicitly coached witnesses¹¹¹⁰ and that Mangenda knew and intended that the 14 witnesses presented by the Main Case Defence would provide false testimony about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.¹¹¹¹ It so concluded after considering the evidence as a whole.¹¹¹² This included but was not limited to the intercepted telephone conversations between Mangenda and Kilolo in respect of D-25, D-29, D-15, D-54 and D-13.

318. The Chamber concluded that Mangenda knew that Kilolo was illicitly coaching witnesses because:

- Mangenda discussed with Kilolo on a substantive and continuous basis the latter's illicit coaching activities, and accompanied Kilolo in the field.¹¹¹³

¹¹⁰⁷ [Mangenda Brief](#), paras. 132, 166-253.

¹¹⁰⁸ [Judgment](#), paras. 847-848, 850, 910.

¹¹⁰⁹ [Judgment](#), paras. 849, 870, 914, 921. Some of Mangenda's arguments incorrectly assume that Chamber found that he knew that Kilolo was inducing the witnesses to testify untruthfully on the merits of the Main Case (see [Mangenda Brief](#), paras. 132, 166-167, 171, 175, 179, 180, 186, 204, 220, 224, 256-257, 261, 259, 261). As shown in paras. 304-305 above, the Chamber made no such finding.

¹¹¹⁰ [Judgment](#), paras. 847-848, 850, 910.

¹¹¹¹ [Judgment](#), paras. 849, 870, 914, 921.

¹¹¹² [Judgment](#), paras. 910, 914.

¹¹¹³ [Judgment](#), paras. 505, 542, 591, 652, 667, 756-763, 849.

- Mangenda espoused the Common Plan that revolved around the illicit coaching of witnesses.¹¹¹⁴
- Mangenda provided an essential contribution to the Common Plan.¹¹¹⁵ In particular, Mangenda participated in the planning of the illicit interference of witnesses, liaised between Bemba and Kilolo, and consulted with and advised Kilolo.¹¹¹⁶ He also participated in the actual illicit coaching of witnesses by conveying Bemba's instructions to Kilolo, by actively assisting and advising Kilolo on the illicit coaching activities and by briefing Kilolo on the witnesses' testimonies whenever Kilolo was not in the courtroom.¹¹¹⁷
- Mangenda took several actions and initiatives to conceal the illicit witness coaching and bribery.¹¹¹⁸ In particular, he was present and assisted Kilolo in distributing new telephones to witnesses, which enabled Kilolo to stay in contact with the witnesses past the VWU cut-off date;¹¹¹⁹ he used coded language in conversations with Kilolo and Bemba when discussing matters related to the illicit coaching activities or the sums of money that were transferred to witnesses;¹¹²⁰ he insisted that other members of the Main Case Defence should not witness the illicit coaching which would enable the co-perpetrators to implement their plan;¹¹²¹ and he agreed with Kilolo not to keep any physical evidence related to the illicit coaching so as to minimise the traceability of their illicit activities.¹¹²²
- Mangenda, together with the other co-perpetrators, took measures to prevent and frustrate the article 70 investigation.¹¹²³ In particular, the three co-perpetrators agreed to contact witnesses they suspected of having spoken to the Prosecution to convince them to terminate their cooperation with the Prosecution. They also agreed to pay witnesses or to offer them non-monetary assistance. Kilolo and Mangenda updated

¹¹¹⁴ [Judgment](#), paras. 103, 681, 802, 847.

¹¹¹⁵ [Judgment](#), para. 848.

¹¹¹⁶ [Judgment](#), paras. 535, 600-606, 612, 685-686, 688, 839, 846.

¹¹¹⁷ [Judgment](#), paras. 704, 717-726, 734, 839-844, 846-847.

¹¹¹⁸ [Judgment](#), paras. 845, 850.

¹¹¹⁹ [Judgment](#), para. 747.

¹¹²⁰ [Judgment](#), paras. 750-761.

¹¹²¹ [Judgment](#), paras. 762-764.

¹¹²² [Judgment](#), paras. 765-768.

¹¹²³ [Judgment](#), para. 848. *See also* paras. 770-801.

Bemba, who gave instructions and authorised measures which Kilolo and Mangenda then implemented.¹¹²⁴

- Mangenda discussed with Bemba the existence of similar proceedings in the *Barasa* case and the penalisation of such conduct under article 70.¹¹²⁵
- Mangenda, as a lawyer and a member of Bemba's Defence team, was aware of and understood the Court's statutory and disciplinary regime.¹¹²⁶

319. The Chamber further concluded that Mangenda knew and intended that the 14 witnesses presented by the Bemba Defence would provide false testimony about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons. In addition to the evidence summarised above, the Chamber also drew this conclusion from the following evidence:

320. First, Kilolo discussed these aspects of the witnesses' testimonies:¹¹²⁷

- With respect to D-25, the Chamber noted that in a telephone conversation during his testimony, Mangenda informed Kilolo that the witness had denied contacts with Kilolo and the latter "expressed satisfaction that D-25 had not revealed an illicit coaching meeting and emphasised that he had given D-25 clear instructions to stay on script".¹¹²⁸ Mangenda also reported that Bemba was particularly pleased with Kilolo's illicit coaching of D-25.¹¹²⁹ These coaching activities included the "consistent denial of all Main Case Defence payments" as a regular feature.¹¹³⁰

¹¹²⁴ [Judgment](#), para. 801.

¹¹²⁵ [Judgment](#), para. 850. See also para. 820 and [Prosecution Final Brief](#), para. 284.

¹¹²⁶ [Judgment](#), para. 850.

¹¹²⁷ [Judgment](#), para. 849.

¹¹²⁸ [Judgment](#), para. 493; Audio recording, CAR-OTP-0074-0992; Translated transcript of audio recording, CAR-OTP-0079-0114 at 0120, lines 153-160; at 0121, lines 179-180 ('Mangenda: *He absolutely denied ... he was pressed ... did ... you ... have a meeting only with Mr Kilolo twice, did Mr Kilolo not introduce you to a member of the personnel, to a military expert (...) to discuss the case? No, I didn't see anyone, that's it. Well, there again, that can happen, so that could maybe be a lapse of memory or well, in fact ... Kilolo: Well, it's good, at least, that he denied it, because that was really a serious error. It's good that he denied it, because just imagine if he had agreed and then had said that there were three of us, me, him and (...)... Can you imagine? (...) Yes, but because the problem is that I had given him clear instructions, that is that with regard to anything that is not clear, really that he shouldn't engage in that discussion*').

¹¹²⁹ [Judgment](#), para. 495.

¹¹³⁰ [Judgment](#), paras. 501-502.

- With respect to D-29, the Chamber noted that in a telephone conversation while the testimony of the witness was ongoing, Kilolo asked Mangenda about D-29's responses to questions on his prior contacts with the Main Case Defence and payments, so that Kilolo could prepare D-29's wife (D-30) accordingly.¹¹³¹
- The Chamber found that Mangenda and Kilolo, in a separate conversation, discussed in general terms "the provision of money to witnesses",¹¹³² without relating this discussion to a particular witness.¹¹³³

321. Second, a regular feature of the illicit coaching activities, and indeed the Common Plan that Mangenda shared,¹¹³⁴ included the instruction for witnesses to lie about their contacts with the Main Case Defence, payments and benefits, and their acquaintances with certain persons:¹¹³⁵

- The evidence relating to D-15 shows that Kilolo illicitly coached D-15 including by asking him to lie about his prior contacts with the Defence;¹¹³⁶ that Kilolo updated Mangenda on his illicit coaching activities;¹¹³⁷ and that Mangenda was involved in and had detailed knowledge of the purpose and content of Kilolo's contacts with witnesses.¹¹³⁸
- The evidence relating to D-13 shows that Kilolo instructed D-13 to give an untruthful account of the number of contacts he had had with the Main Case Defence,¹¹³⁹ and that Kilolo discussed his illicit coaching of D-13 with Mangenda.¹¹⁴⁰
- The Chamber also relied on the fact that Kilolo illicitly coached a further nine witnesses, namely P-260 (D-2),¹¹⁴¹ P-245 (D-3),¹¹⁴² P-256 (D-4),¹¹⁴³ D-6,¹¹⁴⁴ P-261

¹¹³¹ [Judgment](#), para. 538.

¹¹³² [Judgment](#), paras. 619-620.

¹¹³³ [Judgment](#), para. 619

¹¹³⁴ [Judgment](#), paras. 103, 681, 802, 847.

¹¹³⁵ [Judgment](#), para. 849.

¹¹³⁶ [Judgment](#), paras. 554-555, 582-583, 590.

¹¹³⁷ [Judgment](#), para. 566.

¹¹³⁸ [Judgment](#), para. 591.

¹¹³⁹ [Judgment](#), para. 664, 666.

¹¹⁴⁰ [Judgment](#), para. 659-661, 667. In this latter conversation, Kilolo did not expressly mention that he was inducing witnesses to lie about the three topics of contacts, payments and associations.

¹¹⁴¹ [Judgment](#), paras. 389, 412.

¹¹⁴² [Judgment](#), paras. 392, 413.

(D-23),¹¹⁴⁵ D-26,¹¹⁴⁶ P-214 (D-55),¹¹⁴⁷ P-20 (D-57)¹¹⁴⁸ and P-243 (D-64),¹¹⁴⁹ and directed them to provide false testimony about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.¹¹⁵⁰ Since Mangenda was regularly informed about Kilolo's illicit coaching activities,¹¹⁵¹ the Chamber relied on this evidence to find that Mangenda was aware that Kilolo's illicit coaching included prompting witnesses to lie on these three topics.

322. Third, Mangenda heard the witnesses' false evidence in Court, or received updates about it. Yet, he expressed his approval and relayed Bemba's approval of such false testimonies.¹¹⁵² Mangenda also continued to collaborate in the illicit coaching activities in which witnesses were instructed to lie despite his being aware of the obvious result.¹¹⁵³

323. In sum, the Chamber correctly concluded that Mangenda knew that Kilolo illicitly coached witnesses and that Mangenda knew and intended that the 14 witnesses presented by the Bemba Defence would provide false testimony about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons. Mangenda's arguments are unsupported and should be rejected.

324. The Chamber made the above factual findings to conclude that Mangenda had the requisite knowledge and intent for the offences under articles 70(1)(b) and (c) pursuant to the mode of liability under article 25(3)(a) of the Statute. However, as discussed below, as a matter of law, the Chamber did not need to conclude that Mangenda knew and intended that each one of the 14 Defence witnesses would falsely testify about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.¹¹⁵⁴

¹¹⁴³ [Judgment](#), paras. 394, 414.

¹¹⁴⁴ [Judgment](#), paras. 399-401, 415.

¹¹⁴⁵ [Judgment](#), paras. 451-453.

¹¹⁴⁶ [Judgment](#), paras. 464, 470-471, 473-474, 475.

¹¹⁴⁷ [Judgment](#), paras. 301-302.

¹¹⁴⁸ [Judgment](#), paras. 250, 253.

¹¹⁴⁹ [Judgment](#), paras. 277-280.

¹¹⁵⁰ [Judgment](#), paras. 707.

¹¹⁵¹ [Judgment](#), paras. 505, 542, 591, 652, 667, 756-763, 849.

¹¹⁵² [Judgment](#), para. 849.

¹¹⁵³ [Judgment](#), para. 849, 870.

¹¹⁵⁴ *See below* paras. 382-384.

V.A.4.b. The Chamber did not err by relying on Mangenda's telephone conversations with Kilolo

325. Mangenda's challenge to the Chamber's conclusion that he was aware that Kilolo induced the 14 Defence witnesses to lie relates to specific aspects of Mangenda's telephone conversations with Kilolo concerning D-25, D-29, D-15, D-54 and D-13.¹¹⁵⁵ But by doing so, Mangenda disregards that the Chamber's findings against Mangenda were based on a broader platform of evidence. In addition to the intercepted telephone conversations between Kilolo and Mangenda, the Chamber relied on intercepted telephone conversations between Kilolo and the witnesses, and between Mangenda and Bemba, as well as on the testimony of witnesses and documentary evidence such as Western Union transfers and call data records ("CDR").¹¹⁵⁶

326. Mangenda ignores that the intercepted telephone conversations between him and Kilolo must be considered in light of the evidence as a whole.¹¹⁵⁷ The weight to be given to certain pieces of evidence cannot be determined in the abstract but rather will depend on the circumstances surrounding each piece of evidence.¹¹⁵⁸ Mangenda adopts a piecemeal interpretation of individual items of evidence or portions thereof. In particular, Mangenda offers only alternative interpretations of individual pieces of evidence, viewed in isolation and artificially removed from other corroborative evidence. In so doing, Mangenda fails to demonstrate that the Chamber "ignored an inference which favours the accused"¹¹⁵⁹ with respect to his guilt or the material facts (regarding elements of the offence and modes of liability) which led to his conviction.

327. The ICTY and ICTR Appeals Chamber has affirmed that the standard of appellate review for cases based on circumstantial evidence permits an Appeals Chamber to uphold a conviction on appeal "even where other inferences sustaining guilt could reasonably have been drawn at trial".¹¹⁶⁰ It further held that where a Trial Chamber has found a material fact to be established beyond reasonable doubt on circumstantial evidence, "the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore

¹¹⁵⁵ [Mangenda Brief](#), paras. 169-239.

¹¹⁵⁶ See previous sub-section.

¹¹⁵⁷ [Lubanga Confirmation Decision](#), para. 39; [Katanga and Ngudjolo Confirmation Decision](#), para. 66; [Lubanga AJ](#), para. 22; [Ngudjolo TJ](#), para. 45; [Bemba TJ](#), para. 225; [Ntagerura AJ](#), paras. 171, 174.

¹¹⁵⁸ [Judge Fernández de Gurmendi Dissent](#) to *Gbagbo* Confirmation Decision, para. 24.

¹¹⁵⁹ [Stakić AJ](#), para. 219.

¹¹⁶⁰ [Kordić AJ](#), para. 288. See also [Ntagerura AJ](#), para. 305.

other inferences that lead to the conclusion that an element of the crime was not proven.¹¹⁶¹ If no reasonable Trial Chamber could have ignored an inference which favours the accused, the Appeals Chamber will vacate the Trial Chamber's factual inference and reverse any conviction that is dependent on it".¹¹⁶² This means that:

The Appeals Chamber will not call the findings of fact into question where there is reliable evidence on which the Trial Chamber might reasonably have based its findings. It is accepted moreover that two reasonable triers of fact might reach different but equally reasonable findings. A party suggesting only a variation of the findings which the Trial Chamber might have reached therefore has little chance of a successful appeal, unless it establishes beyond any reasonable doubt that *no* reasonable trier of fact *could have* reached a guilty finding.¹¹⁶³

328. This is consistent with ICC jurisprudence—the Appeals Chamber will accord a margin of appreciation to factual findings and inferences that a Trial Chamber has drawn from the available evidence.¹¹⁶⁴ This means that the Appeals Chamber “will not disturb a [...] Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”.¹¹⁶⁵

329. Mangenda now presents the same or similar arguments as he brought at trial. As the appellant challenging his conviction, Mangenda must present clearly and in detail an alternative inference he wants the Appeals Chamber to consider.¹¹⁶⁶ Consistent with the required holistic evaluation of the evidence, it is not enough for him to present alternative inferences with respect to isolated pieces of evidence. Instead, Mangenda must present an alternative inference which affects the Chamber’s findings with respect to the material facts relating to the elements of the offences and/or the modes of liability and/or other facts

¹¹⁶¹ [Stakić AJ](#), para. 219; [Delalić AJ](#), para. 458; [Kvočka AJ](#), para. 18.

¹¹⁶² [Stakić AJ](#), para. 219. See also [Blaškić AJ](#), para. 13; [Kunarac AJ](#), paras 43, 48; [Niyitegeka AJ](#), para. 10.

¹¹⁶³ [Krnojelac AJ](#), para. 12 (emphasis in original). See also [Kordić AJ](#), para. 288. With respect to the Chamber’s findings of fact on which the conviction does not rely (i.e. subsidiary facts), the Appeals Chamber will defer to the findings of the Trial Chamber where such findings are supported by reliable evidence ([Stakić AJ](#), fn. 470).

¹¹⁶⁴ [Mbarushimana Interim Release AD](#), paras. 1, 17; [Lubanga Stay AD](#), para. 56; [Bemba First Application Release AD](#), para. 45; [Bemba Second Application Release AD](#), para. 16.

¹¹⁶⁵ [Lubanga AJ](#), para. 21; [Ngudjolo AJ](#), para. 22.

¹¹⁶⁶ [Vasiljevic AJ](#), para. 12; [Blaškić AJ](#), para. 13, [Kunarac AJ](#), paras. 43, 48; [Niyitegeka AJ](#), para. 10.

indispensable to his conviction.¹¹⁶⁷ And then, he must show that no reasonable chamber could have ignored that inference. He fails to do so. Essentially, Mangenda merely disagrees with the Trial Chamber's assessment of evidence and conclusions, without properly applying the appellate standard of review. Since he fails to show any appealable error in the Judgment, his arguments should be rejected.

330. The following sub-sections detail why Mangenda's challenges to the Chamber's reliance on Mangenda's intercepted telephone conversations with Kilolo relating to D-25, D-29, D-15, D-54 and D-13 do not demonstrate that the Chamber erred.

V.A.4.b.i. The Chamber correctly relied on the intercepted conversations concerning D-25

331. Mangenda does not show that the Chamber erred in relying on the intercepted conversations between Mangenda and Kilolo concerning D-25.¹¹⁶⁸ When assessing these conversations, the Chamber provided a reasoned opinion,¹¹⁶⁹ and properly rejected Mangenda's alternative readings of discrete terms used in the conversation. It did so by interpreting such terms in the context in which they were used¹¹⁷⁰ and based on its holistic considerations of all the evidence.¹¹⁷¹

332. Mangenda fails to demonstrate an appealable error. Rather he (i) takes discrete parts of the intercepted conversations regarding D-25 out of the context of the whole conversation and out of the context of the evidence as a whole;¹¹⁷² (ii) offers hypothetical alternative interpretations of discrete terms used in the conversations, such as "*enseignement*",¹¹⁷³ to argue that the statements could have been made in the context of permissible witness preparation;¹¹⁷⁴ (iii) misrepresents the Chamber's findings;¹¹⁷⁵ and (iv) incorrectly assumes that the Chamber found that the terms used in the conversations implied instructions to testify

¹¹⁶⁷ [Lubanga TJ](#), para. 92; [Ngudjolo TJ](#), para. 35; [Ngudjolo Prosecution Response Brief](#), paras. 37-69. See also [Halilović AJ](#), para. 125; [Blagojević AJ](#), para. 226; [Ntagerura AJ](#), para. 174. For an application of this principle, see [Kupreškić AJ](#), para. 226. See further, *Shepherd v. R*, at 164-166. See also *Chamberlain v. R (No 2)*, at 626; *R v. Morin* at 346-347, 354-362; [R v. JMH](#), at para 31; [R v. MacKenzie](#); *Thomas v. The Queen* at 37-38. This holding has been approved and adopted by Northern Ireland Court of Appeal: [R v. Meehan](#), at 32-34. See also [R v. Murray](#), at 126-127; *United States v. Viafara-Rodriguez*, at 913.

¹¹⁶⁸ *Contra* [Mangenda Brief](#), paras. 169-180.

¹¹⁶⁹ [Judgment](#), paras. 477-506.

¹¹⁷⁰ *E.g.* [Judgment](#), para. 488.

¹¹⁷¹ *E.g.* [Judgment](#), paras. 501-502.

¹¹⁷² [Mangenda Brief](#), paras. 171, 174, 175, 176.

¹¹⁷³ [Mangenda Brief](#), paras. 172-173, 174, 177, 179.

¹¹⁷⁴ [Mangenda Brief](#), paras. 176, 178, 179.

¹¹⁷⁵ [Mangenda Brief](#), para. 175 (see [Judgment](#), para. 490).

untruthfully, as opposed to evidencing Kilolo's illicit coaching in general terms.¹¹⁷⁶ That Mangenda at one point admits that the Chamber's conclusion was reasonable,¹¹⁷⁷ indicates that his arguments fall short of establishing an appealable error.

V.A.4.b.ii. The Chamber correctly relied on the intercepted conversations concerning D-29

333. Mangenda challenges the Chamber's findings that D-29 lied about his contacts with the Defence,¹¹⁷⁸ but admits that D-29 failed to mention in his testimony his phone call to Kilolo requesting assistance in relocating his son,¹¹⁷⁹ a call which occurred immediately after D-29 had met with the VWU.¹¹⁸⁰ The Chamber found this contact to be of relevance because it was during this phone call that Kilolo promised D-29 that he would arrange for money to be sent to D-29.¹¹⁸¹

334. The Chamber reasonably found that when he testified in the Main Case trial, D-29 deliberately withheld at least one prior contact with the Bemba Defence, namely his telephone call to Kilolo in which he requested Kilolo's assistance to relocate his son.¹¹⁸² Whether the Chamber was correct about another contact that D-29 had withheld in his testimony is irrelevant,¹¹⁸³ because from the aforementioned evidence, read together with other findings and evidence relating to the D-29's illicit coaching,¹¹⁸⁴ and evidence relating to other witnesses,¹¹⁸⁵ the Chamber correctly found that Mangenda knew that Kilolo was instructing witnesses, including D-29, to testify untruthfully about their contacts with the

¹¹⁷⁶ [Mangenda Brief](#), paras. 171, 175, 179, 180. As to the scope of the illicit coaching, see [Judgment](#), paras. 651, 825, 860, 862. See also para. 304 above.

¹¹⁷⁷ [Mangenda Brief](#), para. 179 ("these comments may reflect satisfaction with illicit coaching...").

¹¹⁷⁸ [Mangenda Brief](#), paras. 181-184.

¹¹⁷⁹ [Mangenda Brief](#), para. 185.

¹¹⁸⁰ [Judgment](#), para. 519.

¹¹⁸¹ [Judgment](#), para. 519.

¹¹⁸² [Judgment](#), para. 528. *Contra* [Mangenda Brief](#), paras. 182, 203.

¹¹⁸³ [Mangenda Brief](#), para. 182; challenging [Judgment](#), para. 528(i) ("his encounter with Mr Kilolo, together with Mr Mangenda, when they escorted D-29 and D-30 to their meeting with the VWU").

¹¹⁸⁴ See the Chamber's findings that: (a) Kilolo illicitly coached D-29, including on his prior contacts with the Defence and on payments ([Judgment](#), para. 541); (b) Kilolo and Mangenda discussed D-29's responses to the questions on prior contacts with the Main Case Defence and payments ([Judgment](#), para. 538); (c) Mangenda provided all relevant information to Kilolo so that the latter could prepare the testimony of D-30 to ensure the consistency of their testimonies ([Judgment](#), paras. 538-539); and (d) Mangenda approved and partook in Kilolo's overall illicit coaching strategy by updating Kilolo on the details elicited from D-29, so that the latter could prepare D-30 and D-29 ([Judgment](#), para. 542).

¹¹⁸⁵ See above paras. 317-324.

Defence, payments and benefits, and their acquaintances with certain persons.¹¹⁸⁶ The Chamber did not need to expressly articulate such a finding in relation to D-29.

335. Mangenda also incorrectly asserts that the Chamber relied on discussions between Mangenda and Kilolo about the merits of the Main Case to establish that he knew that Kilolo had engaged in offences against the administration of justice with D-29.¹¹⁸⁷ As shown above,¹¹⁸⁸ the Chamber did not infer Mangenda's knowledge by relying on his belief that witnesses lied about the merits of the Main Case, or that the witnesses did (objectively) lie on these issues.¹¹⁸⁹ The example of D-29 shows this. The Chamber relied on Kilolo's and Mangenda's expressed concerns about co-counsel Peter Haynes to infer that they were illicitly coaching witnesses, rather than finding that Kilolo was inducing witnesses to testify untruthfully on the merits of the Main Case.¹¹⁹⁰

336. Mangenda submits that in their conversations he and Kilolo were not speaking about illicit coaching but rather about legitimate witness preparation.¹¹⁹¹ In light of all the evidence, such an inference is unreasonable and the Chamber correctly rejected it. Such an inference relies on an isolated interpretation of selected excerpts of Mangenda's statements, is contradicted by the evidence relied upon by the Chamber and is predicated on the incorrect assumption that Kilolo did not illicitly coach witnesses.¹¹⁹² The same applies to the remainder of Mangenda's arguments in relation to D-29.¹¹⁹³ Mangenda merely re-argues his interpretation of the evidence (already put forward at trial) without demonstrating any error in the Judgment.

337. Finally, Mangenda incorrectly argues that the Chamber erred in inferring that he knew that Kilolo illicitly coached witnesses from its findings in relation to D-30—a witness who was not found to have been illicitly coached.¹¹⁹⁴ First, the Chamber's inference as to Mangenda's knowledge was not based on whether D-30 was coached, but on evidence relating to Kilolo's illicit coaching of D-29. This includes Kilolo's questions to Mangenda

¹¹⁸⁶ *Contra* [Mangenda Brief](#), para. 203; [Judgment](#), paras. 544-542.

¹¹⁸⁷ [Mangenda Brief](#), para. 187.

¹¹⁸⁸ *See above* paras. 303-307.

¹¹⁸⁹ In any event, the Chamber would not have erred even if it had relied on evidence demonstrating Mangenda's subjective *belief* that the witnesses' testimonies were false on the merits (*see* para. 323 above).

¹¹⁹⁰ [Judgment](#), paras. 536-537.

¹¹⁹¹ [Mangenda Brief](#), paras. 189-199.

¹¹⁹² *See for instance*, [Mangenda Brief](#), para. 197.

¹¹⁹³ [Mangenda Brief](#), para. 200.

¹¹⁹⁴ [Mangenda Brief](#), para. 203.

about D-29's testimony on his prior contacts with the Defence and about payments, matters on which D-29 had previously been illicitly coached by Kilolo.¹¹⁹⁵ According to the Chamber, these follow up-questions to ensure that D-29's false evidence was consistent with that of other witnesses, including D-30, were part of the "overall illicit coaching strategy"¹¹⁹⁶ and demonstrated how this strategy was implemented with respect to D-29. Second, the Chamber was not precluded, as a matter of law, from relying on evidence relating to D-30 to establish Mangenda's *mens rea* in relation to the overall illicit coaching strategy, and in particular as it pertained to D-29.¹¹⁹⁷ A Chamber can make subsidiary findings and rely on the evidence before it without being bound by the confirmation decision in that respect.¹¹⁹⁸

V.A.4.b.iii. The Chamber correctly relied on the intercepted conversations concerning D-15

338. Mangenda's arguments that the Chamber erred in finding that "Kilolo intended to induce D-15 to tell lies"¹¹⁹⁹ lack merit. The Chamber did not make findings that Kilolo's illicit coaching included inducing witnesses to testify untruthfully on the merits of the Main Case. Rather, the Chamber found that Kilolo induced D-15 to lie about his prior contacts with the Defence, and his acquaintances with certain persons.¹²⁰⁰ As shown above, the Chamber correctly made these findings from the evidence before it.¹²⁰¹

339. The Chamber also correctly inferred that "Mangenda was firmly involved in and approved of Mr Kilolo's illicit coaching activities involving D-15".¹²⁰² It did so based on evidence that "Kilolo updated Mr Mangenda on the details of his illicit coaching activities",¹²⁰³ that "Mangenda had broad and detailed knowledge concerning the purpose and the content of Mr Kilolo's contacts with D-15",¹²⁰⁴ and that upon Kilolo's request, Mangenda provided Kilolo with the LRV's questions, knowing that they would be used for illicit purposes.¹²⁰⁵

¹¹⁹⁵ [Judgment](#), para. 541.

¹¹⁹⁶ [Judgment](#), para. 542. *See also* para. 538.

¹¹⁹⁷ *Contra* [Mangenda Brief](#), para. 202.

¹¹⁹⁸ [Gbagbo Confirmation Date Decision](#), para. 27. *See also* [Bemba Abuse of Process Decision](#), para. 15, referring to [Lubanga Regulation 55\(2\) AD](#), footnote 163.

¹¹⁹⁹ [Mangenda Brief](#), para. 204.

¹²⁰⁰ [Judgment](#), paras. 554-555, 582-583, 590.

¹²⁰¹ *See above* paras. 317-324.

¹²⁰² [Judgment](#), para. 591. *Contra* [Mangenda Brief](#), para. 205.

¹²⁰³ [Judgment](#), para. 566.

¹²⁰⁴ [Judgment](#), para. 576.

¹²⁰⁵ [Judgment](#), paras. 576, 591.

340. Mangenda's challenge to the Chamber's interpretation of the phone call of 11 September 2013¹²⁰⁶ relies on an isolated excerpt of that conversation but fails to place it in the context of the evidence as a whole. These arguments merely repeat Mangenda's rejected trial arguments and do not identify an error.¹²⁰⁷ Mangenda likewise challenges the Chamber's interpretation of the phone call of 13 September 2013,¹²⁰⁸ but does not mention that Kilolo clearly indicated to Mangenda that he intended to send the LRV's confidential questions to D-15.¹²⁰⁹ The Chamber correctly used these conversations to infer that Mangenda knew about Kilolo's illicit coaching activities.¹²¹⁰

341. Mangenda's argument that D-15 did not testify incorrectly about his last contact with Kilolo because he misunderstood the question posed to him,¹²¹¹ is not reasonable. From the context in which the question was asked and the words used, both by the Prosecution and the witness, D-15 could not reasonably have understood the Prosecution's question to refer to his *meetings*, as opposed to his *contacts* with the Defence.¹²¹² In addition, while there is no direct evidence that Mangenda knew that Kilolo instructed D-15 to testify untruthfully on his prior contacts with the Defence,¹²¹³ the Chamber correctly inferred that from a wealth of circumstantial evidence¹²¹⁴ which it used to conclude that Mangenda was firmly involved in and approved of Kilolo's illicit coaching activities involving D-15.¹²¹⁵ The Chamber also correctly inferred that Mangenda knew that D-15 testified untruthfully about his prior contacts with Kilolo,¹²¹⁶ because Kilolo and Mangenda discussed Kilolo's contacts with D-15 before and during D-15's testimony¹²¹⁷ and Mangenda was present in the courtroom when D-15 denied having had these contacts.¹²¹⁸ Mangenda's proposed alternative inference is unreasonable,¹²¹⁹ especially because by the time D-15 testified (11-13 September 2013),¹²²⁰ Mangenda was already aware that Kilolo had illicitly coached witnesses and instructed other

¹²⁰⁶ [Mangenda Brief](#), paras. 205-209.

¹²⁰⁷ [Judgment](#), para. 566, fn. 1214.

¹²⁰⁸ [Mangenda Brief](#), paras. 210-212; [Judgment](#), para. 576, fn. 1252.

¹²⁰⁹ [Judgment](#), para. 575.

¹²¹⁰ [Judgment](#), para. 576.

¹²¹¹ [Mangenda Brief](#), para. 213, challenging [Judgment](#), para. 582.

¹²¹² [T-345-RED](#), 4:21-5:17; 9:20-10:9.

¹²¹³ [Mangenda Brief](#), para. 214.

¹²¹⁴ *See above* paras. 317-324.

¹²¹⁵ [Judgment](#), para. 591.

¹²¹⁶ [Judgment](#), paras. 910, 914. *Contra* [Mangenda Brief](#), para. 215.

¹²¹⁷ [Judgment](#), paras. 565-566, 574-576.

¹²¹⁸ [Mangenda Brief](#), para. 218, last sentence.

¹²¹⁹ [Mangenda Brief](#), paras. 216-217.

¹²²⁰ [T-343-RED](#); [T-344-RED](#); [T-345-RED](#).

witnesses,¹²²¹ including D-25¹²²² and D-29,¹²²³ to testify untruthfully about their prior contacts with the Defence in the Main Case, payments and benefits, and their acquaintances with certain persons.

V.A.4.b.iv. The Chamber correctly relied on the intercepted conversations concerning D-54

342. With respect to D-54, the Chamber relied on a wealth of compelling evidence to conclude that Kilolo “extensively rehearsed, instructed, corrected and scripted the expected answers on a series of issues pertaining to the Main Case” and “instructed D-54 to testify incorrectly about his prior contacts with the Main Case Defence”.¹²²⁴ The Chamber correctly assessed Mangenda’s conversations with Kilolo in the context of Kilolo’s illicit witness coaching of D-54¹²²⁵ and other evidence¹²²⁶ to conclude that Mangenda knew that Kilolo “intended to and did illicitly coach D-54”.¹²²⁷

343. The Chamber correctly found that: (i) Mangenda conveyed Bemba’s instructions to Kilolo to influence D-54 to testify about specific matters; (ii) Kilolo notified Mangenda of D-54’s agreement to testify; and (iii) together they discussed the best approach to ensure consistency with other evidence and to avoid contradictions on D-54’s part.¹²²⁸ Mangenda has not shown that the Chamber’s underlying findings are unsupported or that the Chamber’s inference was unreasonable.¹²²⁹ His arguments follow the pattern of his previous arguments:¹²³⁰ Mangenda suggests that he was merely involved in the legitimate practice of witness preparation.¹²³¹ However he does so on a piecemeal interpretation of portions of the evidence; by re-hashing some of his prior arguments;¹²³² by proposing other possible but unreasonable inferences;¹²³³ and by suggesting that the conversations took place in private

¹²²¹ [Judgment](#), paras. 598-614. The conversations took place between 29 August and 9 September 2013. The Chamber could not conclude that in their discussion on 19 October 2013, Kilolo and Mangenda discussed about payments to D-54 in particular, but was satisfied that payments to witnesses were discussed in general terms ([Judgment](#), paras. 619-620).

¹²²² [Judgment](#), paras. 493, 495, 501-502, 505.

¹²²³ [Judgment](#), paras. 538, 542.

¹²²⁴ [Judgment](#), para. 651. *See also* paras. 597-649.

¹²²⁵ *See for instance*, [Judgment](#), para. 599, in which the Chamber hold that Mangenda’s first conversation must be assessed “in light of subsequent events”.

¹²²⁶ [Judgment](#), paras. 910, 914.

¹²²⁷ [Judgment](#), para. 652.

¹²²⁸ [Judgment](#), para. 652. *See also* paras. 599, 601, 605-606, 608-609, 611-612.

¹²²⁹ [Mangenda Brief](#), paras. 219-234.

¹²³⁰ [Mangenda Brief](#), paras. 223-232.

¹²³¹ [Mangenda Brief](#), para. 220, 231.

¹²³² [Mangenda Brief](#), para. 227.

¹²³³ [Mangenda Brief](#), paras. 224-231.

and in circumstances in which the participants did not always choose the most appropriate terms.¹²³⁴

344. The four telephone conversations between Mangenda and Kilolo about D-54 and their conversations with Bemba may well have taken place before the cut-off date for substantive communications with witnesses.¹²³⁵ However, the details of these conversations clearly show that Mangenda was actively involved in preparations for Kilolo's illicit coaching of D-54, and his knowledge and intention that Kilolo would proceed accordingly.¹²³⁶ That the Chamber correctly interpreted these conversations is shown by the fact that Kilolo did subsequently illicitly coach D-54, as he had discussed with Mangenda.¹²³⁷ Although there is no direct evidence that Mangenda was informed that Kilolo had illicitly coached D-54,¹²³⁸ the Chamber correctly inferred his knowledge¹²³⁹ from the nature and content of their conversations, especially considered in the context of Mangenda's knowledge that Kilolo had already illicitly coached other witnesses who had testified before D-54.¹²⁴⁰

345. The Chamber did not find that the four intercepted conversations between Mangenda and Kilolo about D-54 included direct evidence that Mangenda knew that Kilolo was inducing D-54 to lie, especially not on the merits of the Main Case.¹²⁴¹ Rather, it found that this evidence showed that Mangenda knew that Kilolo intended to illicitly coach D-54, which he then did.¹²⁴² The Chamber relied on this evidence, together with the telephone conversation on 19 October 2013 in which Mangenda and Kilolo discussed payments to witnesses "in general",¹²⁴³ to support its overall finding that Mangenda knew that Kilolo was inducing witnesses to provide false testimony on their prior contacts with the Main Case Defence.¹²⁴⁴

¹²³⁴ [Mangenda Brief](#), para. 224.

¹²³⁵ [Mangenda Brief](#), paras. 220, 222.

¹²³⁶ [Judgment](#), paras. 599, 601, 605-606, 608-609, 611-612.

¹²³⁷ [Judgment](#), paras. 616, 625-645.

¹²³⁸ [Mangenda Brief](#), para. 232.

¹²³⁹ [Judgment](#), para. 652.

¹²⁴⁰ See for instance D-15 ([Judgment](#), para. 591); D-29 ([Judgment](#), para. 542); D-25 ([Judgment](#), para. 505).

¹²⁴¹ *Contra* [Mangenda Brief](#), paras. 220, 224, 232-233.

¹²⁴² [Judgment](#), para. 652.

¹²⁴³ [Judgment](#), paras. 619-620.

¹²⁴⁴ [Judgment](#), paras. 849, 870.

V.A.4.b.v. The Chamber correctly relied on the intercepted conversations concerning D-13

346. The Chamber's findings with respect to D-13 were not based on a single intercepted conversation between Mangenda and Kilolo.¹²⁴⁵ The Chamber relied on evidence relating to D-13, which showed that Kilolo illicitly prepared and coached D-13 with regard to the content of his testimony in the Main Case¹²⁴⁶ and instructed D-13 to give an untruthful account about the number of contacts he had had with the Main Case Defence,¹²⁴⁷ and that Kilolo discussed his illicit coaching of D-13 with Mangenda.¹²⁴⁸ The Chamber interpreted the relevant conversation in light of the evidence as a whole and correctly relied on it to conclude that Mangenda knew that Kilolo induced D-13 to provide false testimony about his contacts with the Defence.¹²⁴⁹

347. The Chamber did not err by relying on the conversation between Mangenda and Kilolo about D-13. The conversation was sufficiently detailed for the Chamber to interpret it in the context of other evidence relevant to Kilolo's illicit coaching activities and Mangenda's knowledge thereof.¹²⁵⁰ In addition, Mangenda, who was present in Court when D-13 testified,¹²⁵¹ knew that D-13 was lying when he testified that his last contact with Kilolo had been several weeks before the start of D-13's testimony. Kilolo had told Mangenda four days earlier that he was dealing with D-13's "*couleurs*".¹²⁵² Finally, contrary to Mangenda's contention, it is not reasonable to conclude that Mangenda and Kilolo discussed D-13's testimony only once simply because there is only one intercepted telephone conversation which expressly concerned this witness.¹²⁵³

V.A.4.b.vi. The Chamber correctly interpreted the term "couleur"

348. Mangenda's challenge to the Chamber's interpretation of the term "*couleur*"¹²⁵⁴ merely proposes an alternative interpretation that ignores both the context in which the term was used and the fact that the practice which the Chamber ascribed to this term did in fact occur. The Chamber correctly found that both Mangenda and Kilolo consistently used this term or

¹²⁴⁵ *Contra* [Mangenda Brief](#), para. 235-236.

¹²⁴⁶ [Judgment](#), paras. 663, 666.

¹²⁴⁷ [Judgment](#), para. 664, 666.

¹²⁴⁸ [Judgment](#), para. 659-661, 667.

¹²⁴⁹ [Judgment](#), paras. 663, 849, 870.

¹²⁵⁰ *Contra* [Mangenda Brief](#), para. 237.

¹²⁵¹ [T-350-RED](#), 4:1-5.

¹²⁵² [Judgment](#), paras. 658-659.

¹²⁵³ [Mangenda Brief](#), para. 237.

¹²⁵⁴ [Mangenda Brief](#), paras. 240-243.

variations thereof as coded language to describe their practice of “illicit coaching or bribing of defence witnesses”.¹²⁵⁵ Mangenda shows no error in these findings.

V.A.4.b.vii. The Chamber correctly relied on conversations referring to “Bravo”

349. The three excerpts from intercepted conversations between Mangenda and Kilolo that referred to the potential witness “Bravo”¹²⁵⁶ are highly incriminating and show that Mangenda and Kilolo were discussing their practice of illicit coaching. These statements are clear on their face.¹²⁵⁷ The Chamber did not err by relying on them to conclude that Mangenda, Kilolo and Bemba shared the Common Plan to illicitly interfere with Defence witnesses to ensure that these witnesses would testify in Bemba’s favour,¹²⁵⁸ and that they illicitly coached witnesses¹²⁵⁹ and presented their false testimony to the Trial Chamber hearing the Main Case. Mangenda’s arguments are unsupported and merely offer an unreasonable alternative inference from those excerpts.¹²⁶⁰

V.A.4.b.viii. The Chamber did not fail to consider relevant evidence or misstate its own findings

350. The Chamber correctly concluded that Mangenda and Kilolo, as part of their illicit coaching activity, discussed the witnesses’ contacts with the Defence, payments and benefits, and their acquaintances with certain persons.¹²⁶¹ It relied on three instances where there was direct evidence of such discussions,¹²⁶² namely in relation to D-25,¹²⁶³ D-29¹²⁶⁴ and a third instance where Mangenda and Kilolo discussed the issue in more general terms.¹²⁶⁵ The Chamber correctly considered this evidence, together with other circumstantial evidence,¹²⁶⁶ to conclude that Mangenda knew that Kilolo was inducing the 14 Defence witnesses to lie about these issues.¹²⁶⁷

¹²⁵⁵ [Judgment](#), paras. 756-763. See also paras. 109, 161, 165, 495, 531, 535, 659-660, 663, 685, 728. See further Prosecution Pre-Trial Brief, Annex A, paras. 113-129.

¹²⁵⁶ [Judgment](#), paras. 714; 719-720, 760.

¹²⁵⁷ See quotes cited in [Judgment](#), paras. 714, 719.

¹²⁵⁸ [Judgment](#), para. 802.

¹²⁵⁹ [Judgment](#), para. 733.

¹²⁶⁰ [Mangenda Brief](#), paras. 244-246.

¹²⁶¹ [Judgment](#), para. 849. Contra [Mangenda Brief](#) para. 248.

¹²⁶² See above para. 320.

¹²⁶³ [Judgment](#), para. 493. See also paras. 495, 501-502, 505.

¹²⁶⁴ [Judgment](#), para. 538. See also para. 542.

¹²⁶⁵ [Judgment](#), paras. 619-620.

¹²⁶⁶ See above paras. 321-324.

¹²⁶⁷ Contra [Mangenda Brief](#), para. 248.

351. The Chamber further correctly found that Mangenda “was informed on a substantive and continuous basis of Mr Kilolo’s activities” and that he had “continuous and substantive knowledge” of Kilolo’s illicit coaching.¹²⁶⁸ The Judgment relies on abundant evidence and subsidiary findings to support these conclusions,¹²⁶⁹ including evidence showing that Mangenda participated in the actual illicit coaching of witnesses by conveying Bemba’s instructions to Kilolo, actively assisting and advising Kilolo on the illicit coaching activities, and briefing Kilolo on the witnesses’ testimonies whenever Kilolo was not in the courtroom.¹²⁷⁰ The Chamber also relied on evidence showing that Mangenda participated in the planning of the illicit interference of witnesses by liaising between Bemba and Kilolo and by consulting with and advising Kilolo.¹²⁷¹ Finally, the Chamber’s findings rely on evidence regarding Mangenda’s actions and initiative to conceal the illicit coaching and bribery of witnesses,¹²⁷² by his measures to prevent and frustrate the article 70 investigations,¹²⁷³ and by his discussion with Bemba about the existence of similar proceedings in the *Barasa* case and the penalisation of such conduct under the article 70 of the Statute.¹²⁷⁴

352. Based on all of the above evidence, and in particular Mangenda’s active involvement in the illicit coaching activities, the Chamber correctly found that he knew and intended that the witnesses would testify falsely concerning their prior contacts with the Defence, payments and benefits, and their acquaintances with certain persons.¹²⁷⁵ Mangenda’s arguments should therefore be rejected.

V.A.5. Mangenda made an essential contribution to the Common Plan

353. The Chamber found that Mangenda made an essential contribution to the Common Plan by participating in the planning and execution of the illicit coaching of witnesses;¹²⁷⁶ liaising

¹²⁶⁸ [Judgment](#), paras. 847-848. *Contra* [Mangenda Brief](#), paras. 249-250.

¹²⁶⁹ *See* [Judgment](#), paras. 493, 495, 501-502, 505, 538, 542, 591, 619-620, 652, 566, 576, 591, 659-667, 667, 756-763, 849.

¹²⁷⁰ [Judgment](#), paras. 704, 717-726, 734, 839-844, 846-847.

¹²⁷¹ [Judgment](#), paras. 535, 600-606, 612, 685-686, 688, 839, 846.

¹²⁷² [Judgment](#), paras. 845, 850. In particular, Mangenda was present and assisted Kilolo in the distribution of new telephones to witnesses, which enabled Kilolo to stay in contact with the witnesses past the VWU cut-off date ([Judgment](#), para. 747); he used coded language in conversations with Kilolo and Bemba when discussing matters related to the illicit coaching activities or the sums of money that were transferred to witnesses ([Judgment](#), paras. 747, 750-761); he insisted that other members of the Main Case Defence should not witness the illicit coaching which would enable the co-perpetrators to implement their plan ([Judgment](#), paras. 762-764); he agreed with Kilolo that no physical evidence related to the illicit coaching was to be kept so as to minimise the traceability of their illicit activities ([Judgment](#), paras. 765-768).

¹²⁷³ [Judgment](#), paras. 770-801.

¹²⁷⁴ [Judgment](#), paras. 820, 850.

¹²⁷⁵ [Judgment](#), para. 849. *Contra* [Mangenda Brief](#), para. 251.

¹²⁷⁶ [Judgment](#), paras. 839-841.

between Bemba and Kilolo;¹²⁷⁷ being involved in the presentation of false evidence;¹²⁷⁸ and taking measures to conceal the Common Plan.¹²⁷⁹ According to the Chamber, these contributions “taken together, were essential to the common plan to illicitly interfere with Defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba”.¹²⁸⁰

354. Mangenda’s arguments¹²⁸¹ mischaracterise the Common Plan and misunderstand the law. The Common Plan was “to illicitly interfere with witnesses in order to ensure that those witnesses would provide evidence in Mr Bemba’s favour.”¹²⁸² This plan included an agreement to instruct Defence witnesses to give specific evidence “knowing the testimony to be false, *at least in part* [...]”.¹²⁸³

355. Mangenda argues that only advice in respect of testimony known to be false may constitute a contribution to the Common Plan.¹²⁸⁴ But his argument disregards that, according to the Chamber, contributions provided knowing of the falsity of the evidence describe *only part* of the Common Plan. The core of the Common Plan was to illicitly interfere with Defence witnesses to ensure that they would testify in Bemba’s favour. As shown above, the Chamber did not find that the illicit coaching of witnesses encompassed instructions to the witnesses to testify untruthfully on the merits of the Main Case.¹²⁸⁵ Accordingly, Mangenda’s contributions to the planning and execution of the illicit coaching of witnesses;¹²⁸⁶ his liaising between Bemba and Kilolo;¹²⁸⁷ and his taking measures to conceal the Common Plan¹²⁸⁸ correctly constituted contributions to the Common Plan.¹²⁸⁹ In any event, the Chamber found that Mangenda knew that Kilolo was inducing witnesses to testify untruthfully about their contacts with the Defence, payments and benefits, and their

¹²⁷⁷ [Judgment](#), paras. 842-843.

¹²⁷⁸ [Judgment](#), para. 844.

¹²⁷⁹ [Judgment](#), para. 845.

¹²⁸⁰ [Judgment](#), para. 847.

¹²⁸¹ [Mangenda Brief](#), paras. 254-262.

¹²⁸² [Judgment](#), paras. 103, 681, 802, 847.

¹²⁸³ [Judgment](#), para. 681 (emphasis added).

¹²⁸⁴ [Mangenda Brief](#), para. 255. Mangenda quotes part of the Chamber’s findings in [Judgment](#), para. 681, but leaves out critical portions of the Chamber’s characterisation of the Common Plan, which specify its criminal element.

¹²⁸⁵ *See above* paras. 303-304.

¹²⁸⁶ [Judgment](#), paras. 839-841.

¹²⁸⁷ [Judgment](#), paras. 842-843.

¹²⁸⁸ [Judgment](#), para. 845.

¹²⁸⁹ *Contra* [Mangenda Brief](#), paras. 256-257, 261, 259, 261.

acquaintances with certain persons,¹²⁹⁰ and therefore correctly considered Mangenda's involvement in presenting false evidence as an additional contribution to the Common Plan.¹²⁹¹

356. Further, there was no need for the Chamber to enter express findings on how Kilolo used Mangenda's reports to engage in subsequent acts of illicit coaching.¹²⁹² The *Lubanga* Trial Chamber held that a co-perpetrator's contribution to a common plan is based on an analysis of "the role that was assigned to, or was assumed by, the co-perpetrator [...]. This assessment involves a flexible approach, undertaken in the context of a broad inquiry into the overall circumstances of a case".¹²⁹³ The Chamber found that Mangenda "acted as an equal in the implementation of the plan", that he participated in the planning and execution of Kilolo's illicit coaching and that he provided "essential logistical support".¹²⁹⁴ The Chamber concluded that without Mangenda's assistance, Kilolo would not have been able to perform the illicit coaching activities in the same manner.¹²⁹⁵ This approach accords with the Court's jurisprudence.

357. Mangenda's argument that his contribution to the Common Plan is based on the provision of "*post facto* information" about the testimony of illicitly coached witnesses¹²⁹⁶ does not adequately represent his role in implementing the Common Plan.¹²⁹⁷ His examples are inapposite. As noted above, Mangenda updated Kilolo on the testimony of D-29 (who had previously been illicitly coached by Kilolo¹²⁹⁸ as part of the "overall illicit coaching strategy"¹²⁹⁹ and therefore as part of the Common Plan) so that the latter could prepare D-30 (D-29's wife) accordingly. Because this follow-up measure was intended to ensure the consistency of D-29's evidence with that of other witnesses,¹³⁰⁰ Mangenda contributed to the implementation of the Common Plan not only in general, but also specifically in respect to D-29.¹³⁰¹ Similarly, providing Kilolo with the LRV's questions, knowing that Kilolo would

¹²⁹⁰ [Judgment](#), para. 849.

¹²⁹¹ [Judgment](#), para. 844.

¹²⁹² *Contra* [Mangenda Brief](#), para. 258.

¹²⁹³ [Lubanga TJ](#), paras. 1000-1001. *See also* [Lubanga AJ](#), para. 473("what is required is a normative assessment of the role of the accused person in the specific circumstances of the case"); [Judgment](#), para. 69.

¹²⁹⁴ [Judgment](#), para. 847.

¹²⁹⁵ [Judgment](#), para. 847.

¹²⁹⁶ [Mangenda Brief](#), para. 258.

¹²⁹⁷ [Judgment](#), para. 846-847.

¹²⁹⁸ [Judgment](#), para. 541.

¹²⁹⁹ [Judgment](#), para. 542. *See also* para. 538.

¹³⁰⁰ [Judgment](#), para. 538.

¹³⁰¹ *Contra* [Mangenda Brief](#), para. 258.

use them to illicitly coach D-15,¹³⁰² is a contribution to the implementation of the Common Plan, irrespective of whether D-15 testified truthfully when answering those questions.¹³⁰³

358. Mangenda also incorrectly argues that his contributions with respect to D-15 were not essential.¹³⁰⁴ This misrepresents the law, which provides that an assessment of an accused's essential contribution is not made on the basis of individual acts looked at in isolation but is made on the basis of the perpetrator's overall role in the Common Plan.¹³⁰⁵ In any event, Mangenda simply disagrees with the Chamber's assessment of the relevance of his involvement in Kilolo's illicit coaching of D-15.¹³⁰⁶

359. Finally, the Chamber clearly established Mangenda's essential role in the Common Plan.¹³⁰⁷ Mangenda's repeated argument as to the lack of connection between his acts and the "objective lies"¹³⁰⁸ misunderstands the Judgment¹³⁰⁹ and takes the Chamber's findings out of context. It should therefore be rejected.

360. For the above reasons, Mangenda's Ground 2 should be dismissed.

V.B. GROUND 3: MANGENDA WAS INVOLVED IN CONTEMPORANEOUS AND POST-FACTO MEASURES TO CONCEAL THE COMMON PLAN

V.B.1. Mangenda engaged in contemporaneous concealment

361. Mangenda challenges isolated findings of the Trial Chamber, but fails to show an error in the Chamber's overall conclusion that Mangenda took measures to conceal the Common Plan, including remedial measures.¹³¹⁰ Mangenda raises six factual errors, but for the reasons below, none of them is supported and they should therefore be dismissed.

362. The first alleged error (related to the distribution of telephones to the Cameroon witnesses in Yaoundé) is addressed under Ground 4 below,¹³¹¹ and the third alleged error (the

¹³⁰² [Judgment](#), para. 591.

¹³⁰³ *Contra* [Mangenda Brief](#), paras. 259-260.

¹³⁰⁴ [Mangenda Brief](#), para. 260.

¹³⁰⁵ [Lubanga TJ](#), para. 1000; [Lubanga AJ](#) para. 473. The Chamber correctly applied this principle: see [Judgment](#), para. 847.

¹³⁰⁶ [Judgment](#), para. 566, 576, 591. *Contra* [Mangenda Brief](#), para. 260.

¹³⁰⁷ [Judgment](#), paras. 837-850.

¹³⁰⁸ [Mangenda Brief](#), para. 261; see also para. 127.

¹³⁰⁹ See above paras. 303-307, 316-324.

¹³¹⁰ [Mangenda Brief](#), paras. 263-276; [Judgment](#), paras. 850, 910.

¹³¹¹ [Mangenda Brief](#), para. 264. See below paras. 374-380.

Chamber's inferences) is addressed under Ground 2¹³¹² as they refer to arguments made elsewhere in Mangenda's Brief.

363. Mangenda's second alleged error,¹³¹³ that the Chamber misinterpreted a conversation in which Mangenda conveyed Bemba's instructions to Kilolo regarding the illicit coaching of D-54, aimed at keeping Peter Haynes outside the Common Plan, is unsupported.¹³¹⁴ Mangenda merely offers an alternative interpretation of one conversation, which is insufficient to establish an error.¹³¹⁵ Consistent with the required holistic evaluation of evidence, it is not enough to present alternative inferences with respect to isolated pieces of evidence. Instead of suggesting only a variation of the findings which the Chamber might have reached, Mangenda must show beyond any reasonable doubt that *no* reasonable trier of fact *could* have reached a guilty finding.¹³¹⁶ That the Chamber failed to explicitly address Mangenda's alternative interpretation about this particular conversation is irrelevant¹³¹⁷ as a Chamber is not obliged to expressly address every Defence argument in its Judgment.¹³¹⁸

364. In addition, the Chamber's inference as to Mangenda's *mens rea* did not run "contrary to the benefit of the doubt" to be afforded to Mangenda because the Chamber had said it would not adjudicate witnesses' testimony on the merits of the Main Case.¹³¹⁹ Although the Chamber made no findings on matters pertaining to the merits of the Main Case,¹³²⁰ it was entitled to consider telephone conversations between Kilolo and Mangenda on matters pertaining to the merits, including in relation to D-54, to establish the offence of illicit coaching of witnesses and Mangenda's knowledge thereof,¹³²¹ including his knowledge that

¹³¹² [Mangenda Brief](#), para. 268. *See above* paras. 333-337.

¹³¹³ [Mangenda Brief](#), paras. 265-267.

¹³¹⁴ [Judgment](#), paras. 600-606; [Mangenda Brief](#), paras. 266, 267.

¹³¹⁵ *See above* paras. 326-329.

¹³¹⁶ [Krnojelac AJ](#), para. 12; [Kordić AJ](#), para. 288.

¹³¹⁷ *Contra* [Mangenda Brief](#), para. 266.

¹³¹⁸ *See* [Tolimir AJ](#), para. 53 ("a trial chamber is not obliged to justify its findings in relation to every submission made during trial. A trial chamber has discretion in deciding which legal arguments address, and is only required to make factual findings which are essential to the determination of guilt on a particular count"). Also, what is essential is that Chamber's reasoning indicates with sufficient clarity the basis of the decision. *See* [Lubanga Redactions AD](#), para. 20; [Lubanga Second Redactions AD](#), para. 30.

¹³¹⁹ *See* [Judgment](#), para. 652 ("the Chamber finds that Mr Mangenda knew that Mr Kilolo intended to and did illicitly coach D-54"). *Contra* [Mangenda Brief](#), para. 267.

¹³²⁰ *See above* paras. 303-307.

¹³²¹ [Judgment](#), para. 194. *See also above* paras. 342-345.

Kilolo instructed witnesses to lie about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.¹³²²

365. The fourth alleged error¹³²³ centres on the Chamber's finding that a 2 October 2013 discussion between Mangenda and Kilolo demonstrated that "the co-perpetrators purposefully excluded other members of the defence team from their mission plans so that they could engage in illicit coaching".¹³²⁴ Again, Mangenda fails to show error in the Judgment. He merely proposes an alternative interpretation of the conversation which he claims is "more sensible",¹³²⁵ and takes the challenged conversation out of context.¹³²⁶ He does not show that the Chamber's finding was unreasonable.

366. The fifth alleged error disputes the Chamber's finding that Mangenda shared the Common Plan by relying, among other things, on his use of coded language in conversations with the co-perpetrators.¹³²⁷ Mangenda fails to support the argument with sufficient reasoning, merely stating that this was a clear error. The Appeals Chamber should dismiss this argument summarily.¹³²⁸ In any event, Mangenda merely offers an alternative interpretation of the conversation¹³²⁹ and repeats arguments that were explicitly considered and rejected in the Judgment.¹³³⁰ Again, he does not show that the Chamber's finding was unreasonable.

367. In his sixth alleged error, Mangenda refers to another portion of his Brief, but it is not clear to which argument he is referring.¹³³¹ In any event, the challenged conversation between Kilolo and Mangenda unambiguously refers to Mangenda's intent to destroy

¹³²² See above paras. 317-324.

¹³²³ [Mangenda Brief](#), paras. 269-274.

¹³²⁴ [Judgment](#), para. 764. See also paras. 762-763.

¹³²⁵ [Mangenda Brief](#), para. 272. See also para. 273.

¹³²⁶ *Contra* [Judgment](#), para. 188. See above paras. 363.

¹³²⁷ [Mangenda Brief](#), para. 275; [Judgment](#), para. 755.

¹³²⁸ [Martić AJ](#), para. 20; [Strugar AJ](#), para. 22; [Halilović AJ](#), para. 13; [Blagojević AJ](#), para. 11; [Brdanin AJ](#), para. 15; [Gacumbitsi AJ](#), para. 10.

¹³²⁹ Mangenda submits only that the use of codes is "commonplace", "widespread", and, in this context, was "nothing more than an attempt to keep confidential matters pertinent to the Defence". See [Mangenda Brief](#), para. 275.

¹³³⁰ [Judgment](#), para. 750. See also above paras. 348-349. Such arguments should be dismissed summarily: [Krajišnik AJ](#), para. 24.

¹³³¹ [Mangenda Brief](#), para. 276, referring to Ground 2(c) (paras. 166-253).

evidence of payments to witnesses,¹³³² and the Chamber therefore reasonably relied on it for that purpose.

V.B.2. Mangenda engaged in *post-facto* concealment

368. The Chamber correctly found that the co-perpetrators discussed and agreed to take a series of measures to prevent and frustrate the article 70 investigation, such as to contact witnesses (in particular the Cameroonian witnesses D-2, D-3, D-4 and D-6) and bribe them to dissuade them from collaborating with the Prosecution.¹³³³

369. First, Mangenda's argument—that Kilolo and Mangenda sought to extort Bemba—is irrelevant to the Chamber's finding that Mangenda's involvement in *post-facto* efforts to conceal the Common Plan demonstrated his awareness of and involvement in the Common Plan.¹³³⁴ What matters is that Mangenda and Kilolo *acknowledged* their previous criminal activities and sought to conceal them.¹³³⁵ This demonstrates the existence of the Common Plan and the involvement of Bemba, Kilolo and Mangenda therein. Accordingly it is probative of their awareness and intent in relation to their past article 70 offences.

370. Each of Mangenda's arguments in support of his 'fictitious cover-up' argument can be disregarded in light of the above analysis.¹³³⁶ For example, that Kilolo did not raise the issue of the article 70 investigation with D-2 and D-3 on the telephone after he became aware of a leak is irrelevant.¹³³⁷ Kilolo knew that he was about to travel to Cameroon to pay them money, whether or not they were collaborating with the Prosecution, and thus did not need to discuss it on the telephone. Equally, the amount of money Kilolo ended up giving to the Cameroonian witnesses—whether 100 or 15,000 EUR—is irrelevant.¹³³⁸ The payments were given clandestinely and in exchange for their Main Case testimonies, which, again, is probative of their awareness and intention in relation to their past article 70 offences.¹³³⁹

¹³³² [Judgment](#), paras. 767-768.

¹³³³ [Judgment](#), paras. 770-801. *Contra* [Mangenda Brief](#), paras. 281-288.

¹³³⁴ [Judgment](#), para. 848.

¹³³⁵ [Judgment](#), para. 800.

¹³³⁶ [Mangenda Brief](#), paras. 283-289.

¹³³⁷ [Mangenda Brief](#), paras. 283-284.

¹³³⁸ [Mangenda Brief](#), para. 285.

¹³³⁹ [Judgment](#), paras. 409, 411. *Contra* [Mangenda Brief](#), para. 286.

371. Second, the Chamber explicitly considered and rejected as irrelevant Mangenda's previous arguments that the discussions about the cover-up were fictitious.¹³⁴⁰ Mangenda shows no error in the Judgment by merely repeating his arguments, which should be dismissed summarily.¹³⁴¹

372. Third, Mangenda merely disagrees with the Chamber's detailed analysis of the evidence concerning the remedial measures that the co-perpetrators took to cover up their commission of crimes.¹³⁴² His submission presents no more than an alternative interpretation of the evidence, which is insufficient to establish an error and should also be dismissed summarily.¹³⁴³

373. For the above reasons, Mangenda's Ground 3 should be dismissed.

**V.C. GROUND 4: MANGENDA SURMISED THAT KILOLO WAS CORRUPTLY
INFLUENCING THE CAMEROON WITNESSES BASED, AMONG OTHER THINGS, ON THE
DISTRIBUTION OF MOBILE TELEPHONES**

374. Mangenda's fourth ground, which challenges the Chamber's finding that Mangenda was complicit in the distribution of telephones to the Cameroon witnesses, D-2, D-3, D-4 and D-6, in May 2013,¹³⁴⁴ mischaracterises and merely disagrees with the Chamber's findings. It should therefore be dismissed summarily.¹³⁴⁵

¹³⁴⁰ [Judgment](#), para. 800. *Contra* [Mangenda Brief](#), para. 289.

¹³⁴¹ [Krajišnik AJ](#), para. 24.

¹³⁴² [Judgment](#), paras. 770-801; [Mangenda Brief](#), paras. 286-288 (With respect to a conversation between Mangenda and Kilolo, on 17 October 2013, in the context of the cover-up, the Chamber held as follows: "Mangenda's comment that "[ç]a va maintenant détruire tous les témoins que nous avons" is not reasonably interpreted as a tacit acknowledgment that every Defence witness has been illicitly coached. An equally, if not more, reasonable interpretation is that any allegation of witness coaching could be fatal to the credibility of the entire case".).

¹³⁴³ *See above* paras. 326-329, 363. [Krajišnik AJ](#), para. 27 ("As a general rule, mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed. Similarly, where an appellant merely seeks to substitute its own evaluation of the evidence for that of the Trial Chamber, such submissions may be dismissed without detailed reasoning".).

¹³⁴⁴ [Mangenda Brief](#), paras. 290-307; [Judgment](#), para. 371.

¹³⁴⁵ [Krajišnik AJ](#), paras. 18 ("submissions which either misrepresent the Trial Chamber's factual findings or the evidence on which the Trial Chamber relies, or ignore other relevant factual findings made by the Trial Chamber will not be considered in detail. As a general rule, where an appellant's references to the Trial Judgement are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument") and 27.

375. First, the Chamber did not misstate the evidence as to the VWU cut-off date.¹³⁴⁶ It consistently distinguished between the VWU “handover” and the VWU “cut-off date”. In the key paragraph containing the finding that Mangenda was implicated in the distribution of telephones to the Cameroon witnesses, the Chamber found that, “taking into account the timing, *a few days before the handover to the VWU and less than three weeks before the VWU cut-off date*, and Mr Mangenda’s knowledge of and role in the Main Case, the Chamber concludes that Mr Mangenda could not have surmised any legitimate purpose for the telephones”.¹³⁴⁷

376. Contrary to Mangenda’s submission, the Chamber distinguished between the two concepts. For example, “[b]oth [witnesses, P-245 (D-3) and P-260 (D-2)] remained consistent in their testimony that the telephones were distributed *at the time of their handover to the VWU*”,¹³⁴⁸ and, “there was no need for such telephones *after the VWU handover*, since any contact *until the cut-off date* could have been facilitated by the VWU”.¹³⁴⁹ Mangenda himself admits that any perceived ambiguity or error is “not consistently repeated”.¹³⁵⁰ In one of the two paragraphs cited by Mangenda as erroneous,¹³⁵¹ the Chamber’s formulation may lack punctuation, but it is clearly understandable in the context of the surrounding sentences and the corresponding parts of the Judgment.¹³⁵² In the other, although Mangenda is correct that the Chamber erroneously found that new telephones were distributed “after the VWU cut-off date”,¹³⁵³ in light of the above there is no material impact on the Judgment.

377. Second, Mangenda challenges the Chamber’s first reason supporting its conclusion that Mangenda could not have surmised any legitimate purpose for the telephones, which is the timing of the issuing of telephones—“a few days before the handover to the VWU and less

¹³⁴⁶ *Contra* [Mangenda Brief](#), para. 292.

¹³⁴⁷ [Judgment](#), para. 371 (emphasis added).

¹³⁴⁸ [Judgment](#), para. 370 (emphasis added).

¹³⁴⁹ [Judgment](#), para. 371 (emphasis added); *see also* [Judgment](#), paras. 383 (“The VWU cut-off date for contacts between this witness [D-3] and the Main Case Defence was 10 June 2013”), 390 (“The VWU cut-off date for contacts between this witness [D-2] and the Main Case Defence was 13 June 2013”).

¹³⁵⁰ [Mangenda Brief](#), para. 292.

¹³⁵¹ [Mangenda Brief](#), para. 292, fn. 574.

¹³⁵² [Judgment](#), para. 747 (“The illicit coaching shortly before and during the defence witnesses’ testimonies before Trial Chamber III was made possible by, inter alia, *distributing new telephones to the witnesses with whom Mr Kilolo stayed in contact past the VWU cut-off date* and in violation of the contact prohibition ordered by Trial Chamber III [...] The evidence shows that Mr Kilolo distributed new cell phones to defence witnesses, such as D-2, D-3, D-4, D-6 [...] *around the time the witnesses were entrusted to the care of the VWU* which would take away their personal telephones”) (emphasis added).

¹³⁵³ [Judgment](#), para. 735 (“distribution of new telephones after the VWU cut-off date”).

than three weeks before the VWU cut-off date”.¹³⁵⁴ In Mangenda’s opinion, a 15- or 19-day interval between the issuance and the court-imposed cut-off date was long enough to introduce a doubt about whether the telephones were issued for illicit purposes.¹³⁵⁵ Later in his submissions, Mangenda offers another alternative interpretation of the evidence.¹³⁵⁶ However, this view of the evidence in isolation disregards other evidence that shows that Mangenda knew that Kilolo was engaged in the illicit coaching of witnesses. The one piece of evidence Mangenda refers to—an excerpt of D-2’s prior statement¹³⁵⁷—is ambiguous, rather than dispositive. It must be read in the context of the evidence as a whole. In addition, Mangenda did not challenge the Chamber’s second reason in support of its conclusion that he could not have surmised any legitimate purpose for the telephones, namely “Mr Mangenda’s knowledge of and role in the Main Case”.¹³⁵⁸ His alternative interpretation of the evidence does not offer a reasonable inference based on a holistic interpretation of the evidence. Accordingly, the Chamber’s conclusion should remain undisturbed.

378. Third, the Chamber did not ignore salient considerations in the reasoning underpinning its conclusions.¹³⁵⁹ Mangenda’s three arguments are unsupported by sufficient reasoning and should be dismissed summarily.¹³⁶⁰ Alternatively, they identify irrelevant or unpersuasive facts. Mangenda refers to the Prosecution’s previous issuing of telephones to witnesses in similar timeframes,¹³⁶¹ but this is unrelated, and occurs in a different context to the conduct *sub judice*.

379. Fourth, Mangenda contests the Chamber’s reliance on three “considerations” additional to its two core reasons supporting its conclusion that Mangenda could not have surmised any legitimate purpose for the telephones.¹³⁶² These three reasons¹³⁶³ are logically consistent with

¹³⁵⁴ [Judgment](#), para. 371.

¹³⁵⁵ [Mangenda Brief](#), para. 293.

¹³⁵⁶ [Mangenda Brief](#), para. 303 (that Mangenda “could have thought, based on the circumstances, that the purpose of the phones was to reach the witnesses” in the three or four days between his and Kilolo’s meeting with the witnesses and the VWU handover).

¹³⁵⁷ [Mangenda Brief](#), para. 293.

¹³⁵⁸ [Judgment](#), para. 371.

¹³⁵⁹ *Contra* [Mangenda Brief](#), para. 294.

¹³⁶⁰ [Martić AJ](#), para. 20; [Strugar AJ](#), para. 22; [Halilović AJ](#), para. 13; [Blagojević AJ](#), para. 11; [Brdanin AJ](#), para. 15; [Gacumbitsi AJ](#), para. 10.

¹³⁶¹ [Mangenda Brief](#), para. 294.

¹³⁶² [Mangenda Brief](#), paras. 295-304; [Judgment](#), para. 371 ((i) Kilolo explained to the witnesses that these telephones were needed as the VWU would take away their personal telephones; (ii) the Main Case Defence kept these telephones secret from the VWU; and (iii) there was no need for such telephones after the VWU handover, since any contact until the cut-off date could have been facilitated by the VWU).

¹³⁶³ [Judgment](#), para. 371.

the Chamber's other reasons for concluding that Mangenda knew of the illicit purpose of the telephones. Mangenda merely disagrees with the Chamber's reasoning without showing error.

380. Finally, Mangenda argues that the Chamber "erred in law by failing to apply or even articulate the proper standard for making findings based on circumstantial evidence of what Mangenda must have been able to 'surmise'".¹³⁶⁴ The alleged legal error is not supported by reasoning, and thus should be dismissed summarily.¹³⁶⁵ In any event, the Chamber clearly stated that it applied the beyond reasonable doubt standard under article 66(3) and that it assessed whether, based on all the evidence, "there is only one reasonable conclusion to be drawn".¹³⁶⁶ It also consistently applied this standard throughout the Judgment.¹³⁶⁷

381. For the above reasons, Mangenda's Ground 4 should be dismissed.

V.D. GROUND 5: MANGENDA CONTRIBUTED, WITH THE NECESSARY MENS REA, TO THE ILLICIT COACHING OF D-2, D-3, D-4, D-6, D-13, D-23, D-26, D-55, D-57 AND D-64

382. Mangenda's argument that the Chamber erred in finding that the Common Plan "encompassed" 10 of the 14 witnesses (namely, D-2, D-3, D-4, D-6, D-13, D-23, D-26, D-55, D-57 and D-64)¹³⁶⁸ misunderstands the applicable law and the relevant findings in the Judgment. The Chamber held that Mangenda was part of a Common Plan "to illicitly interfere with witnesses in order to ensure that those witnesses would provide evidence in Mr Bemba's favour".¹³⁶⁹ Consistent with the applicable law,¹³⁷⁰ this Common Plan encompassed the illicit coaching of Defence witnesses in general. The Chamber found that Mangenda provided an essential contribution to the Common Plan to illicitly interfere with Defence

¹³⁶⁴ [Mangenda Brief](#), para. 306.

¹³⁶⁵ [Martić AJ](#), para. 20; [Strugar AJ](#), para. 22; [Halilović AJ](#), para. 13; [Blagojević AJ](#), para. 11; [Brdanin AJ](#), para. 15; [Gacumbitsi AJ](#), para. 10.

¹³⁶⁶ [Judgment](#), paras. 185, 188.

¹³⁶⁷ See e.g., [Judgment](#), para. 366 ("Therefore, in the light of P-245 (D-3)'s testimony and demonstrable pattern, the Chamber finds, *as the only reasonable conclusion available on the evidence*, that Mr Kilolo also instructed D-4 and D-6 at the time to lie about payments and any non-monetary benefits."); see also paras. 221, 250, 215, 277, 278, 302, 302, 401, 409, 502.

¹³⁶⁸ [Judgment](#), paras. 208-309.

¹³⁶⁹ [Judgment](#), paras. 103, 681, 802-803, 847.

¹³⁷⁰ See also below paras. 477-480 and 416.

witnesses, without which Kilolo would not have been able to perform the illicit coaching activities in the same manner.¹³⁷¹

383. Co-perpetration “requires that the offence [is] the result of the combined and coordinated contributions of those involved”.¹³⁷² Consequently, “the Prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan”.¹³⁷³ The Appeals Chamber has endorsed this finding: an “agreement between [the] perpetrators, which [leads] to the commission of one or more crimes [...] ties the co-perpetrators together and [...] justifies the reciprocal imputation of their respective acts”.¹³⁷⁴ The mutual attribution of the respective conduct of co-perpetrators who share a common plan means that an individual co-perpetrator who provides an essential contribution to the common plan resulting in certain crimes can be held responsible for other crime(s) to which he did not directly contribute, as long as these latter crimes were committed by his co-perpetrators in the implementation of their common plan.¹³⁷⁵

384. This is consistent with the Court’s jurisprudence which holds that “[n]one of the participants [in a common plan] exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such.”¹³⁷⁶ Joint control over crimes carried out in implementing the common plan can occur in situations (i) where the co-perpetrators distribute the functions necessary to implement the common plan vertically, for instance, where some co-perpetrators contribute to the “planning or preparation stage, including when the common plan is conceived”,¹³⁷⁷ while other co-perpetrators execute the crime; and (ii) where the co-perpetrators distribute functions horizontally at the

¹³⁷¹ [Judgment](#), paras. 847, 911.

¹³⁷² [Lubanga TJ](#), para. 994.

¹³⁷³ *Ibid.*

¹³⁷⁴ [Lubanga AJ](#), para. 445.

¹³⁷⁵ [Lubanga TJ](#), paras. 1000, 1004. See [Lubanga AJ](#), paras. 488 and 491 (where the Appeals Chamber confirmed the Trial Chamber’s findings as to the “essential nature of his contribution to the common plan” and “Mr Lubanga’s [essential role] to the implementation of the common plan”). See [Judgment](#), para. 69 (“It is not necessary that each co-perpetrator personally and directly carry out the offence(s), or that he or she be present at the scene of the criminal offence, as long as he or she exercised, jointly with others, control over the criminal offence”).

¹³⁷⁶ [Lubanga TJ](#), para. 994; [Blé Goudé Confirmation Decision](#), para. 136; [Katanga and Ngudjolo Confirmation Decision](#), paras. 524 and 488(b), referring to “joint control over the crime” and control “together with others”. See also [Judgment](#), para. 69.

¹³⁷⁷ [Lubanga AJ](#), para. 469.

execution stage of the crimes, for instance, where each co-perpetrator executes certain crimes or portions thereof.¹³⁷⁸

385. Mangenda's misunderstanding of the law affects many of his arguments under Ground 5, which should be rejected on that basis alone. In any event, as demonstrated in the following sub-sections, Mangenda's arguments should also be rejected because they are unsupported.

V.D.1. The Chamber did not unreasonably extend the Common Plan backwards in time

386. Although the Chamber made no findings that Mangenda was directly involved in the illicit coaching of D-57, D-64 or D-55, none were required.¹³⁷⁹ Instead, the Chamber drew a reasonable inference, based on evidence of Mangenda's later direct involvement in the Common Plan, that he had agreed to the Common Plan "at least [by] the time that D-57's testimony was arranged".¹³⁸⁰ This inference rendered Mangenda liable under the theory of co-perpetration, for the illicit coaching of these witnesses by Kilolo, his co-perpetrator.¹³⁸¹

387. The Chamber was correct to so find. First, at the earliest point at which the Chamber found direct evidence of Mangenda's involvement in the Common Plan—during the illicit coaching of witnesses D-2, D-3, D-4 and D-6 in Yaoundé in May 2013 with Kilolo—Mangenda's conduct was collaborative and his reaction unsurprised. The Chamber found that "Mr Mangenda was present when D-2, D-3, D-4, and D-6 received the telephones",¹³⁸² for which "Mr Mangenda could not have surmised any legitimate purpose",¹³⁸³ and which were in fact intended to be used by the witnesses for illicit contact with Kilolo.¹³⁸⁴ Mangenda expressed no surprise at, or opposition to, Kilolo's illicit conduct at the time. Indeed, he had

¹³⁷⁸ The ICTY Appeals Chamber applied the theory of joint criminal enterprise in the *Tadić* case where the accused had been convicted of participating, together with a group of armed men, in the attack of a village, which resulted in the killing of five persons. The Appeals Chamber found that the killing was a foreseeable part of the common plan and that the accused "actively took part in this attack [by] rounding up and severely beating some of the men". See [Tadić AJ](#), paras. 230-234. Accordingly, the Appeals Chamber reversed the acquittal entered by the Trial Chamber, which had found that the accused played no role in the killing of any of the five men. See [Tadić TJ](#), paras. 373 and 761.

¹³⁷⁹ *Contra* [Mangenda Brief](#), paras. 310-311.

¹³⁸⁰ [Judgment](#), para. 802.

¹³⁸¹ [Judgment](#), para. 915 ("Mr Mangenda was part of a common plan with others (i) who clearly had standing to present evidence and (ii) whose acts are mutually attributable to Mr Mangenda by virtue of the latter's participation in the plan"). Although the Chamber made such findings in the context of Mangenda's criminal responsibility for article 70(1)(b) offences, the same reasoning applies to article 70(1)(a) offences.

¹³⁸² [Judgment](#), para. 367.

¹³⁸³ [Judgment](#), para. 371.

¹³⁸⁴ [Judgment](#), paras. 367-370.

gone to Cameroon with Kilolo knowing that they would meet those witnesses together. It is clear from other evidence that those outside the Common Plan—in this case Mr Haynes—were not asked to join any field missions because they would witness *les couleurs*.¹³⁸⁵ Thus, it was reasonable for the Chamber to infer that Mangenda shared the Common Plan before May 2013.

388. Second, Kilolo’s illicit coaching of D-57, D-64 and D-55 followed a similar pattern to that of later witnesses, with respect to whom there is abundant evidence of Mangenda’s criminal involvement. For example:

- D-57: “[T]here were regular phone contacts between Mr Kilolo and D-57 prior to his testimony before Trial Chamber III commencing on 17 October 2012, and after the VWU cut-off date of 16 October 2012”¹³⁸⁶ and “D-57’s wife received USD 665 through Western Union on 16 October 2012, the day of D-57’s travel to The Hague.”¹³⁸⁷
- D-64: “[T]here were at least three contacts between Mr Kilolo and D-64 on 16 October 2012 and one further call after the VWU cut-off date, on 17 October 2012”, prior to the witness’s testimony before Trial Chamber III on 22 and 23 October 2012,¹³⁸⁸ and D-64 received “USD 700 in two transactions” on 17 October 2012, the day D-64 travelled to The Hague to testify.¹³⁸⁹
- D-55: “[T]here were in total five telephone or SMS contacts between D-55 and Mr Kilolo, including one after the VWU cut-off date of 23 October 2012”,¹³⁹⁰ and D-55 concealed, despite being asked, his meeting with Mr Kilolo in Amsterdam and the telephone call with Mr Bemba, and lied that he had not received any money from the Main Case Defence, including any legitimate reimbursement of expenses.¹³⁹¹

¹³⁸⁵ [Judgment](#), paras. 763-764.

¹³⁸⁶ [Judgment](#), para. 235.

¹³⁸⁷ [Judgment](#), para. 239.

¹³⁸⁸ [Judgment](#), para. 262 (citation omitted).

¹³⁸⁹ [Judgment](#), para. 268.

¹³⁹⁰ [Judgment](#), para. 291.

¹³⁹¹ [Judgment](#), para. 301.

389. This pattern of conduct and consequence is the same as that which occurred when the evidence shows Mangenda's direct involvement in the implementation of the Common Plan. For example:

- D-2, D-3, D-4 and D-6: "Mr Mangenda was present when Mr Kilolo distributed new telephones to D-2, D-3, D-4 and D-6 [...] to stay in contact during the witnesses' testimonies",¹³⁹² and "Mr Kilolo [...] paid CFAF 540,000 or CFAF 550,000 to each witness shortly before their testimonies in the Main Case as an encouragement to testify in Mr Bemba's favour".¹³⁹³
- D-25: "The evidence shows that after the VWU cut-off date of 15 August 2013 and prior to the witness's testimony, Mr Kilolo called D-25 several times",¹³⁹⁴ and D-25 denied any payment from the Main Case Defence, including legitimate reimbursement of travel or other expenses, despite evidence of him receiving a payment of at least USD 132.61.¹³⁹⁵
- D-29: "in the run-up period to the VWU cut-off date of 26 August 2013, Mr Kilolo and D-29 were in telephone and SMS contact",¹³⁹⁶ and "D-29 received USD 649.43 via Western Union" "at Mr Kilolo's behest".¹³⁹⁷

390. Indeed on numerous occasions, the Chamber used as a basis for its conclusions, the patterns of payments to witnesses for the purposes of influencing their testimony,¹³⁹⁸ and telephone contacts with witnesses immediately preceding and during their testimony.¹³⁹⁹ These patterns, including those demonstrated above, linked Mangenda's conduct with respect to witnesses who testified after May 2013 with those who testified before, and thus placed him in the Common Plan encompassing all 14 Defence witnesses.

¹³⁹² [Judgment](#), para. 421.

¹³⁹³ [Judgment](#), para. 419.

¹³⁹⁴ [Judgment](#), para. 484.

¹³⁹⁵ [Judgment](#), para. 500.

¹³⁹⁶ [Judgment](#), para. 517.

¹³⁹⁷ [Judgment](#), para. 520.

¹³⁹⁸ See e.g., [Judgment](#), paras. 245, 380, 397, 439, 523, 691, 702 ("On the contrary, the repeated pattern of witness payments was a deliberate approach on the part of the co-perpetrators to influence the testimony of the witnesses and secure their testimony in the Main Case in Mr Bemba's favour.").

¹³⁹⁹ See e.g., [Judgment](#), paras. 302, 366, 450 ("The Chamber also considers the recurring pattern of communication with witnesses during their in-court testimony, especially those who were called during recesses in and adjournments of their testimony, such as witnesses D-25, D-26 and D-54."), 497, 663.

391. Third, throughout the period covered by the Common Plan, Mangenda fulfilled the role of Kilolo's "assisting hand and confidant",¹⁴⁰⁰ and "was informed on a substantive and continuous basis of Mr Kilolo's activities".¹⁴⁰¹ As exemplified in the transcripts of intercepted communications, Mangenda's conversations with Kilolo about case-related issues frequently included discussions about their illicit coaching of witnesses.¹⁴⁰² Given that this level of close interaction existed unchanged throughout the period of illicit coaching,¹⁴⁰³ the Chamber reasonably inferred that the same discussions took place and thus that he had been a member of the Common Plan from its start.¹⁴⁰⁴

392. The ICTY cases cited by Mangenda are unpersuasive.¹⁴⁰⁵ His *Šainović* citation¹⁴⁰⁶ cannot guide the Appeals Chamber in this case because it related to a factual finding on the evidence in that case. His *Blagojević* citation does not appear to be relevant to the proposition cited.¹⁴⁰⁷ The *Krajišnik* Appeals Judgment¹⁴⁰⁸ is irrelevant because in this case, contrary to the *Krajišnik* case, the Chamber made a concrete finding regarding the latest starting date of the Common Plan.¹⁴⁰⁹

393. As a matter of law, the Chamber was entitled to use subsequent evidence to infer that Mangenda had been a member of the Common Plan from the outset. The ICTY has found it reasonable for a Chamber to draw inferences of prior *mens rea*, and involvement in a common plan, from later and circumstantial evidence. For example, the *Stakić* Appeals Chamber held that *Stakić's* public utterances post-dating the indictment period could be relied on to infer his earlier (indictment period) state of mind in relation to the crime of persecution.¹⁴¹⁰

¹⁴⁰⁰ [Judgment](#), para. 866.

¹⁴⁰¹ [Judgment](#), para. 847.

¹⁴⁰² See e.g., [Judgment](#), paras. 491-495.

¹⁴⁰³ This is demonstrated by the call data records of conversations between Mangenda and Kilolo. See e.g. a spreadsheet of CDR of Kilolo's [REDACTED] telephone number, [REDACTED], for the period 21 September 2012 to 20 September 2013, CAR-OTP-0072-0078, recording frequent (almost daily) communications with Mangenda's [REDACTED] telephone number, [REDACTED].

¹⁴⁰⁴ [Judgment](#), para. 103 ("[...] The agreement was made in the course of the Main Case among the three accused at the latest when the Main Case Defence arranged for the testimony of D-57.").

¹⁴⁰⁵ [Mangenda Brief](#), para. 311.

¹⁴⁰⁶ [Šainović AJ](#) para. 1667, under heading B (para. 1607).

¹⁴⁰⁷ [Blagojević AJ](#), para. 298, referred to in [Mangenda Brief](#), footnote 620.

¹⁴⁰⁸ [Krajišnik AJ](#), para. 173.

¹⁴⁰⁹ [Judgment](#), para. 802.

¹⁴¹⁰ [Stakić AJ](#), para. 128 ("[T]he Trial Chamber did not abuse its discretion in assuming that an expression of ethnic or religious bias made by the Appellant during late 1992 was probative of his likely state of mind earlier

V.D.2. The Chamber correctly found Mangenda responsible as a co-perpetrator for offences under articles 70(1)(b) and (c) with respect to D-23 and D-26

394. Mangenda's request to reverse his convictions for the offences under article 70(1)(b) and (c) with respect to D-23 and D-26 disregards the Chamber's competence to draw reasonable inferences and misunderstands the law on co-perpetration.¹⁴¹¹ It should be rejected.

395. Mangenda argues that there is no direct link between his activities and D-23's and D-26's false testimony, and in particular that he had no knowledge that their evidence was false.¹⁴¹² However, the Chamber correctly found that Mangenda knew and intended that the 14 witnesses presented by the Main Case Defence, including D-23 and D-26, would provide false testimony on their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.¹⁴¹³ As demonstrated above,¹⁴¹⁴ this conclusion is based on the Chamber's cumulative interpretation of the evidence as a whole. In addition, the Chamber correctly inferred Mangenda's knowledge of the illicit coaching of D-23 and D-26 from the fact that Kilolo illicitly coached D-23 and D-26 prior to and during their testimony in August 2013,¹⁴¹⁵ in the middle of the period covered by the Common Plan and after Mangenda was found to have been involved in the illicit coaching of D-2, D-3, D-4 and D-6 in Yaoundé in May 2013. As explained above,¹⁴¹⁶ the nature of Kilolo's illicit coaching of D-23 and D-26 was identical to that of other witnesses, with respect to whom there is abundant evidence of Mangenda's criminal involvement. These patterns of payments to witnesses for the purpose of influencing their testimony and of telephone contacts with witnesses immediately preceding and during their testimony are highly probative evidence of Mangenda's knowledge of the illicit coaching of D-23 and D-26.

396. In any event, as a matter of law, it was not necessary for the Chamber to enter specific findings on Mangenda's knowledge with respect to each individual witness. As argued above,¹⁴¹⁷ the Chamber correctly found that Mangenda was criminally responsible as a co-perpetrator for the offences under articles 70(1)(b) and (c) committed against the 14 Defence

that same year. Accordingly, the Trial Chamber did not err in relying on the statement to establish the Appellant's intent for the crime of persecutions [...]".).

¹⁴¹¹ [Mangenda Brief](#), paras. 312-313.

¹⁴¹² [Mangenda Brief](#), paras. 312-313.

¹⁴¹³ [Judgment](#), para. 849, 870.

¹⁴¹⁴ *See above* paras. 317-324.

¹⁴¹⁵ [Judgment](#), paras. 148-158.

¹⁴¹⁶ *See above* paras. 387-389.

¹⁴¹⁷ *See above* paras. 382-384.

witnesses, because he shared the Common Plan and played a key role in its implementation. This is so even if he did not personally contribute to or know of the illicit interference of each individual witness, as long as the other co-perpetrators illicitly interfered with them pursuant to the Common Plan.¹⁴¹⁸ In fact, the Common Plan included the presentation of evidence, “knowing the testimony to be false, at least in part”.¹⁴¹⁹ Mangenda need not have had specific knowledge of the falsity of the evidence of each individual witness to be found criminally responsible as a co-perpetrator for the offences under article 70(1)(b) and (c) committed by other co-perpetrators pursuant to the Common Plan.¹⁴²⁰ It sufficed that he knew and intended that the witnesses give false testimony about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.

V.D.3. The Chamber’s findings with respect to the four Cameroonian witnesses were reasonable

397. The Chamber’s findings with respect to the five witnesses discussed under this ground—D-23, D-26, D-55, D-57 and D-64—should not be disturbed.¹⁴²¹ For the reasons already outlined in response to Mangenda’s Ground 5,¹⁴²² Mangenda fails to show the Chamber erred by convicting him as a co-perpetrator for the offences under articles 70(1)(b) and (c) in relation to these witnesses. Thus, Mangenda’s argument that an error in relation to these five witnesses affects his conviction for the four Cameroonian witnesses—D-2, D-3, D-4 and D-6—should also be dismissed as moot.¹⁴²³

V.D.4. The Chamber did not err with respect to D-13

398. Mangenda’s submission that the Chamber erred in finding that he was “involved in a common plan to illicitly coach D-13”¹⁴²⁴ incorrectly understands the Chamber’s findings and the law. As noted above,¹⁴²⁵ the Common Plan was to illicitly interfere with Defence witnesses in general and not with specific witnesses.¹⁴²⁶

399. In any event, as for the other witnesses, the Chamber inferred Mangenda’s knowledge that D-13 would provide false evidence about his prior contacts with the Defence from its

¹⁴¹⁸ See [Judgment](#), para. 915 with respect to article 70(1)(b) offences. The same reasoning applies to article 70(1)(c) offences.

¹⁴¹⁹ [Judgment](#), paras. 103, 681, 802, 847.

¹⁴²⁰ *Contra* [Mangenda Brief](#), para. 312; [Judgment](#), para. 914.

¹⁴²¹ [Mangenda Brief](#), para. 314.

¹⁴²² *See above* paras. 382-395.

¹⁴²³ [Mangenda Brief](#), para. 314.

¹⁴²⁴ [Mangenda Brief](#), para. 315.

¹⁴²⁵ *See above* paras. 382-384, 395.

¹⁴²⁶ [Judgment](#), paras. 103, 681, 802, 847.

consideration of the evidence as a whole.¹⁴²⁷ It also made findings about Mangenda's involvement in the illicit coaching of D-13. It found that on 10 November 2013, "Mr Kilolo discussed his illicit coaching activities with Mr Mangenda over the telephone. They both used coded language during their conversation".¹⁴²⁸ Although Mangenda merely listened to Kilolo complain about his illicit coaching of D-13, later in the conversation Mangenda participated actively in the conversation, including by using the code word "*les couleurs*" with respect to coaching witnesses.¹⁴²⁹ These findings are sufficient to qualify as participation in, and a contribution to, the illicit coaching of D-13. Mangenda's submission that they do not rise to that level merely disagrees with the Chamber's interpretation of the facts.

400. For the above reasons, Mangenda's Ground 5 should be dismissed.

V.E. GROUND 6: THE CHAMBER CORRECTLY FOUND THAT MANGENDA ABETTED D-2, D-3, D-4, D-6, D-13, D-25 AND D-29 TO GIVE FALSE TESTIMONY AND AIDED D-15 AND D-54 TO GIVE FALSE TESTIMONY

V.E.1. Mangenda abetted D-2, D-3, D-4, D-6, D-13, D-25 and D-29 to give false testimony

401. Mangenda's submission that abetting occurs only when the abettor provides assistance to a principal perpetrator who is encouraged by that assistance, misstates the law as set out in the Judgment.¹⁴³⁰ After defining the notion of abetting as "the moral or psychological assistance of the accessory to the principal perpetrator",¹⁴³¹ the Chamber held that "[t]he accessory may provide assistance to the principal perpetrator or intermediary perpetrator".¹⁴³² Read together, this permitted the Chamber to find Mangenda responsible for abetting the false testimony of D-2, D-3, D 4, D-6, D-13, D-25 and D-29 by his assistance to Kilolo.

¹⁴²⁷ See above paras. 317-324.

¹⁴²⁸ [Judgment](#), para. 667. The Chamber is referring to the conversation at paras. 658-661.

¹⁴²⁹ [Judgment](#), para. 660, footnote 1528 (citing to CAR-OTP-0082-1140 at 1146, lines 143, 154). See also above paras. 346-347.

¹⁴³⁰ [Mangenda Brief](#), paras. 318-319.

¹⁴³¹ [Judgment](#), para. 89.

¹⁴³² [Judgment](#), para. 96.

402. The Chamber’s approach to assistance to intermediate perpetrators—Kilolo, in this case—accords with the approach of the SCSL Trial Chamber (to which the Chamber cites¹⁴³³), the SCSL Appeals Chamber and various chambers at the ICTY.

403. In the *Taylor* case at the SCSL, the Defence argued that it must be proved that “the aider and abettor provided assistance to the physical actor and that the assistance was used in the commission of a specific crime by the physical actor”.¹⁴³⁴ The *Taylor* Appeals Chamber rejected this argument. It held instead that “the essential question is whether the acts and conduct of an accused can be said to have had a substantial effect on the commission of the crime charged”, and not that assistance is provided directly to the “physical actor”.¹⁴³⁵ It continued, “the particular manner in which such assistance is provided” is irrelevant, and this principle “applies equally to personal culpability for ordering, planning, and instigating the commission of crimes”.¹⁴³⁶ In this context, the *Taylor* Appeals Chamber relied *inter alia* on

¹⁴³³ [Judgment](#), para. 96, fn. 169.

¹⁴³⁴ [Taylor AJ](#), para. 363.

¹⁴³⁵ [Taylor AJ](#), para. 368. *See also* paras. 371 (“International tribunals have never required that, as a matter of law, an aider and abettor must provide assistance to the crime in a particular manner, such as providing assistance to the physical actor that is then used in the commission of the crime”), 372-373, 375, 384 (“aiding and abetting liability” may be applied “to large-scale crimes committed by organised groups of individuals”), 385 (“Where the evidence establishes that the crimes were committed in the implementation of a plan, program, policy or strategy [...] the crimes were committed, as a matter of fact, not by the physical actors alone, but by the organised participation and contributions of many persons. In accordance with [...] customary international law, triers of fact are required to consider whether, by assisting, encouraging or supporting the planning, preparation or execution of the plan, program, policy or strategy, an accused’s acts and conduct thereby had a substantial effect on some or all of the crimes committed in furtherance of the plan, program, policy or strategy. That an accused’s acts and conduct had a substantial effect on the commission of the crimes establishes the requisite *actus reus* for aiding and abetting liability, not the manner in which an accused assisted the commission of the crimes”).

¹⁴³⁶ [Taylor AJ](#), para. 368.

the approach of the ICTY in *Brđanin*,¹⁴³⁷ *Blagojević and Jokić*,¹⁴³⁸ *Krstić*,¹⁴³⁹ and *Simić*,¹⁴⁴⁰ as well as post-WWII jurisprudence.¹⁴⁴¹

404. The *Milutinović* Trial Judgment also establishes liability for “giving encouragement or moral support to the physical perpetrator or intermediary perpetrator”.¹⁴⁴² Likewise, the *Orić* Trial Chamber agreed that “any kind of physical or psychological, verbal or instrumental assistance or support, regardless whether rendered directly to the perpetrator or by way of an intermediary” may constitute the *actus reus* of aiding and abetting.¹⁴⁴³ The *Orić* Chamber was supported in this view by the *Furundžija* Trial Chamber’s observation that aiding and abetting need not be qualified as “direct”.¹⁴⁴⁴

405. Mangenda’s reliance on the *Brđanin* Appeals Chamber’s holding that “encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it”¹⁴⁴⁵ is inapposite. This holding was made in the context of the ‘silent spectator’ theory,¹⁴⁴⁶ which does not apply in this case.¹⁴⁴⁷ In fact, the Appeals Chamber’s findings in that case were consistent with the Chamber’s in this case. It held that,

¹⁴³⁷ *Taylor AJ*, paras. 373-374 (recalling *inter alia* that “Brđanin aided and abetted crimes of persecution committed on a widespread and systematic scale, finding that he ‘aided and abetted the maintenance of a system in which Bosnian Muslims and Bosnian Croats were unable to seek legal redress’ for their illegal detention and the appropriation of their property and ‘actively aided and abetted the setting up of impediments for Bosnian Muslims and Bosnian Croats to move around freely’”, and that these convictions were affirmed on appeal).

¹⁴³⁸ *Taylor AJ*, para. 375 (recalling that Blagojević was “liable for aiding and abetting crimes where he ‘permitted the use of personnel or resources to facilitate the commission of these crimes’” and “[t]he personnel attributable to Blagojević did not perpetrate the crimes themselves”; rather, “Blagojević’s acts and conduct assisted and had a substantial effect on the crimes because the personnel attributable to him participated in guarding and detaining the eventual victims”).

¹⁴³⁹ *Taylor AJ*, para. 375 (recalling that Krstić was convicted of aiding and abetting genocide because “he permitted the Main Staff to call upon Drina Corps resources and to employ those resources”).

¹⁴⁴⁰ *Taylor AJ*, para. 376 (recalling that “Simić participated in, supported and sustained ‘the system of arrests and detentions’, and thereby his acts and conduct had a substantial effect on those crimes”).

¹⁴⁴¹ *Taylor AJ*, paras. 377-380 (quoting *inter alia* the *Ministries*, *Flick*, and *Justice* cases at the Nuremburg Military Tribunal).

¹⁴⁴² *Milutinović TJ, Vol. I*, para. 89 (fn. 107). This was consistent with its general approach to intermediate perpetration. See e.g. *Milutinović TJ, Vol. I*, paras. 69, 91-94.

¹⁴⁴³ *Orić TJ*, para. 282. See also para. 285 (“Since the aiding and abetting contribution may be remote both in time and place from when and where the principal crime will be committed, there is no reason why it should be treated differently from instigation which, as previously acknowledged, can be indirect. Accordingly, aiding and abetting should not be limited to direct contributions, as long as the effect of facilitating the crime is the same, irrespective of whether produced directly or by way of indirect means or intermediaries, provided, of course, that the final result is covered by the participant’s corresponding intent”).

¹⁴⁴⁴ *Furundžija TJ*, paras. 232, 234.

¹⁴⁴⁵ *Mangenda Brief*, para. 318.

¹⁴⁴⁶ See *Judgment*, para. 89 (“Under certain circumstances, even the act of being present at the crime scene (or in its vicinity) as a ‘silent spectator’ can be construed as tacit approval or encouragement of the crime”, citing to ICTR and ICTY jurisprudence).

¹⁴⁴⁷ *Brđanin AJ*, para. 277.

“in principle, it is not required as an element of that mode of liability that the principal perpetrators know of the aider and abettor’s existence or of his assistance to them”.¹⁴⁴⁸

406. Thus, the Chamber correctly found that Mangenda abetted D-2, D-3, D 4, D-6, D-13, D-25 and D-29 to give false testimony, considering that there are ample factual findings in the Judgment to support Mangenda’s provision of support to Kilolo, an intermediary perpetrator. In applying the law to the facts, the Chamber correctly concluded that:

- Mangenda “gave moral support and encouragement to Mr Kilolo through his presence” at meetings in which witnesses (D-2, D-3, D-4, D-6) were distributed cell phones, and that this in turn “had an effect on the false testimony” of those witnesses and “facilitated the subsequent Article 70(1)(a) offences”.¹⁴⁴⁹
- Mangenda “had an effect on the false testimony given by D-13”, providing “moral support to Mr Kilolo by telephone during the illicit coaching of D-13, listening to Mr Kilolo’s updates and complaints about such activities and tacitly approving them”.¹⁴⁵⁰
- Mangenda gave similar support to Kilolo in inducing the false testimony of D-25¹⁴⁵¹ and D-29¹⁴⁵² by, *inter alia*, reporting to Kilolo on the witnesses’ testimony.

V.E.2. There is no substantiality requirement in article 25(3)(c)

407. Second, Mangenda’s challenge to the Chamber’s application of article 25(3)(c), arguing that aiding and abetting contains a ‘substantial contribution’ threshold,¹⁴⁵³ lacks merit. The Chamber considered these same arguments at some length and rejected them.¹⁴⁵⁴ It found that the “causality” and “enhanced *mens rea*” requirements contained in article 25(3)(c) are adequate to filter out those forms of contribution that are clearly not encompassed by the provision.¹⁴⁵⁵ The Chamber also referred by analogy to the text of the 1996 Draft Code of

¹⁴⁴⁸ [Brdanin AJ](#), para. 349.

¹⁴⁴⁹ [Judgment](#), paras. 867, 921-922.

¹⁴⁵⁰ [Judgment](#), paras. 568-660, 868, 921-922.

¹⁴⁵¹ [Judgment](#), paras. 487-495, 866, 921-922.

¹⁴⁵² [Judgment](#), paras. 533-539, 866; 921-922.

¹⁴⁵³ [Mangenda Brief](#), para. 320.

¹⁴⁵⁴ [Judgment](#), paras. 91-92.

¹⁴⁵⁵ [Judgment](#), paras. 94-95.

Crimes against the Peace and Security of Mankind of the International Law Commission, which it found could provide some guidance as to the interpretation of article 25(3)(c).¹⁴⁵⁶

408. The Chamber's approach to the contribution threshold for article 25(3)(c) was correct. The broad formulation under article 25(3)(c) (any form of assistance) implies that the degree of assistance is not qualified. In particular, it is not necessary to demonstrate that the accused's assistance was substantial or significant, as long as it is shown that his or her conduct did in fact assist the direct perpetrator(s) in any way in the commission of the crime. A further qualification of the accused's contribution to the crime, as suggested by Mangenda, would also have no practical effect. It would exclude from the applicability of article 25(3)(c) only those contributions that are *insubstantial* or *insignificant*. In the words of a Pre-Trial Judge (now a Judge of the Appeals Chamber), such contributions could be qualified as "neutral", because they are so trivial that no relation between the accused's conduct and any element of the crime can be established.¹⁴⁵⁷ Neutral contributions do not give rise to criminal responsibility under article 25(3)(c).

V.E.3. Mangenda aided D-15 and D-54 to give false testimony

409. Mangenda's remaining arguments under Ground 6 divorce the Chamber's findings on Mangenda's specific conduct from their context.¹⁴⁵⁸ When viewed through the framework of the evidence as a whole,¹⁴⁵⁹ the Chamber's findings and inferences are reasonable.

410. With respect to D-15, first, the Chamber concluded that "Mr Kilolo consulted Mr Mangenda in detail and had exchanges with him about the on-going testimony of the witnesses, particularly [...] D-15. This was indispensable assistance to Mr Kilolo, who, in turn, illicitly coached the witnesses in a focused manner".¹⁴⁶⁰ Mangenda's submission that he "[n]ever advised Kilolo on the content of D-15's testimony"¹⁴⁶¹ does not dispute this finding or its factual underpinnings, but merely challenges the Chamber's characterisation of this

¹⁴⁵⁶ [Judgment](#), para. 93.

¹⁴⁵⁷ [Mbarushimana AD](#), Separate Opinion of Judge Fernández de Gurmendi, para. 12, in relation to contributions under article 25(3)(d).

¹⁴⁵⁸ [Mangenda Brief](#), paras. 321-322.

¹⁴⁵⁹ [Judgment](#), para. 188. *See also above* para. 326.

¹⁴⁶⁰ [Judgment](#), para. 866. *See also* para. 591 ("The Chamber finds that Mr Mangenda was firmly involved in and approved of Mr Kilolo's illicit coaching activities involving D-15, in particular the fact that Mr Kilolo was rehearsing questions to be posed by the Main Case Defence and the victims' legal representatives. Indeed, he was updated by Mr Kilolo on the illicit coaching of D-15 and provided Mr Kilolo with the questions of the victims' legal representatives, knowing that they would be used for illicit purposes.").

¹⁴⁶¹ [Mangenda Brief](#), para. 321.

activity as “advising”.¹⁴⁶² The Appeals Chamber need not enquire further into Mangenda’s disagreement with the Chamber’s phraseology. In any event, there is no legal requirement for Mangenda to have “advised” Kilolo on the content of D-15’s testimony for him to be liable under article 25(3)(c).

411. Second, Mangenda concedes the Chamber’s finding that he forwarded the LRV’s questions to Kilolo, who later sent them to D-15,¹⁴⁶³ but disputes the causal link between his conduct and the witness’s false testimony about his prior contacts with the Defence.¹⁴⁶⁴ However, the Chamber did not need to find a direct causal link between these events. It properly assessed this conduct in light of the totality of the evidence with respect to D-15—including the telephone conversations between Mangenda and Kilolo mentioned above—and reasonably concluded that Mangenda aided Kilolo’s illicit coaching of D-15.¹⁴⁶⁵

412. With respect to D-54, again after a detailed evidential analysis the Chamber found that “Mr Mangenda was deeply involved in the planning of Mr Kilolo’s illicit coaching activities, such as those involving [...] D-54”.¹⁴⁶⁶ Mangenda’s claim that the temporal link between Kilolo’s and Mangenda’s discussion and D-54’s testimony was too tenuous is merely an alternative interpretation of the evidence.¹⁴⁶⁷ As indicated above,¹⁴⁶⁸ it is not enough to present alternative inferences with respect to isolated pieces of evidence. Mangenda must show that *no* reasonable trier of fact *could have* reached a guilty finding based on the evidence considered as a whole.

413. Mangenda’s submission that he cannot be held liable because he and Kilolo did not explicitly discuss D-54’s false testimony about his prior contacts with the Defence should likewise be dismissed.¹⁴⁶⁹ The Chamber reasonably relied on Mangenda’s participation in multiple telephone calls with Kilolo about the illicit coaching of D-54, relating to his comportment in court and the merits of the Main Case,¹⁴⁷⁰ to infer Mangenda’s intent and knowledge with respect to D-54’s untruthful evidence about his prior contacts with the

¹⁴⁶² [Mangenda Brief](#), para. 321.

¹⁴⁶³ [Mangenda Brief](#), para. 321; [Judgment](#), paras. 574-578.

¹⁴⁶⁴ [Mangenda Brief](#), para. 321.

¹⁴⁶⁵ *See also above* para. 357

¹⁴⁶⁶ [Judgment](#), para. 866.

¹⁴⁶⁷ [Mangenda Brief](#), para. 322.

¹⁴⁶⁸ *See above* paras. 326-329, 363.

¹⁴⁶⁹ [Mangenda Brief](#), para. 322.

¹⁴⁷⁰ [Judgment](#), paras. 172-174, 598-621, 652.

Defence, understanding that the latter did not materialise in a vacuum but instead resulted from Kilolo's illicit coaching. The Chamber's conclusion was informed by its finding with respect to Mangenda's knowledge and intent regarding the Common Plan to present false testimony to the Chamber:

Mr Mangenda was regularly informed or even present when Mr Kilolo illicitly instructed witnesses. A regular feature of such illicit coaching activities included the instruction to lie about Main Case Defence payments and contacts, as well as association with other persons. Mr Mangenda and Mr Kilolo also discussed this aspect of the witnesses' testimonies.¹⁴⁷¹

414. In sum, Mangenda has not shown the Chamber erred. Ground 6 should be dismissed.

415. For the reasons set out above, the Appeals Chamber should dismiss Mangenda's appeal and uphold his conviction.

¹⁴⁷¹ [Judgment](#), para. 849. *See also above* paras. 317-324.

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VI. BEMBA WAS PROPERLY CONVICTED

416. Pursuant to article 25(3)(a), the Chamber convicted Bemba as a co-perpetrator of corruptly influencing 14 Defence witnesses contrary to article 70(1)(c), and presenting their false evidence contrary to article 70(1)(b).¹⁴⁷² With Kilolo and Mangenda, Bemba agreed to illicitly interfere with witnesses (by instructing or motivating them to provide false testimony) and to present their false evidence to this Court.¹⁴⁷³ This was the Common Plan, which crystallised at least by the time “that [P-20 (D-57)]’s testimony was arranged”.¹⁴⁷⁴ Although the Common Plan thus encompassed the offences regarding the 14 Defence witnesses, the Judgment is not understood as finding that the co-perpetrators specifically selected and agreed in advance which witnesses would be interfered with, nor was it required to do so.¹⁴⁷⁵

417. The Chamber also convicted Bemba of soliciting the giving of false testimony by the 14 Defence witnesses under articles 25(3)(b) and 70(1)(a).¹⁴⁷⁶

418. On appeal, Bemba largely repeats his unsuccessful arguments from trial, merely disagreeing with the Chamber’s approach, and (like Mangenda) offers alternative interpretations to specific evidence. He shows no error materially affecting the Judgment. Accordingly, his appeal should be dismissed and his convictions affirmed.

VI.A. THE CHAMBER DID NOT RELY ON A VAGUE OR IMPROPERLY PLEADED COMMON PLAN (BEMBA GROUND 2.1)

419. Bemba’s arguments that he was not properly informed of the nature and content of the charges against him¹⁴⁷⁷ should be dismissed because they misunderstand the relevant law and the facts of this case.

420. Bemba incorrectly argues that the DCC (*preceding* the confirmation of charges) did not set out the charges relevant to the Common Plan with sufficient precision. He disregards that

¹⁴⁷² [Judgment](#), paras. 923-929.

¹⁴⁷³ [Judgment](#), paras. 681, 802.

¹⁴⁷⁴ [Judgment](#), paras. 103, 802. *See also below* para. 452.

¹⁴⁷⁵ *See also above* paras. 382 - 384. *Cf.* [Judgment](#), para. 802 (“As laid out above, the agreed plan involved, at least, the corrupt influencing of 14 Main Case defence witnesses, together with the presentation of their evidence”, emphasis added).

¹⁴⁷⁶ [Judgment](#), paras. 930-933.

¹⁴⁷⁷ [Bemba Brief](#), paras. 57-140.

the Appeals Chamber has held that it is not the (pre-confirmation) DCC,¹⁴⁷⁸ but “the decision on the confirmation of the charges [that] defines the parameters of the charges at trial.”¹⁴⁷⁹ In addition, auxiliary documents may, depending on the circumstances, provide further details about the charges,¹⁴⁸⁰ provided the information was made available “before the start of the trial hearings”.¹⁴⁸¹

421. In its Confirmation Decision, the Pre-Trial Chamber found that Bemba, Kilolo and Mangenda shared a Common Plan or “Overall Strategy”¹⁴⁸² to “defend[] Mr Bemba against the charges in the Main Case by means which included the commission of offences against the administration of justice”.¹⁴⁸³ The Confirmation Decision further stated that Bemba was “the ultimate beneficiary” of this strategy,¹⁴⁸⁴ and detailed how he contributed to the implementation of the strategy which resulted in the commission of crimes under articles 70(1)(b) and (c).¹⁴⁸⁵

422. In its Pre-Trial Brief, an auxiliary document providing additional information to the accused as to the nature, cause and content of the charges,¹⁴⁸⁶ the Prosecution further detailed the scope of the Common Plan;¹⁴⁸⁷ the actors involved in it and their respective roles in its implementation;¹⁴⁸⁸ the means by which the Common Plan was implemented;¹⁴⁸⁹ Bemba’s precise role in its implementation;¹⁴⁹⁰ Bemba’s intent and knowledge;¹⁴⁹¹ and how the co-perpetrator’s coordinated action in pursuance of the Common Plan resulted in the commission of the charged crimes.¹⁴⁹²

¹⁴⁷⁸ See generally e.g. [Bemba Brief](#), paras. 60-69.

¹⁴⁷⁹ [Lubanga AJ](#), para. 124.

¹⁴⁸⁰ [Lubanga AJ](#), paras. 124, 128, 132.

¹⁴⁸¹ [Lubanga AJ](#), para. 129.

¹⁴⁸² For the purposes of this case, the terms “Common Plan” and “Overall Strategy” were synonymous: [Prosecution Pre-Trial Brief](#), para. 238; [Judgment](#), para. 680.

¹⁴⁸³ [Confirmation Decision](#), para. 52.

¹⁴⁸⁴ [Confirmation Decision](#), paras. 52, 97.

¹⁴⁸⁵ [Confirmation Decision](#), paras. 97-106, pp.47-48.

¹⁴⁸⁶ [Lubanga AJ](#), paras. 128-129.

¹⁴⁸⁷ [Prosecution Pre-Trial Brief](#), paras. 17, 237-238.

¹⁴⁸⁸ [Prosecution Pre-Trial Brief](#), paras. 18-25.

¹⁴⁸⁹ [Prosecution Pre-Trial Brief](#), paras. 26-63.

¹⁴⁹⁰ [Prosecution Pre-Trial Brief](#), paras. 21, 240-241.

¹⁴⁹¹ [Prosecution Pre-Trial Brief](#), paras. 241, 246-248.

¹⁴⁹² [Prosecution Pre-Trial Brief](#), paras. 64-219.

VI.A.1. The Common Plan was not impermissibly vague by using the term “included”

423. The fact that the Common Plan stated that the co-perpetrators agreed to defend Bemba against the charges in the Main Case “by means which *included* the commission of offences against the administration of justice”¹⁴⁹³ does not affect Bemba’s rights under article 67(1)(a).¹⁴⁹⁴

424. The term “included” merely expressed that the co-perpetrator’s agreement to achieve the objective of “defending Bemba against the charges in the Main Case”, extended to illegitimate means which amounted to offences against the administration of justice. The Prosecution did not allege that *all* of the co-perpetrator’s activities to defend Bemba were illegitimate. This is consistent with the Court’s jurisprudence that “the agreement or common plan need not be specifically directed at the commission of offence(s) and may include non-criminal goals”,¹⁴⁹⁵ as long as it involves a “critical element of criminality”.¹⁴⁹⁶

425. In this case, the Prosecution alleged that the co-perpetrators agreed that in defending Bemba against the charges in the Main Case, they would, among other things, resort to the commission of offences against the administration of justice.¹⁴⁹⁷ This formulation of the Common Plan is neither vague nor imprecise. It clearly specifies how the criminal element of the Common Plan relates to the objective of defending Bemba.¹⁴⁹⁸ Bemba’s argument that he could not discern the Common Plan’s criminal element is unreasonable.¹⁴⁹⁹

426. The *Ruto* and *Katanga* examples,¹⁵⁰⁰ where the Trial Chambers held that the term “included” was too broad, are inapposite because they relate to instances where the Chambers, based on the specific facts of the cases, held that the Prosecution should provide more clarity with respect to its “statement of facts including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to

¹⁴⁹³ [Confirmation Decision](#), para. 52 (emphasis added).

¹⁴⁹⁴ *Contra* [Bemba Brief](#), paras. 60-69.

¹⁴⁹⁵ [Judgment](#), para. 67, quoting [Lubanga Confirmation Decision](#), para. 344; [Lubanga TJ](#), para. 984.

¹⁴⁹⁶ [Lubanga AJ](#), para. 446, [Lubanga TJ](#), para. 984, [Ruto et al Confirmation Decision](#), para. 301.

¹⁴⁹⁷ *See also* [Judgment](#), para. 67 (noting that committing the crimes as such need not be the primary or overarching goal of the co-perpetrators).

¹⁴⁹⁸ *Contra* [Bemba Brief](#), para. 64.

¹⁴⁹⁹ [Bemba Brief](#), paras. 66-67. Nor is it unusual for an international court or tribunal to sift the evidence to determine what is probative of an alleged common plan, amounting to the commission of crimes, as opposed to legitimate (for example, political) conduct which might be aimed at achieving related outcomes: *see e.g.* [Stanišić and Župljanin AJ](#), paras. 67-70; [Krajišnik AJ](#), para. 192.

¹⁵⁰⁰ [Bemba Brief](#), para. 65.

trial [...]”.¹⁵⁰¹ However, this does not mean that it is always inappropriate to use inclusionary language to describe the charges,¹⁵⁰² nor does it mean that it cannot be used to distinguish the criminal component of a Common Plan from its non-criminal components. The fact that the Pre-Trial Chamber and the Trial Chamber had already rejected Bemba’s similar complaints in this case does not demonstrate any error in the Judgment.¹⁵⁰³

VI.A.2. The Common Plan was charged properly

427. Bemba was properly informed of the date by which the Common Plan was formulated and the specificities regarding his contributions to the implementation of the Common Plan.¹⁵⁰⁴

428. The Confirmation Decision provided that Bemba was charged with crimes committed “between [the] end of 2011 and 14 November 2013”.¹⁵⁰⁵ Because Bemba was charged for article 70 offences as a co-perpetrator under article 25(3)(a), this necessarily implied that the Common Plan was in place by the end of 2011. The Pre-Trial Brief further put the Defence on notice that the Common Plan involving Bemba existed and was implemented between the end of 2011 and 14 November 2013.¹⁵⁰⁶ In addition, both the Confirmation Decision¹⁵⁰⁷ and the Pre-Trial Brief¹⁵⁰⁸ specified the nature of Bemba’s contributions to the Common Plan and the fact that they occurred on precise dates within that time frame.¹⁵⁰⁹

429. Bemba’s arguments that he was not notified of the nature and scope of the Common Plan, and that the Chamber erred by “reformulating” the Common Plan,¹⁵¹⁰ are unsupported and should be rejected. As the Prosecution has responded to Mangenda’s similar argument,¹⁵¹¹ the Common Plan for which Bemba was convicted¹⁵¹² is *in substance* identical

¹⁵⁰¹ [Lubanga AJ](#), para. 119.

¹⁵⁰² See e.g. [Bemba DCC Corrections Decision](#), paras. 85-87, 257-279; also paras. 88-89, 102-103, 159, 249; [Victims Decision](#), paras. 55, 58; see also [Ntaganda DCC Decision](#), paras. 70-72 (generally disallowing inclusive language in the DCC—except for child soldier offences—due to the different language used to confirm the charges).

¹⁵⁰³ *Contra* [Bemba Brief](#), paras. 68-69.

¹⁵⁰⁴ *Contra* [Bemba Brief](#), paras. 61, 70-71.

¹⁵⁰⁵ [Confirmation Decision](#), p. 47.

¹⁵⁰⁶ [Prosecution Pre-Trial Brief](#), paras. 1, 17 (Bemba’s espousal of the Common Plan can be inferred from the fact listed at paras. 17-63, 241, 246-248).

¹⁵⁰⁷ [Confirmation Decision](#), paras. 99-104.

¹⁵⁰⁸ [Prosecution Pre-Trial Brief](#), paras. 64-219.

¹⁵⁰⁹ Regarding Bemba’s argument that he was not put on notice on his contribution “as concerns each witness” ([Bemba Brief](#), para. 70), see below para. 437.

¹⁵¹⁰ [Bemba Brief](#), paras. 72-73.

¹⁵¹¹ See above paras. 309 - 314.

¹⁵¹² [Judgment](#), paras. 103, 681, 802.

to the Common Plan notified to Bemba in the Confirmation Decision and the Pre-Trial Brief. The Chamber did not “reformulate” the Common Plan but merely articulated it in slightly different words. It is irrelevant that the Chamber noted in its Judgment that the Prosecution in its closing statement failed to “clearly articulate a definition” of what it considered to be the Common Plan.¹⁵¹³ At that stage of the trial, the Prosecution could not deviate from the material elements of the Common Plan that had clearly been notified to Bemba at its start. Accordingly, Bemba’s rights under article 67(1)(a) were not violated by how the Prosecution pleaded the Common Plan.¹⁵¹⁴

VI.B. THE JUDGMENT DID NOT EXCEED THE SCOPE OF THE CONFIRMED CHARGES **(BEMBA GROUND 2.2)**

VI.B.1. The Chamber did not rely on an undefined common plan with an insufficient criminal element

430. The Trial Chamber did not define a “new” Common Plan or change its focus.¹⁵¹⁵ It merely articulated the Common Plan, as confirmed by the Pre-Trial Chamber and further detailed in the Pre-Trial Brief, in slightly different words.¹⁵¹⁶ The Chamber’s formulation of the Common Plan retained its focus on its criminal element.¹⁵¹⁷ The Confirmation Decision¹⁵¹⁸ and the Pre-Trial Brief¹⁵¹⁹ referred to the plan of “defending Mr Bemba against the charges in the Main Case by means which included the commission of offences against the administration of justice”,¹⁵²⁰ and then set out in detail the material facts relevant to the charges under articles 70(1)(a)-(c). Without changing the scope or the focus of the Common Plan, the Trial Chamber articulated the relevant article 70 offences when it defined the Common Plan as follows:

Mr Bemba, Mr Kilolo and Mr Mangenda, in the context of defending Mr Bemba from the charges in the Main Case, agreed to illicitly interfere with witnesses in order to ensure that those witnesses would provide evidence in Mr Bemba’s favour. More precisely, Mr Bemba, Mr Kilolo and Mr Mangenda agreed to instruct or motivate defence witnesses to give a specific testimony, knowing the testimony to be false, at

¹⁵¹³ [Judgment](#), para. 681.

¹⁵¹⁴ *Contra* [Bemba Brief](#), para. 73.

¹⁵¹⁵ *Contra* [Bemba Brief](#), paras. 75-76.

¹⁵¹⁶ *See above* paras. 311-314.

¹⁵¹⁷ *Contra* [Bemba Brief](#), para. 76.

¹⁵¹⁸ [Confirmation Decision](#), para. 52; *see also* pp. 47-52; paras. 53-106.

¹⁵¹⁹ [Prosecution Pre-Trial Brief](#), paras. 17-63, 237-238.

¹⁵²⁰ [Confirmation Decision](#), para. 52.

least in part, by giving monies, material benefits or promises, and subsequently to present these witnesses to the Court.¹⁵²¹

431. The Chamber's use of the term "more precisely" made it clear that the phrase "illicitly interfere with witnesses" was intended to describe the three forms of illegal conduct under articles 70(1)(a)-(c) that were further specified in the sentence that follows. Moreover, the terms used by the Chamber to describe the charged offences also delimit the scope of the phrase "illicit interference with witnesses".¹⁵²² Accordingly, the Common Plan did not refer to a different offence of "interfer[ing] with the collection of evidence" under article 70(1)(c),¹⁵²³ that was not charged in this case and of which Bemba was not convicted.¹⁵²⁴

432. In addition, the Common Plan did not "assume" illicit conduct, but clearly set out its criminal element by emphasising that the evidence to be provided by the witnesses "in favour of Mr Bemba" resulted from illicit interference with them.¹⁵²⁵ There is no practical difference between this phrase and the Pre-Trial Brief's reference to securing "false testimony in support of Bemba".¹⁵²⁶ The Chamber's finding that Bemba approved illicit payments to witnesses, knowing that the purpose of such payments was to ensure the witness' testimony in his favour¹⁵²⁷ does not indicate that the Chamber confused the criminal element of the Common Plan with potentially legitimate defence strategies.¹⁵²⁸

VI.B.2. The Chamber did not make findings on issues concerning the merits of the Main Case

433. The Chamber did not make findings on issues falling outside the scope of the charges, and in particular on the merits of the Main Case.¹⁵²⁹ The Chamber's finding that Bemba gave instructions on the illicit coaching of witnesses, including on what and how witnesses were expected to testify,¹⁵³⁰ does not imply that the Chamber made findings on the merits of the Main Case and in particular whether the witnesses testified "falsely" on the merits of the

¹⁵²¹ [Judgment](#), para. 681; *see also* paras. 103, 802, 847.

¹⁵²² *Contra* [Bemba Brief](#), paras. 79-80.

¹⁵²³ *Contra* [Bemba Brief](#), paras. 76-77.

¹⁵²⁴ *Contra* [Bemba Brief](#), para. 78.

¹⁵²⁵ *Contra* [Bemba Brief](#), paras. 79-80, 82.

¹⁵²⁶ [Prosecution Pre-Trial Brief](#), para. 27. *Contra* [Bemba Brief](#), para. 81.

¹⁵²⁷ [Judgment](#), para. 816.

¹⁵²⁸ *Contra* [Bemba Brief](#), para. 81.

¹⁵²⁹ *Contra* [Bemba Brief](#), paras. 83-87.

¹⁵³⁰ [Judgment](#), para. 734.

Main Case.¹⁵³¹ Illicit coaching was understood as instructing witnesses to “testify according to a particular script concerning the merits of the Main Case, *regardless of the truth or falsity of the information therein*”.¹⁵³² This practice encompassed the rehearsing, instructing, correcting and scripting of expected answers on issues pertaining to the Main Case.¹⁵³³ Accordingly, Bemba was not convicted for uncharged conduct,¹⁵³⁴ but rather for the offences resulting from the Common Plan, to which he contributed, which included influencing witnesses’ testimonies in a manner that, without it, “they would not have testified on a number of issues in the same way”.¹⁵³⁵

434. Before trial, the Chamber noted that “statements pertaining to the merits of the Main Case could [...] have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching was in fact repeated during testimony.”¹⁵³⁶ The Chamber was free to rely on all evidence before it, including conversations in which the co-accused were discussing the merits of the Main Case, to establish whether Bemba and his co-perpetrators engaged in the practice of illicit coaching. This does not mean that the Chamber made findings on the truth or falsity of the merits of the Main Case. Indeed, the Chamber made no such findings.

435. Bemba’s argument that the Prosecution in its DCC defined illicit coaching as “improper influence upon the witness [...] with the view to rendering false evidence into testimony”¹⁵³⁷ shows no error in the Judgment.¹⁵³⁸ The (pre-confirmation) DCC does not govern the charges for the trial,¹⁵³⁹ nor was it the basis on which the trial was conducted.¹⁵⁴⁰ In any event, the Trial Chamber did not make any findings on the merits of the Main Case.

¹⁵³¹ *Contra* [Bemba Brief](#), paras. 84, 87.

¹⁵³² [Judgment](#), para. 704 (emphasis added); *see also* paras. 712, 733, 808.

¹⁵³³ *See e.g.* [Judgment](#), paras. 651, 825, 860, 862.

¹⁵³⁴ *Contra* [Bemba Brief](#), para. 84.

¹⁵³⁵ [Judgment](#), para. 825.

¹⁵³⁶ [T-10-RED](#), 5:24-6:1; *see also* [Judgment](#), para. 194. *Contra* [Bemba Brief](#), para. 85.

¹⁵³⁷ [Bemba Brief](#), paras. 86-87 (especially fn. 143, quoting DCC, fn. 40).

¹⁵³⁸ *See above* paras. 236 - 260 (Chamber’s definition of article 70(1)(c)).

¹⁵³⁹ *See above* para. 420.

¹⁵⁴⁰ *See e.g.* [Prosecution Pre-Trial Brief](#), para. 225; [Prosecution Confirmation Submission](#), paras. 275-277.

VI.B.3. Bemba was correctly convicted based on an “actual knowledge” standard, and was not convicted for conduct relating to witness D-19 or potential witness “Bravo”

436. As discussed below, Bemba’s argument that the Chamber convicted Bemba for his “implicit”, rather than his “actual” knowledge,¹⁵⁴¹ misinterprets the Judgment.¹⁵⁴² Bemba knew and intended Kilolo to instruct witnesses to testify about certain information regardless of the truth or falsity of this information.¹⁵⁴³

437. Bemba’s argument that he was convicted for conduct relating to witness D-19 and “a person who never testified”¹⁵⁴⁴—which the Prosecution understands to refer to potential witness “Bravo”—also misrepresents the Judgment. Neither D-19 nor “Bravo” is one of the 14 Defence witnesses whose illicit coaching constitutes the basis of Bemba’s conviction.¹⁵⁴⁵ Instead, the Chamber correctly relied on *evidence* showing that Bemba abused the privileged line and spoke to D-19,¹⁵⁴⁶ and *evidence* that the co-perpetrators discussed “Bravo”,¹⁵⁴⁷ as just part of its analysis based on all the evidence in the record. This helped establish the fact of illicit coaching, and the co-perpetrators’ collaboration in executing the illicit coaching activities, and Bemba’s own involvement.¹⁵⁴⁸

VI.C BEMBA PRESENTED FALSE EVIDENCE AND CORRUPTLY INFLUENCED WITNESSES AS A CO-PERPETRATOR (BEMBA GROUNDS 2.3-2.5)

438. Bemba shows no error in the Chamber’s findings on the Common Plan, and on Bemba’s knowing and intentional contribution to the offences it encompassed.

VI.C.1. The Common Plan was proven circumstantially, by the correct approach

439. The Chamber reasonably inferred the existence of the Common Plan from the “concerted actions” of Bemba, Kilolo, and Mangenda, as well as the conduct of Babala, Arido, and other relevant third parties.¹⁵⁴⁹ This was the only reasonable inference it could

¹⁵⁴¹ [Bemba Brief](#), para. 88.

¹⁵⁴² *See below* paras. 482-485.

¹⁵⁴³ [Judgment](#), paras. 817-818. On the application of article 30 to article 70 offences, *see also e.g.* [Judgment](#), para. 50; *above* paras. 194 - 208, 246 - 250.

¹⁵⁴⁴ [Bemba Brief](#), paras. 89-91.

¹⁵⁴⁵ *See e.g.* [Judgment](#), paras. 923, 925, 926-927, 929-933. *Contra* [Bemba Brief](#), para. 90.

¹⁵⁴⁶ [Judgment](#), paras. 741, 816, 831, 833, 856, 861. *See also below* paras. 460-462, 489, 515-517, 536-538, 559.

¹⁵⁴⁷ [Judgment](#), paras. 714, 719, 760, 787, 812, 825, 839. *See also below* paras. 463-465.

¹⁵⁴⁸ [Judgment](#), paras. 733, 741, 769, 801, 816, 832-836, 846-850.

¹⁵⁴⁹ [Judgment](#), paras. 682, 803.

have reached. Among “its assessment of the evidence as a whole”,¹⁵⁵⁰ the Chamber relied on evidence showing that:

- Acts corruptly influencing the 14 Defence witnesses “were not spontaneous or coincidental, but the result of a carefully planned and deliberate strategy”,¹⁵⁵¹ in which Bemba, Kilolo, and Mangenda participated.¹⁵⁵² A “significant number” of witnesses—including P-260 (D-2), P-245 (D-3), P-256 (D-4), D-6, D-57, P-261 (D-23), and D-29¹⁵⁵³—received “nearly the same amount of money or other valuable goods” from Kilolo, and the timing of these transactions was “noticeably similar in all instances”, shortly before they testified.¹⁵⁵⁴
- This “recurring pattern” of witness payments and non-monetary promises, as well as other factors including Kilolo’s remarks to witnesses, convinced the Chamber that the money was an “encouragement to testify in favour of Mr Bemba.”¹⁵⁵⁵ Bemba himself was “involved in the payment scheme extensively”, demonstrated by the “significant body of evidence” proving that Babala consulted Bemba before making any payment to Kilolo or other persons,¹⁵⁵⁶ and that Bemba knew that at least some of the payments authorised “served also illegitimate purposes”.¹⁵⁵⁷
- Bemba, Kilolo, and Mangenda “fulfilled different tasks” in collaboration with one another in order to “illicitly coach[]” witnesses.¹⁵⁵⁸ Bemba directed what and how the

¹⁵⁵⁰ [Judgment](#), para. 683.

¹⁵⁵¹ [Judgment](#), para. 684.

¹⁵⁵² [Judgment](#), para. 688. *See also* paras. 535, 600-606, 609, 612, 685-686 (evidence of Kilolo’s and Mangenda’s intercepted conversation discussing the coaching of D-29 and D-54, and referring to Bemba’s knowledge and instructions); 360, 434, 436, 637-638, 687 (instructions to witnesses such as D-2, D-54, and D-23 to ensure the common plan remained efficient and undetected, which were carried out).

¹⁵⁵³ [Judgment](#), para. 690 (cross-referring to paras. 242-246, 268-271, 373-378, 396, 407-410, 438, 520).

¹⁵⁵⁴ [Judgment](#), paras. 689, 702.

¹⁵⁵⁵ [Judgment](#), para. 691 (cross-referring to paras. 374, 436-438). *See also* paras. 293-298, 373, 406, 692 (non-monetary promises made to D-3, D-6, and D-55 expressly included assurances of Bemba’s good regard).

¹⁵⁵⁶ [Judgment](#), para. 693-698, 703. For example, Babala and Bemba spoke on 2 May, 25 May, 28 September, 13 November, 22 November, and 30 November 2012, and 26 April, 29 April, and 6 May 2013. Selected utterances in these calls, standing alone, evidence “discrete statements of Mr Babala asking Mr Bemba for authorisation to proceed with the transfer or payment of money to Mr Kilolo”, Babala informing Bemba “about the status of money transactions, *inter alia*, to Mr Kilolo”, and Bemba authorising Babala to make payments, in coded language. *See also* paras. 699 (in a conversation between Kilolo and Babala of 21 October 2013, Babala responded to Kilolo’s request for money by asking if he had talked with Bemba, “prov[ing] that payments could not be effected without prior authorisation of Mr Bemba”), 798.

¹⁵⁵⁷ [Judgment](#), para. 700 (cross-referring to paras. 265-271). *See also* paras. 701 (Bemba took steps to conceal his conversations with Babala, cross-referring to paras. 737-738, 783-785), 703.

¹⁵⁵⁸ [Judgment](#), paras. 704, 733.

witnesses were expected to testify;¹⁵⁵⁹ Kilolo undertook the illicit coaching itself;¹⁵⁶⁰ and Mangenda liaised between the two, and assisted and advised Kilolo.¹⁵⁶¹

- Bemba, Kilolo, and Mangenda took precautionary measures to “cover up the witness interference”,¹⁵⁶² including: abusing the “privileged line” to circumvent the monitoring of telephone calls from the Detention Centre;¹⁵⁶³ transferring money indirectly;¹⁵⁶⁴ distributing new telephones to witnesses once contact was supposed to have ceased;¹⁵⁶⁵ using coded language;¹⁵⁶⁶ concealing illicit activities from other members of Bemba’s defence team;¹⁵⁶⁷ and agreeing to destroy physical evidence.¹⁵⁶⁸
- Once alerted, on 11 October 2013 Bemba, Kilolo, and Mangenda took “remedial measures” to ascertain the scope of the article 70 investigation and to frustrate it.¹⁵⁶⁹ This included mutual consultations,¹⁵⁷⁰ directions from Bemba to investigate the leak,¹⁵⁷¹ liaising with Babala who had financed the interference,¹⁵⁷² and initial implementation of countermeasures based on further mutual consultation and reporting.¹⁵⁷³

V1.C.1.a. The Chamber correctly considered all relevant evidence (Bemba Ground 2.3.1)

440. Bemba incorrectly asserts that the Chamber “inferred the existence” of the Common Plan “from concerted action with persons who were not members of the common plan”,

¹⁵⁵⁹ [Judgment](#), paras. 704, 727-734. *See further* paras. 495, 535, 565, 567-568, 585, 605, 649.

¹⁵⁶⁰ [Judgment](#), paras. 704-716, 734. *See further* paras. 250-251, 277-278, 299, 302, 355-363, 366, 389, 392, 394, 398, 400-401, 434, 436-437, 463-466, 487-489, 491-494, 500-501, 531, 533-536, 538-539, 554, 556-561, 565-566, 574-579, 581-582, 622-632, 637-639, 649, 659-661, 664.

¹⁵⁶¹ [Judgment](#), paras. 704, 717-726, 734. *See further* paras. 487-490, 492, 533-536, 565-566, 574-578, 609, 611-612, 659-661, 714-715.

¹⁵⁶² [Judgment](#), paras. 735, 769.

¹⁵⁶³ [Judgment](#), paras. 735-745, 769.

¹⁵⁶⁴ [Judgment](#), paras. 735, 746, 769.

¹⁵⁶⁵ [Judgment](#), paras. 735, 747, 769.

¹⁵⁶⁶ [Judgment](#), paras. 735, 748-761, 769.

¹⁵⁶⁷ [Judgment](#), paras. 762-764, 769.

¹⁵⁶⁸ [Judgment](#), paras. 765-769.

¹⁵⁶⁹ [Judgment](#), paras. 770, 800-801.

¹⁵⁷⁰ [Judgment](#), paras. 771-775.

¹⁵⁷¹ [Judgment](#), paras. 776-778.

¹⁵⁷² [Judgment](#), paras. 779-781.

¹⁵⁷³ [Judgment](#), paras. 782-801.

occasioning a “reversible error of law”.¹⁵⁷⁴ His analysis misinterprets the Judgment and mistakes the law.

441. The Judgment expressly states that the Common Plan was inferred from “*Mr Bemba’s, Mr Kilolo’s and Mr Mangenda’s concerted actions*”, adding that these sometimes “also involv[ed]” other persons, such as Babala,¹⁵⁷⁵ whose actions were taken into account in order “to fully and comprehensively assess the actions of *the three co-perpetrators*.”¹⁵⁷⁶ This was not erroneous: the existence of a common plan and its membership are simply questions of fact. Indeed, it would be wholly unrealistic and unjustifiable to limit the evidence of a common plan solely to the internal relations between the alleged co-perpetrators, since almost every crime depends on interaction with the *external* world and not just with persons who are co-perpetrators or their “tools” or “agents”.¹⁵⁷⁷ Such ‘external’ interactions may be highly relevant and probative as evidence from which the co-perpetrators’ mutual execution of a common plan might be inferred.¹⁵⁷⁸ For example, in *Dorđević*, which Bemba cites,¹⁵⁷⁹ the common purpose was proven with reference, among other factors, to the “attitude expressed even publicly or to international representatives by senior political leaders of the FRY and Serbia”.¹⁵⁸⁰

442. Bemba’s selective criticisms address only some of the evidence, considered in isolation. The Common Plan was not proved solely by inferences from “the individual actions of Mr Babala, and concerted action between Mr. Bemba and Mr. Babala”.¹⁵⁸¹ Rather, interactions between Bemba and Babala were relevant to only two of the five factors upon which the Chamber primarily relied:¹⁵⁸² paying money to witnesses (second factor),¹⁵⁸³ and concealing

¹⁵⁷⁴ *Contra Bemba Brief*, para. 95.

¹⁵⁷⁵ *Judgment*, para. 682 (emphasis added; cited at *Bemba Brief*, para. 95, fn. 158).

¹⁵⁷⁶ *Judgment*, para. 682 (emphasis added). *See also* paras. 803 (“The Chamber infers the common plan from the concerted action of the three co-perpetrators, in connection with that of other co-accused”), 878; *above* para. 439.

¹⁵⁷⁷ Consider, for example, a common plan for an armed bank robbery. Evidence that the robbers purchased weapons from a third party would be highly relevant and probative, even if the purchase was itself lawful and the gun-seller was not a member of the common plan.

¹⁵⁷⁸ *Contra Bemba Brief*, para. 95 (“concerted action with individuals who are neither co-perpetrators, nor agents controlled by one of the co-perpetrators, has no probative value concerning the common plan at stake”).

¹⁵⁷⁹ *Bemba Brief*, para. 95 (fn. 160).

¹⁵⁸⁰ *Dorđević TJ*, para. 2026. *See also Dorđević AJ*, para. 158.

¹⁵⁸¹ *Contra Bemba Brief*, para. 96.

¹⁵⁸² *See above* para. 439. In addition, Babala’s interactions with other co-perpetrators, such as Kilolo, were taken into account in other factors, such as the remedial measures. *See e.g. Judgment*, paras. 779-782, 797-799.

¹⁵⁸³ *See e.g. Judgment*, paras. 693-700 (analysis supporting that “Bemba was involved in this payment scheme extensively”).

the Common Plan (fourth factor).¹⁵⁸⁴ Nor indeed was this evidence decisive in either respect.¹⁵⁸⁵ Bemba's dismissal of the remaining significant body of evidence is both undeveloped and incorrect,¹⁵⁸⁶ since it appears to depend on the erroneous view that the Common Plan, and Bemba's membership, cannot be proved inferentially, and that evidence of Bemba's express assent must be shown.¹⁵⁸⁷

443. Furthermore, Bemba's criticism of the reasoning concerning his interactions with Babala is itself mistaken. It does not follow that evidence which may be insufficient to show Babala's participation *as a co-perpetrator* in the Common Plan is necessarily also insufficient, in the context of all the other evidence, to demonstrate that Bemba is a co-perpetrator. Not only is Bemba's logic faulty,¹⁵⁸⁸ but the Chamber expressly stated its view that there was no inconsistency in this respect.¹⁵⁸⁹ It did not err.¹⁵⁹⁰

VI.C.1.b. The Chamber correctly considered evidence of conduct throughout the Common Plan (Bemba Ground 2.3.2)

444. Bemba incorrectly asserts that the Chamber erred in relying, "to a decisive extent", on "ex post facto contributions" in order to prove the Common Plan and/or Bemba's

¹⁵⁸⁴ See e.g. [Judgment](#), paras. 737-739 (analysis supporting that "Bemba [...] directed the commission of the offences from the ICC Detention Centre, using his privileged telephone line with his counsel to talk unmonitored and candidly not only with Mr Kilolo but also with Mr Mangenda and Mr Babala"), 748 (concerning the use of coded language in calls between Bemba and Babala).

¹⁵⁸⁵ See e.g. [Judgment](#), paras. 689-692 (concerning the second factor, analysis of payments and non-monetary promises made by Kilolo), 740-747, 749-768 (concerning the fourth factor, analysis of: communications between Bemba and D-55, and Bemba and D-19, facilitated by Kilolo; indirect money transfers; distribution of telephones to witnesses in violation of the contact prohibition; the use of coded language in calls between Bemba and Kilolo, and Mangenda's insistence that this be so; Mangenda's advice to ensure that witnesses were instructed according to the narrative pre-determined with Bemba; Kilolo's admission to Mangenda that, if their scheme were discovered, he would be the first person targeted; concealment of activities from other members of Bemba's legal team; and agreements to destroy physical evidence).

¹⁵⁸⁶ *Contra* [Bemba Brief](#), para. 96 ("irrelevant evidence post-dating the offences"). The basis for implying that the relevant findings depend on the analysis only in paragraphs 693 to 698 is unclear. See also para. 97 (suggesting that communications with Babala are "the exclusive basis for inferring Mr Bemba's agreement to be part of a common plan", citing paragraphs 693-700).

¹⁵⁸⁷ *But see e.g.* [Lubanga TJ](#), para. 988 ("co-perpetration does not require that the agreement or the common plan is explicit"). See also [Lubanga AJ](#), para. 445 (noting in passing that the agreement can be "express or implied, previously arranged or materialising extemporaneously").

¹⁵⁸⁸ *Contra* [Bemba Brief](#), para. 97.

¹⁵⁸⁹ [Judgment](#), para. 878.

¹⁵⁹⁰ *Contra* [Bemba Brief](#), paras. 98-99.

participation.¹⁵⁹¹ Bemba's undeveloped arguments, based on unsupported assumptions, fail for three reasons.

VI.C.1.b.i Even the 'remedial measures' were agreed and initially implemented while the execution of the Common Plan was ongoing

445. First, although Bemba does not explain specifically what he means by "*ex post facto* contributions",¹⁵⁹² he must mean the 'remedial measures' to counter the article 70 investigation.¹⁵⁹³ Yet these measures did not occur *after* all the offences falling within the Common Plan were completed, but *while they were ongoing*.

446. The co-perpetrators were alerted to the article 70 investigation on 11 October 2013,¹⁵⁹⁴ and the 'remedial measures' largely took place over the following two weeks.¹⁵⁹⁵ Yet, since P-201 (D-54)'s testimony did not even commence until 30 October 2013,¹⁵⁹⁶ and D-13's testimony did not commence until 12 November 2013,¹⁵⁹⁷ offences within the Common Plan continued until at least 13 November 2013.¹⁵⁹⁸ The 'remedial measures' thus not only sought to protect and conceal criminal conduct which had already taken place, but also ongoing and future criminal conduct. In this sense, they were no different from other measures to conceal the Common Plan, which had been carried out as required since the plan's inception.¹⁵⁹⁹

VI.C.1.b.ii Bemba confuses the Chamber's separate reasoning concerning the existence of the Common Plan, Bemba's essential contribution, and Bemba's mens rea

447. Second, the Judgment shows that the Chamber's analysis of the Common Plan, Bemba's essential contribution and Bemba's *mens rea*, was carefully distinguished, and fully reasoned. No part of its analysis relied decisively on the 'remedial measures', nor was it

¹⁵⁹¹ *Contra* [Bemba Brief](#), paras. 100, 106. It is not altogether clear whether Bemba is challenging reliance on this evidence in one or both of these respects: *e.g.* [Bemba Brief](#), para. 105 (referring to Bemba's "association and intent concerning the initial common plan").

¹⁵⁹² *See e.g.* [Bemba Brief](#), para. 100.

¹⁵⁹³ *See e.g.* [Bemba Brief](#), para. 105 ("Bemba['s] alleged involvement in obstructing the Prosecution's Article 70 investigation").

¹⁵⁹⁴ [Judgment](#), para. 770.

¹⁵⁹⁵ *See* [Judgment](#), paras. 770-799 (discussing incidents from 11 October 2013 to 22 October 2013).

¹⁵⁹⁶ [Judgment](#), paras. 597, 646.

¹⁵⁹⁷ [Judgment](#), para. 656.

¹⁵⁹⁸ *See e.g.* [Judgment](#), paras. 615-653 (including notable contacts between Kilolo and D-54 on 29 October, 30 October, and 31 October 2013), 656-667 (including notable contacts between Kilolo and D-13 on 8 November, 9 November, 10 November, 11 November, 12 November, and 13 November 2013). D-54's testimony was completed on 1 November 2013, and D-13's testimony was completed on 14 November 2013).

¹⁵⁹⁹ *See e.g.* [Judgment](#), paras. 735-769.

wrong to rely on this evidence to the extent that it did.¹⁶⁰⁰ Bemba's arguments fail to acknowledge the Chamber's distinct reasoning, and mistakenly assume that, even if reliance on *ex post facto* conduct is subject to any limitation (*arguendo*),¹⁶⁰¹ such a limitation would apply equally to the entirety of the Chamber's analysis.¹⁶⁰² This is incorrect.

448. The Chamber clearly took the 'remedial measures' into account in establishing the existence of the Common Plan. However, this was still just *part* of the evidence underlying the five factors upon which the Chamber relied.¹⁶⁰³ This evidence spanned the planning, preparation, execution, and cover-up phases of the Common Plan, and Bemba shows no error in the Chamber's reasoning in this respect. Even if reliance on the evidence of 'remedial measures' was excluded, the Common Plan is still the only reasonable inference from the other evidence.

449. Likewise, although the Chamber referred to Bemba's role in ordering the 'remedial measures' when finding that he made an essential contribution to the execution of the Common Plan,¹⁶⁰⁴ this was not the heart of its reasoning. Rather, it found that Bemba made an essential contribution from the plan's very inception, such as:

- "planning [...] the illicit coaching of witnesses";¹⁶⁰⁵
- playing "a critical role in providing instructions, feedback and approval on the topics to which witnesses were illicitly coached", including close involvement in determining which witnesses should be called to testify;¹⁶⁰⁶
- approving "the payment of money, including illicit payments, to witnesses" and ensuring, through Babala, "that financial means were available to the co-perpetrators with which they executed their illicit activities";¹⁶⁰⁷ and

¹⁶⁰⁰ *Contra* [Bemba Brief](#), paras. 100, 102-106.

¹⁶⁰¹ *But see below* paras. 454-455.

¹⁶⁰² For example, even if *arguendo* there is a limit on the use of *ex post facto* conduct in proving contribution (due to principles of causation), this does not necessarily preclude the use of such evidence in proving intent or knowledge.

¹⁶⁰³ *See above* para. 439.

¹⁶⁰⁴ [Judgment](#), para. 815. *See also* para. 816.

¹⁶⁰⁵ [Judgment](#), para. 816. *See also* paras. 684-687, 808.

¹⁶⁰⁶ [Judgment](#), para. 816. *See also* paras. 704, 721, 727-734, 809-812.

¹⁶⁰⁷ [Judgment](#), para. 816. *See also* paras. 689, 693-701, 703, 798-799, 813.

- “[a]uthorising, ensuring and/or implementing measures to conceal the common plan”, since from the outset “[i]t was critical for the success of such a plan that this influence on the witnesses be concealed, as their testimony would otherwise lose all credibility.”¹⁶⁰⁸

450. Consequently, the Chamber found that Bemba could frustrate the Common Plan by issuing other directions or otherwise refusing his approval.¹⁶⁰⁹ This reflected Bemba’s status as “the ultimate and main beneficiary of the implementation of the common plan, as the offences were committed in the context of his defence”,¹⁶¹⁰ and his “overall coordinating role”¹⁶¹¹ in “planning, authorising and instructing” the criminal activities carried out by Kilolo and Mangenda to ensure his “satisfaction”.¹⁶¹² Bemba was thus found to be an archetypical leadership figure whose contribution was no less essential if made at the “planning or preparation stage” of the Common Plan, “including when the common plan is conceived”, rather than in its execution.¹⁶¹³

451. Furthermore, the Chamber did not err by including *ex post facto* conduct—among all Bemba’s other conduct—in assessing the contribution which he actually made to the Common Plan.¹⁶¹⁴ As established in *Lubanga*, an essential contribution may be proved by a “cumulative[.]” assessment of the accused’s conduct.¹⁶¹⁵ Even if *ex post facto* conduct may not have the capacity, of itself, to frustrate the commission of the crime, it may still be relevant—together with *ex ante* conduct—in assessing the nature and extent of the contributions made overall. In any event, even if reliance on the ‘remedial measures’ was excluded, Bemba’s essential contribution is still the only reasonable inference from the other evidence of his conduct.

¹⁶⁰⁸ [Judgment](#), paras. 814 (including sub-title), 819. *See also* paras. 698, 701, 703, 735-741, 748-761, 766-768

¹⁶⁰⁹ [Judgment](#), para. 816.

¹⁶¹⁰ [Judgment](#), para. 805.

¹⁶¹¹ [Judgment](#), para. 816.

¹⁶¹² [Judgment](#), para. 806. *See also* paras. 495, 724, 737.

¹⁶¹³ [Lubanga AJ](#), para. 469. *See also* para. 473; [Lubanga TJ](#), paras. 1003-1004; Ambos, p. 153. Indeed, the *Lubanga* Appeals Chamber’s dictum that “[t]he essential contribution can be made as early as the planning and preparation stage and as late as the execution stage of the offence(s)” was made precisely in the context of its reasoning that a co-perpetrator need not physically be involved in the execution of the crime(s), rather than any more general reasoning about the timing of contributions. *See* [Judgment](#), para. 69 (citing [Lubanga AJ](#), para. 469); [Bemba Brief](#), para. 101.

¹⁶¹⁴ *E.g.* [Judgment](#), paras. 807 (“Mr Bemba’s contribution [...] materialised in various ways. The Chamber relied on a number of actions that persuaded it to conclude that Mr Bemba’s contributions were essential”), 816 (“these contributions of Mr Bemba, taken together, were essential”).

¹⁶¹⁵ [Lubanga AJ](#), paras. 488-490, 499; [Lubanga TJ](#), para. 1270.

452. Finally, based on the totality of the evidence, the Chamber clearly found that Bemba had the requisite knowledge and intent *from the outset* of the Common Plan,¹⁶¹⁶ which occurred no later than 17 October 2012.¹⁶¹⁷ Although the weight of relevant evidence grew over time,¹⁶¹⁸ the Chamber reasonably made this inference beyond reasonable doubt. There is no principled bar to using evidence of subsequent knowledge or conduct to infer prior intent,¹⁶¹⁹ and Bemba's contrary assertion is unsupported and unexplained.¹⁶²⁰ Nor is evidence relevant to proving a common plan, or a person's contribution to a common plan, in some way inadmissible if it has not been charged as a material fact.¹⁶²¹ This confuses two distinct issues.¹⁶²²

453. The Chamber's conclusion that Bemba possessed the necessary *mens rea* was the only reasonable inference from the evidence of his "continuous and substantive knowledge",¹⁶²³ considered with all the other relevant evidence. The Chamber never considered that "[r]emedial action [...] in itself reflect[s] a guilty mind".¹⁶²⁴ Nor did it even rely "heavily" on this evidence, which was but one factor in the Chamber's analysis.¹⁶²⁵ No express disclaimer of the "limitations" of evidence of *ex post facto* knowledge was thus required.¹⁶²⁶ Relevant factors included:

- Bemba's "planning and organising activities relating to the common plan";¹⁶²⁷
- Bemba's "deliberate and knowing abuse of his privileged line" and the other concealing "measures taken" by him and/or in his knowledge "throughout the Main Case proceedings";¹⁶²⁸
- Bemba's "specific directions and instructions concerning testimony relating to the merits of the Main Case";¹⁶²⁹

¹⁶¹⁶ [Judgment](#), paras. 817-820. *See also* paras. 70, 807; [Bemba Brief](#), para. 103.

¹⁶¹⁷ [Judgment](#), para. 802. *See also* para. 246; *above* para. 416.

¹⁶¹⁸ *See below* para. 453.

¹⁶¹⁹ *See above* para. 393.

¹⁶²⁰ *Contra* [Bemba Brief](#), para. 104.

¹⁶²¹ *Contra* [Bemba Brief](#), para. 105.

¹⁶²² *See above* para. 337 (and authorities cited in fn. 1198).

¹⁶²³ [Judgment](#), para. 817.

¹⁶²⁴ *Contra* [Bemba Brief](#), para. 104.

¹⁶²⁵ *Contra* [Bemba Brief](#), para. 105.

¹⁶²⁶ *Contra* [Bemba Brief](#), para. 105.

¹⁶²⁷ [Judgment](#), para. 817. *See also* paras. 684-688, 727, 731, 734, 737, 816.

¹⁶²⁸ [Judgment](#), paras. 817, 820. *See also* paras. 735-769, 816.

- information shared with or known to Bemba “of the coaching activity and the contacts, as well as payments to the witnesses”;¹⁶³⁰
- Bemba’s personal observation of witnesses consistently giving testimony that he knew to be incorrect;¹⁶³¹ and
- “the remedial measures taken to counter the Article 70 investigations”.¹⁶³²

VI.C.1.b.iii A co-perpetrator may render his ‘essential contribution’ after execution of the common plan has commenced

454. Third, and in any event, it is not necessarily wrong in principle to derive a co-perpetrator’s essential contribution from conduct which occurs after execution of a common plan has commenced. In this context, the notion of ‘prior agreement’ (required for *ex post facto* aiding and abetting) is otiose,¹⁶³³ since co-perpetration liability is *always* derived from proof of a common plan based on the mutual acceptance and division of tasks, whether implicit or explicit.¹⁶³⁴ Those tasks need not be executed synchronously but may occur sequentially—one co-perpetrator’s contribution may occur and be completed before another co-perpetrator’s contribution even begins. Accordingly, what matters is the essential nature of the co-perpetrators’ contribution to the *common plan*, which is the basis to justify mutual attribution of criminal responsibility for each co-perpetrator’s conduct.¹⁶³⁵ If this is correct, as the Prosecution maintains,¹⁶³⁶ then provided an alleged co-perpetrator’s conduct genuinely amounts to an essential contribution to the common plan, its precise timing is irrelevant. Bemba’s logic ignores the significance of the common plan and depends on his erroneous view that a co-perpetrator must have the power to frustrate each individual criminal act.¹⁶³⁷

¹⁶²⁹ [Judgment](#), para. 818. *See also* paras. 727-732, 734, 737, 816.

¹⁶³⁰ [Judgment](#), para. 819. *See also* paras. 685-686, 692-701, 703-704, 714-715, 721, 728-732, 734, 737, 740-741, 753-754, 756-757, 766-767, 774-778, 780, 782-796, 808-815.

¹⁶³¹ [Judgment](#), para. 819. *See also* paras. 495, 732, 854.

¹⁶³² [Judgment](#), para. 820. *See also* paras. 770-800, 813, 815-817.

¹⁶³³ *See* Finnin, p. 89; [Furundžija TJ](#), para. 229; [Blagojević TJ](#), para. 731; [Haradinaj TJ](#), para. 145. *See also* Van Sliedregt, p. 112. The requirement for the principal’s knowledge that they will receive assistance after the fact reflects that ‘*ex post facto* assistance’ is really a form of abetting (where knowledge of the principal is obviously necessary), as opposed to objective assistance of which the principal need not know: *e.g.* [Brdanin AJ](#), para. 349; [Tadić AJ](#), para. 229. *Contra* [Bemba Brief](#), para. 102.

¹⁶³⁴ *E.g.* [Judgment](#), paras. 62, 68, 70-71; [Lubanga TJ](#), paras. 1000, 1013.

¹⁶³⁵ *E.g.* [Judgment](#), paras. 62, 69, 71.

¹⁶³⁶ *See below* paras. 477-480.

¹⁶³⁷ *Contra* [Bemba Brief](#), para. 101. *See below* paras. 477-480.

455. Moreover, as the Chamber recognised, the Common Plan did not depend solely on the execution of the offences but the execution of those offences *in secret*.¹⁶³⁸ Unlike other crimes, whose object may be preserved even if the crimes are discovered and the perpetrators are punished, the illicit interference with witnesses only had a point so long as this interference went undiscovered. Accordingly, if this was anticipated from the outset, even measures after the commission of (some of) the offences to try and conceal them may be considered an essential contribution to the Common Plan. Although the Chamber's finding was by no means this narrow, Bemba's assumption that such a state of affairs would be wrong in principle is, itself, incorrect and should not be adopted.

VI.C.1.c. Bemba mischaracterises certain evidence as “bad character” evidence (Bemba Ground 2.3.3)

456. Bemba deprecates evidence against him—pertaining to D-19, potential witness “Bravo” and the ‘remedial measures’—as “bad character” evidence because, in his view, it either “[p]ost[]-dated the charges”, was “not established to the threshold of beyond reasonable doubt”, or was “triggered by a fundamental mistake of fact”.¹⁶³⁹ Yet his criticism both misapplies the concept of “bad character” evidence and mistakes the Chamber's approach.

457. Although “bad character” evidence has traditionally been approached with caution, at least in common law jurisdictions,¹⁶⁴⁰ this historical concern has decreased as trial procedures have become more sophisticated.¹⁶⁴¹ Nor is this concern so well-founded when professional judges, rather than juries, are the finders of fact.¹⁶⁴² Bemba thus overstates the case when he suggests that the *ad hoc* tribunals consider the “prejudicial value” of *all* evidence which might be termed “bad character” evidence to “outweigh[] its probative value”.¹⁶⁴³ To the contrary, although the *Bagosora* Trial Chamber stressed the inadmissibility of evidence introduced “*merely* to blacken the character of the Accused” by showing a

¹⁶³⁸ [Judgment](#), para. 819 (“It was critical for the success of such a plan that this influence on the witnesses be concealed, as their testimony would otherwise lose all credibility”).

¹⁶³⁹ [Bemba Brief](#), paras. 107-108.

¹⁶⁴⁰ This is because it may tend to be “very influential in its effect” on a finder of fact, since it is potentially highly probative, but also potentially highly prejudicial: see *e.g.* Tapper, pp. 371-372; Gosnell, p. 433.

¹⁶⁴¹ See *e.g.* Tapper, p. 381 (fn. 81, quoting *Chopra*, para. 12: “whereas previously evidence of the defendant’s propensity to offend in the manner now charged was *prima facie* inadmissible, now it is *prima facie* admissible”); Keane, pp. 480-481. See further below para. 458.

¹⁶⁴² See *e.g.* [Milutinović Decision](#), para. 19; [Bagosora Decision](#), para. 28. See also [Bagosora Appeal Decision](#), para. 20.

¹⁶⁴³ *Contra* [Bemba Brief](#), para. 109 (citing [Bagosora Decision](#), paras. 12, 17, 35).

general criminal propensity,¹⁶⁴⁴ it recognised that “[t]his does not preclude the introduction of such evidence for *other valid purposes*, if those purposes exist, and if they outweigh the prejudicial effect”.¹⁶⁴⁵ This reasoning was affirmed on appeal.¹⁶⁴⁶ Indeed, information about uncharged crimes or other acts has “*often*” been “introduced during international criminal trials”, for example “to establish a pattern of conduct”, “to prove a contextual aspect of the case”, or to assist in showing the knowledge and intent of the accused.¹⁶⁴⁷ Bemba’s blanket and unsubstantiated assertion that it can never “pertain[] to the accused’s personal conduct”, unless the accused has ‘opened the door’, is incorrect.¹⁶⁴⁸

458. Even in the modern law of England and Wales—not only a jury system, but the single domestic jurisdiction to which Bemba effectively refers, and upon which he relies¹⁶⁴⁹—two important considerations apply. First, “bad character” evidence does *not* encompass evidence which “has to do with the alleged facts of the offence with which the defendant is charged” or “evidence of misconduct in connection with the investigation or prosecution of that offence”.¹⁶⁵⁰ To the contrary, such evidence is admissible in the ordinary fashion.¹⁶⁵¹ Second, even genuine “bad character evidence” may still be admissible, for example if it is “important explanatory evidence” or if it is “relevant to an important matter in issue between the defendant and the prosecution”.¹⁶⁵²

459. It follows that Bemba’s complaints must be closely examined on their substance—a general dismissal of evidence as going to “bad character” is insufficient.¹⁶⁵³ Instead, a specific assessment in the concrete circumstances must be made of the probative value

¹⁶⁴⁴ [Bagosora Decision](#), para. 17 (emphasis added).

¹⁶⁴⁵ [Bagosora Decision](#), para. 35 (emphasis added). See e.g. para. 14 (“similar fact” evidence, revealing “a propensity that is so highly distinctive or unique as to constitute a signature” is admissible).

¹⁶⁴⁶ [Bagosora Appeal Decision](#), paras. 13-14, 17.

¹⁶⁴⁷ Gosnell, pp. 429-430 (emphasis added); see also pp. 431-433. See e.g. [Popović Appeal Decision](#), para. 24; [Šešelj Appeal Decision](#), paras. 21-25; [Kupreškić AJ](#), paras. 321-322; [Milutinović Decision](#), paras. 9-10, 12; [Strugar Decision](#); [Kunarac TJ](#), paras. 589, 591. At this Court, see also e.g. [Ntaganda Rape Admissibility Decision](#), paras. 13-14, 17; [Ntaganda Rape Admissibility ALA Decision](#); [Ntaganda Oral Admissibility Decisions](#), pp. 11-12, 61-63; [Ntaganda Oral Admissibility ALA Decision](#). Cf. [Bemba Brief](#), paras. 109-110; Ambos (2016), pp. 506-507.

¹⁶⁴⁸ [Bemba Brief](#), para. 109.

¹⁶⁴⁹ [Bemba Brief](#), paras. 110-111 (fns. 181-182, citing *Mitchell*, paras. 7, 16, 43-45, 53). In material respects, the law of Northern Ireland follows “its England and Wales counterpart”, by virtue of the [Criminal Justice \(Evidence\) \(Northern Ireland\) Order 2004](#); *Mitchell*, para. 31.

¹⁶⁵⁰ [Criminal Justice Act 2003](#), s. 98. See also Tapper, pp. 383-386; Keane, pp. 482-484.

¹⁶⁵¹ Keane, p. 484.

¹⁶⁵² [Criminal Justice Act 2003](#), s. 101(1). Such evidence is also subject to certain procedural safeguards. See generally Tapper, pp. 381-383, 392-396, 401-407.

¹⁶⁵³ See also [Milutinović Decision](#), para. 12 (“It is difficult to distil[] from any of these specific cases a general jurisprudential principle that can apply across the board to all other cases”).

weighed against any prejudicial effect.¹⁶⁵⁴ In this context, Bemba confuses evidence relevant to show the working of the Common Plan, or its context, with supposed evidence that Bemba has “a propensity to commit a crime of a similar nature” or has “always been of a criminal mind”.¹⁶⁵⁵ This is unsupported by the Judgment, which recognised that the impugned evidence *does* touch on the actual events charged, and was not admitted to show propensity. For this same reason, *Mitchell* is inapposite.¹⁶⁵⁶

VI.C.1.c.i Bemba’s multi-party phone call with D-19 is not “bad character” evidence

460. Evidence that Bemba spoke with D-19 via a multi-party phone call enabled by Kilolo is not “bad character” evidence, since it “has to do with the alleged facts of the offence with which the defendant is charged”.¹⁶⁵⁷ The Chamber relied upon Bemba’s multi-party call with D-19, abusing the privileged line established by the Registry, as evidence of the steps taken to conceal the Common Plan, including by Bemba. Where crimes are charged within a common purpose, it follows that evidence of other conduct *within that same common purpose* (in this case, maintenance of secrecy),¹⁶⁵⁸ is evidence “to do with” the charged crimes,¹⁶⁵⁹ even though D-19 was not charged as one of the 14 witnesses ultimately subject to interference.¹⁶⁶⁰ It is not propensity, pattern or any other form of “bad character” evidence.

461. Moreover, even if this evidence were to be considered “bad character” evidence, Bemba fails to show any error in the Chamber’s approach. Indeed, Bemba’s specific arguments concerning D-19 do not challenge the admissibility of this evidence but merely assert that the Chamber erred in fact. Bemba wrongly suggests that evidence of the multi-party phone call between Bemba and D-19 is relevant “to ascribe illicit intention to Mr.

¹⁶⁵⁴ [Milutinović Decision](#), para. 12; [Bagosora Decision](#), para. 18.

¹⁶⁵⁵ *Contra* [Bemba Brief](#), para. 110.

¹⁶⁵⁶ *Contra* [Bemba Brief](#), para. 111 (citing *Mitchell*, paras. 43-44). The UK Supreme Court considered that, if propensity is relied upon, that propensity must be established beyond reasonable doubt, because “[e]vidence about a propensity or tendency to commit a specific type of crime [...] is not *in pari materia* with testimony that touched on the actual events said to constitute the particular crime involved”: *Mitchell*, para. 44. Nor was it required that “each individual item of evidence said to show propensity must be proved beyond reasonable doubt.”

¹⁶⁵⁷ *See above* para. 458.

¹⁶⁵⁸ *See above e.g.* para. 455.

¹⁶⁵⁹ By analogy, *see e.g.* Keane, p. 484 (section 98(a) of the *Criminal Justice Act 2003* “also covers misconduct other than the offence charged, for example, evidence of an assault or criminal damage committed in the course of a burglary with which the accused is charged”).

¹⁶⁶⁰ *See also above* para. 416 (the common plan was not specific as to which witnesses would be subject to interference, but rather encompassed all interference with witnesses which was necessary to achieve the object of the common plan).

Bemba as concerns [...] [Bemba's] communication with [P-214 (D-55)]".¹⁶⁶¹ This is unelaborated, unsupported by the Judgment and incorrect. To the contrary, the D-19 call was relevant as another example of the types of measures taken to conceal the Common Plan (abusing the privileged line), and the significance and meaning of the call with D-55 can be assessed independently.¹⁶⁶² Bemba's calls with D-55, D-19 and Babala are cited as equal examples of his abuse of the privileged line.¹⁶⁶³ The timing of Bemba's call with D-19, thus, has no significance on the probative value assigned to it by the Chamber, either in itself or with regard to D-55.¹⁶⁶⁴

462. In this context, although it is true that the Judgment appears to contain a minor error in its reasoning concerning the multi-party phone call between Bemba and D-19, this is harmless. The Prosecution notes that the Judgment cites no evidence supporting a "multi-party call [...] between Mr Bemba and D-19 on 4 October 2012",¹⁶⁶⁵ and indeed the Prosecution alleged no such call during trial.¹⁶⁶⁶ Rather, the Prosecution alleged that this call occurred on 13 January 2013¹⁶⁶⁷—as the Chamber also found.¹⁶⁶⁸ Nor is there any material distinction, for the purpose of the Chamber's analysis, between a finding that this call occurred on 4 October 2012 and 13 January 2013. First, the basis for attributing the numbers of Bemba, Kilolo and D-19 on 13 January 2013 does not depend on any evidence relating to 4 October 2012.¹⁶⁶⁹ Second, the Chamber's conclusion that "Kilolo had the technical abilities as well as the idea for such a multi-party call in mind as early as 4 October 2012"¹⁶⁷⁰ need only be adjusted by a single day—the multi-party call between Bemba and D-55, which

¹⁶⁶¹ [Bemba Brief](#), para. 112.

¹⁶⁶² Compare [Judgment](#), para. 741, with paras. 735-740, 742-769 (analysis of measures to conceal the Common Plan). See also paras. 282-305 (analysis concerning D-55, with no mention of D-19). On the significance of the measures to conceal the common plan in the Chamber's analysis, see *above* paras. 439, 449, 453.

¹⁶⁶³ [Judgment](#), para. 816 ("Bemba spoke on the telephone to witnesses D-55 and D-19, or other persons, such as the co-accused Mr Babala, abusing the Registry's privileged line").

¹⁶⁶⁴ *Contra* [Bemba Brief](#), para. 112.

¹⁶⁶⁵ [Judgment](#), para. 741 (including no citations relevant to 4 October 2012). Furthermore, the Chamber's subsequent observation that "it established in the case of D-55 that Mr Kilolo did enable such a multi-party call the following day" does not seem to support any call on 4 October 2012, since Bemba's multi-party call with D-55 itself occurred the day after, on 5 October 2012: see paras. 740-741. See also [Bemba Brief](#), Annex G.

¹⁶⁶⁶ See [Prosecution Pre-Trial Brief](#), para. 46 (fn. 106); [Prosecution Final Brief](#), paras. 81, 274-278, 319.

¹⁶⁶⁷ Compare [Prosecution Pre-Trial Brief](#), para. 46 (fn. 106: "Witness D-19: BEMBA called KILOLO, and then KILOLO called D-19, while still on the line with BEMBA. CAR-OTP-0072-0391, rows 16728, 16732; CAR-OTP-0074-0066, row 21. D-19 used the number "[REDACTED]". See CAR-OTP-0077-0942 at 0942, row 16"), with [Judgment](#), para. 741 (fns. 1697-1698: citing CAR-OTP-0072-0391, rows 16728, 16732; CAR-OTP-0074-0066, row 21; CAR-OTP-0077-0942 at 0942, row 16).

¹⁶⁶⁸ [Judgment](#), para. 741.

¹⁶⁶⁹ See CAR-OTP-0072-0391, rows 16728, 16732; CAR-OTP-0074-0066, row 21; CAR-OTP-0077-0942 at 0942, row 16.

¹⁶⁷⁰ [Judgment](#), para. 741.

occurred on 5 October 2012, points to essentially the same conclusion.¹⁶⁷¹ This adjustment has no effect on the broader findings concerning the Common Plan or its commencement.¹⁶⁷²

VI.C.1.c.ii Kilolo's and Mangenda's discussion of potential witness Bravo is not "bad character" evidence

463. Evidence that Kilolo stated, in conversation with Mangenda, that he would only call potential witness Bravo if he agreed to be "briefed" by him "all day and every night"¹⁶⁷³ is not "bad character" evidence, since it "has to do with the alleged facts of the offence with which the defendant is charged".¹⁶⁷⁴ For the same reason, neither is Mangenda's response to Kilolo that:

[Y]ou have to... have to tell the Client that... that it's... he's the one who needs to weigh up the pros and cons. He has to be told that side of things, because if he comes and... he screws up, it's... the Client who'll lose face, isn't it?¹⁶⁷⁵

464. The direct relevance of these observations to the charged offences is demonstrated by the Chamber's express reliance on them as an example of "the illicit coaching strategy", and "the close collaboration and interplay between the three co-perpetrators" including "Bemba's knowledge and approval of the illicit coaching strategy" and "ultimate control over who would be called to testify."¹⁶⁷⁶ These two factors are central to the charged Common Plan.¹⁶⁷⁷

465. Bemba fails to show any error, even if this evidence were considered "bad character" evidence, nor does he relate his specific challenge to the "Bravo" evidence to its admissibility. First, there was no obligation for details of this specific conversation between Kilolo and Mangenda to be charged in the DCC¹⁶⁷⁸—Bemba confuses evidence for material facts.¹⁶⁷⁹ Second, although the evidence is a recorded conversation, the probative content concerns Kilolo's and Mangenda's own views, and not the views of anyone else.¹⁶⁸⁰ Hearsay

¹⁶⁷¹ [Judgment](#), para. 740.

¹⁶⁷² *See above* para. 452 (the Common Plan crystallised at some point on or preceding 17 October 2012).

¹⁶⁷³ [Judgment](#), para. 714.

¹⁶⁷⁴ *See above* para. 458.

¹⁶⁷⁵ [Judgment](#), para. 714, fn. 1647.

¹⁶⁷⁶ [Judgment](#), para. 715. *See also* paras. 714, 719, 760, 787, 812, 825, 839.

¹⁶⁷⁷ *See above* para. 460 (*especially* fn. 1659).

¹⁶⁷⁸ *Contra* [Bemba Brief](#), para. 113.

¹⁶⁷⁹ *See above* paras. 337 and 352.

¹⁶⁸⁰ *Cf.* [Bemba Brief](#), para. 113 (describing this evidence as "untested hearsay").

is not inadmissible in principle.¹⁶⁸¹ Nor does anything in the Judgment suggest that the Chamber relied upon the conversation as *direct* evidence of Bemba’s knowledge, but rather as evidence which—in the context of all the other evidence—required the inference of his knowledge. By addressing this one conversation in isolation from all the other evidence,¹⁶⁸² Bemba fails to show that no reasonable Chamber could have reached this conclusion.¹⁶⁸³

VI.C.1.c.iii The co-perpetrators’ ‘remedial measures’ are not “bad character” evidence

466. Evidence that Bemba and the other co-perpetrators sought to frustrate the investigation of their article 70 crimes—the ‘remedial measures’—is not “bad character” evidence, since it is plainly “evidence of misconduct in connection with the investigation or prosecution”.¹⁶⁸⁴ Nor does Bemba show any error, even if this evidence were to be considered “bad character” evidence; he does not assert that it was inadmissible, but rather that the Chamber erred in law in its interpretation of articles 30 and 32.¹⁶⁸⁵

467. Bemba misses the point of the Judgment when he contends that it is impermissible “to rely on a person’s awareness as to a specific circumstance or consequence, if this awareness was generated through false information.”¹⁶⁸⁶ First, although the co-perpetrators might have been mistaken on whether or not the Prosecution had contacted certain witnesses, they were correct in believing that they were under investigation for article 70 offences.¹⁶⁸⁷ Accordingly, their conduct responding to that belief was not based on false information, and indeed was both relevant and probative. Second, the Chamber did not rely solely on the ‘remedial measures’ for any finding essential to Bemba’s liability but, rather, these were but one factor taken into account.¹⁶⁸⁸ Bemba’s mere incorporation by reference of his unsuccessful trial argument shows no error in this context,¹⁶⁸⁹ nor is he assisted by

¹⁶⁸¹ See e.g. [Ngudjolo AJ](#), para. 226 (“the fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, ‘although even this will depend upon the infinitely variable circumstances which surround hearsay evidence [...]’”); [Bemba TJ](#), para. 238. See also above paras. 66 and 185.

¹⁶⁸² See above paras. 326 - 329.

¹⁶⁸³ *Contra* [Bemba Brief](#), para. 113.

¹⁶⁸⁴ See above para. 458. By analogy, see e.g. Keane, p. 484 (section 98(b) of the [Criminal Justice Act 2003](#) “covers, for example, evidence that [...] during the investigation or proceedings the [...] accused had sought to intimidate potential witnesses”).

¹⁶⁸⁵ [Bemba Brief](#), para. 115.

¹⁶⁸⁶ [Bemba Brief](#), para. 115.

¹⁶⁸⁷ *Cf.* [Bemba Brief](#), para. 114.

¹⁶⁸⁸ See above paras. 439, 445, 447-449, 453.

¹⁶⁸⁹ *Contra* [Bemba Brief](#), para. 115 (fn. 191). See [Krajišnik AJ](#), para. 24.

unexplained reference to sixteen pages of evidence,¹⁶⁹⁰ or unexplained (and apparently wholly unrelated) case law concerning money-laundering¹⁶⁹¹ and entrapment.¹⁶⁹²

VI.C.2. Bemba made an essential contribution to the crimes within the framework of the Common Plan

468. The Chamber reasonably determined that Bemba made an essential contribution to the implementation of the Common Plan, including by exercising an overall coordinating role, involving himself in the planning of the illicit coaching; providing instructions, feedback and approval to Kilolo and Mangenda; approving the provision of funds; and participating in concealing the activities of the Common Plan.¹⁶⁹³ Bemba shows no error in these conclusions.

VI.C.2.a. Contributions need not be criminal in and of themselves (Bemba Ground 2.3.4)

469. It is well established that contributions to a common plan, itself containing the critical element of criminality, need not be criminal in nature.¹⁶⁹⁴ This common sense conclusion flows from two basic and uncontroversial principles: that a person may be liable for the ‘commission’ of crimes if they make a sufficient contribution to the execution of a relevant common purpose; and a person need not have physically committed any of the crimes within that common purpose.¹⁶⁹⁵ These same principles underlie liability under article 25(3)(a),¹⁶⁹⁶ and hence the *ad hoc* tribunals’ caselaw is, in this respect, consistent with the framework of

¹⁶⁹⁰ [Bemba Brief](#), para. 115 (fn. 192, citing “Annex C”).

¹⁶⁹¹ [Bemba Brief](#), para. 115 (fn. 191, citing *GH*). In *GH* (paras. 20, 32-37, 40, 50), the UK Supreme Court ruled that, for the purpose of domestic money-laundering legislation, “criminal property” must have that status independently, and not by operation of the legislation itself.

¹⁶⁹² [Bemba Brief](#), para. 115 (fn. 192, citing *Shannon*, p. 11; *Nottingham City Council; Healthcare Professionals*). In *Shannon* (p. 13), the ECtHR did not even find the appearance of a violation of the ECHR, art. 6, and declared the application inadmissible. In *Nottingham City Council* (p. 1076H), the Divisional Court reversed the ruling of a stipendiary magistrate that the evidence of “agents provocateurs” should be excluded because of ECHR, art. 6. In *Healthcare Professionals*, the High Court reversed a decision of the General Medical Council’s Fitness to Practise Panel because entrapment of a doctor by a journalist did not amount to an abuse of process.

¹⁶⁹³ [Judgment](#), para. 816. See also para. 817 (referring to “Bemba’s essential contributions to the common plan taken as a whole”). See further above paras. 449-450.

¹⁶⁹⁴ [Stanišić & Župljanin AJ](#), paras. 110 (recalling consistent caselaw that a “contribution to a joint criminal enterprise need not be in and of itself criminal, as long as the accused performs acts (or fails to perform acts)” that make the necessary contribution “to the furtherance of the common purpose”), 731. See further e.g. [Popović AJ](#), paras. 1615, 1653 (recalling, also, the dictum from *Blagojević and Jokić* that “the fact that [the accused’s] participation amounted to no more than his or her ‘routine duties’ will not exculpate the accused”); [Šainović AJ](#), para. 985; [Krajišnik AJ](#), paras. 215, 695-696; [Babić SAJ](#), para. 38; [Kvočka AJ](#), paras. 99, 263; [Ntakirutimana AJ](#), para. 466; [Vasiljević AJ](#), para. 100; [Krnojelac AJ](#), paras. 31, 81; [Tadić AJ](#), para. 227.

¹⁶⁹⁵ [Krajišnik AJ](#), para. 695.

¹⁶⁹⁶ See e.g. [Lubanga AJ](#), paras. 465-466, 469; [Katanga TJ](#), para. 1391; [Blé Goudé Confirmation Decision](#), para. 134.

the Statute and should be followed.¹⁶⁹⁷ By contrast, Bemba’s general assertion that “neutral acts generally cannot constitute co-perpetration” is inconsistent with the logic of the Statute and should be rejected. Not only is it based on a small sample of international and domestic caselaw, but the cited authorities—all apparently relating to accessorial liability—do not support this point.¹⁶⁹⁸ It is also beset by two significant flaws.

470. First, Bemba is incorrect when he asserts that the Chamber failed to find that he had the necessary subjective awareness concerning his own conduct.¹⁶⁹⁹ It properly directed itself that article 30 requires proof that Bemba acted with intent and knowledge,¹⁷⁰⁰ and that it was the three co-perpetrators’ “mutual awareness and acceptance” of the criminal plan¹⁷⁰¹—constituted by “the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner”¹⁷⁰²—which “justifies that the contributions made by the others may be attributed to each of them” and that they may be “held responsible as principals”.¹⁷⁰³ The Chamber’s findings concerning Bemba’s intent and knowledge must be understood accordingly, and thus its conclusion that Bemba knew of “the co-perpetrators’ concerted actions”, executing the Common Plan, necessarily includes the requisite subjective awareness of his own actions.¹⁷⁰⁴ This is confirmed by the Chamber’s further observation that “Bemba intended to engage in the relevant conduct and acted with full awareness that implementing the common plan will result in the fulfilment of the material elements of the crimes”.¹⁷⁰⁵

¹⁶⁹⁷ This is the case notwithstanding the distinctions between JCE liability and article 25(3)(a): see [Lubanga AJ](#), paras. 470-472.

¹⁶⁹⁸ *Contra* [Bemba Brief](#), para. 119 (fn. 196, citing the entirety of a German authority of 20 September 1999 (for which no translation into a working language of the Court has been provided); *Van Anraat*, para. 7; *Kouwenhoven*, para. 9.3; [Stanišić and Simatović AJ](#), paras. 94-109). In *Van Anraat*, at para. 7, the Court considered the responsibility of the accused as an accessory to genocide, and determined, on the facts, that the accused’s knowledge of the crimes of the principal(s) was insufficiently established. In *Kouwenhoven*, at para. 9.3, the Court discussed the existence of an armed conflict at the relevant times, and noted that the allegations of the accused’s responsibility as an accessory to crimes in this conflict would have to be inferred from the evidence. In *Stanišić and Simatović*, at paras. 94-109, the ICTY Appeals Chamber recalled that it had previously rejected the doctrine of ‘specific direction’ in aiding and abetting in *Šainović* and *Popović*, and therefore found that the Trial Chamber had erred in imposing such a requirement.

¹⁶⁹⁹ *Contra* [Bemba Brief](#), para. 117.

¹⁷⁰⁰ [Judgment](#), para. 70.

¹⁷⁰¹ [Judgment](#), para. 71.

¹⁷⁰² [Judgment](#), para. 62.

¹⁷⁰³ [Judgment](#), para. 71.

¹⁷⁰⁴ [Judgment](#), para. 807 (Bemba “knew that it was virtually certain that the implementation of the common plan through the co-perpetrators’ concerted actions would bring about the material elements of the offences”, emphasis added). See also [Bemba Brief](#), para. 116.

¹⁷⁰⁵ [Judgment](#), para. 817.

471. Second, the article 30 requirements (*mens rea*) are formally independent from the requirements under article 25(3)(a) for a co-perpetrator's contribution to the common plan (*actus reus*). Although both must be established for a person to be convicted, the manner in which *one* is proved does not depend upon the manner in which the *other* is proved. Nor is it impermissible to rely on common evidence to satisfy *both* requirements.¹⁷⁰⁶ Bemba presents no authority for his argument that “conduct, which was not *per se* illicit” must be “corroborated by *independent* evidence that the accused engaged in this conduct with the intent to fulfil the material elements of the offences”.¹⁷⁰⁷ Again, neither of the authorities cited appears even to be on point for this proposition, much less to support it.¹⁷⁰⁸

472. Likewise, Judge Fernández's separate opinion to the *Mbarushimana* appeal is irrelevant. Her comment was not concerned with any principled requirement for *separate evidence* to prove *actus reus* and *mens rea*, but rather called for attention to “normative and causal” considerations when assessing whether conduct actually is a contribution to a crime.¹⁷⁰⁹ Yet even to the extent there may be such a concern in the context of aiding and abetting,¹⁷¹⁰ this is diminished in the context of article 25(3)(a), which already amounts to “a normative assessment of that person's role”¹⁷¹¹ through consideration of the framework of the common plan and the essential contribution made by the accused.¹⁷¹² Bemba is incorrect to suggest this is impossible if the Chamber “relied on non-licit conduct in order to establish both the *actus reus* and *mens rea* of the accused.”¹⁷¹³

473. In any event, Bemba is also incorrect to imply that the Chamber relied solely on “neutral contributions” both to find that he essentially contributed to the common purpose and to infer his *mens rea*.¹⁷¹⁴ To the contrary, his conduct not only included acts which might

¹⁷⁰⁶ See also e.g. [Gate AJ](#), para. 263.

¹⁷⁰⁷ [Bemba Brief](#), para. 117 (emphasis supplied).

¹⁷⁰⁸ [Bemba Brief](#), para. 117 (fn. 194, citing [Mbarushimana Confirmation Decision](#), para. 132; [Ruto and Sang Termination Decision](#), per Judge Fremr, paras. 135-136). However, the cited passage of *Mbarushimana* concerns a factual finding on the murder and mutilation of a civilian. The cited passage of *Ruto and Sang* concerns Judge Fremr's doubt whether, on the facts, Ruto's conduct actually constituted a sufficient contribution for the purposes of article 25(3)(b) or (c).

¹⁷⁰⁹ [Mbarushimana AD](#), Separate Opinion of Judge Fernández de Gurmendi, para. 12.

¹⁷¹⁰ But see [Judgment](#), paras. 94-95, 97-98; [Blé Goudé Confirmation Decision](#), para. 167; [Ongwen Confirmation Decision](#), para. 43; [Al Mahdi Confirmation Decision](#), para. 26. See also article 25(3)(c) (“For the purpose of facilitating the commission of such a crime [...]”). See below fn. 1740.

¹⁷¹¹ [Lubanga AJ](#), para. 466. See also para. 471.

¹⁷¹² See below para. 479. See also [Lubanga AJ](#), para. 469.

¹⁷¹³ Contra [Bemba Brief](#), para. 118.

¹⁷¹⁴ Contra [Bemba Brief](#), paras. 117-118. See also [Mbarushimana AD](#), Separate Opinion of Judge Fernández de Gurmendi, para. 12 (in the context of article 25(3)(d), referring to a “neutral contribution” as a contribution

ostensibly be legitimate, but also acts which he knew to be—and could only be—directed to criminal purposes such as: playing “a critical role in providing instructions, feedback, and approval on the topics to which witnesses were illicitly coached”; “approving the payment of money, including illicit payments, to witnesses”; and “[a]uthorising, ensuring and/or implementing measures to conceal the common plan”.¹⁷¹⁵ Bemba’s account of the conduct relevant to his essential contribution is thus selective, and deprives even those incidents of their broader context.¹⁷¹⁶ This is graphically illustrated by his view that the conduct in question was “either protected by Article 67(1) of the Statute, or encouraged by the Trial Chamber and VWU”.¹⁷¹⁷ To the contrary:

- Bemba’s discussion with Kilolo concerning D-15 was far from innocuous,¹⁷¹⁸ especially given its coincidence with Kilolo’s “extensive” rehearsal, instruction, correction and scripting of D-15’s testimony, which D-15 followed “scrupulously”;¹⁷¹⁹ nor was this the only evidence that Bemba provided instructions, feedback, and approval on the topics on which witnesses were illicitly coached;¹⁷²⁰
- Bemba’s “concrete instructions” concerning “possible topics to be addressed” in D-54’s testimony, “and the manner in which the witness was expected to testify”,¹⁷²¹ were far more than mere “information concerning the ‘Defence case’ to be put to potential witnesses during investigations”—a supposition which the Chamber

which is so trivial that no relation between the conduct of the accused and any element of the crime can be established).

¹⁷¹⁵ See *above* paras. 449 (*especially* fns. 1606-1608), 453 (*especially* fns. 1628-1631).

¹⁷¹⁶ *Contra* [Bemba Brief](#), para. 120.

¹⁷¹⁷ *Contra* [Bemba Brief](#), para. 121.

¹⁷¹⁸ See [Judgment](#), paras. 168, 567-568, 729, 809-810. *Contra* [Bemba Brief](#), para. 120.

¹⁷¹⁹ [Judgment](#), para. 590, 592 (“Bemba was updated by Mr Kilolo on the questions rehearsed with D-15” and “Bemba knew about and approved Mr Kilolo’s illicit coaching activities” and “provided feedback on how specific issues should be handled when he felt they were handled wrongly by Mr Kilolo”). See *further* paras. 543-588; *below* paras. 508-514.

¹⁷²⁰ See *e.g.* [Judgment](#), paras. 600-606, 686, 729, 734 (Mangenda relayed Bemba’s precise instructions concerning D-54’s testimony to Kilolo); 535, 728, 734 (Bemba knew of the need for illicit coaching); 730-731, 734 (in conversation with Kilolo, Mangenda recalled a time when he witnessed Bemba giving instructions concerning a witness and his testimony); 293-298, 305, 740, 769 (Bemba took steps to circumvent the Registry monitoring system to talk directly with D-55); 741, 769 (Bemba took steps to circumvent the Registry monitoring system to talk directly with D-19, an uncharged witness); 749, 753-754, 756-757, 769 (Bemba insisted on the use of coded language in speaking with Kilolo and Mangenda, including a coded term for the illicit coaching or bribing of witnesses).

¹⁷²¹ [Judgment](#), para. 811. See *also* paras. 652-653.

expressly and reasonably rejected¹⁷²²—but indeed the immediate prelude to inviting D-54 to testify, and Kilolo’s coaching of him;¹⁷²³

- Bemba not only concedes that the Chamber found he authorised payments to D-57 and P-243 (D-64) knowing them to have an illicit purpose,¹⁷²⁴ but also fails to acknowledge the broader evidence of his control over the disbursement of funds, “including illicit payments to witnesses”;¹⁷²⁵
- Bemba did not merely “[t]hank[] a witness for testifying”,¹⁷²⁶ but “intentionally circumvented the Registry’s monitoring system” to do so;¹⁷²⁷ the Chamber thus reasonably found, in this context and the context of the other relevant evidence more generally, that Bemba’s communication was done “with the intention of motivating D-55 to give specific testimony”.¹⁷²⁸

474. Bemba also fails to address other factors upon which the Chamber relied to evaluate his actions, and his view of their legitimacy, such as his broader involvement in concealing the Common Plan, and in the ‘remedial measures’ when he became aware of the article 70 investigation.¹⁷²⁹ Likewise, he fails to acknowledge the Chamber’s finding that, although his ability to take practical measures contributing to the Common Plan was limited by his incarceration,¹⁷³⁰ he played a key role as architect and mastermind of the scheme as a whole.¹⁷³¹ This alone may be a sufficient contribution,¹⁷³² proven inferentially from all the circumstances.

¹⁷²² *Contra* [Bemba Brief](#), para. 120. See [Judgment](#), para. 605.

¹⁷²³ Bemba’s instructions were relayed to Kilolo by Mangenda on 30 August 2013, when D-54 had not yet been called to testify, and shortly after Kilolo had reminded Mangenda of “prior conversations with Mr Bemba where he clarified the need to properly instruct witnesses concerning their testimonies”: [Judgment](#), paras. 535, 599 (fn. 1305), 600-602. By 1 September 2013, however, Kilolo reported to Mangenda that D-54 was willing to testify, and expressed his intention to convince D-54 “to testify on a proposition that he had supposedly and fervently rejected beforehand”: [Judgment](#), paras. 608-609. On the coaching of D-54, see *further* paras. 610-651.

¹⁷²⁴ [Bemba Brief](#), para. 120. See [Judgment](#), paras. 700-701, 813.

¹⁷²⁵ [Judgment](#), para. 695. See *further* paras. 689-694, 696-703, 798, 813.

¹⁷²⁶ *Contra* [Bemba Brief](#), para. 120.

¹⁷²⁷ [Judgment](#), para. 814. See also paras. 293-298, 305, 740, 769.

¹⁷²⁸ [Judgment](#), paras. 298, 305.

¹⁷²⁹ See *above* paras 439 (*especially* fns. 1562-1573), 449 (*especially* fn. 1608), 453 (*especially* fns. 1628, 1632).

¹⁷³⁰ See [Judgment](#), para. 727; [Sentencing Decision](#), para. 223.

¹⁷³¹ See [Judgment](#), paras. 727 (“the ultimate beneficiary of illicit coaching, whom both Mr Kilolo and Mr Mangenda intended to keep satisfied” and whose “role consisted in approving the coaching strategy and giving directions”), 816 (“an overall coordinating role”); *further above* para. 450.

¹⁷³² [Judgment](#), para. 69. See *further above* para. 450 (fn. 1613).

475. Finally, the Chamber did not need to provide extensive reasoning as to whether *each* act by Bemba itself “had [an] intentional impact on the realisation of the specific charged offences.”¹⁷³³ Having established the existence of the Common Plan beyond reasonable doubt, and provided that it was also satisfied overall that Bemba made an essential contribution to that plan with the requisite intent and knowledge, the Chamber did not need to parse the circumstances of each individual event. This follows not only from the principle that contributions need not be criminal *per se*,¹⁷³⁴ but also from the requirement for contributions to be made within the framework of the common plan,¹⁷³⁵ and the recognition that co-perpetration may be proven circumstantially.¹⁷³⁶ Bemba’s criticism of the Chamber’s treatment of three aspects of his conduct is thus misplaced, and takes the evidence in isolation.¹⁷³⁷

476. Bemba’s misunderstanding of the law in this respect is further illustrated by his reference instead to discussion of the concept of ‘remoteness’ in aiding and abetting¹⁷³⁸—specifically, temporal and geographic remoteness between *accessories* and principal perpetrators.¹⁷³⁹ Yet aiding and abetting is distinguished from co-perpetration, among other factors, by the lack of shared intent for the commission of the crime (through participation in a common plan).¹⁷⁴⁰ Accordingly, the potential concerns arising in *Perišić* are otiose in the context of co-perpetration, where necessarily there is no ‘remoteness’ between the co-perpetrators if the common plan is proved. The wide geographic scope over which the common plan may itself be *implemented* is irrelevant.¹⁷⁴¹

¹⁷³³ [Bemba Brief](#), para. 122.

¹⁷³⁴ *See above* para. 469.

¹⁷³⁵ *See below* paras. 477-480.

¹⁷³⁶ *See below* para. 496.

¹⁷³⁷ *Contra* [Bemba Brief](#), para. 122.

¹⁷³⁸ *Contra* [Bemba Brief](#), para. 122.

¹⁷³⁹ [Perišić AJ](#), para. 40 (discussing “factors indicating that acts of an accused *aider and abettor* are remote from the crimes of principal perpetrators”, emphasis added).

¹⁷⁴⁰ *See e.g.* [Judgment](#), para. 97 (clarifying that the “elevated subjective standard” in article 25(3)(c) “relates to the accessory’s facilitation, not the principal offence”). *See also* para. 98 (noting that the aider and abettor must also “at least be aware that the principal perpetrator’s offence will occur in the ordinary course of events”, emphasis added, but recognising that the aider and abettor need not “know the precise offence which was intended [by the principal] and which in the specific circumstance was committed”, provided they know “its essential elements”). Accordingly, the aider and abettor’s awareness of the principal’s offence cannot be the same as the intent of the co-perpetrator for their *own conduct*, even if proven at the lesser standard in article 30 (knowledge that crimes will occur in the ordinary course of events as a consequence of the common plan of which they are a proven member).

¹⁷⁴¹ *Cf.* [Bemba Brief](#), para. 122 (noting Bemba’s “geographic remoteness from the witnesses, and the in situ activities of his Defence”, emphasis added). *See also* [Lubanga AJ](#), para. 473 (“the question of whether an

VI.C.2.b. The Chamber applied the ‘joint control’ theory correctly (Bemba Ground 2.5, Part D)

477. Bemba misunderstands article 25(3)(a) and the case law of this Court when he criticises the Chamber’s application of the statutory regime to convict him as a co-perpetrator. It is not necessary for a co-perpetrator to make an essential contribution to each charged criminal *incident*, provided that those incidents occur within the framework of the common plan, to which the co-perpetrator *did* make an essential contribution, with intent and knowledge. Accordingly, there was no obligation to enter findings with the specificity Bemba claims.¹⁷⁴² As the following paragraphs demonstrate, the Chamber was legally correct to convict on the basis of proof of Bemba’s “essential” contribution, “without which the influencing of the witnesses”—in other words, the *Common Plan*, and the crimes resulting from it—“would not have occurred *in the same way*.”¹⁷⁴³

478. Article 25(3)(a) provides for three types of perpetration liability:¹⁷⁴⁴ direct perpetration, indirect perpetration,¹⁷⁴⁵ and co-perpetration.¹⁷⁴⁶ Thus, inherently, “a person who did not him- or herself carry out the incriminated conduct can, depending on the circumstances, nevertheless be a perpetrator.”¹⁷⁴⁷ In the context of co-perpetration, “reciprocal imputation” (also known as mutual attribution) of the co-perpetrators’ acts is justified by the existence of the *agreement* to commit the charged crimes (the common plan),¹⁷⁴⁸ to which each co-perpetrator makes an “essential” contribution.¹⁷⁴⁹

479. Although various chambers of this Court (including the Chamber in this case) have correctly accepted the ‘joint control’ principle as the *means* to define an “essential” contribution, there is nonetheless a slight misnomer in suggesting this entails a power of the

accused ‘committed’ a crime [...] cannot only be answered by reference to how close the accused was to the actual crime and whether he or she directly carried out the incriminated conduct”).

¹⁷⁴² *Contra Bemba Brief*, para. 130.

¹⁷⁴³ *Judgment*, para. 924 (concerning Bemba, emphasis added). *See also* paras. 898 (Kilolo), 911 (Mangenda). *See further* paras. 68-69, 679, 804, 816, 833, 847.

¹⁷⁴⁴ *Lubanga AJ*, para. 464.

¹⁷⁴⁵ *See Lubanga AJ*, para. 465 (where a perpetrator acts “through another”).

¹⁷⁴⁶ Co-perpetrators “jointly” commit the charged crime(s), and may act directly (*i.e.*, personally) or indirectly (*i.e.*, through another, known as “indirect co-perpetration”): *see e.g. Ongwen Confirmation Decision*, paras. 37-41; *Blé Goudé Confirmation Decision*, para. 136; *Ruto et al Confirmation Decision*, paras. 286-290; *Katanga and Ngudjolo Confirmation Decision*, paras. 490-493.

¹⁷⁴⁷ *Lubanga AJ*, para. 465. *See also* para. 466; *above* para. 469.

¹⁷⁴⁸ *Lubanga AJ*, para. 445.

¹⁷⁴⁹ *Lubanga AJ*, para. 468 (requiring an “essential” contribution “because the blameworthiness of the person is directly dependent on the extent to which the person actually contributed”, and hence it is “appropriate to distinguish between liability as a perpetrator and as an accessory primarily based on the objective criterion of the accused person’s extent of contribution”).

individual accused “to frustrate the commission of *the crime*” (if this is understood in a narrow way, isolated from the framework of the common plan).¹⁷⁵⁰ Affording undue significance to this formulation may, wrongly, shift the legal emphasis from the *common plan* as the justification for mutual attribution of responsibility,¹⁷⁵¹ and risk neglecting the basic requirement in article 25(3)(a) that the co-perpetrators need only exercise *joint* control over the resulting crimes,¹⁷⁵² rather than individually.¹⁷⁵³ For this reason, the Chamber correctly situated its assessment of ‘joint control’ in the context of “a normative assessment of the role and activities of the accused person in the specific circumstances of the case, taking into account the division of tasks”.¹⁷⁵⁴ This approach is supported by four considerations.

- First, to give effect to the ordinary meaning and context of article 25(3)(a), co-perpetration must be defined to be genuinely distinct from direct and indirect perpetration. This can only be done if the co-perpetrator jointly controls (*i.e.* has the power to frustrate) the execution of the *common plan*, which results in the charged crimes, in accordance with the tasks mutually allocated. By contrast, requiring each co-perpetrator to control—to have the power to frustrate—*each and every* charged criminal incident would render co-perpetration no different from, for example, indirect perpetration.¹⁷⁵⁵
- Second, to satisfy the object and purpose of article 25(3)(a), co-perpetration liability must be able to encompass not only a *vertical* allocation of tasks but also a *horizontal* allocation of tasks. This means understanding the “essential contribution” to pertain to the common plan, and not specific criminal incidents. In a vertical allocation of tasks, a high-level co-perpetrator (like Bemba in the Common Plan in this case) may coordinate and direct the crimes while other co-perpetrators execute them.¹⁷⁵⁶ Yet in a horizontal allocation of tasks, each co-perpetrator executes a distinct portion of the

¹⁷⁵⁰ [Lubanga AJ](#), para. 469 (emphasis added; citing [Lubanga Confirmation Decision](#), para. 338; [Katanga and Ngudjolo Confirmation Decision](#), para. 484; [Katanga TJ](#), para. 1394). See also *e.g.* para. 468 (referring to “the objective criterion of the accused person’s extent of contribution to the crime”).

¹⁷⁵¹ See above para. 478.

¹⁷⁵² The crimes must, at least, be a natural consequence of the common plan, in the ordinary course of events: see below para. 487.

¹⁷⁵³ *Contra* [Bemba Brief](#), paras. 130-131.

¹⁷⁵⁴ [Judgment](#), para. 69. See also para. 62; above fn. 1743.

¹⁷⁵⁵ For example, if a person has such a position of control that he or she has the power to frustrate *every* criminal incident, even though using others physically to carry out those crimes, that person is an *indirect* perpetrator, not a co-perpetrator: see above fn. 1745.

¹⁷⁵⁶ See [Lubanga AJ](#), paras. 469, 473.

common plan, and the resulting crimes, either simultaneously or sequentially.¹⁷⁵⁷ Although the legal and moral responsibility of the co-perpetrators in this scenario is no less than in a vertical allocation of tasks, it cannot be said that each co-perpetrator has the power to frustrate the portions of the plan assigned to the others. Rather, what they each retain is the power to frustrate the successful implementation of the crimes *as they were contemplated within the common plan*.

- Third, there is no colourable argument militating *against* this interpretation of article 25(3)(a) and ‘joint control’. In particular:
 - There is no question of going *beyond* the framework of articles 25(3) and 30 but, rather, the only issue is interpreting and applying article 25(3)(a) *correctly*.¹⁷⁵⁸
 - Reference to the phrase “such a crime” in article 25(3)(a) cannot be dispositive, since it remains subject to commission “jointly”—and thus is satisfied no matter which interpretation of “essential contribution” is upheld.¹⁷⁵⁹
 - The Court may not, and should not, simply adopt whichever interpretation is the most difficult to prove.¹⁷⁶⁰ This is not the correct interpretive approach, which would indeed be sterile, and is unsupported by the authority presented.¹⁷⁶¹ Indeed, statutory interpretation remains entirely distinct from the standard and burden of proof, which always remains the same as established by article 66.
 - No matter the definition of ‘joint control’, co-perpetration remains wholly distinct from “mere membership of an organisation” or mere “association with a general criminal plan”.¹⁷⁶² Notably, co-perpetration not only requires

¹⁷⁵⁷ For example, a firing squad of five soldiers who, simultaneously or sequentially, shoot five victims, pursuant to a common plan. See also e.g. [Tadić AJ](#), paras. 230-234; [Tadić TJ](#), paras. 373, 761.

¹⁷⁵⁸ [Lubanga AJ](#), para. 470. Cf. [Bemba Brief](#), para. 131 (fn. 215).

¹⁷⁵⁹ *Contra* [Bemba Brief](#), para. 131 (fn. 217).

¹⁷⁶⁰ Cf. [Bemba Brief](#), para. 131 (“a theory cannot lessen the evidential burden of the Prosecution”).

¹⁷⁶¹ See [Kordić TJ](#), para. 218 (rejecting an interpretation collapsing the distinction between persecution and other crimes against humanity, on the basis of the context and object and purpose of these crimes). See [Bemba TJ](#), para. 77; *above* paras. 196, 227, 252-253 (discussing the VCLT interpretive method applicable at this Court, which considers *inter alia* similar factors)

¹⁷⁶² *Contra* [Bemba Brief](#), para. 131 (fn. 219).

proof of shared intent for the crimes,¹⁷⁶³ but also a far higher level of contribution even than that identified by the ICTY as required under customary international law.¹⁷⁶⁴

- Fourth, requiring an essential contribution to the *common plan* is consistent not only with the reasoning of this Appeals Chamber in *Lubanga*, but also many other chambers including *Katanga*,¹⁷⁶⁵ *Lubanga*,¹⁷⁶⁶ *Gbagbo*,¹⁷⁶⁷ *Blé Goudé*,¹⁷⁶⁸ and *Ongwen*.¹⁷⁶⁹ Bemba addresses none of these authorities, and thus provides scant support for his view that “control is linked to the *crime* specifically, not the *common plan* generally”.¹⁷⁷⁰ Indeed, Bemba acknowledges that the *dictum* of the *Katanga* Trial Judgment which he cites was concerned with article 25(3)(d)¹⁷⁷¹—for which, the accused is *not* party to the common plan, even if he or she may aim to further that plan in whole or part, but only contributes to (and is liable for) specific resulting

¹⁷⁶³ Cf. [Ngudjolo TJ, Concurring Opinion of Judge Van den Wyngaert](#), paras. 32-35. See below para. 487.

¹⁷⁶⁴ On the standard in customary international law, see e.g. [Stanišić and Župljanin AJ](#), para. 109. See also [Ojdanić JCE Appeal Decision](#), para. 25 (even JCE is different from membership of a criminal organisation).

¹⁷⁶⁵ [Katanga and Ngudjolo Confirmation Decision](#), para. 492 (reasoning, in the context of indirect co-perpetration, that “there are no legal grounds for limiting the joint commission of the crimes solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it”); see also paras. 488 (defining a co-perpetrator as someone who “has, together with others, control over the offence by reason of the essential tasks assigned to him”, emphasis added), 524-526 (repeatedly referring to the notion of “joint control” over the crime, emphasis added).

¹⁷⁶⁶ [Lubanga TJ](#), paras. 994 (“responsibility of the co-perpetrators from crimes resulting from the execution of the common plan arises from mutual attribution based on the joint agreement or common plan”; “control over the crimes falls in the hands of a collective as such”, emphasis added), 1000 (“the co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential”, emphasis added). See also paras. 1006, 1018 (requiring that “the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime”). Judge Fulford, although dissenting from the majority’s reasoning in this respect, would also have found liability in such circumstances: e.g. [Lubanga TJ](#), Separate opinion of Judge Fulford, paras. 12, 15-17 (reasoning, *inter alia*, that requiring proof of a power to frustrate the crime is generally “unrealistic and artificial”). The majority’s reasoning was not disturbed on appeal: [Lubanga AJ](#), paras. 456-473.

¹⁷⁶⁷ [Gbagbo Confirmation Decision](#), para. 230 (“without Laurent Gbagbo’s actions, the crimes would not have been committed or would have been committed in a significantly different way”, emphasis added).

¹⁷⁶⁸ [Blé Goudé Confirmation Decision](#), paras. 135 (“[t]he decisive consideration is whether the individual contribution of each co-perpetrator within the framework of the agreement is such that without it the crime would not be committed or would be committed in a significantly different way”, emphasis added), 136 (in the context of indirect co-perpetration, “it is not required that each co-perpetrator be individually in a position of control with respect to some or all of the direct perpetrators” but only that “the co-perpetrators be jointly in control of the direct perpetrators”, emphasis added). Subsequent references to “control over the crimes” in this decision must be understood accordingly: see e.g. para. 141.

¹⁷⁶⁹ [Ongwen Confirmation Decision](#), paras. 38 (understanding ‘control over the crime’ to mean “an evaluation of whether the person had control over the crime by virtue of his or her essential contribution within the framework of the agreement with the co-perpetrators”, emphasis added, and specifically citing (at fn. 17) the reasoning in *Blé Goudé*), 39 (understanding the ‘power to frustrate’ in the sense that each co-perpetrator “has the capacity to frustrate the commission of the crime in the way it is realised by not performing his or her coordinated contributive acts within the framework of an agreement among them”, emphasis added; citing [Blé Goudé Confirmation Decision](#), para. 136).

¹⁷⁷⁰ [Bemba Brief](#), para. 131 (emphasis supplied).

¹⁷⁷¹ [Bemba Brief](#), paras. 132-133.

crimes.¹⁷⁷² Although unsurprising in this context that proof might therefore be required “that the accused’s contribution” is “connected to the commission of the crime and not solely to the activities of the group in a general sense”,¹⁷⁷³ this is irrelevant to article 25(3)(a)—which addresses any remoteness concern by requiring the accused *to be* part of the common plan.

480. Furthermore, consistent with the Chamber’s correct approach that Bemba and the other co-perpetrators need not make an essential contribution to each charged criminal incident, there was likewise no need for the Chamber to establish that Bemba specifically knew of each charged criminal incident.¹⁷⁷⁴ Rather, the proper inquiry was whether Bemba possessed the requisite *mens rea* concerning the Common Plan, and specifically the crimes which would result from it in the ordinary course of events. In this regard, it is notable that the Common Plan did not detail the specific witnesses to be subjected to illicit interference, but was framed more broadly.¹⁷⁷⁵ This approach was correct, consistent with the well-established principle that a common plan need not expressly contemplate each and every specific incident in which it will be executed.¹⁷⁷⁶ Indeed, any departure from this principle would render all but the very smallest common plans practically impossible to establish, and would be wholly unfit to impute responsibility for the “unimaginable atrocities that deeply shock the conscience of humanity”,¹⁷⁷⁷ for which article 25 was designed.

VI.C.3. Bemba acted with the necessary intent and knowledge

481. The Chamber reasonably found that Bemba contributed to the Common Plan with the necessary intent and knowledge, which was the only reasonable inference from factors such as his activities to plan and organise the Common Plan; the measures he took to conceal the Common Plan; the specific directions and instructions he provided concerning witness testimony; the reports made to him by other co-perpetrators; his personal observation of witnesses in his defence giving testimony that he knew to be incorrect; and his involvement

¹⁷⁷² See e.g. [Katanga TJ](#), paras. 1618-1619. Cf. para. 1631.

¹⁷⁷³ [Katanga TJ](#), para. 1632.

¹⁷⁷⁴ *Contra* [Bemba Brief](#), para. 134. See also above paras. 324, 382 - 384.

¹⁷⁷⁵ See above para. 416.

¹⁷⁷⁶ See e.g. [Šainović AJ](#), para. 1491 (“[a]s a participant in the JCE, Lukić need not have known of each specific crime committed by the MUP and VJ forces in order to be criminally liable”); [Kvočka AJ](#), para. 276 (“a participant in a joint criminal enterprise would not need to know of each crime in order to be criminally liable”).

¹⁷⁷⁷ Statute, Preamble.

in the ‘remedial measures’ to counter the article 70 investigation.¹⁷⁷⁸ Bemba shows no error in these conclusions.

VI.C.3.a. “Implicit knowledge” means actual knowledge proven inferentially (Bemba Ground 2.4)

482. In summarising its conclusions about Bemba’s *mens rea* for offences under articles 70(1)(b) and (c), the Chamber observed:

[N]o direct evidence exists that Mr Bemba also directed or instructed false testimony [regarding prior Defence contacts, payments and non-monetary benefits, and acquaintances]. However, *on the basis of an overall assessment of the evidence*, the Chamber *makes the inference* that Mr Bemba *at least implicitly knew* about these instructions to the witnesses and expected Mr Kilolo to give them. It bases *this inference* on the following considerations.¹⁷⁷⁹

483. Bemba attacks this reasoning on the basis that “[i]mplicit knowledge’ is not a term of legal art or recognised legal standard, and it is an improper and insufficient basis on which to build a conviction.”¹⁷⁸⁰ However, this criticism misreads the Judgment. It cannot be understood as making the factual finding that Bemba only possessed “implicit knowledge” in the sense of “tacit knowledge”, or an “innate presentiment”, or taking the view as a matter of law that a “broad ‘might have known’ standard, which is less than negligence”, sufficed for liability.¹⁷⁸¹ This would be contrary to article 30 (absent a relevant express provision in the Statute), as the Chamber plainly recognised.¹⁷⁸²

484. Rather, to avoid this manifest contradiction and absurdity,¹⁷⁸³ and notwithstanding any infelicity in the particular wording used, the Judgment can only properly be understood to have found that Bemba had *actual* knowledge, proven *inferentially*. This is strongly

¹⁷⁷⁸ [Judgment](#), para. 816. *See also* para. 817 (referring to “Bemba’s essential contributions to the common plan taken as a whole”). *See further above* paras. 452-453.

¹⁷⁷⁹ [Judgment](#), para. 818 (emphasis added).

¹⁷⁸⁰ [Bemba Brief](#), para. 123.

¹⁷⁸¹ *Contra* [Bemba Brief](#), paras. 124, 129.

¹⁷⁸² [Judgment](#), paras. 27-29, 55, 70.

¹⁷⁸³ This is a relevant interpretive consideration even in construing instruments, such as legislation and treaties, which might be expected to be drafted with even greater care than legal judgments: *e.g.* *Ron Pair*, p. 242 (“The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.’”); Gardiner, pp. 380-381 (“absurdity of result is sometimes argued as an aid to excluding meanings when identifying the ordinary meaning of a term”).

suggested by the Chamber’s repeated emphasis in the same sentence, and the following sentence, that it could infer Bemba’s knowledge to the requisite standard from “an overall assessment of the evidence”. It is further supported not only by the Chamber’s subsequent re-expression of similar logic in different words,¹⁷⁸⁴ but also by the relative ease of a drafting ‘slip’ in this context,¹⁷⁸⁵ and the logical symmetry between the Chamber’s initial observation concerning the limited “direct evidence” and the inferential approach which it then adopted. Finally, it is also supported by the logic inherent in the Chamber’s reasoning¹⁷⁸⁶—Bemba’s *actual* knowledge of, and reliance upon, Kilolo’s instructions to the witnesses to testify falsely about their contacts with the Defence, payments and benefits, and their acquaintances with certain persons is indeed the only reasonable inference from: the Common Plan itself (which depended on secrecy¹⁷⁸⁷); reports to Bemba concerning “the coaching activity and the contacts, as well as payments to the witnesses”; Bemba’s personal observation of witnesses testifying in a way he knew to be incorrect; Bemba’s satisfaction with such testimony; and Bemba’s conduct in ordering the ‘remedial measures’ “to cover and conceal the coaching activity”, when he learned of the article 70 investigation.¹⁷⁸⁸

485. On this reading of the Judgment, Bemba’s complaint based on the Chamber’s wording does not arise.¹⁷⁸⁹ Nor does his further criticism of (some aspects of) its substantive reasoning as “tangential and speculative” show that it was unreasonable or otherwise erroneous.¹⁷⁹⁰

- It is not “illogical” to infer Bemba’s actual knowledge of Kilolo’s specific conduct implementing an essential aspect of the Common Plan from the broader evidence that Bemba, Kilolo and Mangenda had formed the Common Plan.¹⁷⁹¹

¹⁷⁸⁴ See [Judgment](#), para. 819 (concluding that Bemba’s *approval* of Kilolo’s instructions was “at least tacit[]”, but that he “*knew and intended* that the Main Case Defence would present false evidence to the Court”, emphasis added). See also para. 853 (“Bemba—at least implicitly—urged Mr Kilolo to take the concrete actions, including instructing the witnesses to lie”).

¹⁷⁸⁵ There is a ready association of ideas between an inference (a deduced conclusion) and an implication (what a source may potentially mean but does not expressly state), which could lead to an erroneous or confusing use of the word “implicit” when attempting to explain inferential reasoning.

¹⁷⁸⁶ *Contra* [Bemba Brief](#), paras. 125, 129.

¹⁷⁸⁷ See *e.g.* *above* paras. 455, 460; *below* para. 523.

¹⁷⁸⁸ [Judgment](#), para. 819. See also *above* paras. 453, 455.

¹⁷⁸⁹ See [Bemba Brief](#), paras. 123 (“an improper and insufficient basis on which to build a conviction”), 124 (a standard which is “highly prejudicial, and legally incorrect”).

¹⁷⁹⁰ *Contra* [Bemba Brief](#), paras. 125, 129.

¹⁷⁹¹ *Contra* [Bemba Brief](#), para. 126. Bemba’s description of the common plan in this context (“a criminal plan to conceal contacts and payments”) is partial and erroneous. On the Common Plan, see *above* para. 439.

- The Chamber’s finding that Bemba personally observed witnesses giving evidence that he knew to be incorrect was adequately based on the evidence.¹⁷⁹² Bemba’s subjective and self-serving appreciation of how alert he may or may not have looked during the evidence of certain other witnesses shows no error.¹⁷⁹³
- The Chamber’s interpretation of Bemba’s actions when learning of the article 70 investigation was reasonable.¹⁷⁹⁴
- The Chamber’s comment that Bemba “at least tacitly” approved Kilolo’s illicit coaching of the witnesses was not “impermissibly circular” because it was a repetition of the Chamber’s *conclusion*,¹⁷⁹⁵ mirroring the previous paragraph,¹⁷⁹⁶ and not the reasoning itself.¹⁷⁹⁷ Nor can the legal recognition of tacit approval, as a form of abetting, restrict the *evidentiary* significance of similar conduct for another mode of liability.¹⁷⁹⁸

VI.C.3.b. The Chamber made sufficient findings on Bemba’s knowledge (Bemba Ground 2.5, Part II)

486. Bemba’s complaint that the Chamber “extrapolated intent concerning specific offences[] from his general involvement in a broadly defined, non-criminal common plan” misunderstands the Judgment and the nature of liability under article 25(3)(a).¹⁷⁹⁹ The Chamber’s reasoning was not based upon a vague inference from the general to the particular, but a coherent and logical analysis.¹⁸⁰⁰ Bemba misapprehends the distinction

¹⁷⁹² *Contra* [Bemba Brief](#), para. 127. *See e.g. Judgment*, paras. 495, 732 (concluding that “Bemba was satisfied with Mr Kilolo’s pre-testimony coaching activities involving D-25” based on Bemba’s observations recounted by Mangenda to Kilolo, after the completion of D-25’s testimony). *See also below* paras. 520, 522.

¹⁷⁹³ Notably, Bemba cites only footage of D-3, D-4, D-23, D-26, D-57, D-64, and D-55—but not D-25, upon which the Chamber relied : *see above* fn. 1792. Nor in any event does a subjective appreciation of Bemba’s appearance necessarily or sufficiently establish that he was not able to follow events in court.

¹⁷⁹⁴ *Contra* [Bemba Brief](#), para. 128. *See also below* paras. 540-544. Bemba fails to show that the Chamber’s finding was unreasonable (the standard of review on appeal), especially since the Chamber was not obliged to apply the criminal standard of proof (only reasonable inference) to the *interpretation of evidence* but only to the elements of crimes and other matters essential for conviction: *see below* para. 496.

¹⁷⁹⁵ [Judgment](#), para. 819 (“The Chamber *thus concludes* that Mr Bemba, along with his instructions on testimony regarding the merits of the Main Case, also authorised and thereby approved, at least tacitly, instructions regarding false testimony on the three above-mentioned points”, emphasis added).

¹⁷⁹⁶ [Judgment](#), para. 818. *See also above* fn. 1784.

¹⁷⁹⁷ *Contra* [Bemba Brief](#), paras. 128, 254. For the Chamber’s reasoning, *see above* para. 484.

¹⁷⁹⁸ *Contra* [Bemba Brief](#), para. 128.

¹⁷⁹⁹ *Contra* [Bemba Brief](#), para. 136. *See also* para. 137.

¹⁸⁰⁰ *See also Stanišić and Simatović AJ*, paras. 81, 86-88 (determination of the “existence and scope of the common criminal purpose”, and whether the acts of the accused “contributed to this common criminal purpose”, may indeed be necessary preconditions to a circumstantial assessment of the *mens rea* of the accused).

between the Common Plan (of which the offences were a virtually certain consequence) and the offences themselves.¹⁸⁰¹ Nor in any event is there any error in relying on the same evidence for different legal purposes.¹⁸⁰²

487. In determining whether a relevant common plan existed, a chamber must be satisfied that it contained a “critical element of criminality”, and that the participants in that plan—the co-perpetrators—at least knew “that the implementation of that common plan *will* lead to the commission of the offences at issue” in the ordinary course of events.¹⁸⁰³ This is a form of intent towards the crimes in question.¹⁸⁰⁴ Having regard to article 30, and the jurisprudence of this Court, the test applied by the Chamber was whether “in the context of the specificities of the case it was virtually certain that the implementation of the common plan would lead to the commission of the criminal offences.”¹⁸⁰⁵ The Chamber found, beyond reasonable doubt, that this was so.¹⁸⁰⁶

488. In particular, the Chamber found that the only reasonable inference from the evidence was that there existed a common plan to illicitly interfere with witnesses in order to ensure false testimony favourable to Bemba, and that such a plan was virtually certain to entail the commission of offences contrary to articles 70(1)(a), (b) and (c) of the Statute.¹⁸⁰⁷ In identifying the membership of this Common Plan, it analysed the conduct of the alleged co-perpetrators, including Bemba, and found that their conduct each constituted an essential contribution to the Common Plan.¹⁸⁰⁸ From the circumstances of their essential contributions, the only reasonable inference was that they were made with the requisite intent and knowledge.¹⁸⁰⁹

VI.D. BEMBA SOLICITED FALSE TESTIMONY (BEMBA GROUND 2.6)

489. The Chamber not only found that Bemba was a co-perpetrator in presenting false evidence contrary to article 70(1)(b) and corruptly influencing witnesses contrary to article 70(1)(c), but also that he solicited the giving of false testimony by the witnesses themselves

¹⁸⁰¹ See [Bemba Brief](#), para. 136.

¹⁸⁰² See *above* para. 471.

¹⁸⁰³ [Judgment](#), para. 67 (emphasis supplied).

¹⁸⁰⁴ Statute, art. 30(2)(b).

¹⁸⁰⁵ [Judgment](#), para. 67. See also para. 29.

¹⁸⁰⁶ [Judgment](#), paras. 681, 802, 807, 817, 822, 834-836, 838, 848-850, 896, 898, 901-902, 910, 914, 924, 928.

¹⁸⁰⁷ See e.g. [Judgment](#), paras. 681, 683, 802-803.

¹⁸⁰⁸ See e.g. [Judgment](#), paras. 807, 816 (concerning Bemba).

¹⁸⁰⁹ See e.g. [Judgment](#), paras. 807, 817 (concerning Bemba).

contrary to article 70(1)(a).¹⁸¹⁰ It was satisfied that he did so, “personally or through Mr Kilolo and Mr Mangenda”, as the only reasonable inference from “Mr Bemba’s various actions, which, taken together, warrant such a conclusion.”¹⁸¹¹ In particular:

- Bemba agreed with Kilolo and Mangenda to illicitly interfere with witnesses in order to ensure that they would provide favourable evidence (the Common Plan);¹⁸¹²
- Bemba knew of the false testimony as he personally observed witnesses giving testimony that he knew to be incorrect;¹⁸¹³
- Bemba sought to conceal the contacts made with witnesses;¹⁸¹⁴ and
- Bemba not only exercised “indirect” influence on witnesses through Kilolo, consistent with the Common Plan, but also exercised personal and “direct” influence on witnesses such as D-55 (a charged witness, for whom he has been convicted) and D-19 (an uncharged witness, for whom he has not been convicted).¹⁸¹⁵

490. In these circumstances, the Chamber was satisfied beyond reasonable doubt that, “without Mr Bemba’s authoritative influence, personally or through Mr Kilolo and/or Mr Mangenda, the untruthful testimony would not have occurred in the same manner”. Bemba “knew with certainty that Mr Kilolo would instruct the witnesses” according to the Common Plan, “and that the witnesses would, in turn, untruthfully testify in court as a consequence of his conduct.”¹⁸¹⁶

491. Bemba’s undeveloped complaint that the “Chamber failed to address the inadequate manner in which the Prosecution pleaded” this charge, citing only his Final Brief and a passage of an ICTY judgment, shows no error in the Judgment but merely repeats an

¹⁸¹⁰ [Judgment](#), paras. 851, 857, 924-925, 928-929, 932-933.

¹⁸¹¹ [Judgment](#), para. 852.

¹⁸¹² [Judgment](#), paras. 853, 932.

¹⁸¹³ [Judgment](#), para. 854.

¹⁸¹⁴ [Judgment](#), para. 855.

¹⁸¹⁵ [Judgment](#), para. 856. *See above* para. 437.

¹⁸¹⁶ [Judgment](#), para. 857. Notwithstanding the status and authority wielded by Bemba and Kilolo, the Prosecution notes that, in general, it is not necessary for a person to have such status (or to be the “intellectual author” of a crime, if this term is understood to elevate the degree of causal contribution required) in order to incur liability under article 25(3)(b): any measurable contribution (*i.e.*, a contribution which has an effect on the commission of the crime) suffices. *See Judgment*, para. 81; [Gbagbo Confirmation Decision](#), paras. 244, 247.

unsuccessful trial argument.¹⁸¹⁷ This was evidently rejected by the Chamber.¹⁸¹⁸ Purported contradictions in the legal or evidentiary reasoning of the *Pre-Trial Chamber* are, moreover, generally inapposite;¹⁸¹⁹ what matters is the correctness and reasonableness of the Chamber's own reasoning in its final Judgment. This is consistent not only with the possibility that the Pre-Trial Chamber's legal characterisation of facts may be subject to change (provided the material facts are not exceeded),¹⁸²⁰ but also the law allowing confirmation decisions to be appealed only *conditionally*.¹⁸²¹

492. Nor indeed is there any contradiction in the finding that Bemba's actions, including through Kilolo and Mangenda, had a "direct effect on the commission or attempted commission of the offence" in the sense of "a causal effect on the offence".¹⁸²² The *means* by which Bemba's influence was communicated did not itself need to be direct,¹⁸²³ provided that it had the requisite effect on the principal. The Chamber reasonably concluded that it did.¹⁸²⁴ It made no finding of "implicit consequences", as Bemba claims,¹⁸²⁵ but rather determined beyond reasonable doubt that Bemba exercised influence over the witnesses not only by his own interactions with them but by Kilolo's and Mangenda's interactions carried out at his

¹⁸¹⁷ *Contra* [Bemba Brief](#), para. 138. See [Krajišnik AJ](#), para. 24 ("The Appeals Chamber will, as a general rule, summarily dismiss submissions that merely repeat arguments that did not succeed at trial without any demonstration that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber").

¹⁸¹⁸ [Judgment](#), paras. 100, 851, 930 (accepting the manner in which the Pre-Trial Chamber confirmed the charge).

¹⁸¹⁹ See [Ongwen Confirmation ALA Decision](#), para. 31 ("the Trial Chamber is not legally bound to follow the [Pre-Trial] Chamber's interpretation in the Confirmation Decision"). *Contra* [Bemba Brief](#), para. 139 (fns. 225-226, contrasting Pre-Trial Chamber findings).

¹⁸²⁰ See Regulations of the Court, reg. 55; [Katanga Regulation 55 AD](#), para. 49; [Ongwen Confirmation Decision](#), paras. 31, 148; see also para. 16 (the purpose of pre-trial proceedings is to ensure that only charges sufficiently supported by evidence, and which are clearly and properly formulated, proceed to trial).

¹⁸²¹ See e.g. [Bemba Confirmation ALA Decision](#), para. 12 ("the drafters of the Statute intentionally excluded decisions confirming (or not) the charges against a suspect from categories of decisions which may be directly appealed without leave of the Chamber [...] Considerations that an interlocutory appeal would address fundamental questions or would be to the benefit of the entire Court do not *per se* warrant to depart from this principle"); [Ongwen Confirmation ALA Decision](#), para. 31 (rejecting a request for leave to appeal based on an allegedly incorrect definition of a mode of liability). Additionally, to the extent a confirmation decision addresses issues of jurisdiction or admissibility, it might be appealed under article 82(1)(a). But the generally restrictive approach to appeals of confirmation decisions is contrasted with the right to appeal errors of law in the Judgment under article 74: Statute, article 81(1).

¹⁸²² [Judgment](#), para. 81. *Contra* [Bemba Brief](#), para. 139.

¹⁸²³ [Judgment](#), para. 78 ("The *actus reus* of 'soliciting' or 'inducing' can be done by any means, either by implied or express conduct"). Cf. [Bemba Brief](#), para. 139 ("solicitation requires direct influence").

¹⁸²⁴ [Judgment](#), para. 857.

¹⁸²⁵ [Bemba Brief](#), para. 139.

direction and on his behalf.¹⁸²⁶ Whether Bemba used express words in dealing with his co-perpetrators is immaterial.

493. Bemba’s generalised challenge to his conviction for soliciting, based on the “same errors that apply to its definition and application of common plan precepts”, is undeveloped and in any event, for the reasons previously expressed, cannot succeed.¹⁸²⁷ Nor is there any confusion in the Judgment, nor even the “appearance” of confusion, between liability under articles 25(3)(a) and (b): the Chamber properly and expressly found only that Bemba causally contributed to the offence—in this case, under article 70(1)(a)—committed by others.¹⁸²⁸ That evidence is relevant to multiple offences, or multiple modes of liability, does not necessarily imply any legal confusion between them.

VI.E. THE CHAMBER DID NOT ERR IN ITS APPROACH TO INFERENCES (BEMBA GROUND 4.2)

494. Even a circumstantial case can be a compelling case.¹⁸²⁹ To the extent the Chamber made inferential findings concerning Bemba, from all the circumstances, these were the *only* reasonable inferences. It is entitled to appropriate deference in this view, based on its intimate familiarity with the evidence, and the Appeals Chamber should not intrude unless it is satisfied that no reasonable chamber could have reached such a conclusion.¹⁸³⁰ Nor indeed was the evidence against Bemba anything less than compelling. Indeed, the comments and observations of his co-perpetrators are at times startlingly clear and direct in their criminal implications. Simply put, in light of all the evidence considered as a whole, it strains credulity to believe that Bemba was *not* a part of the common purpose, and so responsible for the charged crimes.

VI.E.1. The Chamber’s approach to the use of inferences was legally correct

495. The Chamber’s approach to circumstantial evidence and the use of inferences was correct, both in principle and in application.¹⁸³¹ It properly directed itself on the burden and

¹⁸²⁶ See above para. 489.

¹⁸²⁷ Contra [Bemba Brief](#), para. 140. See above paras. 416-488.

¹⁸²⁸ Contra [Bemba Brief](#), para. 140. See [Judgment](#), paras. 74, 79, 81-82, 851-852, 857, 932-933.

¹⁸²⁹ See e.g. [Galić AJ](#), para. 218 (“there is nothing intrinsically erroneous about a criminal case being established through proof by circumstantial evidence”); [Kupreškić AJ](#), para. 303 (“[c]ircumstantial evidence can often be sufficient to satisfy a fact finder beyond reasonable doubt”).

¹⁸³⁰ See e.g. [Stakić AJ](#), para. 219. See further above paras. 327 - 328.

¹⁸³¹ Contra [Bemba Brief](#), paras. 203, 208.

standard of proof,¹⁸³² its application to “all the facts underpinning the elements of the particular offence and the mode of liability”,¹⁸³³ and the approach to circumstantial evidence:

When assessing the evidence, the Chamber carries out ‘a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue’. When the Chamber concludes that, based on the evidence, there is only one reasonable conclusion to be drawn from the facts *sub judice*, the conclusion is that they have been established beyond reasonable doubt.¹⁸³⁴

496. Following from these principles, although not spelled out in the Judgment, is the common sense view that “each piece of circumstantial evidence need not be, nor rarely is, proved beyond a reasonable doubt since that would involve trials within trials, *ad infinitum*.”¹⁸³⁵ Rather, only essential findings (usually, those necessary to establish the elements of charged crimes and modes of liability) need be made beyond reasonable doubt.¹⁸³⁶ Otherwise, a chamber is free to interpret each piece of evidence—or even any intermediate inference¹⁸³⁷—in the way it considers to be most reasonable, having regard to all the other evidence.¹⁸³⁸ In this context, Bemba is right to concede that “‘stacked’ inferences” and “non-sequential reasoning” are not terms of legal significance but, at most, a way of attempting to evaluate the extent to which a particular inferential finding, or even an interpretation of the evidence, is reasonable.¹⁸³⁹

497. Bemba overstates the position when he implies that, “to demonstrate that an inference is the *only* reasonable one on the evidence,” a chamber must always “articulate *why* that is the case”.¹⁸⁴⁰ Although it is true that a judgment must be adequately reasoned,¹⁸⁴¹ this does not require exhaustive reference “to the testimony of every witness or every piece of

¹⁸³² [Judgment](#), paras. 185, 187.

¹⁸³³ [Judgment](#), para. 186.

¹⁸³⁴ [Judgment](#), para. 188. See further [Bemba TJ](#), para. 216; [Katanga TJ](#), para. 109; [Lubanga TJ](#), para. 111. Consistent with this approach, see [Delalić AJ](#), para. 458; [Galić AJ](#), para. 218. See also [Bemba Brief](#), para. 204.

¹⁸³⁵ [Galić AJ](#), para. 218. See also [Ngudjolo AJ, Dissenting Opinion of Judges Trendafilova and Tarfusser](#), paras. 34, 41, 69; [Katanga TJ, Concurring Opinion of Judges Diarra and Cotte](#), para. 4.

¹⁸³⁶ [Lubanga AJ](#), para. 22.

¹⁸³⁷ In Windridge’s terms (cited by Bemba), an “intermediate inference” appears not necessarily to be a finding indispensable to conviction, and is understood as such: Windridge, p. 406.

¹⁸³⁸ See above paras. 327 - 328.

¹⁸³⁹ [Bemba Brief](#), paras. 204, 206. See Windridge, p. 418 (“there is nothing inherently wrong in drawing inference upon inference”).

¹⁸⁴⁰ Contra [Bemba Brief](#), para. 207.

¹⁸⁴¹ [Kunarac AJ](#), para. 41. See further below fn. 1998.

evidence”.¹⁸⁴² In *Blaškić*, although the Appeals Chamber noted that the Trial Chamber had not explained a particular inference, its fundamental concern was that the inference itself was obviously unreasonable.¹⁸⁴³ Likewise, in *Bagosora*.¹⁸⁴⁴ Thus, there is no legal requirement for a chamber to explain the reasoning for every inference, provided that it does not interpret the evidence or draw inferences in a way that no reasonable chamber could have done.

VI.E.2. The Chamber did not err in considering that Bemba was the beneficiary of the Common Plan (Bemba Ground 4.2.1)

498. Bemba’s claim that “there is no evidence that the illicit conduct was done for the benefit of Mr Bemba” defies common sense, as well as the evidence.¹⁸⁴⁵ The Chamber noted that Bemba was “the ultimate and main beneficiary of the implementation of the common plan”,¹⁸⁴⁶ but this was not the sole or even decisive basis for its reasoning concerning his contribution to the common purpose or his intent and knowledge, which provided a more than adequate “evidential link”.¹⁸⁴⁷

499. Rather, to the extent that the Chamber considered Bemba’s status, this was no more than context supporting and corroborating its other reasoning. As such, since no essential finding rests upon this inference, it did not need to be made beyond reasonable doubt.¹⁸⁴⁸ Bemba’s identification of (what he considers) other reasonable conclusions is thus immaterial, and shows no error in the Judgment.¹⁸⁴⁹ In any event, the decision by Bemba and his remaining defence team (Counsel who were not privy to the Common Plan) not to rely on the tainted witnesses—after the suspicions of article 70 offences were known to be well founded—hardly undermines the Chamber’s reasoning. Nor is the Defence any better

¹⁸⁴² [Hadžihasanović AJ](#), para. 13. The Appeals Chamber continued: “a Trial Chamber should limit itself to indicating in a clear and articulate, yet concise manner, which, among the wealth of jurisprudence available [...] and the myriad of facts that emerged at trial, are the legal and factual findings on the basis of which it reached the decision either to convict or acquit”. See also [Bemba TJ](#), para. 227 (citing relevant ICTY jurisprudence with approval); [Judgment](#), para. 196 (following *Bemba*).

¹⁸⁴³ [Blaškić AJ](#), para. 519 (“it is difficult to conceive of a situation in which the absence of evidence that an individual gave an order could reasonably give rise to an inference that he did so”).

¹⁸⁴⁴ [Bagosora AJ](#), paras. 572 (noting that “the Trial Chamber failed to provide a reasoned opinion”, but then continuing to find that “based on the Trial Chamber’s factual findings, no reasonable trier of fact could have found that the only reasonable inference was that Bagosora ordered the crime”), 604-605 (noting that “the Trial Chamber failed to explain why Bagosora was the only person who could reasonably be inferred to have ordered or authorised” the killing, reasoning that it could not “be reasonably excluded that the orders or authorisation could have come” from other “high-level military authorities”, and finding simply that the “Trial Chamber erred”).

¹⁸⁴⁵ *Contra* [Bemba Brief](#), para. 209.

¹⁸⁴⁶ [Judgment](#), para. 805. See also para. 727.

¹⁸⁴⁷ *Contra* [Bemba Brief](#), paras. 209-210, 213. See above paras. 439, 449, 453, 469-476.

¹⁸⁴⁸ See above para. 496.

¹⁸⁴⁹ *Contra* [Bemba Brief](#), paras. 211-212.

assisted by its assertions that the false evidence elicited did not ultimately prove to be objectively helpful to Bemba,¹⁸⁵⁰ or that Kilolo and Mangenda may have sought to exploit the situation further for their own financial gain.¹⁸⁵¹

VI.E.3. The evidence demonstrates Bemba's involvement in illicit coaching (Bemba Ground 4.2.2)

500. The evidence of Bemba's involvement in "illicit coaching" amply sufficed for the Chamber to reach this conclusion as part of its broader determinations a.) of the existence of the Common Plan;¹⁸⁵² b.) that Bemba provided an essential contribution to the crimes as contemplated within the Common Plan;¹⁸⁵³ and c.) that Bemba had the requisite intent and knowledge.¹⁸⁵⁴ This evidence was assessed properly and impartially, but it was also—as the law requires—assessed in the context of all the other evidence in the case, and not in isolation.¹⁸⁵⁵ Bemba fails to show any error either in the Chamber's interpretation of this evidence or in the Chamber's limited use of this evidence regarding Bemba.¹⁸⁵⁶

VI.E.3.a. The Chamber did not err concerning D-54 (Bemba Ground 4.2.2.1)

501. Notably, the Chamber found that Bemba conveyed to Kilolo, through Mangenda, "specific instructions which the two co-perpetrators were expected to follow" concerning the content and manner of D-54's testimony.¹⁸⁵⁷ This was shortly after Kilolo had reminded Mangenda of "prior conversations with Mr Bemba when he clarified the need to properly instruct witnesses concerning their testimonies", and immediately before Kilolo informed Mangenda that D-54 was willing to testify and that Kilolo would coach him.¹⁸⁵⁸ The Chamber relied on this evidence not only as an example of Bemba's contributions to the Common Plan, but also as illustrating his intent and knowledge.¹⁸⁵⁹ In making these findings,

¹⁸⁵⁰ [Bemba Brief](#), para. 211.

¹⁸⁵¹ [Bemba Brief](#), para. 212.

¹⁸⁵² *See above* para. 439.

¹⁸⁵³ *See above* para. 449.

¹⁸⁵⁴ *See above* para. 453.

¹⁸⁵⁵ *Cf.* [Bemba Brief](#), para. 214 (suggesting that the evidence was not "assessed neutrally" but "rather [...] through the lens of the false premise that Mr Bemba was the beneficiary of the common plan"). *See above* para. 495.

¹⁸⁵⁶ *Contra* [Bemba Brief](#), para. 214.

¹⁸⁵⁷ [Judgment](#), para. 811. *See also* para. 605. *See above* para. 473 (especially fns. 1721-1723).

¹⁸⁵⁸ *See above* fn. 1723.

¹⁸⁵⁹ *See* [Judgment](#), paras. 811, 816-818.

the Chamber did not err in its interpretation of or reliance upon intercepted conversations between Bemba and Kilolo, Kilolo and Mangenda, or Kilolo and D-54.¹⁸⁶⁰

VI.E.3.a.i. Conversations between Bemba and Kilolo

502. Bemba shows no error in the Chamber’s approach either to the intercepted conversation of 17 October 2013 or to the intercepted conversation of 1 November 2013.¹⁸⁶¹ Both calls occurred more than six weeks after Bemba had issued his instructions to Kilolo and Mangenda concerning D-54 (recounted in an intercepted conversation of 30 August 2013). The 17 October 2013 call was not directly relied upon by the Chamber in its analysis concerning Bemba’s instructions regarding D-54 (although it does indeed corroborate its core finding);¹⁸⁶² the 1 November 2013 call was expressly noted by the Chamber, again presumably as corroboration.¹⁸⁶³ Neither call had the significance Bemba claims.¹⁸⁶⁴

503. Bemba overstates the significance of the Chamber’s finding that it could not “conclude with certainty” that Bemba and Kilolo were talking about D-54 in the 17 October 2013 call,¹⁸⁶⁵ when Kilolo remarked that they had already “*beaucoup arrangé*/arranged a lot” in this respect.¹⁸⁶⁶ Although the Chamber noted that “the utterance, as such, does not indicate with certainty that Mr Kilolo was speaking about his illicit coaching activities regarding D-54”, it continued to note that “*the assessment of this statement is context-dependent and will therefore be considered in the light of the following events.*”¹⁸⁶⁷ In the following passages, the Chamber satisfied itself that Kilolo did indeed coach D-54 extensively.¹⁸⁶⁸ This evidence thus formed a reasonable context to interpreting the 17 October 2013 call. Bemba demonstrates no error. Nor in any event is Bemba correct that the Chamber must be “certain[]” about the meaning of a single piece of evidence as a precondition to relying upon

¹⁸⁶⁰ To any extent that Bemba intended to challenge the Chamber’s assessment in this last respect, the Prosecution understands the argument to have been dropped: *compare Bemba Brief*, para. 215, with paras. 216-231 (apparently not challenging evidence of communication between Kilolo and D-54).

¹⁸⁶¹ *Contra Bemba Brief*, para. 216.

¹⁸⁶² See *Judgment*, paras. 729-731, 811. The Chamber discussed *another* call between *Mangenda and Kilolo* on 17 October 2013, in which Mangenda recalled witnessing Bemba giving “instructions concerning the witness and his testimony”, but this should not be confused with the relevant 17 October 2013 call between Bemba and Kilolo (which is, itself, one of four on that day): *compare* paras. 615, 730-731.

¹⁸⁶³ *Judgment*, para. 729 (fn. 1677).

¹⁸⁶⁴ *Contra Bemba Brief*, para. 220.

¹⁸⁶⁵ *Contra Bemba Brief*, para. 216.

¹⁸⁶⁶ *Judgment*, para. 616 (fn. 1378).

¹⁸⁶⁷ *Judgment*, para. 616 (emphasis added).

¹⁸⁶⁸ *Judgment*, paras. 617-647, 650-651. See also paras. 600-614.

it to “corroborate or support any further inferences on this point.”¹⁸⁶⁹ Chambers of this Court do not require “certainty” on *all* factual determinations,¹⁸⁷⁰ nor indeed are they required to apply the criminal standard of proof to assessing individual pieces of evidence.¹⁸⁷¹

504. Nor did the Chamber err in interpreting the 1 November 2013 call, in which Kilolo complained to Bemba that he was fatigued by “[l]a personne que vous connaissez/[t]hat person you know”.¹⁸⁷² First, since the identity of this person is merely a matter of interpreting the evidence (and does not support a finding essential to Bemba’s conviction), the Chamber was not obliged to exclude alternative reasonable inferences.¹⁸⁷³ Second, the Chamber’s interpretation that Kilolo was referring to D-54 was reasonable, based on Kilolo’s “dealings with D-54, whom he had to prepare for his last day of testimony”.¹⁸⁷⁴ Third, Bemba’s alternative interpretations are speculative, nor in any event did the Chamber need to ascertain Bemba’s opinion of or interest in Kilolo’s remark¹⁸⁷⁵—the conversation is relevant in this context only as some corroboration of Bemba’s knowledge of Kilolo’s coaching of D-54.¹⁸⁷⁶

VI.E.3.a.ii. Conversations between Kilolo and Mangenda

505. Bemba shows no error in the Chamber’s interpretation of the intercepted conversations between Kilolo and Mangenda.¹⁸⁷⁷ One of these calls, on 30 August 2013, directly shows that Bemba issued specific instructions concerning D-54’s testimony, which Kilolo and Mangenda were required to carry out,¹⁸⁷⁸ and which did not constitute legitimate “interview preparation”.¹⁸⁷⁹ Bemba’s subjective view of the conversation between Kilolo and Mangenda on 29 August 2013, the day before Mangenda relayed Bemba’s instructions to Kilolo, shows no error in the Judgment.¹⁸⁸⁰

¹⁸⁶⁹ *Contra Bemba Brief*, para. 216.

¹⁸⁷⁰ See e.g. *Ngudjolo AJ*, para. 109; *Ngudjolo AJ, Dissenting Opinion of Judges Trendafilova and Tarfusser*, paras. 54-57; *Judgment*, para. 187.

¹⁸⁷¹ See above para. 496.

¹⁸⁷² *Judgment*, para. 649 (fn. 1486).

¹⁸⁷³ *Contra Bemba Brief*, para. 217. See above para. 496.

¹⁸⁷⁴ *Contra Bemba Brief*, para. 218. See *Judgment*, para. 649. D-54’s testimony concluded later that same day: *Judgment*, para. 646. D-54 admitted that Kilolo had “called him during his testimony [...] between 31 October and 1 November 2013”: *Judgment*, para. 622. Intercepted conversations show Kilolo coaching D-54 on 31 October 2013: *Judgment*, paras. 623, 634-637.

¹⁸⁷⁵ *Contra Bemba Brief*, paras. 219-220.

¹⁸⁷⁶ See *Judgment*, para. 729.

¹⁸⁷⁷ *Contra Bemba Brief*, para. 222.

¹⁸⁷⁸ See above para. 501.

¹⁸⁷⁹ *Contra Bemba Brief*, para. 222. See also above para. 473.

¹⁸⁸⁰ Compare *Bemba Brief*, para. 222, with *Judgment*, para. 599.

506. The Chamber did not err in concluding that, in the 30 August 2013 call between Kilolo and Mangenda, “the person referred to as ‘il’ or ‘notre frère’ was Mr Bemba”.¹⁸⁸¹ First, there was no obligation to make this identification with “certitude”.¹⁸⁸² Second, Bemba shows no error in the Chamber’s analysis. The Chamber was fully entitled to remark upon Mangenda’s insistence that Kilolo take notes, “underlining the importance of the information to be given”, and to take this detail into account, without it being specifically “pleaded by the Prosecution”.¹⁸⁸³ But in any event this was far from the only basis for the identification, which was instead premised on the view that “such instructions to lead counsel, in particular, on important matters concerning the conduct of the defence team, likely emanate from the client” and that “[n]o other person would normally be in a position to instruct lead counsel in this manner.”¹⁸⁸⁴ Bemba does not challenge this broader reasoning, or its manifest reasonableness and common sense. Instead, his arguments address only peripheral issues, and merely disagree with the Chamber’s evaluation:¹⁸⁸⁵

- Mangenda’s relay of Bemba’s instructions to Kilolo—which is established by direct evidence—is not inconsistent with, much less undermined by, the possibility that Bemba and Kilolo may also have spoken directly on the same day.¹⁸⁸⁶
- Bemba’s assertion that “‘il’ appears to be someone who is not detained” is neither convincing on its face, nor in any event is a chamber required to address every argument raised at trial.¹⁸⁸⁷
- Bemba speculates when he suggests that the instruction (from Bemba) as to the manner of D-54’s testimony made it “more reasonable” to consider that this instruction came from “someone who had actual experience of being questioned”;¹⁸⁸⁸ such an instruction could just as well come from someone concerned with the manner in which the testimony would be perceived by the Court.

¹⁸⁸¹ [Judgment](#), para. 604.

¹⁸⁸² *Contra* [Bemba Brief](#), para. 223. *See above* paras. 496, 503 (*especially* fn. 1870).

¹⁸⁸³ *Contra* [Bemba Brief](#), para. 224. *See* [Judgment](#), para. 604 (specifically noting, also, that “[t]he Bemba Defence maintained that the Prosecution merely conjectured that the reference to ‘notre frère’ is directed at Mr Bemba”).

¹⁸⁸⁴ [Judgment](#), para. 604.

¹⁸⁸⁵ *See* [Lubanga AJ](#), para. 33 (“repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation”).

¹⁸⁸⁶ *Contra* [Bemba Brief](#), para. 224.

¹⁸⁸⁷ *Contra* [Bemba Brief](#), paras. 225-226.

¹⁸⁸⁸ *Contra* [Bemba Brief](#), para. 227. *See* [Judgment](#), paras. 605 (“*ce ne soit pas un système ... du tic au tac*” it shouldn’t be a system ... a quick-fire system”), 729.

- Bemba’s implication that “*notre frère*” could be “other superior officers of D-54” is obscure and undeveloped.¹⁸⁸⁹ The mere reference by D-54 and/or Kilolo to certain individuals ([REDACTED], [REDACTED], [REDACTED], and [REDACTED])—in conversations well after August 2013¹⁸⁹⁰—does not itself suggest that Mangenda conveyed instructions from them to Kilolo two months before. Nor is this argument assisted by Mangenda’s references in the 30 August 2013 conversation to [REDACTED], which read in context clearly refer to a different person than “*il*”.¹⁸⁹¹ Bemba’s elaborate alternative speculation that D-19 might be “*il*” and/or [REDACTED] is likewise so tenuous, and convoluted, that it cannot show any error.¹⁸⁹²

507. Bemba’s assertion that he “had no means to clarify” the proper interpretation of the 30 August 2013 call in the absence of Kilolo’s or Mangenda’s testimony is irrelevant.¹⁸⁹³ Even if one or both of them had testified, their testimony would not necessarily have been credible, given the circumstances. Rather, it was for the Court to determine whether it could reasonably determine the identity of “*il*” or “*notre frère*”, and it did so. Bemba fails to show an error in this determination.

VI.E.3.b. The Chamber did not err concerning D-15 (Bemba Ground 4.2.2.2)

508. Bemba shows no error in the Chamber’s finding that he “directed and approved Mr Kilolo’s illicit coaching activities”, provided “specific instructions” or “feedback” where necessary, and was “regularly informed by the other co-perpetrators of the illicit coaching

¹⁸⁸⁹ *Contra* [Bemba Brief](#), paras. 228-229.

¹⁸⁹⁰ See [Bemba Brief](#), fns. 452-455 (citing CAR-OTP-0082-1109), 456-457 (citing CAR-OTP-0082-0663). Both intercepts were made in late October 2013, during D-54’s testimony. See further e.g. [Judgment](#), paras. 623, 631-632, 641, 644.

¹⁸⁹¹ *Contra* [Bemba Brief](#), para. 229. See e.g. [Judgment](#), para. 811 (quoting CAR-OTP-0079-0131 at 0134-0135: “Il a dit, bon pour que lui-même soit fin prêt, il lui faut au moins déjà 2 heures à l’avance, avant que notre blanc n’arrive, il faut déjà l’informer et puis il a dit en ce qui concerne la connaissance de [REDACTED] lui-même, qu’il n’oublie surtout pas.../He said well, for him, for him to be fully prepared, he needs at least two hours’ notice before our white guy arrives: he needs to be already informed; and then he said that as for knowledge of [REDACTED] himself, he particularly shouldn’t forget...”). See also para. 601 (finding that D-54 was referred to by “the code ‘[REDACTED]’, which stands for [REDACTED] and correspond to the witness’s initials”).

¹⁸⁹² *Contra* [Bemba Brief](#), paras. 229-230.

¹⁸⁹³ *Contra* [Bemba Brief](#), para. 231.

activities”.¹⁸⁹⁴ The Chamber did not err in its reliance on D-15 as an “example” of Bemba’s “deep involvement” in this way.¹⁸⁹⁵

509. The Chamber found that Bemba “knew precisely about Mr Kilolo’s instructions to D-15 over the telephone”, that he “provided feedback on how specific issues should be handled”, and that this “demonstrate[d] Mr Bemba’s control over the presentation of the evidence and the fact that he was in a position to, and did indeed, instruct Mr Kilolo”.¹⁸⁹⁶ It is immaterial to this evidence—which goes to Bemba’s knowledge, intent, and contribution to the execution of the crimes within the context of the Common Plan—whether Bemba “influenced the *content* of D-15’s responses”.¹⁸⁹⁷ Bemba overlooks the purpose for which the Chamber considered the evidence, as well as its context.

510. First, Kilolo reported to Bemba on the morning of D-15’s second day of testimony—a time at which it would be almost certainly too late to “solicit Mr Bemba’s input concerning *answers* which could or should be given by the witness” in that day’s court session.¹⁸⁹⁸ By contrast, it was not too late for Kilolo to obtain feedback on the strategy that *he* should adopt, in and out of the courtroom, in his further dealings with D-15.¹⁸⁹⁹ This was highly probative for the question for which the Chamber relied on this evidence—Bemba’s control over the *presentation of the evidence*, and Kilolo himself.¹⁹⁰⁰

511. Second, it is immaterial whether the particular aspects of Kilolo’s conversation with D-15 on 11 September 2013 which *the Chamber* found to be especially clear examples of “Kilolo’s control over D-15’s testimony” were reported to Bemba on 12 September 2013.¹⁹⁰¹ What interested the Chamber in the Judgment and what interested Bemba in September 2013 are entirely different things.

¹⁸⁹⁴ [Judgment](#), para. 808. *Contra* [Bemba Brief](#), para. 232.

¹⁸⁹⁵ [Judgment](#), paras. 808-809.

¹⁸⁹⁶ [Judgment](#), paras. 809-810. *See further* paras. 567-568, 592, 729.

¹⁸⁹⁷ *Contra* [Bemba Brief](#), paras. 233, 236 (emphasis supplied).

¹⁸⁹⁸ *Contra* [Bemba Brief](#), para. 234 (emphasis added).

¹⁸⁹⁹ *See* [Judgment](#), para. 810. *See also further* paras. 569-580. D-15 testified from 11-13 September 2013. The relevant call between Bemba and Kilolo occurred on 12 September at 07:58: [Judgment](#), para. 567. Subsequent calls between Kilolo and D-15, in which Kilolo provided D-15 further instructions occurred on 12 September 2013 at 21:00 and 23:06: [Judgment](#), paras. 569, 577.

¹⁹⁰⁰ *See above* fn. 1896.

¹⁹⁰¹ *Contra* [Bemba Brief](#), para. 234 (citing [Judgment](#), paras. 561-562). *See also above* paras. 276-277.

512. Third, Bemba's interventions in the 12 September 2013 call do not "reflect his belief that the Defence is putting forward a truthful case".¹⁹⁰² Bemba's comment that "... any way you look at it, what they're saying there isn't possible, you know" is merely an instruction for the position to be taken in "the submissions".¹⁹⁰³ Nor does "the phrase '*je reviens à la question d'hier*' support[] the more reasonable conclusion" that Bemba and Kilolo were not discussing "illicit coaching".¹⁹⁰⁴ To the contrary, having introduced this issue, Kilolo not only asks for Bemba's confirmation that he agrees with a particular point but then informs him of what D-15 *will testify*.¹⁹⁰⁵ Nor was the Chamber's approach inconsistent with *Kordić*, which suggests at most that the benefit of the doubt should be given if (i) a chamber is obliged to make "a finding" based solely on a particular piece of evidence; and (ii) the interpretation of the relevant evidence remains ambiguous both of itself and in the context of all the other evidence in the record.¹⁹⁰⁶

513. There was no inconsistency between the 12 September 2013 call between Bemba and Kilolo, and the 11 September 2013 call between Kilolo and Mangenda.¹⁹⁰⁷ Nothing in the Chamber's analysis of the 12 September 2013 call suggests that Kilolo had *not* already begun to coach D-15,¹⁹⁰⁸ and thus its analysis is not undermined by this fact, or that Kilolo notified Mangenda of some "details of his illicit coaching activities".¹⁹⁰⁹ Kilolo still reported to Bemba the following morning, and Bemba still gave him feedback. Differences in Kilolo's manner of expression likewise do not affect this fact.¹⁹¹⁰

514. In any event, evidence of the conversation between Bemba and Kilolo concerning D-15 was not the only evidence upon which the Chamber relied to determine that Bemba

¹⁹⁰² *Contra* [Bemba Brief](#), para. 234.

¹⁹⁰³ *Contra* [Bemba Brief](#), para. 234 (fn. 471, quoting CAR-OTP-0091-0127, at 0131, ln. 71). *See* CAR-OTP-0091-0127, at 0131, lns. 68-71 ("*Next two lines said simultaneously*") JPB: No, it isn't necessary: we'll put that in the submissions. To the effect that ... AK: Mm... mm... there we are. JPB: ...any way you look at it, what they're saying there isn't possible, you know?").

¹⁹⁰⁴ *Contra* [Bemba Brief](#), para. 235. *See* [Judgment](#), para. 568.

¹⁹⁰⁵ *See* CAR-OTP-0091-0127, at 0129-0130, lns. 29-35 ("AK: ... erm... going back to yesterday's issue... But if I tell you that my brother was the one who was in... he was the one who issued all the orders to all the control posts in the country. JPB: Yes. AK: Will you be in agreement with that point of view or not? JPB: Yes, yes. AK: And then... erm... afterwards, he goes back over what you know about. JPB: All right.", emphasis added).

¹⁹⁰⁶ *Contra* [Bemba Brief](#), para. 235 (citing [Kordić AJ](#), para. 691). *See also above* para. 496.

¹⁹⁰⁷ *Contra* [Bemba Brief](#), para. 237.

¹⁹⁰⁸ To the contrary, *see* [Judgment](#), paras. 551-564 (coaching of D-15 prior to the conversation between Kilolo and Mangenda of 11 September 2013).

¹⁹⁰⁹ [Judgment](#), para. 566.

¹⁹¹⁰ *Contra* [Bemba Brief](#), para. 238.

controlled the presentation of the evidence and issued instructions to Kilolo.¹⁹¹¹ Bemba is not assisted by reference either to Kilolo's initial comment concerning D-54,¹⁹¹² or the discussion between Kilolo and Mangenda concerning potential witness 'Bravo'.¹⁹¹³ Indeed, although Kilolo had reservations about attempting to call this person, Mangenda points out that:

[Y]ou have to... have to tell the Client that [...] he's the one who needs to weigh up the pros and cons. He has to be told that side of things, because if he comes and... he screws up, it's... the Client who'll lose face, isn't it?¹⁹¹⁴

VI.E.3.c. The Chamber did not err concerning D-19 and D-55 (Bemba Ground 4.2.2.3)

515. The Chamber did not err in recognising the significance of the covert nature of Bemba's communications with D-19 and D-55,¹⁹¹⁵ abusing the Registry facilities for privileged communications and avoiding passive monitoring.¹⁹¹⁶ Thus, the Chamber's inference that Bemba "urged them to cooperate and follow the instructions given by Mr Kilolo" not only emanated from "the evidence as a whole", including all the circumstances of the Common Plan, but also from the specific measures taken by Bemba to avoid detection.¹⁹¹⁷ This was not unreasonable—and it did not need to be the only reasonable inference since this finding was, again, not itself indispensable to the conviction.¹⁹¹⁸ The Chamber's conclusion that Bemba spoke with D-55 "with the intention of motivating D-55 to give specific testimony" was not speculative, but merely reflected this same reasoning.¹⁹¹⁹ There was no contradiction between this conclusion and D-55's evidence, notwithstanding his reluctance "to deliberately implicate Mr Bemba".¹⁹²⁰ Nothing in the Judgment suggests that their conversation need have been long, that Bemba must have *expressly* raised the

¹⁹¹¹ *Contra Bemba Brief*, paras. 239, 241. See e.g. *Judgment*, paras. 686, 688, 704, 714-715, 727, 729, 731, 734, 753-754, 776-778, 780, 783, 785, 787, 794, 796, 801, 806, 808, 810, 812, 815-816, 820.

¹⁹¹² *Contra Bemba Brief*, para. 240 (fn. 480). See *Judgment*, para. 599 (noting only that "this conversation must be assessed in the light of subsequent events").

¹⁹¹³ *Contra Bemba Brief*, para. 240 (fn. 479). See also above paras. 463-465.

¹⁹¹⁴ *Judgment*, para. 714 (fn. 1647).

¹⁹¹⁵ *Contra Bemba Brief*, paras. 242, 272. See also above paras. 461-462, 473, 489.

¹⁹¹⁶ *Judgment*, paras. 736-737, 740-741, 769.

¹⁹¹⁷ *Judgment*, para. 856. See also paras. 298, 814, 816.

¹⁹¹⁸ *Contra Bemba Brief*, paras. 243-244. See above para. 496. This finding was, rather, an 'intermediate' (and not sole or decisive) step to the conclusions that a.) Bemba made an essential contribution to the execution of the crimes as contemplated within the Common Plan, with the requisite intent and knowledge; and b.) Bemba exerted influence on the 14 charged witnesses to testify falsely (the *actus reus* of soliciting false testimony): see e.g. *Judgment*, paras. 740-741, 814, 816, 856. Only these inferential findings had to be made at the criminal standard of proof.

¹⁹¹⁹ *Judgment*, paras. 298, 305. *Contra Bemba Brief*, para. 242.

¹⁹²⁰ *Judgment*, para. 293.

content of D-55's testimony, or that the conversation could not have been arranged at D-55's request.¹⁹²¹

516. Nothing in *Taylor* supports Bemba's claim that "intent to engage in serious acts of contempt [...] cannot be inferred from detention unit infractions."¹⁹²² If anything, by the very fact that the Prosecution in that case sought access to records which might be relevant in this context, it tends to suggest that they *were* considered to be relevant and probative, if they could be obtained.¹⁹²³ Nor does undeveloped reference to an unsuccessful legal argument from trial suffice to show that the Chamber erred in its approach to Bemba's contacts with D-55 and D-19,¹⁹²⁴ especially when the underlying facts may readily be distinguished.¹⁹²⁵

517. Bemba's undeveloped claim that the Chamber drew "an erroneous inference concerning the CDRs" in concluding that Bemba spoke with D-19 does not materially affect the Judgment.¹⁹²⁶ Even if the Chamber should have found that the conversation between Bemba and D-19 occurred on 13 January 2013, rather than 4 October 2012, this has no impact on the Chamber's conclusions.¹⁹²⁷

VI.E.3.d. The Chamber did not err concerning conversations between Kilolo and Mangenda (Bemba Ground 4.2.2.4)

518. Bemba's criticism of the Chamber's reliance on the intercepted 29 August 2013 conversation between Kilolo and Mangenda—in which "Kilolo told Mr Mangenda that he had told Mr Bemba about the need to conduct illicit coaching (*'faire encore la*

¹⁹²¹ *Contra* [Bemba Brief](#), paras. 244-245.

¹⁹²² *Contra* [Bemba Brief](#), para. 243. See [Taylor Decision](#), pp. 2-4 (addressing whether the Prosecution had demonstrated "a risk to the integrity of the proceedings", justifying a judicial review of the Acting Registrar's decision not to disclose detention centre records concerning communications by the accused; the Chamber rejected the request because the Prosecution had not "provided any further evidence" of an interference with the trial since its previous unsuccessful motion).

¹⁹²³ Bemba may misapprehend the observation in the [Taylor Decision](#) that "detention is [...] a matter for administrative rather than judicial decision [...] the principle remains that judges are generally not involved in administrative detention matters, including the detainee's communications generally and telephone communications specifically", which reflects only the distinct competences of the Registry and the judiciary, and the scope of judicial review, but does not reflect a principle of evidence in a criminal trial.

¹⁹²⁴ *Contra* [Bemba Brief](#), para. 243 (fn. 485). See [Krajišnik AJ](#), para. 24.

¹⁹²⁵ See [Karera AJ](#), para. 235 (no error in a chamber declining to infer collusion between witnesses to wrongfully implicate the accused from the possibility that they discussed relevant events); [Kanyarukiga AJ](#), paras. 240-241 (no error in a chamber declining to infer collusion from witnesses attending a *Gacaca* session together, or from their housing arrangements).

¹⁹²⁶ *Contra* [Bemba Brief](#), para. 243 (fn. 487).

¹⁹²⁷ See *above* paras. 462, 515.

couleur’)¹⁹²⁸—merely disagrees with the weight given to this evidence. Manifestly, this intercept *itself* is some evidence that “this advice was actually communicated to Mr Bemba”,¹⁹²⁹ even if its probative value may be qualified partially by its nature (Kilolo telling Mangenda what he had done). Nor was this the sole or decisive evidence supporting the Chamber’s finding that Bemba knew and intended the illicit coaching.¹⁹³⁰ It was not essential for the Prosecution to adduce evidence of the particular “terms used” by Kilolo in his conversations with Bemba, or “Bemba’s response.”¹⁹³¹

519. Moreover, and in any event, Kilolo’s use in this context of the distinctive term “*faire encore la couleur*” is highly suggestive not only of what he said to Bemba but what Bemba would have understood by it. Plainly not ordinary speech, and thus meaningless unless you were ‘in the know’, this term was a code understood by all three co-perpetrators “to refer to the illicit coaching or bribing of defence witnesses.”¹⁹³² Although primarily used in conversations between Kilolo and Mangenda, the evidence also shows that it was understood by Bemba.¹⁹³³ By using this unique term in conversation with Mangenda, Kilolo thus left little room to doubt that he was talking about anything other than illicit coaching, and indeed what Bemba would have understood from the terms in which it was probably described to him.

520. Likewise, no error is shown in the Chamber’s attention to Mangenda’s observation that Bemba “must have noticed” the manner in which D-25 testified—“with such precision” in accordance with the illicit coaching.¹⁹³⁴ This finding would not “apply to everyone who was

¹⁹²⁸ [Judgment](#), para. 728. *See also* paras. 165, 535 (quoting Kilolo: “*le problème que... que j’ai toujours dit au Client, de faire encore la Couleur. Un ou deux jours avant que la personne passe, pourquoi? Parce que les gens oublient... tu vois? Les gens ne se souviennent pas de tout avec précision/Now you can see the problem that... that I’ve always told the Client to redo the colour. A day or two before the person appears. Why? Because people forget... you see? People don’t remember at all accurately*”), 685, 756.

¹⁹²⁹ *Contra* [Bemba Brief](#), para. 247.

¹⁹³⁰ *See e.g. above* para. 453.

¹⁹³¹ *Contra* [Bemba Brief](#), para. 247.

¹⁹³² [Judgment](#), para. 756.

¹⁹³³ *See e.g.* CAR-OTP-0082-1065, at 1074, lns. 270-274 (on 17 October 2013 at 18:26, in answering Bemba’s urgent questions about the progress of the article 70 investigation, Kilolo tells him that witnesses admitted “*la couleur*”). Although the Judgment does not specifically cite this particular passage, it relies extensively upon this intercept: *see e.g.* [Judgment](#), paras. 782, 792-795 (*especially* para. 792: Kilolo informed Bemba that D-3 “had told him about the Prosecution’s visit and interview in the context of the Article 70 investigation”). *See also* paras. 819-820. Moreover, the Chamber acknowledged that the term “*la couleur*” was known to all three co-perpetrators: para. 660 (“[t]hat expression is used repeatedly and in varied forms [...] by the accused, *mainly* Mr Kilolo and Mr Mangenda, throughout their conversations in relation to (potential) defence witnesses”, *emphasis added*).

¹⁹³⁴ [Judgment](#), para. 495, fn. 1020. *See also* fn. 1018 (noting Mangenda’s statement that “[*le client*] *a vu vraiment que (...) un véritable travail de couleurs a été effectivement fait (...) lui-même il a vraiment senti*

present in the courtroom” unless they knew of the Common Plan: to illicitly interfere with witnesses.¹⁹³⁵ Bemba thus partly misunderstands the significance of this evidence. It not only suggests that Bemba did indeed observe D-25’s untruthful testimony, but also reflects the mutual understanding of the Common Plan among the co-perpetrators, such that Mangenda *expected* Bemba to notice the signs of its execution.

521. There is also no error in the Chamber recalling Mangenda’s observation, when speaking of Bemba to Kilolo, that “*j’y... ai déjà assisté une fois, et... et quand il donnait les instructions pour le témoin. Comment il devait déposer./I’ve... already taken part once, and... and when he gave the instructions for the witness. How he was to testify.*”¹⁹³⁶ Although this evidence does indeed emanate from an intercepted conversation, it is Mangenda’s direct recollection of his own experience—there is nothing “third-hand” about it. It is also hard to see how Mangenda’s words suggest anything *other* than “illicit coaching”. Bemba merely speculates by suggesting that Mangenda must be recalling an instruction given to those members of his legal counsel who were not part of the Common Plan; one could speculate equally that Bemba could have been talking to someone who was not a lawyer at all. But in any event the Chamber did not speculate, but instead noted and gave some weight to a reasonable interpretation of Mangenda’s statement, in the context of all the other evidence in the record. This was correct.

VI.E.3.e. The Chamber did not err concerning Bemba’s expressions of satisfaction and gratitude (Bemba Ground 4.2.2.5)

522. The Chamber did not infer that Bemba “knew of and was ‘fully involved’ in illicit coaching” simply “from its factual findings that Mr Bemba expressed satisfaction with witness testimony, and thanked witnesses for testifying”.¹⁹³⁷ These considerations only formed part of the Chamber’s broader assessment of his contributions to the execution of the offences within the framework of the Common Plan, and his intent and knowledge.¹⁹³⁸ In

cela/[the client] really saw that (...) thorough colour work was effectively carried out (...) he himself truly felt that”). See also above para. 485.

¹⁹³⁵ *Contra* [Bemba Brief](#), para. 248.

¹⁹³⁶ [Judgment](#), para. 731 (fn. 1685). *Contra* [Bemba Brief](#), para. 249.

¹⁹³⁷ *Contra* [Bemba Brief](#), para. 250, 252.

¹⁹³⁸ *See above* paras. 439, 449, 453. *See e.g.* [Judgment](#), para. 732 (Bemba’s satisfaction or dissatisfaction with “the testimony of the coached witnesses and Mr Kilolo’s illicit coaching activities [...] *further underscores* that he was fully involved”, emphasis added).

stating that “it is not illicit to thank witnesses for their testimony”, Bemba misses the point of the Chamber’s analysis and thus shows no error.¹⁹³⁹ For example:

- although Bemba thanked D-55 before his court appearance, he did so in the context of a covert communication abusing the Registry’s “privileged line”—which the Chamber considered, based on the “context and timing”, to have been done “with the intention of motivating D-55 to give specific testimony”,¹⁹⁴⁰
- Kilolo’s assurance to D-15 that Bemba approved of his testimony corroborated evidence that Kilolo had reported his illicit coaching of D-15 to Bemba, and received feedback on it, that morning;¹⁹⁴¹
- reference to Bemba’s satisfaction with D-25’s testimony was significant in the context of Mangenda’s and Kilolo’s view that it must have been apparent to Bemba that the illicit coaching of D-25 was effective;¹⁹⁴²
- it was Kilolo who reassured D-6 that Bemba was pleased with the witnesses’ performance in court, and that Bemba would meet personally with D-6, in the context of Kilolo’s promises to reward D-6 for his testimony.¹⁹⁴³

VI.E.3.f. The Chamber did not err concerning the coaching of witnesses to conceal contacts and payments (Bemba Ground 4.2.2.6)

523. The Chamber did not simply infer that Bemba approved Kilolo’s “instructions regarding false testimony” from Bemba’s knowledge of those instructions, nor did it err in concluding that Bemba had that knowledge.¹⁹⁴⁴ Rather, as the Chamber stated, it inferred that Bemba had actual knowledge of Kilolo’s instructions to witnesses to testify falsely from all the evidence.¹⁹⁴⁵ Given the broader circumstances—including the existence of the Common Plan, Bemba’s role within it and the essential importance of secrecy—the Chamber determined that Bemba authorised and approved instructing witnesses to testify falsely not

¹⁹³⁹ [Bemba Brief](#), para. 251.

¹⁹⁴⁰ See e.g. [Judgment](#), paras. 123, 293-298, 305, 692, 740. See also above paras. 461-462, 473, 489, 515.

¹⁹⁴¹ See e.g. [Judgment](#), paras. 168-169, 567-569. See also above paras. 473, 508-514.

¹⁹⁴² See e.g. [Judgment](#), paras. 161, 495, 505-506, 732. See also above para. 520.

¹⁹⁴³ See [Judgment](#), paras. 405-406, 692.

¹⁹⁴⁴ *Contra* [Bemba Brief](#), paras. 253-255.

¹⁹⁴⁵ See above paras. 482-485. Concerning Bemba’s claim that “[t]here is no direct or indirect evidence” to support the finding that he was “kept abreast of the coaching activity” ([Bemba Brief](#), para. 255), see above para. 453 (especially fn. 1630).

only on the merits of the Main Case but also other matters necessary to preserve the secrecy of the Common Plan.¹⁹⁴⁶ The lack of direct evidence of Bemba's knowledge on certain technical aspects, such as "the specific breakdown of payments" or "the specific number of contacts" is immaterial.¹⁹⁴⁷

VI.E.4. The evidence demonstrates Bemba's involvement in witness payments (Bemba Ground 4.2.3)

524. The Chamber was "convinced" that Bemba was "at all times aware of the payments, including illicit payments, effected to witnesses or other persons and the purposes of those payments."¹⁹⁴⁸ Not only does the record contain a "significant body of evidence" proving that the co-perpetrators and Babala "would seek authorisation from or inform Mr Bemba before making any payment", but Bemba also "discussed and approved" the use of payments to witnesses as a 'remedial measure' to frustrate the article 70 investigation.¹⁹⁴⁹

525. In this context, the Chamber's finding was thus manifestly not based on "one technically flawed conversation with Mr Babala".¹⁹⁵⁰ Nor was there any contradiction, or "leap[] in logic", in its reasoning in this respect.¹⁹⁵¹ To the contrary, the 16 October 2012 call was cited by the Chamber as an "example" of Bemba's awareness and approval of illicit payments, but this finding was made much more generally.¹⁹⁵² Accordingly, since this example is not decisive for the Chamber's finding (nor in any event is the Chamber's finding of Bemba's involvement in witness payments decisive for its finding that he is a co-perpetrator),¹⁹⁵³ any error *arguendo* would not materially affect the Judgment.

VI.E.4.a. The Chamber did not err in interpreting the 16 October 2012 call between Bemba and Babala

526. On 16 October 2012, at Kilolo's request, Babala transferred USD 665 to D-57's wife.¹⁹⁵⁴ Later that same day, at 19:49, Bemba and Babala spoke on the telephone,¹⁹⁵⁵ and

¹⁹⁴⁶ [Judgment](#), para. 819. See also above para. 455. See also e.g. [Judgment](#), para. 251 (noting that the evidence "suggests that the instruction to conceal the extent and nature of contacts with the Main Case Defence was an integral part of Mr Kilolo's illicit coaching activities").

¹⁹⁴⁷ *Contra* [Bemba Brief](#), para. 255.

¹⁹⁴⁸ [Judgment](#), para. 813.

¹⁹⁴⁹ [Judgment](#), para. 813. See also paras. 693-700, 790-791, 798.

¹⁹⁵⁰ *Contra* [Bemba Brief](#), para. 256.

¹⁹⁵¹ *Contra* [Bemba Brief](#), para. 257.

¹⁹⁵² See below para. 526.

¹⁹⁵³ Cf. [Bemba Brief](#), para. 261.

¹⁹⁵⁴ [Judgment](#), para. 243.

¹⁹⁵⁵ [Judgment](#), para. 265.

Babala assured Bemba “*C’est la même chose comme pour aujourd’hui. Donner du sucre aux gens vous verrez que c’est bien*”/It’s the same thing as for today. You’ll see that it’s good to give people sugar”.¹⁹⁵⁶ On the following day, on Babala’s behalf and at Kilolo’s request, Babala’s employee (P-272) transferred USD 700 to D-64’s daughter.¹⁹⁵⁷ The Chamber thus found that Babala’s observation “proves Mr Bemba’s knowledge about money transfers to witnesses.”¹⁹⁵⁸ Subsequently, it also referred to this conversation “as a prominent example” of its finding that “Bemba knew that at least some of the payments he discussed and authorised over the phone served also illegitimate purposes.”¹⁹⁵⁹

527. The Chamber’s interpretation of this incident was not “unacceptably remote and unreliable”, and did not depend on six separate inferences, nor was it wrong to consider it a relevant “example” of Bemba’s knowledge.¹⁹⁶⁰ Nor in any event, given the nature of this finding, was the Chamber obliged to make a finding about this conversation beyond reasonable doubt.¹⁹⁶¹ Rather:

- Given its findings that the co-perpetrators and Babala used coded language,¹⁹⁶² Babala’s status as Bemba’s “financier”,¹⁹⁶³ and the timing of the payments to D-57 and D-64,¹⁹⁶⁴ it was a natural conclusion that Babala and Bemba understood the phrase “*donner du sucre*” to mean the making of payments.
- Although Bemba need not have known specifically *which* witnesses were receiving the payments,¹⁹⁶⁵ he must have understood that the payments were illicit. This follows inevitably from the significance of the conversation itself (why discuss the *routine* reimbursement of expenses in this manner?), the use of coded language,¹⁹⁶⁶ and the findings concerning the existence of the Common Plan itself and Bemba’s overall

¹⁹⁵⁶ [Judgment](#), para. 267. Although the Chamber could not, “with certainty”, establish the “reference point” for Babala’s preceding remark, it was satisfied that the quoted passage “stands on its own and can be relied upon.”

¹⁹⁵⁷ [Judgment](#), paras. 268-269.

¹⁹⁵⁸ [Judgment](#), para. 267.

¹⁹⁵⁹ [Judgment](#), para. 700. This finding was based on “an overall assessment of the evidence”, and was also “corroborated” by Bemba’s abuse of the Registry’s “privileged line” to talk to Babala: [Judgment](#), paras. 700-701. The Chamber’s observation at paragraph 117 must be understood in this light (the conversation alluded “to the fact that these payments were aimed at securing certain testimony”).

¹⁹⁶⁰ *Contra* [Bemba Brief](#), paras. 258-260. *See also below* paras. 551-553.

¹⁹⁶¹ *Contra* [Bemba Brief](#), paras. 261, 264. *See above* paras. 496, 525.

¹⁹⁶² *See e.g.* [Judgment](#), paras. 267, 701, 703, 748-761, 884.

¹⁹⁶³ *See e.g.* [Judgment](#), paras. 112, 693, 703, 779, 798, 877-878, 887, 889, 892-893, 935, 939, 942.

¹⁹⁶⁴ *See above* para. 526.

¹⁹⁶⁵ *See above* paras. 416, 480.

¹⁹⁶⁶ *See above* fn. 1962.

coordinating role.¹⁹⁶⁷ Reliance on the use of coded language in this respect is not circular: the only reasonable inference from this practice between Bemba and Babala in discussing matters arising from the proceedings before the Court—which were almost invariably financial—is that those matters were illicit.¹⁹⁶⁸ Moreover, since D-57’s testimony commenced the following morning,¹⁹⁶⁹ and D-64’s testimony followed after that¹⁹⁷⁰—and bearing in mind the consistent practice of the co-perpetrators in making illicit payments to witnesses shortly before their testimony¹⁹⁷¹—it was wholly reasonable for the Chamber to consider that Bemba knew those were the witnesses of whom Babala spoke.

- The Chamber’s view that Bemba must be considered to have authorised the payments to D-57 and D-64 does not emanate from the 16 October 2012 call at all (even though it may be *applied* to it), but rather from the separate evidence including Babala’s repeated and consistent requests for Bemba’s authorisation for payments.¹⁹⁷² Bemba’s claim that there was some fundamental difference in kind between licit and illicit payments is unsubstantiated and illogical.¹⁹⁷³

528. Nothing in the 16 October 2012 call supports the claim that Bemba “did not understand the codes” used by Babala, especially when this is considered in the context of the wider evidence concerning the use of codes and Bemba’s insistence on this practice.¹⁹⁷⁴ Moreover, since Bemba did not apparently contend at trial that he did not understand Babala, he can hardly fault the Chamber if it failed expressly to address this possibility—especially since the sequencing of the remarks in the conversation cannot be relied upon.¹⁹⁷⁵ The Chamber was

¹⁹⁶⁷ See above paras. 450, 474.

¹⁹⁶⁸ Contra [Bemba Brief](#), para. 262. See [Judgment](#), para. 748.

¹⁹⁶⁹ See [Judgment](#), paras. 246, 252-254.

¹⁹⁷⁰ See [Judgment](#), paras. 276, 281.

¹⁹⁷¹ See e.g. [Judgment](#), paras. 104, 239, 250, 252-254, 267, 280-281, 342, 380, 419, 438-439, 443, 453, 541, 689-691.

¹⁹⁷² Compare [Judgment](#), para. 700 (referring to “an overall assessment of the evidence”), with paras. 693-697, 798.

¹⁹⁷³ Contra [Bemba Brief](#), para. 263.

¹⁹⁷⁴ See e.g. [Judgment](#), paras. 753-754 (Bemba reminding Kilolo to use code, and Mangenda insisting to Kilolo that Bemba should be briefed in code).

¹⁹⁷⁵ Contra [Bemba Brief](#), para. 260 (citing [Bemba Closing Brief](#), para. 203). The transcript of the 16 October 2012 call does not appear in the materials cited at paragraph 203 of the Bemba Closing Brief, but only in the context of Bemba’s arguments concerning ‘misalignment’: see [Bemba Closing Brief](#), para. 207. On misalignment, see [Judgment](#), paras. 227, 266 (referring to the need to treat “this recording with utmost caution”, and especially “the sequence of the questions and responses”, due to the “misalignment problems”). In the transcript of the 16 October 2012 call, the remarks quoted by Bemba occur *before* the “*donner au sucre*” statement: CAR-OTP-0077-1299, p. 1301, lns. 23, 26, 28.

reasonable, in the circumstances of the case as a whole, to reject the possibility that Bemba was not privy to the use of codewords, and to consider that Babala's statement spoke for itself.

529. The Chamber also interpreted the 16 October 2012 call consistently with the guidelines it had previously set out for such evidence.¹⁹⁷⁶ In particular, the Chamber plainly did not seek to consider the significance of dialogue between two speakers, but only considered the meaning of the words of one speaker (in this case, Babala) as a 'stand-alone' statement.¹⁹⁷⁷ Bemba's logic is faulty when he claims that, merely because Babala's statement offers an insight into what Bemba knew, the Chamber could have relied only on Bemba's own words.¹⁹⁷⁸ His speculation as to the alternative meaning of the conversation merely repeats an unsuccessful argument from trial, without showing that the Chamber was unreasonable to reject it.¹⁹⁷⁹

530. Likewise, the Chamber clearly did not consider the possibility of Babala independently paying out "small amounts of money" to undermine its view that Bemba "was at all times aware of the payments, including illicit payments, effected to witnesses or other persons and the purposes of those payments."¹⁹⁸⁰ Bemba fails to substantiate his claim that the Chamber failed "to give due weight" to his trial arguments.¹⁹⁸¹

VI.E.4.b. The Chamber did not err in its approach to the 21 October 2013 call between Kilolo and Babala

531. The Chamber did not err in being "particularly attentive" to the 21 October 2013 call between Kilolo and Babala, in which Babala responded to a query about the "budget" by verifying that Kilolo had first spoken to "the client".¹⁹⁸² Although it is true that this evidence is an intercepted conversation, Kilolo again speaks of his own prior conduct. Such evidence is thus not "wholly unreliable", nor was reliance upon it conditional upon calling Kilolo and/or Babala to testify.¹⁹⁸³ Bemba's partial reference to another conversation between

¹⁹⁷⁶ See [Judgment](#), para. 227.

¹⁹⁷⁷ See [Judgment](#), paras. 266-267. See also below paras. 552-553.

¹⁹⁷⁸ *Contra* [Bemba Brief](#), para. 261.

¹⁹⁷⁹ Compare [Bemba Brief](#), para. 261, with [Bemba Closing Brief](#), para. 207. See [Krajišnik AJ](#), para. 24.

¹⁹⁸⁰ See [Judgment](#), paras. 813, 816. *Contra* [Bemba Brief](#), para. 264.

¹⁹⁸¹ See [Bemba Brief](#), para. 264 (fns. 526, 529-530). See [Krajišnik AJ](#), para. 27 ("As a general rule, mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed").

¹⁹⁸² [Judgment](#), paras. 699, 798.

¹⁹⁸³ *Contra* [Bemba Brief](#), paras. 265-266. See also above para. 521; below para. 547.

Kilolo and Babala, occurring a day later, does not suffice to show that “Bemba was opposed to the idea of payments to the witnesses” in general,¹⁹⁸⁴ but rather relates to the *different* approach ordered by Bemba for three particular witnesses which “are not causing problems”.¹⁹⁸⁵ Nor does Bemba’s general and undeveloped reference to the “Chamber’s failure to address Defence arguments” suffice to show an error in the Judgment.¹⁹⁸⁶

VI.E.5. The evidence demonstrates Bemba’s involvement in concealing illicit activities (Bemba Ground 4.2.4)

532. As part of its overall assessment of Bemba’s contribution to the execution of the crimes within the framework of the Common Plan, and his intent and knowledge, the Chamber took into account his involvement in concealing illicit activities throughout the material period.¹⁹⁸⁷ It did not err in this respect, nor was it obliged to exclude all reasonable alternative inferences since the findings of Bemba’s activities to conceal the Common Plan were not essential to his convictions.¹⁹⁸⁸

VI.E.5.a. The Chamber did not err concerning the use of coded language (Bemba Ground 4.2.4.1)

533. Bemba shows no error in the Chamber’s reasoning.¹⁹⁸⁹ It did not speculate about the co-perpetrators’ motives in using codes (beyond rejecting the different hypotheses advanced by the Defence as untenable and inconsistent).¹⁹⁹⁰ Rather, it found objectively (and, indeed, consistent with common sense) that the use of codes “assisted in keeping the illicit coaching and bribing activities hidden from others, including the Court’s officials”.¹⁹⁹¹ Where appropriate, it took account of this fact in considering the knowledge and intent of the co-perpetrators.¹⁹⁹²

534. Bemba’s disagreement with the Chamber’s understanding of his arguments concerning “prior use of coded language” shows no error, and is inconsistent with the reasoning in the

¹⁹⁸⁴ *Contra* [Bemba Brief](#), para. 266.

¹⁹⁸⁵ Notably, this passage begins with Kilolo saying to Babala: “*Alors par contre, les trois-là, bon, le client m’a dit qu’on puisse attendre, comme eux ne posent pas de problèmes, qu’on puisse attendre calmement comment ça va évoluer, et puis...*”/Now, *conversely*, the three there, well, the client told me that we can wait, since they are not causing problems, that we can wait quietly and see how things develop, and then...” (emphasis added): see [Judgment](#), para. 888; see also paras. 797, 799, 889.

¹⁹⁸⁶ *Contra* [Bemba Brief](#), para. 267. See [Krajišnik AJ](#), para. 24.

¹⁹⁸⁷ See above paras. 439, 449, 453.

¹⁹⁸⁸ *Contra* [Bemba Brief](#), para. 268. See above para. 496.

¹⁹⁸⁹ *Contra* [Bemba Brief](#), para. 269.

¹⁹⁹⁰ [Judgment](#), paras. 748-750.

¹⁹⁹¹ [Judgment](#), para. 751.

¹⁹⁹² See e.g. above para. 527.

Judgment. His claim that the Chamber “mischaracterised” his position is purely semantic, and does not engage with the substance. Thus, Bemba now asserts that, prior to the events at issue in this trial, he “had a consistent pattern of using codes (including some of the same codes in this case) to discuss non-illicit activity”, as a “general practice” which might be applied even to “routine matters” in order “to achieve privacy” given Bemba’s and Babala’s membership of “a political opposition party”.¹⁹⁹³ Yet the Judgment expressly considered and rejected this claim as it neither explained the same behaviour by Kilolo and Mangenda, who are “not involved in DRC politics”, nor explained the invention of “new code terms and code names”.¹⁹⁹⁴ The Chamber was not unreasonable to determine, rather, that it would make its own findings as to the significance of the codes used in the context of the allegations in this case.¹⁹⁹⁵

535. Indeed, the Chamber did not merely “assume[] that codes and phrases had a unitary meaning”,¹⁹⁹⁶ but rather analysed specific usage where appropriate, and recognised that terms and mannerisms could vary to some degree depending on the speakers and context.¹⁹⁹⁷ This shows no error, nor any lack of reasoned opinion.¹⁹⁹⁸ “[I]n itself”, and in isolation, the use of codes was not considered to show “illicit intent”, but it was relevant and probative evidence of that intent, especially in the context of all the other evidence in the record.¹⁹⁹⁹

VI.E.5.b. The Chamber did not err concerning Bemba’s improper use of the “privileged line” (Bemba Ground 4.2.4.2)

536. As previously recalled, the Judgment appears to contain a harmless error, which does not materially affect the Chamber’s reasoning, concerning the particular *date* on which Bemba abused the Registry’s “privileged line” to contact D-19 illicitly.²⁰⁰⁰ But Bemba shows nothing unreasonable in the Chamber’s finding that it would be “unreasonable and far-fetched” to assume that Kilolo would put Bemba on hold for “such a substantial period” as

¹⁹⁹³ [Bemba Brief](#), para. 270.

¹⁹⁹⁴ [Judgment](#), para. 748. Notably, Bemba fails to address this paragraph at all: see [Bemba Brief](#), para. 270. See also [Judgment](#), para. 750 (noting that Mangenda had put forward an inconsistent explanation).

¹⁹⁹⁵ [Judgment](#), para. 749.

¹⁹⁹⁶ *Contra* [Bemba Brief](#), para. 271.

¹⁹⁹⁷ See e.g. [Judgment](#), paras. 755 (“the co-perpetrators used coded language, referring, for example, to other individuals not by their actual names but using terms representing the individuals’ initials, or other expressions, such as [...]”), 756 (“The Chamber is convinced that the term ‘*faire la couleur*’ or variant forms thereof were used”), 758 (“Variant forms of ‘*faire la couleur*’ were also used by Mr Kilolo and Mr Mangenda”).

¹⁹⁹⁸ *Contra* [Bemba Brief](#), para. 271. See further e.g. [Perišić AJ](#), paras. 9, 95; [Kalimanzira AJ](#), para. 195; [Kvočka AJ](#), para. 23; [Lubanga Redactions AD](#), para. 20; [Gbagbo Provisional Release Appeal Decision](#), para. 48. See also [Tolimir AJ](#), para. 53; [Bemba Brief](#), para. 328 (acknowledging only that “sufficient clarity” is required).

¹⁹⁹⁹ *Contra* [Bemba Brief](#), para. 270.

²⁰⁰⁰ See above paras. 461-462, 517. Cf. [Bemba Brief](#), paras. 273-274.

17 minutes.²⁰⁰¹ Indeed, although the Prosecution is also of the view that Kilolo putting Bemba on hold for nine minutes and ten minutes respectively may be unlikely (in the context of other alleged multi-party calls with D-51 and D-64), it recognises that the Chamber might reasonably draw this distinction.²⁰⁰² Nor did the Chamber err in taking into account evidence of Bemba's illicit contact with an uncharged witness such as D-19.²⁰⁰³

537. Bemba's attempt to connect these considerations with his general complaint about the Chamber's interpretation of call data records (CDRs) is tenuous and unsustainable.²⁰⁰⁴ His attempt to apply the 'beyond reasonable doubt' standard to the interpretation of *evidence* is misplaced and incorrect.²⁰⁰⁵

- First, the Chamber stressed that, "[w]hen determining the relevant details of the telephone communications, such as the speakers, relevant numbers and the date of the call, the Chamber has conducted its own independent assessment of the evidence."²⁰⁰⁶ As Bemba grudgingly concedes, this was entirely proper.²⁰⁰⁷
- Second, the Chamber accepted the evidence of P-433 and P-361 on the interpretation of communication "logs",²⁰⁰⁸ and P-361 on the "origins of CDRs".²⁰⁰⁹
- Third, P-361 testified that CDRs do not distinguish between a multi-party call and "call waiting" (*i.e.*, one caller being put on hold), but allowed for the possibility that inferences might be drawn by "examining overlapping time frames to determine whether [...] the first person was put on hold."²⁰¹⁰ This is just what the Chamber

²⁰⁰¹ [Judgment](#), para. 741. *Contra* [Bemba Brief](#), paras. 273, 276.

²⁰⁰² See [Judgment](#), paras. 742 ("the longest continuous overlap of 9 minutes [...] is not long enough to exclude the possibility that either Mr Bemba or D-51 or both in alternation were put on hold during these 9 minutes"), 743 ("The Chamber [...] does not find it *entirely* unreasonable to imagine that such an overlap of ten minutes could have resulted from Mr Kilolo putting one or both of the interlocutors on hold", emphasis added).

²⁰⁰³ *Contra* [Bemba Brief](#), para. 274. See *above* paras. 437, 457, 489. See also paras. 337 and 349.

²⁰⁰⁴ *Contra* [Bemba Brief](#), para. 274.

²⁰⁰⁵ *Contra* [Bemba Brief](#), para. 275 ("In order to rely on an inference, the Chamber must be satisfied that it is the only reasonable inference available on the evidence"). See *above* para. 496.

²⁰⁰⁶ [Judgment](#), para. 216.

²⁰⁰⁷ [Bemba Brief](#), para. 277. The *Gotovina* case cited by Bemba is inapposite since, in that case, the Appeals Chamber considered there was "no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error": [Gotovina AJ](#), para. 58 (emphasis added).

²⁰⁰⁸ [Judgment](#), para. 216 (fn. 227).

²⁰⁰⁹ [Judgment](#), para. 221.

²⁰¹⁰ See [T-17-RED](#), 25:6-8, 26:15-18. *Contra* [Bemba Brief](#), para. 274 (characterising P-361 as testifying that it "is impossible to determine, on the basis of CDRs alone, whether a particular overlapping contact is a conference call, as opposed to other equally plausible possibilities")

did.²⁰¹¹ Bemba’s implication that the Chamber simply “disregard[ed] P-361’s expert testimony”, or ventured outside the evidence submitted and discussed before it at trial is thus manifestly incorrect.²⁰¹²

- Fourth, Bemba overlooks the limits of P-361’s expertise. P-361 offered no opinion, and was not qualified to offer any opinion, on the question whether, on a different occasion from the D-19 call, “Bemba was willing to endure call waiting and disrupted phone activity for a total duration of over 15 minutes”.²⁰¹³ Accordingly, this claim cannot properly be contrasted with the Chamber’s view that it was “unreasonable and far-fetched” to expect Bemba to remain on hold for 17 minutes.²⁰¹⁴
- Fifth, Bemba takes the Judgment out of context in emphasising its observation that “Kilolo included unauthorised persons in conference calls on the privileged line or *otherwise simultaneously and unlawfully relayed information to third persons during privileged line calls*”.²⁰¹⁵ Although the Chamber may have recognised this possibility, this was not the finding that it made with regard to Bemba’s illicit multi-party calls with D-19 and D-55.²⁰¹⁶

538. Bemba’s further assertion in this context—that the Chamber erred by failing to consider, or to provide a reasoned opinion on, evidence cited in his Closing Brief—is insufficiently developed and should be dismissed.²⁰¹⁷ As previously recalled, the “Chamber is not under the obligation to justify its findings in relation to every submission made during the trial”.²⁰¹⁸

539. Nor does Bemba show any error in the Chamber’s finding that “Bemba used the privileged line, *inter alia*, to talk to Mr Babala without being recorded.”²⁰¹⁹ Although the Chamber did not expressly address Bemba’s argument that Kilolo was using the [REDACTED] number while on mission to the DRC, it did consider Babala’s related

²⁰¹¹ See *e.g.* above para. 536.

²⁰¹² *Contra* [Bemba Brief](#), paras. 276-277. See Statute, art. 74(2).

²⁰¹³ *Contra* [Bemba Brief](#), para. 276.

²⁰¹⁴ [Judgment](#), para. 741. *Contra* [Bemba Brief](#), para. 276.

²⁰¹⁵ [Judgment](#), para. 109 (emphasis added).

²⁰¹⁶ *Contra* [Bemba Brief](#), para. 275. See [Judgment](#), paras. 740-741. On the standard of proof, see above paras. 496, 537.

²⁰¹⁷ *Contra* [Bemba Brief](#), para. 277 (especially fns. 554-556, citing [Bemba Closing Brief](#), paras. 139-140).

²⁰¹⁸ [Kvočka AJ](#), para. 23. See further above fn. 1998.

²⁰¹⁹ [Judgment](#), para. 738. *Contra* [Bemba Brief](#), paras. 279-280.

argument (that calls to the [REDACTED] number were forwarded to Kilolo), and found it to be “purely speculative”.²⁰²⁰ In any event, since the Chamber’s finding concerning the [REDACTED] number was just one way in which Bemba abused the privileged line,²⁰²¹ and that abuse was just further evidence of the measures taken to conceal the Common Plan²⁰²²—which itself was just part of the evidence establishing the Common Plan, and Bemba’s contributions, intent and knowledge²⁰²³—it is not decisive for any of the convictions in the Judgment. Accordingly, even if the Chamber’s finding concerning the [REDACTED] number is erroneous, this error would not materially affect the Judgment.

VI.E.6. The evidence demonstrates Bemba’s involvement in the ‘remedial measures’ (Bemba Ground 4.2.5)

540. Consistent with its findings that Bemba and the other co-perpetrators took measures to conceal the Common Plan, the Chamber also found that they took steps to frustrate the article 70 investigation once they learned of it. This further demonstrates Bemba’s contribution to the execution of the crimes within the framework of the Common Plan, and his intent and knowledge.²⁰²⁴ Bemba’s claim that evidence of the co-perpetrators’ involvement in these ‘remedial measures’ was entirely *irrelevant* is unsubstantiated and unconvincing.²⁰²⁵ Manifestly, this was not the case, and the Chamber was entitled to consider this evidence in reaching its conclusions on the charges.

541. Bemba fails to show that the Chamber’s interpretation and assessment of the evidence of the ‘remedial measures’ was erroneous.

542. The Chamber’s reasoning concerning the co-perpetrators’ discussion of the *Barasa* article 70 case was adequate. It was not required to address every single sentence in Bemba’s trial submissions,²⁰²⁶ nor in any event does Bemba’s general interest in other cases, even if accepted, diminish the probative value of the three co-perpetrators discussing the significance

²⁰²⁰ [Judgment](#), para. 739.

²⁰²¹ For example, the Chamber found that Bemba abused the privileged line by making ‘multi-party’ calls, with Kilolo’s connivance, both to D-19 and D-55: see e.g. [Judgment](#), paras. 293-298, 740-741, 769, 814. See also above paras. 460-462, 489, 515-517, 536-538; below para. 559.

²⁰²² See above para. 439 (especially fns. 1562-1568).

²⁰²³ See above paras. 439, 449, 453.

²⁰²⁴ Concerning Bemba’s contributions, intent, and knowledge, see above paras. 439, 449, 453.

²⁰²⁵ *Contra* [Bemba Brief](#), paras. 281-282. See also above paras. 445-455.

²⁰²⁶ *Contra* [Bemba Brief](#), para. 282 (citing [Bemba Closing Brief](#), para. 84 : “The recordings relied upon by the Prosecutor also reflect Mr Bemba’s tendency to discuss topical issues in other ICC cases”). See above fns. 1998, 2018.

of the *Barasa* case and its similarity to their own position.²⁰²⁷ Nor in these circumstances does Bemba substantiate his claim that this evidence should have been excluded as privileged or prejudicial.²⁰²⁸ Indeed, Bemba's claim that this evidence should have been excluded is based on the incorrect premise that it had "non-existent probative value"; yet, as the Chamber reasonably found, in the context of the co-perpetrators' discussions about *Barasa*, Bemba's interest in knowing about "any legal consequences for one of the high-profile accused" shows his understanding that "similar actions by his co-perpetrators could have consequences for him personally."²⁰²⁹

543. Bemba fails to develop or explain his claim that the Chamber's findings on his role in the 'remedial measures' were "invalidated" by reliance on "hearsay", and thus must be summarily dismissed.²⁰³⁰ To the contrary, the Chamber did not err in finding that the 'remedial measures' were probative of the Common Plan, rather than "a completely alternative universe, in which the Prosecution investigation was described to [Bemba] as being completely unlawful."²⁰³¹ This was not the sole basis for the Chamber to establish Bemba's *mens rea* but merely one part of the evidence.²⁰³² Bemba's attempt to reinterpret the evidence, based on intercepted conversations with Kilolo on 17 October 2013, considered selectively and in isolation, fails to show that the Chamber was unreasonable, and merely elaborates upon unsuccessful trial arguments.²⁰³³

- First, Bemba's emphasis on the 17 October 2013 conversations is beside the point.²⁰³⁴ Kilolo cannot have misled Bemba in the way Bemba claims because, as the Chamber found, Kilolo had already informed Bemba of the essential points of the article 70

²⁰²⁷ See [Judgment](#), paras. 111, 780 (Kilolo and Babala), 784 (Bemba and Kilolo, in which Kilolo "presents the *Barasa* case as '*une histoire similaire*', likening that situation to their own"), 820 (referring to conversations between Bemba and Mangenda, and Bemba and Kilolo).

²⁰²⁸ [Contra Bemba Brief](#), para. 282. See also above paras. 109 - 121.

²⁰²⁹ [Judgment](#), para. 820.

²⁰³⁰ See [Bemba Brief](#), para. 283. See further above fn. 1681; below paras. 545-557.

²⁰³¹ [Contra Bemba Brief](#), para. 284.

²⁰³² [Contra Bemba Brief](#), para. 286. See above para. 453.

²⁰³³ Compare [Bemba Brief](#), paras. 284-285, Annex D, with [Bemba Closing Brief](#), paras. 89, 233, 239, 302-304, and fns. 78-79, 139, 143, 247-251, 266, 272-274, 283, 339, 348-350 (citing intercepts discussed in Bemba Brief, Annex D); T-48-CONF, 72:19-75:23.

²⁰³⁴ See [Bemba Brief](#), para. 285 (citing only Annex D). Annex D cites only three (of four) conversations of 17 October 2013 between Bemba and Kilolo: the conversation beginning at 13:01 (CAR-OTP-0082-1309), at 16:24 (CAR-OTP-0082-0618), and at 18:26 (CAR-OTP-0082-1065). See also [Judgment](#), paras. 615, 782. The references in Annex D to "CAR-OTP-0080-1065" do not relate to any document in evidence, and appear to be a typographic error for "CAR-OTP-0082-1065".

investigation on the *previous day*.²⁰³⁵ Bemba’s reinterpretation of the discussions on 17 October 2013 entirely fails to address this significant context—not to mention all the other evidence of Bemba’s involvement in the Common Plan itself,²⁰³⁶ or indeed the co-perpetrators’ conduct *after* 17 October 2013²⁰³⁷—and is avowedly an analysis conducted “in isolation”.²⁰³⁸

- Second, Bemba’s reinterpretation of his 17 October 2013 conversations with Kilolo (claiming that he sought to gather evidence to show the Prosecution was corruptly influencing witnesses) is tenuous and does not show the Chamber’s analysis to be unreasonable.²⁰³⁹ The Chamber carefully considered these conversations,²⁰⁴⁰ noting salient aspects which support the broader conclusion concerning the ‘remedial measures’.²⁰⁴¹ Bemba does not squarely address many of these findings, but merely selectively highlights other passages of the evidence, rearranged to fit his preferred narrative.²⁰⁴²

²⁰³⁵ See [Judgment](#), paras. 770 (Kilolo and Mangenda become aware of the article 70 investigation on 11 October 2013), 773-778 (Kilolo informs Bemba of the article 70 investigation on 16 October 2013, evidenced by Kilolo telling Mangenda that he “had just informed Mr Bemba of the commencement of the Article 70 investigation and that Mr Bemba had panicked”; “that he had calmed Mr Bemba down and explained the possible consequences, namely, that they would ‘lose’ all the work that had been done so far and that Mr Bemba could face another five-year prison sentence distinct from any sentence pronounced in the Main Case”; that Bemba had “directed Mr Kilolo to call each of the defence witnesses the same night in order to ascertain whether any of them had leaked information to the Prosecution”; and that Kilolo’s reservations about this course of action led him to “falsely represent to Mr Bemba that the leak originated from three Cameroonian witnesses”).

²⁰³⁶ See *e.g.* [above](#) paras. 439, 449, 453.

²⁰³⁷ See [Judgment](#), paras. 796-800.

²⁰³⁸ [Bemba Brief](#), para. 285.

²⁰³⁹ *Contra* [Bemba Brief](#), para. 285.

²⁰⁴⁰ [Judgment](#), paras. 779, 782-795.

²⁰⁴¹ See *e.g.* [Judgment](#), paras. 783 (“Bemba responded that, in the worst case scenario, Mr Kilolo would have to deny everything”), 784 (“Kilolo presents the *Barasa* Case as ‘*une histoire similaire*’, likening that situation to their own”), 787 (between Kilolo’s conversations with Bemba, Mangenda relayed “concrete instructions” to Kilolo from Bemba “to make the witnesses sign a document stating that whatever [the Cameroonian witnesses] had said to the Prosecution was untrue”), 790 (between Kilolo’s conversations with Bemba, Mangenda reported to Kilolo that he had “advised Mr Bemba to act swiftly and to incentivise the witnesses to change their minds”, by a “*message codé/coded message*” which Bemba “*comprendait/clearly understood*”, including the use of “*tous les voies et moyens/all ways and means*” which “*c’est-à-dire déboursier les moyens comme exigé d’habitude, exiger que quelqu’un change d’idées*/means pay the funds as normally required, ask someone to change their mind”), 794 (“Kilolo, upon direction of Mr Bemba, intentionally targeted the witnesses and sought to convince them to side with the Main Case Defence”).

²⁰⁴² See Bemba Brief, Annex D (entitled “Timeline: conversations between AK and JPB”, presenting excerpts of the 17 October 2013 conversations under 11 headings). Although the small number of excerpts under *each* heading are presented chronologically (within that heading), the excerpts in Annex D as a whole are not. Thus, the first three excerpts relate to the first conversation between Bemba and Kilolo of 17 October 2013, then the next three excerpts relate to the fourth conversation of that day, the seventh excerpt relates to the first conversation, the eighth excerpt relates to the third conversation, the ninth excerpt to the fourth conversation, the tenth excerpt to the first conversation, and so on.

544. In interpreting the evidence, including Bemba's and Kilolo's conversations on 17 October 2013, the Chamber properly considered it in the context of all the other evidence in the record. It was not obliged to exclude "alternative or exculpatory interpretations" in its analysis of *evidence*, rather than indispensable findings,²⁰⁴³ or to provide express reasoning for each aspect of its analysis.²⁰⁴⁴ Thus, the Chamber's interpretation of Bemba's instruction that, "in the worst case scenario, Mr Kilolo would have to deny everything" was not erroneous nor based on the meaning of this statement in isolation, but rather on its meaning in the broader context of the 'remedial measures', as well as the measures to conceal the Common Plan more generally, and the Common Plan itself.²⁰⁴⁵ Repetition of unsuccessful arguments from trial does not alter this analysis,²⁰⁴⁶ nor does Bemba's second alternative narrative (based on Kilolo's and Mangenda's alleged acts "to derive a personal gain") show that any of the Chamber's findings was unreasonable.²⁰⁴⁷ In particular, Bemba fails to substantiate his claim that his conduct and *mens rea* in October was so conditioned on any fraud by Kilolo and Mangenda that it cannot be probative of his previous conduct and *mens rea*—such a view would be wholly inconsistent with the careful analysis in the Judgment.

VI.F. THE CHAMBER DID NOT ERR IN ITS APPROACH TO HEARSAY EVIDENCE **(BEMBA GROUND 4.3)**

545. As already explained, the Chamber relied on a wealth of reliable and mutually compatible evidence, including Bemba's own words captured in recorded telephone conversations. Bemba's selective challenge to this evidence, mischaracterised as "remote hearsay",²⁰⁴⁸ is based on numerous errors. He claims that the Chamber relied upon uncorroborated evidence,²⁰⁴⁹ yet fails to appreciate that one piece of evidence corroborates another so long as they are compatible with each other.²⁰⁵⁰ He repeatedly claims that the

²⁰⁴³ *Contra* [Bemba Brief](#), para. 287. *See above* para. 496.

²⁰⁴⁴ *Contra* [Bemba Brief](#), paras. 287-288.

²⁰⁴⁵ *Contra* [Bemba Brief](#), para. 287.

²⁰⁴⁶ *Contra* [Bemba Brief](#), para. 288 (citing [Bemba Closing Brief](#), paras. 190-200, 227). *See* [Krajišnik AJ](#), para. 24.

²⁰⁴⁷ *Contra* [Bemba Brief](#), para. 289 (citing Annex C). Annex C quotes excerpts of four conversations between Kilolo and Mangenda: beginning at 19:46 on 16 October 2013 (CAR-OTP-0080-0322), at 22:19 on 16 October 2013 (CAR-OTP-0079-1762), at 12:03 on 17 October 2013 (CAR-OTP-0082-1293), and at 16:37 on 17 October 2013 (CAR-OTP-0082-1326). *See also* [Judgment](#), paras. 730, 773, 782.

²⁰⁴⁸ [Bemba Brief](#), paras. 290, 295, 304-308, 311.

²⁰⁴⁹ [Bemba Brief](#), paras. 296, 303, 305-306, 325.

²⁰⁵⁰ [Gatete AJ](#), para. 125 ("two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way").

Chamber relied on untested evidence,²⁰⁵¹ but overlooks his own ample opportunity to test that evidence—including evidence of his own words—through his Defence case, and by testifying himself, if he chose to do so. Bemba’s reliance on cross-references to his Closing Brief in place of developed argument²⁰⁵² also warrants summary dismissal, as appropriate.²⁰⁵³

VI.F.1. The Chamber reasonably relied on recorded conversations between Mangenda and Kilolo

546. The Chamber reasonably relied on recorded conversations between Mangenda and Kilolo in establishing Bemba’s criminal responsibility. The content of these conversations are not “vague”, do not constitute “remote hearsay” and are not comprised of “opinion, conjecture or fantasy”.²⁰⁵⁴ Nor are these conversations remotely comparable to the type of evidence at issue in either *Muvunyi* or the ICC jurisprudence that Bemba cites.²⁰⁵⁵

547. It makes no difference that the intercepted conversations between Mangenda and Kilolo did not take place under oath, and indeed such a requirement would effectively deprive the Court of an important type of evidence.²⁰⁵⁶ This does not deprive these conversations of their evidentiary value. In their conversations Mangenda and Kilolo discussed their efforts to update Bemba about the illicit coaching operation and the Prosecution’s article 70 investigation.²⁰⁵⁷ They also catalogued Bemba’s instructions to advance the illicit coaching operation and to impede the Prosecution’s article 70 investigation.²⁰⁵⁸ Although Bemba claims Kilolo and Mangenda had a motive “to provide inaccurate or exaggerated information”,²⁰⁵⁹ he does not explain why they would have such a motive, particularly since the conversations between Kilolo and Mangenda are as incriminating to the two of them as they are to Bemba.

548. Far from being unreliable, the records of Kilolo and Mangenda’s phone conversations are compatible with other evidence the Chamber relied upon to conclude that Bemba was

²⁰⁵¹ [Bemba Brief](#), paras. 290, 295, 304, 306-307, 311, 323.

²⁰⁵² [Bemba Brief](#), fns. 611, 628, 631, 637, 656, 658.

²⁰⁵³ See also [Galić AJ](#), para. 297; [Krajišnik AJ](#), para. 26.

²⁰⁵⁴ *Contra* [Bemba Brief](#), para. 295, 307-308, 310.

²⁰⁵⁵ *Contra* [Bemba Brief](#), paras. 310-311. See also *below* para. 681.

²⁰⁵⁶ *Contra* [Bemba Brief](#), para. 307. See also e.g. [KSC Revised Rules Judgment](#), para. 54 (“much could be obtained from the covert surveillance of the [...] communications of others (including other criminals) who may have relevant information”; excluding such a means of evidence-gathering “risks fettering” the Prosecution in its duty “to carry out an effective and thorough investigation” into allegations of serious crime).

²⁰⁵⁷ See e.g. [Judgment](#), paras. 714-715, 774-775, 787-788, 790, 796, 812.

²⁰⁵⁸ See e.g. [Judgment](#), paras. 604-606, 729, 731, 776-778, 787, 811.

²⁰⁵⁹ [Bemba Brief](#), para. 295.

criminally responsible. This evidence included telephone recordings involving Bemba himself, which show that he controlled payments made by his Defence team;²⁰⁶⁰ planned and directed the illicit coaching carried out by Kilolo;²⁰⁶¹ and directed and closely followed the ‘remedial measures’ to impede the article 70 investigation.²⁰⁶²

549. Rather than addressing the Chamber’s holistic analysis, Bemba refers to a minor typographical error in the Independent Counsel’s first report, transcribing a remark by Mangenda to Kilolo as “*couloir*” (corridor or passage) not “*couleur*” (colour),²⁰⁶³ to support his hollow claim of prejudice.²⁰⁶⁴ The Chamber did not need to hear from Mangenda or Kilolo to determine that this was a typographical error,²⁰⁶⁵ as demonstrated by the original French/Lingala version of the transcript.²⁰⁶⁶

550. Bemba also tries to impugn the Chamber’s reliance on the recorded conversations between Kilolo and Mangenda by asserting that, in common law jurisdictions, the content of electronic communications must be repeated by the speaker under oath, to be admissible as proof of the truth of their contents.²⁰⁶⁷ However, the evidentiary practices in domestic jurisdictions are not binding on this Court,²⁰⁶⁸ which “enjoys a significant degree of discretion in considering all types of evidence.”²⁰⁶⁹ In any event, the few cases Bemba cites—which, for the most part,²⁰⁷⁰ do not even concern the admission of electronic communications—are incapable of supporting Bemba’s sweeping assertion regarding the practice in common law jurisdictions. For instance, in the United States—a common law jurisdiction which Bemba ignores—recorded statements by an accused’s co-conspirator in a

²⁰⁶⁰ [Judgment](#), paras. 693, 699, 798.

²⁰⁶¹ [Judgment](#), paras. 809-810.

²⁰⁶² [Judgment](#), paras. 783-786, 792-795.

²⁰⁶³ CAR-OTP-0074-0897, at 0914.

²⁰⁶⁴ [Bemba Brief](#), para. 309.

²⁰⁶⁵ [Contra Bemba Brief](#), para. 309.

²⁰⁶⁶ CAR-OTP-0079-0075 at 0078_1.

²⁰⁶⁷ [Bemba Brief](#), para. 307.

²⁰⁶⁸ See [Ruto and Sang Conduct of Trial Decision](#), para. 11; [Muthaura Counsel Appointment AD](#), para. 62; [Lubanga Sentence Review Decision](#), para. 23.

²⁰⁶⁹ [Lubanga Admission Decision](#), para. 24.

²⁰⁷⁰ See *Ratten* (a murder case in which the Defence challenged the admissibility of evidence by a telephonist who worked at the local exchange concerning a call that the telephonist received from the deceased victim moments before her death); *Walton* (a murder case in which the Defence challenged the admissibility of evidence from witnesses who said that the deceased victim had told them that she was going to meet the accused, and evidence from another witness concerning statements which the witness overheard the deceased victim and her child make during a phone call); *Lejzor Teper* (a fraud case in which the Defence challenged the admissibility of a remark that a police officer overheard a woman saying and which was used to identify the accused as the person who set fire to a building); *Smith* (a murder case in which the Defence challenged the admissibility of evidence from the mother of the victim who described what the victim had told her during four separate telephone conversations).

telephone intercept *can* be used as evidence against the accused even if the co-conspirator does not testify at trial.²⁰⁷¹ Nor does Bemba even attempt to address the practice of ‘civil law’ legal systems, in which many “law enforcement practitioners find it hard to conceive of fighting serious organised crime without using intercept material as evidence.”²⁰⁷²

VI.F.2. The Chamber reasonably relied on recordings of conversations between Bemba and Babala

551. The Chamber reasonably relied on recordings of conversations between Bemba and Babala when inferring that Bemba was aware of illicit payments to witnesses.²⁰⁷³ The Chamber adopted a cautious and reasonable approach in assessing these conversations. Mindful of misalignment problems affecting the recordings of these conversations, the Chamber relied on selected remarks by Bemba and Babala that were capable of being understood on their own without reference to other parts of the conversation.²⁰⁷⁴ At the same time, in interpreting what Bemba and Babala meant by their comments, and drawing inferences from these comments, the Chamber appropriately considered the remarks in light of the totality of evidence, including the context of surrounding events.²⁰⁷⁵

552. Bemba distorts this cautious and reasonable approach. The Chamber neither considered Babala’s comments in isolation, nor improperly reconstructed Bemba’s conversations with Babala.²⁰⁷⁶ Bemba’s arguments depend on the flawed premise that the only relevant evidence of his involvement in paying witnesses were the words spoken by Babala²⁰⁷⁷— but he ignores that, in their other conversations, he told Babala to proceed with payments.²⁰⁷⁸ Moreover, there were yet other factors—also unaddressed by Bemba—upon which the Chamber relied to conclude that Bemba was aware of illicit payments to witnesses, including that:

²⁰⁷¹ See *Inadi*, pp. 391-400.

²⁰⁷² [UK Privy Council Report](#), para. 142 (reporting observations of law enforcement practitioners in the Netherlands). See further paras. 128-132 (considering the practice in France, where “judicially-authorised interception for law enforcement purposes” is seen “as essential for many investigations”, and is regarded as “compliant with ECHR requirements”), 139-142 (considering the practice in the Netherlands, where intercept evidence is “used extensively and successfully”), 143-149 (considering the practice in Spain, where intercept evidence is used “extensively to support criminal prosecutions for serious crime”).

²⁰⁷³ [Judgment](#), para. 813 (citing paras. 693-700).

²⁰⁷⁴ [Judgment](#), paras. 226-227, 266-267, 695-697.

²⁰⁷⁵ See [Judgment](#), para. 188. Also para. 700.

²⁰⁷⁶ *Contra Bemba Brief*, paras. 312, 318-324. See above paras. 526-530.

²⁰⁷⁷ See *Bemba Brief*, paras. 319-320, 324-325.

²⁰⁷⁸ [Judgment](#), paras. 697-698. See also above para. 527.

- Babala did not merely seek authorisation from Bemba, he updated Bemba on the status of money transactions;²⁰⁷⁹
- Bemba spoke to Babala in code, so he and Babala could conceal their discussions about illegitimate payments;²⁰⁸⁰
- Bemba was responsible for authorising payments to witnesses, as evidenced by Kilolo's, Babala's and Mangenda's remarks in various conversations;²⁰⁸¹ and
- Bemba's own sister illicitly paid a Defence witness.²⁰⁸²

553. Bemba also argues that the Chamber erred in relying on Babala's comment to him that "[c]'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien/[i]t's the same thing as for today. You'll see that it's good to give people sugar".²⁰⁸³ The Chamber reasonably found that this comment referred to a payment Babala had made to D-57's wife earlier the same day, and payments Babala's employee made to D-64 the following day.²⁰⁸⁴ Bemba shows no error in this respect.

- First, the Chamber did not derive the meaning of Babala's comment from other parts of the conversation.²⁰⁸⁵ The Chamber recognised that the recording of the conversation suffered from misalignment problems.²⁰⁸⁶ When it referred to other parts of the conversation, the Chamber did so to demonstrate that Babala and Bemba spoke in code during their conversation and in that vein, the "*donner du sucre*" remark was spoken in code as well.²⁰⁸⁷ In interpreting what Babala meant by this coded remark, the Chamber appropriately relied on the surrounding circumstances: the day Babala made the remark, he had paid D-57's wife, and on the day after, one of Babala's

²⁰⁷⁹ [Judgment](#), paras. 696, 698.

²⁰⁸⁰ [Judgment](#), para. 701.

²⁰⁸¹ [Judgment](#), paras. 699, 766, 790.

²⁰⁸² [Judgment](#), paras. 396-397.

²⁰⁸³ [Bemba Brief](#), paras. 316-317.

²⁰⁸⁴ [Judgment](#), paras. 267, 700.

²⁰⁸⁵ *Contra* [Bemba Brief](#), para. 316.

²⁰⁸⁶ [Judgment](#), para. 266.

²⁰⁸⁷ [Judgment](#), para. 267. *Contra* [Bemba Brief](#), para. 316. *See also above* paras. 527-528.

employees paid D-64.²⁰⁸⁸ Given these circumstances, the Chamber reasonably concluded that Babala’s comment was a coded reference to these payments.²⁰⁸⁹

- Second, the Chamber did not improperly assume that Babala uttered the “*donner du sucre*” remark in one continuous sequence.²⁰⁹⁰ Bemba’s argument has no basis in the evidence. D20-1 did not suggest that the “flaw in metering silence” affected the sequence or continuity of the recording of an individual speaker’s speech.²⁰⁹¹ Indeed, as the Judgment noted,²⁰⁹² he confirmed the opposite.²⁰⁹³

VI.F.3. The Chamber reasonably relied on the evidence of D-2 and D-3

554. The Chamber did not err in relying upon the evidence of D-2 and D-3 merely because they testified falsely during their Main Case testimony.²⁰⁹⁴ As discussed elsewhere,²⁰⁹⁵ the evidence of these witnesses was no different than accomplice evidence.²⁰⁹⁶ As caselaw from the ICTR and SCSL demonstrates, a chamber may rely on such evidence even in the absence of corroboration.²⁰⁹⁷ What is required of a chamber is that it assesses accomplice evidence with caution.²⁰⁹⁸ The Chamber did that in this case. In carrying out its assessment, the Chamber considered the lies told by the witnesses during their Main Case testimony. In doing so, it observed that the witnesses did not distance themselves from these lies. This, the Chamber reasonably found, enhanced their credibility.²⁰⁹⁹ The Chamber also considered a variety of other factors in assessing the credibility of D-2 and D-3, none of which Bemba addresses.²¹⁰⁰

555. Rather than addressing the Chamber’s measured and detailed analysis, Bemba misrepresents the circumstances under which D-2 and D-3 provided statements to the

²⁰⁸⁸ [Judgment](#), paras. 243, 267-269, 700.

²⁰⁸⁹ [Judgment](#), paras. 267, 700.

²⁰⁹⁰ [Bemba Brief](#), para. 317.

²⁰⁹¹ [T-43-RED](#), 30:14-32:14.

²⁰⁹² [Judgment](#), para. 227.

²⁰⁹³ [T-43-RED](#), 21:22-24 (“if you were to take just [one of the speakers], all of their utterances, all of their speech occurs sequentially [...] what they said at the beginning of the call is at the beginning of the recording, and what they said at the end of the call is at the end”).

²⁰⁹⁴ *Contra* [Bemba Brief](#), paras. 298-300, 306.

²⁰⁹⁵ *See above* para. 291; *below* paras. 706-714.

²⁰⁹⁶ [Brima AJ](#), para. 127. *Also* [Niyitegeka AJ](#), para. 98.

²⁰⁹⁷ [Nchamihigo AJ](#), paras. 42, 48; [Brima AJ](#), paras. 127, 129.

²⁰⁹⁸ [Nchamihigo AJ](#), paras. 42, 47-48; [Niyitegeka AJ](#), para. 98; [Brima AJ](#), para. 129.

²⁰⁹⁹ [Judgment](#), paras. 308, 313. *Contra* [Bemba Brief](#), para. 306.

²¹⁰⁰ *See above* para. 292.

Prosecution.²¹⁰¹ Bemba also wrongly implies that the witnesses were given an incentive to lie by virtue of agreements they signed with the Prosecution in which they agreed to tell the truth.²¹⁰² These agreements enhanced the reliability of D-2 and D-3's evidence in this case.²¹⁰³ Although Bemba argues that the witnesses gave false and contradictory evidence,²¹⁰⁴ his arguments are unsupported.

- The only support which Bemba provides for his claim that the witnesses provided “demonstrably false” evidence in this case is his own notice of appeal,²¹⁰⁵ which is no support at all.
- Bemba misrepresents the evidence given by D-2 and D-3 when claiming that they “contradicted each other on material aspects”.²¹⁰⁶ The witnesses provided consistent testimony regarding the issue Bemba alludes to—their relocation-related discussions with Kilolo.²¹⁰⁷ Both witnesses testified consistently that the issue was not openly discussed with Kilolo at the meeting in Douala in February 2012.²¹⁰⁸ Both witnesses also testified consistently that they, together with D-4 and D-6, expressed frustration during a May 2013 meeting with Kilolo that they were still awaiting Arido's promise of relocation to be fulfilled.²¹⁰⁹

556. D-2's testimony does not “undercut” the Chamber's determination that Kilolo paid witnesses pursuant to the Common Plan of which Bemba was a part.²¹¹⁰ D-2, like D-3, gave evidence from which the Chamber reasonably concluded that Kilolo illicitly coached witnesses, including by instructing them to provide false evidence and that Kilolo paid witnesses to testify in Bemba's favour.²¹¹¹ Their evidence supports the Chamber's conclusion that payments were made pursuant to the Common Plan.

²¹⁰¹ [Bemba Brief](#), para. 299.

²¹⁰² [Bemba Brief](#), paras. 299-300.

²¹⁰³ *Contra* [Bemba Brief](#), paras. 299-300.

²¹⁰⁴ [Bemba Brief](#), para. 300.

²¹⁰⁵ *See* [Bemba Brief](#), fn. 618.

²¹⁰⁶ [Bemba Brief](#), para. 300.

²¹⁰⁷ [Bemba Brief](#), fn. 619.

²¹⁰⁸ [Judgment](#), para. 349.

²¹⁰⁹ [Judgment](#), paras. 314, 372.

²¹¹⁰ *Contra* [Bemba Brief](#), paras. 301-302.

²¹¹¹ [Judgment](#), paras. 365-366, 372-380, 384-389, 391-392, 394, 396-401, 407-419.

557. Finally, Bemba argues that the Chamber erred in relying upon discrete details in D-2 and D-3's evidence,²¹¹² but he fails to show how the Chamber erred. D-2's testimony that Kilolo identified the money he paid D-2 as a gift from Bemba,²¹¹³ and D-3's testimony that Kilolo had said that Bemba would meet D-2, D-3, D-4 and D-6 after his release from detention,²¹¹⁴ were hardly central to the Chamber's determination concerning Bemba's criminal responsibility.²¹¹⁵ There was other compatible evidence connecting Bemba to the inducements offered and provided to Defence witnesses.²¹¹⁶ Bemba's arguments that the Chamber erred in relying upon D-2 and D-3's evidence should be dismissed.

VI.G. ALL MATERIAL FINDINGS OF FACT WERE BASED ON THE EVIDENCE (BEMBA GROUND 4.4)

558. Bemba overstates the case, and merely recycles his existing arguments, when he states that his convictions rest "on several key findings, which are not supported by evidence".²¹¹⁷ Unexplained reference to a 43-page table attached to Bemba's notice of appeal is not, of itself, a sufficient basis to substantiate an argument on appeal, and matters raised solely therein will not be addressed.²¹¹⁸ Nor are his remaining claims well-founded, since they rely simply on reading passages of the Judgment in isolation or on incorrect legal interpretations. Thus:

- The Chamber found that the Common Plan had crystallised at least by the time arrangements were made for D-57's testimony on the basis of the evidence that D-57 was coached and bribed as part of the conduct falling within the Common Plan.²¹¹⁹ It did not need to identify the particular date with greater precision, provided that it was satisfied that the relevant criminal conduct fell within the duration of the Common Plan as established by the evidence.²¹²⁰
- The Chamber found that Bemba had the necessary intent and knowledge under articles 30 and 70(1)(c) because this offence, among others, was a virtually certain

²¹¹² [Bemba Brief](#), paras. 301, 303-306.

²¹¹³ [Judgment](#), para. 374.

²¹¹⁴ [Judgment](#), para. 373.

²¹¹⁵ *See* [Judgment](#), paras. 805-820.

²¹¹⁶ *E.g.* [Judgment](#), paras. 243, 269, 271, 293-295, 298, 301, 396-397, 406, 693-701, 790, 888-889.

²¹¹⁷ *Contra* [Bemba Brief](#), para. 326. *See also* para. 331.

²¹¹⁸ *Contra* [Bemba Brief](#), para. 329 (fn. 677, citing [Bemba Detailed Notice, Annex A](#)). *See* [Krajišnik AJ](#), paras. 23, 26.

²¹¹⁹ *Compare* [Judgment](#), paras. 103, 802, with paras. 235-254. *See also above* paras. 416, 452.

²¹²⁰ *Contra* [Bemba Brief](#), para. 329.

consequence of the Common Plan, to which the evidence showed that Bemba knowingly and intentionally made an essential contribution.²¹²¹

- The Chamber found that Bemba made an essential contribution to the commission of the offences as contemplated in the Common Plan, based on the evidence, which is all that is required by article 25(3)(a) of the Statute.²¹²²
- The Chamber found that Bemba asked the 14 Defence witnesses to lie, “either personally or through Mr Kilolo”.²¹²³ This was primarily based on the evidence of Kilolo’s conduct as discussed in the context of the Common Plan, as well as Bemba’s direct contact with D-55.²¹²⁴ Lies on the “issues of payments and contacts” were integral to lies on the merits of the case, since the Common Plan depended on secrecy,²¹²⁵ and as such could properly be inferred from evidence of requests to lie on the merits.
- The Chamber’s finding that D-55 “lied about not having been promised that he would benefit from Mr Bemba’s good graces” was based on evidence that Kilolo had indeed promised D-55 “would benefit from Mr Bemba’s good graces”.²¹²⁶ Although the Chamber omitted the precise citation, Bemba fails to show how this was “misleading” or “incorrect”.²¹²⁷

559. The Chamber did make two harmless errors concerning Bemba’s abuse of the privileged line, but these do not materially affect the Judgment. It remains the case that Bemba abused his privileged line to Kilolo, for example, by participating in illicit multi-party calls with D-19 and D-55;²¹²⁸ whether or not this is a disciplinary infraction under the Registry rules is immaterial to the relevance and probative value of this conduct for the

²¹²¹ See [Judgment](#), paras. 807, 817-820, 924-925. See also above paras. 486-488. Contra [Bemba Brief](#), para. 329 (fn. 679, citing only [Judgment](#), para. 700).

²¹²² See [Judgment](#), paras. 816-817, 924. See also above paras. 477-480. Contra [Bemba Brief](#), para. 329.

²¹²³ [Judgment](#), para. 853.

²¹²⁴ [Judgment](#) para. 856; see also paras. 293-298, 305, 740, 814. See also above paras. 473, 489, 515, 522. Contra [Bemba Brief](#), para. 329.

²¹²⁵ [Judgment](#), para. 251. See also above paras. 455, 460, 484, 523.

²¹²⁶ [Judgment](#), para 301. See further paras. 283 (noting evidence including CAR-OTP-0074-0872-R03, a record of the “January 2014 statement”), 286 (relying “on the January 2014 statement for the purpose of its evidentiary assessment”), 289-290 (citing the “January 2014 statement” in discussing a meeting in Amsterdam), 301. Concerning the promise, see CAR-OTP-0074-0872-R03, p. 0878 (“*Lors de son séjour a Amsterdam [...] Kilolo lui a assuré que Bemba le traiterai bien*”). See also above para. 290.

²¹²⁷ Contra [Bemba Brief](#), para. 330.

²¹²⁸ See e.g. [Judgment](#), paras. 740-741 (although on 13 January 2013, not 4 October 2012), 814, 816, 856.

Common Plan.²¹²⁹ Nor did the Chamber place “significant weight” on this finding in particular; rather, it was one of a wide variety of findings supporting the existence of the Common Plan, and Bemba’s essential contribution, knowledge, and intent.²¹³⁰

- As previously acknowledged,²¹³¹ the Chamber incorrectly implied that, on two occasions, Bemba had spoken to D-19 (via a multi-party call) during his privileged conversation with Kilolo. Although this occurred only on 13 January 2013, and not 4 October 2012, this error does not materially affect the Judgment.²¹³²
- The Chamber characterised the 16 October 2012 telephone conversation between Bemba and Babala as occurring “on his privileged line”.²¹³³ However, the Prosecution agrees that this call was placed to Babala on the [REDACTED] number, and therefore was not privileged.²¹³⁴ This does not materially affect the Judgment, however, as the Chamber’s findings concerning this call turn on its content and timing, not on its (mis)characterisation as “privileged”.²¹³⁵ Indeed, notably, the Chamber does not even refer to the 16 October 2012 call when discussing its general findings concerning abuse of the privileged line.²¹³⁶

VI.H. CONCLUSION

560. For all the reasons above, and in light of the arguments elsewhere addressed in this response concerning legal and procedural aspects of his conviction and the trial,²¹³⁷ Bemba’s appeal should be dismissed and his convictions affirmed.

²¹²⁹ *Contra* [Bemba Brief](#), para. 330 (fns. 689-690).

²¹³⁰ *Contra* [Bemba Brief](#), para. 330 (fn. 685, citing [Judgment](#), para. 737). *See above* paras. 439, 449, 453.

²¹³¹ *See above* paras. 462, 517, 536.

²¹³² *Cf.* [Bemba Brief](#), para. 330 (referring to a “October 2013 call [...] based on a clear error”, citing Annex G). This appears to be a typographic error, and should read “October 2012”: *see e.g.* Annex G.

²¹³³ [Judgment](#), para. 265.

²¹³⁴ *Compare* [Judgment](#), para. 265, with CAR-OTP-0074-0052 (record of Bemba’s unprivileged calls in October 2012), row 97. *Contrast* CAR-OTP-0074-0079 (cited at [Judgment](#), para. 265, fn. 352; containing no reference to the [REDACTED] number); CAR-OTP-0074-0065 (record of Bemba’s privileged calls in 2012), rows 704-705 (listing two privileged calls made on 16 October 2012 to a different number, [REDACTED], attributable to Kilolo).

²¹³⁵ *See e.g.* [Judgment](#), paras. 117, 265, 700-701, 703, 813, 816-820.

²¹³⁶ *See* [Judgment](#), paras. 736-745.

²¹³⁷ *See above* sections one to three.

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VII. BABALA WAS PROPERLY CONVICTED

561. Babala aided the corrupt influencing of D-57 and D-64, and was properly convicted under article 70(1)(c) for these offences.²¹³⁸ Babala's challenge to the Chamber's factual and legal findings underpinning his conviction discloses no error.²¹³⁹ In ground D of his Brief, Babala offers a partisan reading of the evidence supporting discrete factual findings, which disregards the totality and clarity of the Chamber's findings.²¹⁴⁰ In ground E of his Brief, Babala presents alternative theories on the law and approaches towards assessing evidence, notwithstanding the Court's established jurisprudence that the Chamber correctly applied.²¹⁴¹ In sub-grounds B.5 and B.6 of his Brief, Babala fails to show that the Chamber erred in relying on the Detention Centre recorded conversations and their transcriptions and translations.²¹⁴² In ground F of his Brief, Babala alleges that "*la valeur juridique du jugement du 19 octobre 2016 est hautement discutable*" and merely repeats select alleged errors that he has previously advanced elsewhere in his Brief.²¹⁴³ Babala's appeal should be dismissed.

VII.A. BABALA AIDED THE CORRUPT INFLUENCING OF D-57 AND D-64

562. As Bemba's financier and an accessory to the co-perpetrators' crimes, Babala provided material assistance to the co-perpetrators when they corruptly influenced witnesses D-57 and D-64.²¹⁴⁴ Babala transferred an illegitimate payment himself or through a third person to these witnesses.²¹⁴⁵ Babala admits that he paid D-57 USD 665 (through his wife) and facilitated the payment of USD 700 to D-64 (through his daughter, with Babala's employee effecting the payment).²¹⁴⁶ He knew that the money was used as an incentive to make the witnesses testify in Bemba's favour.²¹⁴⁷ Moreover, as the Chamber correctly found, Babala lent his assistance with the aim of facilitating the offences of corruptly influencing D-57 and D-64.²¹⁴⁸ Further, the Chamber was properly satisfied that "considering his regular exchanges with [Bemba] and [Kilolo], in particular his role as financier" and when "viewed

²¹³⁸ [Judgment](#), paras. 936-937.

²¹³⁹ [Babala Brief](#), paras. 73-308.

²¹⁴⁰ [Babala Brief](#), paras. 73-106.

²¹⁴¹ [Babala Brief](#), paras. 107-270.

²¹⁴² [Babala Brief](#), paras. 34-48.

²¹⁴³ [Babala Brief](#), paras. 271-308.

²¹⁴⁴ [Judgment](#), para. 878.

²¹⁴⁵ *Ibid.*

²¹⁴⁶ [Judgment](#), para. 879.

²¹⁴⁷ [Judgment](#), para. 879.

²¹⁴⁸ [Judgment](#), para. 893.

in the light of the evidence as a whole”, Babala was aware that the payments were illegitimate and aimed at altering and contaminating the witnesses’ testimony.²¹⁴⁹

563. The Chamber’s findings were firmly based on credible and corroborated evidence. The Chamber’s findings on Babala’s role *vis-à-vis* D-57 were based on P-20 (D-57)’s “generally forthcoming” and “essentially consistent” testimony²¹⁵⁰ and P-242’s—P-20 (D-57)’s wife—“credible” testimony.²¹⁵¹ The reliable evidence included Western Union records showing the payments,²¹⁵² and the call sequence table and corresponding call data records showing contacts between D-57 and Kilolo.²¹⁵³ Likewise, the Chamber’s findings on Babala’s role *vis-à-vis* D-64 were based on P-243 (D-64)’s “credible” and “essentially consistent” testimony,²¹⁵⁴ and P-272’s (Babala’s employee) “consistent” and “truthful” testimony.²¹⁵⁵ Reliable evidence included the call sequence table and related call data records showing at least three contacts between Kilolo and D-64 on 16 October 2012, and one further call after

²¹⁴⁹ [Judgment](#), para. 893.

²¹⁵⁰ [Judgment](#), para. 231 (“The Chamber finds the witness credible as regards the core details relating to his prior contacts with [Kilolo and Babala] and payments of money. His account [...] remained essentially consistent. The witness was generally forthcoming in answering questions, and did not change crucial aspects of his testimony during the Defence examination. The Chamber thus considers that it can rely on the core parts of P-20 (D-57’s) testimony since he testified about facts within his personal knowledge when explaining his prior contacts with some of the Accused and the manner in which payments were effected. However, the Chamber also notes that the witness occasionally prevaricated with regard to his own conduct. In such instances, in particular when P-20 (D-57) testified as to the Accused’s behaviour, the Chamber relied on his word only to the extent that it was corroborated by other evidence. The Chamber will determine on a case-by-case basis whether other aspects of his testimony can be relied upon without corroboration.”).

²¹⁵¹ [Judgment](#), para. 233 (“[...] The Chamber finds the witness credible as regards the core details relating to her contact with [Babala], the conduct of her husband and the payment of money. She volunteered relevant information and remained consistent during both the Prosecution and Defence examinations.”).

²¹⁵² [Judgment](#), para. 243 (noting that the 16 October 2012 transfer of USD 665 by Babala to D-57’s wife was “further corroborated by the relevant Western Union records and P-242’s testimony” and considering that “this mutual corroboration serves as another example of the accuracy and reliability of the Western Union records.”).

²¹⁵³ [Judgment](#), paras. 236-237 (finding the call sequence table/call data records reliable in showing contacts, including their duration, between witness D-57 and Kilolo during the period concerned.).

²¹⁵⁴ [Judgment](#), para. 257 (“The Chamber finds this witness credible as regards core details relating to the payment of money to him and his daughter and some telephone contacts with [Kilolo]. His account, as reflected in the January 2014 statement and his subsequent in-court testimony, remained essentially consistent. However, the Chamber noticed a degree of reluctance on the part of the witness to fully disclose information at the time of his January 2014 statement. [...] In sum, the Chamber considers that it can rely on core parts of P-243 (D-64)’s testimony concerning his contacts with [Kilolo] and monetary payments to him and his daughter, which are facts within his personal knowledge. However, on account of the contradictions in his statement, in particular concerning the Accused’s behaviour, the Chamber relied on P-243 (D-64)’s evidence only if corroborated by other evidence.”).

²¹⁵⁵ [Judgment](#), para. 260 (“[...] The Chamber finds him credible. He was straightforward and candid in answering questions. P-272’s testimony remained consistent with his prior recorded statement of March 2015. He did not equivocate, despite the fact that he testified against his employer, [Babala]. His admission [...] and willingness to stand corrected [...] reinforce the general impression that the witness intended to truthfully recount his personal experience. The Chamber thus considers that it can rely on P-272’s testimony concerning payments he effected on [Babala’s] behalf, which are facts within his personal knowledge.”).

the VWU cut-off date on 17 October 2012,²¹⁵⁶ and Babala's standalone utterances in a 16 October 2012 conversation with Bemba in the Detention Centre.²¹⁵⁷

VII.A.1. Babala aided the corrupt influencing of D-57

564. Kilolo arranged the transfer of USD 665 to D-57 through Babala shortly before D-57's testimony in the Main Case, to secure his testimony in Bemba's favour. Babala transferred USD 665 to D-57's wife shortly before D-57's testimony, knowing that the money was to ensure that D-57 would testify in the Main Case in Bemba's favour.²¹⁵⁸ Kilolo and Babala closely co-ordinated their actions regarding their contact with D-57 and the payments.²¹⁵⁹

565. Kilolo and D-57 had regular telephone contacts after the VWU cut-off date of 16 October 2012 and before D-57 testified before Trial Chamber III on 17 October 2012.²¹⁶⁰ Moreover, D-57 admitted to having spoken to Kilolo on 15 October 2012 and 20 October 2012.²¹⁶¹ As D-57 admitted, Kilolo promised him "a little bit of money".²¹⁶² He also informed him of the "imminent" money transfer.²¹⁶³ D-57 then gave Kilolo the name of his wife, P-242.²¹⁶⁴

566. On the morning of 16 October 2012—the day of D-57's travel to The Hague—D-57 received a call from Babala in Kinshasa. Babala, who D-57 did not know at the time, confirmed his (Babala's) name and the transfer to be made.²¹⁶⁵ D-57 noted down the name of the transferor and transfer number on a piece of paper and instructed his wife to collect the money.²¹⁶⁶ On that same day, D-57's wife (P-242) received USD 665 through Western

²¹⁵⁶ [Judgment](#), paras. 262-263.

²¹⁵⁷ [Judgment](#), paras. 265-267. See [Judgment](#), para. 267 ("[The] Chamber is satisfied that [Babala's] statement, 'C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien', stands on its own and can be relied upon.").

²¹⁵⁸ [Judgment](#), paras. 253-254.

²¹⁵⁹ [Judgment](#), paras. 242, 253.

²¹⁶⁰ [Judgment](#), para. 235 (noting the following contacts (i) 15 October 2012, at 14.16, for approximately 7 minutes; at 17.34, for approximately 70 minutes; (ii) 16 October 2012, at 08.35, for approximately 6.5 minutes; at 11.11, for approximately 11 minutes). See [ICC-01/05-01/08-T-256-RED2 et seq](#) (D-57's testimony in the Main Case starting 17 October 2012) and CAR-OTP-0078-0290 at 292 (noting the VWU cut-off date as 16 October 2012).

²¹⁶¹ [Judgment](#), para. 237 (noting that although D-57 disputed the length of the conversation with Kilolo on 15 October 2012, he did not contest that it had occurred.). E.g., [T-31-RED2](#), 36:13-37:8.

²¹⁶² [Judgment](#), para. 238; [T-31-RED2](#), 22:3-23:16.

²¹⁶³ [Judgment](#), para. 238; [T-31-RED2](#), 27:14-16 ("But before [Babala] sent the money, brother Kilolo told me that he was going to send a little bit of money").

²¹⁶⁴ [Judgment](#), para. 238.

²¹⁶⁵ [Judgment](#), para. 242; [T-31-RED2](#), 25:25-27:2.

²¹⁶⁶ [Judgment](#), para. 242.

Union.²¹⁶⁷ P-242 stated that she received an SMS from a person who “did not state his name” with the transfer number, name of the transfer and the amount being sent. She also stated that she collected the money after D-57 had departed for The Hague—a fact the Western Union records confirm.²¹⁶⁸ P-242 also received a further call from Babala enquiring if she had received the money.²¹⁶⁹ P-242, in a telephone conversation with her husband, informed him that she had collected the money. D-57 had agreed that his wife “spen[t] some [money] [...] and ke[pt] the rest for him.”²¹⁷⁰

567. As the Chamber correctly found, D-57 was paid USD 665 “to motivate him to testify to particular matters in favour of [Bemba] before Trial Chamber III.”²¹⁷¹ Both “the temporal proximity between the money transfer and the witness’s testimony” and D-57’s statement that the money was sent *because of* his departure to The Hague demonstrate the link between the payment and the testimony.²¹⁷² Kilolo instructed D-57 “to lie concerning his receipt of money transfers” and “to conceal the real number of contacts with the Main Case Defence [...].”²¹⁷³ In his testimony before Trial Chamber III, D-57 falsely testified about the money he had received and the number of contacts he had had with Kilolo.²¹⁷⁴

VII.A.2. Babala aided the corrupt influencing of D-64

568. Kilolo, through Babala, arranged the transfer of USD 700 to D-64 shortly before he testified in the Main Case, to secure the witness’s testimony in Bemba’s favour. Babala then transferred, through his employee (P-272), USD 700 to D-64’s daughter. Babala arranged the payments knowing that the money was to ensure that D-64 would testify in Bemba’s favour. Babala also informed Bemba by telephone of the need to pay prospective witnesses.²¹⁷⁵

²¹⁶⁷ [Judgment](#), para. 239.

²¹⁶⁸ [Judgment](#), para. 244; [T-37-RED](#), 33:9-36:10; CAR-OTP-0073-0274, tab 31, row 14, column AA.

²¹⁶⁹ [Judgment](#), para. 244.

²¹⁷⁰ [Judgment](#), para. 248; [T-37-RED](#), 34:13-15.

²¹⁷¹ [Judgment](#), para. 240.

²¹⁷² [Judgment](#), para. 239. *Also* para. 239 (rejecting the suggestion that Kilolo had sent the money as “a gesture of kindness”) and para. 240 (rejecting Kilolo’s argument that the money was reimbursement of outstanding expenses.).

²¹⁷³ [Judgment](#), paras. 250-251.

²¹⁷⁴ [Judgment](#), paras. 246, 249, 252.

²¹⁷⁵ [Judgment](#), paras. 280-281.

569. Kilolo and D-64 had at least three telephone contacts on 16 October 2012, and one further call after the VWU cut-off date on 17 October 2012.²¹⁷⁶ Shortly after the last telephone call between D-64 and Kilolo on 16 October 2012, Babala spoke to Bemba at the Detention Centre by telephone.²¹⁷⁷ In that conversation, Babala said the following to Bemba:

*C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien/It's the same thing as for today. You'll see that it is good to give people sugar.*²¹⁷⁸

570. By using the phrases “*c'est la même chose comme pour aujourd'hui*” and “*donner du sucre aux gens*”, Babala was referring to the payment made to D-57's wife earlier that day. By so doing, he also demonstrated his awareness of D-57's and D-64's status as Main Case witnesses and the importance of paying witnesses shortly before they testified.²¹⁷⁹

571. On 17 October 2012—one day after Babala's “*donner du sucre*” remark and the day D-64 travelled to the Hague—Babala's employee, P-272, transferred USD 700, in two transactions, to D-64's daughter on Babala's behalf.²¹⁸⁰ As D-64 stated, his daughter had first received [REDACTED]. According to her, “the same uncle who had sent [her] the money” had called her to ask how much she had received. When told of the amount, “the same individual” said “no, that's not right” and said that he was “going to send [her] a little bit more money.”²¹⁸¹ Babala admitted that, at Kilolo's request, he facilitated the money transfer for D-64's benefit. Kilolo admitted the same transfer.²¹⁸² As the Western Union records reliably show, D-64's daughter collected the money that same day.²¹⁸³

²¹⁷⁶ [Judgment](#), para. 262 (noting contacts on (i) 16 October 2012, at 17.56, for almost 1.5 minutes; at 18.11, for approximately 8 minutes; and at 18.42 for 48 minutes; and (ii) 17 October 2012, at 13.17, for approximately 4 minutes.).

²¹⁷⁷ [Judgment](#), para. 265.

²¹⁷⁸ [Judgment](#), para. 267, fn. 361.

²¹⁷⁹ [Judgment](#), para. 267.

²¹⁸⁰ [Judgment](#), para. 268; [T.25-RED](#), 37:4-7 (“[...] The boss is not your friend. When he sends you off and he tells you ‘Take this money and give it to such another person to do this or that’ you can’t talk about it. We never talked about that. I know one thing, he sent me to go and do this or that. That’s all.”); [T.25-RED](#), 37:10-11 (“[...] I go, I send the money, and then I bring back the receipt of the transaction, and I give it to him, and then I would go off.”).

²¹⁸¹ T-32-CONF, 55:16-24; [Judgment](#), para. 271.

²¹⁸² [Judgment](#), para. 269. *E.g.*, [Babala Closing Brief](#), para. 220; [Babala DCC Response](#), paras. 20, 43, 46, 82, 124, 126, 131 and 148; [Kilolo Closing Brief](#), para. 260.

²¹⁸³ [Judgment](#), para. 269; CAR-OTP-0070-0007, tab 34, rows 2 and 3, column AC; T-32-CONF, 55:13-14 (D-64 said that he gave Kilolo his daughter's contact information).

572. Babala admitted contacts with D-64 in connection to the money transfer.²¹⁸⁴ The Chamber correctly concluded that Kilolo and Babala arranged the money transfer to D-64 in a manner intended to conceal any link between the witness and the Main Case Defence.²¹⁸⁵ D-64 was aware that he had been paid when he testified.²¹⁸⁶ Accordingly, when he testified before Trial Chamber III, D-64 withheld information on the number of contacts he had had with Kilolo and incorrectly denied having received any payments from the Main Case Defence.²¹⁸⁷

VII.A.3. Babala advised the co-perpetrators to provide “*le service après-vente*” to the witnesses

573. When the co-perpetrators became aware that they were the subject of the Prosecution’s article 70 investigation, Babala advised them on counter-measures.

- On 17 October 2013, when Kilolo informed Babala that he had identified the witness who had spoken to the Prosecution, Babala agreed “that the Prosecution’s investigatory focus was the identification of the ‘*faiblesse*’, i.e., witnesses who could provide information.”²¹⁸⁸ Babala then declared that it was necessary to ensure “*le service après-vente*”: “*Il fallait assurer le service après-vente*”\ “*We needed to provide after-sales service.*”²¹⁸⁹
- On 21 October 2013, in a conversation with Kilolo, Babala confirmed that he made payments with Bemba’s approval.²¹⁹⁰
- On 22 October 2013, Babala encouraged Kilolo to make the necessary payments as “*le service après-vente*”, which were seemingly small, even without Bemba’s authorisation: (“Babala: *Non, non, non, je ne suis pas d’accord avec lui, là. Il faut y aller, faire le service après-vente, hein, mon gars [...] Je le...je connais mon gars-là.*”).

²¹⁸⁴ [Judgment](#), para. 269; e.g., [Babala DCC Response](#), paras. 126 and 148 (“[...] il est clair que les seuls contacts que M. Babala a eus avec les témoins sont ceux qui concernent notamment D-57 et D-64”); [Babala Confirmation Response](#), para. 56.

²¹⁸⁵ [Judgment](#), para. 272.

²¹⁸⁶ [Judgment](#), paras. 274-275 (rejecting the proposition that D-64 was unaware of the transfer at the time of his testimony).

²¹⁸⁷ [Judgment](#), paras. 273-278.

²¹⁸⁸ [Judgment](#), para. 780.

²¹⁸⁹ [Judgment](#), para. 781.

²¹⁹⁰ [Judgment](#), paras. 699, 798. (“Babala: *Tu as parlé avec le client? Kilolo: J’ai parlé avec le client, oui. On a convenu ça hier soir*”/ “Babala: Have you spoken to the client? Kilolo: Yes, I’ve spoken to the client. We agreed that last night.”).

On n’a pas besoin de lui pour ça. Ça, on peut gérer à nous deux. C’est pas des trucs important, quoi”/“No, no, no, I don’t agree with him on that point. We have to go, provide, the after-sales service, you know, mate [...] I...I know my man there. We don’t need him for that. The two of us can handle that. It’s nothing important is it?”)

574. As the Chamber correctly found, Babala was “fully aware of the legal implications of his suggestion to render ‘après-vente’ services and facilitate illicit defence witness payments in relation to D-57 and D-64.”²¹⁹¹ Babala’s remarks showed that he had “agreed to ensure that any prior illicit payment to D-57 and D-64 [was] not detected.”²¹⁹² His remarks also demonstrated his understanding of his role as Bemba’s financier, and one who “took risks”, and who was determined to proceed without Bemba’s authorisation when the payments were relatively small.²¹⁹³

VII.B. THE CHAMBER PROPERLY ASSESSED THE FACTS

575. To challenge the Chamber’s correct and thorough interpretation of the facts and evidence, Babala puts forward a piecemeal interpretation.²¹⁹⁴ None of his claims demonstrates that the Chamber failed to consider certain facts (Bemba’s legal aid status, the purported “*faux scenario*” put forward by the Independent Counsel, [REDACTED] (P-272, Babala’s employee) testimony, or the functioning of the Detention Centre’s telephone system).²¹⁹⁵ Many of these “facts” are, indeed, irrelevant to the Chamber’s findings on Babala’s guilt. Likewise, although he claims that the Chamber incorrectly assessed certain other facts (the nature of Babala’s money transfer to the Main Case Defence team, his use of codes, his knowledge of the details of the Main Case, and D-57’s testimony), once again, he fails to show error.²¹⁹⁶ In contrast, as the Judgment underscores, the Chamber properly assessed the evidence before it.²¹⁹⁷

²¹⁹¹ [Judgment](#), para. 891.

²¹⁹² [Judgment](#), para. 887.

²¹⁹³ [Judgment](#), paras. 886-892.

²¹⁹⁴ [Babala Brief](#), paras. 73-106.

²¹⁹⁵ *Contra* [Babala Brief](#), paras. 73-88.

²¹⁹⁶ [Babala Brief](#), paras. 89-106.

²¹⁹⁷ [Judgment](#), paras. 229-281, 873-893.

VII.B.1. The Chamber considered all relevant facts

VII.B.1.a. Bemba's legal aid status is irrelevant

576. Babala's submissions regarding Bemba's legal aid status²¹⁹⁸ have no impact on the Chamber's findings relating to Babala's convictions.

577. First, Trial Chamber III's assessment of Bemba's indigence is irrelevant to the Chamber's determination of Babala's liability.²¹⁹⁹ The illicit payments for which Babala was found to be liable—USD 665 to D-57's wife and USD 700 to D-64's daughter (through his employee)²²⁰⁰—were not made to Bemba for the purposes of his legal defence, but to D-57 and D-64 for illicit purposes.²²⁰¹ Babala also admits to having made those transfers.²²⁰² That Bemba may or may not have been indigent in the Main Case is not germane to the issue.

578. Second, and similarly, Babala's view that Bemba's Defence depended on a "*sui generis*" payment system is irrelevant to the convictions entered.²²⁰³ Although Babala argues that, in that context, "[l]e rôle de l'appelant ne consistait qu'à mettre à la disposition de l'Equipe de défense de M.Bemba dans l'affaire principale des fonds ainsi mobilisés par la famille et les amis de ce dernier",²²⁰⁴ the Chamber correctly found that even if "the money transfers were provided out of solidarity with [Bemba]", such motivation "is irrelevant to its criminality".²²⁰⁵ In other words, notwithstanding Babala's motivations to assist Bemba, his conduct in illicitly paying D-57 and D-64 was still criminal. Babala fails to acknowledge this finding.

VII.B.1.b. Babala's submissions on the "faux scénario" are irrelevant

579. Babala's argument that the Chamber failed to consider the alleged "*faux scénario*" put forward by the Independent Counsel—where Kilolo and Mangenda sought to appropriate more money from Bemba to purportedly pay off witnesses—demonstrates no error.²²⁰⁶ Significantly, even if the *faux scénario* were a factor in the Chamber's assessment, it would not diminish Babala's culpability or alter the Chamber's findings in any manner.

²¹⁹⁸ [Babala Brief](#), paras. 75-79, 92.

²¹⁹⁹ [Babala Brief](#), para. 75.

²²⁰⁰ [Judgment](#), paras. 254 (D-57), 281 (D-64).

²²⁰¹ See [Judgment](#), paras. 239-248 (D-57), 265-275 (D-64).

²²⁰² Above paras. 562, 571-572.

²²⁰³ [Babala Brief](#), paras. 76-79.

²²⁰⁴ [Babala Brief](#), paras. 77, 79.

²²⁰⁵ [Judgment](#), para. 881.

²²⁰⁶ [Babala Brief](#), paras. 80-82 (noting IC Third Report, and IC Third Report Annex, pp. 22-31, 34-45, 47-50, 75-77, 84-86).

580. First, the Chamber was not bound by the Independent Counsel's comments. Rather, it was entitled to reach its own finding based on a comprehensive review of the evidence before it. And it did so.²²⁰⁷ It did not find that a "*faux scénario*" along the lines that Babala suggests existed. But it *did* find that Mangenda and Kilolo critically discussed Bemba's instructions to ascertain the leak among witnesses regarding their scheme, and the feasibility of doing so.²²⁰⁸ Thereafter, the Chamber considered that Kilolo and Mangenda made genuine representations to Bemba and Babala regarding their intention to identify and bribe witnesses to discourage them from collaborating with the Prosecution.²²⁰⁹

581. Second, Babala's claim that the "*faux scénario*" involving Kilolo and Mangenda somehow diminished his own criminal culpability²²¹⁰ misstates the Chamber's findings and is, in any event, irrelevant. Whatever the Chamber's findings regarding Mangenda's and Kilolo's representations to Bemba in the context of the cover-up, there is ample evidence that supports, independently, Babala's intention to ensure that his prior illicit payments to D-57 and D-64 were not detected. For example, on 17 October 2013, Babala declared to Kilolo that, with respect to witnesses who testified in the Main Case, it was necessary to ensure "*le service après-vente*".²²¹¹ And in a 22 October 2013 recording, Babala demonstrated his understanding of the legal implications of making illicit payments to witnesses, saying to Kilolo that "[e]n tant que financier, c'est moi qui prend des risques".²²¹² With respect to this latter conversation, the Chamber noted correctly that "there would be no risk for Mr Babala in assisting in legitimate financial matters".²²¹³ These findings underpinning Babala's guilt remain unaffected by his argument.

²²⁰⁷ The Judgment cites to the evidence of intercepted telephone conversations, SMS and emails reviewed by the Independent Counsel, but it does not refer to his characterisations of that evidence in his reports.

²²⁰⁸ [Judgment](#), para. 778 ("Considering [Kilolo's] reluctance to follow [Bemba's] directions to approach *all* witnesses, he thereafter agreed to falsely represent to [Bemba] that the leak originated from three Cameroonian witnesses.").

²²⁰⁹ [Judgment](#), para. 780 ("[Kilolo] assured [Babala] that [the situation was manageable], although he had trouble contacting one of the witnesses whom he suspected to have leaked information to the Prosecution. This evinces that [Kilolo] was determined to interfere with and frustrate the Article 70 investigation"); para. 790 ("[Mangenda] also reported that he advised [Bemba] to act swiftly and to incentivise the witnesses to change their minds."); para. 793 ("The evidence clearly demonstrates that [Kilolo] intervened and attempted to discourage the witnesses from collaborating with the Prosecution with the prospect of potential arrest"); para. 794 ("The following excerpt shows how [Kilolo], upon direction of [Bemba], intentionally targeted the witnesses and sought to convince them to side with the Main Case Defence.").

²²¹⁰ [Babala Brief](#), paras. 80-81.

²²¹¹ [Judgment](#), para. 781.

²²¹² [Judgment](#), para. 889, fn. 1950.

²²¹³ [Judgment](#), para. 892.

582. Third, Babala’s argument that the evidence did not implicate him in the corrupt influencing of D-57 and D-64²²¹⁴ is unsupported. Babala’s one paragraph submission—stating that the Chamber “*a omis d[e l]’exploiter en faveur de l’appelant*”²²¹⁵—ignores the wealth of other evidence that supported the Chamber’s conclusions regarding his liability, including his telephone exchanges with Bemba and Kilolo, his role as a financier, his knowledge of the Main Case, and his use of codes regarding Main Case matters.²²¹⁶ Babala’s submissions should be dismissed summarily.²²¹⁷

VII.B.1.c. The Chamber correctly evaluated P-272’s testimony

583. Babala’s argument that the Chamber omitted to take into account salient facts in [REDACTED] (P-272’s) testimony is cursory and should be rejected summarily.²²¹⁸ Babala merely states, “*l’omission de la Chambre de prendre en compte les faits décrits par* [REDACTED] [...]”,²²¹⁹ but fails to specify which facts were purportedly overlooked. In any event, Babala disregards the Chamber’s clear findings. Not only did the Chamber find that [REDACTED] “was straightforward and candid in answering questions”,²²²⁰ his testimony was compatible and thus corroborated by ample other evidence.²²²¹

VII.B.1.d. Babala’s submissions on the functioning of the Detention Centre’s telephone communication system are irrelevant

584. Babala’s claim that the Chamber found that he conversed with Bemba on the Detention Centre’s privileged line, as opposed to the non-privileged line, has no impact on the findings made against Babala and the Judgment as a whole.²²²² His argument also overlooks relevant findings.

585. First, the Chamber’s characterisation of the 16 October 2012 telephone call between Bemba and Babala as taking place on Bemba’s “privileged line”, with Bemba’s “privileged number”,²²²³ is not germane to its conclusions.²²²⁴ The Chamber relied on Babala’s recorded

²²¹⁴ [Babala Brief](#), para. 82.

²²¹⁵ [Babala Brief](#), para. 82.

²²¹⁶ See [Judgment](#), paras. 879-892.

²²¹⁷ [Krajisnik AJ](#), para. 18.

²²¹⁸ [Babala Brief](#), para. 83.

²²¹⁹ [Babala Brief](#), para. 83.

²²²⁰ [Judgment](#), para. 260.

²²²¹ Above para. 563. See [Prosecution Final Brief](#), para. 35.

²²²² [Babala Brief](#), paras. 84-88.

²²²³ [Babala Brief](#), para. 85.

²²²⁴ See [Judgment](#), para. 265.

words during the telephone conversation;²²²⁵ it did not matter on which line—privileged or non-privileged—those words were spoken. Similarly, the Chamber correctly found that the telephone number [REDACTED] belonged to Bemba, which is the case whether or not it was characterised in the Judgment as being privileged.²²²⁶ Likewise, the [REDACTED] number was confirmed as belonging to Babala.²²²⁷ Similarly, Babala’s complaint that the Chamber described the Detention Centre call logs and audio recordings as emanating from incoming *and* outgoing communications between Bemba and other persons, rather than outgoing communications alone, is manifestly irrelevant.²²²⁸ In the Chamber’s analysis of Babala’s culpability, it mattered not whether Babala called Bemba or *vice versa*. What was important and relied upon was the *content* of their communications.

586. Second, the Chamber’s finding that Bemba abused the privileged line included significant other evidence unrelated to the telephone number [REDACTED], which was indicated as belonging to Kilolo.²²²⁹ Moreover, that finding is not relevant to the factual basis of Babala’s convictions. In any event, as the Judgment makes clear, the privileged telephone numbers for Bemba included telephone number [REDACTED], which was indicated as belonging to Kilolo, but was used by Babala on at least two occasions on 4 and 5 October 2012 during the “multi-party calls”, even if such calls were not eventually found to be conducted as multi-party ones.²²³⁰

VII.B.2. The Chamber correctly assessed all relevant facts

VII.B.2.a. Babala’s money transfers to the Main Case Defence team were not deemed “automatically unlawful” in nature

587. By claiming that the transfers he made on behalf of Bemba were given “*automatiquement un caractère criminel*”, Babala misreads the Judgment.²²³¹ Rather, the Chamber found that “Babala’s role as a financier does not automatically imply his criminal

²²²⁵ [Judgment](#), para. 267.

²²²⁶ See [Judgment](#), para. 265, fn. 352 (citing to CAR-OTP-0074-0079. The heading is titled “Privileged Telephone Numbers Bemba, 9805”), fns. 353-354. Also para. 265 (noting that in the intercepted call, Babala refers to Bemba as ‘*Président*’, alluding to Bemba’s position as MLC President).

²²²⁷ [Judgment](#), para. 265. Also T-25-CONF, 35:22-36:6 (where P-272 confirmed that the ‘8707’ number belonged to Babala).

²²²⁸ [Babala Brief](#), para. 86.

²²²⁹ *Contra* [Babala Brief](#), paras. 87-88. Also [Judgment](#), paras. 884, 736-745. Above paras. 536-539.

²²³⁰ [Judgment](#), paras. 738, 744-745. Also para. 885 (“On at least one occasion, [Babala] was put in contact with [Bemba] through [Kilolo] that succeeded the communication between [Kilolo] and D-51. While the evidence does not reveal that [Babala] became privy to the content of the earlier conversation with D-51, the Chamber nevertheless takes into account that his contact with [Kilolo] and [Bemba] was facilitated with the Registry’s knowledge by abusing the privileged line and in temporal proximity with a telephone call with D-51.”).

²²³¹ [Babala Brief](#), paras. 77, 89-94.

responsibility with regard to payments, but only where it can be established that he assisted in the knowledge that they were illegitimate.”²²³² In its further analysis, the Chamber did establish the requisite *mens rea* for Babala’s payments to D-57 and D-64.²²³³ Babala fails to show error.

588. Moreover, at no point did the Chamber use the evidence of Babala’s general role as Bemba’s financier, without more, to establish his liability for the illicit coaching of D-57 and D-64.²²³⁴ Instead, it used these money transfers to establish Bemba’s direct involvement in and knowledge of the payment scheme, and relied on it, together with other evidence,²²³⁵ to establish his essential contribution to and knowledge of the Common Plan.²²³⁶ Babala fails to show any error—let alone the error of reasoning that he claims.²²³⁷

VII.B.2.b. The Chamber correctly relied on Babala’s use of codes

589. Babala’s argument that his use of coded language “*n’est pas criminel*”²²³⁸ disregards the plain findings. The Chamber correctly inferred his *mens rea* from, *inter alia*, his use of coded language, including about Main Case issues.²²³⁹ The Chamber expressly rejected the suggestion that Bemba and Babala resorted to code language to discuss political affairs in the DRC.²²⁴⁰ As the Chamber correctly noted, Bemba and Babala used code to discuss the proceedings at this Court and not their political work.²²⁴¹ Babala does not acknowledge this finding.²²⁴²

²²³² [Judgment](#), para. 878.

²²³³ [Judgment](#), paras. 880-893.

²²³⁴ [Judgment](#), para. 883 (“[The] Chamber does not rely on the various telephone conversations in which [Babala] merely asks for authorisation of payments to [Kilolo]. [They] cannot establish any link, without more, between those payments and subsequent illegitimate payments effected to the witnesses. [...] [The] Chamber also does not rely on intercepts from the ICC Detention Centre which show that [Babala] conveyed messages from [Bemba] to [Kilolo]. Again, the evidence does not establish any link between [Babala’s] actions to convey these messages and concrete illegitimate payments to other witnesses. It therefore cannot serve as evidence to prove [Babala’s] intent to assist in the commission of the offences.”).

²²³⁵ [Judgment](#), paras. 805-820.

²²³⁶ [Judgment](#), paras. 689-703, in particular para. 693 (“[Bemba] was involved in this payment scheme extensively”); para. 695 (“These statements clearly demonstrate [Bemba’s] direct involvement and knowledge of the payments effected, including illicit payments to witnesses.”); para. 699 (“[...] payments could not be effected without prior authorisation of [Bemba]”); para. 703 (“[Bemba] was in control of the payment scheme as he was aware of and authorised the transfers that [Babala], his financier, would effect”).

²²³⁷ [Babala Brief](#), para. 93.

²²³⁸ [Babala Brief](#), para. 95; *also* paras. 96-99.

²²³⁹ [Judgment](#), para. 884.

²²⁴⁰ [Judgment](#), paras. 748, 884. *Contra* [Babala Brief](#), para. 98.

²²⁴¹ *Ibid.*

²²⁴² [Krajisnik AJ](#), para. 24.

590. Moreover, Babala’s submission that the Chamber allegedly violated rule 136 of the Rules of Procedure and Evidence,²²⁴³ overlooks not just the evidence on the record, but the nature of this case. First, the Chamber correctly found that “the accused did not simply continue to use coded language, as a matter of habit, since new code terms and code names were invented for the Main Case witnesses and introduced by [Kilolo] and [Mangenda]. [...] the fact that [Mangenda] insisted that [Kilolo] brief [Bemba] in codes cannot be explained with the necessity that [Bemba] and [Babala] used codes in discussions involving DRC politics.”²²⁴⁴ Far from violating any of Babala’s rights, this finding properly reflects that Babala was among the Accused who also used coded language. For instance, in a conversation with Bemba on 16 October 2012, Babala said that “[c]’est la même chose comme pour aujourd’hui. Donner du sucre aux gens vous verrez que c’est bien” \ “It’s the same thing as for today. You’ll see that it is good to give people sugar”—referring to an illicit payment to D-57’s wife earlier that day.²²⁴⁵ Further, Babala used the code “*le service après-vente*” in discussions with Kilolo during the cover-up.²²⁴⁶ And the Chamber properly relied on Babala’s use of codes to establish his culpability.²²⁴⁷ Babala’s query—“*quid de M. Babala?*”—disregards the plain text.²²⁴⁸

591. Second, in any event, the Chamber could also reasonably infer from the codes used by Mangenda and Kilolo that other codes used by Babala with Bemba were also related to the illicit scheme.²²⁴⁹ The nature of this case allows such inferences: as the Chamber found, “to establish the existence of the common plan between the co-perpetrators, the Chamber inferred its existence from [Bemba’s, Kilolo’s and Mangenda’s] concerted actions, *also involving the two co-accused [Babala and Arido]*.”²²⁵⁰ The Chamber was thus allowed to fully and comprehensively assess the actions of the three co-perpetrators in light of Babala’s conduct and *vice-versa*.²²⁵¹

²²⁴³ [Babala Brief](#), para. 97. See rule 136 (2): In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

²²⁴⁴ [Judgment](#), para. 748.

²²⁴⁵ [Judgment](#), paras. 243, 265, 267, 882, 884.

²²⁴⁶ [Judgment](#), para. 781.

²²⁴⁷ [Judgment](#), para. 884 (“Rather, the evidence shows that [Babala] actually underlined to [Bemba] the importance of paying certain witnesses (in this case, D-57 and D-64) in connection with their testimonies in court.”).

²²⁴⁸ [Babala Brief](#), para. 97.

²²⁴⁹ [Judgment](#), para. 884.

²²⁵⁰ [Judgment](#), para. 682.

²²⁵¹ *Ibid.*

592. Finally, Babala's claim that the Chamber erred in disregarding "*des décisions des Chambres préliminaires II et III*"²²⁵² is unfounded. He cites only to his Closing Brief, and merely disagrees with the finding.²²⁵³ In any event, the Chamber correctly found that the decisions of the Registry and Pre-Trial Chamber II and III from 2008 and 2009 could not bind this Chamber, especially when this Chamber was tasked "to make findings on the use of coded language in the context of events that took place between 2011 and 2013 and with regard to charges of offences against the administration of justice."²²⁵⁴ The Chamber correctly found the 2008 and 2009 decisions inapposite.

VII.B.2.c. The Chamber correctly inferred Babala's knowledge of details of the Main Case

593. Babala's claim that the Chamber erred in fact, that he had no knowledge of internal details of the Main Case including witnesses' names,²²⁵⁵ merely disagrees with the Chamber's findings and should be dismissed.

594. The Chamber correctly found that Babala "was aware—to some extent—of internal details of the Main Case, including the identity of witnesses, and arranged or effected the money transfers to the co-accused and other persons".²²⁵⁶ Babala has himself admitted that he had contact with D-57 and D-64.²²⁵⁷ Likewise, as D-57 testified, Babala called D-57 on the morning of 16 October 2012 and said "he was sending a little bit of money in my [D-57's] wife's name",²²⁵⁸ which necessarily implies his knowledge of the witness's identity. And as P-272 testified, he (P-272) followed Babala's instructions to send money to D-64's daughter²²⁵⁹—which could not have been done without Babala's knowledge of D-64's identity. Babala was thus well aware of D-57's and D-64's identities and their status as witnesses in the Main Case.²²⁶⁰

²²⁵² [Babala Brief](#), para. 95. Also [T-48-RED](#), 64:6-8 ("After auditing [Bemba's] conversations in 2008 and 2009, the Registry and Pre-Trial Chamber concluded that these coded communications reflected no evidence of witness interference.").

²²⁵³ [Babala Brief](#), para. 95, fn. 152 (citing [Babala Closing Brief](#), para. 41). [Krajišnik AJ](#), para. 24.

²²⁵⁴ [Judgment](#), para. 749.

²²⁵⁵ [Babala Brief](#), paras. 100-101.

²²⁵⁶ [Judgment](#), para. 885.

²²⁵⁷ E.g., [Babala DCC Response](#), paras. 126 and 148 ("[...] il est clair que les seuls contacts que M. Babala a eus avec les témoins sont ceux qui concernent notamment D-57 et D-64"); [Babala Confirmation Response](#), para. 56; also [Judgment](#), paras. 243, 879.

²²⁵⁸ [T-31-RED2](#), 26:5-27:2; also [Judgment](#), para. 242.

²²⁵⁹ [T.25-RED](#), 37: 4-7.

²²⁶⁰ [Judgment](#), para. 267. Above paras. 564-572.

595. Further, the Chamber correctly inferred Babala's knowledge of internal details of the Main Case including witnesses' identities²²⁶¹ from his conversations with Bemba. For example, Babala's comment to Bemba on 16 October 2012 that "*C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien*", referring to the illicit payment Babala had made to D-57's wife earlier that day, again demonstrates that Babala was aware of D-64's and D-57's status as witnesses in the Main Case.²²⁶²

VII.B.2.d. The Chamber correctly relied on D-57's testimony

596. Babala incorrectly alleges that the Chamber relied inappropriately on D-57's identification of Babala as the person to whom he spoke on 16 October 2012.²²⁶³ Babala's submission overlooks the sheer weight of the corroborated evidence that establishes Babala as the person who transferred USD 665 to D-57 before his (D-57's) testimony. In addition to D-57's own testimony, the Chamber also had heard P-242's—P-20 (D-57)'s wife—"credible" testimony,²²⁶⁴ and the reliable evidence of Western Union records showing the payments,²²⁶⁵ and the call sequence table and corresponding call data records showing contacts between D-57 and Kilolo.²²⁶⁶ All of this evidence establishes Babala's role in paying D-57.²²⁶⁷ Critically, Babala has previously admitted to transferring the money to D-57²²⁶⁸—a fact he now overlooks.

597. In any event, by questioning how the Prosecution refreshed the witness's memory on the issue of Babala's identity,²²⁶⁹ Babala fails to show error. He merely repeats his objection at trial.²²⁷⁰ As throughout the trial, the Presiding Judge closely managed the questioning of this witness, including the process of refreshing his memory on the identity of the person who telephoned him: "Mr Vanderpuye, I will not give you a second chance in that respect to be honest, because it's really, you see, it's indeed what Mr Gosnell said is true. So perhaps we could ask the witness if this rings a bell and then finish this".²²⁷¹ The Prosecution's next question was phrased to follow the Presiding Judge's instructions and the answer came from

²²⁶¹ [Judgment](#), para. 885.

²²⁶² [Judgment](#), para. 267.

²²⁶³ [Babala Brief](#), paras. 102-106.

²²⁶⁴ [Judgment](#), para. 233.

²²⁶⁵ [Judgment](#), para. 243.

²²⁶⁶ [Judgment](#), paras. 236-237.

²²⁶⁷ *Above* paras. 562-567.

²²⁶⁸ [Judgment](#), para. 879.

²²⁶⁹ [Babala Brief](#), paras. 102-104.

²²⁷⁰ [T-31-RED2](#), 23:21-24:7; 25:11-22.

²²⁷¹ [T-31-RED2](#), 25:11-13.

the witness: “Yes, I believe that it’s the name Fidèle Babala, yes”.²²⁷² Three questions later, the witness confirmed that, “[h]e [Babala] gave the name and said he was sending. [...] He gave a name, the name and -- well, because without that name I can't pick the money up from Western Union. [...] So I wrote it down on a piece of paper, gave it to my wife”.²²⁷³ Babala may disagree with the questioning (and the answer), but the questioning complied with the Presiding Judge’s order. Moreover, D-57’s answer established that even if he did not himself know who Babala was at the time of the phone call, he was aware that the person who contacted him was, indeed, Babala.

598. This argument, and Babala’s Ground D, should be dismissed.

VII.C. THE CHAMBER CORRECTLY APPLIED THE LAW

VII.C.1. The Chamber adhered to the principle of legality

VII.C.1.a. The Chamber’s assessment of circumstantial evidence was correct

599. Babala’s claim that the Chamber violated article 22(2)²²⁷⁴ and resorted to “*raisonnement par induction*”²²⁷⁵ and to “*raisonnement par analogie*”²²⁷⁶ with respect to D-57 and D-64 misunderstands the scope of article 22(2) and ignores the Chamber’s ability to draw inferences from circumstantial evidence.

600. First, Babala’s submission misunderstands the purpose of article 22(2) and the principle of legality. Babala’s reference to article 22(2)²²⁷⁷ and to French and other European law²²⁷⁸ is inapposite. Article 22(2) simply provides that, “the definition of a crime shall be strictly construed and shall not be extended by analogy”.²²⁷⁹ The provision does not regulate what type of evidence the Chamber needs—direct or circumstantial—to support its findings, or how it must reach its findings. While the provision sets out the parameters or statutory limits of crimes and offences, it does not govern how a Chamber must assess the evidence before

²²⁷² [T-31-RED2](#), 25:25.

²²⁷³ [T-31-RED2](#), 26:17-21.

²²⁷⁴ [Babala Brief](#), paras. 110-111. See article 22(2): The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

²²⁷⁵ [Babala Brief](#), paras. 112-126.

²²⁷⁶ [Babala Brief](#), paras. 127-139.

²²⁷⁷ [Babala Brief](#), paras. 110-111, 118, 124, 139.

²²⁷⁸ [Babala Brief](#), paras. 114, 130-131, 138.

²²⁷⁹ [Bemba TJ](#), para. 84; [Katanga TJ](#), para. 53; *above* para. 257.

it.²²⁸⁰ The French and other European law to which Babala refers similarly, and exclusively, relate to the interpretation of legal provisions. It does not purport to regulate how a Chamber should assess the evidence in the record of a case and arrive at its factual findings. In any event, this law does not bind the Chamber by virtue of article 21(1). Nor does it supersede this Court's law, which allows factual findings to be based on circumstantial evidence.

601. Second, the Chamber is clearly permitted to make findings based on circumstantial evidence, if there is only one reasonable inference to be drawn.²²⁸¹ The Judgment is consistent with this case law: the Chamber applied the beyond reasonable doubt standard under article 66(3)²²⁸² and stated that, when assessing (circumstantial) evidence, it made a conclusion based on the evidence when there was "only one reasonable conclusion to be drawn".²²⁸³

602. The Chamber consistently and correctly applied this test in the Judgment. For example, in relation to D-57, the Chamber assessed the totality of the evidence, including the patterns of evidence, and found, "as the only reasonable conclusion available, that [Kilolo] also instructed D-57 not to reveal the illegitimate transfer of money shortly before his testimony".²²⁸⁴ Likewise, based on the "demonstrable pattern of instructing witnesses [...] to testify to a specific and false number of prior contacts with the Main Case Defence", the Chamber correctly inferred, "as the only reasonable conclusion based on the evidence, that [Kilolo] also instructed D-57 to conceal the real number of contacts with the Main Case Defence [...]".²²⁸⁵ In relation to D-64, the Chamber found, again on the basis of patterns of evidence, "the only reasonable conclusion available on the evidence, [was] that [Kilolo] also instructed D-64 to conceal the real number of contacts with the Main Case Defence".²²⁸⁶ And "in light of [discernible patterns of Kilolo's explicit instructions to witnesses]" and D-64's denial of payments, the Chamber properly inferred "as the only reasonable conclusion" that

²²⁸⁰ Broomhall (2016), p. 960, mn. 39 ("[article 22(2)] applies only to the definitions of crimes in articles 6-8 (and 8bis, once it enters into force.)").

²²⁸¹ E.g., [Bemba TJ](#), para. 88 ("Indeed, a victim's killing may be proven by circumstantial evidence so long as the victim's death is the only reasonable inference that can be drawn therefrom"), which cites to [Katanga TJ](#), para. 768 and [Kvočka AJ](#), para. 260; [Stanišić & Župljanin AJ](#), para. 375 ("While such intent can be inferred from circumstantial evidence, it must be the only reasonable inference"); also [Bemba TJ](#), para. 239; also above paras. 495-497.

²²⁸² [Judgment](#), para. 185.

²²⁸³ [Judgment](#), para. 188.

²²⁸⁴ [Judgment](#), para. 250.

²²⁸⁵ *Ibid.*

²²⁸⁶ [Judgment](#), para. 277; also [Judgment](#), paras. 221, 251, 278, 302, 302, 366, 401, 409, 502.

Kilolo had instructed D-64 to lie about money matters.²²⁸⁷ Babala’s characterisation of this analysis as being improper “*raisonnement inductif*”²²⁸⁸ merely disagrees with the Chamber’s approach.

603. In any event, his argument shows no error. The paragraphs in the Judgment that Babala identifies in relation to D-57²²⁸⁹ and D-64,²²⁹⁰ in which the Chamber drew inferences based on patterns of evidence, were well supported by the facts.²²⁹¹

VII.C.1.b. The Chamber correctly interpreted the elements of article 25(3)(c) and article 30

604. Babala’s factual and legal challenges to the Chamber’s interpretation of article 25(3)(c)²²⁹² and article 30²²⁹³ should be rejected. The Chamber did not err.

605. Babala’s claim that the Chamber erred in its interpretation of article 25(3)(c)—requiring the accessory to know the “essential elements” of an offence, rather than the precise offence which was intended and which in the specific circumstances was committed²²⁹⁴—misstates the law. First, by suggesting that the “purpose” requirement under article 25(3)(c) includes “*le moyen(s) et le(s) but(s)*”—where the “*le but*” includes “*l’obtention d’une deposition, une déclaration ou une déclaration ou une attestation mensongère [...]*”—Babala conflates the requirements of articles 70(1)(a), 70(1)(b) and 70(1)(c).²²⁹⁵ Aiding an article 70(1)(c) offence only requires the accessory to lend his or her assistance *with the aim of facilitating the offence of corrupt influencing of a witness*, and to at least be aware that the essential elements of the principal perpetrator’s offence of *corruptly influencing* a witness will occur in the ordinary course of events.²²⁹⁶ The Chamber found this to be so: it was convinced beyond reasonable doubt that Babala lent his assistance with the aim of facilitating the offences of corruptly influencing D-57 and D-64. It was further satisfied that, based on his regular exchanges with Bemba and Kilolo, in particular his role as

²²⁸⁷ [Judgment](#), para. 278.

²²⁸⁸ [Babala Brief](#), para. 112.

²²⁸⁹ [Judgment](#), paras. 239, 250, 251; [Babala Brief](#), paras. 116, 117, 119.

²²⁹⁰ [Judgment](#), paras. 277, 278; [Babala Brief](#), paras. 122, 123.

²²⁹¹ *Above* paras. 562-573.

²²⁹² [Babala Brief](#), paras. 140-150; 161-167, 170.

²²⁹³ [Babala Brief](#), paras. 151-160.

²²⁹⁴ [Judgment](#), para. 98; *contra* [Babala Brief](#), paras. 147-150.

²²⁹⁵ [Babala Brief](#), paras. 142-143, 145, 157.

²²⁹⁶ [Judgment](#), paras. 97-98. The Chamber’s position is consistent with the Court’s jurisprudence. See [Blé Goudé Confirmation Decision](#), para. 167; [Ongwen Confirmation Decision](#), para. 43; [Al-Mahdi Confirmation Decision](#), para. 26.

financier, viewed in the light of the evidence as a whole, Babala was aware that the payments were illegitimate and aimed at altering and contaminating the witnesses' testimony.²²⁹⁷ Contrary to Babala's submission, obtaining false testimony or a false declaration is not a requirement of article 70(1)(c).²²⁹⁸ Rather, it is a requirement of article 70(1)(a) and 70(1)(b) offences—offences for which Babala is not convicted. In any event, on the facts, Babala participated in concealing the witnesses' links with the Main Case Defence, by making covert payments through third parties.²²⁹⁹

606. Second, contrary to Babala's submission, an accessory "must be aware of [the essential elements of the principal perpetrator's offence]", but is not required "to know the precise offence which was intended and which in the specific circumstances was committed".²³⁰⁰ By suggesting otherwise, Babala's argument is contrary to established criminal jurisprudence.²³⁰¹ His reliance on select academic treatises is inapposite.²³⁰² His claim that the Chamber erred in interpreting article 30 in the context of articles 25(3)(c) and 70(1)(c) is similarly flawed.²³⁰³ Contrary to Babala's submission, article 25(3)(c) contains no "*dolus specialis*".²³⁰⁴

607. In light of this analysis, the Chamber was not obliged to make the detailed findings that Babala suggests in his Brief.²³⁰⁵ Instead, the Chamber correctly assessed the evidence with respect to Babala's *mens rea* and made the only reasonable conclusion: that he was guilty.²³⁰⁶

²²⁹⁷ [Judgment](#), para. 893.

²²⁹⁸ [Judgment](#), para. 48 ("[article 70(1)(c)] penalises the improper conduct of the perpetrator who intends to influence the evidence before the Court and does not require proof that the conduct had an actual effect on the witness. It is not required for this offence that the criminal conduct actually influences the witness in question [...] the provision penalises the conduct of the physical perpetrator who, from his or her vantage point, seeks to manipulate the evidence given by the witness."); para. 50 ("This means that [article 70(1)(c)] 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 offence [...]"). Also above paras. 246-250.

²²⁹⁹ [Judgment](#), paras. 245, 272.

²³⁰⁰ [Babala Brief](#), paras. 146-150.

²³⁰¹ [Judgment](#), para. 98 (citing [Karera AJ](#), para. 321; [Blaskić AJ](#), para. 50; [Kvočka TJ](#), para. 255; [Mrkšić TJ](#), para. 556; [Sesay TJ](#), para. 280).

²³⁰² [Babala Brief](#), paras. 140-170.

²³⁰³ [Judgment](#), paras. 97, 98; [Babala Brief](#), paras. 142, 151-160.

²³⁰⁴ E.g., [Babala Brief](#), paras. 142, 157.

²³⁰⁵ [Babala Brief](#), paras. 163, 167, 170.

²³⁰⁶ [Judgment](#), paras. 882-893. Babala's arguments rely on the summary of findings early in the Judgment, and not the Chamber's detailed factual analysis in the section devoted to Babala's criminal responsibility. See [Judgment](#), paras. 107, 115; [Babala Brief](#), paras. 162, 165.

608. Finally, contrary to Babala's submission²³⁰⁷ this analysis is consistent with the Chamber's findings that "assistance [pursuant to article 25(3)(c)] may be given before, during or after the offence has been perpetrated",²³⁰⁸ a concept which is also well supported by international criminal jurisprudence.²³⁰⁹

VII.C.1.c. The Chamber correctly established Babala's mens rea

609. Babala's argument that he lacked the requisite intent and knowledge for his crimes fails to show error.²³¹⁰

610. First, regarding the Chamber's findings on his intent, Babala merely states that "*le Jugement querellé ne comporte aucune preuve de l'intention de M.Babala de faciliter la commission par M.Kilolo de l'infraction de subornation sur les témoins D-57 et D-64*"²³¹¹ and that the Chamber was "*en défaut*"²³¹²; he fails to provide any factual basis for his claim. His argument should be dismissed summarily.²³¹³

611. In any event, the Chamber correctly assessed the evidence with respect to Babala's *mens rea* and drew the only reasonable conclusion.²³¹⁴

- In particular, the Chamber found that Babala's *mens rea* to aid the corrupt influencing of D-57 and D-64 was established contemporaneously, *inter alia*, by his advising Bemba to make payments to witnesses, for which Mr Bemba would see the benefit.²³¹⁵

²³⁰⁷ [Babala Brief](#), paras. 168, 169.

²³⁰⁸ [Judgment](#), para. 96.

²³⁰⁹ [Judgment](#), para. 96 (citing [Blaskić AJ](#), para. 48; [Mrkšić AJ](#), para. 81; [Blagojević AJ](#), para. 127; [Ngirabatware TJ](#), para. 1294; [Renzaho TJ](#), para. 742; [Case 002/01 TJ](#), paras. 712-713; [Sesay TJ](#), para. 278; [Taylor TJ](#), para. 484).

²³¹⁰ [Babala Brief](#), paras. 171-182.

²³¹¹ [Babala Brief](#), para. 175; *also* paras. 174, 176-177.

²³¹² [Babala Brief](#), paras. 174-177.

²³¹³ [Krajisnik AJ](#), para. 26.

²³¹⁴ [Judgment](#), paras. 882-893.

²³¹⁵ [Judgment](#), para. 882.

- Likewise, Babala’s resort to using code to communicate this message to Bemba further underscored the illegitimate nature of these payments²³¹⁶ and his knowledge thereof.²³¹⁷
- Moreover, while Babala admitted to transferring money to D-57 and D-64 shortly before their testimony, he was equally and fully aware at the time of their status as witnesses.²³¹⁸
- Significantly, Babala’s interactions with the co-perpetrators on 17 and 22 October 2013 provide further support for the Chamber’s finding that Babala agreed to ensure that any prior illicit payment to D-57 and D-64 would not be detected. Babala not only fully understood his role as Bemba’s financier, and as one who took risks, he also actively advised the co-perpetrators to provide “after-sales service” to the witnesses who had testified.²³¹⁹ Indeed, Babala’s advice to provide “after-sales service” came after he had discussed the article 70 warrant of arrest issued in the *Barasa* case for alleged witness interference in the Kenya situation with Kilolo.²³²⁰

612. Moreover, Babala’s close interaction with Kilolo is established by: (i) the timing of the telephone calls and Babala’s payments to D-57 and D-64²³²¹ and (ii) the communication between Babala and Kilolo in October 2013 after they became aware that they were the subject of an investigation.²³²² In light of this compelling evidence, Babala’s complaint about the absence of evidence of communication between Kilolo and Babala at the time of the transfers is immaterial.²³²³

613. Second, Babala’s argument that he lacked the requisite knowledge for his crimes is similarly flawed.²³²⁴ Babala merely states that there was nothing criminal in delegating the money transfer to D-64 to his employee; that Kilolo never revealed Main Case Defence strategy to Babala; and that the Chamber erred in not taking into account P-272’s testimony

²³¹⁶ [Judgment](#), para. 884.

²³¹⁷ [Judgment](#), para. 890.

²³¹⁸ [Judgment](#), para. 885.

²³¹⁹ [Judgment](#), paras. 886-889.

²³²⁰ [Judgment](#), para. 891.

²³²¹ [Judgment](#), paras. 235-244 (D-57); paras. 262-271 (D-64).

²³²² [Judgment](#), para. 888; *contra* [Babala Brief](#), para. 182.

²³²³ [Babala Brief](#), paras. 181-182.

²³²⁴ [Babala Brief](#), paras. 178-182.

on these matters.²³²⁵ He provides alternative interpretations of the evidence or merely disagrees with the Chamber's findings. They are unsupported claims which do not demonstrate that the Chamber materially erred.²³²⁶

614. Further, as shown above,²³²⁷ Babala, as an accessory to an article 70(1)(c) offence, did not need to know the details of D-57's false testimony. Nor did he need to have the level of detailed knowledge of D-57's and D-64's testimony that he suggests—for example the dates of the witnesses' testimony, or the decisions of Trial Chamber III.²³²⁸ It is enough for the Chamber to have found that Babala was aware—to some extent—of internal details of the Main Case, including, importantly, the identities of witnesses. The Chamber based this finding in part on Babala's comments in conversations with the co-perpetrators in October 2013 after they became aware that they were the subject of an investigation,²³²⁹ assessed in light of the totality of the evidence.

VII.C.2 The Judgment correctly applied the evidentiary standard

VII.C.2.a. The Chamber did not reverse the Prosecution's burden pursuant to article 66(2)

615. Babala's claim that the Chamber reversed the Prosecution's burden of proof pursuant to article 66(2)²³³⁰ fails to identify a material error. His discrete claims are unsubstantiated and duplicate other submissions. They should be dismissed summarily.

616. First, although Babala couches his argument—“*[t]ous les transferts opérés par M.Babala participaient, à sa connaissance, au fonctionnement de l'équipe de défense dans l'affaire principale*”²³³¹—in terms of a reversal of the Prosecution's burden of proof, in fact he merely disagrees with the Chamber's findings. He overlooks that the Chamber did differentiate between his licit and illicit payments,²³³² finding only that the payments to D-57 and D-64 were illicit, because he possessed the requisite intent and knowledge.²³³³

²³²⁵ [Babala Brief](#), para. 181.

²³²⁶ Above paras. 562-573.

²³²⁷ Above paras. 604-608.

²³²⁸ [Babala Brief](#), paras. 178, 182.

²³²⁹ [Judgment](#), paras. 885-886.

²³³⁰ [Babala Brief](#), paras. 197-219.

²³³¹ [Babala Brief](#), para. 201; *also* paras. 200, 202.

²³³² [Judgment](#), para. 878.

²³³³ [Judgment](#), para. 254 (D-57), para. 281 (D-64); paras. 882-893.

617. Second, Babala’s objection to the Chamber’s findings about his use of codes—including his comment to Bemba that “[c]’est la même chose comme pour aujourd’hui. Donner du sucre aux gens vous verrez que c’est bien”²³³⁴—duplicates his earlier arguments.²³³⁵ It has been addressed in full previously.²³³⁶ To the extent that Babala now advances new interpretations of the phrase, he fails to acknowledge the Chamber’s earlier finding rejecting his alternative interpretations.²³³⁷

618. Third, Babala’s argument that the Chamber reversed the burden of proof in relation to the [REDACTED] number²³³⁸ has no impact on the Judgment.²³³⁹ The Chamber expressly addressed and rejected Babala’s arguments that it is impossible to attribute the SIM card from which the [REDACTED] number was extracted to Kilolo, and that calls to the [REDACTED] number were forwarded to Kilolo.²³⁴⁰ Significantly, Babala disregards the Chamber’s finding that “the SIM card in question was transmitted in a sealed manner by the Belgian authorities and that [Kilolo] was indicated as the owner.”²³⁴¹ Moreover, “when the Independent Counsel received the material, members of the Registry were present to observe the unsealing.”²³⁴² Therefore, the authenticity of the SIM card and Kilolo’s ownership of it was established.²³⁴³ As noted above, the privileged telephone numbers for Bemba included telephone number [REDACTED] , which was indicated as belonging to Kilolo, but was used by Babala on at least two occasions on 4 and 5 October 2012 during the “multi-party calls”, even if such calls were not eventually found to be conducted as multi-party ones.²³⁴⁴

619. In any event, Babala fails to show a material error in the Judgment. Since the Chamber’s finding on the use of the telephone number [REDACTED] does not affect the factual basis of Babala’s convictions, it is not decisive for his conviction.²³⁴⁵

²³³⁴ [Judgment](#), para. 267; *contra* [Babala Brief](#), paras. 203-208.

²³³⁵ [Babala Brief](#), paras. 95-99.

²³³⁶ *Above* paras. 589-592.

²³³⁷ *E.g.*, [Babala Brief](#), para. 208. *See* [Judgment](#), para. 882 (rejecting Babala’s suggestion of “*faire du bien aux gens*” in lieu of “*donner du sucre aux gens*”).

²³³⁸ [Babala Brief](#), paras. 209-219.

²³³⁹ [Judgment](#), para. 884.

²³⁴⁰ [Judgment](#), para. 739; *contra* [Babala Brief](#), paras. 209-210. The Chamber found the latter argument to be “purely speculative”. *See* [Judgment](#), para. 739.

²³⁴¹ [Judgment](#), para. 739.

²³⁴² *Ibid.*

²³⁴³ *Ibid.*

²³⁴⁴ [Judgment](#), paras. 738, 744-745, 885. *See also above* para. 539.

²³⁴⁵ The Chamber also relied on, *inter alia*, Babala’s advice to Bemba to make payments to witnesses (para. 882), his communication in coded language for matters relating to the Main Case (para. 884), his awareness, to

VII.C.2.b. The Chamber adhered to the ‘beyond reasonable doubt’ standard in article 66(3) in relation to codes Babala used

620. Babala’s argument that the Chamber violated article 66(3) merely repeats arguments made elsewhere in his Brief, and shows no error.²³⁴⁶ He states, without substantiation, that the Chamber misinterpreted the evidence, or proposes alternative interpretations of the evidence. His arguments should be dismissed summarily.²³⁴⁷

621. Moreover, Babala’s arguments do not reflect the established law at this Court on the “beyond reasonable doubt” standard: the standard of proof beyond reasonable doubt applies *only* to material facts, namely, those forming the elements of the crime or the mode of responsibility alleged against an accused, and facts indispensable for entering a conviction.²³⁴⁸ Further, as the Appeals Chamber has cautioned, “the reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice.”²³⁴⁹ It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.²³⁵⁰ Babala’s attempt to apply the “beyond reasonable doubt” standard to *every* finding on the record is incorrect.

622. To the extent Babala raises new arguments, they are unpersuasive. First, the Chamber’s findings were not deficient merely because there was no evidence of the content of further conversations between Babala, Bemba and Kilolo in relation to D-57 and D-64.²³⁵¹ The

some extent, of internal details of the Main Case (para. 885), his encouragement to maintain contact with defence witnesses and if necessary to give them money, in the context of his discussions with the co-perpetrators in October 2013 when they became aware that they were the subject of an investigation (para. 887), and his awareness that he took risks as Bemba’s ‘financier’ through his involvement in witness payments (para. 892).

²³⁴⁶ [Babala Brief](#), paras. 220-248. The following arguments are addressed above: (i) his argument that the Chamber “*n’établit pas que la seule conclusion raisonnable à tirer de l’expression « c’est la même chose comme pour aujourd’hui. Donner du sucre aux gens vous verrez que c’est bien » est celle qu’Elle a fournie*”: [Babala Brief](#), paras. 229, 220-248; *above* paras. 589-592; (ii) His claim that the purpose of the money transfers to D-57 and D-64 was to assist the Main Case Defence team: [Babala Brief](#), para. 237; *above* paras. 587-588; (iii) His objection to the Chamber’s finding that he knew D-57 and D-64 were witnesses: [Babala Brief](#), paras. 230, 237, 242, 245, 247; *above* paras. 593-595; (iv) His claim that he had no knowledge of the Detention Centre telephone system: [Babala Brief](#), para. 238; *above* paras. 584-586; (v) His assertion that he had no knowledge of the details of the Main Case: [Babala Brief](#), paras. 230, 237, 241, 242, 247; *above* paras. 593-595; (vi) His argument that his comments in telephone conversations in October 2013 do not demonstrate his *mens rea*: [Babala Brief](#), para. 240; *above* paras. 579-582, 609-614.

²³⁴⁷ [Krajisnik AJ](#), para. 27.

²³⁴⁸ [Ntagerura AJ](#), para. 171 (emphasis added); [Bemba TJ](#), para. 225 (where the Chamber decided “whether incriminatory evidence in the record of the case should be accorded any weight and whether it established any of the alleged facts and circumstances beyond reasonable doubt, notwithstanding the exculpatory evidence submitted.”); [Ngudjolo AJ](#), paras. 124-125.

²³⁴⁹ [Ngudjolo AJ](#), para. 109 (citing [Rutaganda AJ](#), para. 488).

²³⁵⁰ [Ngudjolo AJ](#), para. 109 (citing [Rutaganda AJ](#), para. 488).

²³⁵¹ [Babala Brief](#), paras. 229, 232.

evidence that *was* on the record was manifestly adequate for the Chamber to find Babala culpable beyond a reasonable doubt.

623. Second, article 69(3) confers on the Chamber the power—but not the unlimited obligation—to proactively request evidence to support other “*hypothèses possibles*”.²³⁵² Third, Babala was found guilty for aiding the commission of offences under article 25(3)(c), not as a member of the Common Plan under article 25(3)(a). His exclusion from the Common Plan is irrelevant to the Chamber’s findings with respect to the two witnesses for whom he was found to have the requisite *mens rea*.²³⁵³ In any event, even though Babala was not part of the Common Plan, the Chamber was entitled to, as it did, infer the existence of the Common Plan from Bemba’s, Kilolo’s and Mangenda’s concerted actions, along with Babala’s and Arido’s.²³⁵⁴ Babala fails to show that the Chamber erred.

VII.C.2.c. The Chamber properly assessed Babala’s 16 October 2012 conversation with Bemba

624. Babala’s argument that the Chamber’s conclusions with respect to his 16 October 2012 conversation with Bemba²³⁵⁵ “*peuvent donner lieu à plusieurs autres conclusions possibles et mêmes plausibles*”²³⁵⁶ proposes alternative and unsubstantiated interpretations of this conversation. It should be dismissed summarily.²³⁵⁷ Further, Babala’s suggestion that his ‘*donner du sucre*’ remark “*renvoie [...] à quelque chose qui n’est pas encore fait alors que le transfert avait déjà eu lieu avant la conversation*” misinterprets the evidence.²³⁵⁸ The Chamber correctly found that, by using those phrases, Babala was referring to “the payment of money to D-57’s wife earlier the same day” and that “the advice [Babala] gave [Bemba] in this conversation further demonstrates that [Babala] was aware of [...] the importance of paying witnesses shortly before their testimony at the Court.”²³⁵⁹ And this future payment was effected to D-64 by Babala’s employee the next day, 17 October 2012.

²³⁵² [Babala Brief](#), para. 231.

²³⁵³ [Babala Brief](#), para. 243.

²³⁵⁴ [Judgment](#), para. 682.

²³⁵⁵ [Judgment](#), para. 267.

²³⁵⁶ [Babala Brief](#), paras. 249 -250.

²³⁵⁷ [Krajisnik AJ](#), para. 27.

²³⁵⁸ [Babala Brief](#), para. 250.

²³⁵⁹ [Judgment](#), paras. 267, 700.

VII.C.2.d. Babala's acquittal under article 70(1)(a) did not preclude his conviction under article 70(1)(c)

625. Babala's argument that he was not found culpable for offences under article 70(1)(a) and therefore cannot be liable under article 70(1)(c)²³⁶⁰ disregards the difference between the two offences and their legal requirements, and misunderstands the Judgment.²³⁶¹ Babala was not convicted for aiding and abetting the article 70(1)(a) offences because the Chamber could not establish a link between his conduct and the witnesses' false testimony on their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.²³⁶² On the other hand, corrupt influencing under article 70(1)(c) criminalises conduct which may have an impact or influence on the testimony to be given by a witness. Since it is a conduct offence—for example effecting a payment—it is completed even if the witness refuses to be influenced by the conduct in question.²³⁶³ The Chamber correctly found that the evidence did not satisfy the elements of article 70(1)(a),²³⁶⁴ but it did satisfy the elements of article 70(1)(c).

VII.C.3. The Judgment was properly reasoned

626. Babala's submission that the Judgment "*est caractérisé par un manque criant de motivation*"²³⁶⁵ misunderstands a Chamber's obligation to set out its reasoning in a Judgment. It is also unsubstantiated and repetitive, and should be dismissed summarily.²³⁶⁶

627. First, Babala misunderstands the Chamber's obligation to set out its reasoning in the Judgment. A Chamber need not mention every last detail.²³⁶⁷ For example, Babala's argument that the Chamber "*n'a répondu ni aux réfutations dûment étayées de la Défense, ni aux soumissions des Equipes de défense des coaccusés [...]*"²³⁶⁸ ignores this standard.

²³⁶⁰ [Babala Brief](#), paras. 251-252 (referring to [Judgment](#), paras. 942 and 879).

²³⁶¹ [Judgment](#), paras. 19-31 (article 70(1)(a)); 43-50 (article 70(1)(c)).

²³⁶² [Judgment](#), para. 942. Also para. 877, paras. 21-22, 24, 29.

²³⁶³ [Judgment](#), paras. 43-50. Above paras. 236-260.

²³⁶⁴ [Judgment](#), para. 877 ("No evidence established a link between [Babala] and the false evidence of the witnesses on any of these three points. Notably, even though [Babala] held the role of financier, no evidence sufficiently establishes that [Babala] assisted in the presentation of the untruthful accounts of witnesses with regard to payments"); para. 885 ("The evidence must also be viewed in the light of the fact that [Babala] was aware – to some extent – of internal details of the Main Case, including the identity of witnesses, and arranged or effected the money transfers to the co-accused and other persons").

²³⁶⁵ [Babala Brief](#), para. 258; also paras. 259-270.

²³⁶⁶ [Krajisnik AJ](#), para. 26.

²³⁶⁷ [Lubanga Redactions AD](#), 14 December 2006, para. 20; [Lubanga Second Redactions AD](#), para. 30.

²³⁶⁸ [Babala Brief](#), para. 269.

628. Second, Babala’s challenge to the Chamber’s findings on “*l’établissement des faits*”,²³⁶⁹ “*des détails internes de l’affaire*”,²³⁷⁰ “*les codes*”²³⁷¹ and “*les éléments de preuves admis au dossier*”²³⁷² constitutes mere disagreement. For instance, regarding his knowledge and intent to aid the corrupt influencing of D-57 and D-64, Babala states, “[i]l n’y a dans le dossier aucun élément de preuve qui soutient cette conclusion”.²³⁷³ However, this is clearly contradicted by the Chamber’s detailed assessment of the evidence at paragraphs 882 to 893 of the Judgment. Similarly, Babala contends that “[n]ulle part on ne voit dans le Jugement un raisonnement de la part de la Chambre concernant l’interprétation des codes qu’Elle a retenus”.²³⁷⁴ The Judgment, however, contains multiple analyses of the co-perpetrators’ and Babala’s use of coded language, and the Chamber drew reasonable inferences of what each code meant based on the evidence before it.²³⁷⁵

629. Third, Babala’s arguments are unsupported. For example, his broad submission that the Chamber’s reasoning was “*ambiguës, irréelles, incomplètes ou totalement inexistantes*”, through the fault of the Prosecution,²³⁷⁶ cites to paragraphs of the Judgment, but provides no clear reasoning in support. Similarly, only a question—“*[c]omment la Chambre a pu détecter l’espoir de M.Kilolo?*”²³⁷⁷—supports his argument that the Chamber allegedly failed to sufficiently reason in respect of Kilolo’s intention to corruptly influence D-57 and D-64.

630. Finally, the substance of these arguments has been repeated multiple times previously.²³⁷⁸ They still do not disclose error.

631. For these reasons, Babala’s Ground E should be dismissed.

²³⁶⁹ [Babala Brief](#), paras. 259-261.

²³⁷⁰ [Babala Brief](#), paras. 262-263.

²³⁷¹ [Babala Brief](#), paras. 264-266.

²³⁷² [Babala Brief](#), paras. 267-270.

²³⁷³ [Babala Brief](#), para. 263.

²³⁷⁴ [Babala Brief](#), para. 266.

²³⁷⁵ [Judgment](#), paras. 748-761; *also* paras. 882, 884.

²³⁷⁶ [Babala Brief](#), para. 253.

²³⁷⁷ [Babala Brief](#), para. 261.

²³⁷⁸ *Above* paras. 587-588 (Babala’s money transfers to the Main Case Defence team were not deemed “automatically unlawful” in nature); paras. 589-592 (The Chamber correctly relied on Babala’s use of codes); paras. 593-595 (The Chamber correctly inferred Babala’s knowledge of details of the Main Case); paras. 609-614 (The Chamber correctly established Babala’s *mens rea*).

**VII.D. THE CHAMBER CORRECTLY RELIED ON THE TELEPHONE CONVERSATIONS
AND THEIR TRANSCRIPTIONS AND TRANSLATIONS**

VII.D.1. The Chamber correctly relied on the telephone conversations in which Babala participated

632. Babala fails to show that the Chamber erred in relying on telephone conversations in which he participated, including with Bemba on the Detention Centre line.²³⁷⁹ The Chamber properly relied on the Detention Centre recordings. As shown above,²³⁸⁰ despite the synchronisation issue, the recordings—and stand-alone utterances within them—were reliable. Moreover, the Chamber’s approach to the recordings was careful: it “review[ed] each and every excerpt within a telephone conversation relied upon”.²³⁸¹ It “treat[ed] with circumspection any probative value” to be attributed to them.²³⁸² Where discrepancies were plausible, it did not rely on them. And it relied on the recordings and related transcription/translation only when corroborated by other evidence.²³⁸³ Babala merely disagrees with the Chamber’s reasoning and findings.

633. First, Babala’s claim that the Chamber acted as “the Prosecution’s expert witness” to explain and correct “*les lacunes dans la présentation du cas du Procureur*”²³⁸⁴ is unfounded. Far from favouring the Prosecution, the Chamber properly discharged its own obligation to independently assess the evidence.²³⁸⁵ Thus, the Chamber correctly stated, “[w]hen determining the relevant details of the telephone communications, such as the speakers, relevant numbers and the date of the call, the Chamber has conducted its own independent assessment of the evidence”.²³⁸⁶ The Chamber further set out its detailed approach in conducting this independent assessment.²³⁸⁷ And following its independent assessment, the Chamber reached the same conclusion as the Prosecution did.

²³⁷⁹ [Babala Brief](#), paras. 34-42.

²³⁸⁰ *Above* paras. 107-108.

²³⁸¹ [Judgment](#), para. 227.

²³⁸² *Ibid.*, para. 227.

²³⁸³ [Judgment](#), para. 227.

²³⁸⁴ [Babala Brief](#), para. 36.

²³⁸⁵ See *e.g.*, article 74(2) of the Rome Statute (“The Trial Chamber’s decision shall be based on its evaluation of the evidence [...]”).

²³⁸⁶ [Judgment](#), para. 216.

²³⁸⁷ [Judgment](#), para. 216 (setting out the Chamber’s three-part approach: (i) the Chamber matched the identification number of the original language audio recording and/or transcripts to a given working language transcript; (ii) the Chamber matched the communication to its corresponding log using the call duration and the e-court metadata, most notably the ‘Title Field’; and (iii) the Chamber attributed the telephone numbers in the logs to the speakers.).

634. Second, in claiming that the Chamber’s interpretation of his coded language in excerpts of conversations with Bemba was a “*jeu de devinette*”²³⁸⁸ or “*dépourvu de logique*”,²³⁸⁹ Babala disregards the Chamber’s stated approach.²³⁹⁰ As previously addressed,²³⁹¹ the Chamber inferred the meaning of each code from the immediate context, viewed in the framework of the evidence as a whole—including the reliability of the Detention Centre recordings, and other evidence related to D-57’s and D-64’s testimony and Babala’s *mens rea*.²³⁹² For example, the Chamber correctly found that Babala’s comment to Bemba on 16 October 2012, “[c]’est la même chose comme pour aujourd’hui. Donner du sucre aux gens vous verrez que c’est bien”, referred to the payment of money to D-57’s wife earlier the same day and thus reflected his intent to aid the illicit coaching of D-57 and D-64.²³⁹³ The synchronisation issue affecting the Detention Centre recordings did not adversely affect the Chamber’s assessment because Babala’s comment “stands on its own” and could be relied upon,²³⁹⁴ i.e., the Chamber did not require Bemba’s utterances to properly evaluate Babala’s comment.

635. Third, the Chamber’s assessment of Babala’s coded language was not “*cyclique*”.²³⁹⁵ Rather, consistent with its careful approach to the recordings and its intention to “rel[y] on such items only if corroborated by other evidence”,²³⁹⁶ the Chamber’s references to other evidence in the case were corroborative. Indeed, the Chamber relied on Babala’s “*donner du sucre*” comment only because it was corroborated by other statements and conduct.²³⁹⁷

636. Fourth, Babala’s argument that the Chamber erred in relying on extracts of Detention Centre conversations, despite having found that the recordings were affected by technical irregularities,²³⁹⁸ overlooks the Chamber’s careful, case-by-case approach and detailed reasoning in support.²³⁹⁹ Babala fails to show error.

²³⁸⁸ [Babala Brief](#), para. 37.

²³⁸⁹ [Babala Brief](#), para. 38.

²³⁹⁰ [Babala Brief](#), paras. 37-38, 42; [Judgment](#), para. 227.

²³⁹¹ *Above* paras. 589-592.

²³⁹² [Judgment](#), para. 188; *also* paras. 882-893.

²³⁹³ [Judgment](#), para. 267.

²³⁹⁴ [Judgment](#), para. 267.

²³⁹⁵ *Contra* [Babala Brief](#), paras. 40-41.

²³⁹⁶ [Judgment](#), para. 227.

²³⁹⁷ [Judgment](#), para. 882 (“Conducting an overall assessment of the evidence, the Chamber must view this statement against the backdrop of other evidence implicating Mr Babala”), *et seq.*

²³⁹⁸ [Babala Brief](#), para. 39.

²³⁹⁹ [Judgment](#), paras. 226-227, 267.

VII.D.2. The Chamber correctly relied on the transcriptions and translations of Detention Centre recordings

637. Babala's challenge to the reliability of the transcriptions and translations of the recordings is unsupported.²⁴⁰⁰ The transcriptions and translations were accurate and reliable. Further, despite alleging "*le manque d'objectivité*" on the part of the Prosecution in preparing these transcriptions and translations, Babala fails to show this is so.²⁴⁰¹ Critically, even if the translations and transcriptions had any minor errors, Babala overlooks that the Chamber listened to the audio-recordings itself, which was the first-hand source.²⁴⁰² Any alleged errors therefore have no impact.

638. First, in claiming that the Chamber "*a marqué son accord avec l'avis de l'expert D20-1*" that transcriptions and translations were unreliable, Babala misstates the Judgment.²⁴⁰³ What Babala advances is only the Chamber's summary of Bemba's argument and D20-1's views,²⁴⁰⁴ not its finding.²⁴⁰⁵ The Chamber did not find the transcriptions and translations were *per se* unreliable. Rather, it found that although it could not rely on them "in isolation", it could when they were corroborated.²⁴⁰⁶

639. Second, although Babala claims that the Chamber inappropriately relied on the Detention Centre recordings because of the unreliability of their transcripts and translations,²⁴⁰⁷ he fails to identify an error that materially affects the Judgment. Babala identifies only two errors in the transcripts, "[REDACTED] *au lieu de* [REDACTED]", and "[REDACTED] *quand on entend très clairement M.Babala disant* [REDACTED]".²⁴⁰⁸ Babala fails to mention that these errors were both corrected by the Prosecution in May

²⁴⁰⁰ [Babala Brief](#), paras. 43-48.

²⁴⁰¹ [Babala Brief](#), para. 43.

²⁴⁰² [Judgment](#), para. 216 (iii) ("Sometimes the content of the communication itself sufficiently confirms who is speaking. [...] There are also a sufficiently large number of calls and/or voice samples in evidence for the Chamber to be able to recognise the voices of some of the Accused on any given call. The Chamber did not rely on voice recognition alone to identify the speakers in a telephone conversation, but always considered the voices heard in connection with the call content and other relevant information."); para. 220 ("When the Chamber is able to recognise peoples' voices on a given call and independently attribute their telephone numbers, the speakers invariably correspond to the telephone numbers in the logs.").

²⁴⁰³ [Babala Brief](#), para. 44.

²⁴⁰⁴ [Babala Brief](#), para. 44 (citing [Judgment](#), para. 226).

²⁴⁰⁵ [Judgment](#), para. 227.

²⁴⁰⁶ *Ibid.*

²⁴⁰⁷ [Babala Brief](#), paras. 43-48.

²⁴⁰⁸ [Babala Brief](#), para. 45.

2015.²⁴⁰⁹ In any event, they are minor typographical errors, neither of which formed the basis of any finding in the Judgment.

640. Although Babala asserts that “[s]ur 12 conversations en français entre MM. Babala et Kilolo, seuls 4 transcripts ne semblent pas présenter des erreurs”,²⁴¹⁰ he fails to provide citations or more precise indications. In any case, minor errors in such a large number of transcriptions and translations are both foreseeable and harmless.

641. Babala’s argument that any transcriptions or translations should not have been done by the Prosecution, but by a neutral party like the Registry,²⁴¹¹ is similarly flawed. He again fails to identify any error, merely implying without substantiation and in general terms that the Prosecution was partial. The ICTY jurisprudence cited²⁴¹²—which relates to the granting of access to the Defence of confidential court records in other cases²⁴¹³—does not support Babala’s submission, and should be rejected.

642. For these reasons, Babala’s sub-grounds B.5 and B.6 should be dismissed.

VII.E CONCLUSION

643. Babala’s final ground of appeal—claiming that “*la valeur juridique du jugement du 19 octobre 2016 est hautement discutable*”—is an attempt to summarise select features of his Brief.²⁴¹⁴ No error is alleged. It should be dismissed summarily.²⁴¹⁵ Should the Appeals Chamber wish to consider it, the Prosecution relies on its previously advanced responses on these issues.

644. For the above reasons, Babala’s ground F, and his entire appeal should be dismissed.

²⁴⁰⁹ CAR-OTP-0082-0576 at 0577_01 (corrected on 14 May 2015); CAR-OTP-0082-0596 at 0598_01 (corrected 28 May 2015).

²⁴¹⁰ [Babala Brief](#), para. 45.

²⁴¹¹ [Babala Brief](#), paras. 47-48.

²⁴¹² [Babala Brief](#), para. 47.

²⁴¹³ [Tolimir Access Decision](#), paras. 14, 16.

²⁴¹⁴ [Babala Brief](#), paras. 271-308 (*inter alia* alleging evidentiary errors with D-57, D-64, purported errors with the admissibility of the Western Union documents, alleged errors with the synchronisation of recordings, alleged error with the mode of responsibility).

²⁴¹⁵ [Krajisnik AJ](#), para. 24.

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VIII. ARIDO WAS PROPERLY CONVICTED

VIII.A. INTRODUCTION

645. The Chamber properly convicted Arido pursuant to article 70(1)(c) as a direct perpetrator under article 25(3)(a) for personally corruptly influencing witnesses D-2, D-3, D-4 and D-6.²⁴¹⁶ None of the arguments Arido advances in his appeal dents the solid, consistent and well-reasoned legal and factual findings of the Chamber.

646. The case against Arido is straightforward. Arido personally and intentionally manipulated the evidence of P-260 (D-2), P-245 (D-3), D-4 and D-6 (the “Cameroonian witnesses”). He personally recruited them and unduly promised them money and relocation in exchange for their testimony in favour of Bemba. He instructed the four witnesses (or facilitated their briefing by others) to present themselves as military men while knowing that they did not have such a background. Arido personally constructed and adjusted the witnesses’ testimonies according to a specific narrative.²⁴¹⁷ The Chamber reached these conclusions after having heard the coherent, clear and mutually corroborated direct evidence of D-2 and D-3²⁴¹⁸ who were personally recruited and coached in a group with D-4 and D-6 by Arido.

647. Arido did not act in a vacuum. Rather he was a go-between between the four witnesses and Kilolo,²⁴¹⁹ in concert with Kokaté,²⁴²⁰ in a larger and complex scheme that included multiple actors, international money transfers, coded conversations and other cover-up activities.

648. Arido’s appeal should be rejected. Virtually all his arguments are either unsupported or misrepresent the evidence,²⁴²¹ the Chamber’s reasoning and/or its findings.²⁴²² Others merely repeat unsuccessful trial submissions²⁴²³ or are premised on an erroneous understanding of the law.²⁴²⁴

²⁴¹⁶ See [Judgment](#), paras. 944-945.

²⁴¹⁷ See [Judgment](#), para. 944.

²⁴¹⁸ See [Judgment](#), paras. 307-319.

²⁴¹⁹ See [Judgment](#), para. 131.

²⁴²⁰ See [Judgment](#), paras. 327, 344.

²⁴²¹ See e.g. [Arido Brief](#), paras. 82-87, 103-112, 312, 314, 322-324, 424-430, 442-453.

²⁴²² See e.g. [Arido Brief](#), paras. 82-87, 103-112, 282-283, 276-278, 221-240, 255-258, 262-269, 431-441.

²⁴²³ See e.g. [Arido Brief](#), paras. 95-96, 116-122, 154-156, 160, 383-392, 463, 466-468.

²⁴²⁴ See e.g. [Arido Brief](#), paras. 22, 213-220, 271, 273, 276, 402, 436.

649. Although most of Arido's arguments are eligible for summarily dismissal,²⁴²⁵ the Prosecution will address the merits of Arido's submissions and explain why his factual and legal submissions as to the fairness of the trial,²⁴²⁶ the law as applied and interpreted,²⁴²⁷ the Chamber's assessment of the evidence²⁴²⁸ and the Chamber's findings²⁴²⁹ should be dismissed.

VIII.B. THE TRIAL WAS FAIR

VIII.B.1. Arido was promptly informed of the nature and content of the charges

650. The Chamber did not violate Arido's fair trial rights by convicting him as a direct perpetrator.²⁴³⁰ Arido had ample notice that he would be tried as a direct perpetrator for corruptly influencing witnesses D-2, D-3, D-4 and D-6. The Pre-Trial Chamber confirmed these charges on the basis that Arido acted as a direct perpetrator.²⁴³¹ The Confirmation Decision,²⁴³² the DCC²⁴³³ and the Prosecution Pre-Trial Brief²⁴³⁴ contain the factual detail needed to allow Arido to prepare his defence on these charges,²⁴³⁵ and Arido conducted his defence at trial in a manner which shows that he knew he was being tried as a direct perpetrator.²⁴³⁶ Arido's arguments not only mischaracterise the quality of the notice information he received,²⁴³⁷ they demonstrate his misunderstanding of the type of notice information he is entitled to under article 67(1)(a) of the Statute. The arguments in paragraphs 7 to 76 of the Arido Brief should be dismissed.

²⁴²⁵ See above fn. 2.

²⁴²⁶ [Arido Brief](#), paras. 7-160.

²⁴²⁷ [Arido Brief](#), paras. 161-231.

²⁴²⁸ [Arido Brief](#), paras. 232-360.

²⁴²⁹ [Arido Brief](#), paras. 361-472.

²⁴³⁰ [Arido Brief](#), paras. 7-76.

²⁴³¹ [Confirmation Decision](#), para. 96 ("Based on the evidence available, the Chamber considers that Mr Arido bears criminal responsibility as a perpetrator under article 25(3)(a) of the Statute for intentionally corruptly influencing D-2, D-3, D-4 and D-6 in accordance with article 70(1)(c) of the Statute [...]"). *Contra* [Arido Brief](#), para. 18.

²⁴³² [Confirmation Decision](#), paras. 88-96.

²⁴³³ See e.g. [DCC](#), paras. 27, 35, 38, 66-68, 74-75, 80, 117, 139.

²⁴³⁴ [Prosecution Pre-Trial Brief](#) e.g. paras. 2, 18, 25, 32, 35-36, 41, 133-136, 144-147, 156, 165, 255-257.

²⁴³⁵ *Contra* [Arido Brief](#), paras. 12, 22.

²⁴³⁶ See below paras. 651-652.

²⁴³⁷ See e.g. [Arido Brief](#), para. 18 (indicating that there "are no references in the [[Confirmation Decision](#) or the [DCC](#)] [...] to the mode of liability of direct perpetration" and indicating that "there are no factual allegations in support of direct perpetration" in the DCC), 22 (contending that the Prosecution Pre-trial Brief suffered from a "lack of factual allegations in support of a material element of the charged mode of liability"), 25 (contending that he was not provided with "specific factual allegations" regarding the *mens rea* and *actus reus* requirements for direct perpetration), 32 (claiming that the [Confirmation Decision](#) "provided no factual allegations" in support of direct perpetration), 35 (contending generally that the Prosecution failed "to provide any factual allegations").

651. As the Chamber reasonably observed when dismissing Arido's similar challenge in his Closing Brief, the manner in which Arido conducted his defence following the Confirmation Decision demonstrates that he had sufficient notice that he would be tried as a direct perpetrator.²⁴³⁸ The absence of a genuine notice issue is shown by how Arido responded to the Chamber's call for objections on the manner in which the proceedings had been conducted following the Confirmation Decision. As the Chamber correctly noted, despite inviting the Parties to raise any objections, Arido failed to raise an issue regarding his notice of the modes of liability which the Pre-Trial Chamber had confirmed.²⁴³⁹

652. The post-confirmation submissions to which Arido refers also demonstrate no genuine notice issue.²⁴⁴⁰ When asking the Chamber to order the Prosecution to file an updated DCC, and when seeking leave to appeal the Chamber's refusal to issue such an order, Arido did not complain that he lacked notice of the modes of liability on which he would be tried or the material facts pertaining to these modes.²⁴⁴¹ Indeed, in his Arido Elements Submissions, far from complaining that he lacked notice, Arido acknowledged that the Pre-Trial Chamber had confirmed charges against him as a direct perpetrator.²⁴⁴²

653. Although Arido sought the Chamber's guidance regarding the legal elements of the applicable offences and modes of liability,²⁴⁴³ this does not show he lacked notice for the purposes of article 67(1)(a).²⁴⁴⁴ Arido's argument that he had a right to be apprised of the legal elements of direct perpetration misunderstands the scope and purpose of article 67(1)(a). This provision entitles an accused person to information concerning the nature, cause and content of the charges which he faces, not the Court's or the Prosecution's interpretation of the legal elements of the charged modes of liability.²⁴⁴⁵ The jurisprudence

²⁴³⁸ [Judgment](#), para. 60. *Contra* [Arido Brief](#), para. 54.

²⁴³⁹ [Judgment](#), para. 60.

²⁴⁴⁰ *Contra* [Arido Brief](#), paras. 41, 43, 55-58.

²⁴⁴¹ See [Arido First Status Conference Submissions](#), para. 53; [Arido UDCC Refusal ALA](#). See also [T-8-RED](#), 66:5-10 ("In the case of Mr Arido, a number of factual allegations were rejected by the confirmation – in the confirmation and allegations that were confirmed were so initially linked to the others that were rejected in the sense that we will have an updated DCC, we will be in a position to know exactly whether the Prosecutor is still bringing in allegations that have been rejected or is confining himself to the charges that were confirmed.").

²⁴⁴² [Arido Elements Submissions](#), para. 43 ("The Arido Defence submits that Article 25(1)(a) contains three modes of liability: perpetration (direct commission), direct co-perpetration and indirect co-perpetration. *The Pre-Trial Chamber confirmed the charges against Mr. Arido for Article 70(1)(c) as direct perpetration.*" *Emphasis added*).

²⁴⁴³ [Arido First Status Conference Submissions](#), paras. 60-62.

²⁴⁴⁴ *Contra* [Arido Brief](#), paras. 41, 58.

²⁴⁴⁵ *Contra* [Arido Brief](#), paras. 22 (contending that the Prosecution Pre-Trial Brief "failed to elaborate the specific *mens rea* required for the mode of liability of direct perpetration"), 34 ("there was no timely notice of

Arido cites does not support his argument. Instead, it confirms the uncontroversial proposition that an accused has a right to be informed of the material facts supporting the charged crimes and modes of liability.²⁴⁴⁶ Arido had ample and timely notice of the material facts in his case.²⁴⁴⁷

654. Arido challenges the Pre-Trial Chamber's decision to confirm the charges against him on the basis of direct perpetration and not co-perpetration.²⁴⁴⁸ However, in doing so, the Pre-Trial Chamber neither exceeded its authority nor impaired Arido's notice of the case that he needed to defend himself against.²⁴⁴⁹ Arido's attempt to compare his case with a different case, based on different facts, does not advance his argument.²⁴⁵⁰ Given the nature of the allegations in the DCC in this case, direct perpetration was subsumed under the Prosecution's co-perpetration theory.²⁴⁵¹ This certainly applied to the allegations concerning Arido, whose alleged role as a co-perpetrator was largely based on his involvement in physically perpetrating the offence of corruptly influencing witnesses.²⁴⁵² Arido ignores passages of the DCC which show this to be the case.²⁴⁵³ He also incorrectly argues—contrary to his previous

the elements of direct perpetration”), 58 (noting Arido’s “requests for judicial guidance” regarding the “constitutive elements” of direct perpetration and connecting these requests to his argument that he lacked notice), 59 (“[n]either the [DCC](#) nor the [\[Confirmation Decision\]](#) identified the legal elements of direct perpetration”); fn. 21 (contending that the Prosecution Pre-Trial Brief did not differentiate between the *mens rea* requirements for direct perpetration and aiding and abetting). *Also* para. 41.

²⁴⁴⁶ [Kupreškić AJ](#), paras. 88, 114, 124; [Kvočka AJ](#), para. 28. *Contra* [Arido Brief](#), para. 10.

²⁴⁴⁷ *Contra* [Arido Brief](#), paras. 12, 22.

²⁴⁴⁸ [Arido Brief](#), paras. 13, 19, 38-39, 62, 67-69, 72.

²⁴⁴⁹ *Contra* [Arido Brief](#), paras. 13, 19, 62, 67-69, 72.

²⁴⁵⁰ *Contra* [Arido Brief](#), paras. 28-30.

²⁴⁵¹ See [Confirmation Decision](#), para. 33.

²⁴⁵² [DCC](#), e.g. paras. 27 (“Arido implemented the Common Plan [...], identifying and procuring false witnesses called in the *Bemba* case, facilitating and paying for their participation, and illicitly coaching them”), 35 (“Arido made promises improperly to prospective witnesses in the *Bemba* case to encourage them to testify falsely”), 38 (“Arido [...] also illicitly coached witnesses directly”), 66 (“[i]n or around January 2012, Arido [...] contacted D-3 to recruit him to testify in the *Bemba* case. Arido promised D-3 money and the possibility to live in another country in exchange for false testimony that he (D-3) was a member of the CAR armed forces in 2002-2003”), 67 (“[w]hen D-3 met Arido with a group of other prospective witnesses in or around January 2012, Arido reiterated the offer: money in exchange for false evidence”), 74 (“Arido promised D-2 the possibility to seek asylum in Europe and ten million CFA if he testified”), 80 (“Arido offered D-4 money in exchange for falsely testifying and directed him to lie about being in the CAR armed forces”), 117 (“Arido’s essential contributions to the realisation of the objective elements of the Article 70 offences [...] comprised at least one of the following acts: [...] (iii) improperly inducing individuals to falsely testify as witnesses in the *Bemba* case [...] (v) illicitly coaching witnesses on [REDACTED] instructions”), 131 (“Arido’s intent and knowledge are evidenced, *inter alia*, by his [...] (viii) informing witnesses he recruited to testify for the Defence in the *Bemba* case that they would receive money and/or have an opportunity to move to Europe in exchange for false testimony”), 139 (“[t]he following facts establish Arido’s awareness of the factual circumstances enabling him [to] exercise control over the offences jointly with his co-perpetrators [...] (iv) his direct participation in recruiting witnesses to testify falsely in exchange for payment or other benefit; (v) his direct participation in the illicit coaching and bribing of witnesses”).

²⁴⁵³ See [Arido Brief](#), paras. 12-13, 18, 23, 31, 33, 36, 59, 65.

submissions²⁴⁵⁴—that the Pre-Trial Chamber confirmed a mode of liability that does not appear in the Statute.²⁴⁵⁵

655. By limiting Arido’s responsibility to charges of corruptly influencing Witnesses D-2, D-3, D-4 and D-6, and confirming the mode of liability of direct perpetration (instead of co-perpetration), the Pre-Trial Chamber simplified the case that Arido needed to defend himself against. It is inconceivable that by doing so the Pre-Trial Chamber deprived Arido of adequate notice. Certainly, Arido’s acknowledgement—before the trial started—that he would be tried as a direct perpetrator²⁴⁵⁶ and the absence of a timely objection by him to the Pre-Trial Chamber’s approach confirms that Arido suffered no harm.²⁴⁵⁷ To the contrary, he had ample notice of the case he needed to defend against—notice that was further enhanced by the Prosecution Pre-trial Brief.²⁴⁵⁸ In these circumstances, it was unnecessary for the Pre-Trial Chamber or the Chamber to order the Prosecution to file an updated DCC.²⁴⁵⁹

656. Finally, in dismissing Arido’s notice challenge in his Closing Brief, the Chamber did not shift the burden of proof to the Defence—it simply recognised what was plain and obvious:²⁴⁶⁰ Arido had ample notice of the case that he needed to defend himself against. The arguments in paragraphs 7 to 76 of Arido’s Brief should be dismissed.

VIII.B.2 The Chamber reasonably rejected Arido’s unsubstantiated allegations of the Prosecution’s misconduct

657. Arido submits that the Chamber erred by “not ruling” on his allegations of the Prosecution’s misconduct in the investigation.²⁴⁶¹ The Chamber is not obliged to *expressly* refer to—and address—every single unsubstantiated Defence allegation.²⁴⁶² What matters is that the basis of the article 74 decision is reasoned—as *per* article 74(5).²⁴⁶³

²⁴⁵⁴ [Arido Elements Submissions](#), para. 43 (“The Arido Defence submits that article 25 (1) (a) contains three modes of liability: perpetration (direct commission), direct co-perpetration and indirect co-perpetration. [...]”).

²⁴⁵⁵ [Arido Brief](#), para. 36 (indicating that “perpetration” does not appear in the Statute). *Also* para. 74 (where Arido acknowledges that the reference in article 25(3)(a) of the Statute to committing “individually” is “basically synonymous with perpetration”).

²⁴⁵⁶ [Arido Elements Submissions](#), para. 43.

²⁴⁵⁷ *See* [Bemba TJ](#), para. 37.

²⁴⁵⁸ *Contra* [Arido Brief](#), paras. 12, 22.

²⁴⁵⁹ *Contra* [Arido Brief](#), paras. 13, 17, 19, 25-26, 31, 34-35, 37, 39, 47-50.

²⁴⁶⁰ Judgment, paras. 59-60. *Contra* [Arido Brief](#), para. 53.

²⁴⁶¹ *See* [Arido Brief](#), paras. 77-81. *See also* [Arido Brief](#) para. 78, fn. 64 referring to [Arido Closing Brief](#), paras. 95-108.

²⁴⁶² *See* [Popović AJ](#), para. 305 (“As for the Defence arguments which Beara submits were ignored by the Trial Chamber, the Appeals Chamber recalls that, although a trial chamber is obliged to set out a reasoned opinion in

658. Arido argued in his Closing Brief²⁴⁶⁴ that the Prosecution had abused its powers and failed to investigate exonerating circumstances by i) not questioning D-2 and D-3 on their “supposed civilian background”,²⁴⁶⁵ and by ii) “holding criminal prosecutions over the heads of Kokaté and D4”.²⁴⁶⁶ Arido’s allegations of prosecutorial misconduct were unsubstantiated.²⁴⁶⁷ As such, the Chamber was entitled to dismiss them without express reasoning.

659. In any event, the Chamber clarified that “in its evaluation of the evidence [it] also draws upon the submissions of the parties as contained in the record.”²⁴⁶⁸ Proof of that is that the Chamber addressed each underlying argument raised by Arido. First, it carefully assessed D-2 and D-3’s testimony, including their status, and concluded that both were credible when they testified that they did not have any military background.²⁴⁶⁹

660. Second, Arido’s allegation that the Prosecution intimidated Kokaté and D-4 by “holding criminal prosecutions over the[ir] heads”²⁴⁷⁰ misunderstands the purpose and obligatory nature of article 55(2) guarantees. Earlier in the trial proceedings, the Single Judge had addressed Arido’s similar concerns on the application of article 55(2).²⁴⁷¹ The Chamber did not need to reiterate its earlier decision in the Judgment.

661. Finally, having had the opportunity to hear the witnesses’ testimony—including on the Prosecution’s investigative methods—and to carefully assess their credibility,²⁴⁷² the Chamber rightfully dismissed without express reasoning, Arido’s unsupported allegation that the Prosecution interviewed D-2, D-3, D-4 and D-6 in a “coercive” environment.²⁴⁷³

writing, it is not obliged to address every argument in detail”); [Tolimir AJ](#), para 53 (“[A] trial chamber is not obliged to justify its findings in relation to every submission made during trial. A trial chamber has discretion in deciding which legal arguments to address, and is only required to make factual findings which are essential to the determination of guilt on a particular count.”). See also [Semanza AJ](#), para. 45.

²⁴⁶³ [Lubanga Redactions AD](#), para. 20.

²⁴⁶⁴ [Arido Closing Brief](#), paras. 95-108 referred to at [Arido Brief](#), fn. 64.

²⁴⁶⁵ [Arido Closing Brief](#), para. 97.

²⁴⁶⁶ [Arido Closing Brief](#), paras. 99-102.

²⁴⁶⁷ See Prosecution Observations on Misconduct Allegations.

²⁴⁶⁸ [Judgment](#), para. 199.

²⁴⁶⁹ [Judgment](#), paras. 126-127, 307-319, 322-323, 328, 334, 338-339.

²⁴⁷⁰ [Arido Closing Brief](#), paras. 99-102 referred to at [Arido Brief](#), fn. 64.

²⁴⁷¹ [Prosecution Witness Contacts Decision](#), para.9. See below para. 669.

²⁴⁷² [Judgment](#), paras. 306-319, 339, 341, 344, 345, 346.

²⁴⁷³ Contra [Arido Closing Brief](#), paras. 103-108 referred to at [Arido Brief](#), fn. 64.

662. The Chamber did not err by rejecting without express reasoning Arido's unsupported allegations of misconduct cursorily advanced in his Closing Brief. In any event, it properly assessed the witnesses' credibility and addressed the substance of Arido's arguments.²⁴⁷⁴ Arido fails to show any abuse of process, any impact or any legal or factual error in the Chamber's reasonable assessment of the evidence.

663. Notably, Arido has not even attempted to show how the Chamber's Arido Additional Requests Decision materially affected his conviction.²⁴⁷⁵ As such, his argument should be summarily dismissed.²⁴⁷⁶

VIII.B.3. The Prosecution presented one coherent case against Arido; Kokaté's role in the events is immaterial to Arido's conviction

664. The Prosecution presented one coherent and consistent case against Arido. Arido's submission that the Chamber failed to rule on his objection that the Prosecution pursued two different theories in the case and failed to investigate exculpatory evidence in relation to Kokaté²⁴⁷⁷ should be summarily dismissed because it is obscure, vague and undeveloped.²⁴⁷⁸

665. First, the Prosecution advanced one case and not two "competing theories".²⁴⁷⁹ As confirmed by the Pre-Trial Chamber, "pursuant to article 70(1)(c) and article 25(3)(a) (perpetration) of the Statute, [Arido] committed the offence of corruptly influencing witnesses D-2, D-3, D-4 and D-6, by way of instructing them to either provide false information or withhold true information during their testimony in Court and encouraging their testimony with money transfers and the possibility of a relocation in Europe (as included in counts 12, 15, 18, and 42 of the DCC) [...]."²⁴⁸⁰

666. Second, the Chamber's findings on Arido's responsibility are clear and consistent with the Prosecution theory, irrespective of the language used to describe Kokaté's role.²⁴⁸¹ Arido personally recruited and instructed the Cameroonian witnesses. He intentionally promised them money and relocation in exchange for their testimony in the Main Case. Arido intended

²⁴⁷⁴ See above fn. 2468-2469, 2472.

²⁴⁷⁵ [Lubanga AJ](#), para. 20 and [Ngudjolo AJ](#), para. 21.

²⁴⁷⁶ [Krajišnik AJ](#), para. 20.

²⁴⁷⁷ [Arido Brief](#), paras. 82-87.

²⁴⁷⁸ [Krajišnik AJ](#), paras. 16, 22-23, 26.

²⁴⁷⁹ *Contra* [Arido Brief](#), paras. 82-83.

²⁴⁸⁰ [Confirmation Decision](#), p. 53; [Judgment](#), para. 943.

²⁴⁸¹ *Contra* [Arido Brief](#), para. 84.

and personally manipulated their testimonial evidence.²⁴⁸² Contrary to Arido's submission,²⁴⁸³ there is no contradiction in the Chamber's findings: upon Kilolo's request, both Arido and Kokaté were engaged in recruiting witnesses.²⁴⁸⁴ Moreover, the Chamber expressly addressed some of Arido's arguments and, for example, stated that D-3 clearly distinguished and consistently described Arido's and Kokaté's respective roles.²⁴⁸⁵

667. Third, Kokaté's role is immaterial to Arido's conviction for personally and directly recruiting and instructing the witnesses.²⁴⁸⁶ Arido's arguments selectively approach the evidence:²⁴⁸⁷ Arido omitted to mention that before testifying that Kokaté "hatched the deal",²⁴⁸⁸ D-2 testified that "[he] was in contact with Mr Arido who gave [him] to understand that there was a deal that they had come to."²⁴⁸⁹ D-2 then clarified that "Mr Arido gave [him] to understand that from the moment when [he] undertook to testify, [he] was to behave as a second lieutenant."²⁴⁹⁰ Further, while citing D-3's testimony implicating Kokaté,²⁴⁹¹ Arido ignores the witness testimony that he was contacted by Arido who offered him money and relocation for his false testimony.²⁴⁹² Repeating his trial assertion that Kokaté's role exculpates him misrepresents the evidence and should be summarily dismissed.²⁴⁹³

668. There are no confusions or contradictions in the Prosecution case, the witness' testimony or the Chamber's findings. If anything, Arido's submissions that Kokaté is the "elephant in the room" make no "legal sense".²⁴⁹⁴

VIII.B.4. Arido was not "forced" to drop D-4

669. Arido was not "forced" to drop D-4 from his witness list and his fair trial rights were not violated.²⁴⁹⁵ Arido repeats his trial argument²⁴⁹⁶ that by interviewing D-4 (who was listed among Arido's witnesses) and giving him article 55(2) guarantees, the Prosecution "attached

²⁴⁸² [Judgment](#), para. 944.

²⁴⁸³ *Contra* [Arido Brief](#), para. 84.

²⁴⁸⁴ *See e.g.* [Judgment](#), paras. 125, 326, 327, 420, 872.

²⁴⁸⁵ [Judgment](#), para. 344.

²⁴⁸⁶ *Contra* [Arido Brief](#), paras. 85-86. *See* [Judgment](#), para. 344 dismissing similar Defence arguments at trial.

²⁴⁸⁷ *Contra* [Arido Brief](#), paras. 85-86.

²⁴⁸⁸ *See* [Arido Brief](#), para. 86, fn. 77 citing T-19-CONF, 64:4.

²⁴⁸⁹ T-19-CONF, 64:2-3.

²⁴⁹⁰ T-19-CONF, 64:14-16. *See also* [Judgment](#), para. 321.

²⁴⁹¹ *See* [Arido Brief](#), para. 86, fn. 77 citing T-22-CONF, 39:13-22.

²⁴⁹² *See for instance* T-22-CONF, 37:10-22. *See also* [Judgment](#), para 328.

²⁴⁹³ [Krajišnik AJ](#), para. 18.

²⁴⁹⁴ *See* [Arido Brief](#) paras. 85 and 87 suggesting that the Prosecution case and Trial Judgment's findings make no "legal sense".

²⁴⁹⁵ *Contra* [Arido Brief](#), paras. 88-94.

²⁴⁹⁶ [Arido Witness Contacts Response](#), paras. 15-21.

‘suspect status’ to D-4”²⁴⁹⁷ and “placed the Defence in the position of either undermining its own case by deciding to not call [the] witnesses [...] or alternatively possibly facilitating the violation of the rights of a suspect”.²⁴⁹⁸

670. As the Single Judge of Trial Chamber VII observed,²⁴⁹⁹ Arido misunderstands the purpose of article 55(2) safeguards—that apply every time there are “grounds to believe that [the interviewed person] has committed a crime within the jurisdiction of the Court”. This is an objective criterion that applies “irrespective of whether or not this person is the active target of a Prosecution investigation”²⁵⁰⁰ and also “applie[s] in interviews of people being questioned by the Prosecution as witnesses”.²⁵⁰¹ In fact, the Prosecution would violate its own obligations if it questioned a person whom it had grounds to believe committed a crime within the Court’s jurisdiction without applying the article 55(2) safeguards.²⁵⁰² Thus, the Single Judge correctly treated D-4 like any other Defence witness and applied the Witness Protocol by ordering Arido to disclose the contact details of D-4 to the Prosecution for its interview²⁵⁰³ and by ordering the Prosecution to disclose to the witness the information underlying his suspect status.²⁵⁰⁴

671. Arido was not required to seek the Prosecution’s permission for his subsequent contacts with D-4²⁵⁰⁵ nor did any “conflict of interest” arise forcing him to drop D-4 from his witness list.²⁵⁰⁶ The decision to drop D-4 as a Defence witness just three days after the Prosecution disclosed the content of its interview²⁵⁰⁷ was exclusively Arido’s strategic choice,²⁵⁰⁸ and not a violation of his fair trial rights.²⁵⁰⁹

²⁴⁹⁷ [Arido Brief](#), paras. 92-93

²⁴⁹⁸ [Arido Witness Contacts Response](#), para. 17. See [Arido Brief](#), paras. 92-93 vaguely referring to an alleged “conflict of interest”.

²⁴⁹⁹ [Prosecution Witness Contacts Decision](#), paras. 8-10.

²⁵⁰⁰ [Prosecution Witness Contacts Decision](#), para. 9.

²⁵⁰¹ [Prosecution Witness Contacts Decision](#), para. 9.

²⁵⁰² [Prosecution Witness Contacts Decision](#), para. 9.

²⁵⁰³ [Prosecution Witness Contacts Decision](#), p. 7.

²⁵⁰⁴ [Prosecution Witness Contacts Decision](#), para. 10.

²⁵⁰⁵ *Contra* [Arido Brief](#), para. 92.

²⁵⁰⁶ *Contra* [Arido Brief](#), paras. 92-93.

²⁵⁰⁷ 4 March 2016 Disclosure Communication.

²⁵⁰⁸ See [Arido Provisional Witness List](#), [Arido Witness List](#) (both including D-4 and D-6) and [Arido Revised Witness List](#) (filed on 7 March 2016 dropping D-4 and D-6).

²⁵⁰⁹ *Contra* [Arido Brief](#), para. 94.

VIII.B.5. The term [REDACTED] in the Austrian Decisions does not violate Arido's fair trial

672. Arido's submission that the term [REDACTED] used by the Austrian authorities in their confidential requests to Western Union constitutes a "serious human rights violation"²⁵¹⁰ merely repeats his unsuccessful trial argument.²⁵¹¹ The Chamber adequately addressed the matter in a decision rendered after Arido filed his Closing Brief,²⁵¹² and not in the Judgment.²⁵¹³

673. In his Closing Brief Arido made several *additional* requests²⁵¹⁴ distinct from—and unrelated to—the merits of the case against him,²⁵¹⁵ including asking the Chamber to "[d]eclare that the characterization of Mr. Arido as a '[REDACTED]' suspect' in the Austrian request defamed his character and reputation and caused irreparable harm and prejudice to him within his community, and the international community."²⁵¹⁶ The Chamber was entitled to address these *additional* requests in its separate decision²⁵¹⁷ issued four months before its article 74 Judgment.²⁵¹⁸

674. Notably, Arido has not even attempted to show how the Chamber's Arido Additional Requests Decision materially affected his conviction.²⁵¹⁹ As such, his argument should be summarily dismissed.²⁵²⁰ As noted by the Chamber, the Prosecution's Request for Assistance ("RFA") to the Austrian authorities made clear that the reason for the request for financial data was because "these money transfers could be linked to the commission of crimes under the jurisdiction of the Court such as offences against the administration of justice."²⁵²¹ [REDACTED] was not mentioned. While the related judicial order from the Austrian authorities mistakenly stated that Arido (and others) were suspected of [REDACTED], the Austrian authorities made "specific reference to the first RFA in the justification of the order", which in turn made clear that the suspected crime was an article 70 offence.²⁵²² As

²⁵¹⁰ [Arido Brief](#), paras. 95-102. See also [Babala Brief](#), para. 24.

²⁵¹¹ *Contra* [Arido Closing Brief](#), paras. 140-141, 406, 410; [Arido Additional Requests Decision](#), para. 20.

²⁵¹² [Arido Additional Requests Decision](#), para. 20.

²⁵¹³ *Contra* [Arido Brief](#), paras. 95-96. See also paras. 688-689.

²⁵¹⁴ [Arido Closing Brief](#), paras. 408-411.

²⁵¹⁵ [Arido Additional Requests Decision](#), para. 1.

²⁵¹⁶ [Arido Closing Brief](#), para. 410.

²⁵¹⁷ [Arido Additional Requests Decision](#), para. 20.

²⁵¹⁸ *Contra* [Arido Brief](#), paras. 95-96.

²⁵¹⁹ [Lubanga AJ](#), para. 20 and [Ngudjolo AJ](#), para. 21.

²⁵²⁰ [Krajišnik AJ](#), para. 20.

²⁵²¹ CAR-OTP-0092-0351, at 0354, para. 5 (*cited in* [First Western Union Decision](#), para. 52).

²⁵²² [First Western Union Decision](#), para. 52 (*citing* CAR-OTP-0092-0834, at 0835).

the Chamber noted, “the fact that Mr Arido was, erroneously, characterised [REDACTED] suspect cannot be imputed to the Prosecution.”²⁵²³

675. Finally, Arido’s suggestion that this mistake “continues to prejudice and harm Appellant and his family”²⁵²⁴ is unfounded. As noted by the Chamber, the relevant Austrian court order is confidential and unavailable to the public and a no point has the Prosecution noted that mischaracterisation in public.²⁵²⁵ The only public revelation of any reference to Arido as a [REDACTED] suspect has come from the Arido Defence, which repeatedly noted this fact in open session and in public filings throughout trial—including his public redacted Document in Support of the Appeal—²⁵²⁶ producing the very alleged harm for which he now seeks a remedy.

VIII.B.6. The Chamber properly considered the absence of CDRs when assessing D-2’s and D-3’s evidence

676. Arido argues that the Chamber erred by not applying the *in dubio pro reo* principle when finding that Arido called Kilolo on the telephone²⁵²⁷ notwithstanding the absence of corroborating Call Data Records (“CDRs”) related to this telephone call.²⁵²⁸ This argument misrepresents the evidence and the Chamber’s findings, and misunderstands the law.

677. Based on D-2’s “organised, chronological and clear” account,²⁵²⁹ the Chamber properly found that once D-2 accepted Arido’s proposal, Arido called Kilolo on the telephone so that D-2 could introduce himself.²⁵³⁰ The Chamber found that D-2’s evidence was corroborated by D-3’s testimony²⁵³¹ that recalled a similar pattern in that Arido spoke on the phone with Kilolo when meeting with D-3.²⁵³² The Chamber did not “presume” that the telephone call occurred,²⁵³³ but based its finding on D-2’s reliable and corroborated evidence.

²⁵²³ [Arido Additional Requests Decision](#), para. 20.

²⁵²⁴ [Arido Brief](#), para. 148.

²⁵²⁵ [Arido Additional Requests Decision](#), para. 20.

²⁵²⁶ See e.g. [T-34-RED](#), 17:1-11; 18:2-4; [T-39-RED](#), 5:12-18, 9:20-10:4; Arido First Western Union ALA, paras. 12, 16-18; [Arido Brief](#), para. 4.

²⁵²⁷ See [Judgment](#), paras. 324-325.

²⁵²⁸ [Arido Brief](#), paras. 103-112.

²⁵²⁹ [Judgment](#), paras. 325, 329. See above para. 258.

²⁵³⁰ [Judgment](#), paras. 324-325.

²⁵³¹ Contra [Arido Brief](#) para. 107.

²⁵³² [Judgment](#), para. 325.

²⁵³³ Contra [Arido Brief](#), paras. 106-107, 110.

678. Arido's argument that the Chamber's conclusion is "purely speculative" is premised on a misleading representation of the Judgment: the Chamber's *did not* conclude that "there *could have been* phone calls"²⁵³⁴ between D-2, Kilolo and Arido *based on* P-433's testimony that CDRs in the record do not comprise all contacts with the accused.²⁵³⁵ Rather the Chamber positively found that Arido called Kilolo based on D-2's direct and corroborated evidence.²⁵³⁶

679. The Chamber referred to P-433's testimony, however, when addressing Arido's argument about the absence of CDRs.²⁵³⁷ Considering P-433's evidence that CDRs do not "comprise *all* contacts between the accused, as they may have used telephone numbers unknown to the prosecuting authorities"²⁵³⁸ the Chamber reasonably found that the *absence* of evidence in CDRs did not undermine D-2's corroborated evidence that the telephone conversation took place.²⁵³⁹

680. Arido's further argument that the absence of CDRs shows not only that the telephone call did not take place but also that D-2 is not a reliable witness²⁵⁴⁰ is based on false logic. In Arido's view, the absence of supporting CDRs creates a non-rebuttable presumption that a telephone conversation did not happen and demonstrates that any witness who testifies to the contrary is unreliable. This lacks common sense.

681. Further, Arido misunderstands the presumption of innocence principle, the "beyond reasonable doubt" standard and the "*in dubio pro reo*" principle.²⁵⁴¹ Under article 66(3), only the material facts underlying the guilt of the accused must be proved beyond reasonable doubt,²⁵⁴² but not the individual evidence (such as D-2's testimony) or predicate

²⁵³⁴ [Arido Brief](#), para. 108 (emphasis added).

²⁵³⁵ [Arido Brief](#), para. 108.

²⁵³⁶ [Judgment](#), para. 325.

²⁵³⁷ [Judgment](#), para. 325. *Contra* [Arido Brief](#), para. 105 suggesting that the Chamber ignored his trial submissions.

²⁵³⁸ [Judgment](#), para. 325.

²⁵³⁹ [Judgment](#), para. 325.

²⁵⁴⁰ [Arido Brief](#), para. 106. *See also* [Arido Brief](#), paras. 109-111, 118.

²⁵⁴¹ [Arido Brief](#), paras. 107-108.

²⁵⁴² Including facts constituting the elements of the crime and mode of liability. *See* [Judgment](#), paras. 185-187. *See also* [Lubanga AJ](#), para. 22. Arido's reliance ([Arido Brief](#), fn. 106) upon [Katanga TJ](#), *Minority Opinion of Judge Van den Wyngaert*, para. 149 is misplaced as it refers to a completely different situation. Judge Van den Wyngaert referred to the absence of "highly relevant evidence" from the trial record that could potentially "alter the findings on facts material to the conviction" and that in turn may in certain circumstances suffice to "generate a reasonable doubt as to the guilt" of the accused. However, the absence of CDRs of the telephone call between Arido and Kilolo does not alter the Chamber's finding that Arido met, instructed and influenced D-

circumstantial facts (such as the telephone conversation between Arido and Kilolo).²⁵⁴³ Similarly, the *in dubio pro reo* principle does not mean that evidence must always be interpreted in favour of the accused.²⁵⁴⁴ The Chamber reasonably concluded that the absence of CDRs did not undermine D-2's corroborated evidence and found that the telephone call took place.

682. Finally, contrary to Arido's submission,²⁵⁴⁵ the Chamber sufficiently explained why it considered that D-2's testimony was corroborated by D-3's evidence: both witnesses recalled *a similar pattern* insofar as Arido and Kilolo spoke on the telephone during their first encounters with Arido.²⁵⁴⁶ The Chamber explained why it found the two witnesses to be reliable, both in general²⁵⁴⁷ and as to their first meetings with Arido,²⁵⁴⁸ irrespective of the absence of CDRs.²⁵⁴⁹ This case cannot be compared to the ICTR case of *Muvunyi*²⁵⁵⁰ where the Trial Chamber found the evidence of two witnesses to be "strikingly similar"²⁵⁵¹ without addressing the "numerous inconsistencies in their testimonies",²⁵⁵² and the Appeals Chamber found it impossible to assess the reasonableness of the Trial Chamber's conclusion.²⁵⁵³ The Chamber's assessment of D-2 and D-3's evidence was meticulous and reasonable. Nor does Arido point to any inconsistency that the Chamber should have addressed.

683. Although labelled as legal arguments, Arido essentially disagrees with the Chamber's evidentiary assessments and factual determinations, but fails to show that no reasonable Trial Chamber could have reached the same conclusion. His arguments should be dismissed.

2, D-3, D-4 and D-6, nor does it generate a reasonable doubt as to Arido's ultimate guilt, in light of the other evidence in the record.

²⁵⁴³ [Lubanga AJ](#), para. 22. *Contra* [Arido Brief](#), paras. 108-111.

²⁵⁴⁴ See [Katanga TJ](#), paras. 53.

²⁵⁴⁵ [Arido Brief](#), paras. 112-113.

²⁵⁴⁶ [Judgment](#), paras. 325, 329.

²⁵⁴⁷ [Judgment](#), paras. 307-319,

²⁵⁴⁸ [Judgment](#), paras. 324-325, 328-330.

²⁵⁴⁹ [Judgment](#), para. 325.

²⁵⁵⁰ *Contra* [Arido Brief](#), para. 112.

²⁵⁵¹ [Muvunyi AJ](#), para. 144. See also [Muvunyi AJ](#), para. 209.

²⁵⁵² [Muvunyi AJ](#), para. 144.

²⁵⁵³ [Muvunyi AJ](#), para. 144.

VIII.B.7. The Prosecution's disclosure did not violate Arido's fair trial rights

684. Arido's fair trial rights were not impaired by the manner in which the Prosecution disclosed material to him.²⁵⁵⁴ The Prosecution fulfilled its disclosure obligations to Arido in a timely manner. Arido's two examples do not support his argument.

685. The disclosure of the Prosecution's RFAs to Cameroon was not untimely.²⁵⁵⁵ The Prosecution opposed Arido's unsubstantiated request of 5 May 2015 for these RFAs.²⁵⁵⁶ The issue of whether the Defence was entitled to the Prosecution's RFAs to national authorities pursuant to rule 77 was subsequently litigated before the Single Judge of the Chamber. In compliance with the Single Judge's Remedies Decision, the Prosecution disclosed its RFAs.²⁵⁵⁷ Although Arido complains that the timing of this disclosure impaired his ability to cross-examine P-433, he fails to explain how he was impaired.²⁵⁵⁸ That Arido did not seek an adjournment or to recall P-433 illustrates that the timing of the disclosure did not impact his cross-examination of P-433.

686. The Prosecution disclosed the additional material which Arido refers to²⁵⁵⁹ pursuant to rule 77 on 23 and 26 February 2016.²⁵⁶⁰ This material was disclosed in response to Arido's request to the Chamber on 18 February 2016.²⁵⁶¹ Arido fails to demonstrate how the Prosecution's immediate disclosure of this material to him following his request adversely affected his fair trial rights.²⁵⁶²

VIII.B.8. The Chamber reasonably denied 11 applications for leave to appeal

687. Arido's unsubstantiated submission that the Appeals Chamber should review 11 Pre-Trial and Trial Chamber decisions rejecting Arido's applications for leave to appeal, and deliberate and rule on the merits of each legal issue therein, should be summarily

²⁵⁵⁴ *Contra* [Arido Brief](#), paras. 116-122. Arido's attempt to incorporate arguments by reference from his final trial brief without developing those arguments in his appeal brief ([Arido Brief](#), para. 116), and his undeveloped claim that P-433's expert report undermines the credibility of D-2 and D-3 ([Arido Brief](#), para. 118), should be summarily dismissed. See [Galić AJ](#), para. 297; [Krajišnik AJ](#), para. 26.

²⁵⁵⁵ *Contra* [Arido Brief](#), paras. 117, 119.

²⁵⁵⁶ Arido Disclosure Request Annex A; Arido Disclosure Request Annex B.

²⁵⁵⁷ See Decision on Remedies, p.9; [30 September 2015 Disclosure Communication](#).

²⁵⁵⁸ [Arido Brief](#), paras. 117, 122.

²⁵⁵⁹ [Arido Brief](#), paras. 120-121.

²⁵⁶⁰ [Prosecution Response Disclosure Request](#), paras. 7-10; 26 February 2016 Disclosure Communication; 23 February 2016 Disclosure Communication. See [Arido Brief](#), para. 121.

²⁵⁶¹ [Arido Rule 77 Request](#).

²⁵⁶² *Contra* [Arido Brief](#), para. 122.

dismissed.²⁵⁶³ Arido does not explain why these 11 decisions were erroneous nor how they materially affected the Judgment.²⁵⁶⁴

VIII.B.9. The Chamber's decisions on Arido's other requests were reasonable

688. In his Closing Brief filed on 24 May 2016, Arido made several new requests unrelated to the merits of the case against him.²⁵⁶⁵ On 29 June 2016 (four months before the Judgment), the Trial Chamber decided on these requests in a separate decision.²⁵⁶⁶ Addressing these matters, unrelated to the merits of the case, in a separate decision did not violate Arido's right to a full and reasoned opinion.²⁵⁶⁷

689. First, the Chamber reasoned its Arido Additional Requests Decision. Second, Arido could—and did—seek leave to appeal this Decision pursuant to article 82(1)(d), and his application was rejected by the Trial Chamber.²⁵⁶⁸ Finally, Arido is entitled to challenge the Chamber's Decision in his appeal against the Judgment, and does so; however, he must show that the Chamber erred in this Decision and that such error materially affected the Judgment. Since Arido fails to do so, his arguments should be summarily dismissed.²⁵⁶⁹

VIII.C. THE CHAMBER DID NOT LEGALLY ERR

VIII.C.1. The Chamber correctly defined and applied the law on modes of liability

VIII.C.1.a. The Chamber correctly found that Arido was a direct perpetrator and that his crimes were connected to the Common Plan

690. Arido argues that the Chamber erred in law by finding that his actions were connected to the Common Plan although he was not charged or convicted as a co-perpetrator of the

²⁵⁶³ [Krajišnik AJ](#), para. 26. *Contra* [Arido Brief](#), paras. 154-156.

²⁵⁶⁴ [Ngudjolo AJ](#), para. 21; [Lubanga AJ](#), para. 20.

²⁵⁶⁵ [Arido Closing Brief](#), paras. 408-410. Specifically, Arido requested the Chamber to a) find that he had a reasonable apprehension for his safety in respect to the [REDACTED]; b) order an investigation as to whether the ICC fulfilled its responsibilities to protect Arido, an expert witness; c) order the Registrar to determine why there was no official response to Arido's security concerns communicated in July 2012 to the ICC and the ICC Judge; d) order that the information about Arido's family members and business associates unconnected to the case be expunged from official records, and be excluded as evidence in this case; e) prohibit the Prosecution from using this information, in relation to this case, as well as other ICC cases; f) declare that the Prosecution's investigations to obtain confidential information about [REDACTED]; g) declare that characterisation of Arido as a [REDACTED] in the Austrian request defamed his character and reputation.

²⁵⁶⁶ [Arido Additional Requests Decision](#), paras. 1, 20.

²⁵⁶⁷ *Contra* [Arido Brief](#), paras. 159-160.

²⁵⁶⁸ Arido failed to explain why the Chamber's denial of his leave to appeal was erroneous. *Contra* [Arido Brief](#), para. 160.

²⁵⁶⁹ [Krajišnik AJ](#), para. 26.

Common Plan.²⁵⁷⁰ This argument misunderstands the Judgment and the law by conflating factual findings and the legal characterisations of such factual findings.

691. The Chamber’s *legal* characterisation of Arido’s responsibility is unequivocal and within the boundaries of the Confirmation Decision.²⁵⁷¹ Arido was charged and convicted as a direct perpetrator of the offences under article 70(1)(c) pursuant to article 25(3)(a) because he personally recruited and instructed four witnesses to falsely testify in favour of Bemba in exchange for money and relocation.²⁵⁷² The Chamber did not find that Arido was a member of the Common Plan or a co-perpetrator together with Bemba, Mangenda and Kilolo. He was convicted *only* for the article 70(1)(c) offences that he personally committed in connection with the Cameroonian witnesses, and *not* for the offences imputed to the co-perpetrators in the Common Plan in connection with the ten other witnesses.

692. This legal characterisation of Arido’s responsibility does not contradict the Chamber’s factual finding that Arido did not act in a vacuum but rather in coordination with others, including the co-perpetrators who corruptly influenced witnesses (including the Cameroonian witnesses) and presented their false testimony.²⁵⁷³ The Chamber was entitled to find that there was a connection between Arido’s actions and the three co-perpetrators as a factual conclusion based on the evidence. Arido’s submission that the Chamber had no “legal basis” to reach this factual conclusion because he was not charged with co-perpetration²⁵⁷⁴ confuses factual findings with their legal characterisation.

693. Arido’s alleged prejudice—that the Chamber erroneously found him guilty because it viewed the evidence against him “through the lens of the common plan”²⁵⁷⁵—is speculative and unsupported. Arido disregards the wealth of reliable and corroborated direct evidence which undeniably establishes his responsibility as a direct perpetrator²⁵⁷⁶—a conviction that would be established even if Arido had been charged and tried alone.

²⁵⁷⁰ [Arido Brief](#), paras. 213-220.

²⁵⁷¹ See e.g. [Judgment](#), para. 943. *Contra* [Arido Brief](#), para. 214.

²⁵⁷² See e.g. [Judgment](#), paras. 943-945.

²⁵⁷³ [Judgment](#), para. 682. See also [Judgment](#), paras. 103, 112, 803, 878.

²⁵⁷⁴ [Arido Brief](#), para. 215.

²⁵⁷⁵ [Arido Brief](#), paras. 216-217.

²⁵⁷⁶ [Judgment](#), paras. 668-672.

VIII.C.2.b. The Chamber correctly found that Arido was a direct perpetrator and that he acted in concert with Kokaté

694. Arido's argument that the Chamber was legally barred from finding that he acted in concert with Kokaté—since he was charged as a direct perpetrator²⁵⁷⁷—is premised on the same misunderstanding. It conflates the legal characterisation of Arido's conduct (as a direct perpetrator) with factual findings regarding the context and broader criminal scheme in which Arido operated.²⁵⁷⁸ As such it should be dismissed.

VIII.D. THE CHAMBER'S LEGAL FINDINGS WERE CONSISTENT

695. The Chamber was not inconsistent in finding that Arido did not aid, abet or otherwise assist the offences under article 70(1)(a) and (b)²⁵⁷⁹ but personally committed the offence under article 70(1)(c).²⁵⁸⁰ Arido's contrary argument²⁵⁸¹ misunderstands the Chamber's findings and the elements of the offences, and should be summarily dismissed.²⁵⁸²

696. The reason why Arido was acquitted of offences under article 70(1)(a) and (b) was not because his actions of recruiting, instructing and promising money and re-location to the Cameroonian witnesses were not proved beyond reasonable doubt.²⁵⁸³ Rather, the Chamber found that Arido's (proved) coaching *on the merits* of the Main Case—coupled with his lack of contact with the Cameroonian witnesses and Kilolo after February 2012²⁵⁸⁴—was insufficient to establish Arido's contribution to the four witnesses' false testimony on *non-merits* issues, namely, their contacts with the Defence, payments and benefits, and their acquaintances with certain persons.²⁵⁸⁵

697. The Chamber noted that it did not assess the truth or falsity of the testimonies on the merits of the Main Case²⁵⁸⁶ and that its findings on the falsity of the evidence for the purpose

²⁵⁷⁷ [Arido Brief](#), paras. 218-220. See [Judgment](#), para. 327.

²⁵⁷⁸ See above paras. 690-693.

²⁵⁷⁹ [Judgment](#), paras. 946-949.

²⁵⁸⁰ [Judgment](#), paras. 943-948.

²⁵⁸¹ [Arido Brief](#), paras. 221-230.

²⁵⁸² [Krajišnik AJ](#), para. 18. [Mbarushimana Reconsideration AD](#), para. 10.

²⁵⁸³ [Contra Arido Brief](#), para. 225. See also paras. 226-227.

²⁵⁸⁴ [Judgment](#), para. 947, where the Chamber found that Arido met the witnesses in February 2012 in Douala and that, by the time they testified (June 2013), he was no longer in contact with them and had cut ties with the Main Case Defence. The Chamber also found that by the time of the 2012 meeting in Douala Arido did not know that Kilolo was going to coach the four witnesses at the May 2013 meeting in Yaoundé ([Judgment](#), para. 674), and that Kilolo did not know that Arido had coached the witnesses before they were introduced to him ([Judgment](#), paras. 126, 326, 329).

²⁵⁸⁵ [Judgment](#), paras. 872, 947, 949.

²⁵⁸⁶ [Judgment](#), para. 194 citing [T-10-RED](#), 4:6-6:6. See also [T-10-RED](#), 5:7-10, 17-23, 4:15-5:13.

of the offences under article 70(1)(a) and (b) could relate *only* to the witnesses' contacts with the Defence, payments and benefits, and their contacts with certain persons.²⁵⁸⁷

698. Consistent with this approach, and having found that “Arido’s meetings with the witnesses concerned only [...] matters closely related to the merits of the Main Case”²⁵⁸⁸—and not their contacts with the Defence, payments and benefits, and their acquaintances with certain persons—the Chamber concluded that the evidence was insufficient to establish Arido’s criminal responsibility with respect to the offences under article 70(1)(a) and (b).²⁵⁸⁹ There is no suggestion in the Chamber’s findings that the evidence was insufficient to prove that Arido coached the Cameroonian witnesses on merits issues and other matters as the basis for his liability under article 70(1)(c).²⁵⁹⁰

699. Thus, Arido’s submission²⁵⁹¹ misrepresents the Chamber’s reasoning and its findings. His other submissions on further alleged inconsistencies are similarly undeveloped and should be dismissed.²⁵⁹²

VIII.E. THE CHAMBER CORRECTLY APPROACHED THE EVIDENCE

VIII.E.1. The Chamber’s approach to the evidence did not violate article 66

700. Arido’s submission that the Chamber was biased and “assist[ed] the Prosecution in satisfying its burden”²⁵⁹³ in violation to article 66 is unsubstantiated and merely disagrees with the Chamber’s assessment of the evidence. It should be summarily dismissed.²⁵⁹⁴ The Chamber did not “fill in” the gaps in the Prosecution’s evidence, but properly carried out a “holistic evaluation and weighing of all the evidence taken together.”²⁵⁹⁵

701. Moreover, the Chamber’s rejection of some of the Prosecution’s evidence and allegations against Arido does not mean that there was insufficient evidence to convict him and that the “burden of proof [shifted] from the Prosecution to the Chamber”.²⁵⁹⁶ If anything,

²⁵⁸⁷ [Judgment](#), paras. 194, 947.

²⁵⁸⁸ [Judgment](#), para. 872. *See also* [Judgment](#), paras. 388, 391.

²⁵⁸⁹ [Judgment](#), paras 872 (“[o]n the evidence, there is no link between Arido’s conduct and the false testimony the witnesses provided on contacts, payments and association with third persons”), 947, 949.

²⁵⁹⁰ [Judgment](#), paras. 944-945.

²⁵⁹¹ [Arido Brief](#), para. 229.

²⁵⁹² [Krajišnik AJ](#), para. 18. *Contra* [Arido Brief](#), para. 230.

²⁵⁹³ [Arido Brief](#), para. 240. *See also* paras. 235-239.

²⁵⁹⁴ [Krajišnik AJ](#), para. 27.

²⁵⁹⁵ [Judgment](#), para. 188 citing [Lubanga AJ](#), para. 22 *inter alia*.

²⁵⁹⁶ *Contra* [Arido Brief](#), paras. 237-238.

it shows that the Chamber critically reviewed all the evidence and, on the basis of *all* reliable and corroborated direct evidence, concluded that Arido had coached and bribed the Cameroonian witnesses.²⁵⁹⁷ It does not show that the burden of proof shifted from the Prosecution to the Chamber.

VIII.E.2. The Chamber properly approached the witnesses' testimonies in the Main Case

702. The Chamber properly approached the witnesses' testimonies in the Main Case.²⁵⁹⁸ Pursuant to article 69(6) the Chamber took judicial notice of the transcripts of the witnesses in the Main Case only in respect of *the dates and content* of the Cameroonian witnesses' (D-2, D-3, D-4 and D-6) testimony—in particular, that they testified they were soldiers—and not for the *truth or falsity* of the testimony itself—namely, if they were actually soldiers.²⁵⁹⁹ Thus, even if Arido disputes the military/civilian status of the witnesses,²⁶⁰⁰ the Chamber was entitled to take judicial notice of when and what they testified about in the Main Case.²⁶⁰¹

703. Whether the witnesses had a military status is immaterial for the purpose of Arido's conviction under article 70(1)(c)—which encompassed instructions for them to testify according to a particular script concerning the merits of the Main Case, regardless of the truth or falsity of the information.²⁶⁰² The Chamber did not use “Trial Chamber III testimony for its truth”²⁶⁰³ to conclude that Arido coached the Cameroonian witnesses.²⁶⁰⁴ Rather, the Chamber's findings that D-2 and D-3 testified *as instructed* by Arido²⁶⁰⁵ and Kilolo²⁶⁰⁶ solely demonstrated that their coaching was reflected in the witnesses' testimony, regardless of the truth or falsity of their testimony.²⁶⁰⁷

704. Moreover, Arido's submissions conflate and misrepresent the Chamber's findings in this Judgment and the Main Case:

²⁵⁹⁷ [Judgment](#), paras. 668-672.

²⁵⁹⁸ *Contra* [Arido Brief](#), paras. 247-269.

²⁵⁹⁹ [Judgment](#), para. 201. [Rule 68\(3\) Clarification Decision](#), paras. 5-6; [Judicial Notice Decision](#), para. 3. *Contra* [Arido Brief](#), paras. 247-269.

²⁶⁰⁰ [Arido Brief](#), paras. 252-256.

²⁶⁰¹ *Contra* [Arido Brief](#), 250-251.

²⁶⁰² [Judgment](#), paras. 48, 872.

²⁶⁰³ *Contra* [Arido Brief](#), para. 254.

²⁶⁰⁴ *See* [Judgment](#), para. 194 citing [T-10-RED](#), 4:6-6:6. *See also* [T-10-RED](#), 4:15-5:13. *See above* paras. 695-699.

²⁶⁰⁵ [Judgment](#), para. 388, 391.

²⁶⁰⁶ [Judgment](#), paras. 388-389, 391-392.

²⁶⁰⁷ [Judgment](#), paras. 669-772.

- Based on D-2's evidence in the Main Case, the Chamber found that he testified in that case that he was a FACA soldier.²⁶⁰⁸ Based on the evidence in *this* case it found that the witness testified in the Main Case "as instructed by Mr. Arido".²⁶⁰⁹
- The Chamber's conclusion that Kilolo and Arido "briefed" D-2 is also based on D-2's testimony in *this* case,²⁶¹⁰ and not upon his testimony in the Main Case.²⁶¹¹
- Based on D-3's evidence in the Main Case, the Chamber found that he testified in that case that he was a FACA soldier.²⁶¹² Based on the evidence in *this* case, the Chamber found that the witness testified "consistent with Mr Arido's instructions".²⁶¹³

705. Further, the Chamber, consistent with its decision not to re-litigate the Main Case,²⁶¹⁴ assessed the falsity of the evidence in the Main Case only in relation to matters not related to the merits of that case (the witnesses' contacts with the Defence, payments and benefits, and their acquaintances with certain persons) and only for offences under article 70(1)(a) and (b).²⁶¹⁵ The falsity of a witness' testimony is not a requisite element for an offence under article 70(1)(c).²⁶¹⁶ The Chamber's findings as to D-4 and D-6's untruthful testimony about their prior contacts with the Defence²⁶¹⁷ related only to offences under article 70(1)(a) and (b) for which Arido was not convicted and are inconsequential to Arido's conviction for influencing these witnesses under article 70(1)(c). Arido's submissions in this regard²⁶¹⁸ should be summarily dismissed.²⁶¹⁹

²⁶⁰⁸ [Judgment](#), para. 388. Fn. 722 reference to D-2's testimony in the Main Case supports only the Chamber's statement that D-2 testified in the Main Case to be a soldier.

²⁶⁰⁹ See for instance, [Judgment](#), paras. 321-323, 334, 338, 339. Contra [Arido Brief](#), paras. 255-256.

²⁶¹⁰ [Judgment](#), para. 389. See also [Judgment](#), paras. 321-323, 334, 338, 339.

²⁶¹¹ Contra [Arido Brief](#), paras. 255-256.

²⁶¹² [Judgment](#), para. 391, fn. 733.

²⁶¹³ See for instance, [Judgment](#), paras. 327-330, 334, 338, 339, 391. Contra [Arido Brief](#), paras. 257-258.

²⁶¹⁴ Contra [Arido Brief](#), para. 266.

²⁶¹⁵ [Judgment](#), paras. 194, 947, 949. See above, paras. 695-699. Contra [Arido Brief](#), paras. 262-269.

²⁶¹⁶ [Judgment](#), para. 48.

²⁶¹⁷ [Judgment](#), para. 394, 399, 401.

²⁶¹⁸ [Arido Brief](#), paras. 262-269.

²⁶¹⁹ [Krajišnik AJ](#), 20.

VIII.F. THE CHAMBER REASONABLY ASSESSED THE TESTIMONY OF D-2 AND D-3

706. The Chamber reasonably assessed the testimony of D-2 and D-3.²⁶²⁰ It considered their status as accomplices,²⁶²¹ weighed all the relevant evidence²⁶²² and provided a full and reasoned explanation²⁶²³ as to why D-2 and D-3 were credible and their testimony was reliable.²⁶²⁴ None of Arido's submissions²⁶²⁵ show that the Chamber erred in law or in fact in so concluding or that Arido's fair trial rights under articles 66 and 67 were violated.²⁶²⁶

VIII.F.1. The Chamber reasonably considered D-2 and D-3's "status" as accomplice witnesses

707. The Chamber, having considered their "status" as accomplice witnesses,²⁶²⁷ reasonably concluded that D-2 and D-3 were credible and provided reliable evidence.²⁶²⁸ Arido fails to show any error in the Chamber's reasoning and careful assessment of the witnesses' credibility and reliability.²⁶²⁹ His mere allegations about the "doubtful credibility" of accomplice witnesses "is insufficient to substantiate an error of the Trial Chamber".²⁶³⁰

708. First, Arido's implication that accomplice testimony is *per se* "compromised" and inherently unreliable²⁶³¹ misunderstands the law. Chambers have a significant degree of discretion in considering all types of evidence and determining their relevance and probative value—especially given the nature of the cases that come before the ICC.²⁶³² A Chamber is

²⁶²⁰ [Judgment](#), paras. 202, 307-319.

²⁶²¹ *Contra* [Arido Brief](#), paras. 273-293, 308.

²⁶²² *Contra* [Arido Brief](#), paras. 294-300, 305-306.

²⁶²³ [Popović AJ](#), para. 305 ("[A]lthough a trial chamber is obliged to set out a reasoned opinion in writing, it is not obliged to address every argument in detail"); [Tolimir AJ](#), para 53 ("[A] trial chamber is not obliged to justify its findings in relation to every submission made during trial. A trial chamber has discretion in deciding which legal arguments to address, and is only required to make factual findings which are essential to the determination of guilt on a particular count.").

²⁶²⁴ *Contra* [Arido Brief](#), paras. 301-304, 309.

²⁶²⁵ [Arido Brief](#), paras. 270-310.

²⁶²⁶ [Arido Brief](#), para. 307.

²⁶²⁷ [Judgment](#), para. 202.

²⁶²⁸ [Judgment](#), paras. 319. *Contra* [Arido Brief](#), paras. 273-279.

²⁶²⁹ [Judgment](#), paras. 202-205, 307-319.

²⁶³⁰ [Krajišnik AJ](#), paras. 149. *See also* [Krajišnik AJ](#), para. 148. *Contra* [Arido Brief](#), para. 274 fn. 276. *See below* fn. 2645.

²⁶³¹ Arido argues that the witnesses were unreliable as a matter of law: "because they were accomplices" ([Arido Brief](#), para. 271); because they entered into an immunity agreement, were considered suspects and were potentially culpable for article 70 offences ([Arido Brief](#), para. 273); and because they gave false testimony in prior case ([Arido Brief](#), para. 276). However, later in his submissions Arido appears to agree that accomplice testimony is not *per se* unreliable but must be treated with caution ([Arido Brief](#) paras. 283-285)—which is precisely what the Chamber did ([Judgment](#), paras. 202, 307-319).

²⁶³² *See* rule 63(2). *See* [Lubanga Admission Decision](#), para. 24 ("[t]he drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited—at the outset—the ability of the Chamber to assess evidence 'freely'"). *See above* para. 183.

not prohibited from relying on accomplice testimony,²⁶³³ especially when, as in this case, the witness is thoroughly cross-examined.²⁶³⁴ Provided the Chamber considers the evidence with some caution, as occurred here,²⁶³⁵ a Chamber “may convict on the basis of the evidence of a single witness, even an accomplice”.²⁶³⁶ A Chamber must weigh the testimony, in light of the circumstances of each case.²⁶³⁷

709. The Chamber properly applied the law,²⁶³⁸ did not introduce a “presumption of reliability”²⁶³⁹ and treated their evidence with the due caution.²⁶⁴⁰ When assessing the witnesses’ credibility, it took into account their prior relationships with Arido, their prior false testimonies,²⁶⁴¹ their motives for telling the truth²⁶⁴² and the fact that they had been given assurances against self-incrimination.²⁶⁴³ These principles guided the Chamber’s well-reasoned and thorough assessment of D-2 and D-3’s credibility.²⁶⁴⁴ Arido’s hollow assertions fail to show that the Chamber misapplied these principles and erred in assessing D-2 and D-3’s evidence.²⁶⁴⁵

710. Second, corroboration is not required²⁶⁴⁶ including for accomplice witnesses.²⁶⁴⁷ In any event, the Chamber properly found that D-2 and D-3’s testimony corroborated each other²⁶⁴⁸—their *prima facie* credible testimony about the same facts is perfectly

²⁶³³ *E.g.* [Nchamihigo AJ](#), paras. 42-43, 48.

²⁶³⁴ [Niyitegeka AJ](#), para. 98.

²⁶³⁵ [Judgment](#), paras. 202, 307-319.

²⁶³⁶ [Nchamihigo AJ](#), paras. 42, 47. *Contra* [Arido Brief](#), 278, 282-283, 288.

²⁶³⁷ [Nchamihigo AJ](#), para. 47.

²⁶³⁸ [Judgment](#), para. 202.

²⁶³⁹ *Contra* [Arido Brief](#), paras. 276-278.

²⁶⁴⁰ *Contra* [Arido Brief](#), paras. 282-283.

²⁶⁴¹ Arido misrepresents the Judgment when he argues that the Chamber “implied that giving false testimony in another case is a ‘neutral’ factor which should be overlooked.” See [Arido Brief](#), para. 277.

²⁶⁴² *Contra* [Arido Brief](#), para. 282.

²⁶⁴³ [Judgment](#), para. 202. *Contra* [Arido Brief](#), paras. 273- 275, 278.

²⁶⁴⁴ [Judgment](#), paras. 307-319. *Contra* [Arido Brief](#), paras. 275, 278 (alleging that the Chamber did not provide reasoned opinion), 286.

²⁶⁴⁵ Contrary to Arido’s submission ([Arido Brief](#), para. 274 fn. 276) the *Krajišnik* Appeal Judgment undermines his argument. The ICTY Appeals Chamber found that—just as in this case—the Trial Chamber “was well aware of the risks related to” the evidence in question and that it had taken a “cautious approach towards this evidence”. On this basis it *rejected* the Defence’s submission and found that “the mere listing of witnesses of allegedly ‘doubtful credibility’ by *Amicus Curiae* and the enumeration of paragraphs of the Trial Judgment which, according to him, rely erroneously on these witnesses, is insufficient in itself to substantiate an error of the Trial Chamber.” [Krajišnik AJ](#), paras. 148-149.

²⁶⁴⁶ See rule 63(4).

²⁶⁴⁷ [Nchamihigo AJ](#), paras. 42, 47. *Contra* [Arido Brief](#), paras. 278, 282-283.

²⁶⁴⁸ [Judgment](#), para. 310, 314.

compatible.²⁶⁴⁹ The mutually corroborative value of their testimony is not “compromised” by their accomplice witness status: Arido’s allegation that D-2 and D-3’s testimony *cannot* be mutually corroborative solely because of this status²⁶⁵⁰ is wrong in principle—corroboration is premised on similar testimonies and not the status of the witnesses—and does not show that the Chamber erred.

711. Third, D-2 and D-3’s testimony concerning D-4 and D-6 is not hearsay but direct evidence.²⁶⁵¹ D-2, D-3, D-4 and D-6 were bribed and coached as a group, thus D-2 and D-3 personally witnessed and provided direct evidence about Arido’s promises and coaching of D-4 and D-6.²⁶⁵² Further, Arido’s submission about D-4 and D-6 being “missing witnesses”²⁶⁵³ ignores that it was his strategic decision not to call D-4 and D-6, who were originally included in his witness list.²⁶⁵⁴ Arido should accept the consequences of his own decision.²⁶⁵⁵

712. Fourth, the Chamber properly articulated and applied the principles guiding its assessment of oral testimony²⁶⁵⁶ and exhaustively reasoned why it found D-2 and D-3 credible²⁶⁵⁷ notwithstanding their accomplice status. Having clarified that it “bore in mind the individual circumstances of the witness, including [...] the provision of assurance against self-incrimination, bias against the accused, and/or motives for telling the truth [and] [...] that no witness is *per se* unreliable, including a witness that has previously given false testimony before a court”,²⁶⁵⁸ the Chamber was not required to re-discuss and specifically re-address these matters when assessing the testimony of D-2 and D-3.²⁶⁵⁹

²⁶⁴⁹ [Gatete AJ](#), para. 125 (citing [Kanyarukiga AJ](#), paras. 177, 220); [Ntawukulilyayo AJ](#), para. 121 (citing [Bikindi AJ](#), para. 81; [Nahimana AJ](#), para. 428).

²⁶⁵⁰ [Arido Brief](#), para. 288.

²⁶⁵¹ [Contra Arido Brief](#), para. 271.

²⁶⁵² See for instance [Judgment](#), paras. 334, 338, 340, 341, 344, 345, 346 (Douala preparatory meetings), 348 (Douala Meeting), 351 (De-briefing). See below paras. 723-745.

²⁶⁵³ [Arido Brief](#), para. 270. Arido misrepresents the Judgment when he suggests that the Chamber found that “the Prosecutor” did not call D-4 and D-6 (See [Arido Brief](#), para. 270). The Chamber rather noted that “D4 and D-6 were not called to testify in the present case” ([Judgment](#), para. 306).

²⁶⁵⁴ See [Arido Provisional Witness List](#), [Arido Witness List](#) (both including D-4 and D-6) and [Arido Revised Witness List](#) (filed on 7 March 2016 dropping D-4 and D-6).

²⁶⁵⁵ [Lubanga AJ](#), para. 75.

²⁶⁵⁶ [Judgment](#), paras. 202-205.

²⁶⁵⁷ [Judgment](#), paras. 307-319. *Contra* [Arido Brief](#), paras. 292-293.

²⁶⁵⁸ [Judgment](#), para. 202.

²⁶⁵⁹ [Popović AJ](#), para. 305 (“[A]lthough a trial chamber is obliged to set out a reasoned opinion in writing, it is not obliged to address every argument in detail”); [Tolimir AJ](#), para 53 (“[A] trial chamber is not obliged to justify its findings in relation to every submission made during trial. A trial chamber has discretion in deciding

713. Arido's argument that the Chamber's erroneous approach is illustrated by its finding that "the witnesses [under an immunity agreement] consistently maintained their statements and did not endeavour to detract from their own wrongdoing"²⁶⁶⁰ is unclear and should be dismissed. First, there was no "immunity agreement". Second, even if a witness' testimony is given after having received an assurance against self-incrimination, a Chamber can still consider the witness' acceptance of wrongdoing when assessing his or her credibility.²⁶⁶¹ Third, D-3 was not inconsistent about Kokaté's involvement in the events.²⁶⁶² In any event, the alleged inconsistency about Kokaté's role is of minor consequence and does not undermine the Chamber's findings that D-2 and D-3's testimonies were consistent about the Douala's meeting.²⁶⁶³

714. Arido fails to point to any error in the Chamber's assessment of the evidence. His mere allegation that D-2 and D-3 were not reliable *because of their accomplice status* is insufficient to substantiate that the Chamber legally or factually erred in assessing the evidence.²⁶⁶⁴

VIII.F.2. The Chamber comprehensively reasoned its findings regarding D-2 and D-3's credibility and reliability

715. The Chamber provided a full and reasoned statement of its findings regarding D-2 and D-3's credibility.²⁶⁶⁵ Arido's submission²⁶⁶⁶ that the Chamber's six-page-long reasoning is incomplete because it did not specifically address the evidence of Arido's wife (D-24) and one email from D-2 to Kilolo²⁶⁶⁷ should be dismissed.

716. As the Chamber recalled, it was not obliged to "refer to every testimony of every witness or every piece of evidence on the trial record."²⁶⁶⁸ Indeed, a Chamber "does not need

which legal arguments to address, and is only required to make factual findings which are essential to the determination of guilt on a particular count.").

²⁶⁶⁰ [Arido Brief](#), paras. 289-290. Judgment, para. 348.

²⁶⁶¹ *Contra* [Arido Brief](#) para. 290.

²⁶⁶² [Arido Brief](#), para. 291 referring to [Arido Closing Brief](#) paras. 269-272, 342. *See below* 775-779.

²⁶⁶³ [Judgment](#), para. 348.

²⁶⁶⁴ [Krajišnik AJ](#), para. 149. *See* [Arido Brief](#), para. 274 fn. 276.

²⁶⁶⁵ [Judgment](#), paras. 202, 307-319. *See above* paras. 707-714.

²⁶⁶⁶ [Arido Brief](#), paras. 294-304.

²⁶⁶⁷ CAR-OTP-0088-0504.

²⁶⁶⁸ [Judgment](#), para. 196 referring to [Bemba TJ](#), para. 227. *See also* [Popović AJ](#), para. 305 ("As for the Defence arguments which Beara submits were ignored by the Trial Chamber, the Appeals Chamber recalls that, although a trial chamber is obliged to set out a reasoned opinion in writing, it is not obliged to address every argument in detail"); [Tolimir AJ](#), para 53 ("[A] trial chamber is not obliged to justify its findings in relation to every submission made during trial. A trial chamber has discretion in deciding which legal arguments to address, and

to explicitly refer to specific witness testimony where there is significant contrary evidence on the record [in which case] it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.”²⁶⁶⁹ This presumption may indeed be rebutted;²⁶⁷⁰ however Arido has not done so because the evidence he refers to is not “clearly relevant to the findings”²⁶⁷¹ and would not have affected the Judgment.²⁶⁷²

717. The Chamber was alert to the need to consider the “individual circumstances of the witness[es], [...] including [their] bias against the accused, and/or motives for telling the truth” in its holistic evaluation of the evidence.²⁶⁷³ Thus, although not expressly mentioned, it did not disregard²⁶⁷⁴ [REDACTED] but concluded that it did not preclude it from finding—based on the other evidence²⁶⁷⁵—that D-2 was a credible witness. The Chamber was entitled not to expressly address this evidence.²⁶⁷⁶ Arido’s argument, [REDACTED], that D-2 had a deep-seated animosity towards Arido is wholly speculative and does not undermine the credibility of D-2’s corroborated evidence.²⁶⁷⁷

718. Arido’s reliance on *Kupreskić*, *Đorđević*, *Popović*, *Muvunyi* and *Kamuhanda*²⁶⁷⁸ is misplaced. The *Kupreskić* and *Đorđević* cases²⁶⁷⁹ are clearly distinguishable from the present one. In *Kupreskić*, the Trial Chamber failed to consider *several* matters going *directly* to the credibility of a *non-corroborated eye-witness* who purported to *identify* the accused in “extremely difficult circumstances”.²⁶⁸⁰ In *Đorđević*, the Trial Chamber found the sexual assault of two women did not take place but did so without addressing the testimony of a

is only required to make factual findings which are essential to the determination of guilt on a particular count.”), *Kvočka AJ*, para. 23, *Krajišnik AJ*, paras. 19.

²⁶⁶⁹ *Judgment*, para. 196 referring to *Bemba TJ*, para. 227.

²⁶⁷⁰ *Arido Brief*, para. 299 referring to *Kvočka AJ*, para. 23.

²⁶⁷¹ *Kvočka AJ*, para. 23. See *Arido Brief*, para. 299 fn. 308 citing *Kvočka AJ*, para. 23 but omitting the Appeals Chamber’s finding that “[i]f the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber’s finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.”

²⁶⁷² *Kamuhanda AJ*, para. 105. See *Arido Brief*, para. 299 fn. 307 citing *Kamuhanda AJ*, para. 105.

²⁶⁷³ *Judgment*, para. 202.

²⁶⁷⁴ *Contra*, *Arido Brief*, paras. 295, 298-299. See *Popović AJ*, para. 305 (“the Appeals Chamber recalls that, although a trial chamber is obliged to set out a reasoned opinion in writing, it is not obliged to address every argument in detail”), *Tolimir AJ*, para. 53.

²⁶⁷⁵ *Judgment*, paras. 307-319. See *Kvočka AJ*, para. 23.

²⁶⁷⁶ T-46-CONF, 22-25; CAR-OTP-0088-0504 at 0509.

²⁶⁷⁷ *Contra* *Arido Brief*, 296 referring to *Arido Closing Brief*, para. 184.

²⁶⁷⁸ *Arido Brief*, paras. 294-295, 299 (fns. 306-308), 301-302.

²⁶⁷⁹ *Arido Brief*, paras. 294-295, 299 (fn. 306).

²⁶⁸⁰ *Kupreskić AJ*, para. 224.

third woman who was detained and raped at the same time, in the same location and by the same group of people.²⁶⁸¹

719. The reference to *Popović* undermines Arido's position.²⁶⁸² The ICTY Appeals Chamber found that Todorović's evidence—that the accused was not at the location where the Trial Chamber determined that he was at a certain time—did not need to be expressly addressed since the evidence “was not of a character that its absence from the Trial Judgement would show its disregard.”²⁶⁸³

720. As discussed above²⁶⁸⁴ this case is not similar to the *Muvunyi* case.²⁶⁸⁵ Notably, Arido fails to point to any inconsistency in D-2 and D-3's testimony about the relevant events.

721. Finally, as the ICTR Appeals Chamber found in the *Kamuhanda* case relied upon by Arido: “[a]n appellant who alleges that the Trial Chamber failed to provide a reasoned opinion in writing [...] not only has to show the lacuna in the Trial Chamber's reasoning, but also has to demonstrate that the evidence allegedly disregarded by the Trial Chamber would have affected the Trial Judgement.”²⁶⁸⁶ Arido's unsupported submissions do not meet this standard.

VIII.F.3. The Chamber did not fail to consider D-2 and D-3's exculpatory evidence

722. Arido's mere assertion²⁶⁸⁷ that the Chamber failed to consider and rely on D-2 and D-3's allegedly exculpatory evidence should be summarily dismissed.²⁶⁸⁸ His further submission that the Chamber “failed to assess the potentially exculpatory evidence which was not produced”²⁶⁸⁹ at trial should likewise be summarily dismissed as contrary to common sense.²⁶⁹⁰

²⁶⁸¹ [Dordević AJ](#), paras. 863-869.

²⁶⁸² *Contra* [Arido Brief](#), para. 299 (fn. 306).

²⁶⁸³ [Popović AJ](#), para. 1137.

²⁶⁸⁴ *See above* paras. 676-683.

²⁶⁸⁵ [Arido Brief](#), para. 301-302.

²⁶⁸⁶ [Kamuhanda AJ](#), para. 105. *Contra* [Arido Brief](#), para. 299, fn. 307.

²⁶⁸⁷ [Arido Brief](#), para. 305.

²⁶⁸⁸ [Krajišnik AJ](#), paras. 19, 21.

²⁶⁸⁹ [Arido Brief](#), para. 306.

²⁶⁹⁰ [Krajišnik AJ](#), paras. 22. *See also* [Krajišnik AJ](#), 19, 21.

**VIII.G. ARIDO’S CONVICTION IN RESPECT TO D-4 AND D-6 DID NOT VIOLATE HIS
FAIR TRIAL RIGHTS**

723. The Chamber properly convicted Arido for the offences related to D-4 and D-6 based on its assessment of the totality of the evidence—including Arido’s own statement²⁶⁹¹ and the testimony of D-2 and D-3.²⁶⁹² Arido’s submission that the “missing” testimony of D-4 and D-6 renders his conviction “illegitimate and unfair” since it is “based on unreliable evidence [...] obtained in violation of [his] fair trial rights”²⁶⁹³ is factually inaccurate, legally unsound and logically flawed. Arido misrepresents the evidence on the record²⁶⁹⁴ and speculates as to the impact that D-4 and D-6’s testimony would have had on the Chamber’s findings.²⁶⁹⁵

VIII.G.1. Arido’s conviction in respect to D-4 and D-6 is based on direct evidence

724. D-2 and D-3 provided *direct* and not *hearsay* evidence about Arido influencing D-4 and D-6.²⁶⁹⁶ Arido coached the four witnesses in a group (in the course of meetings including also other Main Case Defence witnesses such as D-7 and D-9 and prospective witnesses who did not eventually testify):²⁶⁹⁷ they were together in Douala at the preparatory meeting during which Arido gave specific directions,²⁶⁹⁸ assigned military ranks and handed out military *insignia*.²⁶⁹⁹ They were together when Arido asked what their conditions were in exchange for their testimony and promised to convey such conditions to Kilolo,²⁷⁰⁰ and again later when he took away their telephones.²⁷⁰¹ The four witnesses were also together when they debriefed Arido about their meeting with Kilolo.²⁷⁰²

²⁶⁹¹ See [Judgment](#), para. 671 referring to CAR-OTP-0074-1065-R02 (Arido’s article 55(2) statement). See also CAR-OTP-0078-0206-R01 (D-3’s Prior recorded testimony); CAR-OTP-0079-1522, CAR-OTP-0079-1526, CAR-OTP-0079-1530 (Personal notes of D-2); CAR-OTP-0080-0069 (D-2’s Prior recorded testimony).

²⁶⁹² *Contra* [Arido Brief](#), paras. 311-325.

²⁶⁹³ [Arido Brief](#) paras. 313, 315.

²⁶⁹⁴ *Contra* [Arido Brief](#), paras. 312, 314, 322-324.

²⁶⁹⁵ *Contra* [Arido Brief](#), paras. 319-321.

²⁶⁹⁶ *Contra* [Arido Brief](#), paras. 312, 314, 322-324, 333-338.

²⁶⁹⁷ [Judgment](#), para. 331.

²⁶⁹⁸ [Judgment](#), para. 334.

²⁶⁹⁹ [Judgment](#), para. 338.

²⁷⁰⁰ [Judgment](#), para. 341.

²⁷⁰¹ [Judgment](#), para. 345.

²⁷⁰² [Judgment](#), para. 351.

725. Contrary to Arido's inaccurate submission,²⁷⁰³ D-2 (whose contemporary notes of the meetings are in evidence)²⁷⁰⁴ and D-3 did not testify about what they heard from others, but about what they *personally directly* witnessed.²⁷⁰⁵ In particular:

- D-2 and D-3 saw D-4 and D-6 in their group when they met and were instructed by Arido in Douala;²⁷⁰⁶
- D-3 *heard* D-4 and D-6 personally stating that they had no military background—something Arido himself confirmed in his statement;²⁷⁰⁷
- D-2 and D-3 saw and *heard* Arido making promises to all witnesses in the group—including D-4 and D-6;²⁷⁰⁸
- D-2 and D-3 saw and *heard* Arido distributing money for food to all witnesses in the group—including D-4 and D-6.²⁷⁰⁹

726. The Chamber properly accepted D-2 and D-3's direct testimony about events concerning the group of prospective Defence witnesses present at the Douala meeting, including D-4 and D-6. The reliability of their corroborated direct testimony²⁷¹⁰ is not undermined by their accomplice status.²⁷¹¹

727. Finally, Arido's argument that not calling D-4 and D-6 violated his "fair trial right to cross examine D-4 and D-6 and to confront their evidence against him"²⁷¹² lacks merit and should be dismissed, and so too his suggestion that not calling a witness violates the principle

²⁷⁰³ [Arido Brief](#), paras. 322, 335.

²⁷⁰⁴ [Judgment](#), paras. 335-336. See CAR-OTP-0079-1522, CAR-OTP-0079-1526, CAR-OTP-0079-1530, Personal notes of D-2.

²⁷⁰⁵ *Contra* [Arido Brief](#), para. 322, 335. As for Arido's allegation at paragraph 322 that the Chamber considered the content of their testimony in the Main Case. See *above* paras. 696-698.

²⁷⁰⁶ See e.g., [Judgment](#), paras. 331, 334, 338. *Contra* [Arido Brief](#) para. 335-336.

²⁷⁰⁷ [Judgment](#), para. 338. *Contra* [Arido Brief](#) para. 335. Further, as discussed above, whether the witnesses actually had a military background is immaterial for Arido's conviction under article 70(1)(c), see [Judgment](#), paras. 704, 733, 872. See *above* paras. 702-705.

²⁷⁰⁸ [Judgment](#), para. 341. *Contra* [Arido Brief](#) para. 335.

²⁷⁰⁹ [Judgment](#), para. 347. *Contra* [Arido Brief](#) para. 335. The Chamber's finding that Arido distributed money for food to four witnesses is immaterial to Arido's conviction, since the Chamber found that money was not distributed for the purpose of influencing the witnesses.

²⁷¹⁰ *Contra* [Arido Brief](#), para. 324.

²⁷¹¹ *Contra* [Arido Brief](#), paras. 314, 322. See *above* paras. 707-714.

²⁷¹² [Arido Brief](#), paras. 313. See also [Arido Brief](#), paras. 334-335, 338-339, 340.

of orality.²⁷¹³ The Chamber properly accepted D-2 and D-3's direct oral testimony about events involving D-4 and D-6. Arido had the right to cross-examine and confront the evidence of D-2 and D-3 against him, which he did,²⁷¹⁴ and the right to call D-4 and D-6 to testify, which, although he included in his list of witnesses, he chose not to do.²⁷¹⁵

VIII.G.2. The alleged “missing” testimony of D-4 and D-6 does not render Arido's conviction unfair

728. As Arido acknowledges,²⁷¹⁶ it is normal in complex international cases not to call every potentially relevant witness to testify. The absence of relevant testimony “central to the events”²⁷¹⁷ does not *per se* raise a reasonable doubt as to the Prosecution's case or the Chamber's findings. For instance, in a trial against a person accused of leading a paramilitary group to commit crimes, the Prosecution is not legally obliged to call every soldier or victim to exclude the theoretical possibility that one of them could contradict and undermine the credible and corroborated trial evidence by others.

729. Judge Van den Wyngaert's Minority Opinion in *Katanga* does not support Arido's argument. Her concern addressed a different factual scenario²⁷¹⁸ where evidence from “those who were really at the centre of things” and which “has the potential to alter the findings” was completely absent and only “persons whose knowledge [...] was second-hand and incomplete at best” were called to testify.²⁷¹⁹

730. The present case is fundamentally different. The Chamber relied upon the credible corroborated and first-hand evidence of D-2 and D-3.²⁷²⁰ The absence of a trial testimony from D-4 (who testified as P-256 in the sentencing hearing to having received money to “support” Arido in this article 70 case against him)²⁷²¹ and testimony from D-6 does not generate a *reasonable* doubt as to the Chamber's conclusions. Arido's contrary submissions²⁷²² are misleading, speculative and fail to show that no reasonable trial chamber

²⁷¹³ [Arido Brief](#), para. 313. *See above* paras. 183-184.

²⁷¹⁴ *Contra* [Arido Brief](#), para. 338, suggesting that D-2 and D-3's evidence about D-4 and D-6 was “untested”.

²⁷¹⁵ *See below* paras. 728-731.

²⁷¹⁶ [Arido Brief](#), para. 319.

²⁷¹⁷ [Arido Brief](#), para. 320.

²⁷¹⁸ *Contra* [Arido Brief](#), para. 320.

²⁷¹⁹ [Katanga TJ, Minority Opinion of Judge Van den Wyngaert](#), paras. 148-149.

²⁷²⁰ *See for instance* [Judgment](#), paras. 307-319.

²⁷²¹ [Sentencing Decision](#), para. 83. D-4 testified that: [REDACTED], (T-53-CONF, 18:23-19:9, 30:16-17); that Arido knew this information was false (T-53- CONF, 21:13-15); [REDACTED] (T-53- CONF, 23:2-21, 24:15-21).

²⁷²² [Arido Brief](#), para. 321.

could have made findings beyond reasonable doubt without having heard D-4 and D-6's testimony.²⁷²³

731. Further, Arido's submission that the Chamber erred by not calling (or requesting the Prosecution to call) D-4 and D-6, and that the relevant charges should have been dismissed "as a matter of law" is untenable.²⁷²⁴ The Prosecution was not obliged to call D-4 and D-6 to testify. D-4 and D-6 were originally included in Arido's witness list.²⁷²⁵ After unsuccessfully opposing the Prosecution's initial attempts to contact them,²⁷²⁶ and after reviewing D-4's interview with the Prosecution,²⁷²⁷ Arido decided not to call the two witnesses.²⁷²⁸ If Arido considered that D-4 and D-6 could have assisted his defence or raised a reasonable doubt as to the Prosecution's case,²⁷²⁹ he should have called them to testify. Instead, he decided otherwise for strategical reasons.²⁷³⁰ Arido's argument that it was the Prosecution's or the Chamber's duty to call these witnesses²⁷³¹ should be dismissed.²⁷³² In any event, Arido was not prejudiced by the Chamber's decision not to call D-4 and D-6 to testify.²⁷³³

VIII.G.3. D-6's [REDACTED] which the Chamber properly rejected at trial should not be admitted as additional evidence in appeal

732. Arido's application to admit D-6's [REDACTED]²⁷³⁴ should be rejected since it does not meet the standard for additional evidence on appeal under regulation 62 as interpreted by

²⁷²³ *Contra* [Arido Brief](#), paras. 320-321.

²⁷²⁴ [Arido Brief](#), paras. 316, 322.

²⁷²⁵ [Arido Provisional Witness List](#), [Arido Witness List](#) (both including D-4 and D-6) *See above* paras. 669-671.

²⁷²⁶ [Prosecution Witness Contacts Decision](#), paras. 6-7.

²⁷²⁷ The Prosecution disclosed D-4's interview on 4 March 2016. *See* 4 March 2016 Disclosure Communication.

²⁷²⁸ [Arido Revised Witness List](#) (filed on 7 March 2016 dropping D-4 and D-6).

²⁷²⁹ [Arido Brief](#), para. 321.

²⁷³⁰ *See above* paras. 669-671.

²⁷³¹ [Arido Brief](#), para. 322.

²⁷³² *See* [Lubanga Victim Participation AD](#), para. 93 ("The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused [...] in trial proceeding lies primarily with the parties, namely, the Prosecutor and the Defence."); [Milutinović Motion to Summon Witnesses Decision](#), para. 3 (The Chamber dismissed the Defence motion because "the Šainović Defence was free to call both Messrs Hill and Mayorski during its case and even seek subpoenas pursuant to Rule 54 for their attendance, but decided not to adopt this course of action. The Šainović Defence even proposed these individuals as witnesses, during the hearing on 2 May 2007, but did not call them during the presentation of its evidence")

²⁷³³ Even under the procedural regime of the ECCC, where the Trial Chamber and not the parties, decides which evidence should be heard, the Supreme Court found that an error not to summon a certain witness to testify would only be relevant if it "resulted in prejudice to the appellant" in the sense that it led to a "grossly unfair outcome in [the] judicial proceedings"—this is particularly true when the same information that could be provided by the witness was already before the Trial Chamber, *see* [Case 002/01 AJ](#), paras. 100, 133, 143-144, 155, 158.

²⁷³⁴ [Arido Additional Evidence Request](#). Upon the Appeals Chamber's instruction under regulation 62(2)(b) (*see* [Arido Additional Evidence Decision](#), para. 12) the Prosecution will show that Arido's application to admit D-6 [REDACTED] interview does not meet regulation 62 standard for additional evidence.

the Appeals Chamber.²⁷³⁵ Further, Arido's arguments that the Chamber erred in rejecting his request to introduce D-6's [REDACTED] after the presentation of evidence was closed²⁷³⁶ should be similarly dismissed. Arido fails to show how this material would impact on Arido's conviction.²⁷³⁷

VIII.G.3.a. Arido's application under regulation 62 to admit D-6's [REDACTED] as additional evidence on appeal should be dismissed

733. Arido's application to admit D-6's [REDACTED]²⁷³⁸ as additional evidence on appeal²⁷³⁹ should be dismissed. First, Arido could have presented such evidence at trial with the exercise of due diligence. Second, even if Arido had presented D-6's [REDACTED] at trial, it could not have led the Chamber to enter a different verdict.²⁷⁴⁰

VIII.G.3.a.i. Arido failed to exercise due diligence at trial

734. Arido has known of the existence and content of D-6's [REDACTED] interview since *before* the start of the trial. In particular, on 19 May 2015, the Prosecution disclosed to Arido [REDACTED]—in response to an enquiry by the Prosecution—in which the [REDACTED] reported that D-6 had provided information about his military background in his [REDACTED]. Hence, Arido knew that D-6 [REDACTED], and that he had told [REDACTED] about his alleged apprenticeship and work as a driver in the CAR military in [REDACTED].²⁷⁴¹ In his opening statement on 1 March 2016, Arido stated that “[t]he Defence will present evidence and demonstrate that in D-6 [REDACTED], he stated that he was a soldier.”²⁷⁴² Arido further stated that he expected D-6, who was included in his witness list,²⁷⁴³ to discuss his military background in his anticipated testimony.²⁷⁴⁴

735. Notwithstanding, Arido made no attempt to obtain D-6's [REDACTED] earlier in the proceedings to assist his case. That the Prosecution had already requested D-6's

²⁷³⁵ [Lubanga AJ](#), paras. 41-63.

²⁷³⁶ [Arido Brief](#), paras. 326-332.

²⁷³⁷ [Lubanga AJ](#), para. 20 and [Ngudjolo AJ](#), para. 21.

²⁷³⁸ CAR-OTP-0094-1580-R01.

²⁷³⁹ [Arido Additional Evidence Request](#).

²⁷⁴⁰ [Lubanga AJ](#), para. 1

²⁷⁴¹ See CAR-OTP-0088-0285; CAR-OTP-0088-0287; 19 May 2015 Disclosure Communication. The [REDACTED] itself was not received by the Prosecution until 31 May 2016—after the close of evidence in this case.

²⁷⁴² T-39-CONF, 33:14-18.

²⁷⁴³ See [Arido Provisional Witness List](#), [Arido Witness List](#) (both including D-4 and D-6) and [Arido Revised Witness List](#) (filed on 7 March 2016 dropping D-4 and D-6).

²⁷⁴⁴ CAR-D24-0004-0092, at 0097. [Arido Brief](#), para. 327.

[REDACTED] did not relieve him of his obligation to prepare his defence.²⁷⁴⁵ Because of Arido's inaction, the Chamber correctly rejected his request for the late admission of D-6's [REDACTED]—which was made months after the deadline for evidentiary submissions.²⁷⁴⁶

736. Arido's Additional Evidence Application similarly fails to explain why he did not exercise due diligence earlier by obtaining D-6's [REDACTED] [REDACTED] during trial. His explanation that it "was not adduced at trial [...] because it was not in the possession of the Appellant"²⁷⁴⁷ is insufficient. Arido knew of the existence of the interview and, if he considered the interview necessary to assist his defence, he should have sought to obtain it—even by asking the Chamber for an order [REDACTED]. Instead, Arido made a strategic decision *not* to obtain it and should now accept the consequences of his decision.²⁷⁴⁸ For this reason alone, Arido's application should be dismissed.

VIII.G.3.a.ii. D-6's [REDACTED] could not have led to a different verdict.

737. Second, even if it had been admitted at trial, D-6's [REDACTED] could not have led the Chamber to enter a different verdict. The fact that D-6 represented [REDACTED] that he had trained and worked as a driver in the military²⁷⁴⁹ could not undermine the reliable and corroborated evidence of D-2 and D-3 about their meetings and interactions with Arido, which included D-4 and D-6.

738. To the extent Arido seeks to rely on the [REDACTED] to argue that D-6 was in fact a member of the CAR military, D-6's assertion [REDACTED]—apart from being self-serving—is contradicted by the evidence in this case including:

- D-3's testimony that he heard D-6 stating that he had no military background;²⁷⁵⁰
- Arido's article 55(2) statement in which he stated that he knew that D-6 had not been a military person;²⁷⁵¹

²⁷⁴⁵ See [Arido D-6 Interview Decision](#), para. 9. See [Arido Additional Evidence Request](#), para. 6.

²⁷⁴⁶ [Arido D-6 Interview Decision](#), para. 10 ("The Arido Defence was aware of the existence of the Interview, presumably knew its contents and did not provide any explanation as to why it did not itself obtain the interview at an earlier point in time. Accordingly, the Chamber does not find that exceptional circumstances warranting a belated admission exist.").

²⁷⁴⁷ [Arido Additional Evidence Request](#), para. 21.

²⁷⁴⁸ [Lubanga AJ](#), para. 75.

²⁷⁴⁹ [Arido Additional Evidence Request](#), para. 16.

²⁷⁵⁰ [Judgment](#), para. 338.

- Official documentation [REDACTED].²⁷⁵²

739. Moreover, [REDACTED]²⁷⁵³ further suggests the untruthfulness of D-6's claims in his [REDACTED] interview.

740. Further, as explained above, whether D-6 had a military background or not is immaterial to Arido's conviction for corruptly influencing D-6.²⁷⁵⁴ Regardless of the veracity of D-6's status in the CAR military, to convict Arido of article 70(1)(c) offences, the Prosecution had to show that Arido's actions were capable of influencing the testimony of the potential witnesses²⁷⁵⁵ and that Arido meant to engage in such conduct.²⁷⁵⁶ The Chamber found that these requirements were met with respect to D-6, as well as for D-2, D-3 and D-4: Arido bribed the witnesses and tampered with their testimony, including by assigning them military ranks and handing out military insignia,²⁷⁵⁷ and he meant to engage in these actions.²⁷⁵⁸ Arido's Additional Evidence Request thus fails to meet the standard under regulation 62 and should be rejected.

741. In addition, should the Appeals Chamber decide to admit the interview,²⁷⁵⁹ the Prosecution seeks the admission in rebuttal of the following documents:

- [REDACTED], which makes no mention of D-6 in any capacity,²⁷⁶⁰ in response to D-6's claim [REDACTED];²⁷⁶¹
- ICC Witness Statement of P-805, [REDACTED],²⁷⁶² in response to D-6's claim concerning his military status;

²⁷⁵¹ [Judgment](#), para. 671.

²⁷⁵² See [REDACTED], (CAR-OTP-0093-0152, at 0155) [REDACTED] (CAR-OTP-0093-0197).

²⁷⁵³ See [REDACTED]

²⁷⁵⁴ [Judgment](#), paras. 48, 704, 733, 872. See above paras. 696-698.

²⁷⁵⁵ [Judgment](#), paras. 45-49.

²⁷⁵⁶ [Judgment](#), para. 50.

²⁷⁵⁷ [Judgment](#), para. 669.

²⁷⁵⁸ [Judgment](#), para. 670.

²⁷⁵⁹ See [Lubanga AJ](#), para. 64 ("the 'rebuttal evidence' need only be considered if the underlying proposed additional evidence is admitted into evidence").

²⁷⁶⁰ CAR-OTP-0093-0071, at 0072.

²⁷⁶¹ CAR-D24-0005-0056, at 0077.

²⁷⁶² CAR-OTP-0093-0064-R01, at 0068, para. 19.

- ICC Witness Statement of P-785, [REDACTED],²⁷⁶³ in response to D-6's claim concerning his military status.

742. The three documents—[REDACTED]—contain sufficient *indicia* of reliability and authenticity for their admission in rebuttal.

743. In light of the evidence on the record, the additional evidence the Prosecution seeks to admit in rebuttal and the irrelevance of D-6's military status for Arido's conviction under article 70(1)(c), D-6's [REDACTED] could not have led the Chamber to enter a different verdict. For this additional reason, Arido's Additional Evidence Application should be rejected.

VIII.G.3.b The Chamber correctly rejected Arido's request to admit D-6's [REDACTED]

744. The Chamber correctly rejected Arido's D-6 Request [REDACTED].²⁷⁶⁴ Even assuming *arguendo* that the interview should be admitted as additional evidence in appeal, Arido fails to show any error in the Chamber's conclusion.²⁷⁶⁵

745. The Chamber properly found that "Arido Defence was aware of the existence of the Interview, presumably knew its contents and did not provide any explanation as to why it did not itself obtain the Interview at an earlier point in time."²⁷⁶⁶ The Chamber did not "impermissibly shift[] the burden in respect to exculpatory material"²⁷⁶⁷ nor did it trump Arido's "right to be informed about exculpatory disclosure."²⁷⁶⁸ The [REDACTED] was not received by the Prosecution from the [REDACTED] authorities until 31 May 2016—well after the close of evidence in this case on 29 April 2016—and was disclosed on 25 July 2016. The Prosecution's administrative oversight which resulted in its disclosure in July 2016 does not explain Arido's inaction in gathering information of which it was already aware and that he could have obtained himself (including through a Chamber's order).²⁷⁶⁹

²⁷⁶³ CAR-OTP-0093-0092-R01, at 0097-0098, paras. 22, 24.

²⁷⁶⁴ See [Arido D-6 Interview Decision](#), paras 7-10. *Contra* [Arido Brief](#), paras. 326-332.

²⁷⁶⁵ [Arido Brief](#), paras. 326-332.

²⁷⁶⁶ [Arido D-6 Interview Decision](#), para. 10.

²⁷⁶⁷ [Arido Brief](#), para. 330

²⁷⁶⁸ [Arido Brief](#), para. 331.

²⁷⁶⁹ [Arido Brief](#), para. 330 suggesting that the Prosecution violated its disclosure obligation. Further, Arido's implication that the Prosecution did not disclose the interview as soon as practicable is undeveloped and unsubstantiated (see [Arido Brief](#), para. 330). On 11 May 2015 the Prosecution received information about the

746. Thus, the Chamber reasonably found that Arido “had the duty to prepare its defence and acquire all documents [he] consider[ed] necessary to mount [his] case”²⁷⁷⁰ and failed to explain why he did not attempt to obtain the interview, the existence and content of which he was informed of from the beginning of the trial.²⁷⁷¹

747. The Chamber reasonably found no exceptional circumstances warranting a belated admission of the evidence.²⁷⁷² Arido’s inaccurate and unsubstantiated submission that it was “factually impossible” for him to adduce the interview²⁷⁷³ shows no legal or factual error in the Chamber’s decision.

VIII.G.4. Conclusion

748. The Chamber properly convicted Arido of corruptly influencing D-4 and D-6 based on the totality of the evidence on the record, including the reliable, corroborated and *direct* evidence of D-2 and D-3. Arido chose not to call D-4 and D-6 to testify, nor to obtain D-6’s [REDACTED]. Arido cannot benefit from his strategic decisions when the Prosecution complied with its obligations and proved its case beyond reasonable doubt.²⁷⁷⁴ Arido’s arguments on appeal²⁷⁷⁵ should be dismissed.

VIII.H. THE CHAMBER REASONABLY FOUND THAT THE CAMEROONIAN POLICE REPORT DID NOT IMPACT D-2’S RELIABILITY

749. The Chamber reasonably found that the report allegedly authored by the Cameroonian police²⁷⁷⁶ did not impact the reliability of D-2’s corroborated evidence concerning his stay at the relevant hotel the night before he and other witnesses met Arido and Kilolo.²⁷⁷⁷ Arido merely disagrees with the Chamber’s assessment of the evidence.²⁷⁷⁸

interview and its content from the [REDACTED] authorities and disclosed this information to Arido on 19 May 2015 (see CAR-OTP-0088-0285; CAR-OTP-0088-0287; 19 May 2015 Disclosure Communication). However, it did not receive the interview until 31 May 2016, well after the Chamber’s deadline to present evidence. It disclosed the interview on 25 July 2016.

²⁷⁷⁰ [Arido D-6 Interview Decision](#), para. 9.

²⁷⁷¹ [Arido D-6 Interview Decision](#), para. 8.

²⁷⁷² [Arido D-6 Interview Decision](#), para. 10.

²⁷⁷³ [Arido Brief](#), para. 328.

²⁷⁷⁴ [Lubanga AJ](#), para. 75.

²⁷⁷⁵ [Arido Brief](#), 311-344.

²⁷⁷⁶ CAR-D24-0002-0001.

²⁷⁷⁷ [Judgment](#), para. 333.

²⁷⁷⁸ [Arido Brief](#), paras. 347-354.

750. The one-page report is not incompatible with D-2 and D-3's testimony that they had stayed at a certain hotel in Douala in February 2012²⁷⁷⁹ because it does not provide positive evidence to the contrary. Rather, it merely states that the Cameroonian authorities could not find any trace of the witnesses having stayed at that hotel. [REDACTED] (*commissaire divisionnaire*) informed Arido's Defence that "*malgré toutes les recherches effectuées, il ne nous a pas été possible de déceler les traces de leur séjour dans cet hôtel à cette date*".²⁷⁸⁰

751. The Chamber considered this report in light of the totality of the evidence and noted that, although bearing sufficient indicia of reliability, (i) the alleged police report was produced on 23 June 2015, more than two years after the relevant events; (ii) the Kilolo Defence implicitly acknowledged that the Douala meeting had taken place; and (iii) D-3 confirmed that he, together with D-2, stayed in the hotel concerned.²⁷⁸¹ For these reasons, the Chamber reasonably concluded that the police report did not impact on D-2's reliability regarding his stay in Douala together with D-3 and other individuals.²⁷⁸² Arido disagrees with the Chamber's reasoning,²⁷⁸³ but fails to show that no reasonable trial chamber could have reached the same conclusion.

VIII.I. THE CHAMBER PROPERLY FOUND THAT D-3 CONSISTENTLY DESCRIBED ARIDO AND KOKATÉ'S RESPECTIVE ROLES

752. The Chamber understood and addressed Arido's arguments with respect to Arido's and Kokaté's alleged inconsistent roles in D-3's testimony.²⁷⁸⁴ The Chamber reasonably rejected Arido's argument and found that D-3 "consistently described [Arido's and Kokaté's] distinct roles."²⁷⁸⁵ Arido simply disagrees with the Chamber's assessment of the evidence and fails to articulate an error. In any event, and regardless of Kokaté's role in the events, the evidence shows that Arido corruptly influenced at least four witnesses. Arido's arguments should be dismissed.

²⁷⁷⁹ *Contra* [Arido Brief](#), para. 348.

²⁷⁸⁰ CAR-D24-0002-0001.

²⁷⁸¹ [Judgment](#), para. 333.

²⁷⁸² [Judgment](#), para. 333.

²⁷⁸³ [Arido Brief](#), paras. 350-353. Rule 136(2) does not stand for the proposition that evidence of one co-accused cannot be held against another co-accused.

²⁷⁸⁴ [Judgment](#), para. 344 referring to [Arido Closing Brief](#), paras. 268-271. *Contra* [Arido Brief](#), paras. 355, 358.

²⁷⁸⁵ [Judgment](#), para. 344.

753. The Chamber was not required to address Arido's further speculations as to the reasons behind D-3's alleged inconsistency.²⁷⁸⁶ Further, Arido merely asserts that the Chamber "failed to consider relevant evidence that Kokaté [...] made the promises"²⁷⁸⁷ but does not show that no reasonable trial chamber could have reached the same conclusion²⁷⁸⁸ on the evidence.²⁷⁸⁹ This argument should be summarily dismissed as a mere assertion that the Chamber failed to consider relevant evidence.²⁷⁹⁰ Finally, Arido's unsubstantiated criticism of the Prosecution and the Chamber for having left Kokaté "untouched and objectively protected"²⁷⁹¹ should also be summarily dismissed, because it fails to articulate an appealable error.²⁷⁹²

VIII.J. THE CHAMBER PROPERLY FOUND THAT ARIDO HAD THE REQUISITE MENS

REA

754. The Chamber properly found that Arido intended to manipulate the testimonial evidence of the Cameroonian witnesses.²⁷⁹³ It found that Arido's "conduct and interaction with the witnesses" demonstrate that "he meant to engage in the conduct of corruptly influencing the witnesses."²⁷⁹⁴

755. The Chamber relied on two factors, taken together.²⁷⁹⁵ First, that Arido "purposefully and deliberately instructed the witnesses to provide certain information" during their testimony without concern for its truth.²⁷⁹⁶ The Chamber also noted Arido's belief that the four witnesses were not military persons.²⁷⁹⁷ Second, that he promised the witnesses significant financial rewards and relocation as an encouragement to give certain evidence. Arido made them believe that this arrangement would lead to a better life for them.²⁷⁹⁸

²⁷⁸⁶ *Contra* [Arido Brief](#), para. 358.

²⁷⁸⁷ [Arido Brief](#), para. 356-357, 360.

²⁷⁸⁸ *E.g.* that Arido made promises to the witnesses, see [Judgment](#), para. 344.

²⁷⁸⁹ Including D-2 and D-3's consistent and mutually corroborating reliable evidence, and D-2's contemporary personal notes (CAR-OTP-0079-1522, CAR-OTP-0079-1526, CAR-OTP-0079-1530).

²⁷⁹⁰ [Krajišnik AJ](#), para. 19.

²⁷⁹¹ [Arido Brief](#), paras. 359.

²⁷⁹² [Krajišnik AJ](#), para. 26.

²⁷⁹³ [Judgment](#), para. 944.

²⁷⁹⁴ [Judgment](#), para. 670.

²⁷⁹⁵ [Judgment](#), para. 670.

²⁷⁹⁶ [Judgment](#), para. 671, fn. 1533 referring to [Judgment](#), paras. 321-323, 328, 334, 338. See also [Judgment](#), para. 944 fn. 2089 referring to [Judgment](#), paras. 129-132, 321, 334-338, 345-346, 351, 420.

²⁷⁹⁷ [Judgment](#), paras. 128, 671, referring to Arido article 55(2) statement, CAR-OTP-0074-1065-R02 at 1066-R02 and 1068-R02.

²⁷⁹⁸ [Judgment](#), para. 672 referring to [Judgment](#), paras. 320, 328, 341-342. See also [Judgment](#), para. 944 fn. 2088, referring to [Judgment](#), paras. 125-128, 328, 341-343, 420.

756. Arido unsuccessfully challenges both factors and his arguments should be dismissed.

VIII.J.1. The Chamber reasonably found that Arido instructed the witnesses

VIII.J.1.a. The Chamber reasonably assessed and relied upon Arido's article 55(2) statements

757. Arido gave two article 55(2) statements to the French authorities: the first on 23 November 2013²⁷⁹⁹ and the second on 17 January 2014.²⁸⁰⁰ The Chamber reasonably relied—together with other evidence—upon Arido's 23 November Statement to conclude that Arido believed that D-2, D-3, D-4 and D-6 had not been military persons.²⁸⁰¹ This does not contradict the Chamber's finding, in its Sentencing Decision, that the Prosecution failed to prove in the sentencing hearing that Arido provided false information in his article 55(2) statements to obstruct justice in this case.²⁸⁰²

758. In its Sentencing Submissions, the Prosecution argued that Arido's sentence should be aggravated by his attempt to obstruct justice in this case, including by providing *some* false information in his article 55(2) statements to the French authorities.²⁸⁰³ The Chamber, however, rejected the Prosecution's arguments because (i) Arido, as a suspect, was not duty bound to incriminate himself and (ii) the Chamber had "doubts as to the Prosecution's selective interpretation of Mr Arido's statements".²⁸⁰⁴ Regardless of the correctness of these propositions, the Chamber expressed no "doubts" as to the reliability of Arido's article 55(2) statements—the Chamber rather questioned the Prosecution's reading of them.²⁸⁰⁵ Since Arido misreads the Sentencing Decision, his arguments should be dismissed.²⁸⁰⁶

759. The Chamber properly rejected Arido's challenges to the admissibility of his article 55(2) statements²⁸⁰⁷ because, "as regards the propriety of the recording [...] French

²⁷⁹⁹ CAR-OTP-0074-1065-R02 ("23 November Statement").

²⁸⁰⁰ CAR-OTP-0078-0117 ("17 January Statement").

²⁸⁰¹ [Judgment](#), para. 671. Arido confirmed his close friendship with D-2, see [Arido Confirmation Submissions](#), para. 251.

²⁸⁰² [Sentencing Decision](#), paras. 84-85.

²⁸⁰³ The Prosecution argued that Arido lied including about the number of payments he received from Kilolo; about not knowing some of the Cameroonian witnesses; about the purpose of the money spent on those witnesses. See [Prosecution Sentencing Submissions](#), para. 87.

²⁸⁰⁴ [Sentencing Decision](#), para. 85.

²⁸⁰⁵ *Contra* [Arido Brief](#), paras. 370-371.

²⁸⁰⁶ *Contra* [Arido Brief](#), paras. 368-372.

²⁸⁰⁷ Arido repeatedly challenged the admissibility of his article 55(2) statements based on alleged rule 111 and 112 violations. See [Arido Third Bar Table Objection](#), para. 35; [Third Article 69\(7\) Decision](#), para. 20. The Chamber later twice rejected Arido's arguments based on rule 111 as already decided. See [First Western Union](#)

authorities took Arido's Statements [...] in compliance with French law" as required under article 99(1).²⁸⁰⁸ Further, Arido was duly informed of his rights under article 55(2)²⁸⁰⁹ as provided by rule 111(2)—the sole part of rule 111 that applies when the person is questioned by national authorities. Arido's submission regarding rule 111(1) and the lack of his counsel's signature should be dismissed.²⁸¹⁰

760. As for the content of Arido's 23 November Statement,²⁸¹¹ the Chamber properly found that Arido had stated therein his belief that D-2, D-3, D-4 and D-6 had not been military persons.²⁸¹² Since Arido disagrees with the Chamber's reading of the statement and merely repeats his trial submissions²⁸¹³ without articulating an error in the Chamber's reasoning,²⁸¹⁴ his submissions should be summarily dismissed.²⁸¹⁵

761. In any event, Arido's alternative interpretation of the statement, namely, that he did not meet any witness in person but only listened and evaluated recordings of anonymous testimonies is illogical and has no connection with the evidence.²⁸¹⁶

762. Contrary to Arido's submission,²⁸¹⁷ [REDACTED].

763. Moreover, and in response to a specific question, in his 23 November Statement Arido said that D-4 was never part of the army.²⁸¹⁸ Later in his 17 January Statement²⁸¹⁹ Arido recanted from his previous statement [REDACTED].²⁸²⁰ The Chamber reasonably chose not to believe Arido's new self-serving version but rather decided to rely on his first

[Decision](#), para. 75 fn. 83 referring to [Third Article 69\(7\) Decision](#), paras. 22-28. See also [First Western Union ALA Decision](#), para. 13 fn. 21 referring to [First Western Union Decision](#), para. 75

²⁸⁰⁸ [Third Article 69\(7\) Decision](#), para. 24 ("Pursuant to Article 99(1) of the Statute, a State shall execute a cooperation request, including for the questioning of a person, in accordance with the relevant procedure under national law"). The drafting history of rule 112 confirms the correctness of the Chamber's approach: a draft proposal suggesting that the questioning by national authorities should follow the Rules and not the national law was, indeed, rejected, see Håkan (2001), p.536. See *contra* [Arido Brief](#), paras. 373-382.

²⁸⁰⁹ [Third Article 69\(7\) Decision](#), para. 22. See also 23 November Statement, pp. 1-2 (CAR-OTP-0074-1065-R02 at 1065-1066) and 17 January Statement, p.2 (CAR-OTP-0078-0117 at 0118).

²⁸¹⁰ *Contra* [Arido Brief](#), paras. 373-382.

²⁸¹¹ [Judgment](#), para. 671, fn. 1535 citing CAR-OTP-0074-1065-R02 at 1066-R02 ([REDACTED])

²⁸¹² [Judgment](#), para. 671. *Contra* [Arido Brief](#), paras. 383-392.

²⁸¹³ See T-49-CONF, 110:13-25.

²⁸¹⁴ See [Ngudjolo AJ](#), para. 75.

²⁸¹⁵ [Krajišnik AJ](#), para. 27.

²⁸¹⁶ *Contra* [Arido Brief](#), paras. 387-389.

²⁸¹⁷ [Arido Brief](#), paras. 390-391

²⁸¹⁸ CAR-OTP-0074-1065-R02 at 1068-R02. See [Judgment](#), para. 671.

²⁸¹⁹ CAR-OTP-0074-0117.

²⁸²⁰ CAR-OTP-0074-0117 at 0121.

statement.²⁸²¹ Arido's mere assertion that the Chamber should have interpreted the evidence differently²⁸²² should be dismissed.

764. Finally, contrary to Arido's suggestion,²⁸²³ the Chamber's findings on his *mens rea* are also based upon the reliable and corroborated evidence of D-2 and D-3 who testified that they informed Arido of their civilian status but were nevertheless instructed by Arido (together with D-4 and D-6) to falsely testify that they were members of the military.²⁸²⁴

VIII.J.1.b. The Chamber reasonably found that the witnesses followed Arido's instructions and that Arido de-briefed them after their meeting with Kilolo

765. The Chamber reasonably found that all four witnesses followed Arido's instructions during the Douala meeting with Kilolo in February 2012.²⁸²⁵ As discussed above, D-2 and D-3's testimony in respect to D-4 and D-6 is not hearsay.²⁸²⁶ Although D-2 and D-3 were not present during the brief time of D-4 and D-6's individual interviews with Kilolo, after the meeting the four witnesses compared their accounts and revisited their scripts under Arido's guidance.²⁸²⁷ Based on the totality of the evidence, including D-2 and D-3's testimony in this and the Main Case,²⁸²⁸ the Chamber reasonably found that they followed Arido's instructions during the Douala meeting.²⁸²⁹ Arido's piecemeal approach to the evidence fails to show that no reasonable trial chamber could have drawn this inference and reach this conclusion on the totality of the evidence.

766. In any event, Arido's conviction does not depend on the Chamber's finding that the witnesses followed his instructions at the Douala meeting because article 70(1)(c) "does not require proof that the conduct had an actual effect on the witness."²⁸³⁰ As such, his argument should be summarily dismissed.²⁸³¹

²⁸²¹ [Judgment](#), para. 671. *Contra* [Arido Brief](#), paras. 393-397.

²⁸²² [Arido Brief](#), para. 396.

²⁸²³ [Arido Brief](#), para. 398.

²⁸²⁴ [Judgment](#), para. 671, referring to [Judgment](#), paras. 321-323, 328, 334, 338.

²⁸²⁵ [Judgment](#), para. 348. *Contra* [Arido Brief](#), paras. 399-402.

²⁸²⁶ *See above* paras. 724-727. *Contra* [Arido Brief](#), para. 402.

²⁸²⁷ *See* [Judgment](#), para. 351. *See also* [T-18-RED2](#), 76:5-9; [T-21-RED3](#), 28:4-13.

²⁸²⁸ *See* [Judgment](#), paras. 388, 391.

²⁸²⁹ [Judgment](#), para. 348.

²⁸³⁰ [Judgment](#), para. 48. *See above* paras. 246-250.

²⁸³¹ [Krajišnik AJ](#), para. 20.

767. Further, the Chamber reasonably found that, based on D-2's "consistent testimony",²⁸³² after meeting Kilolo, Arido de-briefed the four witnesses and readjusted their scripted testimonies.²⁸³³

768. First, contrary to Arido's submission,²⁸³⁴ corroboration is not required at this Court, including for "accomplice" witnesses.²⁸³⁵ Second, Arido selectively cites D-2's testimony to argue that Arido did not de-brief the witness after he met with Kilolo.²⁸³⁶ However, in the extract of D-2's testimony cited by Arido, D-2 was not asked where he went after meeting Kilolo, but whether he met Kilolo again after that occasion.²⁸³⁷ In response to *this* question, D-2 stated that "[a]fter the meeting that was held in Douala we went our separate ways" and that he "went back home up until the day when Mr Kilolo came back a second time".²⁸³⁸ Thus, this portion of D-2's testimony is not inconsistent with his overall testimony and the Chamber's finding that Arido de-briefed the four witnesses after they met Kilolo.

769. Finally, the Chamber reasonably found that D-2's contemporary personal notes were reliable.²⁸³⁹ Arido argues that D-2's evidence of "aging" the notes to convince Kilolo "makes no sense" because he never showed them to Kilolo.²⁸⁴⁰ However, D-2 testified that he "aged" his notes *in case* Kilolo asked for them.²⁸⁴¹ Thus, Arido's submissions should be dismissed.

²⁸³² [Judgment](#), para. 351.

²⁸³³ [Judgment](#), para. 351. See for instance T-21-CONF, 26:5-28:7. *Contra* [Arido Brief](#), paras. 403-407.

²⁸³⁴ [Arido Brief](#), paras. 403-405.

²⁸³⁵ See rule 63(4). See also [Nchamihigo AJ](#), paras. 42, 47. See *above* paras. 707-714.

²⁸³⁶ [Arido Brief](#), paras. 403-406. See para. 406, fn. 408 citing T-19-CONF, 8:17-23.

²⁸³⁷ T-19-CONF, 8:13-16

²⁸³⁸ T-19-CONF, 8:13-23 ("Q [...] Did you have a subsequent meeting involving Mr Kilolo? Now, the one we're talking about is in February of 2012. Did you have a subsequent meeting? A: After the meeting that was held in Douala we went our separate ways. And when we went back to the hotel -- well, we chatted amongst ourselves and each one of us was supposed to go his separate way. The people from Yaoundé were supposed to go back there, the people from Douala were supposed to stay in Douala. So we went back home up until the day when Mr Kilolo came back a second time to make us available to the Court because we were supposed to give testimony from that spot.")

²⁸³⁹ [Judgment](#), paras. 336-337, 358.

²⁸⁴⁰ [Arido Brief](#), para. 407.

²⁸⁴¹ "[REDACTED]", CAR-OTP-0080-0494-R01 at 0506-R01, lines 442-443 (emphasis added).

VIII.J.1.c. D-4's testimony during the sentencing hearing is not part of the appeal record and Arido's related arguments should be summarily dismissed

770. Arido's argument that D-4's testimony during the sentencing hearing contradicted D-2 and D-3's trial evidence²⁸⁴² should be summarily dismissed. D-4's testimony was not part of trial record available to the Chamber when it decided on the guilt of Arido.²⁸⁴³

771. The Appeals Chamber has found in this case that evidence submitted "during the sentencing phase [...] constitutes additional evidence for the purposes of the appeal against the Conviction Decision" because it "was not part of the evidentiary record available to the Trial Chamber when it decided on the guilt or innocence."²⁸⁴⁴ For this reason, D-4's testimony "can only be considered in the present appeal if admitted into evidence under regulation 62."²⁸⁴⁵

772. Arido's failure to seek the introduction of D-4's testimony as additional evidence in the appeal is fatal to the merits of his arguments.²⁸⁴⁶

VIII.K. THE CHAMBER REASONABLY FOUND THAT ARIDO PROMISED MONEY AND RELOCATION TO THE CAMEROONIAN WITNESSES

773. The Chamber reasonably found that Arido (i) promised the Cameroonian witnesses significant financial reward and relocation as encouragement to testify²⁸⁴⁷ and (ii) instructed them to write down their conditions so that he would convey them to Kilolo.²⁸⁴⁸ The Chamber was also reasonable to rely, among other evidence, on Arido's promises to conclude that he intentionally corruptly influenced the witnesses and possessed the required *mens rea*.²⁸⁴⁹

VIII.K.1. The Chamber reasonably found that Arido promised money and relocation, irrespective of Kokaté's role in the process

774. The Chamber reasonably found, including based on the consistent and mutually corroborating evidence of D-2 and D-3, that Arido promised money and relocation to the

²⁸⁴² [Arido Brief](#), paras. 408-422.

²⁸⁴³ [Krajišnik AJ](#), para. 25.

²⁸⁴⁴ [Arido Additional Evidence Decision](#), para. 10.

²⁸⁴⁵ See [Arido Additional Evidence Decision](#), para. 10.

²⁸⁴⁶ [Arido Brief](#), paras. 408-423.

²⁸⁴⁷ [Judgment](#), paras. 320, 328, 342. See also [Judgment](#), para. 672 fn. 1536.

²⁸⁴⁸ [Judgment](#), para. 341. See also [Judgment](#), para. 672, fn. 1537.

²⁸⁴⁹ [Judgment](#), paras. 670, 672, fn. 1536 referring to [Judgment](#), paras. 320, 328, 342.

Cameroonian witnesses in exchange for their testimony.²⁸⁵⁰ Arido's contrary arguments should be summarily dismissed because they misrepresent the evidence²⁸⁵¹ and challenge findings that are irrelevant to Arido's conviction.²⁸⁵²

775. Arido's submission that Kokaté, and not Arido, made the promises and instructed the witnesses to write down their conditions²⁸⁵³ is based on a piecemeal and misleading approach to the evidence. First, there is no contradiction between the Chamber's finding, based on D-2 and D-3's testimony, that Arido promised money and relocation²⁸⁵⁴ and the portions of their testimony implicating Kokaté.²⁸⁵⁵ The portions of D-2 and D-3's testimony referred to by Arido²⁸⁵⁶ do not exonerate Arido and are consistent with the Chamber's finding that Kokaté was involved in the process and repeated Arido's offers.²⁸⁵⁷

776. Second, Arido selectively refers to an extract from D-3's testimony²⁸⁵⁸ that, if read in its context, clearly shows that D-3 testified that Arido (and not Kokaté) had asked the Cameroon witnesses to write down their conditions on a piece of paper which he then collected.²⁸⁵⁹

777. Third, there is no contradiction between the Chamber's findings and D-3's testimony. That Arido asked the Cameroonian witnesses to write their conditions before Kokaté arrived

²⁸⁵⁰ See e.g. [Judgment](#), paras. 320, 328, 342, 343.

²⁸⁵¹ [Arido Brief](#), paras. 424-430, 442-453. See [Krajišnik AJ](#), para. 18-19, 21, 27. [Mbarushimana Reconsideration AD](#), para. 10.

²⁸⁵² [Arido Brief](#), paras. 431-441. [Krajišnik AJ](#), para. 20.

²⁸⁵³ [Arido Brief](#), paras. 424-430.

²⁸⁵⁴ [Judgment](#), paras. 320, 328, 342, 343, 672.

²⁸⁵⁵ *Contra* [Arido Brief](#), paras. 425, 446, 453. See *above* para. 694.

²⁸⁵⁶ [Arido Brief](#), para. 425, fns. 431-433 referring to T-20-CONF, 36:18; T-18-CONF, 71-72; T-19-CONF, 5-6, 64; T-22-CONF, 39.

²⁸⁵⁷ See for instance [Judgment](#), paras. 341-342.

²⁸⁵⁸ See [Arido Brief](#), para. 426 challenging the Chamber's reliance on T-22-CONF, 39:14-15 at [Judgment](#), para. 341, fn. 562. See also [Arido Brief](#), para. 425, fn. 433 (where Arido merely offers his interpretation of this portion of D-3's testimony [REDACTED] but fails to explain why the Chamber's interpretation [REDACTED] is erroneous). The Prosecution notes that Arido erroneously refers to D-2 rather than D-3, who is the witness the Chamber relied upon at fn. 562. See also [Arido Brief](#), para. 452.

²⁸⁵⁹ See [Judgment](#), para. 341, fn. 562 referring also to T-26-CONF, 48:14-49:24 ([REDACTED]); [T-26-RED](#), 50:2-5 (A. I didn't tell anyone. I did not tell anyone the amount that I wanted. That is what the leader himself had instructed us to do. He, himself, that is Arido, he said he was the one who was responsible for presenting all those requests to Mr Kilolo.). See also [Judgment](#), para. 341, fn. 563 referring to [T-26-RED](#), 52:12-16 (See also [T-26-RED](#), 52:10-16: Q. After you wrote down the amount that you don't remember anymore, did Mr Arido pick up everybody's sheets of paper? A. Yes, he picked up all the pieces of paper to convince us that -- he was trying to convince us that he was doing what we wanted him to do and so that we would continue. Q. Did you notice him putting the papers into a brown envelope? A. No, it wasn't an envelope. They were individual sort of sheets of paper that he put into a cardboard file, a file folder. So he put the sheets of paper into a file folder.)

so that they could be further discussed with Kokaté²⁸⁶⁰ does not detract from the fact that Arido would transmit the requests to Kilolo.²⁸⁶¹

778. Fourth, that D-3 could not remember the *amount* of money he had written down and that he could not see what others had written down, does not make his corroborated testimony that Arido *offered* money and relocation less credible.²⁸⁶² Arido's argument that "there is no proof beyond a reasonable doubt"²⁸⁶³ of the promises remains unsupported and should be dismissed.

779. Arido does not accurately present the evidence:²⁸⁶⁴ both D-2²⁸⁶⁵ and D-3²⁸⁶⁶ unequivocally testified that Arido promised money and relocation.²⁸⁶⁷ It is irrelevant—and indeed part of the Chambers' findings²⁸⁶⁸—that Kokaté reiterated the promises made by Arido.²⁸⁶⁹ In its six-page-long analysis, the Chamber provided an adequately reasoned explanation²⁸⁷⁰ as to why it found D-2 and D-3 to be generally credible.²⁸⁷¹ Further, in its 15-page-long analysis the Chamber carefully reviewed D-2 and D-3's evidence about the events involving Arido, including the internal and external consistency of their evidence in light of the Defence's challenges.²⁸⁷² However, the Chamber was not obliged to expressly address all of Arido's unsupported arguments on these witnesses.²⁸⁷³

²⁸⁶⁰ T-26-CONF, 48:22-25 referred to at [Judgment](#), para. 341, fn. 562. *Contra* [Arido Brief](#), para. 427 fn. 437. *See also* T-26-CONF, 50:10-51:8 [REDACTED].

²⁸⁶¹ T-26-CONF, 50:2-5 referred to at [Judgment](#), para. 341, fn. 562. *Contra* [Arido Brief](#), para. 427, fn. 438 (the Prosecution notes that at fn. 438 Arido erroneously refers to p. 48:2-5).

²⁸⁶² *Contra* [Arido Brief](#), paras. 428, 452.

²⁸⁶³ [Arido Brief](#), para. 428.

²⁸⁶⁴ [Arido Brief](#), paras. 445-446, 451-453.

²⁸⁶⁵ *See e.g.* [T-20-RED2](#), 3:25-4:2 ("Mr Arido had met with me and he told me about this, particular deal, the first condition was that if I agreed to give testimony, I would get 10 million, and that there would be travel to Europe"). *See also* [T-2-RED2](#), 72:4-5.

²⁸⁶⁶ T-22-CONF, 55:17-18 ("The idea was to agree for me to testify in exchange for receiving some money or for [REDACTED]. Those were the two proposals that Arido made to me"); *see also* T-22-CONF, 37:24-38:1; [T-23-RED2](#), 15:14-15; [T-27-RED](#), 48:5-8 ("I said that when Arido arrived I was in a difficult situation and when he made that proposal to me, I found it as an opportunity for me to get out of this life of misery").

²⁸⁶⁷ *Contra* [Arido Brief](#), para. 446.

²⁸⁶⁸ [Judgment](#), para. 342. As the Chamber found, D-3 provided further details about the discussion he had with Kokaté regarding his request (*See* fn. 571, referring to T-22-CONF, 39:18-23).

²⁸⁶⁹ *Contra* [Arido Brief](#), para. 446.

²⁸⁷⁰ *Contra* [Arido Brief](#), paras. 449-451.

²⁸⁷¹ [Judgment](#), paras. 307-319.

²⁸⁷² *See in particular* [Judgment](#), paras. 320-352 discussing the events involving Arido directly.

²⁸⁷³ [Judgment](#), para. 196 referring to [Bemba TJ](#), para. 227. *See also* [Popović AJ](#), para. 305 ("As for the Defence arguments which Beara submits were ignored by the Trial Chamber, the Appeals Chamber recalls that, although a trial chamber is obliged to set out a reasoned opinion in writing, it is not obliged to address every argument in detail"); [Tolimir AJ](#), para 53 ("[A] trial chamber is not obliged to justify its findings in relation to every submission made during trial. A trial chamber has discretion in deciding which legal arguments to address, and

780. Finally, the Chamber did not rely upon its findings at paragraph 372-380 and 411 to conclude that Arido promised the witnesses money and relocation.²⁸⁷⁴ Arido's contrary submission²⁸⁷⁵ should be summarily dismissed.²⁸⁷⁶

VIII.K.2. Arido conveyed to Kilolo the Cameroonian witnesses' conditions

781. Based on the consistent and mutually corroborating testimony of D-2 and D-3, the Chamber properly found that Arido acted as the "go-between" and relayed the witnesses' concerns and conditions to Kilolo.²⁸⁷⁷ Arido's contrary arguments²⁸⁷⁸ either misrepresent the evidence or the findings or misunderstand the law.

782. First, Arido does not accurately present the trial record when he argues that "there is no evidence"²⁸⁷⁹ of Arido conveying the witnesses' promises to Kilolo. For example, D-2 testified that Arido acted as an intermediary ("he was the go-between"),²⁸⁸⁰ and D-3 repeatedly stated that Arido collected the witnesses' requests and said that he would be reporting them to Kilolo.²⁸⁸¹

783. Second, there is no contradiction between the Chamber's finding that Arido was a "go-between"²⁸⁸²—which, in Arido's submission, is a person that does not have any authority²⁸⁸³—and the Chamber's premise that Arido had some "power to promise" money and relocation. His argument should be dismissed because it misrepresents the Chamber's

is only required to make factual findings which are essential to the determination of guilt on a particular count."), [Kvočka AJ](#), para. 23, [Krajišnik AJ](#), paras. 19. *Contra* [Arido Brief](#), para. 449.

²⁸⁷⁴ [Judgment](#), para. 672 referring to paras. 320, 328 and 342. Although some of these paragraphs refer in passing to Arido's promise, they are not the foundation of Arido's conviction.

²⁸⁷⁵ [Arido Brief](#), paras. 442, 444-445, 450-451 challenging [Judgment](#), paras. 372-380, 411

²⁸⁷⁶ [Krajišnik AJ](#), para. 20.

²⁸⁷⁷ [Judgment](#), paras. 131, 341, 344, 349, 420, 674.

²⁸⁷⁸ [Arido Brief](#), paras. 431-441.

²⁸⁷⁹ [Arido Brief](#), para. 433.

²⁸⁸⁰ [Judgment](#), para. 341 fn. 564 referring to T-18-CONF, 72:15-17 *Contra* [Arido Brief](#), para. 433.

²⁸⁸¹ T-22-CONF, 65:12-14 (Arido said "that he would be responsible for reporting all of our various concerns and complaints to Mr Kilolo. Mr Arido was the go-between."), *see* [Judgment](#), para. 349 fn. 594. *See also* T-27-CONF, 26:1 referred to at [Judgment](#), para. 349 fn. 594; T-22-CONF, 66:19-20 (Arido "was speaking on our behalf" with Kilolo), [T-26-RED](#), 50:3-5 (Arido "was responsible for presenting all those requests to Mr Kilolo") referred to at [Judgment](#), para. 349 fn. 595.

²⁸⁸² [Judgment](#), paras. 131, 341, 344, 349, 420, 674.

²⁸⁸³ In Arido's submission a go-between is "someone who act [as] a liaison between others, but does not have authority in the situation" ([Arido Brief](#), para. 436)

findings.²⁸⁸⁴ Arido disregards that he and Kokaté recruited potential Defence witnesses *upon Kilolo's request*.²⁸⁸⁵

784. Arido suggests that because the Chamber found that he was a “go-between” between the witnesses and Kilolo, it was legally barred from finding that he was a “principal” in the sense of being a “direct” perpetrator of the offence under article 25(3)(a).²⁸⁸⁶ However, he conflates factual findings with their legal characterisation.²⁸⁸⁷

785. Finally, the Chamber expressly found that Arido had the requisite *mens rea* for corruptly influencing the four Cameroon witnesses²⁸⁸⁸ and clearly set out the evidence and subsidiary findings that it relied on to reach this conclusion.²⁸⁸⁹ The fact that the Chamber did not endorse *all* of the Prosecution's submissions is inapposite and distinct from the ample evidence which the Chamber found supported Arido's conviction.²⁸⁹⁰ Moreover, and as noted above, the Chamber reasonably relied, among other factors, on Arido's belief expressed in his article 55(2) statement that the four Cameroonian witnesses had not been military persons.²⁸⁹¹

786. Arido's submissions challenging the Chamber's findings on his *mens rea* should be dismissed.

VIII.L.THE CHAMBER REASONABLY FOUND THAT ARIDO TOOK AWAY THE CAMEROONIAN WITNESSES' TELEPHONES

787. The Chamber reasonably found, based on the “consistent, indeed, nearly identical evidence”²⁸⁹² of D-2 and D-3 that Arido took away the telephones of D-2, D-3, D-4 and D-6

²⁸⁸⁴ [Arido Brief](#), paras. 434-441.

²⁸⁸⁵ [Judgment](#), para. 327. *Contra* [Arido Brief](#), para. 439 (erroneously stating that the Chamber “places him also in the role as ‘deal-maker’ or ‘king-pin’”).

²⁸⁸⁶ [Arido Brief](#), para. 436.

²⁸⁸⁷ *See above* paras. 690-694.

²⁸⁸⁸ [Judgment](#), para. 670 (“The Chamber is satisfied that Mr Arido's *mens rea* is demonstrated by his conduct and interaction with the witnesses. On the evidence, he meant to engage in the conduct of corruptly influencing the witnesses.”).

²⁸⁸⁹ [Judgment](#), paras. 670-672. *Contra* [Arido Brief](#), paras. 457-459. On the application of article 30 to article 70 offences, *see above* paras. 247-248.

²⁸⁹⁰ *Contra* [Arido Brief](#), para. 458.

²⁸⁹¹ [Judgment](#), paras. 128, 671. *Contra* [Arido Brief](#), para. 460.

²⁸⁹² [Judgment](#), para. 345.

and instructed them to lie to Kilolo that they had no telephone.²⁸⁹³ Arido's mere repetition of his trial submission that D-2 and D-3 are not credible²⁸⁹⁴ should be summarily dismissed.²⁸⁹⁵

788. Moreover, Arido does not accurately present the record.²⁸⁹⁶ D-3 testified that Arido took "all our telephones away from us" before they entered the compound to meet Kilolo.²⁸⁹⁷ He went on to say: "my mobile, []'s mobile, Arido took my mobile, []'s mobile, [D-2]'s mobile".²⁸⁹⁸ Once again, Arido selectively quotes the evidence.²⁸⁹⁹ Consistently, D-2 testified that the group of witnesses lied to Kilolo "to say that we did not have a telephone".²⁹⁰⁰ Whether D-2 identified the other persons by name is irrelevant,²⁹⁰¹ since he clearly spoke about the Cameroon witnesses recruited and coached as a group by Arido.²⁹⁰²

789. Finally, Arido repeats some findings made by the Chamber²⁹⁰³ but fails to point to any error.²⁹⁰⁴

VIII.M. CONCLUSION

790. Arido personally and corruptly influenced witnesses D-2, D-3, D-4 and D-6. The Chamber properly convicted him pursuant to article 70(1)(c) as a direct perpetrator under

²⁸⁹³ [Judgment](#), paras. 345-346. *Contra* [Arido Brief](#), paras. 561-465.

²⁸⁹⁴ [Arido Brief](#) para. 463 fn. 462 citing [Arido Closing Brief](#), paras. 237-291.

²⁸⁹⁵ [Krajišnik AJ](#), para. 24.

²⁸⁹⁶ [Arido Brief](#), para. 464.

²⁸⁹⁷ T-22-CONF, 40:10.

²⁸⁹⁸ T-22-CONF, 40:10-12. Contrary to Arido's submission that D-3 only refers to himself and [REDACTED] ([Arido Brief](#) para. 464), even in this portion of his testimony D-3 refers to D-2 as well.

²⁸⁹⁹ See [Judgment](#), para. 345, fn. 580-581, 583 referring to [T-22-RED2](#), 62:17-20 ("Arido took away our phones and told us that he had told Mr Kilolo that we were his people and that we were in the bush, and that in the bush we did not have telephones, we only had Thurayas, and that when we meet with him, if he asks us a question, we should tell him that we did not have any phones."); [T-26-RED](#), 56:23-25 ("That's what Arido had told us to tell Kilolo, to say that we didn't have telephones; and since we were in the bush, we had been using Thuraya phones. I remember."); [T-27-RED](#), 33:23-34:2 ("It is Arido who had asked us to say that. I never discussed any such thing with Mr Kilolo. We did not speak about the bush with Mr Kilolo. Arido had asked me and the other members of the group to say such and such a thing, and all I did was to give an account of what Mr Arido had asked us to say."); [T-22-RED2](#), 62:19-20, 25; [T-22-RED2](#), 66:21. *Contra* [Arido Brief](#), para. 464.

²⁹⁰⁰ See [Judgment](#), para. 345 fn. 582 referring to [T-19-RED2](#), 17:25-18:3 ("When Maître Kilolo arrived on the first occasion we told him that we did not have any telephone at our disposal because when I was talking to Mr Arido we were supposed to lie to Maître Kilolo to say that we did not have a telephone and we said that to him and we said that we wanted to have a telephone."); [T-20-RED2](#), 76:19-20 ("when we arrived we told him that we did not have telephones").

²⁹⁰¹ *Contra* [Arido Brief](#), para. 464.

²⁹⁰² See *above* paras. 724-727.

²⁹⁰³ [Arido Brief](#), paras. 466-472.

²⁹⁰⁴ [Krajišnik AJ](#), para. 26, [Mbarushimana Application Release AD](#), para. 18, [Bemba Review Detention AD](#), paras. 69-71.

article 25(3)(a).²⁹⁰⁵ Arido has failed to show any legal or factual error in the judgment. His appeal should be dismissed in its entirety.

CONCLUSION AND RELIEF SOUGHT

791. For the reasons above, the appeals brought by the Appellants should be dismissed, and the convictions of Bemba, Kilolo, Mangenda, Babala and Arido affirmed.



Fatou Bensouda, Prosecutor

Dated this 13th day of October 2017²⁹⁰⁶
At The Hague, The Netherlands

²⁹⁰⁵ See [Judgment](#), para. 944.

²⁹⁰⁶ This submission complies with regulation 36, as amended on 6 December 2016: [Al Senussi Admissibility AD](#), para. 32.